ARTICLES

THE IMPERIAL PROSECUTOR?

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ABSTRACT

Federal prosecutors' authority in the U.S. legal system is imperial. When they act, prosecutors speak for the whole of the U.S. government across all policy-making domains. Ideally, their judgments, expressed in many thousands of retail investigative and prosecutive decisions each year, are meant to be insulated from the interests of other Executive Branch actors—even, on many accounts, from the White House. The relevant ideal is expressed not principally as an injunction against self-dealing or "political" influence, but rather as the far broader norm of prosecutorial independence.

This Article describes and appraises a growing set of federal criminal prohibitions that predictably implicate national interests beyond the criminal law, such as national security, diplomatic, and economic interests. Crucially, the criminalization of activity in such policy domains, when paired with exclusive charging discretion for prosecutors, may yield divergent judgments within the Executive about whether the enforcement of criminal law serves the national interest. Yet prosecutors' deliberative practices take place principally among prosecutors, using the distinctive grammar of ordinary, case-by-case law enforcement judgment. That grammar reflects a conscious selection to allow prosecutors a pro-criminal-enforcement free agency. Moreover, that grammar is, by design, insensitive to other modes of Executive decision-making. On a strong account of the independence norm, prosecutors' judgment must win.

Because enforcement choices in federal criminal cases are allocated to prosecutors alone, this creates a "deliberative dilemma": prosecutors wield a power that can affect the whole Executive's interests, but they can act without transparent access to information about priorities beyond criminal law enforcement. This Article argues that we can choose strict prosecutorial independence or whole-government deliberation about the national interest, but we cannot have both.

Predictable pathologies ensue when the dilemma is not managed. The ideal of independence may give way way to ad-hoc accomodations that are sometimes

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feigned, sometimes tactical, but in any event sufficiently risky to recommend other models of Branch-wide prosecutorial decision-making. After unearthing these tensions, the Article concludes by exploring Branch-wide deliberative norms to manage them.

INTRODUCTION

The American prosecutor is a peculiarly powerful agent of her government. When she speaks, she speaks for "The United States of America";[1] when she acts, she draws upon a fund of Executive and Judicial power that has been endowed by the courts and the Executive Branch with unusually strong legitimacy and independence.[2]

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1. *See* 28 U.S.C. § 516 ("reserv[ing]" to the Department of Justice all litigation in which the United States is interested); Sewall Key, *The Legal Work of the Federal Government*, 25 VA. L. REV. 165, 198 (1938) (describing the consolidation of the government's litigating authority in the Department of Justice).

2. *See* The Att'y Gen.'s Role as Chief Litigator for the U.S., 6 Op. O.L.C. 47, 48 (1982) (describing a "[p]lenary power over the legal affairs of the United States" vested in the head of the Department of Justice); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion"); Lauren M.

The American prosecutor is also an especially powerful agent *within* her government. She is neither a regulator, a diplomat, a trade negotiator, nor an obvious part of the national-security apparatus, yet she often defines and executes the sovereign's national interest nonetheless. When the prosecutor's mandate to administer the criminal justice system requires her to balance law-enforcement prerogatives with other reasons of state, how should she deliberate, speak, and act, as the agent of the United States?

Consider three slightly stylized cases.

First: Congress, of a mind to regulate the domestic oil industry, criminalizes anti-competitive conduct, and it puts the industry under the regulatory oversight of the Secretary of the Interior. A local U.S. Attorney indicts several oil retailers under the new statute. The Secretary of the Interior, the putative regulator of the industry, registers his disagreement in the press: "I do not agree with the policy of the U.S. Attorney for the Southern District of California in seeking these indictments." And he charges the prosecutors with "once more throwing the oil industry . . . into a state of chaos."[3]

Second: Congress empowers the President to impose economic sanctions against countries that pose an "unusual or extraordinary threat" to the "national security, foreign policy, or economy" of the United States[4] and criminalizes efforts to evade those sanctions.[5] Investigators soon suspect an elaborate scheme: a bank owned by an allied country allegedly facilitates billions of dollars' worth of indirect transfers to a country deemed to be a risk to national security. A criminal judgment would threaten vast economic consequences for the ally. The bankers' attorneys reportedly approach the Secretary of State with an offer: the ally will release an American abroad if the Secretary can convince the Attorney General to drop the case. The Secretary refuses, allegedly calling the proposed intervention "illegal,"[6] and line prosecutors resist reported efforts by the AG to reach a settlement.[7] Ultimately, a U.S. Attorney indicts the foreign bank and several alleged conspirators.

Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2278–2316 (2014) (describing the special "legitimacy" of the federal criminal justice system and federal prosecutors' special sway in court).

3. *California Oil Companies Indicted on Accusations of Violating Oil Code—Secretary Ickes Clashes with Department of Justice over Action*, 138 COMM. & FIN. CHRON. 2826, 2827 (1934).

4. 50 U.S.C. §§ 1701–1702.

5. *Id.* § 1705(a), (c). *See also* 31 C.F.R. § 560.203.

6. *See* Kelly Bjorklund, *Trump's Inexplicable Crusade to Help Iran Evade Sanctions*, FOREIGN POL'Y (Jan. 9, 2021), https://foreignpolicy.com/2021/01/09/trump-help-iran-evade-sanctions-turkey-halkbank/; Nick Wadhams, Saleha Mohsin, Stephanie Baker & Jennifer Jacobs, *Trump Urged Top Aide to Help Giuliani Client Facing DOJ Charges*, BLOOMBERG NEWS (Oct. 9, 2019), https://www.bloomberg.com/news/articles/2019-10-09/trump-urged-top-aide-to-help-giuliani-client-facing-doj-charges.

7. Erica Orden & Kara Scannell, *Attorney General's Actions Spark Outrage and Unease Among US Prosecutors*, CNN (Feb. 15, 2020), https://edition.cnn.com/2020/02/15/politics/william-barr-roger-stone-prosecutors-outrage/index.html.

Third, federal investigators reportedly secure search warrants that permit them to seize the overseas communications of the Defense Minister of a major ally. While the investigation proceeds, other officials continue ordinary interactions with the Defense Minister, unaware of the blockbuster case their Justice Department colleagues are pursuing. Then the prosecutors strike: The official is indicted in secret and arrested upon arriving at an American airport. The arrest reportedly takes the foreign country by surprise, and it issues increasingly bitter protests about prosecutors' failure to disclose their plans. At their height, the threats reportedly include the suspension of military and law enforcement cooperation, the expulsion of all American investigators, and the removal of immunity from prosecution.[8] Prosecutors acquiesce and dismiss the indictment. Upon the minister's return to the foreign country, the local Attorney General reportedly clears him of all wrongdoing, and the local President opines that the American investigation was unfounded.[9] The press reports that American lawmakers and diplomats widely disapprove of the prosecutors' decision.

In each of these cases, with varying degrees of apparent oversight,[10] *prosecutors* decided the national interest, and *prosecutors* spoke for the state. How is this great deliberative distance between the sovereign principal and its prosecutorial agents justified?

Generally speaking, American federal prosecutors are empowered by their government to work with an exceptionally high degree of autonomy—vastly more than in any other Executive agency.[11] Americans have embraced "separationism"[12] in fashioning prosecutors' relationship to the rest of the Executive. We have done so because we view prosecutors as, by and large, experts in the administration of criminal justice;[13] because of the political interests expressed in Congress's

8. Alan Feuer & Natalie Kitroeff, *Mexico, Outraged at Arrest of Ex-Official, Threatened to Toss U.S. Agents*, N.Y. TIMES (Nov. 18, 2020), https://www.nytimes.com/2020/11/18/world/americas/mexico-cienfuegos-barr.html.

9. Mark Stevenson & Christopher Sherman, *Mexico Clears General, Publishes US Evidence Against Him*, AP NEWS (Jan. 15, 2021), https://apnews.com/article/joe-biden-mexico-coronavirus-pandemic-mexico-city-drug-trafficking-3e0fca4b5296c26b6c9422f738a4fa6f.

10. On the question of the desirability of centralization of prosecutorial decision making in the Department of Justice, see Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 470–71 (1996), arguing in support of greater centralization in the "main" Department of Justice to better discipline prosecutors' offices.

11. *See* David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 480–81 & n.39 (2016) (collecting descriptions of the "immense authority of the public prosecutor over criminal justice"); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 87 (2011) (noting the "enormous discretionary power" exercised by prosecutors in deciding "which defendants deserve punishment and which ones merit mercy").

12. *See* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 688 (2000) (describing "separationism" and arguing that we should "carve out a space, insulated from direct political intervention, in which judges and bureaucrats may deploy their professional judgment in service of legislative objectives").

13. Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1050–51 & n.75 (2013) (noting that "[o]ne dominant current conception is that law enforcement policy should be driven by nonpolitical experts" and collecting sources).

capacious designs for federal criminal law; and, crucially, because of the concern that any alternative method of prosecutorial decision-making would invite too much corruption. A zealous independent prosecutor thus expresses an overriding national interest *in law enforcement*: the Executive and Legislative branches define the crime and jointly appoint a U.S. Attorney to prosecute it by her own lights.[14]

This Article argues that it must be wrong to invoke prosecutors' "independence" to solve the deliberative question whether every federal prosecution is in the national interest. To be sure, the invocation of independence answers whether self-dealing or undue political influence should bear on prosecutorial decisions. It also suggests that prosecutors should decide the national interest in cases that sound exclusively in criminal law enforcement policy. But independence does not provide a coherent account of how prosecutors' estimation of the national interest is likely to be true in all cases that blend criminal and non-criminal policy questions.

The central claim is thus analytic: we have a choice between two important and widely-celebrated Executive Branch norms. We can choose strict prosecutorial independence or whole-government deliberation, meaning a deliberative process that fully captures the Executive's judgment about the national interest. But we cannot have both. When one takes in a full view of the breadth of conduct now regulated by the federal criminal law, the conviction that only independent prosecutors are equipped to judge whether their actions are in the national interest must give way.

Although this dilemma between prosecutorial independence and whole-of-government deliberation is endemic to the modern Executive, it might often be solved by accident. That is to say, the typical federal criminal case simply picks one horn of the dilemma over the other without much consequence. In choosing independence, one can reasonably predict that prosecutors will not err in appraising the "national interest" because all relevant political equilibria favor efficient enforcement of a broadly construed federal criminal law.[15] And, even though it amounts to an overbroad remedy, the independence norm will ensure that any malefactors elsewhere in the Executive cannot infect prosecutorial decision-making with their private interests. The interests of other Executive departments in declination or prosecution are thus inadmissible in such cases, but that is a worthy price for prophylaxis against possible corruption.

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14. William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2565–68 (2004) (describing the special freedom enjoyed by federal prosecutors, as against state prosecutors, in light of the relative lack of political constraints and the pliability of the crimes defined by Title 18).

15. *See infra* Part III.B.

This leaves the atypical—but often gravely important—cases, in which we are reasonably assured that more than just the national interest in criminal law enforcement is at stake. Though the prosecutor's interest in law enforcement is theoretically separable from competing views of the national interest, the criminal-justice interest cannot always be so cleanly separated from other affairs of state. Here, we are back between the horns of the dilemma between independence and deliberation, and it is not clear that corruption propylaxis alone should break the tie.

We cannot resolve the dilemma without some understanding of the kinds of criminal cases that hold a more vexed relationship to the national interest, compared to the mine-run federal prosecution. For reasons explored below, such cases predictably outstrip prosecutors' capacities for national-interest judgments, and they pose unusually difficult interpretive questions about the reach of federal criminal law. And in such cases, independence as a *corruption* remedy will seem especially overbroad wherever it crowds out whole-of-government deliberation.

We have resolved the deliberative dilemma in ad hoc ways in these exceptional cases, often in favor of prosecutorial independence. But these solutions may be pathological: prosecutors' interpretations of the reach of federal criminal law are likely to tack towards enforcement, while interpretations considering *all* national interests may favor declination. Meanwhile, prosecutors' cloistered decision-making environment can imperil the regulatory goals of the broader government, as defendants try to make sense of the sovereign's regulatory agenda and other Executive interests express themselves. Indeed, for outside observers, the peculiar notion of U.S. prosecutors' independence introduces confusion: do prosecutors speak only for their Department, or can prosecutors' actions be attributed to the Executive as a whole?

By offering a more systematic account of the incentives and structure of prosecutorial decision-making in cases that call for whole-of-government deliberation, this Article draws into view the settlements we have reached in deciding how much federal criminal law enforcement is in the national interest. This account also makes apparent the tensions that these settlements obscure. In so doing, the Article aims to manage the central dilemma posed by the imperial prosecutor whose view of the national interest is predictably narrower than the policy interests implicated by the federal criminal law. Rather than resolving this dilemma, this account identifies a set of pathologies that an overbroad embrace of prosecutorial independence must manage. It is a dilemma to be aired, rather than obscured by redoubting to prosecutors' independence.

The argument proceeds as follows. Part I describes the norm of prosecutorial independence, which is largely taken for granted as an assumption of American rule-of-law discourse, as well as the relationship between that norm and other deliberative norms of the broader Executive Branch. While the fear of self-dealing or corruption favors case-specific prosecutorial independence in mine-run cases,

something more is required to justify prosecutorial independence in *all* cases.[16] Criminal cases that implicate mixed policy interests, which are increasingly a significant province of federal criminal law, place the Executive in a deliberative dilemma: given the norms of independence and whole-branch deliberation about the national interest, we can only achieve one at a time.

Part II explores implications of this dilemma by describing the privileging of criminal law-enforcement judgments across the Executive and the incentives that shape prosecutors' exercise of their discretion. It then contends that important areas of the modern federal criminal code now call upon prosecutors to make national-interest judgments that will outstrip the expertise, incentives, and mores that usually structure prosecutors' discretion. This is a claim that requires some elaboration, especially given the dearth of materials describing prosecutorial decision-making. Drawing on a useful set of public archival materials describing prosecutors' judgments in "national defense," "economic," and cross-border investigation cases, the Article notes the recent ascendance of a class of criminal activities that implicate other agencies' judgments about the national interest. It also describes, with unusually direct historical evidence, the ways in which the typical national-interest calculus of prosecutors has drawn difficult interpretive questions in pro-enforcement directions. By way of example, prosecutors' wartime efforts to develop new foreign-propaganda crimes by defining ideals of American civic life; prosecutors' efforts to draw non-criminal economic policy inquiries into prosecutorial decision-making during the financial crisis; and prosecutors' efforts to streamline foreign evidence gathering in pro-enforcement directions are all considered. Each case reveals the same tendency to privilege enforcement in prosecutors' national-interest calculus and a basic comfort with pursuing national interests by way of criminal regulation.

Part III then synthesizes the normative choices that the Executive, courts, and scholars have made in endowing criminal law enforcement regulators with a preeminent capacity to express the Executive's judgments about prosecuting crime. It makes three claims, in ascending levels of generality. First, our public law embraces a provincial view of the prosecutor's agency in cases that implicate non-criminal national interests. These choices, some theoretical and some doctrinal, cultivate a worrisome ambivalence about whether independent prosecutors reliably act in the national interest and whether that ambivalence undermines the regulatory signal sent by criminal law enforcement. Second, it explores whether maintaining

16. Because I argue that a prohibition on corruption (or self-dealing) and a bureaucracy-wide independence norm are separable ideas—and, indeed, that the first prohibition principally justifies our commitment to the second—it remains entirely possible for Presidents, other Executive Branch principals, and Attorneys General or U.S. Attorneys to commit abuses by intervening in particular criminal justice matters, even if the "independence norm" were discarded. The wrong in such cases is the failure to recuse, not the violation of the independence norm per se. Relatedly, if we keep the anti-corruption and prosecutorial-independence norms separate, it is possible to theorize non-prosecutors (say, a Secretary of State or Treasury) opining on criminal justice matters without understanding that intervention to be a breach of rule-of-law principles.

the independence norm is worth its deliberative costs, including whether the norm's appeal turns on its empirical capacity to constrain the corruption of decision-makers who are most intent on discarding it. Finally, the Article argues that the broad privileging of prosecutors' judgments reduces the American "national interest" to the distinctive prerogatives and dynamics of federal prosecutorial culture. As the cases described in the prior Parts demonstrate, it is unlikely that a whole-government view of the national interest should always have a pro-criminal-enforcement valence. To underscore this possibility, this Part describes real-world alternative deliberative arrangements that dispense with an *ex ante* commitment to independent prosecutorial decision-making about the national interest.

I. THE IMPERIAL PROSECUTOR

If the "history of the American administrative state is the history of competition among different entities for control of its policies,"[17] then the federal prosecutor has won. Prosecutors' law-enforcement powers are broadly privileged in the decision-making architecture of the Executive.[18] To borrow James Q. Wilson's description, while all bureaucracies are prone to "steadily strive[] for more resources and authority," the agencies run by prosecutors have achieved something close to "imperialistic"[19] authority.

In ideal-typical terms, federal prosecutors act with coordinate authority over the administration of justice within their districts—that is, they are "all homologues with similar authority inherent in their positions"—and they are usually subject to only weak forms of hierarchical command.[20] In a word, federal prosecutorial authority is "dispersed" and even "semi-autonomous" from the Executive Department in which it is located.[21]

Yet the power the prosecutor exercises is also thought to be "quintessentially executive," lying at the "heart of the . . . power . . . vested in the President."[22] We thus

17. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2000).

18. *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 876–77 (2001).

19. JAMES Q. WILSON, THE INVESTIGATORS: MANAGING FBI AND NARCOTICS AGENTS 165 (1978).

20. Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 510–12 (1975). By statute, U.S. Attorneys are subject to the supervision of the Attorney General. *See* 28 U.S.C. § 519. The Attorney General's degree of actual control is, however, less clear. *See infra* Part I.B.

21. Daniel Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 805–10 (1998) (discussing the "[b]enefits of [d]ispersed [a]uthority"); JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 108 (1978) (describing the "position of semiautonomy" that Justice Department field offices can achieve). *See also* William Braniff, *Local Discretion, Prosecutorial Choices and the Sentencing Guidelines*, 5 FED. SENT'G REP. 309, 311 (1993) ("The U.S. Attorney . . . is the single person in the criminal justice system who must look to the totality of criminal threats within the district, as well as the available resources to meet those threats, and fashion a prosecution response that maximizes the positive impact that can be obtained from the resources. No other person has this broad responsibility.").

22. Kagan, *supra* note 17, at 2357 & n.422.

distribute to federal prosecutors the heart of unified Executive power, but we aim to separate them from the Executive's rivalrous and vexed political soul.

An important normative discourse supports this distinctive distribution of prosecutorial authority within the Branch: the idea of prosecutorial "independence." The prosecutor's independent judgment is thought to insulate her from the "crassest forms" of politics,[23] and her relative insensitivity to political pressure is a virtue.[24] This Part describes the discourse of prosecutorial independence and the decision-making culture it nurtures.

A. The Appearance of Corruption and the Problem of Prophylaxis

Despite the public opacity of prosecutors' deliberations,[25] it is not difficult to find evidence demonstrating that the *idea* or *norm* of independence is critical to prosecutors' modern self-conception.[26] In myriad ways, the institutions of modern American government have taken care to at least partially insulate prosecutors' judgments from influence by other Executive actors. Courts, for example, signal that prosecutors should be given exceptionally wide latitude in making their investigative and charging decisions. The concerns that motivate prosecutors—deterrence, enforcement policy priorities, and mission effectiveness—cannot be subject to external scrutiny without "chill[ing]"[27] their law-enforcement mission.

A significant justification for the deliberative insulation that surrounds prosecutors is the repudiation of the Watergate-era excesses of the Nixon Administration. Nixon's attorneys had resisted a special prosecutor's subpoena by arguing that the Executive Branch, not independent prosecutors, should "decide whether other governmental interests outweigh the interest in a particular criminal prosecution."[28] For "sufficiently grave" cases, Nixon argued, prosecutorial decision-making must be the subject of deliberation by the whole Executive—even the President himself—since sometimes law enforcement

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23. *Id*. at 2357.

24. Richman, *supra* note 21, at 807 ("[T]he entire American criminal justice system is characterized by an almost instinctive embrace of fragmented authority, with the tensions between police and prosecutors, attorneys general and district attorneys usually seen as a virtue, rather than a vice."). *But see* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge*, 105 COLUM. L. REV. 583, 583 (2005) (noting that federal prosecutors are "less politically accountable than in state justice systems"); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 543 (2001) (noting that federal prosecutors' decision-making is sometimes aimed at "attaining valuable litigation experience and advancing professional reputation").

25. Courts rigorously shield prosecutors' deliberative work product from view, agreeing that the discovery or second-guessing of prosecutors' files would impede the free exercise of their "core executive constitutional function." United States v. Armstrong, 517 U.S. 456, 465 (1996); *see also* United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) ("[T]he courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.").

26. *See infra* notes 42–44.

27. Wayte v. United States, 470 U.S. 598, 607 (1985).

28. Reply Brief Regarding Subpoena of Recordings and Documents, 1973, 9 WEEKLY COMP. PRES. DOC. 981, 999 (Aug. 20, 1973) (collecting cases standing for the principle that the Executive's prosecutorial discretion is "absolute").

activities may implicate "national security, conduct of foreign policy, or a conflict between two branches of government . . . ."[29]

Here, then, was a simple description of the structure of prosecutorial decision-making that attends to the equities of other agencies: in Nixon's view, prosecutors are not so independent as to prevent other agencies, or the President, from weighing in on whether a prosecution is in the national interest. Justice Scalia famously advanced the same deliberative argument:

> Almost all investigative and prosecutorial decisions . . . involve the balancing of innumerable legal and practical considerations. Indeed, even political considerations (in the nonpartisan sense) must be considered, as exemplified by the recent decision of an independent counsel to subpoena the former Ambassador of Canada, producing considerable tension in our relations with that country.[30]

The Nixon-Scalia argument against independent prosecutors blends two claims: first, that the prosecution function must be the province of the whole Executive; and second, the whole Executive branch, under the control of the President, is best-suited to weigh whether criminal prosecution is appropriate in "grave" cases. These two discrete claims about unitary Executive deliberation, however, are lumped together in modern memory as the poor defenses of a President who wished to forestall his own prosecution.

While there are, to be sure, higher-order constitutional debates about the Executive Power that bear on the question, as a discursive matter, thousands of federal prosecutors now contend that the memory of Watergate compels the conclusion that prosecutorial decisions are for the Department of Justice alone.[31] In other words, prophylaxis against Nixonian abuses of power counsels in favor of a deliberative "wall" between prosecutors and the rest of the Executive.[32]

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29. *Id*. at 1000 (quoting *Cox*, 342 F.2d at 193).

30. Morrison v. Olson, 487 U.S. 654, 707–08 (1988) (Scalia, J., dissenting).

31. *See* Letter from Alumni and Alumnae of the U.S. Att'y's Off. for D.C. to the Hon. Timothy J. Shea, Acting U.S. Att'y for D.C. (Feb. 26, 2020), https://context-cdn.washingtonpost.com/notes/prod/default/documents/7ec0ad4c-1021-4e55-bb10-478c01bd9e1a/note/dc76abe9-6aa5-44cd-be65-c6fd39247613.pdf; Spencer S. Hsu, *Former U.S. Prosecutors in Washington Call on New Head Tim Shea to Assert Independence from Barr, Trump*, WASH. POST (Feb. 27, 2020), https://www.washingtonpost.com/local/legal-issues/former-us-prosecutors-in-washington-call-on-new-head-tim-shea-to-assert-independence-from-barr-trump/2020/02/27/90c3f2b0-59a4-11ea-9000-f3cffee23036_story.html; *see also* SUSAN HENNESSEY & BENJAMIN WITTES, UNMAKING THE PRESIDENCY 174–75 (2020) (listing the FBI's "Levi Guidelines," the "normative rules about contacts between the Justice Department and the White House," and the "institutional culture at the Justice Department that values the independent and apolitical administration of justice" as principal defenses against abusive prosecutorial practices).

32. *See* Andrias, *supra* note 13, at 1072 ("One needs to think no further than President Nixon's efforts to direct the Internal Revenue Service (IRS) to engage in politically motivated tax audits or his direction to the Attorney General to drop the government's appeal of an antitrust suit . . . to understand the importance of keeping law enforcement nonpartisan, and the problems that can arise when presidents direct individual prosecutions. Accordingly, internal White House rules typically prohibit White House staffers from contacting agencies about specific enforcement actions without preclearance from the White House Counsel's Office." (footnotes omitted)).

The norm of prosecutors' independence is now taken to "be so embedded in our understanding of criminal justice that both the Executive and Judiciary have implicitly accepted it in the way that they exercise their powers."[33] Indeed, the freedom of prosecutors' charging discretion "is considered to be a defining feature of their work."[34] Prosecutors' independence has thus been vaunted as "a cornerstone of American democracy, built into the way the country is governed."[35]

Because the fear of undue influence by malefactors is so great, mainline accounts of the modern administrative state "prohibit [Presidential] direction [of agencies] when, *but only when*, the government exercises prosecutorial authority."[36] And, within the broader Executive, there is a strong norm[37] that law enforcement activity should be independent and "non-partisan."[38] The mischief that a broad independence norm remedies, then, is "partisanship" in charging and declination decisions, such as targeting the President's foes or immunizing the President's friends. [39] On this principle, non-prosecutors must not intervene in particular cases for an instrumental reason: prosecutorial decisions must be "based on law and merit, and not on considerations of party affiliation, political image-making, or White House approval or influence."[40]

To be sure, the independence norm brooks a minor role for political influence. The President is allowed a general "policymaking authority" to set broad priorities for federal prosecution but may not otherwise intervene in prosecutors' work.[41] The extent to which the President may permissibly intervene turns on the distinction between matters of policy and deciding or directing the outcome of individual criminal cases.[42] It is the difference between giving direction regarding cases (plural), which is permissible, as against a case (singular), which breaches the post-

33. Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 11–12 (2018).

34. *Id*. at 16.

35. *Id*. at 4.

36. Kagan, *supra* note 17, at 2357 (emphasis added). *But see* Ackerman, *supra* note 12, at 690–91 (noting that "a presidential phone call to a judge about a pending case is treated as a crime against the Constitution," and advancing the broader view that "a similar call to a middle-level bureaucrat" should be viewed as posing a comparable "threat to the separation of powers when considered as a doctrine of functional specialization").

37. *See generally* Daphna Renan, *Presidential Norms*, 131 HARV. L. REV. 2187, 2206–42 (2018) (elaborating a theory of the "norm-based" Executive).

38. Griffin B. Bell, Att'y Gen. of the U.S., Address to Department of Justice Lawyers, at 2–3 (Sept. 6, 1978), https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-06-1978b.pdf.

39. *See* HENNESSEY & WITTES, *supra* note 31, at 173 (describing the "defensive side" of the abuse of law enforcement as the power to "cultivat[e] impunity for friends").

40. *Removing Politics From the Department of Justice: Hearing on S.R. 2803 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 93d Cong. 16 (1974) (Statement of Hon. Theodore Sorenson, Former Special Counsel to President John F. Kennedy).

41. *See, e.g.*, Green & Roiphe, *supra* note 33, at 9–10.

42. *See id*. at 55.

Watergate norm.[43] A prosecutor's final decision to investigate and prosecute an individual is ordinarily the end of the matter.

As a result of these phenomena, American prosecutors are, at least according to some prominent self-conceptions, "one of the most powerful peace-time forces known to our country."[44] For many prosecutors, this classification entails the equally powerful belief that they operate in "a neutral zone in the Government."[45] Prosecutors' independence and legitimacy mutually reinforce their control over the most coercive bureaucratic apparatus of the state.

Understood as a decision to "unbundle" the prosecutorial function from the rest of the Executive,[46] strict independence might improve or impede a large number of desireable norms: accountability and monitoring; regulatory energy and effectiveness; the likelihood of capture; and especially the capacity to coordinate deliberative processes that could bear on whether and how to use criminal regulatory tools.

For my purposes, unbundling federal criminal law enforcement implicates three ideals in particular: (a) *non-interference*, or the insulation of law-enforcement decision making from other Executive decision making; (b) the *avoidance of conflicts of interest*, or preventing self-interested actors from intervening in enforcement decisions; and (c) *deliberation*, or the creation of a unified inter-agency judgment on whether a given Executive action is in the national interest.[47]

Keeping with this analytic thread, modern federal criminal law enforcement will predictably place these norms in a trilemma: among *non-interference*, *avoidance of self-dealing*, and whole-government *deliberation*, only two can be achieved at a time.

This dilemma—which I call prosecutors' *deliberative dilemma*—is thought to be solved by arguing that independence is simply necessary to prevent corruption from clouding line prosecutors' decisions. But that cannot be true in all cases. The next section will explain such cases in richer detail, but broadly speaking, where conflicts arise between criminal regulation and other bona fide (that is, non-corrupt) policy interests, we should expect various Executive agencies' consensus about the national interest in law enforcement to fray. We might also expect

43. JAMES COMEY, A HIGHER LOYALTY: TRUTH, LIES, AND LEADERSHIP 105–06 (2018) (noting policy discretion over "what crimes to prioritize" and the "tension" that a prosecutor faces, given that lady justice "is not supposed to peek out to see how her political master wishes to weigh a matter"). *But see* HENNESSEY & WITTES, *supra* note 31, at 178 (describing the dating of the independence norm to Watergate as a "pervasive myth," and contending that its roots are even older).

44. Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 18 (1940).

45. Bell, *supra* note 38, at 3.

46. *See generally* Jacob Gersen, *Unbundled Powers*, 96 VA. L. REV. 301 (2010) (noting, in the separation-of-powers context, that policy responsibility can be "unbundled" or combined and analyzing the implications of this constitutional design choice for constitutional values including accountability, capture, coordination, deliberation, efficacy, energy, and "tyranny and liberty" interests).

47. *Cf.* Renan, *supra* note 37, at 2206–42 (identifying these three norms as features of the modern Executive branch).

prosecutors to acquire some of their non-prosecutor colleagues' expertise for themselves, as their Department seeks to recreate the external agency within itself.[48]

It is worth asking, then, how federal prosecutorial decision-making addresses the deliberative dilemma when it arises, and whether publicly available historical evidence of prosecutors' choices suggests that the deliberative costs of prosecutorial independence are more serious than they appear at first blush.

B. Prosecuting the National Interest in Court

In light of the rhetorical power of the independence norm, prosecutors' deliberative monopoly in the Executive Branch is plain. It is also useful to recall prosecutors' special capacity to wield the state's power.

Prosecutors' legal tools are enormously effective, resulting from the widespread agreement that the prosecutor has been entrusted with independently enforcing those "societal norms [articulated] through criminal law."[49] For example, acting through the grand jury, the prosecutor wields "the judicial power of the United States"[50] to conduct "investigation[s] and inquisition[s], the scope of whose inquiries is not to be limited narrowly by questions of propriety."[51] Witnesses must give evidence as part of their "necessary contribution . . . to the welfare of the public."[52] With a search warrant, federal agents search for and seize broad swathes of evidence.[53] And with an indictment, the prosecutor can deprive the accused of his liberty anywhere he is found.[54] We entrust to the prosecutor tools that can impose, "by the mere institution of proceedings," an "incalculable" harm upon the "reputation or liberty" of those she investigates and accuses.[55] Prosecutors thus wield a high degree of "infrastructural power" to "actually penetrate civil society, and to implement . . . political decisions."[56]

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48. It would undermine the independence norm's theory of democratic accountability for line prosecutors to evade the supervision of the appointed leadership of the Department; there is "not a career Department of Justice and a political appointees' Department of Justice. It's all one DOJ." U.S. DEP'T OF JUSTICE, OFF. OF THE INSPECTOR GEN., REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI'S CROSSFIRE HURRICANE INVESTIGATION 295 (Dec. 2019), https://int.nyt.com/data/documenthelper/6565-doj-inspector-general-horowitz-report/8125be3a81c0d37f40d9/optimized/full.pdf [hereinafter, "OIG Report"] (quoting comments from then-Deputy Attorney General Sally Q. Yates).

49. McCleskey v. Zant, 499 U.S. 467, 491 (1991).

50. Blair v. United States, 250 U.S. 273, 280 (1919).

51. *Id.* at 282; *see also* John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 445–46 (1974) (arguing that the grand jury "conceal[s] the extent of prosecutorial discretion").

52. *Blair*, 250 U.S. at 281. *See also* Trump v. Vance, 140 S. Ct. 2412, 2424 (2020) (invoking the maxim that the grand jury has a right to "every man's evidence," and observing that "the public interest in fair and accurate judicial proceedings is at its height in the criminal setting").

53. *See* Fed. R. Crim. P. 41(c); *see also* ADMIN. OFF. OF THE U.S. COURTS, FORM AO 106: APPLICATION FOR A SEARCH WARRANT, https://www.uscourts.gov/sites/default/files/ao106.pdf.

54. *See* Fed. R. Crim. P. 4(b); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599 (1950).

55. *Ewing*, 339 U.S. at 599.

56. Michael Mann, *The Autonomous Power of the State*, 25 EUR. J. SOC. 185, 189 (1984).

It is perhaps because of prosecutors' privileged position within American legal culture that the most prominent judicial critiques of prosecutorial abuses also most strongly endorse prosecutors' power. In the most-cited description of prosecutors' status, Justice Sutherland expressed the core idea that "[t]he U.S. Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."[57]

Viewed, from Sutherland's vantage point, as sovereigns unto themselves, prosecutors' offices must be held to both the highest possible due process standards and the most exacting scrutiny of whether the processes that structure prosecutors' discretion adequately attend to the national interest.

C. Incentives, Discretion, and Autonomy

The choice to prize the prosecutor's independence makes the prosecutor a monopolist regarding the exercise of law-enforcement judgment by the Executive, not just in adversarial proceedings (as, for example, in a system that disproportionately favors plea bargaining) but internally within the Executive as well.[58] An inertia will inevitably favor prosecution of proved-up cases, and it will constrain non-prosecutors from intervening in criminal investigations. The reasons for this powerful inertia require some explication because they bear on the aptitude of prosecutors to consider non-criminal national interests in the kinds of cases discussed in the next Part.

Although prosecutors' intra-Executive authority tends toward monopoly, prosecutorial authority is not monolithic. It is instead dispersed among individual prosecutors' offices in a phenomenon I'll refer to as the "horizontal" independence of federal criminal law. (I contrast this to the claim that decision-making by prosecutors should be insulated from supervision outside the Department—e.g., by the President or other Executive principals—a norm I call "vertical" independence.)

A persistent feature of the American criminal justice system is its "localism,"[59] which produces a relatively narrow enforcement discretion for state and local law enforcement but reciprocally broad discretion for local federal prosecutors. The federal prosecutor has a significantly greater power to decline prosecution and dissuade referral of cases that underserve the policy priorities of her office. As several scholars have observed, one result of this declination discretion is that there is vastly more state and local criminal law enforcement activity than federal activity—both in terms of charges filed and number of law enforcement agents assigned to

57. Berger v. United States, 295 U.S. 78, 88 (1935).

58. *Id.*; *see also* Damaška, *supra* note 20, at 534–35.

59. William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL'Y 665, 665 (2002).

investigations.[60] These starkly different resource profiles leave federal prosecutors to assess, by their own lights, a great many discretionary factors—retail policy judgments of a kind—when considering an indictment. In 2019, omitting immigration offenses, federal prosecutors considered charging approximately 92,407 individuals and declined to prosecute almost forty percent of them.[61]

This distribution of enforcement activity does not reflect the scope of conduct criminalized by federal law. "[A]nyone with more than a passing familiarity with federal criminal law is struck by the extraordinary extent to which Congress has eschewed legislative specificity" in drafting the federal criminal code.[62] Federal criminal law is over-inclusive by design, assuming that the vast majority of plausible federal criminal cases will never be pursued. [63] Congress thus gives prosecutors authority to bring a broad swath of possible indictments, while intending that prosecutors will only pursue "a small percentage of cases."[64]

Accordingly, the existing institutional equilibrium enables and expects federal prosecutors to choose their cases to maximize a federal policy interest in criminal law enforcement. In pursuit of this goal, federal prosecutors "enjoy the power of initiative" in pursuing cases.[65] The federal prosecutor thus *always* engages in policy-making about the national interest in prosecution, even if it is only the politics of dividing cases worth federal attention from cases that are not.[66] Each day prosecutors make hundreds of judgments that the national interest does *not* favor particular prosecutions.

Whether to bring an indictment in a proved-up case or not will turn largely on the prosecutor's on-the-spot assessment of whether the case favors a national interest in law enforcement. The bigger the case, the more important the indictment. I discuss that dynamic in what follows.

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60. *See id.* at 665–66 & n.1. According to recent data published by the Department of Justice, federal prosecutors brought charges against approximately 66,279 individuals in non-immigration cases in 2019, while their state and local counterparts obtained convictions in vastly more—more than 2 million in 2007 alone. *Compare* BUREAU OF JUST. STATS., FEDERAL JUSTICE STATISTICS, 2019, at 7 tbl. 4 (Oct. 2021), https://bjs.ojp.gov/content/pub/pdf/fjs19.pdf, *with* BUREAU OF JUST. STATS., PROSECUTORS IN STATE COURTS, 2007 – STATISTICAL TABLES, at 2 (Dec. 2011), https://www.bjs.gov/content/pub/pdf/psc07st.pdf. Omitting immigration enforcement and correctional officers, there are about 50,000 federal law enforcement officers, compared to 701,000 local officers. BUREAU OF JUST. STATS., FEDERAL LAW ENFORCEMENT OFFICERS, 2016 – STATISTICAL TABLES, at 3 tbl. 1 (Oct. 2019), https://www.bjs.gov/content/pub/pdf/fleo16st.pdf. That distribution has remained essentially unchanged over the past several decades.

61. *See* BUREAU OF JUST. STAT., FEDERAL JUSTICE STATISTICS, 2019, at 7 tbl. 4 (Oct. 2021), https://bjs.ojp.gov/content/pub/pdf/fjs19.pdf.

62. Richman, *supra* note 21, at 761.

63. Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967, 972 (1995).

64. *Id.* at 973.

65. Kahan, *supra* note 10, at 479–81 (arguing that the open-textured language of the federal criminal code and courts' diminished view of their own interpretive agency "empowers individual prosecutors, who face no check in advancing exceedingly broad statutory readings"); *see also* Langbein, *supra* note 51, at 440–43 (contrasting American discretion with the "rule of compulsory prosecution").

66. Barkow, *supra* note 18, at 871; Richman, *supra* note 21, at 759.

Once a prosecutor has a fully proved up case concerning a high-profile matter, the question whether a substantial federal interest favors prosecution will often, as a practical matter, tend toward enforcement. The tendency of the prosecutor's judgment to be pro-enforcement reflects non-nefarious facts about the nature of prosecutors' and agents' work, the perception of their joint membership on the same law-enforcement team, and the prosecutor's membership in a white-collar professional bar.

A prosecutor's typical day will bring her into contact with her "clients": federal and local law-enforcement agents who come to pitch cases, to ask her to draft criminal process, or to encourage her to seek an indictment. In hard cases, after months or years, the prosecutor will synthesize an unwieldy surfeit of facts to draft an indictment that reflects her best assessment of the evidence. She will think about whether the leadership of her local office will approve the indictment, and the reputational costs of declining an indictment within the local law-enforcement network. She will also obsess about the likely defenses, whether the case is worth the time investment, and the headwinds she might face before a district court or the white-collar bar if her legal theory is too precarious. She will write a "pros memo" to her supervisors, which sets forth her view of the evidence and explains why the admissible evidence proves up each element of the crime.[67] She may well anticipate "knock-down, drag-out fights about whether to charge, who[m] to charge,"[68] in which office leadership, other law-enforcement professionals, and defense counsel will weigh in on whether an indictment serves the government's interest. The final charging decision "is art, not science,"[69] and the artists are prosecutors.

The Executive's decision-making about regulating federal crime thus proceeds almost entirely within a prosecutor's office, and it accords with the distinctive mores of an insulated legal culture. Once a federal prosecutor has made up her mind, as a practical matter her judgment is difficult to resist. "Senators, local politicians, even some defendants, believe it would be improper to try to influence a U.S. attorney's decisions directly."[70] Apart from defense counsel's vigorous advocacy, any lobbying that occurs will be with the softest of touches. Indeed, "politicians can expect a public outcry if any hint of tampering emerges, both because the public values prosecutorial independence and because the parties most likely to need congressional intervention will generally have done obviously bad (indeed criminal) things."[71]

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67. *See, e.g.*, U.S. Dep't of Just., Crim. Res. Manual § 2073 (describing the elements of a prosecution memorandum in the RICO context).

68. Benjamin Wittes, Susan Hennessey, Chuck Rosenberg & Margaret L. Taylor, *The Mueller report: What did we learn?*, BROOKINGS INST.: LAWFARE, at 1:11:29 (Apr. 23, 2019), https://www.brookings.edu/events/the-mueller-report-what-did-we-learn/.

69. *Id.*

70. EISENSTEIN, *supra* note 21, at 204.

71. Richman, *supra* note 21, at 777.

Arguments whether to proceed to indictment are all framed by and for prosecutors. In this way, Congress's substantive criminal lawmaking includes the decision to delegate law-enforcement discretion both away from Congress *and away from the rest of the Executive*. Instead, the discretion is placed in what Dan Richman has called the "blind trust" of the U.S. Attorneys' Offices.[72]

The autonomy of federal prosecutors' decision-making has suggested to some that the federal criminal law system has simply failed to "devise [a] means to regulate the prosecutor's monopoly,"[73] in contrast to other, better-functioning areas of administrative law.

That view may be too strong, but it properly frames the question whether prosecutors' autonomy can be constrained by the modes of influence that have grown in response to that autonomy. In conceiving of its own accountability, for example, the Department does not ordinarily invoke the norm of prosecutorial independence at all.[74] Instead, it cites a reporting structure with political appointees at its apex: department "leadership, which is nominated by the President and confirmed by the Senate, is ultimately answerable within the Executive Branch . . . ."[75]

More informally, prosecutors are subject to all the reputational pressures of a large bureaucracy with a strong internal law enforcement culture. That culture itself can encourage federal prosecutors to practice "responsible gatekeeping"[76] in deciding what to investigate and what to charge—at least with respect to *local* political interests. "Politically appointed [U.S.] attorneys who harbor ambitions that require the support of others for realization cannot ignore how others will react to their decisions,"[77] and of course it is in prosecutors' self-interest to avoid provoking the ire of the communities in which they work.[78] And, as some have contended, prosecutors' membership in relatively close-knit white-collar bars

72. *Id.* at 812–13. The persistence of the "blue slip" norm, which permits Senators to veto U.S. Attorney appointments in their home states, may also speak to Congress's commitment to the idea of prosecutorial independence even during hyperpartisan periods. *See* Press Release, Sen. Lindsey Graham, S. Judiciary Comm., Chairman Graham's Statement on Trump Administration's Intent to Nominate Jay Clayton to be U.S. Attorney for Southern District of New York (June 20, 2020), https://www.judiciary.senate.gov/press/rep/releases/chairman-graham-statement-on-trump-administrations-intent-to-nominate-jay-clayton-to-be-us-attorney-for-southern-district-of-new-york.

73. Langbein, *supra* note 51, at 443.

74. *See, e.g.*, OIG Report, *supra* note 48, at 399 ("The Department's leadership, which is nominated by the President and confirmed by the Senate, is ultimately answerable within the Executive Branch, to Congress, and in the courts for the investigations, prosecutions, and other activities of the Department, whether politically sensitive or routine."). As a formal matter, the Attorney General, and not the U.S. Attorney, appoints and removes line prosecutors within an office. *See* 28 U.S.C. §§ 542(b), 519.

75. OIG Report, *supra* note 48, at 399.

76. Richman, *supra* note 21, at 788.

77. EISENSTEIN, *supra* note 21, at 204.

78. The same is true with respect to prosecutors' relationships with the political representatives of the communities they serve. *See* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice*, 44 SYRACUSE L. REV. 1079, 1090–91 (1993) ("Legislatures may authorize police and prosecutors to investigate and punish in ways that might in theory offend powerful interest groups, but police and prosecutors in practice are likely to exercise their discretion so as to avoid such unpleasant collisions.").

create professional[79] incentives that may encourage them to engage genuinely with defendants' counsel in high-profile cases. The regularity of such meetings suggests that adversary counsel's lobbying against bringing an indictment bounds, to some degree, prosecutors' discretion—at least when a case concerns policy judgments that are purely "criminal."

But while high-powered defense counsel might constrain prosecutorial decision-making, this process is entirely internal to prosecutors' offices and thus inflected through local office practices. While such meetings may force a line prosecutor to inhabit a quasi-administrative role,[80] this deliberative arrangement yields a mode of decision-making that appeals entirely to *prosecutors'* judgments.[81] Prosecutors and defense counsel operate within the same regulatory silo: everyone in the room is debating about criminal policy. And the prosecutor has an appointed side in that debate: she is "part of a law enforcement complex that shares policy goals with the police."[82] The decisions made by prosecutors in these moments will, in the words of one of the most prominent prosecutors of the Watergate era, "very properly be influenced by policy preferences," and they will sometimes have vast public policy consequences. [83]

In short, prosecution decisions are always "political" in a non-pejorative sense; "the treatment of the law and facts simply cannot be separated from ideas of economic, social, or political—in the highest sense of the word—philosophy."[84] As explored below, when criminal cases implicate other Executive branch priorities, the dominant modes of professional discipline may be insufficient to attend to the whole national interest. Yet in both their interpretive choices, and their exercise of enforcement discretion, prosecutors will express much more than the sovereign's judgment about whether the criminal law should be enforced. Instead, they will be speaking for the national interest in quite different contexts, with fewer reliable guideposts to counsel and constrain them.

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79. EISENSTEIN, *supra* note 21, at 174–75 ("The cooperation and cordiality that typify [AUSAs'] interactions with private attorneys reflect at least in part their eagerness to enhance their career prospects."); Samuel Buell, *Why Do Prosecutors Say Anything?*, 96 N.C. L. REV. 823, 838 (2018) ("If these prosecutors have an eye on a future job, it is almost always one of three positions: a more senior appointment with the DOJ, a partnership at a marquee law firm, or a general counsel-type position at a major corporation or investment firm."). *But see* Richman, *supra* note 21, at 779 (noting that the fragmentation of investigative authority would undercut the effectiveness of such "low-visibility" lobbying, as would the countervailing interest in being perceived as a prosecutor who wins cases against powerful adversaries).

80. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2149 (1998) ("[P]rosecutors, in their discretionary charging and plea bargaining decisions, are acting largely as administrative, quasi-judicial decision-makers . . . .").

81. *Id.* at 2124–29.

82. *Id.* at 2128.

83. *Removing Politics from the Department of Justice: Hearing on S.R. 2308 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 93d Cong. 205 (1974) (statement of Archibald Cox, Former Special Prosecutor, U.S. Dep't of Just.).

84. *Id.* at 202.

II. THE SOVEREIGN'S OTHER INTERESTS

Notwithstanding the prosecutor's criminal-law remit, a prosecutor's public acts are taken to express the whole Executive's view of the matters she discusses in and out of court. When the Executive exercises the prosecution power, a prosecutor appears in court to speak for the whole American sovereign. She works to "vindicate[e] . . . the 'judicial [p]ower *of the United States*,' and it is that interest, unique to the sovereign, ..." (citation omitted) that her actions express.[85] There are, however, a great many other national interests that a sovereign pursues and vindicates.

This Part describes several episodes in which prosecutorial statutory interpretation, investigative decision-making, and charging decision-making reached far beyond the ordinary scope of prosecutors' work. Each episode transparently implicated whole-of-government interests, such as foreign policy, national defense, and economic policy. I plumb these examples not to suggest a definitive history, but rather because they permit an unusually candid view into prosecutorial decision-making while suggesting the deliberative problems at the core of this Article.

What is striking about each of these episodes is that the genuine interpretive and enforcement puzzles they pose transcend the enforcement questions that shape prosecutorial decision-making culture. In addition to asking "should this defendant be prosecuted for this alleged crime?" these classes of cases ask, for example: "what is the definition of American civic life and can criminal law enforcement protect it from propagandistic influence?"[86]; "should the punitive machinery of the criminal law interfere with diplomacy?"; and "is the economic wreckage of prosecuting this defendant too great?" The deliberative dynamics of the prosecutor's office and white-collar decision-making culture are, at first blush, ill equipped to answer such questions. Those dynamics will instead tack in familiar directions, by embracing broad interpretations of statutory authority and pro-enforcement outcomes.

1. Propaganda Prosecutions as Total War

As part of the war effort in 1940, the Department of Justice launched a portfolio of "National Defense" prosecutions arising from "[t]he European conflict and the present unsettled condition of world affairs . . . ."[87] Archival records of the Department's activities during this period capture, to an unusual degree, prosecutors' deliberative processes during a moment in which their work was inseparable from whole-of-government national-security concerns.

One of the "National Defense" prosecutions, *United States v. Curtiss-Wright Export Corp.*, would become a singularly famous test of the Executive's foreign-

85. United States v. Providence Journal Co., 485 U.S. 693, 700 (1988).
86. *See infra* Part II.1.
87. 1940 ATT'Y GEN. ANN. REP. 74.

affairs powers,[88] but others seem more innocuous today: *United States v. Gorin*, *United States v. Bookniga, Inc.*, and *United States v. Rush*.[89] All were part of a sustained effort by Department of Justice to use its powers to join in the national defense.

Inside the Department of Justice, a unit specially created to pursue national-defense prosecutions understood its mission in grand strategic terms.[90] Wielding the authority of the newly minted Foreign Agents Registration Act ("FARA"), passed just two years earlier, the unit saw the advent of the Second World War as a call to action. A "military war," they thought, was just the "mop-up phase" of a total war that would begin with "propaganda warfare" that would "subvert the structure of internal security" of the country.[91] It was time, they wrote, for the Department to undertake its "traditional charge" of the "protection of our Internal Security."[92]

The Department understood that it could not embrace a "tradition of suppression" to protect American civic life.[93] Instead, it would pursue "a more acceptable and effective tool for dealing with the propaganda attacks: Disclosure by Government."[94] Namely, the Department could use criminal law to address the national security problem of "propaganda."

The Department's intuition was that "the average citizen, if he is provided with those facts and comments necessary as a basis for a realistic decision, will choose correctly in supporting . . . ideas often enough to insure the continued existence of our democratic society."[95] But as Department lawyers acknowledged, "[t]he effect of fair disclosure has regularly been weakened by the use of procedures which smacked of 'witch hunts' and violated the public's sense of fair play."[96]

Another memorandum tackled the problem of how prosecutors should "'sell' the idea of 'Disclosure' to Americans."[97] The author recommended that the Department describe federal criminal law as serving two ends: first, disclosure would inoculate listeners so they could "protect themselves against the unknown activities of groups which threaten them."[98] Second, prosecutors would emphasize

88. 299 U.S. 304 (1936).

89. *See* ANN. REP., *supra* note 87, at 76–77.

90. Because such deliberative work product is so rarely accessible, I will quote from the original archival source where possible.

91. Memorandum from William B. Cherin to R. Keith Kane 1 (Oct. 15, 1941) (on file at Yale Univ. Library, MS 1043, Series 3, Box 184).

92. *Id.*

93. *Id.* at 3.

94. *Id.*

95. *Id.*

96. *Id.* at 5. The memo further argued that this critique made it "possible for anti-Democratic propagandists to pose as misrepresented 'under-dogs' and to confuse the public by impugning the objectivity of the disclosing agencies." *Id.*

97. Undated Memorandum from E.L. Ehle to W.B. Cherin 1 (on file at Yale Univ. Library, MS 1043, Series 3, Box 184).

98. *Id.*

the "positive benefit in guiding [listeners'] activities as members and supporters of groups in society."[99] If the Department's criminal-law work could develop this "consciousness" in the American public, "it should follow that the whole procedure of 'Disclosure' might be accepted as a source of information and guidance rather than as an indictment."[100]

Russia's entry into World War II caused the Department to redirect its FARA efforts from the Soviet Union to Nazi Germany.[101] Department lawyers deemed Nazi propaganda part of a "total war" with terrible domestic stakes. The pressing question, they thought, concerned "the web of our legal order which binds us together as fellow-members of a national community–will it hold or tear into a thousand angry, tangled threads?"[102] In a memorandum commenting on a study of German and American propaganda,[103] a Department lawyer suggested that "the [First] World War redeemed us from being a divided nation racially unless we permit an unholy alliance of politicians and propagandists to promote the creation of new racial minorities."[104] Viewed from this height, FARA prosecutions would hold together the modern web of the American state and would combat propaganda's most insidious characteristics.[105]

During this period, prosecutors pursued at least four relevant FARA investigations. One series of prosecutions involved alleged Soviet propagandists: a firm called Bookniga and its directors. Another was one of the "National Defense" cases personally highlighted by the Attorney General—*United States v. Gorin*—which was prosecuted under the Espionage Act. One more FARA investigation, *United States v. Ovakimian*, was never brought to indictment. All of these cases involved Soviet nationals or corporations, and they all brought prosecutors into conversation with national security and foreign-affairs interests—all while those prosecutors were deciding, on a blank slate, what the meaning of the new criminal law should be.

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99. *Id.*

100. *Id.*

101. *See* Cherin Memorandum, *supra* note 91, at 1 ("Until recently, the Communists carried on a parallel assault – and may some day be in a position to renew it.").

102. *Id.* The prosecutors' efforts to combat propaganda were in fact efforts to protect the "delicate web" of a free society, woven out of a "common tradition of freedom, dignity, and mutual respect, a common faith that the American Dream is good." *Id.*

103. The study quoted by the Department lawyer was written by George Sylvester Viereck, who was seen as a Nazi propagandist. *See* Phyllis Keller, *George Sylvester Viereck: The Psychology of a German-American Militant*, 2 J. INTERDISC. HIST. 59, 59 (1971) (noting that Viereck "rose to prominence as a spokesman for militant pro-Germanism" and that even "[a]fter the war . . . his profound identification with Germany persisted, and, in the 1930s, he became one of the major pro-Nazi propogandists in the country").

104. *See* Memorandum from William B. Cherin to Lawrence M.C. Smith 2 (Apr. 1, 1942) (on file at Yale Univ. Library, MS 1043, Series 3, Box 184) (quoting GEORGE SYLVESTER VIERECK, SPREADING GERMS OF HATE 269–70 (1931)).

105. Cherin summarized propaganda's most salient characteristics as follows: "a) it promotes false (i.e., inconsistent with pro-democratic premises). b) it circulates false or incomplete information. c) it camouflages its origin. d) it camouflages its motives. e) it hides its support both financial and morale. f) its success depends upon the enlistment of unwitting rather than paid circulators." *Id.* at 4.

a. *Rush*

In *United States v. Rush*, prosecutors accused three Americans of running a propaganda outlet called Bookniga.[106] When the case went to trial, the prosecutor explained that "[w]e are here, *the government of the United States is here*, because the government has been defied by propagandists working for the Soviet[s] and spreading Communist doctrines."[107] In charging the jury, the judge contended that FARA represented Congress's attempt to "deter through the instrumentality of registration with the Secretary of State those activities of persons who are engaged by foreign governments directly or indirectly to advise them on what methods . . . to employ public propaganda . . . ."[108] All defendants were convicted and sentenced to prison.

The prosecution of the *Rush* defendants, and eventually against the Bookniga firm, caused significant blowback at the State Department. A Soviet diplomat summoned the American Ambassador to the Foreign Office in Moscow. He expressed his government's astonishment that the United States was using *criminal* proceedings to conduct diplomacy. Prosecutions were absurd, the diplomat argued, because "practically every Soviet Union citizen in this country is in some way or other an employee of the Soviet Government."[109] In his government's view, diplomats, not prosecutors, should be doing this work.[110]

The Secretary of State instructed the American Ambassador that he "might unofficially and informally intimate that the Government was impressed with the offensive tone of the [message]. No prosecution is motivated by the fact that the defendants have Soviet connections."[111]

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106. U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1941, GENERAL, THE SOVIET UNION, VOLUME I, 711.61/823: TELEGRAM, THE AMBASSADOR IN THE SOVIET UNION (STEINHARDT) TO THE SECRETARY OF STATE (July 5, 1941, 6:00 PM), https://history.state.gov/historicaldocuments/frus1941v01/d935; *see also Bookniga is Called Agency of Soviet*, N.Y. TIMES (June 12, 1941), https://timesmachine.nytimes.com/timesmachine/1941/06/12/issue.html (discussing documents introduced in the *Rush* case alleging that Bookniga "had taken over 'the functions' of a proved agency of the Soviet government and had the sole distribution rights for this hemisphere for official Russian publications").

107. *Bookniga Heads Convicted by Jury*, N.Y. TIMES (July 12, 1941), https://nyti.ms/2sYFPer (emphasis added); *see also* 1942 ATT'Y GEN. ANN. REP. 117 (noting that trial attorneys from Main Justice prosecuted the *Rush* case).

108. 87 CONG. REC. A3,476 (1941).

109. U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, THE SOVIET UNION, 1933–1939, 861.01B11/68, MEMORANDUM BY THE ASSISTANT SECRETARY OF STATE (MESSERSMITH) (Apr. 20, 1939), https://history.state.gov/historicaldocuments/frus1933-39/d733.

110. *See* U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, THE SOVIET UNION, 1933–1939, 800.01B11—BOOKNIGA CORPORATION/35: TELEGRAM, THE AMBASSADOR IN THE SOVIET UNION (STEINHARDT) TO THE SECRETARY OF STATE (Dec. 20, 1939, 5:00 PM), https://history.state.gov/historicaldocuments/frus1933-39/d735.

111. U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, THE SOVIET UNION, 1933–1939, 800.01B11 REGISTRATION—BOOKNIGA CORPORATION/37: TELEGRAM, THE SECRETARY OF STATE TO THE AMBASSADOR IN THE SOVIET UNION (STEINHARDT) (Dec. 22, 1939, 7:00 PM), https://history.state.gov/historicaldocuments/frus1933-39/d736.

b. *Ovakimian*

Within a year of *Rush*, FBI agents in New York arrested Gaik Ovakimian in downtown Manhattan.[112] The Executive Branch's interactions with Ovakimian unfolded first as a matter of criminal law, and then as a matter of high diplomacy.

The House Committee on Un-American Activities would later call Ovakimian a "master spy of the Soviet Union," but he was ostensibly investigated for a FARA offense.[113] Within three hours of Ovakimian's arrest, a Soviet Ambassador lodged a protest.[114] In a subsequent correspondence, the Ambassador argued that the prosecution was motivated by broader trade negotiations. "It was difficult to disassociate the arrest of Ovakimian," he said, "from other actions which had been taken recently by the American Government with the apparent purpose of making trade relations impossible" between the two countries.[115] Prosecutors, he thought, were using the criminal law to change the terms of trade with the Soviet Union. Whatever the criminal merits, the "matter in question should be disposed of through the normal diplomatic channels and not by criminal proceedings."[116]

Even though the dispute had ripened into an international incident, the Department of State repeated the mantra that it could not stop the wheels of criminal justice. The U.S. Secretary of State responded tersely: the matter was "for the determination of the appropriate courts of this country."[117] Within weeks of Ovakimian's arrest, the Soviet Ambassador reached out to ask whether the United States was in a trading mood, and proposed that the Ovakimian and the Bookniga cases be dropped in exchange for the release of Americans held abroad.[118]

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112. U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1941, GENERAL, THE SOVIET UNION, VOLUME I, 800.01B11 REGISTRATION—OVAKIMIAN, GAIK (DR.)/25, THE SECRETARY OF STATE TO THE AMBASSADOR OF THE SOVIET UNION (UMANSKY) (July 8, 1941), https://history.state.gov/historicaldocuments/frus1941v01/d937.

113. H.R. REP. NO. 82-1229, at 19 (1951).

114. U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1941, GENERAL, THE SOVIET UNION, VOLUME I, 800.01B11 REGISTRATION—OVAKIMIAN, GAIK (DR.)/19, MEMORANDUM BY THE ASSISTANT CHIEF OF THE DIVISION OF EUROPEAN AFFAIRS (HENDERSON) (MAY 5, 1941), https://history.state.gov/historicaldocuments/frus1941v01/d922.

115. U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1941, GENERAL, THE SOVIET UNION, VOLUME I, 800.01B11 REGISTRATION—OVAKIMIAN, GAIK (DR.)/8, MEMORANDUM OF CONVERSATION, BY THE ASSISTANT CHIEF OF THE DIVISION OF EUROPEAN AFFAIRS (HENDERSON) (May 12, 1941), https://history.state.gov/historicaldocuments/frus1941v01/d924.

116. U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1941, GENERAL, THE SOVIET UNION, VOLUME I, 800.01B11 REGISTRATION—OVAKIMIAN, GAIK (DR.)/17, MEMORANDUM BY THE ASSISTANT CHIEF OF THE DIVISION OF EUROPEAN AFFAIRS (HENDERSON) (May 20, 1941), https://history.state.gov/historicaldocuments/frus1941v01/d925.

117. U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1941, GENERAL, THE SOVIET UNION, VOLUME 1, 800.01B11 REGISTRATION—OVAKIMIAN, GAIK (DR.)/18, THE SECRETARY OF STATE TO THE AMBASSADOR OF THE SOVIET UNION (UMANSKY) (MAY 28, 1941), https://history.state.gov/historicaldocuments/frus1941v01/d927.

118. U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1941, GENERAL, THE SOVIET UNION, VOLUME 1, 800.01B11 REGISTRATION—OVAKIMIAN, GAIK (DR.)/18, MEMORANDUM OF

The proposal of a trade posed a jurisdictional problem within the Executive branch. A complicated inter-agency dance ensued. The Assistant Attorney General asked the Department of State for time "in order to investigate the case carefully and in order to ascertain how important it might be for the internal protection of the United States for the prosecution to be continued."[119] The Department of State relayed to the U.S. Attorney that "it was not [the Department's] desire that this case should be dropped, at least before some arrangements could be made for the release of American citizens in the Soviet Union."[120]

The Departments of Justice and State then came to an accomodation: Justice would drop the prosecutions if Ovakimian agreed to leave the country and if State would certify to Justice that discontinuing the prosecution "would be to the interest of the United States from an international point of view."[121] "After the departure of Mr. Ovakimian from the country, the case against him would be quietly dropped."[122] Each agency played its part,[123] and Ovakimian sailed home.

The deal worked out among State, Justice, and the court left one constituency unaccounted for: Congress. It was difficult to walk back Ovakimian's indictment in a political environment that still viewed Russia in adversarial terms. The House Committee on Un-American Activities saw Soviet "perfidy" in the "suspicious" exchange, and reported that many of the prisoners offered by the Soviet Union were either not released or later revealed to be unduly "sympathetic to the Soviet Union."[124]

c. *Gorin*

In early 1939, the Department of Justice indicted the Gorins for espionage in the Southern District of California. Both pleaded not guilty and litigated their case to the Supreme Court.[125]

Conversation, by the Assistant Chief of the Division of European Affairs (Henderson) (July 1, 1941), https://history.state.gov/historicaldocuments/frus1941v01/d933.

119. *Id.*

120. *Id.*

121. U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1941, GENERAL, THE SOVIET UNION, VOLUME 1, 800.01B11 REGISTRATION—OVAKIMIAN, GAIK (DR.)/37, MEMORANDUM BY THE ASSISTANT CHIEF OF THE DIVISION OF EUROPEAN AFFAIRS (HENDERSON) TO THE UNDER SECRETARY OF STATE (WELLES) (July 18, 1941), https://history.state.gov/historicaldocuments/frus1941v01/d942.

122. *Id.*

123. *See* U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1941, GENERAL, THE SOVIET UNION, VOLUME 1, 800.01B11 REGISTRATION—OVAKIMIAN, GAIK (DR.)/27, THE ACTING SECRETARY OF STATE TO THE ACTING ATTORNEY GENERAL (BIDDLE) (July 18, 1941), https://history.state.gov/historicaldocuments/frus1941v01/d943 (certifying to the Justice Department that, in the opinion of the State Department, "it would be to the public interest to suspend the case against Mr. Ovakimian on condition that he leave the United States as soon as possible and never return").

124. H.R. REP. NO. 82-1229, at 17–18 (1951).

125. Gorin v. United States, 312 U.S. 19, 20 (1941).

Outside of this judicial process, a Soviet Chargé d'Affaires again appeared at the State Department to protest the "sneering allusion[s]" made by indictment, complaining that the prosecutor was "trying his case by insinuations against the Soviet Ambassador."[126] A State Department official responded that "remarks made by a federal district attorney during the course of a trial were not previously approved or disapproved by the central authorities in Washington," and, in any event, he was "sure that [the Soviet official] had been in the United States long enough to know that the statements made by the federal district attorney who was prosecuting the case could not be considered as the official views of the American Government."[127]

After Gorin was convicted, Soviet diplomats proposed a pardon in exchange for the release of American prisoners abroad. The State Department refused "on the ground that it could not traffic in justice."[128] Soviet diplomats responded that "far more than law [is] involved" in Gorin's criminal proceeding.[129] As one American official later summarized: "what we regarded as a legal matter, [the Soviet ambassador] seemed to regard as a political matter."[130]

Eventually, an American diplomat conceded that "the Department of State believed that [it is] in the interest of our international relations" that Gorin be allowed to leave the country.[131] But the diplomat also cautioned that the Department of State "could not appropriately undertake the responsibility for a decision of this character which must necessarily rest with the law enforcement agents of the government, namely, the Department of Justice."[132]

Smarting from Congressional criticism of Ovakimian's release, the Department of Justice wanted no part in the proposed trade. The Attorney General spoke with an Undersecretary of State to indicate that "the Department of Justice was not willing to take the steps suggested *except* upon the formal recommendation of the

126. U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, THE SOVIET UNION, 1933–1939, 311.6121 GORIN, M. N./20, MEMORANDUM BY THE CHIEF OF THE DIVISION OF EUROPEAN AFFAIRS (MOFFAT) (Mar. 6, 1939), https://history.state.gov/historicaldocuments/frus1933-39/d727.

127. *Id.*

128. U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1941, GENERAL, THE SOVIET UNION, VOLUME I, 311.6121 GORIN, M. N./44: TELEGRAM, THE ACTING SECRETARY OF STATE TO THE AMBASSADOR IN THE SOVIET UNION (STEINHARDT) (Mar. 24, 1941, 7:00 PM), https://history.state.gov/historicaldocuments/frus1941v01/d913.

129. U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, THE SOVIET UNION, 1933–1939, 311.6121 GORIN, M. N./12, MEMORANDUM BY THE CHIEF OF THE DIVISION OF EUROPEAN AFFAIRS (MOFFAT) (Mar. 2, 1939), https://history.state.gov/historicaldocuments/frus1933-39/d726.

130. U.S. DEP'T OF STATE (Mar. 6, 1939), *supra* note 126.

131. U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1941, GENERAL, THE SOVIET UNION, VOLUME I, 311.6121 GORIN, M. N./42, MEMORANDUM OF CONVERSATION, BY THE UNDER SECRETARY OF STATE (WELLES) (Feb. 24, 1941), https://history.state.gov/historicaldocuments/frus1941v01/d901.

132. *Id.*

Department of State."[133] Otherwise, "the Attorney General would be subject to attack from the [House Un-American Activities Committee]."[134]

To overcome the political obstacle, an Undersecretary of State did something that today draws intense suspicion. He "took the matter up personally with the President."[135] The President, in turn, instructed the Undersecretary to inform the Attorney General that "the President believed Gorin should be deported immediately from the United States rather than imprisoned for a further period in this country."[136] All of the relevant Executive actors—the President, the Attorney General, and the Department of State—agreed that public announcements should emphasize that the Attorney General was acting "based upon representations made to the Department of Justice by the authorities of the Government charged with the conduct of our foreign relations."[137] To deal with Congress, the State Department dispatched an Assistant Secretary of State to speak to the chair of the House Un-American Activities Committee. He persuaded the chairman that the exchange of Gorin for Americans—particularly one condemned to death[138]—was worthwhile.[139]

And finally, prosecutors sought the acquiescence of the courts. American diplomats explained that "the constitutional organization of this Government renders it difficult, if not impossible, for us to drive hard and fast bargains in matters of this kind."[140] After prosecutors broached Gorin's release with the district judge, the judge replied that he "would not take such steps unless he could place on the record a letter from the Department of State addressed to Justice to the effect that in the opinion of the Department the release of Gorin would be to the interests of the United States."[141]

Back in Los Angeles, the district court convened to hear a routine procedural motion. A government attorney appeared, however, to disclose that he had lately "received instructions from the Attorney General to acquiesce" in Gorin's probation.[142] The district judge addressed the defendant, and disclosed that

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133. *Id.* (emphasis added).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1941, GENERAL, THE SOVIET UNION, VOLUME 1, 311.6121 GORIN, M. N./42¼, MEMORANDUM BY THE ASSISTANT CHIEF OF THE DIVISION OF EUROPEAN AFFAIRS (HENDERSON) TO THE UNDER SECRETARY OF STATE (WELLES) (Feb. 21, 1941), https://history.state.gov/historicaldocuments/frus1941v01/d900.

139. U.S. DEP'T. OF STATE (Feb. 24, 1941), *supra* note 131.

140. U.S. DEP'T. OF STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1941, GENERAL, THE SOVIET UNION, VOLUME I, 311.6121 GORIN, M. N./44: TELEGRAM, THE ACTING SECRETARY OF STATE TO THE AMBASSADOR IN THE SOVIET UNION (STEINHARDT) (Mar. 24, 1941, 7:00 PM), https://history.state.gov/historicaldocuments/frus1941v01/d913.

141. *Id.*

142. Transcript of Proceedings at 3, United States v. Gorin, No. 13,793-RJ (S.D. Cal. Mar. 22, 1941) (on file at NARA Riverside RG 21, Box 786, Folder 13793).

> [F]rankly, . . . when your petition for probation was filed, the Court was not sympathetic. . . . I am informed that [the] U.S. Attorney was likewise opposed. May I say, however, that neither [the U.S. Attorney] nor the Court were at that time fully informed as to the national and international importance of this matter.[143]

Because, however, the Executive now believed Gorin's release was "of vital importance to the United States in connection with its dealings with [Russia]," the court would acquiesce. The judge noted, obliquely, that "it would be improper for me to reveal any further information which may have been furnished me as to the reasons which have motivated the government," but that "[t]his Court is anxious to do everything possible and proper to assist the government in these days of delicate and important negotiations."[144] The court noted that one of Gorin's American co-conspirators had already served a year of his sentence, and encouraged the government to seek his parole "in the interests of fair play."[145]

The *Gorin* prosecutors' procedural acrobatics are a quiet reminder that the idea of independence is considered to be more than a mere norm when we discuss the federal judiciary, and that prosecutors' peculiar role in federal court anchors the idea of independence broadly across the government's criminal enforcement enterprise. Indeed, we embrace—both as norm and as hard Constitutional fact—the idea of *judicial* insulation from whole-of-government concerns. As independent administrators of criminal justice, prosecutors become in these mixed-policy cases brokers between branches. Whether prosecutors are *in fact* independent from the whole Executive is, on this account, less relevant that the fact that the judiciary expects them to be.[146]

d. *FARA During and After the War*

The onset of World War II caused the Department to curtail its propaganda prosecutions, but prosecutors did not abandon their national-defense program. To some within Main Justice, the dispersed authority structure of the Department—what I have called its horizontal independence—posed an obstacle to fully realizing the anti-propaganda mission. In a memorandum to the Attorney General, these lawyers lamented that the Department's efforts were "accidental" and "disjointed."[147] Main Justice, they thought, should coordinate the investigative work in the field.[148] The

143. *Id*. at 10.

144. *Id*. at 11.

145. *Id*. at 12.

146. I am grateful to Dan Richman for the conversations that drew out this point.

147. Undated Memorandum from Lawrence M.C. Smith, Chief, Special War Policies Unit, to the Att'y Gen. 2 (on file at Yale University Library, MS 1043, Series 3, Box 184).

148. Specifically, Smith recommended appointing a Departmental Committeee on Internal Security. *Id.* All of the various offices' efforts regarding "sedition, Voorhis [i.e., subversion], Foreign Agents [i.e., FARA], Selective Service . . . denaturalization, enemy alien control, [and] fund freezing," should compose the committee, along with the FBI. *Id*. The Attorney General should then get the U.S. Attorneys on board: USAOs from "Washington

impulse in the national-defense prosecutions was thus to *centralize* prosecutorial authority.

Another memorandum proposed that prosecutors intensively publicize their national-defense work. Members of foreign-sponsored organizations, academics, school teachers, and "nationality groups" targeted by propaganda should all be informed of its foreign source. The disclosure of a foreign agency relationship could also be shared with "the government facilities for intelligence coordination," but only "provided such cooperation is effected with a maximum of understanding and a minimum of balderdash."[149]

The Department subsequently designed a "Program of Exposure of Convicted Foreign Agents." The Attorney General wrote to people who appeared on mailing lists seized during FARA investigations, informing them that the defendants "did not tell you that their propaganda was being paid for by the [foreign] Government" and "concealed the fact that they were acting in the interests of a foreign government."[150] While such letters emphasized that prosecutors would "take it for granted that your name was not on these mailing lists through any fault of yours,"[151] it was nevertheless "important to expose their propaganda so that no loyal American will unknowingly continue to believe or spread ideas that serve the cause of our enemies."[152] This was bellicose rhetoric, laden with both national-security and foreign-affairs implications.

FARA enforcement since this period has been "rather dormant."[153] However, the contours of the decision-making structure and policy goal of public disclosure of foreign influence operations persist. Prosecutions under FARA require approval of the Department's National Security Division,[154] and the Department's guidelines to prosecutors still prize remedial disclosure to "unwitting" victims of foreign-influence operations.[155]

DC, Philadelphia, New York, Boston, Detroit, Chicago, Los Angeles, and San Francisco" would all be called to a meeting to coordinate efforts, and a unit from Main Justice would shepherd the cases to indictment. *Id.* at 2–3.

149. Undated Memorandum from Dale McAdoo to W.B. Cherin 2 (on file at Yale University Library, MS 1043, Series 3, Box 184).

150. Undated Memorandum from Lawrence M.C. Smith, Chief, Special War Policies Unit, to the Att'y Gen, app. at 1 (on file at Yale University Library, MS 1043, Series 3, Box 184) (sample letter from the Att'y Gen to individuals named on seized mailing lists).

151. *Id.* app. at 2.

152. *Id.* app. at 1.

153. Francis R. O'Hara, *The Foreign Agents Registration Act - "The Spotlight of Pitiless Publicity,"* 10 VILL. L. REV. 435, 435 (1965).

154. *See* U.S. Dep't of Just., Just. Manual § 9-90.710 (2018). I discuss the centralization of prosecutorial judgment in such cases below. *See infra* Part I.B.1.

155. *See* U.S. Dep't of Just., Just. Manual § 9-90.730 (2018) ("It is the policy of the Department of Justice to investigate, disrupt, and prosecute the perpetrators of illegal foreign influence activities where feasible. It is also the Department's policy to alert the victims and unwitting targets of foreign influence activities, when appropriate and consistent with the Department's policies and practices, and with our national security interests").

e. *Consequences of FARA Prosecution*

The national-security consequences of this first generation of FARA prosecutions suggest a few possible ways to frame the risks of empowering prosecutors to tend simultaneously to the criminal-enforcement, national-defense, and foreign-affairs interests of the United States.

The first interpretation is unease. If prosecutors were acting independently—if, as diplomats claimed, only prosecutors could "traffic in justice"—then the prosecutions exposed a weakness in the Executive Branch's ability to come to unified policy judgments in a time of crisis. Once defendants were publicly indicted, many avenues of quiet accommodation vanished. Had there been no U.S. Attorney decrying Soviet crimes in open court, the Executive's public silence would have preserved room to maneuver in service of other reasons of state.

The second interpretation views the State Department's response to the diplomatic protests with skepticism. Perhaps prosecutors were not independent at all, but the *claim* that they were independent was meant to strengthen the American negotiating position. This view takes prosecutors' actions, no matter their gravity, as advancing the reconciled expression of the Executive's foreign-affairs and national-security judgments. This view also surmises that the blunt benefits of public prosecution are sometimes worth the cost of limiting Executive freedom to walk indictments back. Propaganda was, after all, viewed as one front of total war. If indictments prompted diplomatic protests, or even tit-for-tat prosecution of Americans abroad,[156] then perhaps the whole government had weighed these costs and resolved to incur them. I discuss the possibility of "feigned" independence, or non-independence-in-fact, below.

A final interpretation celebrates the diplomats' invocation of prosecutors' independence, along with the judiciary's uneasy deference to two Executive branches in the *Gorin* prosecution, as illustrating an important value in American governance. The main lesson to those foreign actors that prosecutors indicted was that if you commit crimes in or against the United States, an independent corps of criminal justice experts will prosecute you in keeping with an American commitment to the rule of law. I assess these interpretive possibilities below.

156. In this same period, Germany arrested several *United Press International* reporters shortly after the United States indicted the German national Manfred Zapp on FARA charges. State Department correspondences indicate that the German arrests may have been retaliatory. *See, e.g.*, U.S. DEP'T. OF STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1941, EUROPE, VOLUME II, 811.91262/205: TELEGRAM, THE CHARGÉ IN GERMANY (MORRIS) TO THE SECRETARY OF STATE (Mar. 18, 1941, 5:00 PM), https://history.state.gov/historicaldocuments/frus1941v02/d547. Zapp became part of yet another prisoner trade in the years that followed. *See* U.S. DEP'T. OF STATE, FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1941, EUROPE, VOLUME II, 811.91262/343: TELEGRAM, MEMORANDUM BY MR. JAMES W. RIDDLEBERGER OF THE DIVISION OF EUROPEAN AFFAIRS (July 8, 1941), https://history.state.gov/historicaldocuments/frus1941v02/d578 (describing the logistics of the exchange of four Americans for four German nationals, including Zapp).

2. Criminal Investigations as Diplomacy

Until the past few decades, the predictable *domesticity* of crime (and, usually, of the defendant) meant that prosecutors' policy-making boundaries were generally coextensive with our territorial boundaries. Thus, it was possible for prosecutors and diplomats to conceive of the Executive's law-enforcement and diplomatic activities as two components of an integrated national interest: prosecutors enforce criminal law at home, while diplomats advance the national interest abroad. But today, the evidence or instrumentalities of ordinary crimes occurring in the United States will often be located in places far removed from American territory.

As the frequency of what Steven Koh has called "foreign affairs prosecutions" increases,[157] the assumed consistency between the prosecutor's activities at home and the diplomat's work abroad breaks down—as does the capacity of the criminal-law ecosystem to police itself. When criminal policy interests conflict with diplomatic concerns, the countermeasures available to foreign sovereigns are unlikely to produce the same kind of self-restraint as the typical jousting behind the closed doors of U.S. Attorneys' offices. This section aims to describe this deliberative dynamic, with reference to actual disputes that have spilled into public view.

The Department of Justice has long known that federal criminal regulation may overlap with foreign-affairs concerns. For example, at the advent of the Department's "war on drugs," the Grand Caymans had acquired a reputation as a haven for "huge amounts of narcotics profits,"[158] and its corporations were identified as "fronts for a variety of illegal operations."[159] The "astute use of tax havens effectively nullifie[d] the ability of United States law enforcement agencies to prosecute drug smugglers and distributors for financial crimes."[160] Prosecutors began to view Caymanian bank secrecy laws with skepticism,[161] while Caymanian officials noted that "the practice of licensing banks and registering companies" funded twenty percent of the government's operating budget each year.[162]

To American prosecutors, foreign bank secrecy laws meant that they could not build their cases.[163] An American Consul wrote to the Cayman Governor seeking to "establish workable procedures for channeling and considering United States' requests for information presently protected by Caymanian confidentiality laws."[164]

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157. Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340 (2019).

158. *Int'l Narcotics Trafficking: Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affs.*, 97th Cong. 626 (1981) (statement of S. Cass Weiland, Chief Counsel, S. Permanent Subcomm. on Investigations).

159. *Id.* at 628.

160. *See* STEVEN WISOTSKY, BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY 85 (1990).

161. S. Exec. Rep. No. 100-26, at 69 (1988).

162. *Int'l Narcotics Trafficking*, *supra* note 158, at 628.

163. *See id.* at 630.

164. Petition for Writ of Certiorari at 10b, Bank of N.S. v. United States, 469 U.S. 1106 (1985) (No. 84-329).

Department of Justice leadership agreed to those procedures but cautioned that "the United States retains the option of relying on other legal processes available to us in gathering evidence."[165] Federal prosecutors then exploited those "other" processes. Prosecutors in Miami, for example, used an ordinary grand jury to investigate a money-laundering conspiracy that they suspected involved accounts held at the Bank of Nova Scotia.[166] They found a local branch in Miami and served a subpoena. The bank contended that American prosecutors must instead use diplomatic channels to obtain their evidence, and protested that if its employees were to comply with the subpoena they would be committing a Caymanian felony. In response, federal prosecutors "declin[ed] to lay open [their] entire grand jury investigation for the purpose of proceeding in the foreign court,"[167] and the bank was ordered to comply or face a contempt hearing.[168]

The prosecutors' recourse to such "extraterritorial" subpoenas was becoming a matter of routine in drug-trafficking cases. Indeed, the same prosecutors' office had, a few years before, served a Canadian bank official while he walked through the Miami airport. Federal courts held the traveler in contempt for failing to testify under immunity, even though the act of testifying before an American grand jury would have amounted to a felony abroad.[169] The Fifth Circuit reasoned that "either the United States or the Cayman interest must give way," and that the grand jury's inquisitorial function was simply too "vital" to the American system to be frustrated by another country's decision to criminalize the testimony.[170]

The Bank of Nova Scotia appealed, with Canada and the United Kingdom joining as *amici* to protest what they called "extraterritorial" grand-jury subpoenas. The United Kingdom explained that its courts "regularly" disclosed bank records to foreign prosecutors "as a matter of comity as the interests of justice so require[d]," but that the use of extraterritorial subpoenas put the bank in an untenable position.[171] Had prosecutors proceeded through ordinary diplomatic channels, the UK claimed, "the information would have been in the hands of the Department of Justice in a matter of days."[172] The Supreme Court denied certiorari.

The technique of issuing an "extraterritorial" subpoena to the domestic branch of a foreign company—especially banks that may hold accounts in countries with secrecy laws—took the name of this case. Today, it is possible for prosecutors to issue a "*BNS* subpoena." The only restriction is a matter of central policy: prosecutors are instructed to seek approval from their superiors at the Department of

165. *Id.* at 11a.

166. *Id.* at 4b.

167. *Id.* at 6b.

168. *Id.* at 3a–4a.

169. United States v. Field (*In re* Grand Jury Proceedings), 532 F.2d 404, 405–06 (5th Cir. 1976).

170. *Id.* at 407.

171. Brief of the United Kingdom of Great Britain and Northern Ireland and the Cayman Islands as Amici Curiae at 2, Bank of N.S. v. United States, 469 U.S. 1106 (1985).

172. *Id.* at 6 n.14. Even if the Caymanian government had declined this request, the Crown promised that it would have instructed the governor to comply. *Id.*

Justice.[173] The Department's guidance also notes that "foreign governments strongly object to such subpoenas," and that "unilateral compulsory measures can adversely affect the law enforcement relationship with the foreign country."[174]

Four years after the *BNS* incident, a former head of the Department of Justice's Office of International Affairs testified before Congress about efforts to create a new treaty-based regime to streamline this evidence gathering. While arguing that extraterritorial subpoenas are lawful,[175] he nevertheless acknowledged that "if we don't go ahead with these treaties, we are going to be faced with significant problems in trying to determine whether we should unleash our extraterritorial subpoenaes, which . . . create[] terrible international tensions."[176] This new regime of treaties, called "mutual legal assistance treaties" ("MLATs") would create new authorities within the law-enforcement agencies of each country to process international requests for evidence.[177] The principal virtue of the new regime was that "the central authorities are, in fact, the justice departments of the two countries, and they deal directly with one another on all treaty matters."[178] And although MLATs removed discretion from diplomats, the treaty regime nonetheless attended to the parties' overall national interests. The Justice Department assured lawmakers that the involvement of prosecutors in the process would create "a dialog, hopefully one that advances law enforcement."[179]

Some Senators perceived a danger in transferring diplomats' discretion to prosecutors. One Senator asked, for example, whether the MLAT system would require the United States to assist foreign governments investigating conduct that would be legal under U.S. law: "[W]hat are we prepared to do? Do we have a policy, or is it just a whim of a Secretary to designate to what extent we might be cooperative, or do we have an obligation to protect our own domiciled corporations."[180] The Senator directly grasped the important difference between the MLAT regime and the earlier diplomatic mode: the investigative "policy judgment would move over from State to [J]ustice and be determined at [J]ustice on the recommendation to a higher authority within [J]ustice."[181]

A Department of State representative agreed that the treaty left little diplomatic discretion to refuse such a request. After the MLATs were signed, she conceded,

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173. U.S. Dep't of Just., Crim. Res. Manual § 279 (2020).

174. *Id.*

175. S. Exec. Rep. No. 100-26, *supra* note 161, at 170. The official stated:

> [T]he United States has the right . . . to assert its jurisdiction if there is an entity in this country that is doing business here and is doing business in one of these islands, that we have the right to order them to produce records by putting a subpoena on them in the United States . . . .

Id.

176. *Id.*

177. *Id.* at 60.

178. *Id.*

179. *Id.* at 67.

180. *Id.* at 72.

181. *Id.* at 74.

"the Secretary of State is no longer involved directly in deciding when there will be . . . cooperation."[182] And, moreover, the treaty did not impose a dual-criminality requirement that would require the investigated conduct to be criminalized by both countries' laws because it would prejudice American prosecutorial interests: "[S]o many things that are illegal in the United States that are very important to us . . . are not necessarily illegal in other countries."[183] A Department of Justice representative also resisted the Senator's skepticism, arguing that the process of negotiating MLAT treaties had created an enduring "close relationship between the Justice Department and the Legal Adviser's Office of the State Department."[184] And in hard cases, he assured the Senator, there would be "significant consultation within the executive branch of Government as to where our national interests lie."[185]

The MLAT regime today remains the province of the prosecutorial arm of the Executive branch. Two salient features of the MLAT regime suggest that the treaties attend principally to the national interest in a criminal prosecution: no MLAT permits criminal *defendants* to make requests, and most MLATs preserve prosecutors' discretion to use "extraterritorial" subpoenas if an MLAT request is fruitless.

As to the first feature, before consenting to the first MLAT, a Senate committee heard from civil libertarian groups who objected to the treaty's asymmetric favoring of prosecutors' interests: Why shouldn't the new treaties allow indicted defendants to request evidence helpful to their defense? A former director of the Department of Justice's Office of International Affairs explained that because the MLAT authority views prosecutors as clients, it cannot help defendants without creating conflicts.[186]

As to the second feature of the MLAT regime, even though prosecutors' use of extraterritorial subpoenas initially prompted the MLAT negotiations, the treaties still leave room for this practice. The Caymanian delegation had wanted something stronger—namely, a commitment by the United States to "bar enforcement" of all unilateral steps.[187] But the American negotiators "refused, viewing this as an undesirably broad restriction on each party's sovereign power to deal with persons who are physically on its soil."[188]

Today, federal prosecutors, not courts, usually strike the dispositive balance in assessing whether the national interest favors extraterritorial evidence-gathering. Consider, by way of contrast, the persistence of courts' willingness to engage in more searching, and less deferential, comity analyses in *civil* cases. There, courts

182. *Id.* at 72.
183. *Id.*
184. *Id.* at 74.
185. *Id.*
186. *Id.* at 174–75 ("Imagine, if you will, a system under which both defendants and prosecutors are asking the same body of attorneys in the Department of Justice . . . to make requests . . . I see enormous conflicts in trying to assist both defendants and prosecutors.").
187. *Id.* at 44.
188. *Id.* at 44–45.

remain bound to assess a constellation of factors that permit a "particularized analysis of the respective interests of the foreign nation and the requesting [litigant's] nation."[189] To be sure, current law requires courts assessing criminal investigative processes to strike a balance between foreign-affairs interests and law-enforcement prerogatives.[190] But unlike the civil litigant, the prosecutor is taken by courts to express a unified Executive interest in the enforcement of American criminal law. That interest is usually "unassailable."[191]

3. Justice and Commerce

So far, this Article has surveyed the structuring of Executive decision-making to privilege the prosecutor's judgment during two national crises: the "national-defense" prosecutions brought in an effort to save democracy from foreign propaganda, and "extraterritorial" money-laundering investigations. The financial crisis

189. Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct., 482 U.S. 522, 543–44 n.28 (1987). On the application of the test in civil and criminal contexts, compare Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 139–141 & nn.18–20 (2d Cir. 2014), in which the court remanded a civil case for the district court to give "proper weight" to a civil judgment in a foreign country, requiring it to:

> [G]ive due regard to the various interests at stake, including: (1) the [foreign] Government's sovereign interests in its banking laws; (2) the Bank's expectations, as a nonparty, regarding the regulation to which it is subject in its home state and also in the United States, by reason of its choice to conduct business here; and (3) the United States' interest in enforcing the Lanham Act and providing robust remedies for its violation,

with *In re* Sealed Case, 932 F.3d 915, 933, 939–40 (D.C. Cir. 2019), in which the court engaged in a comity analysis in the criminal context and enforced a subpoena after noticing the "unassailable interest in successfully investigating and, with any luck, frustrating North Korea's arms programs" along with the fact that:

> The government decided to pursue the records at issue through [subpoenas] rather than the [MLAT] process only after twice sending delegates to China and engaging in extensive 'internal discussions with subject matter experts . . . within the FBI, as well as consultations involving senior FBI management and Department of Justice and Department of Treasury officials.'

190. The principal federal cases upholding prosecutors' power to issue a *BNS* subpoena frame the question in terms of section 40 of the Second Restatement, which elaborates a multifactor test to determine whether the "enforcement jurisdiction" of the issuing state should trump the equities of the receiving state. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (AM. L. INST. 1965). This requires a "good faith" consideration of various factors, including:

> (a) [V]ital national interests of each of the states, (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person, (c) the extent to which the required conduct is to take place in the territory of the other state, (d) the nationality of the person, and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Id. The vitality of the inquisitorial grand jury in the American system (factor (a)) and courts' power to secure compliance through contempt (factor (e)) are ordinarily dispositive in American courts' thinking. *See, e.g.*, United States v. Field (*In re* Grand Jury Proceedings), 532 F.2d 404, 407 (5th Cir. 1976); United States v. Bank of N.S. (*In re* Grand Jury Proceedings Bank of N.S.), 740 F.2d 817, 829 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

191. *See In re Sealed Case*, 932 F.3d at 933.

of 2008 furnishes a third example of the tendency of Executive branch decision-making to favor prosecutors' views of the national interest.

An indictment that threatens systemic economic consequences—for instance, indicting a large corporation, a large issuer of securities, or a large defense contractor—will implicate the non-criminal policy judgments of other agents of Executive power. It might also implicate the non-criminal economic interests of the government as a whole. I now turn to discuss how prosecutors are empowered to impose economic sanctions on firms even where those sanctions affect other Executive interests. This final example rounds out a partial set of examples of prosecutors' capacity to engage in non-criminal policy-making, and it also primes a comparative account of alternative models to American prosecutorial independence that follows in the next Part.

Prosecutors' failure to indict any individual banking executives after the financial crisis suggested to some that the Executive branch had adopted an "apparent disregard for equality under the law."[192] This critique is phrased in criminal-policy terms: prosecutors alone made these decisions, and they struck the wrong balance in deciding whether indicting individuals would advance a substantial federal interest. But when we ask whether financial *firms* should have been prosecuted, the balance of interests may be different.

The prosecution of financial firms in a highly integrated economy poses a straightforward problem: corporate indictments can harm a national economy. In the financial crisis of 2008, some prosecutors discerned "indications that if we do . . . bring a criminal charge, it will have a negative impact on the national economy, perhaps even the world economy."[193] In such cases, going after firms could interfere with sprawling webs of contracts, creditors, and entire markets.[194]

The 2008 crisis accelerated federal prosecutors' growing realization that some cases carry a risk of severe economic consequences that may outstrip the policy interests that frame their usual charging decisions. A decade before the crisis, prosecutors began to consider the risk that indictments of corporate defendants might cause disproportionate collateral economic harm.[195] Even in these early moments, it was clear that criminal regulation of corporate defendants put the DOJ "in the business of corporate reform."[196] Since the 1990s, the Department has issued a

192. *See, e.g.*, Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REVIEW OF BOOKS (Jan. 9, 2014), https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/.

193. Danielle Douglas, *Holder Concerned Megabanks Too Big to Jail*, WASH. POST (March 6, 2013), https://www.washingtonpost.com/business/economy/holder-concerned-megabanks-too-big-to-jail/2013/03/06/6fa2b07a-869e-11e2-999e-5f8e0410cb9d_story.html (alteration in original).

194. *See, e.g.*, KATHARINA PISTOR, THE CODE OF CAPITAL 48–51 (2019) (describing the enormous web of legal relationships implicated in the collapse of Lehman Brothers during the financial crisis).

195. *See* Buell, *supra* note 79, at 828 (describing the advent of the Deferred Prosecution Agreement in the SDNY in order to avoid causing the collapse of Prudential Securities).

196. *Id.*

"saga"[197] of guidance documents that transplant a distinctive set of non-criminal policy judgments into the prosecutor's office.

For corporate defendants, the Department now cautions line prosecutors to consider unusual factors when making their charging decisions. These factors include "whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution."[198] Prosecutors are instructed to be mindful that their decisions will "necessarily intersect[] with federal economic, tax, and criminal law enforcement policies," and they are thus directed to "consult" with other Department of Justice stakeholders.[199] Yet the final decision remains, in the end, the prosecutors' to make.[200]

These guidelines have now become law-like within prosecutors' offices.[201] Consequently, sophisticated defense counsel now tailor their appeals to these factors when attempting to dissuade prosecutors from indicting firms. The back-and-forth between corporate counsel and line prosecutors has grown to embrace this new "lingua franca," through which "prosecutors, the defense bar, lobbying groups, the press, and academic critics who write about corporate enforcement skirmish over policy and practice."[202]

The Department's response to the problem of corporate indictments aligns with the trend of gradual accretion of intra-Executive power described throughout this Article. The Department's impulse here, as with national security and foreign-affairs concerns, has been to prioritize the interest in law enforcement by recreating the extramural expertise in-house. The Department maintains its vertical independence from the rest of the Executive by withdrawing some horizontal independence from prosecutors in the field. Prosecutors are encouraged to consult with the Department offices with jurisdiction over "Criminal, Antitrust, Tax, Environmental and Natural Resources, and National Security Divisions, as appropriate."[203]

Interestingly, prosecutors do not make all of the coercive decisions that might affect whole-of-government economic concerns. Where firms' economic activity is systemically important *to the government*, prosecutors can use special tools to

197. *Id.* at 832.

198. U.S. Dep't of Just., Just. Manual § 9-28.300 (2018).

199. *Id.* § 9-28.400 (2019).

200. *See id.* (instructing prosecutors to "consider the practices and policies of the appropriate Division of the Department" and instructing prosecutors, "in determining whether or not to charge a corporation," to "consult with the Criminal, Antitrust, Tax, Environmental and Natural Resources, and National Security Divisions, as appropriate"). *See also id.* § 9-28.200 (2020) (describing a system where federal prosecutors consult with various government stakeholders before reaching their decision on whether to prosecute business organizations).

201. *Cf.* Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017) (describing, largely outside the prosecutorial context, how agencies' internal directives, guidance, and organizational forms can structure the discretion of agency employees in law-like ways).

202. Buell, *supra* note 79, at 833.

203. U.S. Dep't of Just., Just. Manual § 9-28.400 (2019).

discipline firms by suspending or excluding them from federal government work. So, for example, a defense contractor that is found criminally liable for submitting a false claim to the government faces the possibility that all of its contracts with the government will be suspended.[204]

Unlike other collateral criminal sanctions, however, suspension and debarment penalties remain subject to the discretion of the affected agency.[205] An agency like the Department of Defense could overlook a prosecutor's debarment penalty if it determines that doing so serves the national interest.[206] Accordingly, an indicted defendant may seek to avoid suspension and debarment as part of a global resolution with prosecutors,[207] but if its counsel's efforts fail, other agencies can act to preserve national economic interests by waiving suspension and debarment penalties.

On the whole, however, the basic independence of federal prosecution within the Executive continues behind a Main Justice firewall. Individual prosecutors will remain entrepreneurial; approval and consultation requirements issued by Main Justice will seem cumbersome; and the sheer work required to build such cases will give line prosecutors and investigators the sense that their sweat equity counsels in favor of a criminal resolution.[208] Moreover, crimes committed by corporate defendants that pose the highest risk of collateral consequences—and thus those that most intersect with other high priorities of state—will *also* be those that appear most transgressive of the law.

Given these complicated dynamics, the central problem is how to create a federal criminal regulatory structure that allows prosecutors to build the exotic, important, and rare cases—those requiring investigative free agency if they are to

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204. *See* Agility Def. & Gov't Servs. v. U.S. Dep't of Def., 739 F.3d 586, 588 (11th Cir. 2013). The Court found that:

> An agency official may suspend a government contractor for various reasons, including the contractor's commission of fraud or a criminal offense, unfair trade practices, or 'other offense[s] indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

Id.; *see also* Press Release, U.S. Dep't of Just., Defense Contractor Resolves Criminal, Civil and Administrative Liability Related to Food Contracts (May 26, 2017), https://www.justice.gov/opa/pr/defense-contractor-resolves-criminal-civil-and-administrative-liability-related-food. For a description of the process due to contractors facing debarment, see Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs, 714 F.2d 163, 166–67 & n.12 (D.C. Cir. 1983).

205. *See* 48 C.F.R. § 9.407-1 (2019).

206. *See* 10 U.S.C. § 2393(a)(2) (providing that government-wide debarment "does not apply in any case in which the Secretary concerned determines that there is a compelling reason to solicit an offer from, award a contract to, extend a contract with, or approve a subcontract with such offeror or contractor"); *Peter Kiewit*, 714 F.2d at 166 n.12 (noting that the § 2393 debarment process is only automatic "absent national security concerns").

207. *See, e.g.*, Press Release, U.S. Dep't of Just., *supra* note 204 (describing an administrative agreement to lift a defense contractor's suspension as part of a global settlement).

208. *See generally* Richman, *supra* note 21, at 780–81.

happen at all—but that also attends to those cases in which the proposed use of a criminal sanction implicates a whole-government view of the national interest.

A. The Signal Attribution Problem

As previously argued, the Justice Department uses indictments to accomplish non-criminal policy ends, including national security, foreign policy, and financial regulatory interests. These indictments press the question whether the Department speaks for the whole sovereign.

If the independence norm presumptively were to yield in cases of conflict, then it would make little sense to attribute criminal regulatory responses to prosecutors. Every indictment would instead speak for all agencies of the Executive, and it would properly signal the national interest of the United States.

But if the independence norm rarely yields, or if it is unclear whether it yielded in a particular case, attribution to the whole Executive is far more vexed. As the FARA prosecutions described above illustrate, the Executive has at various times cultivated ambiguity about this question of attribution. This in turn creates an unsettling set of regulatory features for mixed-policy criminal cases: should indictments be attributed to prosecutors or the whole Executive?

For example, in 2015, prosecutors in New York indicted several individuals connected to a parastatal bank belonging to an American ally.[209] They alleged an "elaborate multibillion dollar scheme to evade economic sanctions which the United States had imposed against Iran during the period 2010 through 2015,"[210] but prosecutors did not immediately indict the bank.

According to press accounts, the allied country then spent more than a year lobbying various parts of the Executive—State, Treasury, the Vice President, and the President—to settle the bank's case without an indictment. Counsel reportedly argued that a settlement would avoid the enormous collateral economic consequences that an indictment would impose on the state-sponsored bank.[211] These lawyers were using the shared conventions of white-collar criminal law to persuade prosecutors to forbear. The decision whether to bring an indictment reportedly lingered in the Department for more than a year.[212]

According to press accounts, prosecutors' efforts to bring a case against the bank caused the Justice Department to centralize its decision-making in the Attorney General's office.[213] Well into the bank's reported lobbying effort at Main

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209. *See* Indictment at 5, United States v. Reza Zarrab, No. 15 Cr. 867 (S.D.N.Y. June 16, 2015).

210. United States v. Atilla, No. 15 Cr. 867 (RMB), 2018 WL 791348, at *1 (S.D.N.Y. Feb. 7, 2018).

211. Eric Lipton, *Settlement Talks for Bank Followed Pressure on Trump by Turkey's Leader*, N.Y. TIMES (Oct. 16, 2019), https://www.nytimes.com/2019/10/16/us/politics/halkbank-trump-turkey.html.

212. *See* David D. Kirkpatrick & Eric Lipton, *Behind Trump's Dealings With Turkey: Sons-in-Law Married to Power*, N.Y. TIMES (Nov. 12, 2019), https://www.nytimes.com/2019/11/12/us/politics/trump-erdogan-family-turkey.html; *see also* Lipton, *supra* note 211.

213. *See* Lipton, *supra* note 211 ("[O]fficials at the Justice Department headquarters, and [Attorney General] Barr himself, were involved in the case . . . .").

Justice, the allied country invaded a neighbor to significant international opprobrium. The President imposed sanctions against the country, proclaiming that the "United States will aggressively use economic sanctions to target those who enable, facilitate, and finance these heinous acts . . . . I am fully prepared to swiftly destroy [the allied country's] economy if [its] leaders continue down this dangerous and destructive path."[214]

The day after the President's speech, prosecutors indicted participants in the alleged scheme. In announcing the charges, the U.S. Attorney, an Assistant Attorney General for National Security, and a senior FBI official in the New York field office all emphasized the role of foreign "government officials" in the offense.[215] A press report expressed the view of one bank insider who said that "[t]he timing is beyond any reasonable coincidence."[216]

While it is possible that the Department of Justice was developing a bespoke foreign and economic policy when it publicly filed the indictment, it is quite opaque whether prosecutors decided to indict by their own criminal-justice-policy lights or whether they were placing new pressure on the foreign state. Whatever the prosecutors' intent, the foreign country reportedly perceived the indictment to be of a piece with the new sanctions. Immediately following the indictment, the president of the allied country reportedly took the matter up directly with the Vice President. An executive at the bank interpreted the charges as "an escalation of Washington's sanctions . . . over [the country's] military incursion,"[217] while the country's foreign minister called the indictment "politically motivated."[218] Vice President Pence reportedly rebuffed the country's protests, contending that this was a matter for the Southern District of New York.[219]

In reportedly admonishing the foreign country to plead its case to prosecutors in Manhattan, the Vice President could have been invoking the independence norm —or he could have been *feigning* prosecutors' independence. Perhaps the

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214. Press Release, The White House, Office of the Press Secretary, Statement from President Donald J. Trump Regarding Turkey's Actions in Northeast Syria (Oct. 14, 2019), https://2017-2021-translations.state.gov/2019/10/14/statement-from-president-donald-j-trump-regarding-turkeys-actions-in-northeast-syria/index.html.

215. *See* Press Release, U.S. Dep't of Just., Turkish Bank Charged In Manhattan Federal Court For Its Participation In A Multibillion-Dollar Iranian Sanctions Evasion Scheme (Oct. 15 2019), https://www.justice.gov/usao-sdny/pr/turkish-bank-charged-manhattan-federal-court-its-participation-multibillion-dollar ("The bank's audacious conduct was supported and protected by high-ranking Turkish government officials . . . . Halkbank, a Turkish state-owned bank, allegedly conspired to undermine the United States Iran sanctions regime . . . ." (internal quotation marks omitted)).

216. Eric Lipton, *U.S. Indicts Turkish Bank on Charges of Evading Iran Sanctions*, N.Y. TIMES (Oct. 15, 2019), https://www.nytimes.com/2019/10/15/us/politics/halkbank-turkey-iran-indictment.html.

217. Ebru Tuncay, *Turkey's Halkbank Dismisses U.S. Charges, Erdogan Calls Them "Ugly,"* REUTERS (Oct. 16, 2019), https://www.reuters.com/article/us-usa-turkey-halkbank/turkeys-halkbank-dismisses-u-s-charges-erdogan-calls-them-ugly-idUSKBN1WV0R4.

218. *Turkey Says Nothing Will Come of Halkbank Case if Law in U.S. Works*, REUTERS (Oct. 20, 2019), https://www.reuters.com/article/uk-usa-turkey-halkbank-idUKKBN1WZ074.

219. Humeyra Pamuk, *Democratic Senator Asks Whether Trump Interfered With Court Case on Turkey's Halkbank*, REUTERS (Oct. 24, 2019), https://www.reuters.com/article/us-usa-turkey-halkbank-idINKBN1X32GW.

Executive's ambiguity about the question of attribution is tactical: the independence norm makes it plausible for non-prosecutors to disavow prosecutors' work in service of their own regulatory activity. Is this ambiguity, on balance, in the national interest of the United States?

If the ambiguity of attribution is tactical—and especially if prosecutors' independence routinely gives way to whole-of-government interests outside of the public eye—the independence norm might license the Executive to act more freely. Prosecutors' ostensible independence may limit the collateral fallout of their indictments for other agencies. For example, a Secretary of State could plausibly "express . . . regret" about federal prosecutors' arrest of a diplomat on American soil, and could convey "concern that we not allow this unfortunate public issue to hurt our close and vital relationship" with the diplomat's home country.[220] At the same moment, the U.S. Attorney prosecuting the case could defend the arrest and prosecution by noting that he is "quite limited in [his] role as a prosecutor in what [he] can say," but also by asking: "Is it for U.S. prosecutors to look the other way, ignore the law and the civil rights of victims . . . or is it the responsibility of the diplomats and consular officers and their government to make sure the law is observed?"[221]

Similarly, the independence norm allows the Executive Branch to act in multiple, perhaps discordant ways. It might refuse to waive the immunity of an American diplomat who was allegedly involved in a fatal car accident abroad,[222] while a local U.S. Attorney could criticize a prince of that country for allegedly refusing to cooperate with an investigation by federal prosecutors in New York.[223] The local prosecutor could explain that his office "has a long history of integrity and pursuing cases and declining to pursue cases based only on the facts and the law and the equities without regard to partisan political concerns."[224] Thus, some version of the independence norm—even if it is feigned—allows different representatives of the U.S. government to make varying statements about criminal law that are all taken to be legitimate. On this view, as the FARA diplomats' wartime correspondence suggested, those acquainted with American legal culture should understand that prosecutors' statements "could not be considered as the official views of the American Government."[225]

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220. Press Release, Marie Harf, Deputy Spokeswoman, U.S. Dep't of State, Secretary Kerry Call to Indian National Security Advisor Menon (Dec. 18, 2013), https://2009-2017.state.gov/r/pa/prs/ps/2013/218890.htm.

221. Press Release, U.S. Dep't of Just., Statement of Manhattan U.S. Attorney Preet Bharara On U.S. v. Devyani Khobragade (Dec. 18, 2013), https://www.justice.gov/usao-sdny/pr/statement-manhattan-us-attorney-preet-bharara-us-v-devyani-khobragade.

222. *See* Rachael Bunyan, *Diplomat's Wife Suspected in Fatal Car Crash Will Not Return to U.K., Trump's Briefing Notes Reveal*, TIME (Oct. 10, 2019), https://time.com/5697091/diplomats-wife-crash-trump/.

223. *See* Alan Feuer, *Prince Andrew Is Stonewalling in Epstein Case, Prosecutor Says*, N.Y. TIMES (Mar. 9, 2020), https://www.nytimes.com/2020/03/09/nyregion/jeffrey-epstein-prince-andrew.html.

224. *Id.*

225. *See* U.S. DEP'T OF STATE (Mar. 6, 1939), *supra* note 126, and accompanying text.

A feigned independence may be particularly useful in policy spheres where the national security, foreign affairs, and economic stakes or criminal regulatory actions are highest. Executive Branch principals may well feign the independence norm and thus engage in a "two-level game" by sending "interconnected messages about [the Executive's] activities to various domestic and international audiences without incurring the full diplomatic, legal, or political risks that official acknowledgement may entail."[226] Indeed, if the independence norm is disregarded behind the scenes, then criminal sanctions are an especially powerful tool that permits the sovereign to exert pressure while denying responsibity when pressed.

But there are reasons to suspect that if there is a two-level game afoot, the players may be showing their hand. When the U.S. Attorney prosecuting the foreign bank stepped down, shares in the foreign bank improved by 8 percent,[227] which suggests that the market, at least, may have attributed the management of the case to the whole Branch. And if public reporting is accurate, the prosecutors who investigated these cases may have pursued a different agenda from the President's.[228]

Other recent examples of indictments with mixed policy stakes abound, suggesting that prosecutors increasingly use criminal indictments that implicate the foreign affairs, trade, and national security agenda of the whole Branch.[229]

Even if prosecutorial independence is routinely set aside, a different attribution problem remains so long as prosecutorial independence is publicly feigned. The prospective regulatory goals of these indictments are only plausible if their targets

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226. David Pozen, *Leaky Leviathan*, 127 HARV. L. REV. 512, 561 (2013).

227. *Turkey's Halkbank Shares Jump After U.S. Prosecutor in Sanctions Case Steps Down*, REUTERS (June 22, 2020), https://www.reuters.com/article/us-turkey-halkbank-stocks/turkeys-halkbank-shares-jump-after-u-s-prosecutor-in-sanctions-case-steps-down-idUSKBN23T133.

228. *See* Eric Lipton & Alan Rappeport, *Bolton Book Puts New Focus on Trump's Actions*, N.Y. TIMES (Jan. 28, 2020), https://www.nytimes.com/2020/01/28/us/politics/bolton-book-trump-china-turkey.html (describing a former National Security Advisor's allegation that the President had sought to intervene in prosecutors' investigation and prosecution decisions regarding the bank).

229. *Compare, e.g.*, Press Release, U.S. Dep't of Just., Chinese Telecommunications Conglomerate Huawei and Subsidiaries Charged in Racketeering Conspiracy and Conspiracy to Steal Trade Secrets (Feb. 13, 2020), https://www.justice.gov/opa/pr/chinese-telecommunications-conglomerate-huawei-and-subsidiaries-charged-racketeering (announcing RICO charges against Huawei), *and* Press Release, U.S. Dep't of Just., Chinese Telecommunications Conglomerate Huawei and Huawei CFO Wanzhou Meng Charged With Financial Fraud (Jan 28, 2019), https://www.justice.gov/opa/pr/chinese-telecommunications-conglomerate-huawei-and-huawei-cfo-wanzhou-meng-charged-financial (announcing individual charges against a Huawei executive), *with* Ken Dilanian, *U.S. Officials: Using Huawei Tech Opens Door to Chinese Spying, Censorship*, NBC NEWS (Feb 14, 2020), https://www.nbcnews.com/politics/national-security/u-s-officials-using-huawei-tech-opens-door-chinese-spying-n1136956 (reporting that the day after the Huawei RICO indictment, American officials disclosed that Huawei technology would permit the Chinese state to spy on critical infrastructure), *and* Robert Fife & Stephen Chase, *Top White House Official Lays Out U.S. Case for Banning Huawei from Canada's 5G Network*, THE GLOBE & MAIL (Canada) (Mar. 9, 2020), https://www.theglobeandmail.com/politics/article-top-white-house-official-lays-out-us-case-for-banning-huawei-from/ (describing meetings in which American national-security officials urged Canadians to avoid Huawei's technology for national-security reasons, and reporting that the American official "reminded Ottawa about the slew of criminal charges Huawei faces in the U.S. and suggested that was indicative of how the Chinese company operates").

view the indictment as a type of sanction, and if they attribute that sanction to the whole American government. Why would a foreign state acquiesce to the Executive's demands if it still must take up the matter with prosecutors in open court, even after bilateral negotiations resolve the open issues?

The basic difficulty lies in deciding whether the independence norm is i) observed in all cases; ii) observed or abandoned in a given case at the prosecutor's election; or iii) routinely disregarded by Executive Branch principals regardless of the prosecutors' choices. Mixed-policy indictments are noisy regulatory signals, insofar as a "critical dimension is hidden from our view."[230] Namely, who speaks for the sovereign, and whose statements engage the state's responsibility abroad? Is the President saying something to the foreign state? Is the Treasury Department saying something about the state's place in the global financial system? Are the State and Treasury Departments both saying something about unrelated treaty and trade negotiations, or is the Justice Department escalating pressure for assistance in other matters? Does an indictment implicate military assistance? Moreover, parties similarly situated to the indicted defendant must ask: will non-investigation or quiet tolerance of *our* potential breach continue, and will these prosecutions continue across administrations?[231] For each of these questions, everything turns on attribution, and the perceived source of the signal is nearly as important as its content.

Moreover, if the President or her delegees routinely dominate prosecutorial decision-making, it is unclear what policy ends independence-feigning serves. The indicted defendant reasonably wonders whether he should hire counsel from the white-collar bar (that is, to ask: *what do these prosecutors want from me?*), or instead should understand his criminal ordeal to express a whole-of-government sanction (that is, to ask: *what does the whole Executive want from me?*). These questions require different responses, and a porous independence norm gives no answer. So long as attribution remains ambiguous, the ambiguity is destructive because it leaves the regulatory strategy unknowable.[232]

As the case studies in this Article suggest, the targets of investigation and prosecution will likely seek to make sense of prosecutors' decisions in the context of the broad enforcement interests of prosecutors' offices. To the extent that prosecutors are independent, the ambiguity of attribution will cultivate what Bert Huang has called "false harmonization": so long as they assume that the whole government acts with a unified purpose, individuals, corporations, and states that are regulated by prosecutors in these cases will draw misleading conclusions as they try to synthesize prosecutors' signals with the signals from other government actors.[233] And even if independence is feigned, the targets of the indictment will falsely

230. Bert I. Huang, *Shallow Signals*, 126 HARV. L. REV. 2227, 2232 (2013).

231. *Id*. at 2249.

232. *Cf*. Pozen, *supra* note 226, at 562 (describing a "constructive ambiguity" in leak prosecutions).

233. Huang, *supra* note 230, at 2256–57 (discussing "false harmonization").

harmonize insofar as they think the relevant regulatory grammar is criminal—for example, if they are told that they should take up the matter with the Southern District of New York when their answer lies in Washington, D.C. Either way, the ambiguity of attribution remains a problem; vagueness is no virtue.[234]

B. Solutions and Discontents

So far, this Article has argued that the question of whether criminal prosecution is the appropriate regulatory tool to address a given problem—the question asked by every prosecutor before each and every indictment—is ordinarily placed in federal prosecutors' hands even though some indictments have non-criminal-policy stakes. This Article has thus described a deliberative dilemma inherent in the idea of a strictly "independent" federal criminal bureaucracy: for mixed-policy cases, the Executive can embrace the norm of prosecutorial independence *or* whole-government deliberation, but it cannot embrace them both at once.

In light of the foregoing arguments, there are at least two formal, but likely unworkable solutions to the deliberative dilemma: (1) forbearance and (2) shrinking the statutory scope of federal criminal law. First, if prosecutors routinely forbear taking investigatory or prosecutorial steps that are likely to implicate the regulatory activities of, say, Defense, State, or Treasury, then the deliberative tradeoff disappears. This is only viable, however, so long as prosecutors both foresee the likely policy conflict and choose to stand down. A second solution is to shrink the statutory scope of federal criminal law so that it excludes offense conduct that implicates multiple national interests—which is only feasible if Congress has the foresight to identify these offenses.

Each of these solutions formally obviates the deliberative dilemma by seeking to ensure that independent prosecutors deliberate *only* about the Executive's interest in criminal law. But each solution defies the trajectory of our modern federal criminal law. As numerous commentators have explained, substantive federal criminal law is endlessly widening its scope.[235] It is simply not plausible that "criminal" law enforcement and "national security" or "national economic interest" can be cleanly separated in the criminal regulatory business of the modern American state.

This leaves informal solutions to the dilemma, which may more accurately capture the reality of the intra-Executive dynamics than does the "independence norm." Two are most relevant.

The first solution is *horizontal centralization*, by which the Department of Justice addresses some of the deliberative costs by withdrawing the autonomy of prosecutors from the field. The horizontal-centralization solution, however, retains

234. *Cf.* Meir Dan-Cohen, *Decision Rules and Conduct Rules*, 97 HARV. L. REV. 625, 639 (1984) (describing doctrines in the criminal common law whose vagueness, "far from being a defect," is, "in light of the policies underlying the defenses, a virtue").

235. *See, e.g.*, Richman, *supra* note 21, at 761 & n.10.

the independence of the broader Department from other parts of the Executive; it thus preserves a degree of the deliberative costs. Indeed, the most distinctive feature of horizontal centralization is that the Department replicates and reinvents the extramural expertise—*e.g.*, the Department of State or Treasury's expertise—in-house with bespoke offices charged acquiring with foreign-affairs, security, or financial expertise.

The second solution is *feigned independence*, which suggests that the "independence norm" is understood by prosecutors to sound only in the problem of "partisan" prosecuting and that it should give way where such partisan self-dealing is not at issue. The feigned-independence solution suggests that the language of "independence" may sometimes be advanced for appearances' sake: all principals understand that, when push comes to shove, all Executive officials can deliberate and debate about the propriety of a given criminal regulatory action. So, the Secretary of Defense, the Secretary of State, the Secretary of the Treasury, the White House Counsel, and even the President can call the Attorney General in "grave" cases.[236] On this view, intervention by non-prosecutors in prosecutorial decision-making is not per se transgressive, since it does not suggest the self-dealing that the norm seeks to suppress.

I discuss each of these exceptions to the independence norm in turn, and I highlight the institutional design choices that they embrace along with the deliberative costs they may still incur.

1. Horizontal Centralization But Vertical Independence

By and large, our criminal code expresses Congress's desire for "decentralized prosecutorial authority, with all the loss of bureaucratic restraint that such a system entails."[237] One solution to the deliberative dilemma created by the independence norm—that is, the loss of whole-Executive deliberation—is to reduce what I have called the *horizontal* independence of federal prosecutors' offices. Namely, the Department may withdraw decision-making authority from the field, and thus resist the powerful localizing forces of federal criminal law enforcement.

Indeed, Congress has, in rare instances, attempted to condition criminal prosecution on approval of the prosecution by a senior political appointee at Main Justice.[238] So, for example, the Atomic Energy Act creates a criminal offense that requires prosecutors to seek approval of the Attorney General and to give notice to the Atomic Energy Commission before proceeding.[239] A 1986 anti-terrorism statute criminalizes murder of American nationals abroad but requires certification of

236. *See* HENNESSEY & WITTES, *supra* note 31, at 178–85 (describing episodes of modern presidential intervention in criminal prosecutions, and noting that "the tradition of prosecutorial and investigative autonomy is impure").

237. Richman, *supra* note 21, at 806.

238. *See, e.g.*, 18 U.S.C. § 245(a)(1); 42 U.S.C. § 2271(c); *see also* U.S. Dep't of Just., Just. Manual § 9-2.112 (incorporating § 245 and § 2271 into the Justice Manual).

239. 42 U.S.C. § 2271(c).

the Attorney General before prosecutors may bring an indictment.[240] The foreign-murder statute requires similar approval by the Attorney General, and further requires the Attorney General to consult with the Secretary of State before approving a prosecution.[241]

It is unclear, given the general embrace of decentralization in the federal criminal bureaucracy, whether such approval requirements actually constrain the choices of federal prosecutors, or whether they are instead "honored in the breach."[242] The Justice Department conveys statutory approval requirements to the offices of the U.S. Attorneys, but it has also argued in court that prosecutors' compliance with statutory approval requirements is not judicially reviewable. Courts have sometimes agreed.[243]

Furthermore, horizontal independence works to create local networks that may, in practice, resist such oversight.[244] For example, the length of time and investment required to conduct a competent investigation, the political and social capital invested by U.S. Attorneys' Offices, and the genuine conviction that line prosecutors are engaged in a brute truth-seeking enterprise, would all give field offices a strong sense that their equities require the Executive to reach pro-enforcement judgments. These equities would likewise counsel suspicion of officious political superiors who would scupper a well-proved case, and political superiors who were once line attorneys may carry pro-enforcement intuitions with them as they ascend in the ranks of the three Branches.

In contrast to Congress's halting efforts to create *statutory* approval requirements, the Department's internal efforts to centralize decision-making over some types of cases are extensive. Matters concerning nearly all of the distinctive, non-criminal policy subjects I have canvassed in this Article are subject to some degree of oversight by Main Justice, varying from mere notification requirements to elaborate procedures for advance approval.[245] The Department sometimes defends the breadth of federal criminal law by noting that these approval mechanisms work as a "policy of strict self-limitation."[246] And apart from approval mechanisms, the

240. *See* 18 U.S.C. § 2332.

241. *See* 18 U.S.C. § 1119(c); *see also* United States. v. White, 51 F. Supp. 2d 1008, 1012 (E.D. Cal. 1997) (discussing the consultation requirements).

242. Richman, *supra* note 21, at 803 n.213 (quoting Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1207–08 (1977)).

243. *See, e.g.*, United States v. Wharton, 320 F.3d 526, 534–35 (5th Cir. 2003) (holding that approval requirements are not elements of a criminal offense), *cert. denied*, 539 U.S. 916 (2003); United States v. Yousef, 327 F.3d 56, 117–18 (2d Cir. 2003) (same), *cert. denied*, 540 U.S. 933 (2003); United States. v. Mehanna, 735 F.3d 32, 52–53 (1st Cir. 2013) (no plain error), *cert. denied*, 574 U.S. 814 (2014).

244. *See generally* Richman, *supra* note 21, at 780–81.

245. *See generally* U.S. Dep't of Just., Just. Manual § 9-2.400 (describing the type and scope of approval prosecutors must obtain in order to pursue a particular criminal or civil case).

246. Screws v. United States, 325 U.S. 91, 159 (1945) (Murphy, J., dissenting); *accord* Richman, *supra* note 21, at 798–99, 807 (describing centralization of decision-making in Main Justice as a method of disciplining overzealous prosecution under expansive federal criminal statutes).

hierarchical structure of the investigative agencies that refer cases to prosecutors also impose some centralized oversight.[247]

At the margins, centralized approval requirements hem in prosecutors by imposing vertically independent oversight. Such approval mechanisms[248] inevitably change the equilibrium of decentralized federal prosecutorial authority to disfavor the entrepreneurial autonomy of prosecutors in the field.[249] Such Departmental approval requirements insert gatekeepers, with complex decision-making pressures of their own and who may be "more sensitive to legislative (or executive) pressure on behalf of special interests . . . ."[250]

Despite addressing the deliberative problem of horizontal independence, the Department's impulse toward centralization does not alter prosecutors' claim to vertical independence from the rest of the Executive.[251] It is still the Attorney General, or her delegees, who issue certifications and approve individual enforcement actions as serving the national interest. This authority is broad. Courts, for example, understand certification requirements to ensure statutory fit between the offense conduct and the actual indictment, not to certify that criminal and noncriminal policy equities are balanced.[252] And where Congress explicitly requires centralized approval, it generally leaves enforcement judgments in the hands of the Department of Justice. Here, as elsewhere in the federal criminal law, the "failure to impose more approval requirements reflects, not apathy or thrift, but a conscious selection of a particular equilibrium."[253] These equilibria usually give prosecutors the final say about investigation or enforcement, even if Congress sometimes raises the prosecutorial judgment to a higher rung of the criminal-justice bureaucracy.

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247. *See generally* Richman, *supra* note 21, at 806.

248. On approval mechanisms generally, see *id*. at 802–05.

249. *Id*. at 805.

250. *Id*. I note, however, that approval mechanisms inevitably lead to fewer successful prosecutions of cases that line prosecutors believe are worth bringing. The consequent tendency in the field might be to avoid developing charges that implicate centralized approval mechanisms—at least when other pathways to prosecution are available.

251. *See* Memorandum from Eric Holder, U.S. Att'y Gen., to Heads of Department Components and All U.S. Attorneys, Communications with the White House and Congress, at 1 (May 11, 2009), https://www.justice.gov/oip/foia-library/communications_with_the_white_house_and_congress_2009.pdf/download (explaining that Justice Department "officials, like their superiors and their subordinates, must be insulated from influences that should not affect decisions in particular criminal or civil cases" and noting that "the Justice Department will advise the White House concerning 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"); *see also* Koh, *supra* note 157, at 385 (describing the memorandum). On the question whether centralization of prosecutorial decision-making is necessary for "foreign-affairs prosecutions," see Steven Arrigg Koh, *Criminalizing Foreign Relations*, JUST SECURITY (Dec. 18, 2020), https://www.justsecurity.org/73853/criminalizing-foreign-relations-how-the-biden-administration-can-prevent-a-global-arrest-game/.

252. *See, e.g.*, United States v. Siddiqui, 699 F.3d 690, 700 (2d Cir. 2012) (reading the AG certification requirement in 18 U.S.C. § 2332 as "ensuring that the statute reaches only terrorist violence inflicted upon United States nationals, not '[s]imple barroom brawls or normal street crime.'" (alteration in original) (quoting H.R. Conf. Rep. No. 99-783, at 87 (1986))), *cert. denied*, 569 U.S. 986 (2013).

253. Richman, *supra* note 21, at 810.

Finally, the impulse to centralize prosecutorial judgment *within* the Department of Justice does not alleviate all relevant deliberative costs even if the central office can overcome the objections of the field. Although hierarchies might, as Mirjan Damaška has written, abhor duplicated functions,[254] the trend to centralize decision-making within the Department evinces a tendency of that bureaucracy to recreate the whole Executive Branch within itself.

For prosecutions implicating foreign affairs, for example, a constellation of notice and approval requirements send line prosecutors not to the Department of State but rather to offices, divisions, and units at Main Justice for oversight.[255] Prosecutors pursuing large financial crimes can similarly run up against oversight from the tax[256] and antitrust[257] divisions within the Department, or supervision by the Department's money-laundering and asset forfeiture section.[258] Prosecutors will also be bound to consider the Department's policy guidance concerning prosecution of corporate entities.[259] But these prosecutors are generally not bound to consult with the Departments of State, Treasury, Commerce, or other agencies with claims to relevant expertise.

Moreover, if the norm of vertical prosecutorial independence is rigorously observed throughout the Executive, non-criminal agencies may factor prosecutors' independence into their regulatory programs and enforcement choices. Programs or enforcement priorities that may implicate criminal policy equities are likely to be transferred out and left to prosecutors' exclusive judgment. Vertical independence thus creates an especially pronounced agency cost if non-criminal agencies are left to fear that prosecutors may usurp whole-of-government control over urgent regulatory concerns.[260]

All of this makes the centralization solution to the deliberative dilemma both noisy and incomplete. Centralizing prosecutorial authority is a *noisy* solution because approval mechanisms may be overlooked entirely by the field, or regarded as interference by meddling bureaucrats. Centralization is *incomplete* because so long as prosecutors at Main Justice make the final decisions, their vertical independence remains intact. Either way, it is a prosecutor who makes the decision in the end.

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254. Damaška, *supra* note 20, at 484.

255. *See* U.S. Dep't of Just., Just. Manual § 3-1.000 (2018) (listing various prior approval requirements); *see also id.* § 9-15.000 (2018) (directing prosecutors to the DOJ Office of International Affairs when seeking prosecutions regarding foreign extradition requests).

256. *Id.* § 6-2.000 (2020).

257. *Id.* § 7-3.000 (2020).

258. *Id.* § 9-119.000 (2018).

259. *Id.* § 9-28.000 (2015).

260. *Cf.* Jennifer Nou, *Agency Self-Insulation*, 126 HARV. L. REV. 1755, 1756–57, 1781–1812 (2013) (noting that the prospect of interference from the Exeuctive will mean that an agency will "select its interpretive and policy choices efficiently, taking into account the court's expected reaction," and describing mechanisms agencies use to insulate their choices from review).

A different solution to the deliberative dilemma is to suggest that the independence norm must *sometimes* give way, even if this reconciliation happens in hidden ways. I discuss this possibility next.

2. Non-Independence in Fact

A solution to the deliberative dilemma is to put far less weight on the norm of prosecutorial independence in practice: to make it a default rule and define the conditions for its suspension. Perhaps the independence norm is skin-deep, applying to routine and prosaic cases but not to the urgent or grave. Perhaps prosecutors' politically appointed leadership and specialized units at the Department of Justice routinely consult and defer to other agencies, effectively waiving—at the prosecutor's discretion—the norm of vertical independence in some classes of cases.[261]

These possible exceptions to the independence norm suggest that the agency costs I have identified may disguise strategic virtues so long as the ruse is kept up.[262] Indeed, if the independence norm is only a default rule that is abandoned when important, non-criminal policy interests arise, then prosecutors' indictments will properly express the Executive's reconciled view of the national interest and the defendant properly negotiates with the prosecutor about its case.

To consider how such an independence-waiving norm might look in practice, consider the national-defense prosecutions discussed in the first Part of this Article. During these prosecutions, the State Department's claim that federal prosecutors did not speak for the whole American state may have actually *increased* the Executive's room to maneuver if cross-department deliberation was happening behind the scenes. Because diplomats could not publicly "traffic in justice," prosecutors could continue proceedings until a proposed prisoner swap was sufficiently valuable. And perhaps in threatening the use of "unilateral" compulsory process during the War on Drugs, prosecutors whose subpoenas caused international incidents generated a treaty-based enforcement regime favoring more effective cross-border investigations. And in establishing restrictive guidelines for corporate prosecution, perhaps prosecutors expressed the reconciled policy judgment of an Executive branch tasked with restoring an economy in crisis. For each of these scenarios, it would be wrong to attribute the policy judgment solely to prosecutors if we assume that the independence norm actually gave way. Prosecutors are, in these hypotheticals, acting precisely in the deliberate national interest of the country.

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261. *See, e.g.*, Pozen, *supra* note 226, at 591 (noting that the referral process "can give an effective veto to the leadership of critical agencies" and that contacts between the White House and senior DOJ leadership allow the White House to "counsel[] caution" about certain classes of cases).

262. On vagueness as a feature rather than a bug, see David E. Pozen & Adam M. Samaha, *Anti-Modalities,* 119 MICH. L. REV. 729, 780–81 (2021), noting the tendency of legal institutions to repudiate a given practice while still retaining the flexibility to adhere to it in "artful" or "low-visibility" ways.

Yet it is impossible to know whether the independence norm is regularly breached because "[a] great deal of secrecy surrounds the criminal process, particularly with respect to who does not get prosecuted."[263] And even if such breaches are common, the norm may still preserve the power of initiative and the pro-enforcement inertia baked into the law-enforcement regulatory enterprise. I return, then, to consider possible reformulations of the independence norm that better accommodate the deliberative dilemma.

III. THE NORMATIVE CHOICES WE HAVE MADE AND COULD REMAKE

How, then, should we appraise the idea of prosecutorial independence as a choice of deliberative norm? Which non-criminal policy goals within the Executive Branch should yield to prosecutors' decisions about criminal enforcement, and, reciprocally, under what circumstances should prosecutors forbear their criminal enforcement priorities to competing Executive views of the national interest? In this last Part, the Article explores the possibility that the independence norm is not infinitely valuable, in part to understand where its benefits lie and where it should give way.

In so doing, this Article resists the thought that the deliberative dilemma created by insulating prosecutorial decision-making should be resolved in the same way in all cases. There is no Panglossian solution that would redeem or rebuke the independence norm in all cases, but there are more and less realistic ways of situating the norm within the deliberative project of the Executive's pursuit of the national interest.

A. Abstention and Independence

This Article has described the distinctive form of discretion given to prosecutors in the federal system to decide the national interest in both criminal and non-criminal regulatory contexts. Prosecutors exercise this discretion without giving public reasons, and are thought to be disciplined at least as much by a distinctive and insulated deliberative culture as they are by external supervision. A blanket devotion to prosecutorial independence obscures a deliberative dilemma, as courts and other decision-makers will abstain from intervening in prosecutors' decision-making for fear of visibly breaching something sacrosanct.

In light of the argument developed so far, we should be skeptical of the independence norm as an end in itself wherever a national interest in criminal enforcement foreseeably conflicts with other, perhaps superordinate, national interests. For example, balancing criminal law-enforcement imperatives with national-security or foreign-affairs concerns requires whole-of-government deliberation. Balancing criminal law-enforcement imperatives with national economic or commercial concerns may also require cross-department deliberation, but perhaps this

263. Richman, *supra* note 21, at 778.

is an area where an institutional design choice favoring prosecutors' judgment has been made with open eyes—that is, we have decided that the loss of national wealth is never enough to decline a criminal prosecution.

Consider, as a comparative illustration, the treatment of the deliberative dilemma by the United Kingdom. That government has named its attempt to accommodate the deliberative dilemma the "Shawcross [E]xercise," according to which a prosecutor may "in a case where there is sufficient evidence to do so . . . sound opinion among his [or her] ministerial colleagues" about a proposed enforcement action.[264] Although a chief prosecutor retains the power of initiative, the Shawcross Exercise formalizes a process that encourages whole-of-government deliberation.[265]

The Shawcross Exercise was tested in spectacular fashion in 2008, when the House of Lords heard an appeal arising from a prosecutor's choice to decline prosecution in a case concerning allegations of serious fraud. The case involved alleged fraud in a defense contract between the United Kingdom and a foreign sovereign,[266] in which the target threatened foreign affairs repercussions if the case proceeded.

On the day of the foreign sovereign's threat, an Undersecretary of State at the British Ministry of Defence called the prosecutors to "express his view that this was a unique case in which the public interest should be considered at an early stage."[267] The prosecutors, in turn, initiated a Shawcross Exercise. The Prime Minister, the Foreign Secretary, and the Defence Secretary all concluded that the investigation adversely implicated the government's national interests in commerce, counter-terrorism, and national security.[268] Notwithstanding these whole-of-government concerns, the Attorney General continued the investigation in light of "the public interest in the rule of law, the independence of the [prosecutor's office] and the . . . Police, all of which could suffer reputational damage if it emerged that an investigation by the [prosecutor's office] had been cut short."[269]

As the investigation proceeded, the foreign government responded with escalating countermeasures. It threatened to withdraw from counter-terrorism agreements, to withdraw from Middle-East security arrangements, and to cancel important defense contracts.[270] Prosecutors were undaunted.[271] They proposed to the Prime Minister that they seek a criminal settlement, but the Prime Minister resisted. In the Prime Minister's words, "recent developments ha[ve] given rise to

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264. *See* R. v. Director of the Serious Fraud Office [2008] (UKHL) 60 ¶ 6 (appeal taken from HM High Court of Justice).

265. *See id.*

266. *See id.* ¶ 3.

267. *Id.* ¶ 4.

268. *Id.* ¶¶ 7–8.

269. *Id.* ¶ 9.

270. *See id.* ¶ 11.

271. See *id.* ¶ 12.

a real and immediate risk of a collapse in . . . security, intelligence and diplomatic co-operation" with the foreign country "which [i]s likely to have seriously negative consequences for the UK public interest in terms of both national security and the UK's highest priority foreign policy objectives in the Middle East."[272] While giving in to threats would send a bad signal to the law-abiding public, the Prime Minister nevertheless felt that "higher considerations were at stake."[273] An Ambassador put a finer point on the national interest: if the prosecutors proceeded, "lives were at risk."[274] Prosecutors discontinued the case, citing security, intelligence, and diplomatic concerns.

Like the American courts involved in mid-century prisoner swaps, the prosecutors memorialized publicly that they were discontinuing the prosecution based on representations made to them by non-prosecutors who attended to other areas of the national interest. The lead prosecutor, for example, noted that "[t]his decision has been taken following representations that have been made . . . concerning the need to safeguard national and international security. It has been necessary to balance the need to maintain the rule of law against the wider public interest."[275] The Attorney General similarly explained that "[t]he heads of our security and intelligence agencies and our ambassador . . . share this assessment."[276] One aspect of the national interest, however, did not motivate the prosecutors: in declining the prosecution, "[n]o weight has been given to commercial interests or to the national economic interest."[277] National security and diplomacy were permissible interests that could be weighed against law enforcement, but an economic loss was not.

The Shawcross Exercise is instructive, both for what it reveals about a common-law understanding of prosecutorial independence,[278] and for how difficult it is to find similar public reason-giving in the American context. The Shawcross Exercise offers a glimpse of what the independence norm might look like without excessive independence, as it normalizes the involvement of non-prosecutors in enforcement decisions that broadly implicate the national interest. It was thus no breach for the ministry of defense to solicit consultations; for government principals to argue with prosecutors' assessments; and, most strikingly, for courts to publicly review the decision.[279]

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272. *Id.* ¶ 17.
273. *Id.* ¶ 18.
274. *Id.* ¶ 17.
275. *Id.* ¶ 22.
276. *Id.*
277. *Id.*
278. Like the American norm, the Shawcross Exercise vests decision making authority in the prosecutors' office. And, like the American system, British prosecutors undertake a public interest analysis that is ordinarily determined according to a criminal policymaking logic (and not, for example, national security or foreign affairs concerns): proportionality, seriousness, culpability, the nature of the victim, and community impact are the touchstones. CPS, THE CODE FOR CROWN PROSECUTORS §§ 4.9–4.14 (2018), https://www.cps.gov.uk/publication/code-crown-prosecutors.
279. *See R. v. Serious Fraud Office*, *supra* note 264, ¶ 1.

To be sure, as discussed in the last Part, the Shawcross Exercise may have informal analogues within the American system, even if the American process embraces a feigned independence norm. Without a routinized reconciliation of competing views of the national interest, however, prosecutors must either engage in haphazard efforts to balance input from non-prosecutors, or they must labor in silence. Either dynamic is likely worse than a deliberative norm that expressly formalizes a process of consultation with non-prosecutors, whether or not prosecutors know to seek such consultation out.

A more promising solution would be to approximate the Shawcross Exercise within our Executive branch—that is, to abandon absolute prosecutorial independence in cases that implicate non-criminal aspects of the national interest. For example, a more realistic description of the independence norm might permit agency heads to weigh in with the White House Counsel's office regarding any investigative or prosecutorial decision (whether or not prosecutors initiate that process). The office, in turn, could screen agencies' input, and, if satisfied that the issue is sufficiently grave, contact Department of Justice principals to begin an interagency consultation. Another solution would be to increase Congressional approval requirements for classes of offenses that predictably implicate non-criminal policy concerns, and for those approval requirements to involve all agencies with relevant expertise. A third option would be to use the Department's prolix consultation-and-approval guidelines as a rough index of which matters are amenable to non-prosecutorial deliberative input. If an investigative step requires approval from Main Justice, it could also be vetted with any agencies whose expertise is implicated. Where an official has a good-faith reason to doubt that an investigation or prosecution decision is in the national interest, it would be no breach for that official to say so even if she were not a prosecutor.

And finally, if any of these rough deliberative solutions is currently practiced by the Executive Branch—if we already practice what I have called "non-independence in fact"—then we should say so. A critical aspect of the Shawcross Exercise, and its assessment by British courts, is its publicity:[280] even if the exercise contemplates that the criminal law will go unenforced to favor other national interests, the decision-making process will more legitimately express a national interest in prosecution by situating it within other high-order reasons of state. And because no genuine stakeholders are required to abstain until a prosecutor calls upon them to render a judgment, the final decision better approximates the national interest than a decision made within a cloistered prosecutor's office. After all, the decision to decline prosecution because it does not seem in the government's national interest happens all the time in the federal system; the issue is whether *non-prosecutors* must abstain from opining on that judgment.

280. On the role of declination statements generally, and for a useful framework for understanding when their use is justified, see Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477 (2020).

It is curious that the gauntlet of internal checks and balances in the modern Executive Branch is thought to generally increase the democratic legitimacy, deliberative fidelity, and resistance to capture of the American regulatory state, but Branch-wide checks and balances are not part of the account of the legitimacy of criminal law enforcement.[281] In the next Section, this Article discusses several of the reasons that may justify our distinctive treatment of criminal justice administration, in order to understand why some national interests might legitimately displace criminal-justice priorities.

B. Criminal Law Enforcement in the National Interest

The basic instrumental justification for a strong prosecutorial independence norm is that the norm is important to ensure that important cases are pursued and that the appearance of corruption is minimized. In other words, that the national interest is best served by a maximally effective prosecutorial corps, and that this effectiveness requires that prosecutors be supervised only by those who prioritize the national interest in criminal law enforcement.

By "effective," I do not refer to prosecutors that produce more indictments. Rather, I refer to the prosecution of some classes of crime that require an independent criminal justice bureaucracy if they are to be investigated or deterred *at all*. Such crimes may be relatively exotic and therefore prosecuted less often than other offenses—such as elaborate fraud or prosecution (or declination) of cases against politically sensitive targets. When such cases are investigated, they may require a sheltered enforcement-oriented decision-making environment if they are ever to succeed. These cases will almost always appear weak and risky until they are entirely proved out. The stories investigators tell of such cases will involve endless

281. On modern accounts of the administrative state, the mere presence of a political appointee will not always be up to the task of ensuring the legitimacy of administrative decision-making. Indeed, a broad trend in modern scholarship is to emphasize the *non*-independence of Executive agencies and the manifold internal constraints that ensure their actions are legitimate. *See, e.g.*, Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183, 2236 (2020) (Kagan, J., dissenting) ("The President's engagement, some people say, can disrupt bureaucratic stagnation, counter industry capture, and make agencies more responsive to public interests."); Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 285–88 (2019) (canvassing "internal" defenses of the administrative state); Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 77–87 (2017) (describing an Executive Branch that is legitimate in part because it is "awash with internal accountability mechanisms," and contending that "bureaucratic accountability also has constitutional salience: It provides the mechanisms to realize constitutionally mandated political and legal accountability"); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 424–26 (2009) (describing a "reciprocal" function of internal and external constraints on Executive decision-making that "exemplif[ies] the kind of constitutionally desirable direct presidential oversight of Executive Branch decisionmaking that fosters political accountability"); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2322–42 (2006) (describing an agency system, and an ideal of civil service, that will "foment internal checks and balances" while wedding expertise with democratic accountability).

toil. Until a last big break, these cases need secrecy and protection from other agencies' intermeddling if they are to be prosecuted at all.

The public record of the Shawcross Exercise discussed in the prior Section is a useful example of the environment required to grow complex and politically sensitive cases. The earliest protests from the foreign government implicated in that case came in response to a routine evidentiary request from the prosecutor. At this early stage, the case was likely incomplete and easily stymied. Indeed, at this stage the Attorney General raised doubts about the strength of the prosecutor's evidence. The prosecutor resisted: "[w]hat he could not accept was the view that there was insufficient evidence to continue . . . ."[282]

It is impossible to know what motivated the Attorney General's concern, but one can imagine that scrutiny of the evidence will become more acute when investigations meet opposition from other Executive stakeholders. Allowing more input by non-prosecutors, especially as cases are investigated, may diminish the frequency of sensitive cases. Therefore, if we consider public corruption prosecutions (and other hard-to-prove cases) to be a public good, then we may need a system that insulates prosecutors—and thereby accepts the deliberative costs of an independent prosecutorial decision-making structure—at least during the investigative phase. For all cases, the warrant for prosecutorial independence is strongest at the earliest stages of investigation. Postponing the moment of whole-of-government deliberation to a later stage—such as the decision whether to indict—would better balance the need for whole-of-government input with the criminal justice goal of investigating these offenses in the first instance.

But it cannot be always true that preserving prosecutors' nimbleness will be worth the deliberative agency costs of total independence in *all* cases. The material I have surveyed in this Article suggests a rough guide to what sorts of national interests should give us most pause about an unyielding norm of prosecutorial independence. National security and foreign affairs concerns are the most obvious.[283] That is because coercive sanctions that have predictable and well-understood meanings within the criminal legal system are likely to mean something radically different in these non-criminal-justice contexts (such sanctions have quite obvious and fraught meanings, for example, in public international law). I have noted that a subpoenas and indictments—the ordinary tools of domestic criminal law enforcement—can signal something both threatening and *ambiguous* to their targets in these non-criminal contexts. Whether the U.S. government, as a matter of its own national interest, intends to communicate such messages requires more than a prosecutor's judgment. By contrast, policy priorities that we may disfavor in comparison to criminal enforcement—such as commerce and risks to the country's wealth—are perhaps rightly subordinated to criminal-justice policy making. On this

282. *R v. Serious Fraud Office, supra* note 264, ¶ 21.

283. *See* Koh, *supra* note 157, at 391–93 (promoting a policy of disclosure by prosecutors to other Executive agencies, and encouraging more intervention by courts and Congress to force consultation).

view, an indictment should not be an inadvertent act of war, but it can cause an inadvertent debit to the federal fisc.

More generally, if prosecutorial independence should be suspended for some, but not other national interests, our guide for sorting the permissible from the impermissible will likely accord with the internal distribution of political capital within the Executive and the relative fear that a given agency will be subject to capture. A phone call from a Secretary of Commerce about a wire fraud prosecution may not be sufficient to disturb prosecutors' ordinary deliberative processes, while a phone call from a Secretary of Defense might.

Such a hierarchical ranking of the national interests may disturb those who would prefer a uniform solution to the deliberative dilemma, but it likely better accords with our ideas about the what makes the Executive's pursuance of the national interest democratically legitimate. It is, indeed, less tolerable for this weighing of national interests to happen either within the internal forum of the prosecutor's own judgment, or, worse, in a hidden and vexed process of ad-hoc accommodation.

CONCLUSION

An *unyielding* norm of prosecutorial independence creates a deliberative environment that can be incompatible with the national interest. As an end in itself—that is, as an ideal to be maximized at all costs—the preference to insulate federal prosecutors' judgments from the rest of the Executive Branch in every case must be wrong. The independence norm's value instead turns on an empirical, practical—and virtually unknowable—prediction about whether the norm will sufficiently deter undue political influence to justify the risk that the sovereign's interest in criminal justice will diverge from the broader national interest.

Having excavated and explained a number of novel, real-world examples of prosecutors' deciding matters that involve non-criminal-justice national interests, my goal has been to destabilize the prevalent assumption that insulating prosecutors from the rest of the Executive is the obvious normative choice. And to underscore both that the independence norm has trade-offs, and that those deliberative trade-offs are matters of *choice*, I turned to a notable example of a contrary model of prosecutorial independence from abroad. In that example, called the Shawcross Exercise, the independence norm is structured quite differently: non-prosecutors are empowered to weigh in when criminal cases implicate other areas of the national interest. Crucially, that exercise is consistent with a national interest equilibrium that favors prosecution—even where that prosecution carries severe national security, foreign policy, or economic consequences. But the exercise illustrates that the Executive Branch's deliberation about the national interest should come in the form of conscious equilibria rather than bright-line answers.

There is no final, revelatory answer about prosecutorial independence. The alternative to an unyielding norm of prosecutorial independence cannot be cleanly settled. What deliberative equilibrium the Executive should strike, and the mechanisms to ensure such an equilibrium is observed, are matters that I have described and suggested without choosing among them. It is important, though, to mark the trade-off and our choice of deliberative equilibrium clearly. It would be the strangest of coincidences if we had struck the balance right without thinking about it at all.