

The Roger Stone Affair: An Examination of the Legal, Normative, and Ethical Restraints on Presidential Interference in Prosecutorial Decisions

JACE JENICAN*

INTRODUCTION

The Trump administration has undoubtedly been a disruptive force in American politics and law. And for many of his voters, that was the point.¹ But in the area of criminal justice, President Trump's tendency to violate traditional restraints on presidential power has revealed just how susceptible to improper political influence federal prosecutions are. The President, recently through Attorney General Bill Barr, has repeatedly meddled in prosecutions against his political and personal allies.² One of the most egregious examples of this conduct was the Roger Stone affair. Stone was convicted for lying to Congress about his relationship with those involved in the Russian government's hack-and-leak operation that was designed to disrupt the 2016 presidential election.³ During Stone's sentencing, the President and his political appointees interfered with the sentencing recommendation of the career prosecutors in an attempt to reduce Stone's sentence.⁴ President Trump eventually commuted Stone's sentence and then pardoned him during his final days in office.⁵

Traditionally, the Department of Justice has been at least partially independent from the President, largely out of policy concerns regarding political influence in

* J.D., Georgetown University Law Center (expected May 2022); B.A., Chapman University (2019). © 2021, Jace Jenican.

1. See Luciana Lopez & Michelle Conlin, *Fed up with Washington, Trump's 'deplorables' shake up the elite*, REUTERS (Nov. 9, 2016, 3:51 A.M.), <https://www.reuters.com/article/us-usa-election-voters/fed-up-with-washington-trumps-deplorables-shake-up-the-elite-idUSKBN1341AB> [<https://perma.cc/9PCS-DNZP>] (quoting Trump voters who claim their support for him is at least in part due to his promises to "shake up" Washington).

2. See, e.g., Sarah N. Lynch, *Democrats accuse 'president's fixer' Barr of political meddling in U.S. justice system*, REUTERS (June 24, 2020, 12:49 P.M.), <https://www.reuters.com/article/us-usa-congress-justice/democrats-accuse-presidents-fixer-barr-of-political-meddling-in-u-s-justice-system-idUSKBN23V2KT> [<https://perma.cc/3LK6-AYHV>].

3. Verdict Form, *United States v. Stone*, No. 19-0018 (ABJ) (D.D.C. Nov. 15, 2019), 2019 WL 6117547.

4. See Mikhailia Fogel, *What Really Happened at the Roger Stone Sentencing*, LAWFARE (Feb. 21, 2020, 4:48 P.M.), <https://www.lawfareblog.com/what-really-happened-roger-stone-sentencing> [<https://perma.cc/NG2V-FZXT>].

5. Amita Kelly, Ryan Lucas & Vanessa Romo, *Trump Pardons Roger Stone, Paul Manafort And Charles Kushner*, NPR (Dec. 23, 2020, 7:38 P.M.), <https://www.npr.org/2020/12/23/949820820/trump-pardons-roger-stone-paul-manafort-and-charles-kushner> [<https://perma.cc/FS6E-XH8V>].

federal prosecutions.⁶ The ostensibly political interference in Stone's sentencing recommendation undermines this principle, but does not seem to obviously contravene any statutory or constitutional mandate.⁷ What it does seem to contravene are the norms and ethical practices that have established the tradition of prosecutorial independence.

This Note will begin by detailing the Special Counsel investigation that spawned the case against Roger Stone, the indictment against Stone, and his trial in Part I. It will also detail the twists and turns following the government's initial sentencing memorandum that culminated in the eventual commutation of Stone's sentence. Part II will continue by examining the legal, normative, and ethical framework underpinning the relationship between the President, Attorney General, and career prosecutors. In light of these principles, the Note will conclude with Part III by examining the effectiveness of these safeguards in the context of the Stone affair and evaluate the behavior of each of the actors in this scandal.

I. THE ROGER STONE AFFAIR

A. THE SPECIAL COUNSEL INVESTIGATION

The Russian government's efforts to interfere in the United States presidential election began to surface in the summer of 2016.⁸ The Democratic National Committee (DNC) announced that it had been hacked in June, and hacked documents were released later that month.⁹ In July, October, and November of that year, Russian government actors using the pseudonym "Guccifer 2.0" worked with Wikileaks to strategically leak documents obtained through the DNC hack and from a later hack of Hillary Clinton campaign chairman John Podesta.¹⁰ The hacking operations were quickly attributed to the Russian government by public reporting which was then confirmed by multiple federal agencies in the fall.¹¹

Meanwhile, the FBI was notified in July by a foreign government that Trump campaign official George Papadopoulos had suggested to a representative of that country that the Russian government had assisted the campaign in gathering damaging information on Hillary Clinton.¹² The FBI quickly opened an investigation into whether any Trump campaign officials were conspiring with the Russian government in its efforts to interfere in the 2016 election.¹³

6. See Bruce A. Green & Rebecca Roiphe, *Can The President Control The Department of Justice?*, 70 ALA. L. REV. 1, 13 (2018).

7. See *id.* at 2.

8. ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, VOLUME I, at 1 (U.S. Dep't of Justice, 2019) [hereinafter THE MUELLER REPORT I].

9. THE MUELLER REPORT I, *supra* note 8, at 1.

10. *Id.* at 175–76.

11. *Id.* at 1.

12. *Id.*

13. *Id.*

After Donald Trump assumed the presidency in 2017, he “took a variety of actions towards the ongoing FBI investigation into Russia’s interference in the 2016 presidential election and related matters that raised questions about whether he had obstructed justice.”¹⁴ This culminated in Trump firing FBI Director James Comey in May 2017.¹⁵ Precisely two weeks later, Deputy Attorney General Rod Rosenstein appointed Special Counsel Robert Mueller to investigate Russia’s interference in the 2016 presidential campaign and Trump’s interference in prior investigations.¹⁶ Simultaneously, several congressional committees in both houses of Congress were conducting similar investigations.¹⁷

B. STONE’S INDICTMENT

In September 2017, Stone testified before the House Permanent Select Committee on Intelligence (HPSCI) where he asserted that he did not “[know] in advance about . . . the hacking of [the] Clinton campaign chairman[’s] email” and that he did not have “advanced knowledge of the source or actual content of the [Organization 1] disclosures regarding Hillary Clinton.”¹⁸ The Special Counsel investigation uncovered information proving this to be false.¹⁹ Stone would go on to make false statements to the HPSCI regarding his possession of documents related to the investigation, his public statements during the campaign, his relationship with Julian Assange, his communications with the Trump campaign, his relationship with Randy Credico,²⁰ and the status of Credico as an intermediary.²¹ After Credico received a subpoena to testify before the HPSCI in their investigation, Stone attempted to convince Credico to falsely testify.²² Stone then threatened to kill Credico and his dog if he cooperated with any investigations.²³ In January 2019, Stone was indicted by Special Counsel Mueller on one count of obstruction of proceedings, five counts of false statements, and one count of witness tampering.²⁴ The Special Counsel’s office then handed off Stone’s

14. ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, VOLUME II, at 1–4 (U.S. Dep’t of Justice, 2019) [hereinafter THE MUELLER REPORT II.]

15. *Id.*

16. *Id.* at 4.

17. *Id.* at 1.

18. Indictment at 20–21, United States v. Stone, No. 1:19CR00018 (D.D.C. January 24, 2019), 2019 WL 321483. “Organization 1” is used throughout the indictment to refer to WikiLeaks.

19. *See id.*

20. Randy Credico is a liberal radio host and associate of Roger Stone for over a decade. During the 2016 campaign, he acted as an intermediary between Stone and Wikileaks. Darren Samuelsohn & Josh Gerstein, *WikiLeaks, dog threats and a fake death notice: Roger Stone’s odd friendship with Randy Credico*, POLITICO (Nov. 8, 2019, 2:36 PM), <https://www.politico.com/news/2019/11/08/roger-stones-trial-randy-credico-068072> [<https://perma.cc/VMX7-VLXN>].

21. Indictment, *supra* note 18, at 19–35. Julian Assange, the head of WikiLeaks, is referred to in the indictment as “the head of Organization 1.” Randy Credico is referred to as “Person 2” in the indictment.

22. *Id.* at 36–39.

23. *Id.* at 39.

24. *Id.*

prosecution to the U.S. Attorney for the District of Columbia at the close of the Mueller investigation, and four Assistant U.S. Attorneys (AUSAs) were assigned to the case.²⁵

Over the next several months, Stone's criminal proceedings became a major news story. And, judging by his subsequent behavior on social media, Stone wanted it that way. In February, Stone posted a picture of District Court Judge Amy Berman Jackson, who presided over his case, next to crosshairs in an apparent attempt to raise money for his legal defense fund.²⁶ Judge Jackson and many members of the media interpreted the crosshairs as an unambiguous and threatening allusion to gun violence, ostensibly directed at the Judge.²⁷ After this incident, Judge Jackson issued an extended gag order, preventing Stone from publicly discussing his trial or posting about it on social media.²⁸ In November 2019, a jury found Stone guilty of all charges.²⁹

C. STONE'S SENTENCING

On February 10, 2020, AUSAs Jonathan Kravis, Michael Marando, Adam Jed, and Aaron Zelinsky filed their sentencing memorandum recommending Stone serve eighty-seven to one-hundred-eight months in prison.³⁰ The AUSAs, looking to the federal sentencing guidelines, determined that for Stone's crimes of conviction, the base offense level was fourteen.³¹ This is the only part of the calculation that Stone conceded was correct.³² The AUSAs recommended a total of fifteen levels of increase from four different sentence enhancements. First, an eight-level increase for threatening physical injury to obstruct justice.³³ Second, a three-level increase because the crime of conviction caused "substantial interference with

25. THE MUELLER REPORT I, *supra* note 8, at Appendix D-3; Government's Response in Opposition to Motion to Dismiss, *United States v. Stone*, No. 19-cr-18 (ABJ) (D.D.C. May 3, 2019), 2019 WL 61117560.

26. Darren Samuelsohn, Josh Gerstein & Matthew Choi, *Judge broadens gag order against Roger Stone after Instagram post*, POLITICO (Feb. 21, 2019, 3:19 PM), <https://www.politico.com/story/2019/02/21/roger-stone-gag-order-1179548> [<https://perma.cc/8GUK-J3S4>].

27. *See id.*

28. *Id.*

29. Verdict Form, *United States v. Stone*, No. 19-0018 (ABJ) (D.D.C. Nov. 15, 2019), 2019 WL 6117547.

30. Government's Sentencing Memorandum, *United States v. Stone*, No. 19-cr-18-ABJ (D.D.C. Feb. 10, 2020), 2020 WL 863545 [hereinafter Initial Sentencing Memo].

31. Initial Sentencing Memo, *supra* note 30. The base offense level is determined by both the crimes of conviction and the criminal history of the defendant. After the base offense level is calculated, specific offense characteristics, or sentence enhancements, are taken into account and can either increase or decrease the offense level. The calculation of the sentencing guidelines is not binding on the court but is a required step. *See United States v. Booker*, 543 U.S. 220 (2005). For a more detailed description of the federal sentencing guidelines and more information about how guidelines sentences are calculated, see US SENTENCING COMM'N, FEDERAL SENTENCING: THE BASICS (2015).

32. Defendant Roger Stone's Sentencing Memorandum and Motion for Variance from Advisory Guidelines, *United States v. Stone*, No. 1:19-cr-00018-ABJ (D.D.C. Feb. 11, 2020) [hereinafter Stone Sentencing Memo].

33. Initial Sentencing Memo, *supra* note 30 (quoting U.S.S.G. § 2J1.2(b)(1)(B)).

the administration of justice.”³⁴ Third, a two-level increase for a crime that was “extensive in scope, planning, or preparation.”³⁵ Fourth, a two-level increase for “willfully obstruct[ing] or imped[ing] . . . the prosecution of the instant offense of conviction,” referring to the incident where Stone posted a picture on Instagram with Judge Jackson next to crosshairs.³⁶ The total offense level of twenty-nine equates to roughly seven to nine years in prison.

Later that day, Stone filed his own sentencing memorandum.³⁷ The memorandum argued that each of the sentence enhancements applied by the government was unjustifiable, and the correct sentencing guidelines calculation was only fourteen.³⁸ A guidelines calculation of fourteen equates to fifteen to twenty-one months of prison, but Stone argued that the circumstances of his crime warranted a downward variation from that guidelines calculation.³⁹ A few hours after that filing, President Trump tweeted: “This is a horrible and very unfair situation. The real crimes were on the other side, as nothing happens to them. Cannot allow this miscarriage of justice!”⁴⁰ The next afternoon, a Department of Justice (DOJ) spokesperson told reporters that DOJ leadership had decided to reverse course on Stone’s sentencing, but that this decision had been made prior to the President’s tweet.⁴¹ In the following hours, all four AUSAs prosecuting Stone filed Notices of Withdrawal with the court and resigned from the Stone case.⁴² Assistant US Attorney Jonathan Kravis resigned from the Justice Department entirely.⁴³

Shortly after these departures, a new DOJ attorney, John Crabb, filed a supplemental sentencing memorandum asserting that the eighty-seven to one-hundred-eight months of imprisonment requested in the first memorandum would be

34. Initial Sentencing Memo, *supra* note 30; *see also* U.S.S.G. § 2J1.2(b)(2).

35. Initial Sentencing Memo, *supra* note 30; *see also* U.S.S.G. § 2J1.2(b)(3)(C). The Initial Sentencing Memo incorrectly cites to U.S.S.G. § 2B1.2(b)(3)(C) when referring to this sentencing enhancement. Transcript of Sentencing at 30, *United States v. Stone*, No. 19-CR-018 (D.D.C. Feb. 20, 2020).

36. Initial Sentencing Memo, *supra* note 30 (quoting U.S.S.G. § 3C1.1).

37. Stone Sentencing Memo, *supra* note 32.

38. *Id.*

39. *Id.*

40. Sarah N. Lynch, *Trump says call for 7-9 years in prison term for advisor Stone is ‘horrible’*, REUTERS (Feb. 10, 2020, 6:26 PM), <https://www.journalism.org/2020/01/24/u-s-media-polarization-and-the-2020-election-a-nation-divided/> [https://perma.cc/YPR7-83ZH].

41. Lucien Bruggeman & Soo Rin Kim, *A timeline of the extraordinary turn of events in the Roger Stone case*, ABC NEWS (Feb. 14, 2020, 10:21 AM), <https://abcnews.go.com/Politics/timeline-extraordinary-turn-events-roger-stone-case/story?id=68921601> [https://perma.cc/67A6-EZRZ].

42. Notice of Withdrawal of Appearance by USA as to Roger Jason Stone, Jr. (Zelinsky, Aaron), *United States v. Stone*, No. 19-cr-18-ABJ (D.D.C. Feb. 11, 2020), ECF 282; Notice of Withdrawal of Appearance by USA as to Roger Jason Stone, Jr. (Kravis, Jonathan), *United States v. Stone*, No. 19-cr-18-ABJ (D.D.C. Feb. 11, 2020), ECF 283; Notice of Withdrawal of Appearance by USA as to Roger Jason Stone, Jr. (Jed, Adam), *United States v. Stone*, No. 19-cr-18-ABJ (D.D.C. Feb. 11, 2020), ECF 285; Notice of Withdrawal of Appearance by USA as to Roger Jason Stone, Jr. (Marando, Michael), *United States v. Stone*, No. 19-cr-18-ABJ (D.D.C. Feb. 11, 2020), ECF 287.

43. Bruggeman & Kim, *supra* note 41.

excessive.⁴⁴ The supplemental memorandum notes that the sentencing enhancements applied in the initial memorandum are “perhaps technically applicable” but an offense level of twenty-nine is “unduly high” for an obstruction case.⁴⁵ The government never explicitly offered another sentencing recommendation, but it did offer counterarguments to the sentencing recommendation in the initial memorandum.⁴⁶

In the face of bipartisan disagreement⁴⁷ with Trump’s decision to opine on an ongoing case, President Trump maintained that he did not interfere with the sentencing process, but it would have been within his rights to do so.⁴⁸ In an ABC News interview a few days after the incident, Attorney General Bill Barr asserted that President Trump had “never asked [him] to do anything in a criminal case,” but also acknowledged that the President’s tweets made it “impossible” for Barr to do his job without a perception of wrongdoing.⁴⁹

At the sentencing hearing on February 20th, Crabb apologized to the court for the “confusion” surrounding the government’s sentencing recommendation.⁵⁰ Crabb explained that the initial sentencing memorandum had been approved by the U.S. Attorney for the District of Columbia, Timothy Shea, but not by Attorney General Barr.⁵¹ Shea, a close confidant of Attorney General Barr, had been appointed to the position less than a month earlier.⁵² Upon probing from Judge Jackson, Crabb characterized the failure to ascertain approval from the DOJ leadership as a “miscommunication,” but that the AUSAs formerly on the case had filed the initial memorandum in good faith and “consistent[ly] with [the] Department of Justice policy to request a sentence within the guidelines.”⁵³

44. Government’s Supplemental and Amended Sentencing Memorandum, United States, v. Stone, No. 19-cr-18-ABJ (D.D.C. Feb. 11, 2020), 2020 WL 863544 [hereinafter Supplemental Sentencing Memo].

45. Supplemental Sentencing Memo, *supra* note 44.

46. *Id.*

47. See Christal Hayes, ‘I don’t think that’s appropriate’: Trump’s involvement in Roger Stone case draws criticism from GOP senators, USA TODAY (Feb. 12, 2020, 1:57 P.M.), <https://www.usatoday.com/story/news/politics/2020/02/12/roger-stone-president-trump-criticized-republicans/4737241002/> [<https://perma.cc/7MYG-SUB9>].

48. Bruggeman & Kim, *supra* note 41.

49. *Id.*

50. Transcript of Sentencing, *supra* note 35, at 44.

51. *Id.* at 45.

52. Press Release, Dep’t of Justice, Attorney General William P. Barr Appoints Timothy Shea Interim U.S. Attorney for the District of Columbia (Jan. 30, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-appoints-timothy-shea-interim-us-attorney-district-columbia> [<https://perma.cc/WDX4-ABX8>]; see also Keith L. Alexander, Spencer S. Hsu & Matt Zapposky, *Attorney General William P. Barr names Timothy Shea, one of his counselors, as the District’s interim U. S. Attorney*, WASH. POST (Jan. 30, 2020, 3:13 PM), https://www.washingtonpost.com/local/public-safety/attorney-general-william-p-barr-names-timothy-shea-one-of-his-counselors-as-the-districts-interim-us-attorney/2020/01/30/446fe6a6-4303-11ea-b503-2b077c436617_story.html [<https://perma.cc/VG3S-ACDM>].

53. Transcript of Sentencing, *supra* note 35, at 47.

Crabb admitted that nothing in the original memorandum was incorrect, but the prosecution should defer to the court’s “unique experience with related cases.”⁵⁴

When conducting the Sentencing Guidelines calculation, Judge Jackson applied the eight-level enhancement for threatening injury to obstruct justice, the three-level enhancement for substantial interference with the administration of justice, and the two-level enhancement for obstructing justice of the instant crime of conviction.⁵⁵ This non-binding calculation resulted in an offense level of twenty-seven—roughly five to seven years in prison. However, Judge Jackson imposed a below-guidelines sentence, primarily to match the sentences received by defendants in similar cases.⁵⁶ Consistency between similarly-situated defendants is a statutorily mandated sentencing consideration that the government highlighted as a reason for a below-guidelines sentence in its supplemental sentencing memorandum.⁵⁷ Judge Jackson sentenced Roger Stone to three years and four months in prison and a \$20,000 fine.⁵⁸

D. STONE’S COMMUTATION

Five months later in July 2020, President Trump commuted the entirety of Roger Stone’s sentence just four days before he was supposed to report to the Bureau of Prisons.⁵⁹ The President’s statement regarding the Grant of Clemency characterized Stone’s prosecution as collateral damage of “the Russia Hoax that the Left and its allies in the media perpetrated for years to undermine the Trump Presidency.”⁶⁰ Members of both major parties denounced the commutation,⁶¹ with Republican Senator Mitt Romney of Utah tweeting that it constituted “[u]nprecedented, historic corruption [for] an American president [to] commute the sentence of a person convicted by a jury of lying to shield that very president.”⁶²

54. *Id.* at 47–50.

55. *Id.* at 17–42.

56. *Id.* at 91.

57. Supplemental Sentencing Memo, *supra* note 44; *see also* 18 U.S.C. § 3553(a)(6) (“The court, in determining the particular sentence to be imposed, shall consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”).

58. Transcript of Sentencing, *supra* note 35, at 91.

59. DEP’T OF JUSTICE, EXECUTIVE GRANT OF CLEMENCY: ROGER JASON STONE, JR. (2020); *see also* Peter Baker, Maggie Haberman & Sharon LaFraniere, *Trump Commutes Sentence of Roger Stone in Case He Long Denounced*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html> [<https://perma.cc/EPD2-7BA7>].

60. THE WHITE HOUSE, STATEMENT FROM THE PRESS SECRETARY ON THE EXECUTIVE GRANT OF CLEMENCY FOR ROGER STONE, JR. (July 10, 2020), <https://web.archive.org/web/20200711010957/https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-executive-grant-clemency-roger-stone-jr/> [<https://perma.cc/6J56-MYZA>].

61. *See* Andrew O’Reilly, *Democrats and Republicans criticize Trump for commuting Roger Stone’s prison sentence*, FOX NEWS (July 12, 2020), <https://www.foxnews.com/politics/democrats-and-republicans-criticize-trump-for-commuting-stones-prison-sentence> [<https://perma.cc/3JR8-XJ65>].

62. Mitt Romney (@MittRomney), TWITTER (July 11, 2020, 9:06 AM), <https://twitter.com/MittRomney/status/1281937795616067586> [<https://perma.cc/4RLZ-U2R6>].

II. LEGAL, NORMATIVE, AND ETHICAL PRINCIPLES AND THEIR RELATIVE IMPACT ON PROSECUTORIAL INDEPENDENCE AND POLITICAL ACCOUNTABILITY

Mainstream media outlets portrayed the Stone Affair as an unprecedented and corrupt power-grab by the executive.⁶³ By right-wing media, it was portrayed as a justifiable attempt to prevent overzealous and biased prosecutors from railroading a political enemy.⁶⁴ While Stone's guilt is settled as far as the courts are concerned, the appropriateness of the actions taken by the other actors involved has not had the same rigorous inspection. While this disparity in media framing is primarily due to the polarized state of political journalism,⁶⁵ it importantly highlights a very real debate over the extent of executive power over prosecution. This Note continues by examining the legal relationship between the President, his political appointees, and line prosecutors, and how exactly powers are shared or separated between these actors. Next, it discusses the importance of norms to this relationship and how they are shaped by external actors, such as the media. Third, the Note factors in the ethical restraints on federal prosecutors and how they functioned during the Stone Affair.

A. SEPARATION OF POWERS WITHIN THE EXECUTIVE BRANCH

Article II of the Constitution vests “[t]he executive power” with the President in a seemingly unqualified way.⁶⁶ But what exactly executive power entails is not immediately obvious. The Framers failed to articulate any consistent and detailed definition of executive power at the time of ratification, let alone discuss whether criminal prosecution is a core executive function.⁶⁷ This debate is even further complicated by a historical analysis of the president's role in overseeing prosecutions. At the time of the founding, the state was not primarily responsible for

63. See, e.g., Jill Colvin & Eric Tucker, *Trump commutes longtime friend Roger Stone's prison sentence*, ASSOCIATED PRESS (July 10, 2020), <https://apnews.com/article/4d9c9a90d023cde628040b1ca0eb89fd> [perma.cc/GK8N-7CK7] (calling Trump's commutation of Stone an “extraordinary intervention . . . in the nation's justice system” that “underscores [] his willingness to flout [] norms . . . that have governed presidential conduct for decades”).

64. See, e.g., Joel B. Pollak, *Pollak: In Defense of Attorney General William Barr*, BREITBART (Dec. 13, 2020), <https://www.breitbart.com/politics/2020/12/13/pollak-in-defense-of-attorney-general-william-barr/> [https://perma.cc/C77V-L9D5] (referring to DOJ actions surrounding Stone's sentencing as “Barr . . . reel[ing] in partisan prosecutors who tried to punish Trump supporters”).

65. See Mark Jurkowitz, Amy Mitchell, Elisa Shearer & Mason Walker, *U.S. Media Polarization and the 2020 Election: A Nation Divided*, PEW RESEARCH CTR. (Jan. 24, 2020), <https://www.journalism.org/2020/01/24/u-s-media-polarization-and-the-2020-election-a-nation-divided/> [https://perma.cc/C64N-ND2A].

66. U.S. CONST. art. II, § 1, cl. 1 (“The executive power shall be vested in a President of the United States of America.”); see *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (“[T]his does not mean some of the executive power, but all of the executive power.”).

67. Stephanie A.J. Dangel, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069, 1076 (1990).

criminal prosecutions—individuals were.⁶⁸ But in the various colonies where the government was engaged in prosecutions, the prosecutors did not answer to the chief executive.⁶⁹ In 1823, President Monroe’s Attorney General William Wirt wrote an opinion arguing that the president does not have the authority to direct outcomes in administrative adjudications.⁷⁰ But less than a decade later, President Andrew Jackson’s Attorney General advised that the President has the authority to direct a U.S. attorney to dismiss a prosecution stemming from the President’s “general supervisory powers . . . which are necessary to enable him to perform the duty imposed upon him, or seeing that the law is faithfully executed.”⁷¹ The opinion did note, however, that the only power the President had to effectuate a direction was the removal of an officer who would not agree to do his bidding.⁷² The idea that the President’s only recourse is the removal power was solidified in *Myers v. United States*, where the Supreme Court overturned limits on the President’s power to remove officers of the United States.⁷³ *Myers* is often referred to as the zenith of presidential authority over the executive branch,⁷⁴ and the plenary removal authority to effectuate presidential direction was slowly chipped away by Supreme Court decisions through the twentieth century, culminating in *Morrison v. Olson*.⁷⁵

The most significant time the Supreme Court weighed in on this question was in *Morrison v. Olson*, when the Court upheld the Ethics in Government Act of 1978.⁷⁶ The Court ruled that it was not a violation of the principle of separation of powers to restrict the President from being able to fire an independent counsel.⁷⁷ Even though the independent counsel had “full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice,” the Court found that only allowing the counsel to be removed by the Attorney General for good cause did not “unduly interfer[e] with the the role of the Executive Branch.”⁷⁸ In a famously fiery lone dissent, Justice Antonin Scalia noted that the majority conceded that the prosecutorial functions of the independent counsel are purely executive.⁷⁹ Because this function is purely

68. Bruce A. Green & Rebecca Roiphe, *Can The President Control The Department of Justice?*, 70 ALA. L. REV. 1, 13 (2018).

69. *Id.*

70. The President and Accounting Officers, 1 Op. A.G. 624 (1823) (William Wirt).

71. The Jewels of the Princess of Orange, 2 Op. A.G. 482 (1831) (Roger Taney).

72. *Id.*

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

74. See, e.g., Alan B. Morrison, *How Independent are Independent Regulatory Agencies?*, 1988 DUKE L. J. 252 (1988).

75. See, e.g., *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935); but see *Selia Law v. Consumer Financial Protection Bureau*, 591 U.S. ___ (2020) (holding that the Consumer Financial Protection Bureau’s structure, where a single director was only removable for cause, was unconstitutional).

76. *Morrison v. Olson*, 487 U.S. 654, 662 (1988).

77. *Id.*

78. *Id.* at 662–93.

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

executive, Scalia argued, it must be a violation of separation of powers principles for it to be taken away from the President.⁸⁰

While Justice Scalia was the only dissenter in *Morrison*, the position he advanced has become more mainstream in the decades since—particularly on the right, but also with more liberal jurists.⁸¹ In the midst of the Special Counsel and impeachment investigations, President Trump’s lawyers repeatedly argued that the President’s control over the Department of Justice is plenary and thus the President is incapable of illegally obstructing justice.⁸² Special Counsel Mueller addressed this constitutional argument in Volume II of the Special Counsel report and came to the conclusion that separation of powers principles do not prevent Congress from criminalizing judicially obstreperous conduct by the President.⁸³ The Office of Legal Counsel (OLC) has also come to the same conclusion.⁸⁴

While the constitutional understanding of the president’s power over the decisions made by career civil servants and political appointees has changed many times since the founding, the Department of Justice has largely remained independent from extensive presidential interference, aside from some prominent exceptions such as the Watergate affair.⁸⁵ In sum, there is no clear and direct constitutional or statutory authority that explicitly states the extent of presidential

80. *Id.* at 705 (Scalia, J., dissenting) (“[T]he decision of the Court of Appeals invalidating the present statute must be upheld on fundamental separation-of-powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution . . . the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power? Surprising to say, the Court appears to concede an affirmative answer to both questions, but seeks to avoid the inevitable conclusion that since the statute vests some purely executive power in a person who is not the President of the United States it is void.”).

81. See, e.g., Adrian Vermeule, *Morrison v. Olson Is Bad Law*, LAWFARE (June 9, 2017, 8:14 P.M.), <https://www.lawfareblog.com/morrison-v-olson-bad-law> [<https://perma.cc/KNW4-ZFS7>]. Both Vermeule and Justice Elena Kagan, who he quotes in this article, praise Justice Scalia’s dissent in *Morrison*, despite differing legal approaches to constitutional law.

82. THE MUELLER REPORT II, *supra* note 14, at 159; see, e.g., Mike Allen, *Exclusive: Trump lawyer claims the “President cannot obstruct justice,”* AXIOS (Dec. 4, 2017), <https://www.axios.com/exclusive-trump-lawyer-claims-the-president-cannot-obstruct-justice-2514742663.html> [<https://perma.cc/VU3B-B57X>].

83. THE MUELLER REPORT II, *supra* note 14, at 171.

84. See *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. at 357 n.11.

85. See Green & Roiphe, *supra* note 6, at 62–74. While the Watergate affair is a large and multifaceted scandal, the event that most implicated prosecutorial independence was the so-called “Saturday Night Massacre” where President Nixon instructed Attorney General Elliot Richardson and Deputy Attorney General William French Smith to fire Independent Counsel Archibald Cox and each resigned rather than carry out the command. *Id.* at 19. Interestingly, Roger Stone was working in President Nixon’s Office of Economic Opportunity during the Watergate affair after volunteering for his reelection campaign. Jordan Riefe, ‘Get Me Roger Stone’ Filmmakers Compare the “Dirty Trickster” to Donald Trump, THE HOLLYWOOD REPORTER (Nov. 30, 2017, 1:00 AM), <https://www.hollywoodreporter.com/news/get-me-roger-stone-filmmakers-compare-dirty-trickster-donald-trump-1061895> [<https://perma.cc/L2S2-TS7U>]. Additionally, Stone has a tattoo of President Nixon on his back and considers himself a “Nixonite” because of the President’s “indestructibility and resilience.” Ashley May, *Roger Stone’s Nixon back tattoo, Netflix documentary and more odd facts about Trump’s associate*, USA TODAY (Jan. 25, 2019, 10:41 A.M.), <https://www.usatoday.com/story/news/politics/2019/01/25/roger-stone-nixon-back-tattoo-netflix-film-facts/2676071002/> [<https://perma.cc/DCH2-QW7X>].

power over individual prosecutorial decisions. The primary mechanisms for restraining the President from influencing prosecutorial decisions are political norms and electoral incentives.

B. NORMS AS ENFORCING PROSECUTORIAL INDEPENDENCE

Aside from criminal laws barring obstruction of justice, there are no significant constitutional or legislative authorities that restrict the power of the President to interfere in federal prosecutions.⁸⁶ What has prevented presidents from exploiting this legal vacuum is institutional norms⁸⁷ and the threat of political backlash for violating those norms.⁸⁸ Norms are not enforced by law, but by social sanctions.⁸⁹ In the political and legal contexts, these sanctions are both internal (e.g. guilt and shame) and external (e.g. the threat of losing reelection or damaging one's reputation).⁹⁰ The general desire to avoid these sanctions is what perpetuates the effectiveness of a norm.

In the area of criminal justice, it is a fairly established norm for the Department of Justice to be somewhat independent of political influence.⁹¹ Especially since the Watergate scandal, career prosecutors and political officials alike have largely abided by the premise that the political considerations of the President should not influence individual investigatory or prosecutorial decisions.⁹² But the norm is not that the President should have *no* influence over criminal justice decisions. Often presidents have legitimate, generally applicable policy goals in the realm of criminal justice that can affect individual decisions made by career officials.⁹³

This distinction highlights another way that norms are responsible for maintaining prosecutorial independence in the effect of professional legal norms on line prosecutors. The norms and ethics of the legal profession help to inform individual prosecutors in distinguishing between an order given that reflects a legitimate policy objective or an impermissible corrupt consideration.⁹⁴

86. See Green & Roiphe, *supra* note 6, at 2.

87. *Id.*

88. See Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, with Special Reference to Sanctions* (John M. Olin Program in Law and Economics Working Paper No. 96, 2000).

89. See *id.* at 371.

90. See *id.* at 371 (discussing the various types of social sanctions that can arise from a norm violation).

91. See Green & Roiphe, *supra* note 6, at 74.

92. *Id.* at 68.

93. See, e.g., DEP'T OF JUSTICE, MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS ON INVESTIGATIONS AND PROSECUTIONS IN STATES AUTHORIZING THE MEDICAL USE OF MARIJUANA (Oct. 19, 2020), <https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states> [<https://perma.cc/7834-TF64>] (directing U.S. Attorneys in states that have legalized marijuana to not prosecute violations of the Controlled Substances Act when those violations would be legal under state law).

94. See Green & Roiphe, *supra* note 6, at 6.

C. ETHICS AS ENFORCING PROSECUTORIAL INDEPENDENCE

The ethical norms within the legal profession also play an important role in the balance between prosecutorial independence and executive oversight. But the way ethical rules apply to prosecutors is partially informed by the very political norms that they help to entrench. The norms surrounding prosecutorial independence from political interference act in the background of a federal prosecutor's consideration of the object of a prosecutor's ethical obligations. This is because a prosecutor's "client" is the state.⁹⁵ Abiding by the ABA *Model Rules of Professional Conduct* is complicated when the client is more of a concept than an individual. For example, take Model Rule 1.2 which requires an attorney to "abide by [their] client's decisions concerning the objectives of representation," or Model Rule 1.3's requirement for zealous advocacy and diligence in representation.⁹⁶ When an attorney has the state as its client, what exactly is ethical zealous advocacy and whose objectives specifically should be abided by?⁹⁷

Prosecutors, especially in politically charged cases, may face contradictory objectives. A prosecutor may see the objectives of political actors in a particular case to be contrary to their personal ethical obligations to whom or whatever they see as their "client." The influence of political actors is not *per se* improper, but certainly can be. The tension between political accountability and prosecutorial independence runs deeply through the relationship between political actors and career prosecutors. A federal prosecutor has a duty of loyalty to both the state as a political actor and the state as a body of laws, and it is incumbent on prosecutors to balance those considerations when those two interests diverge.⁹⁸

When a prosecutor weighs these considerations and finds that political actors are injecting improper considerations that contravene the intent of the laws of the United States, there are a few ethical approaches they may take. The most obvious action that a career prosecutor can take is to resign, but in some instances it may be prudent to stay in one's role and resist the political influence.⁹⁹ The goal of both actions is to avoid engaging in unethical legal practices and to raise the alarm of abnormal and unethical legal practices. Model Rule 1.16 is most informative in delineating when resignation may even be required, and will be discussed in greater depth in Part III.¹⁰⁰

95. Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 465 (2017); see also Irene Oritseweyinmi Joe, *The Prosecutor's Client Problem*, 98 B.U. L. REV. 885 (2018).

96. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2018); MODEL RULES OF PROF'L CONDUCT R. 1.3, c. 1 (2018).

97. Irene Oritseweyinmi Joe, *The Prosecutor's Client Problem*, 98 B.U. L. REV. 885 (2018) (analyzing how these questions weigh on prosecutors' ethical considerations).

98. See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2018).

99. See Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349 (2019); Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 101 (2019).

100. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2018).

The Model Rules do have a set of ethical obligations specific to prosecutors: Model Rule 3.8 offers a set of ethical considerations that largely protect those that they are prosecuting by, for example, requiring prosecutors to disclose exculpatory or mitigating evidence to the defense.¹⁰¹ These obligations may create a framework for preventing prosecutorial abuse that comes at the expense of the accused, but these obligations don't seem to consider the possibility of improper political interference *on behalf of* the accused.

III. THE TENSION BETWEEN ACCOUNTABILITY AND POLITICAL INDEPENDENCE IN THE STONE AFFAIR

While the Trump administration's actions throughout the Stone affair were met with plenty of criticism, very little of that criticism alleged any sort of constitutional or statutory violation. As demonstrated above, the legal landscape delineating the President's authority over federal prosecutorial decisions is bare, or at least murky. But this is not to say that what the Trump administration engaged in was fully above board. Nearly every step of the way, the Trump administration engaged in ethically dodgy norm-breaking.¹⁰²

This Note will continue by looking at the appropriateness of each of the actors' conduct in the two major episodes of the Stone Affair. First, the Note will tackle the conduct of the Attorney General and career prosecutors during the week of the conflicting sentencing memoranda. Then, the note will analyze President Trump's commutation of Roger Stone's sentence.

A. THE CONFLICTING SENTENCING MEMORANDA

While the President and the Attorney General have maintained that President Trump had no direct influence over the Department of Justice's decision to file a supplemental sentencing memorandum,¹⁰³ he almost certainly had an implicit influence over that decision. Without the President's relationship to Stone, it is unlikely Attorney General Barr would have ever concerned himself with Stone's prosecution. Regardless of whether the President's personal political incentives were directly communicated to Attorney General Barr or they were made clear through the President's tweets, the President extended his influence into the sentencing decision of a longtime confidant and broke longstanding norms of prosecutorial independence. He may not have done anything technically illegal, but his omnipresence over this sentencing offended the norms and ethics of the career prosecutors enough to make them quit in protest.¹⁰⁴

101. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2018).

102. See, e.g., Jill Colvin & Eric Tucker, *supra* note 63.

103. Katie Benner, *Barr Says Attacks From Trump Make Work 'Impossible'*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/us/politics/william-barr-trump.html>? [https://perma.cc/JA3W-SSQA].

104. Bruggeman & Kim, *supra* note 41.

Attorney General Barr's intervention during this episode was also norm-violating. Regardless of his communications with the President, Attorney General Barr demanded that career prosecutors depart from Department of Justice policy and advocate against their own sentencing position in the supplemental memorandum.¹⁰⁵ While the Attorney General may have the legal authority to do this,¹⁰⁶ it is unprecedented for an Attorney General to interfere so closely in a sentencing decision against a confidant of the President he serves at the pleasure of. It is also clear that this is not just the application of a general policy change. The policy of the Justice Department is to pursue a guidelines-level sentence¹⁰⁷ and the departure from this policy for a personal friend of the President is obviously unethical.

The same day that Attorney General Barr undermined the initial sentencing memorandum, each of the four prosecutors resigned from the case.¹⁰⁸ This is the rare example within this saga of norms and ethics working effectively. It seems these individual prosecutors came to the conclusion that their superiors within the Department of Justice had rejected their initial sentencing memorandum because of purely political considerations, and that it was their ethical obligation to resign from the case. Their initial memorandum was entirely legal, factually correct, and faithful to Department of Justice policy.¹⁰⁹ Other than the one sentencing enhancement rejected by Judge Jackson, their memorandum matched the recommendation within the Pre-sentence Report.¹¹⁰ In weighing the permissible policy influence of the politically accountable actors and the interest in zealously upholding the generally applicable body of laws, all four of the prosecutors made the ethically correct decision that they needed to either resign or resist. In this instance, it was more appropriate to resign, because it was effective at highlighting the norm violation by the Attorney General without creating bureaucratic dysfunction that could be labeled as norm-breaking itself.

Additionally, Model Rule 1.16 may even require them to resign in this case. As noted above, Model Rule 1.16(a)(1) requires withdrawal of representation if "representation will result in violation of the rules of professional conduct or other law" and Rule 1.16(b)(2) allows withdrawal if "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent."¹¹¹ Each of the prosecutors on this case may have reasonably

105. *Id.*

106. DEP'T OF JUSTICE, MEMORANDUM OPINION FOR THE ATTORNEY GENERAL: THE ATTORNEY GENERAL'S ROLE AS CHIEF LITIGATOR FOR THE UNITED STATES (Jan. 4, 1982), <https://www.justice.gov/file/22896/download#:~:text=at%20458%2D59,as%20its%20chief%20legal%20officer> [<https://perma.cc/KZ9L-RUD4>] (stating that the Attorney General has plenary power over all federal litigation).

107. DEP'T OF JUSTICE, MEMORANDUM FOR ALL FEDERAL PROSECUTORS: DEPARTMENT CHARGING AND SENTENCING POLICY (May 10, 2017) [hereinafter General Sentencing Policy Memo].

108. Bruggeman & Kim, *supra* note 41.

109. See General Sentencing Policy Memo, *supra* note 105; Transcript of Sentencing, *supra* note 35, at 47–50.

110. Transcript of Sentencing, *supra* note 35, at 91.

111. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2018).

seen the command to file the supplementary sentencing memorandum as either forcing them to violate their ethical obligations under a number of *Model Rules*, such as the Rule 3.3 obligation of candor to the court.¹¹² If one of these prosecutors were to defend the supplemental sentencing memorandum before Judge Jackson, they may have come dangerously close to being forced to make what they believe to be a false statement of law. Alternatively, the prosecutors may have even reasonably perceived the supplemental sentencing memorandum as fraudulent in its reasoning. Regardless, *The Model Rules* point to the most ethical outcome as being withdrawal, which all of the prosecutors in this case appropriately did.

B. ROGER STONE'S COMMUTATION

The power to grant clemency is a constitutionally enumerated right for any President.¹¹³ But just because the Constitution allows a President to exercise a power does not guarantee that each use of that power will be proper.¹¹⁴ Although Presidents have historically issued pardons or clemency to former colleagues, friends, and family that have been politically damaging, President Trump's commutation of Stone's sentence is not like those other politically damaging pardons.¹¹⁵ As Senator Romney pointed out in his tweet, Roger Stone was convicted of lying to protect this President from legal jeopardy and President Trump unprecedentedly commuted a sentence for someone that obstructed justice to his benefit.¹¹⁶ This norm violation is certainly concerning. Unlike with the norm of prosecutorial independence, there are not serious legal scholars arguing against the norm of Presidents not using their power to grant clemency as a means for rewarding the judicially obstreperous activities of their agents to protect themselves from legal jeopardy. But this norm still did not stop the President. The sanctions that norm violations of this magnitude should bring, such as criticism from one's own political party, the mainstream media, and the public writ-large, were not substantial enough to dissuade the President from violating the norm. The problem with relying on norms is that they are in part enforced by other political actors signaling to the public that there has been an offensive violation of norms. In a time of unprecedented partisan polarization, norm violations are not receiving the wide bipartisan condemnation they may once have had and thus do not have the same enforcement power they once had. In fact, the conduct of the

112. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2018).

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

114. See Articles of Impeachment Against Donald John Trump, H.R. 755, 116th Cong. (1st Sess. 2019) (describing President Trump's use of constitutionally granted powers in a corrupt and unlawful manner).

115. See, e.g., David Johnston & Don van Natta Jr., *THE CLINTON PARDONS: THE LOBBYING; Clinton's Brother Pursued Clemency Bids for Friends*, N.Y. TIMES (Feb. 23, 2001), <https://www.nytimes.com/2001/02/23/us/clinton-pardons-lobbying-clinton-s-brother-pursued-clemency-bids-for-friends.html> [https://perma.cc/3XDB-E6A7].

116. Romney, *supra* note 62.

Republican Party over the last four years has challenged the idea that norms can be effective barriers at all to presidential action in a highly polarized era.¹¹⁷

CONCLUSION

The Roger Stone Affair makes it clear that there are not sufficient safeguards against political interference in federal prosecutions. The current safeguards that are primarily made up of norms and ethical restrictions are ineffective when the President does not respond to the negative incentives and sanctions that accompany norm-breaking.¹¹⁸ Additionally, norms erode when they are broken and undermined, so these safeguards are only becoming more ineffective.¹¹⁹ Perhaps the highly polarized nature of American politics makes relying on norms impossible going forward. It may be necessary to codify some sort of restriction on presidential influence over politically-charged prosecutions. Although, while clear legal standards may be more effective than relying on political norms and the ethical considerations of individual prosecutors, crafting a legal standard that can balance the legitimate concern for political accountability may also be politically impossible in the current era. Regardless, the Trump administration has left in its wake an overly politicized Department of Justice¹²⁰ and something must be done to remedy this mistake before another President commits an even more egregious contravention of justice.

117. See, e.g., Maeve Reston, *Republicans acquitted Trump again, but this time is different*, CNN (Feb. 15, 2021, 2:11 P.M.), <https://www.cnn.com/2021/02/14/politics/donald-trump-impeachment-republican-vote/index.html> [perma.cc/V2GD-5TLV] (describing Senate Republicans' capitulation to former President Trump's series of norm violations associated with his incitement of an insurrection by failing to convict him during his impeachment trial).

118. See Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1435 (2018).

119. See *id.*

120. See Carrie Johnson, *How The Justice Department Has Changed Under Trump's Presidency*, NPR (Oct. 25, 2020, 7:51 A.M.), <https://www.npr.org/2020/10/25/927564343/how-the-justice-department-has-changed-under-trumps-presidency> [https://perma.cc/J8U5-WPHF].