The Independent Attorney General: An Analysis of Why the Office Should be Insulated from Presidential Political Imperatives

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INTRODUCTION

The Office of the Attorney General, created during the First Congress, has become one of the most recognizable administrative offices within the executive branch.[1] A president's pick to head the Department of Justice is one of the most consequential and scrutinized.[2] However, the Department of Justice (DOJ), as we have come to know it, did not exist until 1870.[3] For nearly one century, the Attorneys General had no authority over any district attorneys, had no employees working under them, and were themselves part-time employees.[4] Until 1870, the authority and powers the Attorney General could exercise were the subject of much debate.[5] But even after the creation of the DOJ, there is still a shocking amount of uncertainty as it pertains to the Department's responsiveness to the executive because the Attorney General (AG) is a prominent member of any president's cabinet.[6]

When compared to the other agencies created in the First Congress–the Department of Foreign Affairs, the Department of War, and the Department of Treasury–the Office of the Attorney General received far less consideration in clearly outlining the role and the powers of the Attorney General.[7] Since 1789,

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1. *See The Executive Branch*, NAT'L ARCHIVES (2017) https://obamawhitehouse.archives.gov/1600/executive-branch [https://perma.cc/49ZB-47C7]; *Attorneys General of the United States,* USDOJ, https://www.justice.gov/ag/historical-bios?page=0 [https://perma.cc/UQ44-VYZS].

2. *See* Debra Cassens Weiss, *Biden's AG pick will be scrutinized amid probe of his son; will special counsel be appointed?*, A.B.A. J. (2020) https://www.abajournal.com/news/article/bidens-ag-pick-to-be-scrutinized-amid-probe-of-his-son-will-special-counsel-be-appointed [https://perma.cc/U997-E2DC]; Scott Stein, Naomi Igra & Doreen Rachal, *INSIGHT: Trump Pick for AG to Be Scrutinized for Views on False Claims Act Enforcement*, BL (2019) https://news.bloomberglaw.com/us-law-week/insight-trump-pick-for-ag-to-be-scrutinized-for-views-on-false-claims-act-enforcement [https://perma.cc/L8K8-92BE].

3. *See* Susan Low Bloch*, The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism,* 1989 DUKE L.J. 561, 619-620 (1989).

4. *Id*. at 567.

5. *See* Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1052 (1978).

6. *See* Bloch, *supra* note 3, at 562.

7. *Id*. at 563.

Congress has been notably silent over the president's ability to exert control over the Attorney General, leading to much confusion among scholars, judges, and even the officeholders, about how responsive the AG is to the political whims of the president.[8]

Today, the legitimacy of the Department of Justice is of great concern as political-in-nature investigations are increasing.[9] Former President Trump tested the limits of a president's ability to exert control over federal prosecutors as he fired or forced the resignation of numerous high-ranking DOJ officials, and the DOJ was consistently in his crosshairs.[10] Additionally, the Justice Department was one of the executive administrative agencies that former President Trump attempted to weaponize to overturn the 2020 election.[11] An analysis of President Trump's incessant attacks on the DOJ will show that whatever independence remains is from the reliance on federal prosecutors' ability to utilize norms and internal DOJ regulations to maintain independence. However, with no explicit codification of these norms, how much pressure from a president can we expect the customs to withstand?

Additionally, the legitimacy of the Department remained in flux even after President Biden assumed office and the appointment of a relatively independent AG in Merrick Garland.[12] Following the events on January 6, 2020, the DOJ conducted expansive investigations into those involved in the raid on the Capitol.[13] Current defendants in these January 6 trials espouse the notion that the DOJ is full of 'political hacks' and that the institution itself is tyrannical in nature.[14] However, supporters of the prosecution of these individuals believe the

8. *See id*. at 562.

9. *See* Stephen Collinson, *The Justice Department is in a no-win situation as Trump's fury rages*, CNN (Aug. 11, 2022) https://www.cnn.com/2022/08/11/politics/justice-department-trump-fury-analysis/index.html [https://perma.cc/8QX5-HQWS].

10. *See, e.g*., Domenico Montenaro, *Suspicious Timing and Convenient Reasoning for Trump's Firing of Comey,* NPR (May 10, 2017) https://www.npr.org/2017/05/10/527744909/suspicious-timing-and-convenient-reasoning-for-trumps-firing-of-comey [https://perma.cc/4VYX-V3CL].

11. *See* Deirdre Walsh, *Trump Tried to Use the DOJ in His Effort to Overturn Election, ex-DOJ Officials Said,* NPR (2022) https://www.npr.org/2022/06/23/1107151077/trump-tried-to-use-the-doj-in-his-effort-to-overturn-election-ex-doj-officials-s [https://perma.cc/BJ9H-ZEEK].

12. Former President Trump did not concede the election until less than two weeks before President Biden's was to take office, and the U.S. Capitol was raided while the results of the election were being certified because a significant portion of Trump supporters (including elected officials) believed the 2020 presidential election was 'stolen.' *Capitol riots timeline: What happened on 6 January 2021?*, BBC (2022) https://www.bbc.com/news/world-us-canada-56004916 [https://perma.cc/956C-ZAZR]. Trump was impeached for his involvement in the January 6 riots, and the DOJ is conducting an expansive investigation into his and his political associate's involvement in the attack. *Trump impeached for 'inciting' US Capitol riot in historic second charge*, BBC (2021) https://www.bbc.com/news/world-us-canada-55656385 [https://perma.cc/LN7Q-96GY].

13. *See 26 Months Since the Jan. 6 Attack on the Capitol*, USDOJ (2023) https://www.justice.gov/usao-dc/26-months-jan-6-attack-capitol [https://perma.cc/E5D6-YHLG].

14. Brandon Straka, *JOHN STRAND INTERVIEW with Brandon Straka*, YouTube (Sept. 12, 2022), https://www.youtube.com/watch?v=m9wfRE_84kY. [https://perma.cc/TVD6-GBLK].

investigations are warranted and necessary to preserve our democracy.[15] Combined with the recent FBI raid of Trump's Mar a Lago resort, and calls for an indictment of the former president, the DOJ could be seen as fanning the flames of an ever-growing fire despite President Biden and AG Garland's insistence the DOJ has remained independent.[16] This phenomenon is the key impetus for this note. Even if an AG, and by extension, the DOJ is acting independently of the president, the legitimacy of the agency will still be called into question because of the political pressures the president places on the AG.

It logically follows then that the public approval rating of the DOJ is closely correlated to the public approval rating of administrations in office.[17] As administrations change political parties, the party in favor of the department switches at a drastic rate.[18] Thus, it is not a stretch to find that the Department is viewed as a political actor, more so than other agencies. This finding is troubling when considering that our nation is one made up of laws, and our society is structured around peoples' interactions with those laws. To ensure a stable society, there must be consistency among those enforcing and investigating potential violations of the law. The last six years have cast a shadow of doubt over the impartiality of a pivotal agency to our society, and such political polarization of an integral agency poses a substantial risk to the legitimacy of those who enforce our laws.[19]

This Note will argue that the political pressures the DOJ has been subjected to are impermissible, and safeguards must be put in place to ensure consistent enforcement of laws. If an agency is found to be insulated from presidential control by the Supreme Court, there is a higher likelihood that these safeguards will be deemed permissible limits to the president's power to exert control over an agency.[20] This Note will therefore argue the DOJ is more insulated than ordinarily thought. Part I of this Note examines the importance of the Department of Justice to the United States, as well as the general structure of the DOJ and its changes since 1789. Part II analyzes the similarities and differences between the DOJ and executive agencies. This section also includes an analysis of independent agencies and discuss how the norm of prosecutorial independence fits into the insulation of the agency at large. Part III explores instances where the president

15. *See* Laura Santhanam, *New Poll Asks Americans Whether Trump Should Face Charges, Top Midterm Priorities,* PBS (2022) https://www.pbs.org/newshour/politics/poll-trump-should-be-charged-for-jan-6-about-half-of-americans-say [https://perma.cc/T3NG-GEUF].

16. *See id.*; Jan Wolfe, *Donald Trump's Mar-a-Lago Home Searched by FBI: What to Know,* THE WALL ST. J. (2022) https://www.wsj.com/articles/donald-trump-search-mar-a-lago-fbi-11660267417 [https://perma.cc/RAZ2-Y8TP].

17. *See Public Holds Broadly Favorable Views of Many Federal Agencies, Including CDC and HHS*, PEW RSCH. CTR. (Apr. 9, 2020), https://www.pewresearch.org/politics/2020/04/09/public-holds-broadly-favorable-views-of-many-federal-agencies-including-cdc-and-hhs/ [https://perma.cc/7WVL-PSPF].

18. *See id.*

19. *See* Collinson, *supra* note 9; Kevin Wack, *American Justice Isn't Impartial Anymore*, THE ATLANTIC (2020) https://www.theatlantic.com/ideas/archive/2020/02/gradual-politicization-doj/606469/ [https://perma.cc/E993-2ZB9].

20. *See* Vermeule, *infra* note 94, at 1166.

has used his power to exercise control over the policies and directives of the DOJ. Part IV discusses the ethical implications and the limited role that the *Model Rules of Professional Conduct* can play in regulating the actions of prosecutors and Attorneys General. Finally, Part V briefly investigates the potential solutions to this legitimacy issue.

I. FROM OAG TO DOJ

As previously discussed, the DOJ and the AG that exist today were not conceived by the creation of the OAG in 1789.[21] Rather, as this section will demonstrate, there was a struggle between the Attorney General and Congress to grant the office more power and authority. This section will document the changes the Justice Department has undergone from its inception until today.

A. THE CREATION – FEDERAL JUDICIARY ACT OF 1789

In the last section of the Federal Judiciary Act of 1789, Congress created the Office of the Attorney General. Considering the perception Americans have today that the Attorney General is one of the oldest Cabinet posts and the DOJ is one of the most notable of the executive agencies, the enabling statute's brevity and lack of explicit detail may come as a shock. Section 35 of the Federal Judiciary Act of 1789 reads:

> And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.[22]

The Act merely provides that the Attorney General has a duty to prosecute and conduct suits concerning the United States in the Supreme Court, and a duty to give legal advice and opinion when required by the president or heads of any department.[23] Notably, within the two duties bestowed upon the Attorney General, there is significant ambiguity. The most glaring of those prompts the question, what is a suit concerning the United States? Additionally, how is the Attorney General to know when suits are brought to the Supreme Court that concern the United States, and how is one person meant to litigate all those suits? On the duty to provide advice, does this mean the Attorney General is meant to act as a private attorney for the president and other executive officials? Furthermore,

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21. *See* Bloch, *supra* note 3, at 619-620.
22. Federal Judiciary Act, ch. 20, 1st Cong., §35, 92-93 (1789).
23. *Id.*

the President of the United States is only mentioned in the context of requesting legal advice and opinion from the Attorney General, but not when discussing the appointment of the officer. Does that mean Congress may then reserve the right to appoint the Attorney General?

Some may believe the Constitution explicitly states the president possesses the power to appoint officers in Article II Section 2 when it states: "and he shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law."[24] However, does the silence regarding who may appoint the Attorney General imply that the office is 'inferior' in nature? If so, the same section of the Constitution provides that "the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."[25] As a matter of fact, the initial drafts of the Act vested the appointment power of the Attorney General upon the Supreme Court, potentially implying that it is in fact an inferior officer.[26]

If the lack of clarity in the appointment of the officer is not an indication of Congress creating an inferior officer, then perhaps the power the office held may indicate its status. The enabling statute failed to make the Attorney General a superior officer in any way.[27] At the time, district attorneys were granted the same powers the Attorney General possessed, except their domain was in the district and circuit courts.[28] However, the AG retained no authority over them–he could not appoint them, and he could not control the litigation that they engaged in; rather, he could only take control of a district attorney's case if it reached the Supreme Court.[29] Additionally, the Office of the Attorney General did not have any employees, nor did it provide for a full-time job or a comparable salary to other government jobs.[30]

Despite these indications that the Attorney General was in fact an inferior officer, President George Washington appointed the first AG, Edmund Randolph, in 1790.[31] Within a year of his tenure, Randolph sent a letter to President Washington requesting the Attorney General be informed of all cases under his statutory purview, have the power to direct district attorneys in those cases, and

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24. U.S. Const. art. II, §2, cl. 2.

25. *Id.*

26. *See* Bloch, *supra* note 3, at 567. It is always difficult to imply Congress intended to do anything when it is silent on any given issue, but the fact that initial drafts vested the appointment power in the Supreme Court, and there is no similar explicit provision for the president to appoint the officer in the final draft could be telling.

27. If the Constitution provides for inferior officers, then there must be superior officers, in which, one would imply they must exert control over others beneath them.

28. *Id.*

29. Bloch, *supra* note 3, at 567.

30. *Id.*

31. *Id.* at 583.

that the office would staff a transcribing clerk to assist in drafting opinions.[32] Instead, Congress merely conceded that district attorneys were to keep him informed of lower court proceedings, nothing more.[33] This, therefore, continues to demonstrate Congress's reluctance to change the Attorney General's status from a relatively inferior officer.

B. ALL INTO ONE – THE CREATION OF THE DOJ

The Office of the Attorney General has changed since 1789. The Attorney General received congressional approval for the office's first clerk in 1819, thirty years after the office was created.[34] However, the most formative changes to the office came in the ten-year timespan bookending the Civil War as Congress approved legislation that afforded the Attorney General control over district attorneys (U.S. Attorneys) in 1861.[35] Later, during Reconstruction in 1870, the Department of Justice was formally created.[36]

It is believed by some scholars that the DOJ was "created to handle the onslaught of post-war litigation" and to handle "the protection of black voting rights from the systematic violence of the Ku Klux Klan."[37] However, there is another school of thought that the DOJ was created to cut spending.[38] This Note will not argue either way because regardless of the intent of Congress in 1870, the passage of *An Act to Establish the Department of Justice* allowed for the expansion in power of the Attorney General and increased the scope of power the federal government possessed, even if not seen immediately.[39]

Before coming under the purview of the Attorney General, U.S. Attorneys were under the direction of the Treasury Department and were therefore subjected to the infamous politicization of the spoils system.[40] However, under the Act, the Attorney General would have direct supervision over "all district attorneys and all other law officers who had been stationed in other departments."[41]

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32. *Id.* at 586.

33. *Id.* at 587.

34. *See* Act of Apr. 11, 1820, ch. 40, 16th Cong. §1, 560 (1820).

35. *See* 18 U.S.C. §519 (1861).

36. *See* 28 U.S.C. §501 (1870).

37. Bryan Greene, *Created 150 Years Ago, the Justice Department's First Mission Was to Protect Black Rights*, SMITHSONIAN MAG. (July 1, 2020), https://www.smithsonianmag.com/history/created-150-years-ago-justice-departments-first-mission-was-protect-black-rights-180975232/ [https://perma.cc/NGM3-8HMK].

38. *See* Jed Shugarman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 122–23 (2014) for a theory that the Department of Justice was not created to increase the scope of the federal government or to safeguard the rights of former slaves; rather it was created to professionalize the legal profession while cutting spending. Spending was cut when the Act "cut the equivalent of about sixty district judges or forty assistant attorneys general from the federal government—about one-third of the federal government's legal staff—and replaced them with only one new lawyer, the Solicitor General."

39. This will be conveyed throughout the rest of this section and Part I.

40. Shugarman, *supra* note 38, at 151.

41. *Id.* at 153.

Additionally, the Act importantly prohibited "the use of outside counsel, both within the Department of Justice and in other departments."[42] Furthermore, the Attorney General firmly sat atop the chain of command within the department. According to Representative Thomas Jenckes, the representative who introduced the DOJ Act, the Attorney General's rulemaking power within the department was to make it such that the officeholder's opinion, whether right or wrong, "is an opinion which ought to be followed by all the officers of the Government until it is reversed by the decision of some competent court."[43] The intent of all of these changes was to isolate the government attorneys from political pressures.

C. THE REAL GROWTH OF POWER – 1870-TODAY

Despite the consolidation of power that the DOJ Act in 1870 provided, the Department of Justice was still left with issues that hindered its ability to use the power it was granted. For one, the DOJ did not have an official building.[44] Instead, all employees were separated, with the temporary offices ranging from other department buildings to rented-out office space.[45] Additionally, while the Attorney General maintained control over law officers from other departments, Congress never explicitly repealed the laws that put those same officers under their own power and the "holdover statutes gave the other departments enough legal cover to continue directing the law officers still housed in their buildings."[46] Third, there was a severe lack of funding to prosecute civil rights cases, making it difficult to enforce some of the most important and high-profile violations of newly enacted laws.[47]

As the Department moved into the turn of the century, the lack of funding became burdensome. In order to conduct effective investigations, the DOJ and US Attorneys were renting Secret Service Agents.[48] In light of the constraints this put on the Attorney General to effectively carry out the duties of the office, Attorney General Bonaparte went to Congress to seek assistance.[49] The legislature was less than pleased with the practice the AG was using, and eventually "banned the loan of Secret Service operatives to any federal department."[50] One

42. *Id.* This change effectively consolidated all legal advice for the executive in the Department of Justice.

43. *Id.* at 154 (citing CONG. GLOBE, 41st Cong., 2d Sess. 3036 (1870)).

44. *Id.* at 165

45. *Id.* (The Attorney General could not overcome this basic geography, especially in an era of limited technology and communication.)

46. *Id.* at 166. This phenomenon led to much confusion surrounding who actually had the statutory authority to order the law officers.

47. *Id.*

48. *A Brief History: The Nation Calls, 1908-1923,* FBI, https://www.fbi.gov/history/brief-history [https://perma.cc/8A7A-RW4X]. Not only was this a costly form of investigation, but there were also hierarchical constraints that existed within this scheme. Secret Service agents, while rented by the AG, did not report to him, rather they reported to the Chief of the Secret Service. The failure to exercise substantial control over the investigations frustrated then-Attorney General Bonaparte who made his frustrations known to Congress.

49. *Id.*

50. *Id.*

month later, what is now known as the Federal Bureau of Investigation (FBI) was created when Bonaparte secretly hired nine Secret Service investigators and twenty-five other investigators.[51] The scope of the FBI's investigative ability was relatively limited in the early years of the bureau; however, the scope of the FBI steadily increased by being placed as lead investigators on matters pertaining to the Mann Act and Espionage Act.[52] Now, a century later, the FBI is the principal federal law enforcement agency and is the go-to agency for domestic intelligence and security.[53] To demonstrate the strength of the DOJ, the Director of the FBI answers to the Attorney General.

In 1935, the Department of Justice was finally granted a building with Congressional approval during the FDR Administration, sixty-five years after the department was created and nearly 150 years since the creation of the Office of the Attorney General.[54] Additionally, the DOJ has eight divisions where it exercises substantial federal power–the Antitrust, Civil, Civil Rights, Criminal, Environmental and Natural Resources, Justice Management, National Security, and Tax Divisions.[55] Moreover, the FBI is not the only federal enforcement agency, as sitting within the DOJ are the U.S. Marshals Service, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the Drug Enforcement Administration (DEA), the Federal Bureau of Prisons (BOP), the Office of the Inspector General (OIG), and the National Institute of Corrections (NIC).[56] Due to the ballooning of responsibility over the course of a century, it should come as no shock that the DOJ "has evolved into the world's largest law office and the central agency for enforcement of federal laws."[57]

D. THE INDEPENDENT COUNSEL

While these structural changes are all essential to understanding the scope of the Department of Justice today, one of the most important changes to the functioning of the Department took place in 1978 after the Ethics in Government Act formally created the position of "independent counsel."[58] In the wake of President Nixon's impeachable conduct and abuse of the DOJ, which will be analyzed more fully in Part III of this Note, Congress set forth to establish a system by which executive officials would be held responsible for criminal acts or abuses

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51. *Id.* The fact that he hired the Secret Service investigators was secret, with the President's apparent approval. Bonaparte did inform Congress of the creation of a special agent force.

52. *Id.*

53. *About: What is the FBI?,* FBI https://www.fbi.gov/about/faqs/what-is-the-fbi [https://perma.cc/K24S-PQM3].

54. Shugarman, *supra* note 38, at 165.

55. *See Agencies,* USDOJ, https://www.justice.gov/agencies/chart [https://perma.cc/K8ZB-JT2F] for an organizational chart of the Department of Justice to fully understand how much has come under the Attorney General's purview since the department's creation in 1870.

56. *Id.*

57. *Office of the Attorney General,* USDOJ, https://www.justice.gov/ag [https://perma.cc/T7MV-9MRW].

58. *See* 28 U.S.C. §592 (1978).

of the office.[59] The Act establishes that if the Attorney General is to learn of high executive officials engaging in suspected wrongdoings, the AG is required to conduct a preliminary investigation to determine "whether any person [contemplated in the Act] may have violated any Federal criminal law."[60] After that investigation is complete, "if he finds 'reasonable grounds' for further investigation, [he/she must] request that a special court created by the Act (the 'Special Division') appoint a special prosecutor (now known as an independent counsel)."[61] The Special Division then appoints an independent counsel and defines their prosecutorial jurisdiction.[62] Within that set-upon jurisdiction, the independent counsel possesses the "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice."[63] This highly detailed Act comes in stark contrast to the special prosecutor system used to investigate the Watergate scandal. The decisions and power to appoint the special prosecutor was made by the Attorney General, and there were no defined limits to the Attorney General's ability to infringe on the investigation.[64] Rather, Archibald Cox operated on a "promise" that AG Elliot Richardson would not interfere with the investigation.[65]

The key provision that led to much controversy in *Morrison v. Olson* states that the independent counsel "may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."[66] The Act, at its core, raised three notable issues:

> (1) whether Congress can put law enforcement responsibilities into the hands of someone neither appointed by the President nor easily controlled or removed by him; (2) whether Congress can order the Attorney General to conduct particular investigations, to circumscribe their scope, and to request the appointment of independent prosecutors; and (3) whether, and to what extent,

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59. *See Select Committee on Presidential Campaign Activities*, SENATE.GOV, https://www.senate.gov/about/powers-procedures/investigations/watergate.htm#:~:text=The%20Senate%20Watergate%20investigation%20remains,to%20produce%20lasting%20legislative%20reform [https://perma.cc/LVL3-F2R8].

60. 28 U.S.C. §591(a) (1978).

61. Bloch, *supra* note 3, at 631.

62. *Id.*

63. 28 U.S.C.§ 594(a) (1978).

64. JACK MASKELL, CONGRESSIONAL RESEARCH SERVICE, INDEPENDENT COUNSELS, SPECIAL PROSECUTORS, SPECIAL COUNSELS, AND THE ROLE OF CONGRESS 1–2 (2013).

65. Jim Mokhiber, *Secrets of an Independent Counsel: A Brief History Independent Counsel Law,* PBS (1998) https://www.pbs.org/wgbh/pages/frontline/shows/counsel/office/history.html [https://perma.cc/V5EC-2Z93].

66. 28 U.S.C. § 596(a)(1) (1978); Morrison v. Olson, 487 U.S. 654, 663 (1988). *See also Morrison*, 487 U.S. at 669.

> extra-judicial activities may constitutionally be assigned to [A]rticle III judges.[67]

The Court, ruling 7-1 that the Act was constitutional, found that the limitation on the removal of the independent counsel did not unduly encroach on the power vested in the president that he take care the laws be faithfully executed.[68] In coming to this conclusion, the Court determined that an independent prosecutor was not a purely executive official who must be removable at will because the independent counsel has "limited jurisdiction and tenure and [lacks] policymaking or significant administrative authority."[69] Additionally, the Court could not understand "how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President."[70]

This decision came in the face of a fiery lone dissent from Justice Scalia, which essentially asserted "that Congress could make executive officials independent from presidential control only when they performed quasi-legislative or quasi-judicial functions" as in *Humphrey's Executor v. United States* and *Wiener v. United States*.[71] The majority disagreed and found the distinctions Scalia made as it pertains to quasi-judicial and quasi-legislative functions were too formulaic. Rather, because the independent counsel was an inferior officer, it was no longer the president's exclusive domain. Scalia also made the assertion that federal prosecution is not only an executive power, but is an exclusively presidential power.[72] However, the Court disagreed as the majority "considered it inessential for the President to be the ultimate arbiter, even on occasions when nonpartisan political considerations and foreign policy considerations were implicated."[73] The consequences of this decision will be discussed further in Part IV.

The Ethics in Government Act allowed for the appointment of an independent special prosecutor, a position deemed so essential for democratic governance that the Supreme Court said the president need not exercise control over the role.[74] However, in 1999, the Act was allowed to sunset, as Congress did not renew the statute. Attorney General Janet Reno, under President Clinton, did promulgate rules within the Department of Justice that provided for the appointment of

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67. Bloch, *supra* note 3, at 632.

68. *Morrison*, 487 U.S. at 659–660.

69. *Id*. at 691.

70. *Id*. at 691–692.

71. Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice*, 70 ALA. L. REV. 1, 30 (2018). ("*Humphrey's Executor v. United States* [upheld] a statute that limited presidential power to discharge FTC commissioners to cases of inefficiency, malfeasance, and neglect, and the 1958 decision in *Wiener v. United States*, [held] that the President did not have authority to fire members of a War Crimes Commission at will.").

72. *Id*. at 32.

73. *Id*.

74. Most notably, the Act was invoked in the Iran-Contra Scandal and the Whitewater Scandal that culminated in the impeachment of President Bill Clinton.

special counsel.[75] The key difference between the Ethics in Government Act and the internal rules is that Congress and the Judiciary have no power in the rule's current form; all power resides within the Attorney General.[76]

II. NOT LIKE THE OTHER CABINET OFFICIALS

The Department of Justice's importance to the functioning of our democracy is unquestionable. Similarly, the Attorney General, leading 115,000 DOJ employees, exercises a great deal of power as the chief law enforcement officer.[77] While these statements may be true, this section of the Note will demonstrate that the Department of Justice is vastly different from the other Cabinet Departments, most notably, the Department of State, Department of Defense, and Department of the Treasury. Following the comparison to the aforementioned agencies, the analysis will turn to a discussion of "independent agencies," which will then be supplemented with an analysis of prosecutorial independence within the DOJ to determine where the DOJ sits on the continuum of independent-dependent agencies.

A. CABINET DEPARTMENTS

With the First Congress as a reference point, it is apparent that the Attorney General was not intended to be so subjected to presidential control as the other heads of departments created. The First Congress created four major offices in 1789, The Secretary of War, the Secretary of Foreign Affairs, the Secretary of the Treasury, and the Office of the Attorney General.[78] The disparities in the offices that were created can demonstrate the Framers' intention as it pertains to executive duties and the power the president may exert over federal offices.

Recall that the only mention of the president in the enabling statute for the Office of the Attorney General was that the AG was to "give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any departments."[79] When analyzing the *Act for Establishing an Executive Department, to be denominated the Department of Foreign Affairs*, the role of the president is entirely different: the Secretary of Foreign Affairs was tasked with performing and executing "such duties as shall from time to time be enjoined on or entrusted to him by the President of the United States."[80] Additionally, the Secretary was ordered to partake in activities (such as negotiations, correspondences, or commissions) that the "President of

75. 28 C.F.R. §600 (1999).

76. *Id.* Nonetheless, one of the most high-profile investigations took place under the rules promulgated by Reno, the 2017-2019 investigation by former FBI Director Robert Mueller into the Russian interference in the 2016 Presidential election.

77. *Why Justice,* USDOJ, https://www.justice.gov/careers/why-justice [https://perma.cc/82S4-38AF].

78. Bloch, *supra* note 3, at 563.

79. Federal Judiciary Act, ch. 20, 1st Cong., §35, 92-93 (1789).

80. Act of July 27, 1789, ch. 4, 1st Cong., §1, 28, 29 (1789).

the United States shall assign to the said department; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct."[81] The president's role in the department and his ability to control the actions of the Secretary are clearly laid out in the statute. Also, it is important to remember that in the creation of the Attorney General, it was only enumerated that an Attorney General "shall also be appointed."[82] The Foreign Affairs statute, in contrast, states, "[t]hat there shall be an *Executive* department," indicating that the Department of Foreign Affairs is exclusively under the control of the executive.[83] No such statement exists in the 1789 Judiciary Act.

As for the removal power of the Secretary of Foreign Affairs, Congress enacted a provision in the statute that reads:

> There shall be . . . an inferior officer, to be appointed by the said principal officer . . . who, whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy, shall during such vacancy have the charge and custody of all records, books, and papers appertaining to the said department.[84]

No such consideration can be found in the statute establishing the Office of the Attorney General. Rather, the Office of the Attorney General was buried in the Federal Judiciary Act that established the federal judiciary and did not even provide the officer with a single employee. The Department of Foreign Affairs received an entire statute dedicated to its creation and extensive debate surrounding the provisions mentioned.

The Department of War's statute has much of the same provisions as that of Foreign Affairs. Congress went through and ensured that the statute establishing the Department of War was clear that the Secretary:

> [W]as to take his orders from the President. He was to 'perform and execute such duties as shall from time to time be enjoined on, or intrusted to him by the President of the United States.' Also, like the Secretary of Foreign Affairs, the War Secretary was subject to presidential removal power.[85]

In addition, Congress did not set any internal structure for both departments, and instead entrusted the president and the secretary of the departments to create their own internal structure.[86] Thus, Congress clearly found that the Department of War and the Department of Foreign Affairs were necessary to assist the President

81. *Id.*
82. Federal Judiciary Act, ch. 20, 1st Cong., §35, 92-93 (1789).
83. Act of July 27, 1789, ch. 4, 1st Cong., §1, 28, 29 (1789).
84. Act of July 27, 1789, ch. 4, 1st Cong., §2, 28, 29 (1789).
85. Bloch, *supra* note 3, at 575.
86. *Id.* at 576.

of the United States in carrying out the duties prescribed to him by the Constitution.

The other executive agency created in 1789 was the Department of the Treasury. Within the enabling statute, Congress explicitly provided for the creation of a hierarchical structure, positions, as well as specific duties that the officers in those roles are responsible for.[87] Much like the Office of the Attorney General, there was no explicit role for the president carved out, as there were "no provisions analogous to those directing the Secretaries of Foreign Affairs and War to 'perform and execute' the duties 'enjoined or entrusted to [them] by the President,'" and "the sole reference to the President was the statutory provision recognizing his power to remove the Secretary."[88] Furthermore, the statute provided for a significant amount of congressional checks on the department because its role is so closely tied to Congress's power of the purse.[89] Thus, even while Congress put more restraints on the ability of the president to control the operation, it still explicitly provided for an approval and removal mechanism demonstrating the president could exert at least some power.

The Office of the Attorney General, while created by the same Congress, was evidently not on par with the other three agencies created in 1789 in terms of the powers lined out for them. Furthermore, the statutes clearly delineated roles for the president, both great and small. The enabling clause for the Office of the Attorney General did no such thing. There was no indication in the statute who the Attorney General was to take orders from, like those that existed in all three of the other agencies. Additionally, each of the three other statutes clearly contemplates that the president can exercise the power of removal; meanwhile, section 35 of the Judiciary Act of 1789 is deafeningly silent. The disparity in office could also be seen in the salaries provided to the officials. The Attorney General was the lowest-paid federal official, making a mere $1,500 compared to $3,500 for the Secretaries of Foreign Affairs and Treasury and $3,000 for the Secretary of War.[90]

Evidently, the Office of the Attorney General has evolved significantly since 1789; however, it is still important to understand the intentions of Congress in creating the office. The actions of the First Congress provide insight into the constitutional issues at play. In 1789, the Attorney General was inferior to the other three high-ranking officials created by statute, indicating the office is not paramount to the president's constitutional duties, and thus Congress may impose limits. Looking at modern times, the Department of Justice differs substantially from the Departments of Defense (War), State (Foreign Affairs), and the Treasury. Namely, the Court in *Morrison*, within the last half-century, clearly

87. Act of Sept. 2, 1789, ch. 12, 1st Cong. §1, 65 (1789).
88. Bloch, *supra* note 3, at 576.
89. *Id.*
90. *Id.* at 567 n.21.

refrained from holding that prosecution is a purely executive power, and that the president should have exclusive control over the domain of federal prosecution. The same cannot be said for Defense, State, or Treasury.

B. "INDEPENDENT" AGENCIES

This distinction increases in importance and relativity when an analysis of independent agencies is conducted. Colloquially, many refer to agencies such as the Federal Election Commission, Securities and Exchange Commission, and the Federal Communications Commission, as "independent agencies;" however, there is a lack of understanding about what makes an agency "independent."[91] Some scholars believe they can be identified by a set of factors:

> (1) leadership by a multi-member panel; (2) political criteria for appointment, with no more than a majority allowed to come from one party; (3) broad rule making authority; (4) power to conduct on-the-record adjudicative hearings; (5) power to conduct investigations and to bring enforcement actions either in court or within the agency itself or both; (6) a specialized mandate directing the agency to focus either on particular industries or on specific cross-cutting problems; and (7) restrictions on the presidential removal power.[92]

Of these factors, the most determinative in finding whether an agency is independent, the theory postulates, is for-cause removal, or the "restrictions on the presidential removal power."[93] However, "[t]here are many important agencies that are conventionally treated as independent, yet whose heads lack for-cause tenure protection. Conversely, there are agencies whose heads enjoy for-cause tenure protection yet are by all accounts thoroughly dependent upon" the executive branch, amongst others.[94]

Agencies such as the Securities and Exchange Commission (SEC) are provided no statutory basis for restrictions on the president's ability to remove its officers.[95] Nonetheless, the Supreme Court read into the SEC structure that its commissioners were removable only for cause, despite the enabling statute saying nothing of the sort.[96] Even before *Free Enterprise Fund*, scholars, political commentators, and the public believed the Chair of the SEC was removable only for cause.[97] The same lack of statutory for-cause protection of commissioners and chairs is present in the FEC, FCC, and the Federal Reserve, who, along with the SEC, are some of the most recognizable "independent agencies."[98] Therefore, if

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91. *See* Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 50 (1986).
92. *Id.* at 51.
93. *Id.*
94. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1165–66 (2013).
95. *Id.*
96. Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561, U.S. 477, 495 (2010).
97. Vermeule, *supra* note 94, at 1195.
98. *Id.* at 1175.

the most recognizable "independent" agencies disprove the theory that for-cause removal is the primary indicator of agency independence, the theory is evidently flawed.

As Kitri Datla and Richard Revesz discuss, forcing analysis of agency interaction with the executive through a binary independent or executive–distinction does not factor in the complexities of an agency.[99] Rather, the authors advance a continuum theory that allows for more nuance in determining how much "presidential direction [is involved] in significant aspects of their functioning," and the extent to which agencies can "resist presidential direction" in other aspects.[100] The enabling statute is the key determinative feature in finding where the agency sits on the continuum, ranging "from most insulated to least insulated from presidential control."[101] By looking solely at the enabling statute, the Department of Justice and Department of Defense sit towards the middle of the spectrum, the Department of State and Department of the Treasury are firmly entrenched as amongst the least insulated from presidential control, while the FCC sits directly in the middle, and the SEC, Federal Reserve, and FEC are amongst the most insulated agencies.[102]

The method of using a continuum to analyze the independence of agencies is certainly more advantageous than being stuck in a binary analysis since binaries fail to appreciate grey areas. However, even the form of this continuum that was created by Datla and Revesz neglects to consider an important aspect of agency independence: norms, standards, and conventions of practice. An enabling statute can provide the statutory basis for the power that a president or the executive can exert over an agency; however, as we have seen with the judicial creation of for-cause removal in the SEC, FCC, FEC, and Federal Reserve, the perception of what a president can or cannot do is also important. As Adrian Vermeule identifies, "agencies that lack for-cause tenure yet enjoy operative independence are protected by unwritten conventions that constrain political actors from attempting to bully or influence them."[103] Therefore, it seems a logical step that the continuum should also include conventions in determining agency insulation.

While factoring in conventions and norms of operation may lead to a lack of clarity in identifying where an agency sits on the continuum, it is nonetheless the most useful way to determine how insulated an agency actually is from presidential control. This is especially true in the context of evaluating agencies that, from

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99. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 826 (2013) ("The binary view forces agencies into one of two categories even though there is no clear dividing line. In doing so, the binary view fails to acknowledge the diversity of agency form.").

100. *Id.*

101. *Id.*

102. *See id.* at 825 for a table displaying numerous agencies and where they sit on the insulation continuum.

103. Vermeule, *supra* note 94, at 1166. While this analysis cannot go into depth probing Vermeule's exhaustive identification of conventions that place limitations on the president's ability to act, it is a convincing theory.

the "indicia" of the enabling statute, are not insulated from the president, but really have numerous safeguards in the form of conventions that create more insulation.

C. PROSECUTORIAL INDEPENDENCE

One of the most visible conventions fostering insulation from the president is present in the Department of Justice: prosecutorial independence. If the enabling statute and convention continuum is used to evaluate agencies, such a strong convention indicates that the DOJ sits closer to the "most insulated" side of the continuum than previously thought.

Over time, prosecutors and officers within the Department of Justice have built up norms and practices of prosecutorial independence.[104] The norm derives "from the fundamental constitutional principle that all three branches must act independently before the United States government may punish someone for violating federal criminal law," not just against the executive.[105] The rationale being that as federal prosecutors upholding the law, they should be insulated from political influence from outside actors. Each branch has a constitutional role to play in the prosecution of individuals. For instance, the judicial branch may determine the guilt or innocence of a defendant, but they are constitutionally barred from using their judicial power to create crimes, and from selecting certain individuals for prosecution.[106] Meanwhile, the legislative branch may generally create the statutes that criminalize behavior, but they too are barred from taking part in individual prosecutions in the form of selecting individuals to prosecute, and they have no say in determining whether a defendant is innocent or guilty.[107]

The constitutional restrictions are not as clearly identified for the executive; rather, only important norms "prevent the White House from intervening in individual criminal cases."[108] Rather than having constitutional restrictions, the executive is merely held to the standard that they *should* remain uninvolved, and leave the decision-making to independent professionals, so they refrain from undermining the rule of law.[109] An analysis of how the norm originated and evolved, as it relates to the executive branch will therefore prove helpful.

When the Office of the Attorney General was created, prosecutorial independence "rested on the distinction between law and politics . . . The Attorney General was independent from the President because of his allegiance to the law, a clearly

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104. *See generally* Bruce A. Green & Rebecca Roiphe, *May Federal Prosecutors Take Direction from the President*, 87 FORDHAM L. REV. 1817 (2019).

105. Todd David Peterson, *Federal Prosecutorial Independence*, 15 DUKE J. CONST. L. & PUB. POL'Y 217, 222 (2020).

106. *Id*. at 225–26.

107. *See id*. at 236–61.

108. *Id*. at 261.

109. *See* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1051 (2013).

discernible body of edicts separate from political inclination."[110] The mere difference in the role the Attorney General played to other political actors was enough to foster independence. Additionally, the district attorneys were insulated from Attorney General control due to the structural weakness of the OAG, such that they were inherently independent.[111] There was a general sense of presidential deferral to federal prosecutors to conduct their job using the legal expertise of those who were "learned in the law," except in cases that implicated national interests.[112] This norm and conventional practice continued unchanged until the creation of the Department of Justice in 1870.[113]

As discussed in Part I, the DOJ was created to formalize a hierarchical structure in a formerly muddied system. Additionally, the Department was created to reign in and hold responsible district attorneys that were using their prosecutorial power for political and personal benefits.[114] The statements of those who proposed the bill and were integral in its passing indicate that "[p]rofessionalism was designed to combat political pressure; therefore, presidential or other political control of prosecutors was inconsistent with the vision behind the law department."[115] Thus, prosecutorial independence was of such paramount importance that Congress created a department to insulate prosecutors from political influence.

The convention of prosecutorial independence went largely unchallenged until the mid-nineteenth century.[116] The watershed moment that ultimately provided the impetus for the next change with the convention was President Nixon's Saturday Night Massacre.[117] Successive Attorneys General attempted to insulate the department from presidential control.[118] The strongest form of the norm came in a memorandum where Attorney General Eric Holder stated "that initial communications between the Department and the White House regarding pending or future criminal investigations or cases would include only the Attorney General or Deputy Attorney General and the Counsel to the President, the principal Deputy Counsel to the President, the President, or the Vice President."[119] The sentiment of Holder's

110. Green and Roiphe, *supra* note 71, at 40.

111. *See* Rebecca Roiphe, *A History of Prosecutorial Independence in America*, Other Publications 1 (2017) https://digitalcommons.nyls.edu/fac_other_pubs/342 [https://perma.cc/75B4-K2PW].

112. *See* Green and Roiphe, *supra* note 71, at 43–44.

113. *See* Roiphe, *supra* note 111, at 2.

114. *See* Green and Roiphe, *supra* note 71, at 51–52 ("By consolidating all legal personnel under the Attorney General, the authors of the bill hoped to remove the taint of this sort of cronyism and promote independence by creating a purely professional branch of government.").

115. *Id*. at 55.

116. *See* Peterson, *supra* note 105, at 264–66. The aforementioned administrations will be discussed in Part III.

117. *Id*. at 266.

118. *See id*. at 266–73 for an exhaustive account of the guidelines and internal regulations attorneys general implemented to signify the importance of prosecutorial independence.

119. *Id*. at 272. The memorandum also included that Congressional communications were to be channeled only to the Attorney General or Deputy Attorney General for criminal cases and the Associate Attorney

memorandum has been reaffirmed by current Attorney General Merrick Garland. In his speech after being confirmed by the Senate in 2021, he said, "The only way we can succeed and retain the trust of the American people is to adhere to the norms that have become part of the DNA of every Justice Department employee . . . Those norms require that like cases be treated alike."[120]

Therefore, while it is abundantly clear that the executive has the authority, and duty under the Take Care Clause, to initiate and handle federal prosecutions, the norm of prosecutorial independence demonstrates the president essentially takes a hands-off approach in taking care that the laws are faithfully executed. The president, according to the convention, stays out of individual prosecutorial decisions such that prosecutions are not tainted by undue political influence.[121] Prosecutorial independence is a norm unlike others that exist in agencies sitting on the Cabinet. It is a norm that protects the separation of powers, as each branch has a role to play in federal prosecution; and equally important, it is a norm that safeguards the liberty of every citizen in the United States of America.[122] Placing such an importance on the independence of officials within the DOJ indicates that when factoring practical agency conventions and norms on the insulation continuum, the Justice Department is closer to those that are often considered "independent" of presidential control.

If this finding is combined with the holding in *Morrison*, that so long as Congress does not "sufficiently [deprive] the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws,"[123] it may enact restrictions on the executive's ability to exert control over the agency. The Supreme Court could then constitutionally uphold these restrictions on the president's ability to politically influence the DOJ and interfere with prosecutors.

III. INSTANCES OF PRESIDENTIAL OVERREACH

Some may wonder: if there is a longstanding culture and tradition of prosecutorial independence, why then is the current form of the DOJ–president relationship not the desirable outcome? This section will demonstrate that while the norms have created some separation between prosecutors and the president's politics, this separation is not enough. Former Attorney General, Robert Jackson, powerfully stated that:

General for civil investigations. The memorandum also set a standard for communications "with respect to personnel decisions."

120. Katie Benner, *On First Day, Garland Vows to Restore Justice Dept. Independence*, N.Y. TIMES (Apr. 19, 2021), https://www.nytimes.com/2021/03/11/us/politics/merrick-garland-attorney-general.html [https://perma.cc/5MZU-U9E4].

121. *See* Barack Obama, *Commentary, The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 823 (2017).

122. *See* Peterson, *supra* note 105, at 289.

123. *Morrison*, 487 U.S. at 693 (1988).

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of this one-sided presentation of the facts, can cause a citizen to be indicted and held for trial.[124]

The need to insulate the prosecutor from political influence is clear. While presidents have, for the most part, refrained from interfering with independent prosecutions, the power they exert over high-ranking officials in the DOJ nonetheless subject federal prosecutors to the political pressures prosecutorial independence seeks to shield them from. How much can society expect federal prosecutors to be free from the political whims of those in power if there are no safeguards and protections for high-ranking officials within the department? This section will lay out instances where presidents have exerted political control over the DOJ and impacted the department's policy in an inappropriate manner.

A. PRESIDENTIAL CONTROL OVER US ATTORNEYS

The United States Attorneys' Office makes up a significant portion of the DOJ workforce, and they handle the vast majority of cases that go through the department.[125] United States Attorneys, formerly district attorneys, are the officials that head each office. As such, they are "the chief federal law enforcement officer in their [judicial] district," and are involved in "civil litigation where the United States is a party."[126] The US Attorney oversees all Assistant US Attorneys within their district. Additionally, the 93 US Attorneys are appointed by the president, with advice and consent of the Senate, and answer to the Attorney General.[127]

A convention has developed in relation to the appointment of US Attorneys at the start of a president's term. Starting with President Reagan, presidents ask for the resignation of US Attorneys at the start of their term.[128] Over time, incoming presidents replacing US Attorneys has become a "common practice—a means of

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124. Robert H. Jackson, *"The Federal Prosecutor" An Address by Robert H. Jackson, Attorney General, Delivered at the Second Annual Conference of U.S. Attorneys*, 1 (1940) https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf [https://perma.cc/6H84-HBFH].

125. *See* Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 781 (1998).

126. *Offices of the United States Attorneys,* USDOJ https://www.justice.gov/usao#:~:text=The%20United%20States%20Attorney%20is,United%20States%20is%20a%20party [https://perma.cc/359V-Z76A].

127. *See id.*

128. David G. Savage, *Replacing U.S. Attorneys Stretches Back to Reagan,* L.A. TIMES (Mar. 23, 2007).

ensuring that administration priorities are honored."[129] However, the convention does not apply to the removal of US Attorneys at any other point during the president's term, as that is seen as "infusing impermissible partisan concerns into individual cases."[130] In 2006, President Bush and his Attorney General, Alberto Gonzales, attempted to flout this convention by firing seven US Attorneys during the middle of his second term, and he faced significant backlash for those actions.[131] Following an investigation conducted by the Inspector General, it was clear there was "significant evidence that political partisan considerations were an important factor" in the decision to fire the attorneys.[132] In addition, Congress initiated its own investigation into the firings, and eventually, Gonzales resigned from his position due to the backlash.[133]

Evidently, the firing of US Attorneys in the middle of the term is deemed as too political. The mere act of replacing US Attorneys at the beginning of the term is also inherently political, yet confusingly the action does not receive the same criticism. If it is the "unwritten, No. 1 rule . . . that once you become a U.S. attorney you have to leave politics at the door," why is there a process of appointment that is inherently political, such that the policy goals of a newly elected president can be enforced?[134] Put another way, if politics are supposed to be "left at the door," but they are the reason an individual makes it through the door, the political influence never truly disappears, especially if the convention exists so administration priorities and policies are enforced.

It may be argued that the removal of US Attorneys is necessary for the DOJ to be held politically accountable. The argument would be that if the president is elected on a campaign of policy initiatives prioritizing the enforcement of certain federal crimes or the nonenforcement of others, then there is legitimacy in removing US Attorneys at the start of the president's term. However, I would point to the fact "that once a bill is enacted into law, the President's legislative role comes to an end and is supplanted by his express constitutional obligation under Article II, §3 to 'take Care that the Law[] be faithfully executed.'"[135] While ensuring that laws are enforced is within this duty, choosing which laws not to enforce is expressly unconstitutional, and as such should not be allowed.[136] If the law is still in existence, and Congress has yet to repeal it,

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129. Green and Roiphe, *supra* note 71, at 69.

130. *Id*.

131. *See* Vermeule, *supra* note 94, at 1202.

132. Peterson, *supra* note 105, at 270.

133. *See id*. at 270–271.

134. Savage, *supra* note 128.

135. TODD GARVEY, CONGRESSIONAL RESEARCH SERVICE, THE TAKE CARE CLAUSE AND EXECUTIVE DISCRETION IN THE ENFORCEMENT OF LAW 4 (2014).

136. *See id*. at 6 ("the most significant aspect of the *Kendall* opinion was its repudiation of the government's assertion that the Take Care Clause constituted a source of presidential power. The Court plainly rejected this argument, holding that the Clause could not be relied upon as a basis for noncompliance with the law . . . The legal reasoning in *Kendall* has long been cited as refuting any asserted presidential power to block the execution

the president should not be allowed to frustrate Congress' intent. The basis for this rationale is that since independence is such a clearly established ideal of the DOJ and federal prosecution, there should not be a difference in the enforcement of the law when administrations change. Consistency and adherence to the law should be preferred. Therefore, the political affiliation of a US Attorney should not be of importance to taking care that the law is faithfully executed.

B. IMPERMISSIBLE PRESIDENTIAL UTILIZATION OF THE ATTORNEY GENERAL AND THE DOJ AT LARGE

Since the mid-twentieth century, the DOJ has seen increased politicization due to the president's influence and interactions with high-ranking officials within the department. The Attorney General is one such high-ranking official that is the least insulated from presidential control.[137] While it is understood the president can discuss enforcement of federal law on a macro level,[138] this subsection will lay out particular instances where the AG, either willfully or not, was used in such a manner that politicized the office and prompted public disapproval.

One of the most glaring uses of the Office of the Attorney General for the personal or political gain of the president was when President John F. Kennedy (JFK) named his brother, Robert F. Kennedy (RFK), to head the Justice Department. Although the DOJ building is named after him and he is seen as a role model to many who have served as AG since the 1960s, his tenure was not absent of scandal.[139] When President Kennedy nominated his brother, he "had to request a voice vote in the Senate because he knew his younger brother would never secure the requisite numbers in a roll call."[140] Not only was nepotism a concern, but so too was politicization of the office with RFK having been JFK's campaign manager during the election.[141] The appointment was made so that RFK would be his brother's ally on the Cabinet, and so he could actively use the DOJ to protect his brother and engage in policy-oriented litigation.[142] Despite Robert

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of validly enacted statutes."). *See also* Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 670 (1985) ("the 'take Care' clause does not authorize the executive to fail to enforce those laws of which it disapproves.").

137. Brian K. Landsberg, *My Experiences with President - Attorney General Relationships*, 53 U. PAC. L. REV. 71 (2021) ("The Attorney General is the chief legal officer of the United States and is also a member of the President's cabinet.").

138. *See id.* at 72.

139. *See* Kris Olson, *Too Close for Comfort: An Insider's View of Presidents and Their Attorneys General*, 38 YALE L. & POL'Y REV. INTER ALIA 1, 3 (2019).

140. *Id.*

141. *See id.*; Landsberg, *supra* note 137, at 73.

142. *See* Olson, *supra* note 139, at 3 (The influence RFK wielded even outside the scope of his office "led the Associated Press to dub him 'Washington's No. 2 Man.'" Additionally, some believe "the President needed his brother to keep an eye on Hoover, who had done everything within his considerable power to undermine the Kennedys.").

Kennedy's long-term impact on the DOJ and civil rights litigation, his appointment caused serious legitimacy concerns for the DOJ at the time.

Kennedy's successor, President Lyndon B. Johnson, also used his presidential power and influence over DOJ officials in a manner that by today's standards, would not be tolerated. The ultimate demise to LBJ's re-election aspirations in 1968 was caused by his shortcomings in the Vietnam War.[143] Unsurprisingly, his incident with the DOJ surrounded the same subject when he "ordered the FBI to investigate and report on civil rights groups and anti-Vietnam war groups for political reasons."[144] Such encroachment by a president in the investigative powers of the DOJ would be met with strong backlash today; however, the norms of prosecutorial independence were not firmly established because President Nixon had yet to have his assault on the department.

Up until the Trump presidency, it was generally accepted that President Nixon was the most detrimental president to the legitimacy of the DOJ.[145] His relationship with the DOJ was one where he exerted his power over the agency to attempt to remain in power, and benefit both personally and politically. His political use of the Department began when he was vice president during the Eisenhower Administration. Attorney General William Rogers was a political ally of Nixon's, and on multiple occasions, saved his political career from scandal.[146] Rogers' ability to steer Nixon through scandals ultimately resulted in forcing "Eisenhower to retain Nixon as his running mate, and Nixon often attributed his political resurrection to Rogers."[147] Nixon returned the favor as he convinced Eisenhower to give Rogers the post of Deputy AG for his first term, and Attorney General for his second term.[148] In the immediate buildup to the Nixon-Kennedy election in November 1960, AG Rogers used his position to assist his ally once more when he postponed the grand jury case against a vital supporter for the Nixon Campaign, Jimmy Hoffa.[149] Once Nixon lost the election, "Rogers brought the indictment."[150]

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143. *See* Robert Mitchell, *A 'Pearl Harbor in politics': LBJ's stunning decision not to seek reelection*, WASH. POST (2018) https://www.washingtonpost.com/news/retropolis/wp/2018/03/31/a-pearl-harbor-in-politics-lbjs-stunning-decision-not-to-seek-reelection/ [https://perma.cc/N369-FC9P].

144. Peterson, *supra* note 105, at 264.

145. *See id*. at 221.

146. *See* Olson, *supra* note 139, at 1 ("Rogers counseled Nixon through his 'Secret Rich Man's Fund' debacle . . . when Nixon was running for Vice President in 1952 and on the verge of being booted off the ticket because of the scandal that had erupted in the press." He was also pivotal in the drafting of Nixon's Checkers Speech, "the first nationally televised address delivered by an American politician—and was one of only a select few permitted to accompany Nixon to the empty auditorium where it was broadcast.").

147. *Id*.

148. *Id*.

149. *Id*. at 2.

150. *Id*.

When Nixon won the presidency in 1968, he began using the DOJ to investigate his political adversaries.[151] However, his main attack on the DOJ's integrity and independence came during his re-election campaign, spearheaded by his first Attorney General, John Mitchell.[152] The former AG himself was a central figure in the Watergate scandal as he "approved the plans for illegal electronic surveillance of the Democratic National Committee's headquarters at the Watergate Hotel as well as other illegal campaign activities suggested by the White House and other campaign officials."[153] Once the FBI investigation was underway, President Nixon had his top aides in direct contact give a presidential mandate to the FBI to close the investigation.[154] Despite the president's numerous attempts to end the investigation, including threatening FBI officials, the investigation continued, but not without the DOJ briefing the White House on its progress and grand jury proceedings.[155]

President Nixon's attempt at controlling the investigation culminated in one of the most infamous nights of the twentieth century: the "Saturday Night Massacre."[156] In October 1973, President Nixon ordered his Attorney General Elliot Richardson to "discharge" Special Prosecutor Archibald Cox, who was conducting the Watergate Investigation.[157] This came after President Nixon "ordered Cox to make no further effort to obtain tapes or other presidential documents. Cox responded that he could not comply with the president's instructions and elaborated on his refusal and vowed to pursue the tape recordings at a televised news conference."[158] When Richardson refused to fire Cox, he then resigned, and President Nixon ordered Deputy Attorney General William Ruckelshaus to fire the special prosecutor.[159] However, he too refused and resigned. When President Nixon then ordered Acting Attorney General (formerly Solicitor General) Robert Bork to fire Cox, he followed the order.[160] These actions ultimately led to the calls for President Nixon's impeachment, which was the impetus for his own resignation.[161] The exertion of such constant pressure and

151. *See* Peterson, *supra* note 105, at 264 ("Both Attorney General John Mitchell and his successor, Richard Kleindienst, allowed the Department of Justice to be used for political purposes and as a tool to advance presidential power.").

152. *Id*. at 265.

153. *Id*.

154. *Id*.

155. *Id*.

156. Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit,* WASH. POST (Oct. 21, 1973) https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm [https://perma.cc/TU88-VGYP]. *See also* Ron Elving, *A Brief History Of Nixon's 'Saturday Night Massacre'*, NPR (Oct. 21, 2018) https://www.npr.org/2018/10/21/659279158/a-brief-history-of-nixons-saturday-night-massacre [https://perma.cc/SX6R-34Z5].

157. *Id*.

158. *Id*.

159. *Id*.

160. *Id*.

161. *See* Landsberg, *supra* note 137, at 72.

control over an investigation into his own actions was intolerable and ultimately led to the passage of the Ethics in Government Act, as well as the further development of prosecutorial independence.

Despite the ever-growing prominence of DOJ standards of prosecutorial independence and public wariness over the politicization of the DOJ, President Ronald Reagan also appointed a political ally to head the department. Attorney General Edwin Meese III assumed the role of AG in 1985 but was formerly the president's chief of staff during his time as governor, chair of his presidential transition team, and was White House counsel for the president's first term.[162] Meese had several scandals during his time as AG. For one, his involvement in the Iran-Contra scandal raised legal concerns.[163] He was also involved in the "Bechtel Iraqi pipeline and WedTech's military contracts with alleged kickbacks."[164] Following an investigation by Special Prosecutor James McKay into the WedTech scandal, it was clear Meese was using his office to benefit Reagan supporters.[165] Despite President Reagan's continued support, Meese resigned in 1988 after the presentation of the WedTech report to Congress, but not before there was further damage to the integrity and image of the DOJ.

Under the succeeding administrations, there was a relative lack of scandals involving the DOJ, up until the 2006 US Attorney firings discussed in the previous subsection.[166] However, beginning in 2017, there was a return to the intense politicization and public questioning of the DOJ's independence that was seen only formerly in the Nixon Administration. President Trump's attacks on the department were constant, and they began within the first days of his presidency. Acting Attorney General Sally Yates, who was to hold the "acting" role until the Senate confirmed Jeff Sessions, refused to defend President Trump's travel ban on the basis that she was not "convinced" of the legality of the order.[167] Just ten days into his presidency, President Trump fired Yates she "betrayed" the department,[168] and he set the tone that his administration would be one that expected loyalty from the DOJ.

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162. *See* Olson, *supra* note 139, at 4.

163. *Id*. at 5.

164. *Id*.

165. *Id*. ("In the wake of these findings, six senior Justice Department officials, among them Deputy Attorney General Arthur Burns and Criminal Division head William Weld, resigned in protest of Meese's malfeasance in office.").

166. *See id*. (This is thanks in large part to the independence and "high ethical standards" of Attorney General Janet Reno who served as AG for the entirety of President Bill Clinton's two terms in office).

167. Carrie Johnson, *Trump Fires Acting Attorney General for Refusing to Defend Immigration Order,* NPR (2017) https://www.npr.org/2017/01/30/512534805/justice-department-wont-defend-trumps-immigration-order [https://perma.cc/V3U5-2ZDC].

168. *Id*. (This account acknowledges the fact that there is a credible argument Yates "wrote a letter that appears to depart sharply from the usual criteria that an Attorney General would apply in deciding whether to defend an EO in court. As such, the letter seems like an act of insubordination that invites the President to fire her. Which he did.").

When Sessions became AG, his attacks did not cease. The main concern for much of Trump's presidency was the investigation into his campaign's ties with the Russian government evidenced by White House aides requesting the FBI refute "reports that Trump campaign advisors had contact with Russia during the presidential campaign."[169] In addition, President Trump had an unprecedented relationship with FBI Director James Comey. On numerous occasions, he asked the head of the FBI to halt investigations into political allies and make misleading statements about the Russia investigation.[170] When he refused to do so in public events, such as the Senate oversight hearing, President Trump fired the FBI Director, an act that has only been done on one other occasion.[171] When the special counsel was appointed to conduct the investigation, President Trump requested Sessions resign because he recused himself from the investigation and did not "protect" the president.[172] President Trump also attempted to have the special counsel discharged, but failed to convince the White House Counsel to do so.[173] These acts all point to President Trump's viewpoint that he has the "absolute right to do what [he wants] to do with the Justice Department."[174]

President Trump also directly flouted prosecutorial independence when his political ally, Roger Stone, was convicted and being sentenced. The prosecutors for the case recommended a prison sentence of seven to nine years, and President Trump stated the recommendation was "'horrible and very unfair' and went on to say that he '[c]annot allow this miscarriage of justice.'" [175] Shortly thereafter, Attorney General William Barr "intervened" and lessened the sentence, which provoked much discord within the DOJ.[176] Following President Trump's loss to Biden in 2020, he also attempted to use the DOJ in his unprecedented attempt to overturn the results of the election.[177]

While President Trump may not have been successful in every attempt to control the Department, he created a serious legitimacy crisis for the DOJ. Norms were flouted, high-ranking officials were fired in an unprecedented manner, and because of the political pressures he put on the agency, particularly those at the

169. Peterson, *supra* note 105, at 274.

170. *See id*. at 278.

171. *See id*. at 279; Philip Bump, *Here's How Unusual it is for an FBI Director to be Fired*, WASH. POST (2017) https://www.washingtonpost.com/news/politics/wp/2017/05/09/heres-how-unusual-it-is-for-an-fbi-director-to-be-fired/ [https://perma.cc/64HV-SJKN] (The only other time an FBI Director was fired was during the Clinton Administration, where the FBI Director was accused of "numerous ethical lapses," and Clinton's reluctance to fire the director "badly demoralized the bureau and exacerbated an already painful rift between the director and top bureau managers").

172. Peterson, *supra* note 105, at 280.

173. *Id*.

174. Green and Roiphe, *supra* note 71, at 3.

175. Peterson, *supra* note 105, at 282.

176. *Id*.

177. *See* Deirdre Walsh, *Trump Tried to Use the DOJ in His Effort to Overturn Election, ex-DOJ Officials Said,* NPR (2022) https://www.npr.org/2022/06/23/1107151077/trump-tried-to-use-the-doj-in-his-effort-to-overturn-election-ex-doj-officials-s [https://perma.cc/KCX5-JNG8].

top of the hierarchical structure, the independence of the entire Justice Department was called into question.

IV. ETHICAL IMPLICATIONS

Attorneys General at both the federal and state levels are subject to the same ethical standards that any other lawyer abides by. The ethical considerations do not change just because an individual is a chief prosecutor in their given jurisdiction. That being said, "the Model Rules were not drafted with government lawyers in mind;" rather the *Model Rules of Professional Conduct* (*Model Rules*) were drafted by private practitioners seeking to regulate private lawyers' interactions with their client.[178] Because of this framing, many of the ethical concerns relating to Attorneys General and their prosecutors are not fully fleshed out in the *Model Rules*. Over time, prosecution and public law were contemplated in the rules, but this portion of the note will argue that even then, the *Model Rules* are inadequate to deal with the ethical quandaries the Attorney General and federal prosecutors face.

Rule 3.8 of the *Model Rules* outlines the "Special Responsibilities of a Prosecutor."[179] The rule states that prosecutors must "refrain from prosecuting a charge" if it lacks probable cause, amongst numerous other safeguards to protect the due process rights of the "accused."[180] However, this rule is deafeningly silent with respect to political superiors directing a prosecutor on any given prosecution. Some may argue that the rule implicitly leaves decision-making power in the hands of the prosecutor as evidenced by the ability to stop investigating or prosecuting a case if it would be unethical to continue with those actions.[181] However, how is a prosecutor meant to uphold ethical standards to the best of their ability if their direct supervisor is forcing upon them an initiative or directive that comes from an official that receives orders from the most well-known politician in the country? The role of the Attorney General, US Attorneys, and the entire prosecutorial field is underrepresented in the *Model Rules*.

While prosecution is only directly considered in rule 3.8, law firms and associations receive extensive consideration in a subset of rules that contemplate the hierarchical structure of firms and the ethical concerns that arise within that structure.[182] Additionally, the *Model Rules* place a significant focus on the standards

178. James E. Tierney, Presentation by James E. Tierney at the 2022 NAAG Attorney General Symposium (April 25–27, 2022).

179. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2018) [hereinafter MODEL RULES].

180. MODEL RULES R. 3.8(a). Other safeguards include ensuring the accused had the opportunity to obtain counsel, and similarly, not to exploit an unrepresented defendant. Additionally, the rule provides standards for the disclosure of evidence as well as public comments about the case. Finally, the rule also states that if there is "clear and convincing evidence" that proves the innocence of a convicted defendant, the prosecutor must remedy the conviction.

181. *See* Green & Roiphe, *supra* note 104, at 1829–30.

182. *See* MODEL RULES R. 5.1–5.7.

for a lawyer's ethical interaction with their client.[183] Unfortunately, the client-based approach does not reflect the type of work that prosecutors engage in. Unlike lawyers at a firm, a prosecutor's client is not a private individual or a corporation; rather, the Supreme Court has held that the United States is "the federal prosecutor's client is the United States and . . . the federal prosecutor's obligation is to see 'that justice shall be done.'"[184] It is imperative to understand that the president is not the client of the prosecutor, rather it is the entire citizenry, a "public entity" that forms a "sovereignty."[185]

If the prosecutor's client is the general public, then much of the *Model Rules* are rendered moot. Rules such as, but not limited to, "a lawyer shall abide by a client's decisions concerning the objectives of representation;"[186] "a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation;"[187] and "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client"[188] serve little purpose to a prosecutor.

It is important to articulate that this note does not argue that the *Model Rules* are useless to federal prosecutors. Rather, the argument is that the rules should be amended to allow for the further ethical regulation of federal prosecutors, a significant portion of the legal workforce in the United States. An entire subset of rules, much like those that exist for firms and associations, should be created to lay out the ethical expectations of prosecutors. In addition, the *Model Rules* should consider including a rule relating to politicians' influence over prosecutors to further solidify the norm of prosecutorial independence. Finally, a rule should be created specifically for Attorneys General that would provide an "ethical out" for the official if they come under extensive political pressure from the President or his/her aides.

V. SOLUTIONS

This analysis has previously discussed that the norm of prosecutorial independence has undergone changes to strengthen the convention when watershed events occur (i.e., cronyism in the Reconstruction era, and the Watergate Scandal). President Trump's attacks on the DOJ and on the independence of federal prosecutors and investigative agencies should be viewed in the same vein. Therefore, President Trump's actions should give rise to an enhancement and strengthening of the independence of the DOJ. With the continuum analysis having been conducted, and this article finding the DOJ may already sit closer to the insulated side on the continuum, courts should be willing to uphold insulation devices for

183. *See* MODEL RULES R. 1.1–1.18.
184. Green & Roiphe, *supra* note 104, at 1828.
185. *Id*.
186. MODEL RULES R. 1.2(a).
187. MODEL RULES R. 1.4(b).
188. MODEL RULES R. 3.2.

the DOJ that they wouldn't otherwise uphold for the Department of State and other agencies of the like.

First and foremost, Congress must codify prosecutorial independence into law. In its current form, the norm is just a guideline for how federal prosecutors are to interact with the president and his aides. There is no disincentive for either party to flout the norms outside of public disapproval. Trust and faith that prosecutors won't be swayed by political pressures can only go so far. Such a statute would provide that disincentive by creating enforcement mechanisms, and ensure that neither the president nor their aides will interfere with individual prosecutions.[189] Additionally, the statute could impose a requirement that the DOJ and the White House compile and submit to Congress a record of all contacts between the two that discussed or implicated a particular case.[190] This process would assist in the enforcement of violations of the new statute, and would aid in the separation of powers concerns because the legislative and judicial branches have clear rules to follow as it pertains to their interactions with the DOJ, while the executive has none.

Another alteration that could be made to the DOJ's structure is making the Attorney General removable for cause instead of at will. While *Morrison* upheld the same standard of removal, it was for an independent counsel that was limited in jurisdiction, tenure, and power.[191] However, the Court never ruled out the possibility of extending the reasoning to other officials like the Attorney General, and did not subscribe to the rationale that the president needs to be the "ultimate arbiter" when it comes to prosecutorial power.[192] However, the Court did hold that if the president's duty established by the Take Care Clause was not infringed upon, Congress could impose removal restrictions.[193] It is important to note that this holding came before prosecutorial independence developed into the strong form seen under AG Holder and now AG Garland. Thus, seeing as the president already operates under a norm of "hands-off" engagement, such a restriction would be permissible. The for-cause removal would then allow the attorney general to recuse themselves from political investigations without fear that they will be forced to resign as Sessions was, as they foster independence and reduce conflicts of interest. Additionally, the provision would insulate the attorney general from improper exertion of presidential influence.

VI. CONCLUSION

Former President Trump imposed significant political pressure on the Department of Justice during his four years as president. While the DOJ was able to resist some

189. *See* Peterson, *supra* note 105, at 286.

190. *See id.*

191. *See Morrison*, 487 U.S. at 671–672 (1988) (The Court also discussed the fact the independent counsel was a subordinate of the attorney general).

192. Green and Roiphe, *supra* note 71, at 32.

193. *Morrison,* 487 U.S. at 689–690.

of that pressure, it did not come out unscathed. Instead, the Department has been tainted with a serious legitimacy issue as it pertains to its ability to remain independent. President Trump demonstrated a willingness to exert presidential authority over the agency on a scale not seen since President Nixon. This is a concern for an agency that is tasked with prosecuting federal laws in a consistent, just, and independent manner. In so doing, political-in-nature prosecutions are bound to arise, such as the January 6 prosecutions and investigations into President Trump. Therefore, legitimacy is of paramount concern to not alienate any faction. Ensuring independence in the department will not only safeguard an individual's right to fair and just prosecution but will allow some of the most sensitive and important investigations to be conducted expertly and independent of political control.

Enacting such protections against executive overreach also addresses separation of powers concerns. The legislative and judicial branches have clearly defined limits on their ability to influence the prosecutorial process, while the president lacks that clarity. Congress can impose parameters on the president's ability to go unchecked in that regard. The constitutionality of such limitations derives from *Morrison* and is enhanced by the Department of Justice's position on the statutory/convention continuum. Thus, the Court should also do its part in ensuring the bounds of the executive are more clearly defined as it relates to federal prosecution and interaction with the Department of Justice.