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## Politics, Prosecutors, and the Presidency in the Shadows of Watergate

By J. Richard Broughton\*

### INTRODUCTION

Perhaps there are no real lessons that are unique to Watergate. Political scandal and corruption, after all, were hardly new to American politics as of 1972. Still, perhaps there is something about Watergate that, if not different, at least amplifies our understanding of the institutional forces at work when government officials seek to extend their authority, or engage in scandalous, or even criminal, behavior.

We know and we see when trouble occurs, or is coming. After all, presidents and other political leaders now have to be presidents and leaders on television. And that reality has been exacerbated, post-Watergate, by the twenty-four-hour news cycle and the ubiquity of the Internet and social media. It has been said that Watergate ushered in an era of great skepticism about the competence of government, generally, and, when combined with the Vietnam War, about the uses of executive power in particular.<sup>1</sup> That skepticism about executive power arose despite a Constitution that needed, and that supplies, an energetic executive<sup>2</sup> (indeed, from the ashes of Watergate emerged an important tool for presidential energy, the executive privilege).<sup>3</sup> And that skepticism seems unlikely to fade in an era of persistent political news coverage and commentary that is capable of reaching the masses instantaneously.

With respect to the presidency specifically, though, perhaps what Watergate accomplished was not merely to make the public skeptical of it but, rather, to affirmatively weaken it, to diminish it, to demystify it (and hence further weaken it).<sup>4</sup> Since Watergate, presidents and presidential candidates have consistently narrowed their distance from the governed and

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\* Assistant Professor of Law, University of Detroit Mercy. I am grateful to the *Chapman Law Review* for inviting me to participate in this symposium, and to Whitney Stefko for her excellent work in planning and executing the event. I am also grateful to Stacy Johnson for excellent research assistance and to Rachael Soren for her excellent editorial assistance.

<sup>1</sup> See, e.g., ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 415–18 (1973).

<sup>2</sup> See *THE FEDERALIST* NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also TERRY EASTLAND, *ENERGY IN THE EXECUTIVE* 9–14 (1992) (discussing Hamilton's energetic executive and placing it in the context of contemporary conservative presidencies).

<sup>3</sup> See generally *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>4</sup> See SCHLESINGER, *supra* note 1, at 417–18. For an excellent treatment of the modern presidency, see ROGER BARRUS, ET AL., *THE DECONSTITUTIONALIZATION OF AMERICA* 105–09 (2007).

embraced a kind of populism that is designed to show empathy with voters and assure the electorate that the candidate can be trusted with power, an assurance made all the more necessary in the shadows of Watergate.<sup>5</sup>

But a contradiction emerges. For as the modern presidency has become more populist—and more Wilsonian, that is, less constitutional and driven to a greater degree by popular opinion<sup>6</sup>—the President's power to persuade the American people to support his political agenda has been emboldened.<sup>7</sup> Presidents now regularly appeal to the masses and to the public mood, and in doing so they have assumed an ever greater role in swallowing up legislative power and dictating the content of national legislation.<sup>8</sup> Presidential campaigns seem rarely to focus on the formal constitutional powers of the office, but instead seem devoted to an explanation of a candidate's proposed political and legislative agenda.<sup>9</sup> Popular leadership, through political rhetoric, has displaced concerns about formal powers and institutional arrangements.<sup>10</sup> Moreover, public approval of Congress has reached record lows: even unpopular presidents remain more popular than Congress.<sup>11</sup> In a strange sense, then, the post-Watergate presidency is in many ways bolder and more pervasive, though often in ways that seem at odds with constitutional forms. The presidency is at once stronger *and* weaker.

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<sup>5</sup> See Roger M. Barrus, *Politics as Theater: The Presidential Debates*, in AMERICA THROUGH THE LOOKING GLASS 19–21 (Roger M. Barrus & John Eastby eds. 1994) (describing how empathy became an issue at the 1992 Richmond presidential debate, and suggesting that this “fellow feeling” was replacing prudence, wisdom, and judgment as the chief qualification for ruling).

<sup>6</sup> See BARRUS, ET AL., *supra* note 4, at 105–09 (discussing the constitutional views of Woodrow Wilson, who rejected the arrangements of the original Constitution and who wanted a presidency grounded in efforts to shape public opinion in order to secure realization of the President's public agenda).

<sup>7</sup> The “persuasive” power of the presidency was described by Richard Neustadt as the core of modern presidential authority. See RICHARD NEUSTADT, *PRESIDENTIAL POWER* 32–60 (1960).

<sup>8</sup> See J. Richard Broughton, *The Inaugural Address as Constitutional Statesmanship*, 28 QUINNIPIAC L. REV. 265, 270–71 (2010) [hereinafter Broughton, *The Inaugural Address*]. I also previously argued that presidents have used the veto power to achieve this result. See J. Richard Broughton, *Rethinking the Presidential Veto*, 42 HARV. J. ON LEGIS 91, 118 (2005).

<sup>9</sup> See Broughton, *The Inaugural Address*, *supra* note 8, at 265–66.

<sup>10</sup> See generally JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* (1987).

<sup>11</sup> Recent public opinion polling, for whatever it is worth on its face, demonstrates consistently lower public approval of Congress (understood, presumably, as it is constitutionally: the House *and* the Senate). According to one website that collects and posts data from various national polls, Congress' approval at the start of 2012 averages somewhere in the low teens. See *Congressional Job Approval*, REAL CLEAR POLITICS, [http://www.realclearpolitics.com/epolls/other/congressional\\_job\\_approval-903.html](http://www.realclearpolitics.com/epolls/other/congressional_job_approval-903.html) (last visited Feb. 20, 2012). According to the widely-respected polling of Gallup, the two-year approval rating of Congress averaged 25% in 2009–10, and 23% in 2007–08. See Lydia Saad, *111<sup>th</sup> Congress Averaged 25% Approval, Among Recent Lowest*, GALLUP POLITICS, (Jan. 5, 2011), <http://www.gallup.com/poll/145460/111th-Congress-Averaged-Approval-Among-Recent-Lowest.aspx>. By contrast, as of the first week of February 2012, President Obama's approval rating was 47%. Throughout most of his presidency, his approval numbers have remained low; his lowest was 38% in October 2011. The average for his term is 49%, as of February 2012. See *Obama Job Approval*, GALLUP, <http://www.gallup.com/poll/124922/Presidential-Job-Approval-Center.aspx> (last visited Feb. 20, 2012).

My focus is on those constitutional arrangements and the kinds of politics that accompany them. I consider them here in the context of one particular aspect of executive power that arises in the shadows of Watergate and the fears of executive power and an Imperial Presidency that followed: the scope of federal prosecutorial power and discretion.<sup>12</sup> The Constitution, I argue, embraces a strong criminal justice presidency. But these are formal powers that presidents and presidential candidates hardly discuss these days.<sup>13</sup>

Generally speaking, prosecutorial power is, and has been recognized by the judiciary as, a core executive power.<sup>14</sup> But the scope of the current federal prosecutorial regime is not the product of presidential aggrandizement.<sup>15</sup> Congress, particularly since Watergate, has continued to expand the scope of the federal criminal law.<sup>16</sup> In doing so, Congress has created an ever-growing menu of charging options for the federal prosecutor, enabling federal prosecutors to leverage more guilty pleas and, as thoughtful scholars have observed, exert tremendous ability to both control the scope of substantive federal criminal law<sup>17</sup> and act as *de facto* final adjudicator of criminal prosecutions.<sup>18</sup> Moreover, courts have not

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<sup>12</sup> See *infra* pp. 8–12.

<sup>13</sup> See *infra* pp. 12–14.

<sup>14</sup> See *United States v. Armstrong*, 517 U.S. 456, 467 (1996); *Morrison v. Olson*, 487 U.S. 654, 691 (1988); *United States v. Nixon*, 418 U.S. 683, 693 (1974). The Court's most vocal adherent to this proposition is Justice Scalia. See *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting) (asserting that "Governmental investigation and prosecution of crime is a quintessentially executive function."). Note also Justice Scalia's observation that prosecuting a crime is *not* part of "the judicial power" under Article III. See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 816–17 (1987) (Scalia, J., concurring).

<sup>15</sup> See Katy J. Harringer, *Executive Power and Prosecution: Lessons from the Libby Trial and the U.S. Attorney Firings*, 38 PRESIDENTIAL STUD. Q. 491, 492–94 (2008).

<sup>16</sup> Numerous scholars have described the ever-increasing "federalization of crime." See generally John S. Baker, *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545, 548–54 (2005); Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 610 (2005); Gerald Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 801–04 (1996); Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 868 (1996); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 505 (1995); Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 158 (1967). I relied upon this literature in another recent piece, as well. See J. Richard Broughton, *Congressional Inquiry and the Federal Criminal Law*, 46 U. RICH. L. REV. 457, 458–66 (2012). *But see* Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 249–52 (1997) (arguing that commentators complaining of overfederalization overlook the federal government's steady decline in criminal law enforcement, as well as substantive areas that ought to command a greater federal enforcement role); Susan Riva Klein & Ingrid B. Grobey, *De-Banking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2050081](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2050081) (disputing the connection between the growth of federal criminal law and the exercise of federal prosecutorial discretion).

<sup>17</sup> See William J. Stuntz, *Plea Bargaining and the Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549–50 (2004); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519 (2001) [hereinafter Stuntz, *Pathological Politics*].

<sup>18</sup> See Rachel Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from the Administrative State*, 61 STAN. L. REV. 869, 878 (2009); see also Angela Davis, *The American*

offered any meaningful limits on prosecutorial discretion.<sup>19</sup> The result is a body of about 4,500 federal criminal laws,<sup>20</sup> many of which are written too broadly, often without meaningful *mens rea* elements,<sup>21</sup> and often for activities that cause either minimal social harms or that are more properly, and constitutionally, regulated by state law.<sup>22</sup> This massive body of law has given rise to, in Rachel Barkow's words, "the Prosecutor as Leviathan."<sup>23</sup> The executive power of prosecuting crimes has appeared to metastasize into substantive lawmaking and adjudicative power, as well.

How can this happen in a post-Watergate world that was supposed to be so solicitous of limits on executive power?

One response is to suggest that, at least for some crimes, broad prosecutorial authority is desirable as a method of combating the kinds of social harms and public corruption that Watergate involved.<sup>24</sup> However, another response is to say that Watergate was concerned not so much about executive power writ large, but about *presidential* power in particular.<sup>25</sup> The key to this distinction is to view the federal prosecutor as politically independent, an executive actor perhaps but not one who acts at the direction of the President. Indeed, making the Justice Department "de-politicized," politically independent, and free of political control has been a constant theme in the post-Watergate era.<sup>26</sup> In light of the Saturday Night Massacre of October 20, 1973, the theme inspired the Ethics in Government Act of 1978<sup>27</sup> and the independent counsel provisions that were so controversial but upheld in *Morrison v. Olson*.<sup>28</sup> The theme also

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*Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001) (describing the power of modern prosecutors and advocating prosecutor review boards as a check).

<sup>19</sup> See *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978).

<sup>20</sup> See Memorandum from John S. Baker, Jr. of Heritage's Center for Legal and Judicial Studies (June 16, 2008).

<sup>21</sup> See generally BRIAN W. WALSH & TIFFANY M. JOSLYN, THE HERITAGE FOUND. & NAT'L ASS'N. OF CRIMINAL DEF. LAWYERS, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN CRIMINAL LAW (2010).

<sup>22</sup> *Id.* at 24–29.

<sup>23</sup> Barkow, *supra* note 18, at 874.

<sup>24</sup> See Harringer, *supra* note 15, at 492–93.

<sup>25</sup> See Archibald Cox, *Watergate and the Constitution of the United States*, 26 U. TORONTO L.J. 125, 126–27 (1976); Ruth P. Morgan, *Nixon, Watergate, and the Study of the Presidency*, 26 PRESIDENTIAL STUD. Q. 217, 229 n.1 (1996).

<sup>26</sup> See, e.g., *Raising the Standards at Justice*, CHI. TRIB., July 14, 1988, at 20 (praising President Reagan's appointment of Dick Thornburgh to replace Ed Meese as Attorney General, despite Thornburgh's partisan political background, and claiming that the Justice Department is "in shambles" after Meese's tenure); James Vicini, *Gonzales Seen as Politicizing Justice Dept.*, REUTERS, Aug. 19, 2007, available at <http://www.reuters.com> (citing sources claiming DOJ politicization under Attorney General Alberto Gonzales).

<sup>27</sup> See Ethics of Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 28 U.S.C. §§ 591–599).

<sup>28</sup> *Morrison v. Olson*, 487 U.S. 654, 696 (1988). Notably, by contrast, John Manning argued that the removal provisions of the independent counsel law actually permitted presidential removal in the event that the independent counsel acted in defiance of a presidential order. See John F. Manning, *The Independent Counsel Statute: Read "Good Cause" in Light of Article II*, 83 MINN. L. REV. 1285, 1288 (1999).

inspired other (unsuccessful) proposals to make the Justice Department and federal prosecutors politically independent.<sup>29</sup> We saw this political independence theme again in the wake of the 2007 United States Attorneys firings scandal in the Bush Justice Department,<sup>30</sup> and more recently in criticism of the Obama Justice Department,<sup>31</sup> both of which drew the attention of the political opposition in Congress.<sup>32</sup> Indeed, current House Judiciary Committee Chairman Lamar Smith of Texas recently issued a report describing the Obama Justice Department as “more partisan than ever.”<sup>33</sup> It seems that “politicization” of the Justice Department has been a regular complaint in official Washington for years.

The theme is sensible as far as it goes. *Of course* we do not want politically motivated criminal prosecutions. That is, we do not want prosecutors to exercise discretion based simply on whether the criminal suspect is a Republican or Democrat, or a political rival of the prosecutors or the administration. Nor do we want federal prosecutors to decline legitimate prosecution of an administration official merely because he fears

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<sup>29</sup> See, e.g., *Removing Politics from the Administration of Justice, Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers, Senate Comm. on the Judiciary*, 93d Cong. 1-3 (1974) [hereinafter *Removing Politics*] (statement of Sen. Ervin) (concerning Senator Ervin’s proposal for making the Justice Department an independent agency); *Watergate Reorganization and Reform Act of 1975, Hearings Before the Senate Comm. on Gov’t Operations*, 94th Cong. 4 (1976) (concerning proposal for temporary special prosecutor recommended by the Attorney General); see also CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* 236 (1992) (arguing that the Justice Department has become “the primary and most effective weapon in the quest to aggrandize presidential power” and this is reason for reconsidering the proposal to make the Department politically independent).

<sup>30</sup> See Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 371 (2009); David M. Dreisen, *Firing U.S. Attorneys: An Essay*, 60 ADMIN. L. REV. 707, 709 (2008); Marisa Taylor, *New Attorney General Has Rebuilding Ahead; Depoliticizing Office Seen as Priority*, LEXINGTON (KY) HERALD-LEADER, Sept. 2, 2007, at A7; Editorial, *New Attorney General: Mukasey Should Chart Independent Course for Justice Department*, COLUMBUS DISPATCH, Nov. 15, 2007, at 16A.

<sup>31</sup> See Hans A. von Spakovsky, *A Politicized Justice Department Strikes Again*, NATIONAL REVIEW ONLINE (Aug. 17, 2011), <http://www.nationalreview.com/blogs/print/274805> (stating “it should come as no surprise that this politicized Justice Department is willing to abuse federal law to suppress anti-abortion views”); Hans A. von Spakovsky, *Politicizing the Law*, NAT’L. REV. ONLINE, Jan. 12, 2010, <http://www.nationalreview.com/blogs/print/228943> (criticizing Civil Rights Division for using enforcement powers to benefit ideological goals of Democrats). In an interview with television and radio host Sean Hannity, former Justice Department lawyer J. Christian Adams discussed a book he recently authored and asserted that what was occurring in the Obama Justice Department was “not just politicization. It’s radicalization . . . .” See *Hannity*, Fox News Channel, Transcript of Interview with J. Christian Adams, available at <http://www.foxnews.com/on-air/hannity/2011/10/05/radicalization-obama-justice-department> (October 4, 2011).

<sup>32</sup> See, e.g., *Preserving Prosecutorial Independence: Is the Justice Dept. Politicizing the Hiring and Firing of U.S. Attorneys?*, Hearing Before the Senate Comm. on the Judiciary, 110th Cong. (2007); *Oversight of the U.S. Department of Justice, Civil Rights Division, Hearing Before the Subcomm. on the Const., House Comm. on the Judiciary*, 112th Cong. (June 1, 2011).

<sup>33</sup> THE OBAMA ADMINISTRATION’S DISREGARD OF THE CONSTITUTION AND THE RULE OF LAW, REPORT OF THE CHAIRMAN, HOUSE COMMITTEE ON THE JUDICIARY, 112th Cong. (Apr. 30, 2012), available at <http://judiciary.house.gov/issues/Reports/AG%20Report%20Final-Final%204%2028%2012.pdf>. [hereinafter CHAIRMAN’S REPORT OF APRIL 30, 2012].

retribution by the President or the President's political appointees, or because he does not want to create a political problem for the otherwise prosecutable individual. The Public Integrity Section of a Justice Department in a Republican presidential administration should not seek indictment of a Democratic governor *merely* because that governor is a political opponent; a United States Attorney appointed by, and with close ties to, a Democratic President should not pursue charges of corporate criminality against a company merely because it was a major Republican campaign contributor. And, presidents and prosecutors should be sensitive to public perception that they are engaged in rank partisanship.

But beyond this, our vision of an apolitical federal criminal enforcement regime is clouded, for there are many ways in which politics and legitimate political considerations affect the role, scope, and duty of the federal prosecutor.<sup>34</sup> Properly distinguishing *partisanship* and *politics*, Dahlia Lithwick and Jack Goldsmith have rightly argued that politics is “inevitable in the enforcement of the law” and that this may be beneficial, at least in the sense of promoting accountability.<sup>35</sup> Moreover—and I would say *inevitably* in Washington politics—some allegations of using the Justice Department as a partisan weapon will naturally flow from the President's political opposition no matter how legitimate the Department's actions.<sup>36</sup> After all, these kinds of allegations tend to come with the hope of partisan gain for the political rivals who lodge them. So just as the Department should be sensitive to claims of partisanship, the Department also should not avoid a legitimate prosecution or other relevant action merely because the President's opponents find some way to accuse him of politicization. We often hear about the “criminalization of politics,”<sup>37</sup> a phenomenon worth sober consideration. But we should also take an interest in the politics of criminalization, or to be more precise, the politics of criminal lawmaking *and* prosecution.

Perhaps the ultimate question is about *who* really controls the exercise of prosecutorial power. One would have thought that a post-Watergate America would have definitively answered this question by now. And yet, the question remains open, and scholars—particularly after *Morrison v. Olson*—vigorously debated this question. I need not resolve that question in this brief project. I simply suggest—as I have in other contexts<sup>38</sup>—that in the context of the federal prosecutorial regime we need not necessarily choose between a strong President and a weak Congress, or a weak

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<sup>34</sup> See Dahlia Lithwick & Jack Goldsmith, *Politics as Usual*, SLATE, Mar. 14, 2007, available at [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2007/03/politics\\_as\\_usual.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2007/03/politics_as_usual.html).

<sup>35</sup> *Id.*

<sup>36</sup> *See id.*

<sup>37</sup> See Edwin M. Yoder, *The Presidency and the Criminalization of Politics*, 43 ST. LOUIS U. L.J. 749, 749 (citing then-recent examples of the phrase's use).

<sup>38</sup> See J. Richard Broughton, *Judicializing Federative Power*, 11 TEX. REV. L. & POL. 283, 314–15 (2007); Broughton, *The Inaugural Address*, *supra* note 8, at 287.

President and a strong Congress. We can, and should, have appropriate (which is to say constitutionally-proscribed) strength in both political branches. The formal powers of *both* political branches inform the role of the federal prosecutor at the level of constitutional *and* ordinary politics. This essay therefore uses federal prosecutorial authority after Watergate as a case study in the embrace (though they remain distinct) between the legal and the political.

#### I. THE POLITICS OF PROSECUTORIAL CONTROLS IN THE CRIMINAL JUSTICE PRESIDENCY

In a post-Watergate world, as we have witnessed, the suggestion of involving the President in the exercise of prosecutorial discretion may be thought to roam too far in politicizing the Justice Department and the notion of impartial criminal justice.<sup>39</sup> But the constitutional presidency leaves quite a bit of room for presidential influence over the enforcement of criminal law, often in ways that will intersect with political considerations. So beyond the formal arrangements that support the case for presidential control over the federal prosecutorial regime, ordinary politics also inform the criminal justice presidency, even as presidents carry out their constitutional functions. Presidents, after all, are not immune from the “tough on crime/soft on crime” dichotomy, however meaningless that dichotomy may be in enforcing and administering criminal law.

To be sure, some scholars have argued compellingly against the notion of broad or exclusive presidential control over federal prosecutors as a matter of our constitutional history.<sup>40</sup> But perhaps the most comprehensive response to this account comes from Saikrishna Prakash, who persuasively uses both text and early constitutional history to argue that the Constitution favors presidential control.<sup>41</sup> Starting from a historical context in which the Crown had control over prosecutors, he notes that early presidents consistently assumed direct control over the work of local federal prosecutors.<sup>42</sup> Moreover, Prakash argues that the text and structure of the Constitution favor presidential control.<sup>43</sup> Indeed, the textual and structural

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<sup>39</sup> See *supra* text accompanying notes 27–31.

<sup>40</sup> See generally Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275 (1989).

<sup>41</sup> Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 521 (2005). For another excellent historical account of presidential perspectives and practices related to control over law enforcement, see generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE* (2008).

<sup>42</sup> Prakash, *supra* note 41, at 527; see also John Yoo, *George Washington and the Executive Power*, 5 U. ST. THOMAS J. L. & PUB. POL’Y 1, 12 (2010) (describing Washington’s view of executive control over law enforcement and explaining that Washington thought his authority as Chief Executive, combined with the Take Care Clause, “gave him the power and responsibility to carry out federal law. This included directing anyone, regardless of his position, who might participate in enforcing the law.”).

<sup>43</sup> Prakash, *supra* note 41, at 537–46.



aspects of Prakash's Chief Prosecutor Thesis form a substantial part of the legal basis for the criminal justice presidency that I describe here (though in my view the criminal justice presidency is more than merely the sum of the constitutional parts, and includes the political components of a President's influence over the federal prosecutorial regime).

The very notion of "executive power," all of which is vested in a single President,<sup>44</sup> offers support for broad presidential control of federal prosecution. The intellectual history of executive power—of which there is no better scholar than Harvey Mansfield—suggests that the term was used throughout political philosophy to mean, in substantial part, executing the law, which included the punishment of criminals.<sup>45</sup> Of course, our constitutional separation of powers owes more to Locke and Montesquieu than to perhaps any other political thinkers, adding the power of judging to the taxonomy.<sup>46</sup> In our system of separated powers, judges and juries adjudicate criminal cases and impose sentences.<sup>47</sup> But, though Mansfield explains that Montesquieu's judicial branch may have softened preceding understandings of executive power by separating the power of judging and making it explicitly independent of political power (thus separating politics from criminal punishment),<sup>48</sup> neither Montesquieu nor other expositors of executive power displaced the authoritative power of the executive to decide when and whether to identify criminal wrongdoers and place them into a system overseen by independent judges. So while judges in our system may ultimately decide and impose criminal sentences, the decision of whether to employ the coercive power of the state against a wrongdoer remains where it was in the earlier taxonomies: with the executive.<sup>49</sup>

The "executive power" that is vested in the President thus includes significant criminal justice responsibilities, which are the core components of the executive power, though not its sum total.<sup>50</sup> Presidents often carry out these responsibilities based on political values that may differ from other presidents. Notably, the President is specifically commanded to "take care that the laws be faithfully executed."<sup>51</sup> But let us consider Take Care Clause politics. After all, the President performs this duty, in significant part, through a system of lawyers at the Justice Department, among them federal prosecutors.<sup>52</sup> Presidents appoint the enforcers of the criminal law: the Attorney General, United States Attorneys, and the Assistant Attorneys General who head the relevant divisions of the Justice Department, including the Criminal Division and other divisions that have a hand in

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44 U.S. CONST. art. II, § 1, cl. 1; *see also* CALABRESI & YOO, *supra* note 41, at 430–31.

45 *See* HARVEY C. MANSFIELD JR., *TAMING THE PRINCE* 102-07, 130-35 (1993).

46 *Id.* at 290.

47 U.S. CONST. art. III, § 1.

48 MANSFIELD, *supra* note 45, at 216.

49 *See* Prakash, *supra* note 41, at 539.

50 *Id.* at 540.

51 *See* U.S. CONST. art. II, § 3; *see also* Prakash, *Chief Prosecutor*, *supra* note 41, at 539–40.

52 *See* Prakash, *supra* note 41, at 539–40.

criminal prosecution. Those appointments may well reflect the enforcement preferences of the President: for example, a United States Attorney who shares the President's desire for rigorous drug enforcement, or an Attorney General who is committed to prosecuting political corruption or corporate criminality or criminal offenses related to civil rights. To highlight this point with just one historical example, President Reagan "consistently named to key positions in the department individuals committed to his *political* objectives."<sup>53</sup> These appointees then "effected important changes in the status quo that illustrate how an administrative presidency is effectively pursued through a particular department."<sup>54</sup>

In addition, other contemporary practices within the Justice Department reveal that the exercise of prosecutorial discretion is affected by a President's political preferences.<sup>55</sup> Enforcement priorities may shift depending upon the political viewpoint of the President.<sup>56</sup> One President may be an advocate for greater attention and resources devoted to violent crimes and terrorism, while the next President may prefer that greater prosecutorial resources be shifted to environmental crimes, financial crimes, or public corruption. Examples are numerous, but a few will suffice here. For one, as Eastland again explains of the Reagan Justice Department, obscenity prosecutions were rare until Reagan's second term, when prosecutions increased substantially.<sup>57</sup> The increase "was a policy change, reflecting the President's concerns," resulting in the creation of a new litigating unit in the Criminal Division to handle obscenity offenses.<sup>58</sup> President Obama recently offered another high-profile example when, in the course of his January 2012 State of the Union address, he indicated that he was requesting that the Attorney General form a special unit of federal prosecutors to investigate and prosecute criminal law violations arising from the mortgage lending scandal.<sup>59</sup> These political preferences also become manifest in the legislative and policy choices that the Department makes, such as when the Department's Office of Legal Policy advocates new legislation, including criminal legislation, that is often a product of the President's political agenda in relevant areas of enforcement.<sup>60</sup> Even when

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<sup>53</sup> See EASTLAND, *supra* note 2, at 155 (emphasis added).

<sup>54</sup> *Id.*

<sup>55</sup> See *id.* at 155–56 (explaining the issue of segregation in school presented "an opportunity for the Justice Department to replace an inherited law enforcement practice with one reflecting the new President's views").

<sup>56</sup> See *id.*

<sup>57</sup> *Id.* at 157–58.

<sup>58</sup> *Id.* at 158. The unit is now known as the Child Exploitation and Obscenity Section (CEOS). See The United States Department of Justice, *Exploitation & Obscenity Section*, available at <http://www.justice.gov/criminal/ceos/>.

<sup>59</sup> See Barack H. Obama, President of the U.S., Remarks by the President in State of the Union Address (Jan. 24, 2012), <http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address>.

<sup>60</sup> See 28 C.F.R. § 0.23 (2011) (detailing duties of the OLP, one of which is to work to "secure enactment" of legislative and policy goals of the Department and Administration); see also Margaret H. Taylor, *Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation*, 16 GEO.

enforcing the Principles of Federal Prosecution found in the *United States Attorneys' Manual*,<sup>61</sup> the Justice Department's enforcement priorities inform prosecutorial decision-making, and again, those priorities often may reflect the political preferences of the White House.<sup>62</sup> As the commentary to the provisions for "substantial federal interest" indicate, the federal prosecutor should consider national investigative and enforcement priorities when exercising his or her discretion about whether to bring a charge.<sup>63</sup> Faithfully executing the law within the arena of prosecutorial discretion thus includes what Jack Goldsmith and John Manning have called the President's "completion power," because the exercise of prosecutorial discretion includes "policy determinations about how best to implement"—to complete—a statutory program of criminal law.<sup>64</sup>

Moreover, it is important to remember that prosecutorial discretion is as much a *check* itself as it is *something to be checked*. The power to decide whether and what charges to bring can just as well function as a way of counteracting a Congress that has drafted criminal legislation poorly, unconstitutionally, or overzealously.<sup>65</sup> Prosecutorial discretion can thus serve as a check on the politics that can produce problematic criminal laws.<sup>66</sup> This kind of decision-making inheres in the obligation to preserve, protect, and defend the Constitution, to faithfully execute the Office of the President, *and* take care that the laws are faithfully executed—complementary powers that not only belong constitutionally to the *President* but that coalesce in the world of controlling prosecutorial discretion.<sup>67</sup> Faithful execution, after all, requires the President to take some measure of the validity of a law he is being compelled to execute, including the power—again when combined with his obligation to the Constitution and to his office—to deliberate upon the constitutionality of the laws and refuse to execute those that contravene the Constitution.<sup>68</sup> For

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IMMIGR. L.J. 271, 293 n.121 (2002) (noting that OLP "is the focal point for developing Justice Department initiatives that advance the President's agenda").

<sup>61</sup> See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-27.001 (1997).

<sup>62</sup> See Mary Kreiner Ramirez, *Prioritizing Justice: Combating Corporate Crime From Task Force to Top Priority*, 93 MARQ. L. REV. 971, 982 (2010) (explaining that "[t]he U.S. Attorneys are appointed by and serve at the discretion of the President of the United States"); see also Brian A. Cromer, *Prosecutorial Indiscretion and the United States Congress: Expanding the Jurisdiction of the Independent Counsel*, 77 KY. L.J. 923, 941 (1989) (explaining that "federal prosecutors cannot be depended upon to maintain an attitude of independence in contravention of the President's wishes.").

<sup>63</sup> U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-27.230.

<sup>64</sup> Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2293 (2006).

<sup>65</sup> The decision not to prosecute has not been subject to particularly rigorous examination in the criminal justice scholarship. But for an excellent recent discussion of discretion not to prosecute, see Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1243 (2011). See generally Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221 (2003) (empirically examining decisions not to prosecute).

<sup>66</sup> See *infra* Part B.

<sup>67</sup> See Saikrishna Bangladore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO L.J. 1613, 1616 (2008).

<sup>68</sup> See Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199,

example, suppose Congress passed, and a prior President signed into law, legislation making X a crime, even though that legislation is clearly unconstitutional. Can Congress demand that it be enforced anyway? Could Congress enact a provision demanding that prosecutors seek indictments pursuant to the legislation? My point here is that it would make little sense to invest a President with power to evaluate the constitutionality of the laws if he cannot authoritatively order his executive branch subordinates not to enforce those laws that he deems to be unconstitutional.<sup>69</sup>

Constitutionally, the President also has the sole power to grant pardons and reprieves, a key ingredient of the criminal justice presidency and one so broad that it is constitutionally limited only in two minor ways: presidents can employ it only for offenses against the United States and not in cases of impeachment.<sup>70</sup> While the breadth of the power means that it may be subject to political abuses,<sup>71</sup> it can also be used to further a President's legitimate political goals or to reflect a President's moral values expressed politically.<sup>72</sup> The President can grant clemency to persons convicted of crimes that the President views as unjust or unconstitutional, or whose sentences are inconsistent with a President's view of just and fair sentencing policy.<sup>73</sup> This, too, represents a meaningful control over the work of federal prosecutors by affirmatively undoing the legal consequences of the conviction or punishment for which the prosecutor's office had fought and invested considerable resources. Of course, as is often the case, the President will exercise his judgment as to the pardon or reprieve in favor of an individual who was prosecuted under a previous administration, thus allowing the President to give conclusive effect to his political differences with his predecessor.

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200 (2004); Prakash, *supra* note 67, at 1616–17; Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1280 (1996).

<sup>69</sup> Sai Prakash has argued that this is actually *required*. See Prakash, *supra* note 67, at 1616–17.

<sup>70</sup> See U.S. CONST. art. II, § 2, cl. 1; see also THE FEDERALIST NO. 74, at 447–48 (Alexander Hamilton) (explaining that “without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel” and that this power is best placed in the hands of a single man, “a more eligible dispenser of the mercy of the government than a body of men”).

<sup>71</sup> See Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 285 (1993); see also Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665, 1666–69 (2001) (describing controversies surrounding pardons granted by President Clinton during his final days in office); Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton's Last Pardons*, 31 CAP. U. L. REV. 185 (2003) (examining the Clinton pardons from a process-based perspective).

<sup>72</sup> See Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. C.R. & C.L. 253, 280 (2010) (explaining that “the founding generation understood the Pardon Clause to mean that when an offense properly falls within its terms, the decision whether to grant clemency would be subject largely to the constraints of the political process and the President's own personal sense of moral integrity.”).

<sup>73</sup> See Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1169 (2010). Moore, *supra* note 71, at 286–88.

Finally, the politics of federal prosecution can emerge in the context of presidential rhetoric.<sup>74</sup> Of course, recent presidential campaigns have rarely focused upon issues of crime and punishment. With a recent decline in crime rates,<sup>75</sup> and national politics focused on either economic conditions or international terrorism, recent sitting presidents also have not made criminal justice policy a regular talking point. This has been true despite the criminal justice presidency I have described here, in which criminal law enforcement and administration are among the chief duties of the head of the executive branch. But as the presidency has become increasingly rhetorical,<sup>76</sup> and as presidents make their case for political preferences to an ever-growing swath of the rhetoric-consuming public (not simply in person, but now electronically in more diverse ways than ever before), presidents can benefit politically from talking more about criminal justice matters. It is preferable that political rhetoric about prosecutorial preferences occur in the context of the President's formal institutional responsibilities, such as in an address to Congress, in signing or vetoing criminal legislation, or in formally recommending criminal legislation.<sup>77</sup> But regardless of the political or institutional context in which the rhetoric is voiced, the expression of such views in the context of political rallies, campaigns, or other public speeches can produce and inform the kinds of policies that prosecutors will be asked to pursue on behalf of the President.

A strong case thus exists for a criminal justice presidency that inheres in the constitutional presidency and that, in practice, functions not simply as a political control over federal prosecutors but also as a way to view the impact of ordinary politics upon the everyday work of prosecutors. Even if prosecutors and other criminal justice professionals in the Government do not view themselves as carrying out partisan objectives, they should nevertheless understand that the nature of their work is determined in substantial part by the political sensibilities of the President under whom they serve.<sup>78</sup> This arrangement surely seems inconsistent with the political independence theme that emerged after Watergate and that arises from time to time in modern politics. Yet it is one that the constitutional system embraces.

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<sup>74</sup> See Obama, *supra* note 59 (illustrating President Obama's discussion of prosecution in his State of the Union Address); see also JEFFREY K. TULIS, REVISING THE RHETORICAL PRESIDENCY, IN BEYOND THE RHETORICAL PRESIDENCY 3 (Martin J. Medhurst ed., 1996).

<sup>75</sup> Preliminary Semiannual Uniform Crime Report, Jan.-June 2011, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/preliminary-annual-ucr-jan-jun-2011> (last visited Mar. 31, 2011); see also *Falling Crime Rates Challenge Long-Held Beliefs*, NPR (Jan. 3, 2012), <http://www.npr.org/2010/01/03/144627627/falling-crime-rates-challenge-long-held-beliefs>.

<sup>76</sup> See TULIS, *supra* note 10, at 4.

<sup>77</sup> *Id.* at 13.

<sup>78</sup> See Cromer, *supra* note 62; see generally Prakash, *supra* note 41.

## II. CONSTITUTIONAL AND CRIMINAL JUSTICE POLITICS IN THE CONGRESS

Even as there are persuasive arguments that existing constitutional formalities provide for strong presidential controls over the federal prosecutorial regime, this does not make Congress impotent as to that regime. It would be unwise to overlook the controls on the work of prosecutors and on the criminal justice presidency that derive from Congress' institutional powers—and that also can be deeply political. Congress usually empowers the criminal justice presidency and the prosecutorial regime that resides in it.<sup>79</sup> But Congress need not always do so, and there is evidence that greater constraints are worth pursuing in light of the scope of federal criminal law and the vast authority of modern federal prosecutors.

The very creation of criminal law by legislation is a political act.<sup>80</sup> The motivations for creating and defining crime may not be, indeed hardly ever are, distinctly *partisan*.<sup>81</sup> But criminal legislation, as much as any other kind of legislation, is motivated by preferences about good social order, justice, and moral desert—preferences that are often subject to dispute among reasonable people.<sup>82</sup> Beyond a small core of federal crimes, there are very few crimes that Congress has created which are universally accepted as legitimate.<sup>83</sup> Consequently, choosing whether to make something a crime means that the lawmaker must take sides on these disputes about preferences, and this creates the likelihood that he will, at least in some measure, consider his own potential political gain.<sup>84</sup> In modern parlance, “tough on crime” beats “soft on crime”,<sup>85</sup> and *that* political factor, as much as anything, helps to explain the current size of federal criminal law.<sup>86</sup> And as federal criminal law demonstrates, this political act of crime-creation has substantial consequences for the exercise of prosecutorial discretion.<sup>87</sup>

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<sup>79</sup> See Krent, *supra* note 40, at 282–85; see also Jack M. Beerman, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 158 (2006) (explaining that “Congress is intimately involved in the execution of the law, both formally through legislative and other controls on the executive branch and informally through oversight, investigations, direct contacts, and other political methods”).

<sup>80</sup> See generally William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006).

<sup>81</sup> *Id.*

<sup>82</sup> For thoughts on the factors related to the aims of the criminal law that influence legislative decision-making, see generally Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

<sup>83</sup> See *id.* at 475.

<sup>84</sup> See Stuntz, *supra* note 80, at 850.

<sup>85</sup> See Broughton, *supra* note 16, at 470–71.

<sup>86</sup> See Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn From the States*, 109 MICH. L. REV. 519, 523–24 (2011).

<sup>87</sup> Although he does not deal exclusively with federal prosecutors or federal legislative politics, Bill Stuntz offers a keen analysis of the relationship between politics constitutional law, and criminal law enforcement. Among other insights, Stuntz argued that the constitutional law of criminal procedure had the effect of making political discourse, and the resulting substantive criminal law, “too punitive, racially divisive, and insufficiently attentive to the liberty and autonomy interests that constitutional law allegedly protects.” Stuntz, *supra* note 80, at 850. In his other writing, however, Stuntz also explains

As we have seen, after all, the story of contemporary federal criminal law is a story of continued expansion.<sup>88</sup> More criminal laws means more potential prosecutions, which means more federal resources devoted to the exercise of prosecutorial power. It means greater overlap with state crimes, so that federal prosecutors are challenged more often to decide whether, consistent with the Department's *Petite* Policy, to prosecute a federal crime after a completed or contemplated state prosecution arising out of the same acts or transactions.<sup>89</sup> This results in greater pressure on the Justice Department, when enforcing internal policies, to determine which interests are both "substantial" and "federal," and whether they are worth pursuing through criminal prosecution.<sup>90</sup> And as the menu expands, (and with the elements in the Government's favor), with the Government pursuing more prosecutions, historical practice demonstrates that an overwhelming number of cases will result in guilty pleas.<sup>91</sup> Ever harsher punishments then aggrandize the phenomenon. That is, in many cases, even though judges hand down the ultimate sentences, prosecutors can persuasively recommend punishments that are harsh, and the *availability* of such harsh sentences only enhances the power to leverage pleas.<sup>92</sup> Prosecutorial discretion thus metastasizes along with the increased scope of the criminal law. Although the judiciary occasionally steps in to police procedural misconduct by prosecutors,<sup>93</sup> or to either strike down or narrow the reach of a substantive criminal law,<sup>94</sup> courts generally do not police prosecutorial discretion.<sup>95</sup> The separation of powers provides ample reason not to do so. But as a result, this arrangement inevitably exerts pressure on political actors—members of Congress, who are the creators—to exert *some* control

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why there are particular kinds of political pressures that apply to federal lawmakers. See Stuntz, *Pathological Politics*, *supra* note 17, at 545–49.

<sup>88</sup> See Stuntz, *Pathological Politics*, *supra* note 17, at 508.

<sup>89</sup> See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-2.031 (2007).

<sup>90</sup> *Id.*

<sup>91</sup> See Barkow, *supra* note 18, at 879; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 56 (1997).

<sup>92</sup> See Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 717–18 (2006).

<sup>93</sup> See, for example, the district court's order in the corruption prosecution of former Senator Ted Stevens. *United States v. Stevens*, 715 F.Supp. 2d 1 (D.D.C. 2009); *In re Special Proceedings*, 2011 WL 5828550 (D.D.C. 2011), as well as the district court's order requiring the government to pay \$600,000 in defense legal expenses as a result of prosecutorial misconduct in the Southern District of Florida. *United States v. Shaygan*, 661 F. Supp. 2d 1289, 1293 (S.D. Fla. 2009).

<sup>94</sup> See, e.g., *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010) (striking down on First Amendment grounds federal criminal law punishing depictions of animal cruelty); *Carr v. United States*, 130 S. Ct. 2229, 2232–33 (2010) (holding that 18 U.S.C. § 2250(a) (2006) applies only to present or future travel in interstate commerce, not to travel that pre-dated the law's enactment); *Abuelhawa v. United States*, 129 S. Ct. 2102, 2107–08 (2009) (holding that Congress did not intend 21 U.S.C. § 843(b) (2006), which makes it a felony to use a communication facility to facilitate certain federal drug crimes, to apply to a person who uses a cell phone to obtain possession of a controlled substance in an amount that would only constitute a misdemeanor); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding Gun Free School Zones Act unconstitutional as violation of Commerce Clause).

<sup>95</sup> See Barkow, *supra* note 18, at 869.

over the law and the process, not simply to empower prosecutors but also to combat prosecutorial overreaching.

The problem, however, is that Congress rarely does so.<sup>96</sup> Of course, the conventional—and I think largely accurate—explanation for this is, in fact, a political one. Legislators see no political upside to reducing the scope of the criminal law or in advocating reduced punishments for convicted criminals.<sup>97</sup> Again, the “tough on crime” label trumps all else.

Examples abound, but political crimes offer a useful model for considering the matter. Most of the attention scholars have given over the past two decades to the Ethics in Government Act of 1978 deals with the independent counsel.<sup>98</sup> But that law also added new criminal provisions related to lobbying and financial disclosure by public officials and federal employees.<sup>99</sup> Many prosecutions though, do not even rely on criminal laws specific to *political* corruption.<sup>100</sup> Some of the most popular items on the prosecution’s menu for fighting public corruption include the Racketeer Influenced and Corrupt Organizations Act (RICO);<sup>101</sup> the Hobbs Act;<sup>102</sup> mail and wire fraud,<sup>103</sup> and honest services fraud;<sup>104</sup> and finally—what is perhaps the new “darling” of the federal prosecutor<sup>105</sup>—the false statements statute.<sup>106</sup>

Yet along with this expanded menu has come the enhanced danger of prosecutorial overreaching.<sup>107</sup> And this danger arises whenever the Congress enacts poorly-crafted legislation, such as legislation that is vague or ambiguous or unclear as to the mental element that the government must prove. In fact, to provide just one recent example, the proclivity for

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<sup>96</sup> *Id.*; see also Richman & Stuntz, *supra* note 16, at 610–11 (describing the increased demand for federal criminal jurisdiction among agencies and observing that “Congress has been all too happy to meet that demand, especially in the past generation”). Professor Krent also argues that the modern Congress has, as a matter of practice, simply acquiesced in the executive’s efforts to control law enforcement, and that this practice “masks the historical conflicts [between Congress and the executive] that have taken place.” Krent, *supra* note 40, at 311.

<sup>97</sup> Barkow, *supra* note 18, at 869; Richman & Stuntz, *supra* note 16, at 610; Broughton, *supra* note 16, at 470–72.

<sup>98</sup> The literature on the independent counsel provisions is extensive. For thoughtful examples, see Julie O’Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 463–65 (1996); see also Christopher H. Schroeder, *Putting Law and Politics in the Right Places – Reforming the Independent Counsel Statute*, 62 LAW & CONTEMP. PROBS. 163, 169 (1999).

<sup>99</sup> See, e.g., 18 U.S.C. § 207(c) (2006) (criminalizing certain communications between former government employees and the offices that employed them).

<sup>100</sup> See generally 18 U.S.C. § 1961 (2006); 18 U.S.C. § 1951 (2006); 18 U.S.C. § 1341 (2006); 18 U.S.C. § 1343 (2006); 18 U.S.C. § 1346 (2006).

<sup>101</sup> 18 U.S.C. § 1961 (2006).

<sup>102</sup> 18 U.S.C. § 1951 (2006) (criminalizing robbery or extortion, including extortion under color of official right, that in any degree obstructs, delays, or affects commerce).

<sup>103</sup> 18 U.S.C. §§ 1341–1343 (2006).

<sup>104</sup> 18 U.S.C. § 346 (2006).

<sup>105</sup> See *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (stating that conspiracy is “that darling of the modern prosecutor’s nursery”).

<sup>106</sup> 18 U.S.C.A. § 1001 (West 2006).

<sup>107</sup> See Barkow, *supra* note 18, at 874, 876–77.



overreaching had become so strong among federal prosecutors in honest services cases that the Supreme Court had to step in to narrow that statute's application in cases of public corruption.<sup>108</sup> In light of the (too) often poorly crafted menu that Congress has created and expanded, and in light of the otherwise anemic limits on discretion, it appears as though the most effective way to restrict the use of discretion without implicating the separation of powers would be to simply remove an item from the menu altogether.

The very political arrangements that produce criminal sanctions, then, are also the same ones that produce the risks and realities of oversized prosecutorial power. But just as Congress has used its institutional tools to (usually) empower the prosecutor's office, Congress also has the institutional tools to constrain it, even outside of the context of repeal or code reform.<sup>109</sup>

As I have argued elsewhere, Congress could use its investigative and oversight powers more aggressively,<sup>110</sup> to examine, for example, presidential enforcement priorities and their consistency with congressional priorities, or the exercise of discretion in specific cases that have been adjudicated. In 2009 and 2010, a House Judiciary subcommittee held hearings on over-criminalization and over-federalization, at which members expressed their concerns about the state of federal criminal law.<sup>111</sup> In addition, following criticisms that arose at the 2009 and 2010 hearings concerning the current scope of federal criminal law, the House is currently considering legislation—H.R. 1823—that would consolidate all federal crimes into Title 18 and eliminate overlapping and duplicative crimes.<sup>112</sup> And both the House and Senate have conducted oversight hearings on the application of the federal death penalty to examine the factors that drive the Justice Department's review, and the Attorney General's decision-making, in potential capital prosecutions.<sup>113</sup> These moves presumably reflect considered political judgments about the scope of federal criminal justice power and the uses and functions of the criminal law.

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<sup>108</sup> See *Skilling v. United States*, 130 S. Ct. 2896, 2931–32 (2010) (holding that the honest services fraud statute covers only bribery and kickback schemes, not mere undisclosed self-dealing).

<sup>109</sup> See *infra* notes 115, 117 (citing statutes constraining prosecutorial discretion).

<sup>110</sup> See Broughton, *supra* note 16, at 479–99.

<sup>111</sup> See *Over-Criminalization of Conduct/Over-Federalization of Criminal Law, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security, House Comm. on the Judiciary*, 111th Cong. (2009); *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security, House Comm. on the Judiciary*, 111th Cong. (2010). For a fuller description of these hearings, see Broughton, *supra* note 16, at 473–79.

<sup>112</sup> See Criminal Code Modernization and Simplification Act of 2011, H.R. 1823, 112th Cong. (2012).

<sup>113</sup> See, e.g., *Oversight of the Federal Death Penalty, Hearing Before the Senate Subcomm. on the Constitution, Senate Comm. on the Judiciary*, 110th Cong., June 27, 2007; *Death Penalty Reform Act of 2006, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security, House Comm. on the Judiciary*, 109th Cong. (2006). I note, in the interest of disclosure, that I assisted Justice Department leaders in preparing for each of these hearings during my time at the Justice Department.

Also, in a few instances, Congress has attempted to use the substantive statutory criminal law to constrain the exercise of prosecutorial discretion.<sup>114</sup> For example, the contempt of Congress statute requires the United States Attorney to convene a grand jury once the relevant chamber has approved the contempt citation.<sup>115</sup> In a more recent example, when Congress passed the new hate crimes legislation in 2009,<sup>116</sup> it included a provision which prohibits a federal prosecutor from bringing a prosecution pursuant to the new law unless the Attorney General has certified that the State lacks jurisdiction; the State has requested that the United States assume jurisdiction; the verdict or sentence in State court has left the federal interest in bias-motivated violence “demonstrably unvindicated;” or a federal prosecution is “in the public interest and necessary to secure substantial justice.”<sup>117</sup> This provision is essentially an effort to codify the Justice Department’s internal policies on prosecuting cases where there is the potential for a dual state prosecution, but now (at least as to hate crimes cases under this new law) those policies have the force of a congressional command, rather than internal policy that the Department could change at any time without congressional approval.

Congress has also successfully asserted its prerogatives to protect itself under the Speech or Debate Clause,<sup>118</sup> which, although limited to acts that are part of the “due functioning” of the legislative branch,<sup>119</sup> is an explicit method of limiting prosecutorial power. It favors Congress in a conflict between the legislative institution and the prosecutorial apparatus of the executive, which may be politically hostile to an individual member or to Congress more broadly.<sup>120</sup> Most recently, in *United States v. Rayburn House Office Building*, the United States Court of Appeals for the District of Columbia Circuit found that the FBI violated the legislative privilege when it searched Representative William Jefferson’s Capitol Hill office and seized materials that were considered “legislative” for purposes of the Speech or Debate Clause.<sup>121</sup> This had the effect of preventing prosecutors from both accessing and using the protected materials, though the prosecution of Representative Jefferson was ultimately successful anyway on the strength of other, independent evidence.<sup>122</sup> Note that by protecting the “legislative” acts of speech or debate, which the Court has construed

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<sup>114</sup> See *infra* notes 115, 117 (citing statutes that limit or mandate prosecutorial action).

<sup>115</sup> 2 U.S.C.A. §§ 192, 194 (West 2005).

<sup>116</sup> See Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, *codified at* 18 U.S.C.A. § 249 (West 2009).

<sup>117</sup> 18 U.S.C.A. § 249(b)(1)(A–D) (West 2005).

<sup>118</sup> See U.S. CONST. art I, § 6, cl. 1.

<sup>119</sup> *United States v. Brewster*, 408 U.S. 501, 513 (1972); see also *Eastland v. U.S. Serviceman’s Fund*, 421 U.S. 491, 503 (1975) (reaffirming that the Clause extends to members and their aides acting within the “legitimate legislative sphere”).

<sup>120</sup> See *United States v. Johnson*, 383 U.S. 169, 179 (1966).

<sup>121</sup> *U.S. v. Rayburn House Office Bldg.*, 497 F.3d 654, 654 (D.C. Cir. 2007).

<sup>122</sup> David Stout, *Ex-Rep. Jefferson Convicted in Bribery Scheme*, N.Y. TIMES, Aug. 6, 2009, at A14.

broadly to effectuate its purpose,<sup>123</sup> and by protecting not only Representatives and Senators but also their aides,<sup>124</sup> the Clause has the practical effect of favoring politics (as practiced within certain institutional boundaries) by placing a fair amount of ordinary politics beyond prosecutorial reach.

And finally, the House and Senate retain the power of impeachment and conviction, respectively.<sup>125</sup> One of the important lessons of Watergate was that the existing constitutional scheme actually provided a political mechanism—impeachment—for dealing with the abuses of the Nixon White House. Similarly, if Congress determines that the President is politicizing criminal prosecution in ways that obstruct or threaten the integrity of the American criminal justice system, it always has the mechanism of impeachment.<sup>126</sup> And this mechanism is as much a political act as it is a legal one.<sup>127</sup>

Of course, these kinds of institutional controls on the Justice Department will often raise separation of powers concerns. For example, even when Congress attempts to use its investigative and oversight powers against the Justice Department, it is not uncommon for the Department officials to assert some privilege that would protect executive branch information from disclosure.<sup>128</sup> And it is debatable whether Congress can use the contempt statute to prosecute a high-ranking White House aide for refusing to answer questions before a congressional committee, even where that committee is investigating possible corruption of the federal prosecutorial regime.<sup>129</sup> Moreover, if criminal prosecution is a core executive function subject to exclusive control by the President, then although Congress can define the criminal law and oversee the executive's program of enforcement, any effort to direct the exercise of prosecutorial discretion would violate the separation of powers. This theory would raise some constitutional doubt regarding the charging directives in, for example, the new hate crimes law. But the formal arrangements that supply these various powers contemplate conflict; and conflict between the political

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<sup>123</sup> See *Doe v. McMillan*, 412 U.S. 306 (1973). *But see* *Hutchison v. Proxmire*, 443 U.S. 111 (1979) (holding that publication of allegedly defamatory material in Senator's press release and newsletters was not protected by Speech or Debate Clause).

<sup>124</sup> See *Gravel v. United States*, 408 U.S. 606, 616–17 (1972) (holding that the day-to-day work of congressional aides "is so critical to the Members' performance that they must be treated as the latter's alter egos").

<sup>125</sup> See U.S. CONST. art. I, §§ 2 cl. 5, 3 cl. 6.

<sup>126</sup> U.S. CONST. art. I, § 2, cl. 5; *cf.* CALABRESI & YOO, *supra* note 41, at 414 (stating that a "President or an attorney general who uses his or her power of prosecution for political ends has committed a high crime and misdemeanor").

<sup>127</sup> See JEFFREY K. TULIS, *Impeachment in the Constitutional Order*, in *THE CONSTITUTIONAL PRESIDENCY* 229–46 (Joseph M. Bessette & Jeffrey K. Tulis eds., 2009).

<sup>128</sup> See Broughton, *supra* note 16, at 489. For additional examples, see LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* (2004).

<sup>129</sup> See Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 564–65 (1991).

branches is good.<sup>130</sup> And often these conflicts—like those involving executive privilege, for example, or application of the contempt statute to White House officials—are resolved not by legal doctrine or court intervention, but by the forces of political muscle and political accommodation.<sup>131</sup>

#### CONCLUSION

This short essay has, of course, only skimmed the surface of some important issues of constitutional and ordinary politics related to the control of the federal prosecutorial regime at a time when the federal criminal law appears, often intolerably, super-sized. But the essay demonstrates that the regime is one that both of the political branches have an interest in controlling and that existing institutional arrangements are adequate for doing so, even when—in fact, particularly when—those arrangements may often place political forces and preferences at loggerheads.

Of course, one response to this suggestion is—and has been—to give ultimate control neither to Congress nor to the President but to affirmatively make the Justice Department independent of each.<sup>132</sup> We have seen numerous proposals of this kind since Watergate, from Senator Sam Ervin's initial proposal to make the Justice Department an independent agency,<sup>133</sup> to Garrett Epps' more recent argument for making the Attorney General an independent elected official.<sup>134</sup> Yet those proposals have not gained wide public acceptance or even wide congressional support.<sup>135</sup> As Nancy Baker has argued, a close relationship between the President and the leadership at the Justice Department may be essential for developing sound legal policy and for ensuring political accountability.<sup>136</sup> And as Lithwick and Goldsmith explain, these proposals present their own set of dangers, which we could avoid by allowing

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<sup>130</sup> See Broughton, *supra* note 16, at 496–98.

<sup>131</sup> See, e.g., FISHER, *supra* note 130, at 258; Todd D. Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PA. J. CONST. L. 77, 77 (2011); Dawn Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127, 1127 (1999); Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL. 719, 719 (1993); Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 462 (1987).

<sup>132</sup> See generally *Removing Politics*, *supra* note 29, at 1.

<sup>133</sup> *Id.* at 3; see also CLAYTON, *supra* note 29, at 236 (arguing that the Justice Department has become “the primary and most effective weapon in the quest to aggrandize presidential power” and this is reason for reconsidering the proposal to make the Department politically independent).

<sup>134</sup> See Garrett Epps, *Why We Should Make Attorney General an Elective Office*, SALON.COM, Mar. 9, 2007, [http://www.salon.com/2007/03/09/attorney\\_general](http://www.salon.com/2007/03/09/attorney_general).

<sup>135</sup> It is notable, however, that following the 2007 United States Attorneys firings scandal, President Bush signed into law new legislation to change the procedures by which interim United States Attorneys are appointed and serve. See Preserving United States Attorney Independence Act of 2007, Pub. L. No. 110-34, § 2, 121 Stat. 224.

<sup>136</sup> NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE* 170–78 (1992).

“Congress, the press, and the people to be the check here. . . . If politics turns out to be the illness here, politics will also prove the cure.”<sup>137</sup> I have attempted to follow these sensible critiques of a politics-free prosecutorial regime with some elaboration: existing constitutional arrangements—including a criminal justice presidency and a Congress that serves as the starting point for federal criminal law—contemplate healthy politics in this regime, and those same arrangements can adequately oversee, and combat excesses and improprieties in, prosecutorial decision-making. These arrangements function best, however, when the political branches take seriously the assertion of their own prerogatives, not on behalf of party but of institution.

None of this is to say that criminal law enforcement should be politicized, in the sense of permitting party affiliation or private political gain to animate prosecutorial decision-making. The Justice Department, the Attorney General, and the Bush Administration more broadly were surely sullied by the United States Attorney firings scandal, just as the Obama Justice Department may well suffer from the ongoing criticism that it has permitted partisanship to trump evenhanded law enforcement.<sup>138</sup> There remains much to be said for preserving both public confidence in the politically impartial administration of criminal justice *and* the reputation of federal prosecutors as devotees of the rule of law.<sup>139</sup> But the effort to divorce criminal law and its enforcement entirely from politics is a fool’s errand, and unwise. And perhaps this is as it should be. The Constitution establishes a workable system in which political actors influence the structure and functioning of criminal law enforcement.<sup>140</sup> While it does so by creating a cooperative arrangement whereby executive actors enforce the law that legislators pass, it also does so through institutional arrangements that pit political forces against one another.<sup>141</sup> And that, if anything, is the real legal legacy of Watergate: institutions with separate constitutional functions and constitutional identities robustly asserting their respective prerogatives to prevent encroachments and ensure political accountability. This, I suggest, is a legacy worth embracing, as it embodies the American rule of law.

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<sup>137</sup> Lithwick & Goldsmith, *supra* note 34.

<sup>138</sup> See CHAIRMAN’S REPORT OF APRIL 30, 2012, *supra* note 33, at 1, 15.

<sup>139</sup> See, e.g., OFFICE OF INSPECTOR GENERAL, U.S. DEPT. OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006, 325–26 (2008) (finding that partisan politics were an important factor in the firings).

<sup>140</sup> See U.S. CONST. art. I, § 2, cl. 5.

<sup>141</sup> See e.g., *Removing Politics*, *supra* note 29, at 1.