

MAY FEDERAL PROSECUTORS TAKE DIRECTION FROM THE PRESIDENT?

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Suppose the president sought to serve as prosecutor-in-chief, telling prosecutors when to initiate or dismiss criminal charges in individual cases and making other discretionary decisions that are normally reserved to trained professionals familiar with the facts, law, and traditions of the U.S. Department of Justice. To what extent may prosecutors follow the president's direction? In recent presidential administrations, the president has respected prosecutorial independence; while making policy decisions, the president deferred to the Attorney General and subordinate federal prosecutors to conduct individual criminal cases. In a recent article, we argued that this is as it should be because the president has no constitutional or statutory authority to control federal criminal prosecutions. But suppose one comes to the contrary conclusion—that the president, as chief executive, has authority to decide how individual criminal prosecutions should be conducted. In this Article, we explore the consequences for prosecutors who receive the president's orders.

We argue here that federal prosecutors cannot invariably and unquestioningly follow the president's direction because doing so would violate ethical rules and professional norms. Further, because prosecutors' professional obligations are created by courts and endorsed by federal statute, presidential control over prosecutorial decision-making would lead to serious separation-of-powers concerns. Particularly, the integrity of the judicial system depends on the ethical rules at issue. By exploring these separation-of-powers concerns, this Article contributes to a growing debate about the power of the executive over prosecution and further supports the independence of the DOJ and federal prosecutors.

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INTRODUCTION

President Trump’s lawyers have insisted that the U.S. Constitution gives the president “exclusive authority over the ultimate conduct and disposition of all criminal investigations and over those executive branch officials responsible for conducting those investigations.”¹ The president and his team are not alone in claiming this authority for the executive.² For example, in *Morrison v. Olson*,³ which upheld the federal independent counsel law that was later allowed to sunset, the late Justice Antonin Scalia argued in dissent that the Constitution vests executive power in the president and that “[g]overnmental investigation and prosecution of crimes is a quintessentially executive function.”⁴ Many prominent constitutional scholars agree with Justice Scalia that the independent counsel law violated constitutional

1. Letter from Marc E. Kasowitz, Counsel to the President, to Robert S. Mueller, Special Counsel (June 23, 2017), <https://www.nytimes.com/interactive/2018/06/02/us/politics/trump-legal-documents.html> [<https://perma.cc/HF37-C3Y7>]. The letter may have been distinguishing between authority over criminal investigations and criminal prosecutions, but that was not apparent from the context and it is not evident that different considerations would apply in these contexts. Given the letter’s reference to the “ultimate conduct and disposition” of investigations, we read the letter as a claim of authority over federal criminal prosecutors and prosecutions no less than over federal criminal investigators and investigations.

2. See Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 16 n.68, 17 nn.69 & 72 (2018) (citing authority). The Article has been referenced and the argument summarized multiple times in the press. See, e.g., Charlie Savage, *By Demanding an Investigation, Trump Challenged a Constraint on His Power*, N.Y. TIMES (May 21, 2018), <https://www.nytimes.com/2018/05/21/us/politics/trump-justice-department-independence.html> [<https://perma.cc/H5TE-P8EX>]; Adam Serwer, *The Bill to Protect Mueller May Not Survive the Supreme Court*, ATLANTIC (Apr. 23, 2018), <https://www.theatlantic.com/politics/archive/2018/04/is-the-senate-bill-to-protect-mueller-constitutional/558440/> [<https://perma.cc/PDT2-L47Z>]; *Trumpcast: Trump’s Challenge to Prosecutorial Independence*, SLATE (May 23, 2018, 11:38 AM), http://www.slate.com/articles/podcasts/trumpcast/2018/05/trump_is_stress_testing_the_department_of_justice.html [<https://perma.cc/VNR5-JG7N>] (interview with Rebecca Roiphe).

3. 487 U.S. 654 (1988).

4. *Id.* at 705–06 (Scalia, J., dissenting) (“The executive Power shall be vested in a President of the United States.” (quoting U.S. CONST. art. II, § 1, cl. 1)).

separation-of-powers principles,⁵ and although they do not necessarily proceed from the premise that the president has plenary constitutional authority over individual federal criminal prosecutions, some probably do.⁶ Others disagree.⁷ This Article contributes to the debate by illustrating how presidential control over federal law enforcement would result in significant separation-of-powers concerns.

Justice Scalia thought overseeing criminal cases was an essential executive function because both investigation and prosecution call for the exercise of prosecutorial discretion, which necessitates “balancing . . . various legal, practical, and [nonpartisan] political considerations.”⁸ He described two criminal cases that, in his view, illustrated why the Constitution allows the president sole power to exercise prosecutorial discretion. Both implicated foreign policy—the first involved subpoenaing a former public official of a neighboring country, and the other involved a prosecution that would necessitate disclosing “national security information.”⁹

In a recent article, we acknowledged that criminal cases implicating foreign policy considerations offer the most compelling support for presidential authority over federal criminal prosecutions.¹⁰ Nonetheless, drawing on a century of U.S. Supreme Court decisions upholding statutory limits on presidential power in the administrative state, we argued that Congress has the authority to decide who has ultimate prosecutorial authority.¹¹ We explored the history of prosecutorial independence in

5. See Akhil Reed Amar, *Testimony Before the Senate Committee on the Judiciary*, SENATE COMMITTEE ON JUDICIARY (Sept. 26, 2017), <https://www.judiciary.senate.gov/imo/media/doc/09-26-17%20Amar%20Testimony.pdf> [<https://perma.cc/39ZG-R9MJ>] (asserting that “[t]he lion’s share of the constitutional law scholars who are most expert and most surefooted on this particular topic now believe that *Morrison* was wrongly decided and/or that the case is no longer ‘good law’ that can be relied upon as a sturdy guidepost to what the current Court would and should do”).

6. Scholars have argued for a “unitary executive,” an executive power concentrated completely in the hands of the president. See generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992). Some have argued specifically that the president has complete control over federal prosecution. Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 571 (2005).

7. See, e.g., 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, 563; William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 476 (1989); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 286 (1989); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 15–16 (1994); Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 18–26 (2018).

8. *Morrison*, 487 U.S. at 708 (Scalia, J., dissenting).

9. *Id.*

10. Green & Roiphe, *supra* note 2, at 15, 28, 75.

11. *Id.* at 32–34. We argue, in summary, that prosecuting crime is not an enumerated executive power; Congress has authority to decide who, within the executive branch, carries out many executive powers that are not specifically entrusted to the president; and the Court has already determined in *Morrison* (over Justice Scalia’s dissent) that prosecution is one such

America and argued that it is deeply woven into the fabric of our democracy. Given this history, we concluded that, absent any explicit statement otherwise, Congress has acquiesced in a system in which prosecutors can and should enjoy significant independence from the White House.¹²

In this Article, we consider some of the implications of the alternate interpretation. Suppose Justice Scalia was correct in his dissent that the president, as chief executive, generally may direct individual criminal prosecutions. To what extent may federal prosecutors ethically comply? And if prosecutors comply with presidential direction in contravention of ethical and professional norms, would doing so undermine judicial independence?

Neither Justice Scalia nor other proponents of plenary presidential authority over criminal justice have fully imagined how presidential authority over criminal prosecutions would be exercised and what would follow. This Article argues that if a president directed federal prosecutors in their exercise of discretion, the prosecutors would confront serious ethical questions. As lawyers, prosecutors are subject to professional conduct rules—both rules adopted by the federal courts before which they appear and, pursuant to a federal statute known as the McDade Amendment,¹³ rules adopted by the state judiciary in which they practice.¹⁴ Federal prosecutors would risk being whipsawed between their obligations to follow presidential direction and their obligation to comply with these rules.

If federal prosecutors choose to ignore their professional obligations in favor of their duties to abide by presidential directive, there would be significant separation-of-powers concerns since prosecutors' professional obligations derive from judge-made law and legislation. If, on the other hand, all federal prosecutors abide by their ethical obligations and resign rather than risk ethically questionable conduct, the president would be hobbled in his constitutional obligation to "take Care" that the laws are faithfully executed.¹⁵

Justice Scalia considered it anomalous for the president to lack authority to make prosecutorial decisions that implicate foreign policy, but we argue

power that Congress may delegate to other executive officials. *Id.* at 7–37. We further argue that the relevant statutes should be interpreted in light of the tradition of prosecutorial independence, which weighs against reading federal law to establish plenary presidential authority. *Id.* at 37–75.

12. *Id.* at 74–75.

13. 28 U.S.C. § 530B(a) (2012) ("An attorney for the Government shall be subject to State laws and rules . . . governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."). For a discussion of federal court regulation of prosecutors' ethics, see Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 399–413 (2002).

14. *See, e.g.*, *United States v. Hammad*, 858 F.2d 834, 837–40 (2d Cir. 1988) (holding that federal prosecutors are subject to the ethics rule restricting communications with represented parties); *see also* *United States v. Ferrara*, 54 F.3d 825, 830 (D.C. Cir. 1995) (holding that a federal prosecutor was subject to discipline in New Mexico, where he was admitted to practice law).

15. U.S. CONST. art. II, § 3.

that it would be equally anomalous for federal prosecutors to obey presidential directions. Part I lays the groundwork for our analysis by identifying two types of discretionary decisions that prosecutors ordinarily make in criminal cases: first, decisions in their role as public officials of the type that clients ordinarily make, and second, strategic or tactical decisions that lawyers ordinarily make in litigation on behalf of clients. Part II considers the federal prosecutor's professional obligations if the president asserts authority to make the first type of discretionary decisions, which prosecutors ordinarily make as public officials on behalf of the government. Part III considers the prosecutor's professional obligations if the president asserts authority, as the prosecutor's supervisor, to make decisions of the second type, which prosecutors ordinarily make as lawyers. As both discussions demonstrate, professional rules and norms would, at least in some circumstances, mandate that prosecutors decline to comply with the president's direction. We argue that, in the criminal context, both sets of rules are necessary to ensure disinterested decision-making and a properly functioning criminal justice system.

For the president to have exclusive authority over federal prosecutors, the president's executive power under Article II must supersede both federal judicial authority to enforce professional conduct rules and congressional authority to pass a law (signed by an earlier president) requiring federal prosecutors to comport with state rules of professional conduct. Part IV addresses the separation-of-powers problems raised by the claim that presidential authority over federal prosecutors displaces the ordinary restraints imposed by professional conduct rules. The broader point is that an independent judiciary depends on independent prosecutors to bring appropriate cases, decline to bring inappropriate ones, and ensure a level of truth and fairness in the judicial process. Prosecutors beholden to the president would be impeded in carrying out this function and the judiciary itself would be hobbled. These constitutional problems, on their face, are no less vexing than those that troubled Justice Scalia.¹⁶

Finally, the Article concludes by considering whether our analysis will matter practically for the U.S. Attorney General or other prosecutors who receive presidential directions to act contrary to U.S. Department of Justice (DOJ) policy, professional norms, and their own best judgment. It acknowledges that federal prosecutors face no realistic disciplinary risk for acceding to presidential direction since state disciplinary authorities rarely sanction prosecutors. Moreover, federal courts will often have no meaningful way of enforcing relevant professional conduct rules, especially if breaches are hard to detect. But the possibility of engaging in professional misconduct and the associated reputational cost would be a plausible

16. David Reisman makes a related argument about the flaws in Justice Scalia's *Morrison* dissent. See generally David N. Reisman, *Deconstructing Justice Scalia's Separation of Powers Jurisprudence: The Preeminent Executive*, 53 ALB. L. REV. 49 (1988). He argues that, taken to its logical conclusion, Justice Scalia's argument would necessarily result in the impermissible diminution of the power of the judiciary and Congress. *Id.* at 91–94.

rationale for defying presidential decrees and a legitimate basis for congressional inquiry of prosecutors who choose to acquiesce.

Even if ethical norms are not enforced, the practical consequences of a president's effort to direct federal prosecution might theoretically defeat rather than enhance executive power. First, it hardly seems like it would fulfill the plain meaning of the "take Care" clause of the Constitution if the president leads a team of prosecutors who are or could be violating important ethical norms.¹⁷ The faithful execution of the law must be read to incorporate these norms and traditions. Second, if federal prosecutors choose to abide by their ethical obligations rather than face congressional or other inquiry, they would have to resign or at least recuse themselves from the particular matter. At the very least, this would leave the executive branch without trained prosecutors to pursue pressing cases. Taken to its logical extreme, it could leave the executive branch stripped of effective criminal law enforcement. This would ironically cripple the president's ability to enforce the laws, whether through presidential directive or through more conventional means involving presidential appointments and oversight. In other words, the unitary executive theory of plenary control over federal prosecution could, at least theoretically, diminish the president's ability to enforce federal criminal laws effectively.

I. BACKGROUND: CONCEPTUALIZING THE PRESIDENT-PROSECUTOR RELATIONSHIP IN ETHICAL TERMS

In general, federal prosecutors in the DOJ and the U.S. Attorneys' Offices make prosecutorial decisions on behalf of the government in criminal cases.¹⁸ These include decisions about the conduct of grand jury proceedings, whether to initiate criminal charges against particular individuals and the nature of those charges, whether to offer a plea bargain or move to dismiss charges, whether to seek an order immunizing witnesses from the use of their testimony, what pretrial disclosures to make to the defense beyond the legally required minimum, trial decisions regarding what witnesses to call and evidence to offer, how to examine witnesses, what

17. U.S. CONST. art. II, § 3. For a discussion of the textual and original public meaning of the "take Care" Clause of the Constitution, see Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 798–808 (2013).

18. See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987) ("A prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity."). Many federal criminal investigative decisions, including whether to make a warrantless arrest or search, are made by federal investigative agents, not prosecutors, although prosecutors oversee grand jury investigations and ordinarily participate in applications for search and arrest warrants. Additionally, lawyers outside the DOJ may be specially designated to serve as federal prosecutors in the DOJ or in a U.S. Attorney's Office. See *United States v. Dulski*, 395 F. Supp. 1259, 1261 (E.D. Wis. 1975) (discussing 28 U.S.C. § 515(a)).

arguments to make, and so on—decisions both large and small. Among the various lawyers with federal prosecutorial authority—the Attorney General, U.S. Attorneys, DOJ lawyers, and Assistant U.S. Attorneys—different decisions in any given prosecution may be made by different lawyers. In a given case, some decisions are dictated by DOJ policy, having been adopted by the Attorney General for the conduct of all criminal cases.¹⁹ Within the confines of DOJ policy, high-ranking DOJ officials must approve particularly sensitive decisions, such as whether to seek the death penalty;²⁰ supervisory prosecutors generally sign off on indictments and plea agreements;²¹ and subordinate trial prosecutors (Assistant U.S. Attorneys or Assistant Attorneys General) typically make strategic trial decisions.²²

Prosecutorial decision-making differs from decision-making in most legal representations. In an ordinary lawyer-client relationship, and particularly one involving an individual client, decision-making authority is divided between the client and the lawyer. Primarily as a matter of agency law, the client, as principal, has control over the key decisions, such as whether to initiate or settle a civil lawsuit.²³ Conversely, if only as a matter of practical necessity, lawyers make strategic decisions about how to carry out the client's objectives, such as how to pose questions to witnesses and whether to make evidentiary objections at trial.²⁴ To a large extent, clients defer to lawyers on questions calling for legal expertise, but sometimes controversies about who has the authority to decide an issue arise when lawyers and clients disagree. In recent decades, drafters of professional conduct rules have made a largely unsatisfactory effort to identify how such disagreements should be

19. See, e.g., *United States v. Hubbell*, 11 F. Supp. 2d 25, 38 (D.D.C. 1998) (discussing the policy in the DOJ manual regarding tax indictments); Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 252 (2017) (discussing the role of DOJ policy in federal prosecutors' decision-making).

20. See *United States v. Feliciano*, 998 F. Supp. 166, 168–69 (D. Conn. 1998) (discussing DOJ policy regarding the prosecution of capital cases); Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 410 (1999) (discussing DOJ decision-making in capital cases).

21. See *United States v. Kouri-Perez*, 47 F. Supp. 2d 164, 165–66 (D.P.R. 1999) (interpreting the procedural rule requiring indictments to be signed by the Attorney General, U.S. Attorneys, or their authorized assistants).

22. Much of the decision-making authority exercised by subordinate federal prosecutors is delegated by a higher-ranking lawyer, who has ultimate authority to make any given decision in a federal criminal matter. One might assume that because the Attorney General has supervisory authority, the Attorney General is authorized to dictate all decisions. But U.S. Attorneys, who have statutory authority to conduct criminal litigation in their districts, might lay claim to decision-making authority as to cases in their districts. And trial prosecutors may argue that there are certain decisions that, as counsel of record in individual cases, they must be free to make. Whatever uncertainty may exist in theory is almost always resolved privately and consensually in practice.

23. Professional conduct rules codify this understanding. See MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2016) (providing that "a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued").

24. Professional conduct rules require that lawyers consult with their clients about these strategic decisions where possible. See *id.* r. 1.2(a), 1.4.

resolved.²⁵ One answer is that clients determine the “ends” or objectives of the representation while the lawyer chooses the “means” to carry them out. Although the ends-means distinction sometimes breaks down in practice,²⁶ it is generally a useful distinction and reflects the conventional judicial understanding.²⁷

Unlike civil attorneys who have a concrete client, prosecutors represent the government or the public. For prosecutors to make discretionary decisions in criminal cases, prosecutors must serve not only the conventional role of a lawyer for a client in litigation who makes decisions about “means,” but also the role of the client or the client’s designated agent who makes decisions about objectives. In turn, if a president asserts control over the prosecution’s discretionary decisions, the president would serve two roles. First, the president would usurp the prosecutor’s traditional role as the government representative making decisions about objectives. And, second, as the prosecutor’s supervisor or boss, the president would direct how the prosecutor as lawyer makes decisions about the means by which those objectives are carried out.

As discussed below in Parts II and III, these conceptions of the president’s role implicate two sets of professional conduct rules—first, those governing lawyers’ ability to take direction from representatives of entity clients; and second, those governing lawyers’ ability to take direction from nonlawyer

25. The current version of the American Bar Association (ABA) Model Rules of Professional Conduct advises lawyers to look to other law to resolve certain disputes over decision-making. *See id.* r. 1.2 cmt. 2 (“Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer.”). In the context of criminal defense representation, courts have resolved certain questions of decision-making authority in the course of interpreting the Sixth Amendment right to effective assistance of counsel. *See, e.g.,* *McCoy v. Louisiana*, 138 S. Ct. 1500, 1505 (2018) (holding that the capital defendant’s trial lawyer may not concede the defendant’s guilt over the defendant’s objection); *Jones v. Barnes*, 463 U.S. 745, 753–54 (1983) (holding that a criminal defendant’s appellate lawyer may decide what issues to raise on appeal). Much of the scholarship on the division of decision-making in the lawyer-client relationship is likewise addressed to criminal defense representations. *See generally* Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1 (1998); Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant’s Tactical Choices*, 68 U. CIN. L. REV. 763 (2000). It is unclear whether these writings are entirely relevant outside the criminal defense context. Even if so, they resolve only a fraction of the questions that might arise.

26. *See* Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 325 (1987) (“[T]he line between means and ends is imprecise at best. At a minimum, clients have a legitimate, and at times, overriding interest in what many characterize as the ‘means’ of the lawsuit.”).

27. *See, e.g.,* *Summerlin v. Schiro*, 427 F.3d 623, 638 (9th Cir. 2005) (observing that “the allocation of control between attorney and client typically dictates that ‘the client decides the ‘ends’ of the lawsuit while the attorney controls the ‘means’” (quoting Strauss, *supra* note 26, at 318)). The Restatement appears to advocate for greater client authority. It recognizes that lawyers must often make decisions without time to consult with the client but implies that lawyers must abide by clients’ instructions that do not require acting unlawfully. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 21–23 (AM. LAW INST. 2000).

employers. One set of rules forecloses a lawyer from acting on certain decisions made by an authorized representative of an entity client.²⁸ When the representative is acting lawlessly or in breach of fiduciary duty, the entity's lawyer may have to refuse the representative's direction because the lawyer owes loyalty to the entity, not its representative.²⁹ A second set of rules forecloses a lawyer from taking direction from a nonlawyer boss regarding the means by which to achieve the entity client's objectives.³⁰ Both sets of rules cast doubt on whether, as a matter of professional ethics, prosecutors may invariably implement the president's directive, and they suggest that prosecutors must exercise some degree of professional independence in light of the prosecutor's conventional duty to "seek justice."³¹

And this insight, in turn, raises the constitutional separation-of-powers question of whether presidential authority supersedes court-adopted professional conduct rules, as plenary presidential authority over criminal prosecution seems to presuppose, or vice versa. The separation-of-powers concern is particularly pressing because in the criminal context these ethics rules, at their core, protect disinterested prosecutorial decision-making. The judiciary generally relies on trial lawyers, including prosecutors, to comply with professional expectations.³² In particular, the judiciary relies on prosecutors to exercise discretion in disinterested fashion against the background of professional traditions, norms, policies, and understandings.³³ While lawyers are imperfect, and judges have regulatory means of responding when prosecutors and other lawyers act improperly, courts rely on prosecutors generally to comply with professional norms so that courts can do their own job of promoting a fair process and fair outcome in criminal cases.³⁴ Allowing a president to control prosecutors threatens to undermine the judiciary, not just by stripping it of the ability to impose ethics rules on lawyers, but also by impeding it in performing its core function of determining the facts and applying the law in individual criminal cases.

We examine these previously unexplored professional and constitutional questions in the context of criminal cases where U.S. foreign policy is implicated. In particular, we focus on the following scenario:

A foreign government arrests a U.S. citizen for espionage. The president directs the Attorney General to arrest and prosecute a prominent citizen of the foreign country when he is in the United States for business, so that the United States has a bargaining chip and publicly conveys its toughness.

28. *See infra* Part II.

29. *See infra* Part II.

30. *See infra* Part III.

31. *See infra* Parts II–III.

32. *See, e.g.*, *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980) (“[T]rial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel.”); *see also* Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 55–56 (2016) (describing courts’ traditional reliance on prosecutorial integrity).

33. Green & Yaroshefsky, *supra* note 32, at 55–56.

34. *See infra* Part III.B.

The Attorney General believes that the foreign citizen has not committed any crime but that the DOJ can pull together circumstantial evidence of a crime that will (barely) satisfy probable cause—the requisite amount of evidence for an arrest and prosecution. The president directs the DOJ to maximize leverage by seeking the foreign citizen’s pretrial detention, prolonging proceedings through deleterious motion practice and requests for continuances, refusing any negotiated resolution, and maintaining the prosecution through trial and likely acquittal, until the U.S. citizen is released.³⁵

The process by which a president would resolve a question of prosecutorial discretion in a situation such as this is uncertain since no contemporary president has asserted control over individual federal prosecutions. But we assume for purposes of this inquiry that the president would decide in the way that presidents ordinarily make decisions, not in the way prosecutors ordinarily make decisions. That is, we assume the president would not consider himself bound by DOJ policy and would not attempt to replicate a prosecutor’s decision-making process under DOJ policy and practice. Rather, the president would set priorities as an elected government official who is not committed to the values, policies, and practices of federal prosecutors. The president would likely seek advice on the relevant foreign policy considerations from officials in the U.S. Department of State or elsewhere outside the DOJ. We assume that the president would not only consider nonpartisan political considerations but would also consider partisan political considerations such as how a failure to free a foreign citizen arrested abroad will play in the polls or future elections. While prosecutors do and should consider many factors in making discretionary decisions, partisan concerns such as these are considered impermissible motivating factors in prosecutorial decision-making.³⁶

35. This is a modified and expanded version of a scenario that was presented but not analyzed in our earlier article. Green & Roiphe, *supra* note 2, at 8. We acknowledge that this scenario, which implicates the criminal defendant’s due process rights as well as prosecutorial independence, differs from the converse, where the president directs a prosecutor to *dismiss* criminal charges to promote foreign policy objectives. In the former but not the latter scenario, the defendant whose prosecution is dismissed is prejudiced by the president’s intervention. On the other hand, in some situations where the president acts to end a particular prosecution, similarly situated defendants whose prosecutions are continued may argue that they are treated unfairly or discriminatorily, in contravention of the general principle that prosecutors should treat similarly situated defendants in like fashion.

36. See, e.g., CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-1.7(f) (AM. BAR ASS’N 2015) (“The prosecutor should not permit the prosecutor’s professional judgment or obligations to be affected by the prosecutor’s personal, political, financial, professional, business, property, or other interests or relationships.”); see also *id.* Standard 3-4.4 (discussing the factors relevant to prosecutors’ discretion in filing, declining, and maintaining criminal charges). See generally Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors’ Conflicts of Interest*, 58 B.C. L. REV. 463, 476–77 (2017) (discussing the illegitimacy of prosecutorial decision-making based on partisan politics). Professional standards on prosecutorial decision-making presuppose that prosecutorial authority will be exercised by a lawyer. See, e.g., CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-2.1(a) (AM. BAR ASS’N 2015) (“The prosecution function should be performed by a lawyer who is (i) a public official, (ii) authorized to practice law in the jurisdiction, and (iii) subject to rules of attorney professional conduct and discipline.”).

A scenario where criminal charges might be brought to promote a foreign policy objective unrelated to the potential defendant's guilt or innocence is a legitimate and useful context in which to explore the relevant professional and constitutional questions. On one hand, leaving aside restrictions on prosecutors' decision-making processes, it would presumably be constitutional to prosecute the foreign national because there is probable cause. This is important because a president's exercise of executive authority is bound by the law; while the president must "take Care" to ensure that the law is faithfully exercised, the implication is that the president may not himself violate the law.³⁷ On the other hand, prosecuting an individual who is believed to be innocent, although "probable cause" exists, would almost certainly be so far contrary to conventional prosecutorial policy and practice that, even giving appropriate weight to the administration's legitimate foreign policy interests and preferences, Attorneys General acting on their own authority would ordinarily decline to initiate criminal prosecution. That is because the understanding among federal prosecutors is that individuals should not be prosecuted unless prosecuting authorities believe them to be guilty and believe a trial to be winnable.³⁸ Since one can envision the president exercising prosecutorial discretion differently from the Attorney General, it matters which has ultimate legal authority to make the discretionary decision.

II. THE PRESIDENT AS THE CLIENT'S DECISION MAKER

There is sometimes uncertainty about how to characterize or identify a government lawyer's "client,"³⁹ but in a federal criminal case it is plain that, however one reads the Constitution and federal statutes, the president is not the federal prosecutor's client.⁴⁰ The prosecutor's client is the United States,

37. It has long been understood that the president is not above the law. *See, e.g.,* *United States v. Lee*, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."). After leaving office, President Nixon famously suggested the contrary: "when the President does it, that means that it is not illegal." Arthur H. Garrison, *The Rule of Law and the Rise of Control of Executive Power*, 18 TEX. REV. L. & POL. 303, 342-44 (2014) (quoting Nixon's interview with David Frost). But the Court had not been sympathetic to the idea that President Nixon was above the law. *See United States v. Nixon*, 418 U.S. 683, 714-16 (1974) (holding that executive privilege did not immunize the president from a grand jury subpoena for tape recordings and documents).

38. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-4.3 (AM. BAR ASS'N 2015).

39. *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. c (AM. LAW INST. 2000) ("No universal definition of the client of a governmental lawyer is possible.").

40. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987) (stating that prosecutors are "appointed solely to pursue the public interest in vindication of the court's authority"); *Town of Newton v. Rumery*, 480 U.S. 386, 395 n.5 (1987) ("[T]he constituency of an elected prosecutor is the public."); CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-1.3 (AM. BAR ASS'N 2015) ("The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim. When investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel who have worked on the matter and such law

not the president either individually or officially.⁴¹ At the state and local level, different prosecutors bring criminal cases in the name of different public entities, such as the State, the Commonwealth, and the People, but their clients are always abstractions—a sovereignty or the public at large—not flesh-and-blood people such as an alleged victim and not the prosecutors themselves or their investigators. In 1935, the Supreme Court recognized in *Berger v. United States*⁴² that essentially the same goes for federal prosecutors:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.⁴³

In other words, the federal prosecutor's client is the United States and, in making decisions on its behalf, the federal prosecutor's obligation is to see "that justice shall be done."⁴⁴

To say that the client is a sovereignty, a public entity, or a similar abstraction is not necessarily to say who makes decisions on the sovereignty's behalf. It is conventionally understood, however, that prosecutors make the decisions that clients, as well as lawyers, ordinarily make in a civil case.⁴⁵ At the federal level, this would not necessarily mean

enforcement personnel are not the prosecutor's clients."). In various other contexts, the president may be a lawyer's client. For example, the current president has retained various lawyers to represent him personally in response to Special Counsel Mueller's investigation of Russian interference in the 2016 presidential election. See Caroline Kelly & Liz Stark, *Key Events in the Talks Between the Trump and Mueller Teams*, CNN (June 5, 2018, 7:09 PM), <https://www.cnn.com/2018/06/05/politics/trump-mueller-timeline/index.html> [<https://perma.cc/QT6F-ZPYM>] (noting that at various times the team of lawyers representing President Trump in connection with the Russia investigation has included Ty Cobb, John Dowd, Emmet Flood, Rudolph Giuliani, Marc Kasowitz, Jane and Marty Raskin, and Jay Sekulow). In other contexts, a lawyer, including the Attorney General or another DOJ lawyer, may represent the president or other government official in his or her official capacity. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2402–03 (2018).

41. For a discussion of the difference between public officials' involvement in litigation in their personal versus official capacity and the significance of this difference, see *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 918–20 (2004) (Scalia, J., memorandum respecting recusal).

42. 295 U.S. 78 (1935).

43. *Id.* at 88.

44. *Id.* Courts frequently refer to prosecutors' duty to seek justice. See, e.g., *Connick v. Thompson*, 563 U.S. 51, 65–66 (2011); *Bertolotti v. Florida*, 476 So. 2d 130, 133 (Fla. 1985). Scholars have written about the implications of this obligation. See generally Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 *FORDHAM URB. L.J.* 607 (1999); K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 *GEO. J. LEGAL ETHICS* 285 (2014); Robert H. Jackson, *The Federal Prosecutor*, 31 *J. CRIM. L. & CRIMINOLOGY* 3 (1940); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 *WASH. L. REV.* 37 (2009).

45. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-1.3 (AM. BAR ASS'N 2015) ("The public's interests and views . . . should be determined by the chief

that foreign policy considerations, or presidential preferences about foreign policy, drop out of discretionary decision-making, as Justice Scalia's dissent in *Morrison* implied.⁴⁶ It would simply mean that, after taking account of the president's preferences, the Attorney General or another federal prosecutor would make the discretionary decision, such as whether to prosecute an individual.⁴⁷ In the scenario described above, the result would likely be a decision not to prosecute the foreign national because the prosecutorial norm against prosecuting possibly innocent individuals is so compelling.⁴⁸ But in other situations, after taking into consideration professional norms as well as executive policy concerns, prosecutors might defer to the president's priorities or reach the same conclusion as the president. As in other legal representations, any initial disagreements would probably be resolved privately and consensually in most cases.

Saying that the president has "exclusive authority" in criminal prosecutions presupposes that federal criminal prosecution is different from state criminal prosecution, in that the federal government's chief executive, not a prosecutor, is the official with ultimate power to exercise prosecutorial discretion. One might analogize the federal government, a public entity, to a private entity, such as a corporation, which operates through officers and

prosecutor and designated assistants in the jurisdiction."); Green, *supra* note 44, at 633 (explaining that federal prosecutors make decisions "ordinarily entrusted to a client"). At the state and local level, for example, although state governors or other executive branch officials may have authority to remove prosecutors who appear to be acting unlawfully or who appear to have a conflict of interest, the chief executive officers ordinarily do not have constitutional or statutory authority to make prosecutorial decisions in individual cases—that is, to direct the exercise of prosecutorial discretion. *See, e.g., Ayala v. Scott*, 224 So. 3d 755, 759 (Fla. 2017) (holding that the governor did not exceed his constitutional and statutory authority by reassigning the prosecution of a capital case, and observing: "[I]mportant to our holding is that the Governor did not attempt to decide which cases are deserving of the death penalty. The Governor's orders do not direct [State Attorney] King to seek the death penalty in any of the reassigned cases, and King has sworn that the Governor has not attempted to interfere with his determination as to whether to pursue the death penalty in any case."); *Johnson v. Pataki*, 691 N.E.2d 1002, 1007–08 (N.Y. 2017) (upholding Governor Pataki's replacement of the district attorney in a criminal case but noting that he did not direct the exercise of discretion in the case). *But see State ex rel. Stubbs v. Dawson*, 119 P. 360, 364–65 (Kan. 1911) (upholding the governor's power to direct the state attorney general to initiate a prosecution); *Garrett v. State ex rel. Atty. Gen.*, 238 P. 846, 847 (Okla. 1925) (describing a statute authorizing the governor to initiate prosecutions). The allocation of decision-making authority when a state is a party in civil, rather than criminal, litigation is more ambiguous. It has been suggested, however, that state attorneys general ordinarily have more independence from governors than the U.S. Attorney General has been assumed to have from the president. *See generally* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 *YALE L.J.* 2446, 2478–79 (2006).

46. *Morrison v. Olson*, 487 U.S. 654, 726–29 (1988) (Scalia, J., dissenting).

47. *See, e.g.,* Lonnie T. Brown, Jr., *A Tale of Prosecutorial Indiscretion: Ramsey Clark and the Selective Non-Prosecution of Stokely Carmichael*, 62 *S.C. L. REV.* 1, 22–23 (2010) (describing a discussion within President Lyndon Johnson's cabinet regarding whether to prosecute black leaders for inciting urban riots, after which Attorney General Ramsey Clark made the decision not to prosecute, contrary to the preference of other cabinet members).

48. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-4.3 (AM. BAR ASS'N 2015).

employees and is headed by a board of directors.⁴⁹ Although the client is the entity, which is a legal abstraction, the decisions that are conventionally made by a client must be made by one or more individuals as the entity's representatives—that is, in the language of the professional conduct rules, by the entity's "duly authorized constituents."⁵⁰ In the corporate context, the corporate bylaws determine who stands in the client's shoes.⁵¹ Typically, the ultimate decision maker is the board.⁵² The corporate board may opt to delegate its authority to the corporation's chief executive officer, to another corporate officer, or to the corporation's in-house or outside counsel.⁵³ But even if it does so, as the ultimate decision maker, the board can reassume that power in a particular case. In a federal criminal case, one might argue, the president, with Congress's consent, ordinarily delegates authority to DOJ lawyers, just as the board ordinarily delegates to subordinate officers or lawyers.⁵⁴ But when it matters, the president can reassert authority just as the corporate board may. In other words, on this account, the president is the federal government's ultimate "duly authorized constituent" for purposes of decision-making.

If one accepts this account of how authority is constitutionally allocated in federal criminal cases, professional conduct rules dictate restraints on prosecutors as lawyers for the United States. In general, lawyers for an entity, including a public entity, owe duties of competence and loyalty to the entity, not to the officers or other representatives who direct the representation on the entity's behalf.⁵⁵ That means that the entity's lawyers cannot simply accept imprudent direction from the entity's authorized representatives as lawyers might from a flesh-and-blood client.⁵⁶ Entity lawyers have a responsibility, at minimum, to intercede when the entity's

49. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 (AM. LAW INST. 2000) (recognizing that, subject to exceptions, the principles governing the representation of a private entity apply to a government lawyer).

50. MODEL RULES OF PROF'L CONDUCT r. 1.13(a) (AM. BAR ASS'N 2016).

51. See, e.g., DEL. CODE ANN. tit. 8, § 109 (2019).

52. See, e.g., DEL. RULES OF PROF'L CONDUCT r. 1.13 cmt. 4 (2013).

53. See, e.g., DEL. CODE ANN. tit. 8, § 109.

54. Cf. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("The Attorney General and United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws. They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'" (first quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985); then quoting U.S. CONST. art. II, § 3)).

55. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 cmt. b (AM. LAW INST. 2000) ("A lawyer representing only an organization does not owe duties of care, diligence, or confidentiality to constituents of the organization." (citations omitted)); *id.* § 97 cmt. f ("Courts have stressed that a lawyer representing a governmental client must seek to advance the public interest in the representation and not merely the partisan or personal interests of the government entity or officer involved.").

56. As in representing any client, a lawyer for an entity has a counseling function. The lawyer must provide the entity's authorized representative adequate advice to enable the representative to make informed decisions. See MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2016).

representative is acting unlawfully or in breach of fiduciary duty while making legal decisions on behalf of the entity.⁵⁷

How does this translate to the federal criminal context? Certain decisions in a criminal prosecution involve objectives or ends, not means—for example, the decisions whether to prosecute, plea bargain, or dismiss a prosecution. If the president acts on behalf of the United States in making decisions such as these, the Attorney General or subordinate prosecutor cannot unquestioningly follow the president’s direction.

If the president directs the prosecutor to take an illegal action, it would clearly be unethical (and perhaps illegal) for a prosecutor to comply. For example, prosecuting in the absence of probable cause would violate constitutional due process.⁵⁸ If a prosecutor knows that probable cause does not exist, based on her own examination of the evidence, she could not ethically comply with a presidential direction to prosecute.⁵⁹

Similarly, it may violate due process or the equal protection clause to prosecute someone in retaliation for their exercise of a constitutional right⁶⁰ or based on a racial or religious motivation.⁶¹ Where constitutionally impermissible considerations appear to be at play, a prosecutor would have some obligation to investigate the president’s deliberative process to satisfy

57. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 cmt. e (AM. LAW INST. 2000) (“A lawyer representing an organization is required to act with reasonable competence and diligence in the representation and to use care in representing the organizational client. The lawyer thus must not knowingly or negligently assist any constituent to breach a legal duty to the organization. However, a lawyer’s duty of care to the organization is not limited to avoidance of assisting acts that threaten injury to a client. A lawyer is also required to act diligently and to exercise care by taking steps to prevent reasonably foreseeable harm to a client.” (citations omitted)). Thus, if the representative acts unlawfully on the entity’s behalf in a manner that might inure to the entity’s likely detriment, a lawyer may not simply follow the representative’s direction. Likewise, a lawyer may not simply accept direction from an entity representative who is breaching his fiduciary duty by, for example, advancing his own self-interest at the expense of the entity. In such situations, the lawyer’s loyalty is owed to the entity-client, not to its individual representative, and the lawyer must act in the entity’s best interest. This may mean referring the matter to higher authority, refusing to act as directed, or, if necessary to protect the entity from substantial injury, making a public disclosure. *See* MODEL RULES OF PROF’L CONDUCT r. 1.3(b)–(c) (AM. BAR ASS’N 2016).

58. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

59. Indeed, the professional conduct rules explicitly so provide. *See* MODEL RULES OF PROF’L CONDUCT r. 3.8(a) (AM. BAR ASS’N 2016) (“The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”).

60. *See, e.g., Blackledge v. Perry*, 417 U.S. 21, 28 (1974) (stating that a prosecutor may not bring a more serious charge in retaliation for a defendant’s successful exercise of his right to appeal).

61. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“[T]he decision whether to prosecute may not be based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification.’” (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962))); *cf. McCleskey v. Kemp*, 481 U.S. 279, 291 n.8, 319 (1987) (recognizing that purposeful racial discrimination in the implementation of the death sentence violates equal protection but cannot be proven based on statistical evidence).

herself that the government is lawfully pursuing charges. For example, a prosecutor could not comply with a presidential dictate to pursue criminal charges if the prosecutor concluded that the president's decision was in retaliation for the exercise of a constitutional right or was animated by racial or religious bias.

What if the president acts, not contrary to constitutional law, but contrary to well-established prosecutorial norms in ordering an undeserved prosecution or halting a legitimate one? In that event, he has at least arguably failed to fulfill his constitutional obligation to "take Care" that the laws are faithfully executed.⁶² Even if the prosecutor were generally required to accept the president's decisions on behalf of the government, it would be problematic to follow the direction of a president who has neglected his constitutional mandate in this manner. Traditionally, the president's role in executing criminal law has been limited to setting criminal justice policy and hiring and firing the Attorney General and other high-ranking prosecutors, and so there is no settled understanding of what it means for the president to faithfully execute the criminal law in making decisions in individual criminal cases. It seems unlikely that presidential decisions that are not flatly illegal automatically qualify as faithful executions of the criminal law. If the president is not required to adhere to conventional prosecutorial understandings, then presidential decision-making must be measured against some other set of understandings. As a lawyer for the United States, a federal prosecutor cannot implement presidential decisions unquestioningly; rather, professional norms would require the prosecutor to consider whether the president is executing the law faithfully and, thus, consistently with the president's fiduciary duty to the United States.

A further question is whether the president is making prosecutorial decisions in a disinterested manner or is breaching his fiduciary duty by seeking to further his own interest or the interests of others. This analysis requires an understanding of what it means for any elected public officials, but particularly the president, to serve as a fiduciary, both in general and in criminal cases particularly. There is a firmly rooted professional expectation, if not constitutional requirement, that prosecutors engage in disinterested decision-making.⁶³ There are also judicial and professional understandings of what it means for prosecutors, as public officials, to properly use or abuse

62. U.S. CONST. art. II, § 3; *see also* Delahunty & Yoo, *supra* note 17, at 798–808.

63. *See* *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987) ("It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters. We have always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty."); *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984) ("It is a bit easier to say what a disinterested prosecutor is not than what he is. He is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant, as distinguished from the appropriate interest that members of society have in bringing a defendant to justice with respect to the crime with which he is charged."). *See generally* Green & Roiphe, *supra* note 36.

their authority in a criminal case.⁶⁴ This tradition is based on the assumption that it is in the public interest—the interest of the client—to pursue prosecutions in a disinterested way. In the absence of a tradition of presidential control over criminal prosecutions, there is no comparable understanding of how presidents should and should not make prosecutorial decisions. But if it is in the public interest for prosecutions to be conducted in a disinterested way, then presumably this interest persists regardless of who is responsible for making decisions.

Notwithstanding some uncertainty, we assume that presidents, like public prosecutors, have an obligation to the sovereignty to “seek justice,” as that concept has been elaborated by federal courts over the years. Although the concept has been incorporated into lawyers’ professional ethics codes,⁶⁵ there is no reason to assume that the obligation to seek justice identified in *Berger* would be any less applicable to other public officials who took the prosecutorial reins. Indeed, the early nineteenth-century judicial understanding was that even when private lawyers were retained by private clients to initiate criminal prosecutions, as occurred with some frequency at the time, the lawyers were obligated to conform to public prosecutors’ professional expectations.⁶⁶ The reasoning offered in *Berger* would apply equally to any other public official: the sovereignty’s interest in a criminal case is in governing impartially and achieving justice, and therefore its representative, whether or not a lawyer, must pursue those objectives when exercising decision-making authority on the sovereignty’s behalf, as a matter of fiduciary duty if not professional obligation.

This does not mean that a president would be expected to exercise discretion in precisely the same way as the particular prosecutor who is asked to implement the president’s direction. After all, different prosecutors can come out differently on questions of discretion, and often do. But while there is ample room for different judgments about how best to achieve justice, the pursuit of justice excludes certain criteria for decision-making, such as the decision maker’s personal interest, the interest of a third party, or partisan

64. See generally CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION (AM. BAR ASS’N 2015); NATIONAL PROSECUTION STANDARDS (NAT’L DIST. ATTORNEYS ASS’N, 3d ed. 2009); R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS (2005).

65. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2016).

66. See *Rush v. Cavanaugh*, 2 Pa. 187, 189–90 (1845), discussed in Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1 (2005); cf. *Young*, 481 U.S. at 804 (“Private attorneys appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated. . . . The prosecutor is appointed solely to pursue the public interest in vindication of the court’s authority. A private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution.”). This is not to say that there was a consensus among prosecutors and the public around prosecutors’ duty to seek justice. Carolyn B. Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1316–17 (2002) (arguing that in the nineteenth century, prosecutors and members of the public did not widely share today’s understandings regarding prosecutors’ duties).

political advantage.⁶⁷ Additionally, certain principles, although not necessarily codified in the law, are conventionally understood to apply to decision-making in criminal cases, such as, most obviously, that prosecutors should endeavor to avoid punishing innocent people.⁶⁸ A prosecutor cannot simply ignore evidence that the president is breaching his fiduciary duty in giving a particular direction.

All of this suggests that, given the rules and norms of lawyers' professional conduct, there are limits on prosecutors' ability to accept the president's direction, assuming the president has constitutional authority to make decisions about the government's objectives in a criminal case. In the hypothetical foreign policy scenario, for example, a prosecutor might conclude that the president was breaching his fiduciary duty to seek justice in ordering the prosecution of a probably innocent foreign national to gain leverage in a foreign policy dispute. To be sure, nonpartisan political considerations, including foreign policy considerations, may deserve considerable weight in other criminal contexts. For example, it would be legitimate and not uncommon to release a foreign national prosecuted for espionage as part of a "spy swap."⁶⁹ But most would regard it as an abuse of government power to prosecute someone who is likely innocent, and even more problematic to prosecute a probably innocent person for instrumental reasons unrelated to the individual's culpability and the ends of criminal justice. If one accepts that the professional norms of the prosecutor are not merely a nicety but rather a necessity for the proper functioning of the criminal justice system, it follows that the president would fail to fulfill his constitutional obligation to "take Care" that the law is faithfully executed if he usurps the decision-making authority normally left to professional prosecutors by directing them to prosecute the foreign national despite their informed belief that he was innocent. Further, if it appeared that the

67. See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-1.7(f) (AM. BAR ASS'N 2015) ("The prosecutor should not permit the prosecutor's professional judgment or obligations to be affected by the prosecutor's personal, political, financial, professional, business, property, or other interests or relationships."). See generally Green & Roiphe, *supra* note 36.

68. See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-4.3(d) (AM. BAR ASS'N 2015) ("A prosecutor's office should not file or maintain charges if it believes the defendant is innocent, no matter what the state of the evidence."). Difficult questions, which are beyond the scope of this Article, may be posed about the extent of prosecutors' "gatekeeping" responsibility to prevent the conviction of innocent people. Prosecutors disagree among themselves about whether it is proper to seek to secure a conviction of someone where the prosecutor's office has a "reasonable doubt" about his guilt and, if so, at what point uncertainty about someone's guilt should preclude a prosecution. Likewise, prosecutors disagree about whether it is proper to bring a case to trial when the office believes it may not win and how likely an acquittal must be to require the office to forgo or terminate a prosecution. See generally Bruce A. Green & Ellen Yaroshesky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 497-501 (2009) (surveying disparate approaches that prosecutors may take toward their responsibility to avoid charging innocent defendants).

69. The "spy swap" of Rudolf Abel and Francis Powers depicted in the movie *Bridge of Spies* is a well-known example. See generally BRIDGE OF SPIES (Dreamworks 2015).

president's underlying motivation was to promote personal self-interest or partisan political interests, the decision would be all the more dubious.

Of course, if one starts with the premise that the president is the decision maker for the federal government, which is the prosecutor's client, it may be the rare case where a prosecutor rejects the president's direction on ethical grounds, and rarer still where a prosecutor rejects a presidential direction that is predicated on foreign policy. As chief executive, the president has an overarching duty to make foreign policy decisions in order to keep the country safe, and prosecutors cannot claim to have superior expertise or authority in that realm. Surely, federal prosecutors cannot substitute their own foreign policy preferences for those of the president. But even so, it does not follow that a federal prosecutor may defer to all presidential decisions that are purportedly in furtherance of foreign policy objectives. Just as a federal prosecutor must disobey a direction to act lawlessly, at times the prosecutor must disobey directions that reflect a clear abuse of fiduciary duty by the president. A claimed foreign policy objective may be pretextual—a cover for a decision patently based on illegitimate considerations. And even when the claimed foreign policy objective is genuine, it is not invariably legitimate for the federal government to use its criminal justice authority to advance a foreign policy objective. The government may have to further that objective by other means, not by contravening criminal justice norms and traditions.

How the professional conduct rules play out, in the situation where a federal prosecutor concludes that the president is breaching his fiduciary duty, is far from settled given the novelty of a presidential intrusion into criminal prosecutions. If a court regarded a prosecution as sufficiently abusive, it might conclude that the prosecutor was subject to discipline for “conduct prejudicial to the administration of justice”⁷⁰ or, in the more extreme case, for having assisted a client in unlawful conduct. But even if not, carrying out the president's direction would seem to be at odds with the ordinary requirement, analogous to the corporate lawyer's duty in the corporate representation context, to resist direction given by unfaithful fiduciaries.⁷¹ The prosecutor could advise the president against the chosen action. Sometimes, when an entity's representative engages in improper decision-making, the entity's lawyer is expected to go “up the ladder,”⁷² but in this setting there may be no higher for a prosecutor to go in search of

70. See MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 2016) (proscribing “conduct that is prejudicial to the administration of justice”).

71. See generally William H. Simon, *Duties to Organizational Clients*, 29 GEO J. LEGAL ETHICS 489 (2016) (discussing the fallacy of identifying the organization's managers as the clients of the organization's lawyer).

72. See MODEL RULES OF PROF'L CONDUCT r. 1.13(b) (AM. BAR ASS'N 2016) (providing that, in certain circumstances in which an entity's constituent acts unlawfully, the entity's lawyer “shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law”).

direction.⁷³ If the prosecutor cannot dissuade the president, the imperative under professional conduct rules may simply be for the prosecutor to refuse to carry out the president's instructions.

III. THE PRESIDENT AS THE PROSECUTOR'S BOSS

President Trump's assertion of exclusive authority over prosecutors suggests a second way to conceptualize claimed presidential authority over criminal prosecutions. According to this understanding, the president, as chief executive, is the chief prosecutor in charge of all federal prosecution and has chosen to delegate this authority to lawyers within the DOJ.⁷⁴ Although federal prosecutors are employed by the United States or one of its agencies, the president, under this conception, is the federal prosecutors' boss and, for that reason, the person with ultimate authority over federal prosecutors' discretionary decisions—both those made on behalf of the public as client and those made as the public's lawyer. Because the president, in this view, takes on the full role of prosecutor, the president can make decisions in a criminal prosecution about “means” that are ordinarily within the province of the lawyer.

This conception evokes different ethical concerns—namely, concerns about the improper influence of nonlawyers on the practice of law. Preliminarily, not all presidents are lawyers. Even those who are lawyers do not act in that capacity. They are, in essence, nonlawyers.⁷⁵ If the president

73. In some situations, a government lawyer may fulfill the up-the-ladder reporting requirement by going over the president's head to Congress. See Note, *Government Counsel and Their Obligations*, 121 HARV. L. REV. 1409, 1425 (2008). But the analogy between Congress and a private corporation's board of directors is imperfect. Confidentiality considerations may limit prosecutors' ability to make disclosures to Congress about pending cases and, in any event, it seems plain that, on separation-of-powers grounds, Congress could not give direction to prosecutors.

74. There are legal and historical problems with this conception that we discuss in our earlier paper. For instance, federal prosecution was not originally an exclusively executive power. Private individuals and state actors brought federal criminal charges in the early republic. See Green & Roiphe, *supra* note 2, at 15, 42. Further, the authority to prosecute is delegated to federal prosecutors by congressional legislation, not by presidential decree. *Id.* at 35–37, 49. Here, however, we are discussing a different set of problems with this conception, namely, those raised by prosecutors' professional obligations and by the constitutional concept of separation of powers.

75. Most professional conduct rules are applicable only in situations where lawyers are practicing law. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 5.7 (AM. BAR ASS'N 2016) (providing that lawyers rendering law-related services are not subject to the rules governing the lawyer-client relationship if they clarify that they are not practicing law). Lawyers who are not practicing law are regulated primarily by professional conduct rules proscribing criminal, fraudulent, and dishonest or deceitful conduct. In some situations, even the general rule subjecting lawyers to discipline for dishonesty and deceit is inapplicable. See, e.g., D.C. Bar Legal Ethics Comm., Op. 323 (2004), <https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion323.cfm> [<https://perma.cc/M4SR-MZ7X>] (explaining that government agency lawyers who are not engaged in legal representations may engage in deceit where legally authorized in furtherance of their official duties); Utah State Bar Ethics Advisory Op. Comm., Op. 02-05 (2002), <http://www.utahbar.org/wp-content/uploads/2017/11/2002-05.pdf> [<https://perma.cc/S2FH-U4RR>] (stating “that as long as a prosecutor's or other governmental lawyer's conduct employing dishonesty, fraud, deceit or misrepresentation is part of an

is the chief prosecutor with full prosecutorial power and has delegated authority to lawyers within the DOJ, then we run into problems analogous to those at the heart of unauthorized practice of law provisions. A nonlawyer cannot appear before courts, argue motions, or perform other tasks typically reserved to lawyers.⁷⁶ Nonlawyers do not have the requisite training and are not governed by the ethics rules.⁷⁷ The risk, at the heart of these provisions, is that without proper training and with no professional commitment to the applicable ethics code, nonlawyers will undermine the legal system rather than uphold it.⁷⁸

In general, professional norms presuppose that lawyers will exercise “professional independence” in several senses, including independence from nonlawyers who might impermissibly influence their conduct.⁷⁹ These expectations are, to some extent, codified in professional conduct rules that restrict lawyers’ relationship with nonlawyers in order to prevent relationships that would leave the lawyer susceptible to improper lay influence. These include rules against fee splitting with nonlawyers and against forming law partnerships with nonlawyer partners or investors.⁸⁰ The purpose behind these rules, like that behind the prohibition on the unauthorized practice of law, is to ensure that the integrity of the legal system is not eroded by the private interest of individuals who owe no obligation to the courts and may not share the same ethical responsibility to the client.⁸¹

This is not to say that lawyers cannot be supervised by nonlawyers, whether individuals or entities. Subject to restrictions, they obviously may

otherwise lawful government operation, the prosecutor or other governmental lawyer does not violate” the ethical rules).

76. Most states have statutes banning the unauthorized practice of law. See Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 5 AM. B. FOUND. RES. J. 159, 180–81, 191–92 (1980); see also Laurel A. Rigertas, *Lobbying and Litigating Against “Legal Bootleggers”—the Role of the Organized Bar in the Expansion of the Courts’ Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65, 66–68 (2009) (tracing the adoption and development of unauthorized practice of law restrictions in the 1920s and 1930s). The ABA has an ethics rule referencing unauthorized practice of law provisions. MODEL RULES OF PROF’L CONDUCT r. 5.5 (AM. BAR ASS’N 2016).

77. See, e.g., *Rules of Admission*, N.Y. CTS., <http://ww2.nycourts.gov/attorneys/admissions/rules.shtml> [<https://perma.cc/J7DU-EK4E>] (last visited Mar. 15, 2019).

78. One might imagine a comparable problem if the president, invoking his authority as commander-in-chief of the armed forces, sought to fly military airplanes without a pilot’s license or, instead, sought from the ground to give direction on how a pilot should fly a plane. The authority to make certain big military decisions does not necessarily imply the power to make all military decisions.

79. See generally Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Bruce A. Green, *Lawyers’ Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599 (2013).

80. See MODEL RULES OF PROF’L CONDUCT r. 5.4 (AM. BAR ASS’N 2016) (titled “Professional Independence of a Lawyer” and restricting, inter alia, sharing legal fees with nonlawyers and having nonlawyer partners and investors in law firms).

81. See generally Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115 (2000) (discussing the history and development of professional restrictions now incorporated in ABA Model Rule 5.4).

be. Besides working as agents of nonlawyer clients, lawyers are employed “in-house” in corporations, not-for-profit organizations, and government agencies. In these settings, lawyers typically provide legal services to the entities that employ them, but, subject to restrictions, they may also provide legal services to third parties. In either case, the entity may be headed by a nonlawyer, who may have authority to hire or fire the lawyer and to whom the lawyer must answer as to certain matters. But even so, employed lawyers must exercise independent professional judgment on behalf of the client to avoid lay influence on their representation. For example, a lawyer in a not-for-profit agency providing legal assistance to its constituents may not share client confidences with the agency’s nonlawyer directors, much less take direction from them regarding the representation of individual clients.⁸²

It is unclear how much influence a government lawyer may allow a nonlawyer superior to exercise over her professional judgment in carrying out the client’s objectives. Suppose that a government lawyer served in an executive regulatory agency headed by a nonlawyer. In this scenario, the client is the regulatory agency, and it acts through the agency head.⁸³ The agency head may decide the objectives of the representation and discuss with the lawyer how to achieve them. The lawyer may share confidential information with the agency head and receive the agency head’s views. But conventionally, as discussed in Part I, the lawyer decides on the “means” to carry out the client’s objectives.⁸⁴ Therefore, it seems doubtful that the

82. See N.Y.C. Bar Comm. on Prof’l Ethics, Formal Op. 1997-2 (1997), <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-1997-2-confidentiality-of-information-concerning-child-abuse-or-mistreatment-preservation-of-confidences-within-a-social-services-agency-advanced-consent-to-the-disclosure-of-client-confidences-and-secrets> [https://perma.cc/9FY9-BZQS] (stating that “the lawyer [who] is employed by, and thus compensated by, a social services agency” shall “represent her clients with independent professional judgment” and must “not allow the agency to direct or regulate her professional judgment in rendering legal services to clients”).

83. W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L.J. 275, 303 (2017) (“A government lawyer’s client is generally the represented agency, exercising its authority through officers authorized to make decisions on behalf of the agency.”); see MODEL RULES OF PROF’L CONDUCT r. 1.13 cmt. 9 (AM. BAR ASS’N 2016). For analyses of the role and responsibilities of government agency lawyers, see generally Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987); Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1170 (2002). For analyses of the roles and responsibilities of civil government lawyers or of government lawyers performing other specific functions on the civil side, see generally Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000); Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033 (2007); Keith A. Petty, *Professional Responsibility Compliance and National Security Attorneys: Adopting the Normative Framework of Internalized Legal Ethics*, 2011 UTAH L. REV. 1563; William H. Simon, *The Professional Responsibilities of the Public Official’s Lawyer: A Case Study from the Clinton Era*, 77 NOTRE DAME L. REV. 999 (2002).

84. See *supra* text accompanying notes 23–27; see also *McCoy v. Alabama*, 138 S. Ct. 1500, 1508 (2018) (“Trial management is the lawyer’s province: Counsel provides his or her assistance by making decisions such as ‘what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.’ Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive

agency head, as the client's representative, would be entitled to call the shots regarding "means" or strategy—that is, regarding decisions about how to achieve the client's ends. Nor could the agency head do so as the lawyer's supervisor. In general, lawyers as their clients' agents determine the "means" because of various considerations—primarily their presumed expertise, as well as the practical difficulty of obtaining client direction as to each decision and lawyers' own reputational interest in the quality and ethical nature of their work.⁸⁵ The argument for lawyer decision-making is, if anything, more compelling when the client is an entity rather than an individual because the lawyer acts for the benefit of the entity, not the supervisor, and therefore, when the supervisor gives direction, the entity is not necessarily assuming the risk of bad strategic decisions. In hiring a lawyer, an entity is ordinarily deciding to seek the benefit of the lawyer's legal judgment and expertise and authorizing the lawyer to make decisions that lawyers conventionally make.⁸⁶

Suppose that, in the hypothetical prosecution of a foreign national, the president, while anticipating that the case will ultimately be dismissed, directs the prosecutor to file nonfrivolous motions and take other steps to delay the resolution of the case in order to sustain leverage against the nation that is holding a U.S. citizen as a prisoner. Assuming that filing motions to secure delay is not itself ethically proscribed,⁸⁷ the question of whether to file motions is a question of "means" not "ends," although one can debate the relevant objective. Ordinarily, in a criminal case, the objectives include, among others, serving the ends of the criminal law (e.g., punishing or incapacitating some of those who commit a crime and deterring others from committing the crime), assuring the accused a fair process, protecting the integrity of the legal system, and conserving public resources. Questions about whether to expedite or delay proceedings (within the bounds of the law) and about whether and what motions to file are clearly strategic decisions of the sort that, in civil litigation, would be entrusted to the lawyer. One may posit that the government's principal objective in this atypical scenario has little to do with U.S. criminal justice and that the entire

the right to a jury trial, testify in one's own behalf, and forgo an appeal." (quoting *Gonzalez v. United States*, 553 U.S. 242, 248 (2008))).

85. See MODEL RULES OF PROF'L CONDUCT r. 1.2 cmt. 2 (AM. BAR ASS'N 2016) ("Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.").

86. The argument for lawyers' professional independence seems even stronger in the criminal context than in the civil regulatory context. Suppose, for example, that a municipality does not elect its prosecutor but, as is sometimes the case, contracts with a private practitioner to prosecute criminal cases. See Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 J. CRIM. L. & CRIMINOLOGY 161, 185–87 (2017). The municipality's chief executive may nominally be the prosecutor's boss and may have authority to hire or fire the prosecutor, but the prosecutor would not be expected to discuss individual cases with the executive, much less to take direction from the executive about decisions in individual cases.

87. See MODEL RULES OF PROF'L CONDUCT r. 3.2 (AM. BAR ASS'N 2016) ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.").

prosecution is a “means” to secure the return of the U.S. citizen (albeit, as discussed above, a dubious means). But even then, although the objectives of the litigation would be expanded, questions of timing and motions in the litigation would still be strategic ones ordinarily entrusted to the lawyer who is responsible for the litigation, not to the client. While the prosecutor could take account of the public interest in securing a citizen’s release, the prosecutor could not ignore the public interests in fair criminal process and in avoiding punishment of the innocent, and those interests would foreclose delaying the proceedings to secure leverage with an unfriendly foreign nation.

In general, under conventional understandings about the lawyer-client relationship, the prosecutor would be obligated to exercise independent professional judgment notwithstanding the prosecutor’s subordinate employment relationship to the president.⁸⁸ Most obviously, the prosecutor could not follow direction to act illegally or unethically. For example, the prosecutor could not follow a direction to file frivolous motions coming from the president as his supervisor any more than from another client representative (or client).

But even if deleterious motion practice and requests for continuances would not be unlawful or unethical *per se*, the prosecutor could not reflexively accept the president’s direction. On the contrary, the prosecutor would be expected to conclude that it runs counter to the norms and expectations of criminal prosecution—to the concept of “seeking justice”—to continue and prolong an individual’s prosecution (and potentially prolong his imprisonment), in anticipation that the defendant will never be convicted and does not deserve to be, in order to serve foreign policy objectives having nothing to do with this defendant’s culpability. If a prosecutor reached that conclusion, it would be unethical for her to follow the nonlawyer supervisor’s direction, even if that supervisor was the president. The president, as the prosecutor’s boss, could fire the prosecutor, just as a corporate chief executive or board of directors could fire the corporation’s in-house general counsel or outside counsel. But even so, from a conventional ethics perspective, a lawyer serving as prosecutor may not accept the nonlawyer supervisor’s direction about how to achieve the government entity client’s lawful objectives but must exercise independent professional judgment.

This means that, insofar as the president gives direction to the Attorney General, who is plainly the president’s subordinate, the Attorney General may not simply direct the trial prosecutor to implement that direction. If the Attorney General, as a lawyer, assumes responsibility for making “means” decisions, he must make an independent professional judgment about how to achieve the legitimate objectives of the representation, which, in any criminal case, entail doing justice. The deliberative process permits giving the president’s preferences only as much weight as they appropriately deserve, but not automatically privileging them. If the Attorney General simply

88. *See supra* text accompanying notes 72–78.

serves in an administrative capacity as a conduit for the president's direction, then it is the trial prosecutor or other subordinate prosecutor authorized to conduct the representation who must engage in the requisite independent decision-making.⁸⁹

IV. THE SEPARATION-OF-POWERS DILEMMA

Our first article on the president's ability to control the DOJ argued that prosecutors serve as an important limit on presidential power. It contributed to a growing dialog about intrabranched checks and balances.⁹⁰ Relying on relevant U.S. Supreme Court precedent, that article concluded that Congress has the power to allocate authority to prosecutors within the DOJ.⁹¹ By examining the specific professional norms at issue, this Article turns to a different but related issue: the interbranch separation-of-powers problems that would inevitably accompany a president's decision to direct individual prosecutorial decisions. This Part concludes that allowing the president the power to control federal prosecutors would undermine separation of powers by stripping courts of the ability to protect themselves from executive encroachment. This allocation of power to the president would not further the executive's constitutionally defined task of taking care that the laws are enforced faithfully. Instead, it would impair the courts' ability to perform their core function: deciding criminal cases according to fact and law.⁹²

There are two related separation-of-powers issues raised by our discussion of prosecutorial ethics. First, the claim of presidential power to control criminal prosecutions interferes with the inherent authority of federal courts and the statutory authority of state courts to regulate lawyers. There are, therefore, two competing claims by two different branches of government regarding the power at issue. It might not seem immediately apparent which branch should win out or whether the branches ought to just do battle in any

89. Of course, if the Attorney General purports to exercise independent professional judgment but apparently defaults on this responsibility, paying unquestionable obeisance to the president, the subordinate prosecutor will have an ethical dilemma regarding whether to accept the Attorney General's direction, as would any subordinate lawyer receiving direction from a supervisory lawyer who appears to be acting in bad faith. How the federal prosecutor might navigate this dilemma is an interesting question but one beyond the scope of this Article. For purposes of this Article's analysis, we assume that all the government lawyers are motivated to behave ethically, insofar as they can discern what professional ethics requires.

90. Green & Roiphe, *supra* note 2, at 5–6.

91. *Id.* at 34–38.

92. As administrative law scholars have pointed out, the formalist view of the division of authority between the branches is difficult to apply to the modern administrative state. Agencies combine judicial, legislative, and executive elements, and it is impossible to imagine separating out these roles in the modern complex society. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—a Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492–93 (1987). Strauss argues that the key question is whether the agency's relationship with the president, members of Congress, or judges undermines the intended distribution of authority among the three. For an argument that criminal law separation of powers ought to be treated differently from administrative agencies and ought to follow a formalist approach, see Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 990–97 (2006).

given case. We conclude that the conflict is illusory because the president's power and obligation is to "take Care" that the laws are executed "faithfully." This obligation presupposes playing by the rules.⁹³ As we argue above, in order to play by the rules, the president has to rely on trained prosecutors who will follow the ethical traditions of the profession rather than assume responsibility himself or delegate to someone else in the executive branch who has no such professional duty and other potentially conflicting interests.

Second, if we were to allow presidential authority over law enforcement to trump ethics rules enforced by courts and endorsed by Congress, we risk significantly weakening an independent judiciary. If we were to assume an anomalous world in which the president can direct prosecutors' decisions and courts are free to sanction prosecutors for following those directions, courts would be significantly impaired in their ability to perform their core function—deciding individual cases according to law and fact. To exercise this function properly, courts rely on an independent bar. Specifically, they rely on independent prosecutors to develop and pursue cases according to professional norms.⁹⁴ While courts possess the theoretical capacity to police these norms, doing so in practice is difficult, if not impossible. The professional norms at issue here are more than just rules of practice. They intersect significantly with constitutional rights and provide the backbone for the integrity of the criminal justice system.⁹⁵ As arbiters within that system, who are tasked with deciding cases in a fair and impartial way, judges depend on prosecutors to follow these rules. They depend on prosecutors to provide them with reliable facts and ensure the integrity of the system by adhering to the norms, traditions, and ethical requirements of prosecution. Allowing a president the power to render these norms meaningless would interfere with the integrity and independence of the judiciary.⁹⁶

Justice Scalia's dissent in *Morrison* rested on an argument about constitutional separation of powers.⁹⁷ Based on his understanding of the constitutional text and history, Justice Scalia argued for a strict division of tasks between the three branches of government.⁹⁸ In *Morrison*, he assumed

93. See *supra* note 17 and accompanying text.

94. For an argument about how central norms are to democratic government, see generally Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018).

95. See *infra* Part III.B.

96. The courts' ability to protect and police the power of the judicial branch against incursion from other branches is well established. THE FEDERALIST NO. 51 (James Madison); see also *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) ("An informed, independent judiciary presumes an informed, independent bar."). Emphasizing the way in which courts depend on prosecutors does not and should not minimize the role that courts play in policing prosecutors. Prosecutors often violate their ethical obligations, and courts are among the important checks on such abuse, but there is a significant amount of professional conduct that courts cannot regulate both because they must respect the boundaries of the executive branch and because it is difficult if not impossible for courts to oversee the conduct.

97. *Morrison v. Olson*, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting).

98. *Id.* Justice Scalia was a proponent of the "formalist" approach to separation of powers. Formalists assume that the Constitution, through the vesting clauses, has completely divided federal government authority between the three branches. Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 857–58 (1990).

that because prosecution is a “purely”⁹⁹ executive power, it must be exercised by the executive branch alone.¹⁰⁰ Critics of Justice Scalia’s separation-of-powers theory have argued that, in fact, he departed from the text and history in order to further his ideological agenda of enhancing the power of the executive at the expense of the other branches of government and did so under the guise of an evenhanded application of the Constitution as it was written and intended.¹⁰¹

This Part adds a dimension to this critique by demonstrating how Justice Scalia’s view of prosecutorial power misinterpreted the nature of federal prosecution (both at the founding and today) and ignores powers traditionally exercised by Congress and the federal judiciary. While it is true that prosecution is an executive function, it is a function that can be controlled by Congress and overlaps significantly with the judiciary as well.¹⁰² By acting as if this is not so, Justice Scalia’s dissent masked that its understanding would impair the power of courts and the legislature to regulate prosecutors and significantly weaken the core function of an independent judiciary.¹⁰³ This Part will take up each of these two separation-of-powers concerns in turn.

A. *The Courts’ and Legislature’s Power to Regulate Prosecutors*

Few would suggest that a prosecutor may follow a president’s direction to break the law—for example, by suborning perjury or withholding material exculpatory evidence. And it is unlikely that anyone would take the position that a prosecutor may follow a president’s direction to violate any and all rules of professional conduct and judicial standards governing lawyers’ conduct. It would be perverse, for example, to argue that a prosecutor may,

Functionalists, on the other hand, believe that the Constitution is largely silent about the tasks assigned to different branches. Given this silence, most of the work of structuring the federal government lies with Congress under the Necessary and Proper Clause. Peter S. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597–99 (1984). Formalists prefer a strict division of power among the branches, and functionalists favor a balance. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1946 (2011). Functionalists also tolerate shared responsibilities as long as they do not interfere with a “core” function of any branch. Strauss, *supra* note 92, at 512–22. A third set of scholars seeks a pragmatic middle ground. They suggest that separation-of-powers analysis should focus on preventing a single branch from accumulating too much power and that the Constitution equips each branch with the power to protect itself and police the others. See, e.g., M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1130 (2000); Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 362–65.

99. *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting).

100. *Id.* at 704–05.

101. Reisman, *supra* note 16, at 50–53.

102. As James Madison argued, the separation of powers does not necessarily require a strict division of authority. THE FEDERALIST NO. 47 (James Madison). And, in fact, some blending of powers may ensure that one branch is able to prevent the encroachment of another. THE FEDERALIST NO. 51 (James Madison).

103. In our earlier article, we argued that characterizing prosecution as a pure executive power is not in keeping with the history of prosecution in the early American republic. Green & Roiphe, *supra* note 2, at 12–15.

much less must, lie to the court (or to anyone else) if the president so directs. Even so, there is no caveat in the theory of complete presidential control over prosecution that makes this point clear, and it is at least conceivable that a president might respond as then-former President Nixon did in an interview with the journalist David Frost, “when the President does it, that means that it is not illegal.”¹⁰⁴

But even if one were to take the more modest view that the president cannot direct a prosecutor to break the law or violate core ethical principles, the professional conduct norms discussed in Parts II and III may seem, at first blush, less important. As discussed above, the premise that the president may make all decisions in any given federal prosecution would not require prosecutors to violate rules directly governing relations with the court or third parties. Rather, presidential control potentially conflicts with professional conduct rules and norms governing lawyers’ relationship with clients, particularly entity clients, concerning questions about who makes decisions and how decisions are to be made.

The professional rules concerning entity representation and nonlawyer influence were not embodied in common-law agency decisions but developed well after the Constitution was written.¹⁰⁵ There is no reason to believe that the constitutional framers expected prosecutors to be bound by these specific rules in whatever interactions they might have with the president. But, at the core, the professional conduct rules in question implement a notion of lawyers’ professional independence that has been fundamental to the role of the American lawyer since this country’s founding.¹⁰⁶ It would be hard to make a principled argument that the presidential authority to direct federal prosecutions is subordinate to professional conduct rules in general but that these particular rules are an exception. Nor could it plausibly be argued that prosecutors’ independence is less important than that of other lawyers.

In order to perform their work adequately, courts assume that prosecutors treat similar cases alike and exclude illegitimate considerations in prosecuting cases. Ethics rules, customs, and practices of prosecutors’ offices help ensure this is so. Unlike career prosecutors, the president would not decide against the background of prior decisions and DOJ traditions and probably cannot avoid interjecting impermissible considerations. The federal court’s deference to prosecutors’ exercise of discretion presupposes

104. See *supra* note 26; see also *Excerpts from Interview with Richard Nixon About Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977, at A16. President Trump’s lawyers have implied that they may share this view. Letter from Marc E. Kasowitz to Robert S. Mueller, *supra* note 1. The president has also implied this himself. *Excerpts from Trump’s Interview with the Times*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/us/politics/trump-interview-excerpts.html> [<https://perma.cc/FBJ4-3WYL>] (“I have absolute right to do what I want to do with the Justice Department.”).

105. Roger N. Walter, *An Overview of the Model Rules of Professional Conduct*, 24 WASHBURN L.J. 443, 444–45 (1985).

106. Gordon, *supra* note 79, at 30–68; Green, *supra* note 68, at 602–08.

prosecutors' professional commitment to seeking justice and to the norms, rules, and traditions that promote and protect that pursuit.¹⁰⁷

This assumption about prosecutors' conduct both supports and presumes prosecutorial independence.¹⁰⁸ Of course, at times, courts do have to question whether prosecutors are behaving ethically. But as a general matter, the presumption that they are committed to the traditional norms of prosecution allows prosecutors to do their job.¹⁰⁹ It makes their work easier because, for example, judges generally take prosecutors at their word and assume that there is probable cause to support their arrests and indictments. If the DOJ takes the position that the president may control it and courts do not know when the president has directly intervened in discretionary decisions, prosecutors may lose the benefit of the presumption in all cases. Not knowing whether prosecutors are or are not adhering to the traditional expectations in any given case, courts may mistrust them in all cases, making it harder for prosecutors to do their job and significantly altering (and likely undermining) the criminal process.¹¹⁰

Ethics rules governing prosecutorial conduct in general, and disinterestedness in particular, are not only professional norms, but also a key tool in the administration of justice and therefore fundamental to a functioning independent judiciary. While superficially appealing in its simplicity, Justice Scalia's dissent in *Morrison* overlooks the complexity of government functioning in general and prosecution in particular. In claiming that prosecution is a *pure* executive power, Justice Scalia misrepresented the early history of prosecution in this country, which demonstrates a complex tradition in which federal prosecution was shared by private individuals, states, and to some extent the judiciary.¹¹¹ It is not surprising then that he

107. Fish, *supra* note 19, at 238–44; Green, *supra* note 44, at 618–37.

108. *Imbler v. Pachtman*, 424 U.S. 409, 423–24 (1976) (“The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case. . . . The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded and we would have moved away from the desired objective of stricter and fairer law enforcement.” (alteration in original) (quoting *Pearson v. Reed*, 44 P.2d 592, 597 (Cal. Ct. App. 1935))).

109. *See id.* at 422–23.

110. If courts were to develop a practice of asking prosecutors to reveal whether or not their decisions are their own or those of the administration, this too could put prosecutors in an ethical bind. If the president is akin to the representative of a client, then revealing the information might be a violation of confidences. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2016). If the president is a nonlawyer employer, then the prosecutor may well face employment consequences for answering.

111. Justice Scalia's inaccurate treatment of history leads to a distorted view of the three branches of government. Many scholars have pointed out how blended the obligations of the different branches were. Federal prosecution was shared by private individuals and states. *See, e.g.*, Green & Roiphe, *supra* note 2, at 70; Krent, *supra* note 7, at 290–310; Reisman, *supra* note 16, at 50–51. Historians have shown that the obligations of different branches were

glossed over the contemporary and deeply rooted reality that the judiciary shares an important part of the prosecution function by, among other things, regulating prosecutors' conduct. By fiat, Justice Scalia's approach would transfer the entire law enforcement function to the executive branch in general and to the president in particular. Under the guise of neutrally applying the text and history of the Constitution, his theory would in fact alter the balance between the three branches by shifting power from the federal courts and Congress to the executive.

One can rationalize presidential authority over federal prosecutors on the theory that while the president's executive power does not displace all professional conduct rules, it supersedes those particular contemporary rules that have the effect of limiting or impeding the president's authority to direct the conduct of criminal prosecutions. In other words, if court-adopted rules or standards have the effect of denying the president the ability to make otherwise-lawful prosecution decisions by putting prosecutors at risk of discipline for complying with the president's decisions, then the rules or standards are preempted by Article II of the Constitution.

The argument seems to set up a direct constitutional conflict between executive branch authority, on one hand, and both judicial and congressional authority, on the other. That is because the professional conduct rules and standards are expressions of both judicial and legislative power.

In general, prosecutors, as lawyers, are subject to the supervisory authority of both the courts that have licensed them and, if different, the courts before which they appear.¹¹² Thus, federal prosecutors are subject to the professional conduct rules of their licensing jurisdictions and the rules and court-made law of the federal courts in which they prosecute.¹¹³ For the most part, prosecutors accept the relevance of these various norms. Although federal courts are highly deferential to prosecutors' discretionary decision-making, particularly as to charging and plea bargaining,¹¹⁴ prosecutors have

shared from the outset in other contexts as well. *See, e.g.,* Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1383–84 (1998).

112. Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 73–74 (1995).

113. Federal courts have broad common-law authority “to supervise and discipline lawyers who appear before them.” Bruce A. Green, *Doe v. Grievance Committee: On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485, 530–31 (1989). In addition, federal courts have general supervisory authority over the conduct of criminal proceedings. *See, e.g.,* McNabb v. United States, 318 U.S. 332, 340 (1943). For a discussion of the supervisory power of courts in criminal cases, see generally Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324 (2006); Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984); Alfred Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969); and Lisa H. Wallach, *Prosecutorial Misconduct in the Grand Jury: Dismissal of Indictments Pursuant to the Federal Supervisory Power*, 56 FORDHAM L. REV. 129, 135–39 (1987).

114. *Bordenkircher v. Hayes*, 434 U.S. 357, 368 (1978) (deferring to prosecutors' decisions in plea bargaining); *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299 (9th Cir. 1992) (holding that judges should not engage in detailed oversight of prosecutors' decisions in plea bargaining and charging); *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379–

not persuaded courts that, as executive branch officials, they are not bound by the court's professional regulation.¹¹⁵

The question of whether federal prosecutors are exempt from certain areas of professional regulation was litigated most vigorously several decades ago in the context of the professional conduct rule restricting lawyers' direct communications with represented persons.¹¹⁶ Invoking this rule, some courts concluded that prosecutors and their investigators may be restricted from conducting otherwise-lawful questioning of represented suspects or defendants without their lawyers' consent.¹¹⁷ Anticipating that additional courts might adopt restrictive readings of the rules, the DOJ issued a memorandum, known as the Thornburgh Memo, which purported to authorize federal prosecutors to undertake investigative measures in potential derogation of the professional conduct rules.¹¹⁸ When courts questioned the policy's authority, the DOJ responded by implementing the federal rulemaking process to promulgate a federal regulation, known as the Reno Regulation, to similar effect.¹¹⁹ The Eighth Circuit held that the Reno Regulation was unenforceable,¹²⁰ and the DOJ abandoned its reliance on the regulation soon thereafter when Congress adopted a law, known as the McDade Amendment,¹²¹ which requires federal prosecutors to abide by the professional conduct rules of the states in which they prosecute.¹²²

In other contexts, questions might be raised regarding which body, as between state courts, federal courts, or Congress, should establish and enforce professional conduct regulation for federal prosecutors. Depending on the subject of the regulation, one or the other may have a stronger claim.¹²³ For example, the federal courts before which prosecutors appear may have the stronger claim to apply their professional conduct rules for trial lawyers in order to protect the integrity of judicial proceedings; state courts may have the stronger claim to apply rules relating generally to prosecutors' character and fitness to practice law; and Congress may have the stronger claim to adopt legislation, such as the Jencks Act,¹²⁴ that explicitly regulates the conduct of criminal prosecutions. In this case, however, the question of how

80 (2d Cir. 1973) (holding that, based on separation of powers, courts will not review a prosecutor's decision not to bring charges).

115. *Whitehouse v. U.S. Dist. Court*, 53 F.3d 1349, 1357 (1st Cir. 1995) (affirming the court's power to regulate federal prosecutors).

116. Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 211–14 (2000).

117. *See, e.g., United States v. Hammad*, 858 F.2d 834, 839–40 (2d Cir. 1988).

118. Memorandum from Richard L. Thornburgh, Att'y Gen. of the United States, to All Justice Dep't Litigators (June 8, 1989), *reprinted in In re Doe*, 801 F. Supp. 478, 489–93 (D.N.M. 1992).

119. 28 C.F.R. § 77 (1995).

120. *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998).

121. 28 U.S.C. § 530B(a) (2012).

122. Zacharias & Green, *supra* note 116, at 211–16 (describing the legislative history and substance of the McDade Amendment).

123. *See generally* Green & Zacharias, *supra* note 13.

124. 18 U.S.C. § 3500 (2012).

to allocate authority among these regulatory bodies is of no moment because all three have regulated in essentially the same way—state and federal courts through the adoption of similar sets of rules, and Congress through the McDade Amendment—and, therefore, federal prosecutors are not subject to inconsistent regulation. The question, instead, is whether any or all of these bodies may adopt regulations for prosecutors, as lawyers, that have the effect of frustrating presidential control of federal criminal prosecutions.

In general, executive branch action must take place within the bounds of the law—that is, within the bounds of legislation or, in litigation, law made by judges pursuant to their inherent or rulemaking authority.¹²⁵ Here, the law in question regulates lawyers and is not specifically directed at government lawyers, though it has implications for them. At a level of generality, it seems obvious that lawyer regulation is among the laws within the confines of which the executive branch must function. A sweeping claim that the president, or the executive branch in general, is above, or unbound by, the law that regulates lawyers in criminal proceedings would have little credibility.¹²⁶ The Constitution assigns the president the task to “take Care” that the laws are faithfully executed.¹²⁷

Proponents of presidential power over criminal prosecutions might argue that the law here is different because, while directed at lawyers generally and therefore applicable to lawyers in the executive branch, the particular professional conduct rules do not restrict action. They regulate how decisions to act are made. Their effect in criminal prosecutions is arguably to regulate how decision-making authority is allocated within the executive branch and the criteria governing otherwise lawful decisions. No doubt, Congress can define crimes and restrict how the executive branch investigates and proves them, and courts can restrict prosecutors’ in-court conduct, all of which may have the effect of limiting executive branch authority. But one might argue that it is a greater intrusion, and different in kind, to dictate the internal decision-making process and criteria for decisions that are entrusted to the executive branch.¹²⁸

We find this argument unpersuasive. To begin with, it misconceives the ethics rules in question. The rules are not fundamentally different from others adopted by courts to regulate lawyers’ professional conduct in the courtroom. The rules are prophylactic ones that protect the lawyer from third parties’ improper influences—that of the client’s faithless fiduciary or the lawyer’s nonlawyer supervisor. But many rules are prophylactic, including

125. See Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777, 807 (2012).

126. See *United States v. Nixon*, 418 U.S. 683, 714–16 (1974); *United States v. Lee*, 106 U.S. 196, 220 (1882) (“No man in this country is so high that he is above the law.”).

127. U.S. CONST. art. II, § 3; see *supra* note 17 and accompanying text.

128. There are certainly precedents for such restrictions. For example, federal legislation allowing some juveniles to be tried in federal court rather than transferred to state authorities sets the criteria for prosecutors’ decisions. See 18 U.S.C. § 5032 (2012). For an argument that federal courts’ supervisory powers should not extend beyond the courtroom, see generally Beale, *supra* note 113, at 1520–22.

those governing conflicts of interest.¹²⁹ At the core, these rules, like the conflict of interest rules, protect the fundamental professional value of lawyer fidelity to the client.¹³⁰ And in the context of prosecution, where the client is the public, they ensure the integrity of the case.

The importance of the ethics rules discussed above relates to the second separation-of-powers concern, which we discuss next.

B. *Undermining a Core Function of an Independent Judiciary*

Stripping states, Congress, and the federal courts of the ability to regulate prosecutors would violate the constitutional separation-of-powers principles by undermining the core power of courts to decide criminal cases according to fact and law. Judicial independence was just as central at the founding as executive power.¹³¹ Justice Scalia in his dissent in *Morrison* ignored how his theory of presidential control over federal prosecution would affect the judiciary. At the very least, this consequence ought to factor into any separation-of-powers analysis. If not, what seems an uncontroversial textual reading of discrete executive power is masking what is, in fact, a significant diminution of the judicial role.

In the context of prosecution in particular, the rules regarding a lawyer's independence from the client play a far more foundational role than it might at first seem to. They serve to promote and ensure prosecutors' "duty to do justice," a principle recognized by the Court in *Berger*.¹³² This duty dates back long before the founding and was clearly intended to be a central part of American criminal justice.¹³³ The rules discussed in the first three parts of the Article are not merely etiquette for lawyers, but rather a way of ensuring disinterested decision-making, which is not only a key professional norm but also fundamental to the proper functioning of the judiciary. As the

129. See Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 *FORDHAM L. REV.* 71, 104 (1996) ("[T]he conflict of interest rules are prophylactic rules They do not proscribe conduct that is necessarily harmful in itself, but protect against the occurrence of various harms."); cf. *Bd. of Governors of the Fed. Reserve Sys. v. Agnew*, 329 U.S. 441, 449 (1947) ("[The banking law's conflict of interest rule] is not concerned, of course, with any showing that the director in question has in fact been derelict in his duties or has in any way breached his fiduciary obligation to the bank. It is a preventive or prophylactic measure.").

130. See *supra* notes 70–72 and accompanying text.

131. See generally SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY*, 1606–1787, at 27–37 (2011).

132. 295 U.S. 78, 88 (1935). For an argument that the prosecutor's duty to do justice, including the duty to engage in disinterested decision-making protected by the rules discussed in Parts II and III, is critical to the administration of justice, see Eric S. Fish, *Against Adversary Prosecution*, 103 *IOWA L. REV.* 1419, 1422 (2018).

133. *Rush v. Cavanaugh*, 2 Pa. 187, 189 (1845) ("[The prosecutor] is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man."); Fish, *supra* note 19, at 238–44; Green, *supra* note 44, at 612–19. For discussions of *Rush v. Cavanaugh*, see Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 *GEO. J. LEGAL ETHICS* 241, 257–58 (1992); Zacharias & Green, *supra* note 66, at 6–11.

Court held in *Legal Services Corp. v. Velazquez*,¹³⁴ “An informed, independent judiciary presumes an informed, independent bar.”¹³⁵ In *Velazquez*, the Court invalidated restrictions that conditioned the petitioner’s funding on its willingness to forgo challenges to certain welfare regulations as impermissible viewpoint discrimination.¹³⁶ The professional norms at issue here are at least as important to maintaining and nurturing an independent bar, which, as the Court explained, is necessary for the functioning of an independent judiciary.¹³⁷ These prosecutorial norms help to ensure that investigations and prosecutions are conducted in a proper and evenhanded way and that the facts developed in an investigation and judgments about the relevance of those facts are trustworthy.¹³⁸ This particular form of disinterested decision-making is unlikely and perhaps even impossible for a president to employ given the conflicting demands of the president’s other duties, the president’s conflicting policy and political commitments, and the president’s lack of training, experience, and expertise in prosecutorial decision-making.

In the case of prosecutors, the core value of professional independence implicates the integrity of the criminal justice system and the courts as a whole. The effect of the rules in the context of criminal prosecutions, as discussed, has been to ensure disinterested prosecutorial decision-making in accordance with both the judicial expectation and the prosecutorial tradition of “seeking justice.” To a degree, the obligation to seek justice is elaborated in the professional conduct rules.¹³⁹ To a greater degree, judicial opinions have elaborated on prosecutors’ distinctive professional obligations, which are rooted in this general concept.¹⁴⁰ Courts’ supervision of criminal prosecutions has built up around the assumption that prosecutors’ offices are committed to this understanding.¹⁴¹ Stripped of their ability to rely on independent prosecutors playing by the rules, courts would be significantly

134. 531 U.S. 533 (2001).

135. *Id.* at 534. The Court in *Velazquez* drew on First Amendment law to strike down the restrictions at issue. *Id.* at 537. While the First Amendment does not apply here, the reasoning is similar. In our hypothetical, prosecutors directed by the president would be unable to provide the court with critical information—that they do not believe the evidence warrants a prosecution.

136. *Id.* at 547–49.

137. *Id.* at 545.

138. See generally CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION (AM. BAR ASS’N 2015).

139. See MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2016).

140. See *supra* note 58 and accompanying text.

141. See Green & Yaroshesky, *supra* note 32, at 55 (noting that, in *Berger v. United States*, the Court “echoed the public’s confidence that prosecutors will faithfully observe their obligations to play fairly and seek justice”); see also *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“[O]ur system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: ‘The United States wins its point whenever justice is done its citizens in the courts.’”).

hobbled in one of their central functions, namely, checking the power of the executive and preventing prosecutorial overreach.¹⁴²

Judicial expectations of prosecutors are not particularly focused on presidential authority. In elaborating expectations for prosecutors, courts have never seriously considered that the president might seek to assert decision-making authority in federal criminal cases even occasionally, much less routinely. Insofar as judges address charging decisions, trial decisions, and other prosecution decisions, their concern is not with who makes decisions, since it has always been assumed that prosecutors will make them, but with how decisions are made—with what considerations may and may not legitimately be considered. Presidential control over prosecution would mean that federal courts, unlike state courts, cannot dictate that prosecutors, as lawyers responsible for criminal prosecutions, bring and try criminal cases consistently with the expectations that have built up over the course of two centuries around the idea of seeking justice.

Federal courts are, for instance, reluctant to use their supervisory power over the grand jury process. This is to protect the independence of that process, which is separate from the three branches of government.¹⁴³ But courts do have an obligation to ensure the integrity of their proceedings.¹⁴⁴ In justifying their standoffishness, courts invoke the professional obligations of prosecutors.¹⁴⁵ The integrity of the grand jury is policed, at the outskirts, by courts. But it is ensured by a corps of professional prosecutors who pursue investigations and indictments for legitimate reasons, not partisan purposes or personal gain.¹⁴⁶ If prosecutors are subject to presidential control and, as a general matter, are no longer making discretionary decisions according to professional norms, one of the premises for judicial restraint in exercise of its supervisory power will be lacking.

Overlooking this implication of presidential control over prosecution risks altering the balance of powers significantly. If courts cannot rely on prosecutors to make decisions in a disinterested manner, then they are compromised in their ability to interpret the law and apply it to the facts. Returning to our hypothetical, a court considering the case of the foreign national has no way of knowing that the charging decision departed from the well-worn tradition that prosecutors will not charge someone if they do not believe that person is guilty.¹⁴⁷ The judge who presides over the case will

142. Prakash, *supra* note 6, at 568 (arguing that, in 1789, “Americans viewed judging, in part, as a check on the executive’s law enforcement”).

143. *United States v. Kilpatrick*, 821 F.2d 1456, 1477–78 (10th Cir. 1987).

144. *United States v. Hasting*, 461 U.S. 499, 505 (1983) (explaining that the preservation of the integrity of the judicial process is one of the justifications for the use of judicial supervisory power).

145. *In re Grand Jury Proceedings*, 700 F. Supp. 626, 630 (D.P.R. 1988).

146. *Id.*

147. If presidential control over prosecutorial decision-making became the norm, perhaps courts could require prosecutors to reveal this fact. This would potentially introduce new problems. First, it would not solve the problem if the president orders a prosecutor not to pursue a case the prosecutor otherwise found compelling. Second, if the president is the representative of an entity client, as we analyze in Part II, the prosecutor would be ethically

probably assume prosecutorial disinterestedness in making key rulings. While the defense will hopefully provide an important check, which could lead to the correct outcome, courts in the criminal justice system also rely on the prosecutor pursuing justice, not only criminal convictions, in reaching the right result.¹⁴⁸

In the context of a prosecution with partisan political implications, the concern is even greater. In our hypothetical case with foreign policy implications, the president has interests that are different from and potentially in conflict with the principles that ought to inform decisions in criminal cases. Even more so in an investigation or prosecution of a federal executive official, as in *Morrison*, the president likely has an interest that directly conflicts with the principles governing disinterested prosecution.¹⁴⁹ Congress enacts laws that are meant to apply to everyone, including the cabinet and the president himself.¹⁵⁰ The judiciary is supposed to apply those laws in particular circumstances. The courts would be significantly compromised in this power if they were deprived of the ability to regulate federal prosecutors to ensure disinterested decision-making.

One could argue that most presidents will likely do the right thing and do their part to ensure the integrity of the system, but prosecutorial decisions are made in private with no transparency—if a president chooses to exercise prosecutorial power, there is little way to ensure the propriety of his decisions. Political scientists have argued that political actors in general and the president in particular are responsible for sustaining the legitimacy of the courts and judicial review.¹⁵¹ Keith Whittington, for instance, writes, “For the Court to compete successfully, other political actors must have reasons for allowing the Court to ‘win.’”¹⁵² Because presidents have the incentive to either undermine or buttress judicial supremacy (depending on the political climate of the day), it is more important for the public to know whether the president is making decisions in a criminal case and on what basis. If a president were to decide to institute or halt a criminal case for illegitimate, self-interested reasons, such as protecting his political party’s power or his own well-being (thereby weakening the role of courts), this fact would remain opaque, inaccessible to Congress, the courts themselves, or the public.¹⁵³ The president would thus weaken the judiciary without anyone

barred from making this disclosure without the president’s permission. MODEL RULES OF PROF’L CONDUCT r. 1.6 (AM. BAR ASS’N 2016). If the president is the prosecutor’s supervisor, as we analyze in Part III, then the disclosure may be permissible under the rules, but the prosecutor could (and possibly would) be fired for insubordination.

148. Fish, *supra* note 19, at 244–48.

149. *Morrison v. Olson*, 487 U.S. 654, 677 (1988).

150. See *United States v. Nixon*, 418 U.S. 683, 714–16 (1974); *United States v. Lee*, 106 U.S. 196, 220 (1882).

151. KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 5 (2007).

152. *Id.* at 26.

153. Drawing on Stephen Skowronek’s taxonomy, Whittington argues that “preemptive” presidents, who manage to win an election despite their opposition to a popular and vibrant

ever knowing. In order for the political process to do its part in shaping the role of the judiciary, the relationship between the president and the courts must be transparent. Whenever branches of government vie for power, which presidential control over prosecution clearly involves, the facts must be clear to all. Without independent, disinterested prosecutors, we can never be sure that those facts are discovered, let alone made public.

The executive branch's interest in preserving its power in this area derives from its obligation to take care that the laws are faithfully executed.¹⁵⁴ The DOJ's Office of Legal Counsel (OLC) has recognized that preserving the integrity of prosecutorial decision-making is fundamental to this Article II task.¹⁵⁵ The president's control over prosecutors, which is—as we explained above—itself fundamentally at odds with the integrity of prosecutorial decision-making, renders the justification for separation of powers moot. This sort of control is at odds with the rationale for the separation of powers since the executive is supposed to preserve the integrity of criminal law enforcement in general and prosecutorial decision-making in particular, not erode it.

CONCLUSION: DOES IT MATTER?

Suppose we are right that ethics rules and norms, unless preempted by Article II of the Constitution, restrict the extent to which federal prosecutors may follow presidential directions in individual criminal cases. What follows for federal prosecutors?

As a preliminary matter, there is a question of how the president would communicate his command. The DOJ has adhered to norms and regulations designed to protect prosecutorial independence from White House interference since Watergate. Pursuant to this protocol, the president is allowed to communicate only through the Attorney General.¹⁵⁶ It is unclear

political regime, are more likely to challenge the court's authority and diminish the power of judicial review. *Id.* at 22–24; *see also* STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* 34–45 (1993). Political actors depend on an independent judiciary to provide information so they can carry out their jobs properly. James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction*, 45 *AM. J. POL. SCI.* 84, 84 (2001).

154. U.S. CONST. art. II, § 3.

155. Assertion of Exec. Privilege Concerning the Special Counsel's Interviews of the Vice President & Senior White House Staff, 32 *Op. O.L.C.* 7, 10 (2008) (arguing that limits on congressional oversight are justified because of the executive branch interest in preserving the integrity of prosecutorial decision-making); *see also* Response to Congressional Requests for Info. Regarding Decisions Made Under the Indep. Counsel Act, 10 *Op. O.L.C.* 68, 75–78 (1986).

156. Griffin Bell, U.S. Att'y Gen., Dep't of Justice, Address Before Department of Justice Lawyers (Sept. 6, 1978) (transcript available at <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-06-1978b.pdf> [<https://perma.cc/L7CP-9RVL>]); Memorandum from Benjamin R. Civiletti, U.S. Att'y Gen., to Heads of Offices, Bds., Bureaus & Divs., Communication from the White House and Congress (Oct. 18, 1979), <http://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/10-18-1979.pdf> [<https://perma.cc/CZ3T-JNGD>]; Memorandum from Donald F. McGahn II, Counsel to the President, Office of White House Counsel, to White House Staff, Communications Restrictions with Personnel at the

whether these norms would be eliminated under the new regime. Under a theory in which the president has complete control over prosecution, the president could simply order their retraction. But the overhaul demonstrates what a radical departure this would be from policies and practices that have defined the DOJ for at least decades. President Trump's unprecedented use of Twitter to communicate demands and instructions raises the further question of whether or not individual prosecutors or the Attorney General would have to consider these more informal communications specific orders or at least factor them into any decision.¹⁵⁷

The prosecutor will have to decide whether to follow the president's direction, which will be determined in part by whether the prosecutor concludes that the president generally has the claimed authority to control federal prosecutions. If the OLC, which is responsible for advising the government on constitutional and other legal questions, concludes that the president generally possesses the claimed authority, some might expect federal prosecutors to go along.¹⁵⁸ It would be unexpected for each to independently resolve the constitutional question. While scholarly literature on the question may expand, prosecutors would not be expected to determine who has the better argument. In general, subordinate lawyers may defer to supervising lawyers' reasonable resolutions of arguable questions of professional duty.¹⁵⁹ On the question of presidential power, subordinate prosecutors would likely just defer to the DOJ's view. Likewise, an Attorney General appointed by the president would be comfortable deferring to presidential decision-making if OLC says he may do so.

Less clear will be how a prosecutor should respond when the president's direction seems to be at odds with DOJ policy and practice, conventional prosecutorial norms, or the developed understandings about what it means to "seek justice." Perhaps OLC will take the position that, as a constitutional matter, presidential authority over criminal prosecutions supersedes

Department of Justice (Jan. 27, 2017), <https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000> [<https://perma.cc/7CBE-2ES5ac>].

157. For instance, on May 20, 2018, President Trump tweeted, "I hereby demand, and will do so officially tomorrow, that the Department of Justice look into whether or not the FBI/DOJ infiltrated or surveilled the Trump Campaign for Political Purposes . . ." Donald J. Trump (@realDonaldTrump), TWITTER (May 20, 2018, 10:37 AM), <https://twitter.com/realDonaldTrump/status/998256454590193665> [<https://perma.cc/J968-ZWZ3>]. If the president failed to follow up officially, it is unclear whether this would count as a direction that individual prosecutors would be required to follow. For a discussion of whether a presidential tweet counts as an interpretation of the law, see Jim Baker, *Donald Trump, Twitter and Presidential Power to Interpret the Law for the Executive Branch*, LAWFARE (Aug. 24, 2018, 10:35 AM), <https://www.lawfareblog.com/donald-trump-twitter-and-presidential-power-interpret-law-executive-branch> [<https://perma.cc/TX8J-847Z>].

158. For a more skeptical view of prosecutors' potential for independence, see Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 445 (2011) ("[T]he structure [of the DOJ] tilts so heavily in favor of secrecy, centralized control, partisan appointment and removal, and political accountability that there is almost no support for even the most modest and uncontroversial form of professional independence . . .").

159. MODEL RULES OF PROF'L CONDUCT r. 5.2 (AM. BAR ASS'N 2016).

professional norms and ethics rules, so that prosecutors must follow presidential direction unless he directs them to act illegally (including unconstitutionally). Or perhaps OLC will put forth a more nuanced view of the extent to which federal prosecutors must implement the president's commands.¹⁶⁰ In part, this scenario will test whether the DOJ's conventional understandings, traditions, and practices regarding federal prosecutors' role in seeking justice is more powerful for prosecutors than the tradition of deference to supervisory authority.¹⁶¹

Suppose that the DOJ takes the view that prosecutors must defer to the president as to lawful acts. While prosecutors may counsel against decisions with which they disagree, they would likely not find it difficult to carry those decisions out. As a general matter, it is probably not unusual for federal prosecutors to disagree with the decisions of supervisory prosecutors and, as an ordinary matter, if the action dictated is not unlawful, subordinate prosecutors carry out the directions. In rare cases, prosecutors might ask to be removed from a case, and in exceedingly rare cases, prosecutors might resign rather than implement a decision with which they strongly disagree or simply ignore instructions.¹⁶² But prosecutors understand that there is a prosecutorial hierarchy, that there is room for disagreement on questions of judgment and that there is, as a general matter, nothing wrong with carrying out decisions different from one's own.

If the DOJ takes the position that prosecutors must defer to the president, ethics questions will contribute modestly, at most, to a decision of the Attorney General or a subordinate prosecutor regarding whether to do so when a presidential direction sharply conflicts with DOJ policy or with the prosecutor's view of what justice requires. Even assuming that a professional conduct rule forecloses prosecutorial acquiescence, disciplinary authorities almost certainly would not proceed against prosecutors, given both the practical and constitutional uncertainty about the application of the rules. As a general matter, disciplinary actions against prosecutors are rare.¹⁶³ Disciplinary actions against prosecutors are rarer still where, as here, the relevant standard of conduct is uncertain.

Nor would a federal court be likely to employ the ethics rules as a predicate for dismissing an indictment or taking other action in a criminal case. Federal courts are deferential to prosecutors, particularly on questions of prosecutorial discretion, and reluctant to use their supervisory authority to

160. The OLC does not have a history of impartial, nonpartisan decision-making. *See, e.g.*, Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1694–709 (2005) (criticizing the reasoning in the OLC “torture memos,” written by John Yoo and Jay Bybee, which supported the administration’s use of waterboarding and other extreme interrogation techniques).

161. For an extensive discussion of this type of dilemma for federal government employees in the contemporary context, see generally Keith A. Petty, *Duty and Disobedience: The Conflict of Conscience and Compliance in the Trump Era*, 45 PEPP. L. REV. 55 (2018).

162. *See* David Luban, *The Conscience of a Prosecutor*, 45 VAL. U. L. REV. 1, 1–3 (2010) (discussing an example of a New York City prosecutor).

163. Green, *supra* note 112, at 92; Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 743–62 (2001).

restrict prosecutors' action. Unless a court concluded that the prosecutor's action was unconstitutional or otherwise unlawful, it would be reluctant to intrude into the prosecutor's decision or decision-making process.¹⁶⁴

In fact, there is little reason to think the court would ever know that the president was behind a particular charging decision or strategic choice. If a prosecutor were to acquiesce to a president's order either because the OLC had implemented a policy of deferring to presidential edict or because the prosecutor believed it was her individual obligation to do so, the court would never know that the prosecutor who was closest to the facts had determined independently that the prosecution was unjustified. In our hypothetical scenario,¹⁶⁵ the court would preside over a prosecution of the foreign official and, unaware of the administration's motivations for the prosecution and doubts about the defendant's guilt, the court would likely remand the defendant pending the trial and accede to the prosecution's delaying tactics. In this scenario, the judiciary would be complicit by lending not only its authority but also its legitimacy to the defendant's incarceration, until the government achieved its foreign policy objective or the case was otherwise resolved. It would have assisted the executive in carrying out a foreign policy objective, but it would have done so by compromising the core function of courts to uncover the truth and apply the law to the facts in an evenhanded way. The judiciary's power to protect itself from the encroachment of the executive would be diminished, an outcome that does not comport with any theory about three coequal branches of government.¹⁶⁶

On the other hand, it is conceivable that an Attorney General or other federal prosecutor would opt instead to defy a presidential direction, as famously occurred in 1973 during Watergate when Attorney General Elliot Richardson and Deputy Attorney General William French Smith resigned rather than obey President Nixon's order to fire independent special prosecutor Archibald Cox.¹⁶⁷ If so, ethics rules may have some rhetorical

164. One possible constitutional argument in support of a motion to dismiss would be that the defendant was denied the right to a disinterested prosecutor. Although the Court has not yet determined whether or not this is an element of due process, some lower federal courts and state courts have recognized that there is a constitutional right to a disinterested prosecutor, while denying a remedy absent extreme prosecutorial bias. *See, e.g.,* Wright v. United States, 732 F.2d 1048, 1057 (2d Cir. 1984) (rejecting the appellant's due process claim but noting that other circuits recognize such claims); *In re Goodman*, 210 S.W.3d 805, 808 (Tex. App. 2006) (applying due process framework); Green & Roiphe, *supra* note 36, at 488–89. Where a prosecutor followed the president's direction to forgo criminal charges rather than to initiate them, it is unclear whether anyone would have standing to challenge the decision or a legal ground to do so. *See* Stuart P. Green, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 YALE L.J. 488, 488 & n.2 (1988) (citing Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973)).

165. *See supra* note 35 and accompanying text.

166. For a discussion of the meaning of separation of powers, see Jeremy Waldron, *Separation of Powers in Thought and Practice*, 54 B.C. L. REV. 433, 459–66 (2013); *see also supra* notes 87, 89 and accompanying text.

167. Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST, Oct. 21, 1973, at A1. More recently, President Trump dismissed Sally Yates from her position as Acting Attorney General for refusing to defend his travel ban in court. Michael D. Shear et al., *Trump Fires Acting Attorney General Who Defied Him*, N.Y. TIMES

force in the prosecutor's defense. The prosecutor would not be limited to arguing that the president lacks the asserted constitutional authority. The prosecutor could further argue in certain cases, such as the foreign policy scenario set out above, that she has ethical obligations, codified in the rules discussed above and furthering the standard set out in *Berger* to "seek justice," which conflict with her carrying out the president's instruction.

If this happened on a broad scale—a thought experiment to be sure—and prosecutors throughout the DOJ recused themselves from a particular case, perhaps the president's goal of controlling the outcome of that case would be thwarted. If, in an even more unlikely scenario, the president sought to exert his control over all cases, intervening here and there not for criminal justice purposes but rather to further assert his will and political power, it is at least possible that all or most federal prosecutors could resign rather than shirk their ethical obligations. Federal prosecution might become such an unpalatable job for well-trained lawyers devoted to the quality and ethical caliber of their work that it would be hard or even impossible to attract well-qualified lawyers to this job. If so, ironically, the president might be thwarted in his ability to execute the laws.

If the propriety of presidential control of criminal prosecutions is not a question for courts to resolve through their application of professional conduct rules or their interpretation of the Constitution, but is principally a question for presidents to resolve as a matter of self-restraint, for Congress, and for the voting public, then the resolution may not be clear. Constitutional arguments for presidential power over prosecutions predicated on the idea of a "unitary executive" have simplicity and intuitive appeal. But so do countervailing arguments that a president cannot ask a prosecutor to violate her ethical and professional obligations. This argument should resonate with professionals and others who believe in the primacy of professional obligation. The countervailing claim that presidential power somehow preempts professional obligation is not, at a level of generality, very appealing. Further, the more nuanced constitutional argument, that presidential power trumps only certain professional regulations including those here, may be hard to understand. But even if it is a matter to be decided by the political will of the people, presidential control of prosecutors' decisions may not be transparent. The public might assume that presidents are abiding by the long tradition of independence and protecting the independent judiciary when in fact the opposite is true. It is hard for the public to assert its political will if it does not know how decisions are being made.

Even if the public could police the president, presidential power over federal prosecutions threatens an independent judiciary. In order to pursue the public interest by applying the law to facts in individual cases, the judiciary is dependent on disinterested prosecutors. Many rules governing prosecutors' conduct are designed to ensure that prosecutors serve justice

(Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/us/politics/trump-immigration-ban-memo.html> [<https://perma.cc/L93K-SN7D>].

rather than individual interests or some other illegitimate end. Presidential control over prosecutions threatens this equilibrium. It directly interferes with the courts' ability both to regulate prosecutors according to ethics rules and judicial standards and to rely on the professional norms of prosecutors to ensure that prosecutors are policing themselves.

We previously argued that the president has no statutory or constitutional authority to control prosecutorial decision-making.¹⁶⁸ Here, we play out the consequences of the competing view, expressed by President Trump's lawyers, Justice Scalia in his dissent in *Morrison*, and various scholars, that the president has absolute control over the DOJ. We have shown that exercising such control would lead to the abdication of established prosecutorial norms and ethical requirements, which, in turn, would undermine the proper functioning of the judiciary. This ensuing chaos offers additional support for our argument that while the president should set broad policy objectives and communicate those priorities to the Attorney General, the president cannot exercise control over prosecutors' decisions in individual cases, even when those cases have foreign policy implications.

Any argument to preserve prosecutorial independence from presidential incursion must be mindful of the dangers involved. Independent prosecutors are far from perfect. They sometimes abuse their discretion and violate their obligations to the public. The challenge is to check abuses by leaving different parties in charge of those decisions that they are best suited to make. Discretionary decisions in criminal prosecutions are best left to trained and experienced professionals, who are policed by the profession and the courts.¹⁶⁹ The president's political and personal interests, as well as his distance from the facts and the traditions of prosecution, are at odds with this goal. The president retains control over the execution of criminal laws through the constitutional power to hire and fire the Attorney General.¹⁷⁰ This balance ensures that the president maintains the power to "take Care" that the laws are faithfully executed without threatening longstanding prosecutorial norms that help preserve the integrity of the judicial process.

168. Green & Roiphe, *supra* note 2, at 3–7.

169. *Id.* at 74–75 (“While prosecutors sometimes fail to live up to expectations, they are better situated than the President to make sound, disinterested prosecutorial decisions in individual cases in light of the evidence and prosecutorial policies and traditions.”). Our argument here is in no way a plea for the status quo. We have, along with others, argued that prosecutors' offices should be structured so as to maximize the effective exercise of their discretionary obligations. Green & Roiphe, *supra* note 36, at 515–35.

170. Green & Roiphe, *supra* note 2, at 23–26.