

# PROFESSIONALS, POLITICOS, AND CRONY ATTORNEYS GENERAL: A HISTORICAL SKETCH OF THE U.S. ATTORNEY GENERAL AS A CASE FOR STRUCTURAL INDEPENDENCE

*Jed Handelsman Shugerman\**

## INTRODUCTION

When you get to the White House there are two jobs you must lock up—  
Attorney General and director of the Internal Revenue Service.

—Joe Kennedy, Sr. to John F. Kennedy, perhaps apocryphally<sup>1</sup>

Historically, the office of the U.S. Attorney General has been identified as “quasi-judicial” or having “quasi-judicial” aspects.<sup>2</sup> Other parts of the Department of Justice (DOJ) have also been described as quasi-judicial, such as the Office of Legal Counsel and the Solicitor General.<sup>3</sup> A glance at a list of past attorneys general seems to confirm this judicial aspiration in practice. Nine attorneys general became U.S. Supreme Court justices,<sup>4</sup> and others

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\* Professor of Law, Fordham University School of Law. I would like to thank Bruce Green for organizing the Colloquium and providing terrific feedback. I would like to thank Jeremy Adelman, Corey Brettschneider, Sueann Caulfield, Kathleen Clark, Julio César Guanche, Andrew Kent, Jennifer Mascott, Asha Rangappa, Rebecca Roiphe, Rebecca Scott, Jeremy Stahl, and Steve Vladeck. John M. Shaw and Gail McDonald provided outstanding research assistance, and Michael Nester and Lauren Gorab provided excellent editing. I also thank Danya Handelsman for her thoughtfulness and support. This Article was prepared for the Colloquium entitled *The Varied Roles, Regulation, and Professional Responsibilities of Government Lawyers*, hosted by the *Fordham Law Review* and the Stein Center for Law and Ethics on October 12, 2018, at Fordham University School of Law. For an overview of the Colloquium, see Bruce A. Green, *Lawyers in Government Service—a Foreword*, 87 FORDHAM L. REV. 1791 (2019).

1. LARRY TYE, BOBBY KENNEDY 458 n.133 (2016) (citing MICHAEL BESCHLOSS, *THE CRISIS YEARS: KENNEDY AND KHRUSHCHEV, 1960–1963*, at 302 (1991)); John P. Roche, *The Second Coming of R.F.K.*, NAT'L REV., July 22, 1988, at 32, 34.

2. See CALEB CUSHING, A REPORT OF THE ATTORNEY GENERAL, SUGGESTING MODIFICATIONS IN THE MANNER OF CONDUCTING THE LEGAL BUSINESS OF THE GOVERNMENT: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, S. EXEC. DOC. NO. 33-55, at 6 (1854) [hereinafter CUSHING REPORT]; see also Caleb Cushing, Office and Duties of the Attorney General, 6 Op. Att'y Gen. 326, 334 (1854) [hereinafter Cushing Opinion]. Cushing also noted that Congress established the Office of the Attorney General “in organizing the judicial business of the United States.” Cushing Opinion, *supra*, at 330.

3. See Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 815 (2017).

4. The attorneys general who became Supreme Court justices were: Roger Taney, Nathan Clifford, Joseph McKenna, William Moody, James McReynolds, Harlan Fiske Stone, Frank Murphy, Robert Jackson, and Tom Clark. See *Attorneys General of the United States*,

were notably judicious and professional in their tenure in the office.<sup>5</sup> Of course, there are some infamous examples of unprofessional cronyism—the appointment of friends or associates to positions of authority, without properly considering their qualifications—but there are famous counterexamples of those who stood up to the presidents they served in defense of legal principles. The “insider” friend, fixer, or brother of the president was presumably the exception.

But a closer examination of the history of the Office of the Attorney General reveals a surprising pattern: the nineteenth century had relatively few crony-ist appointments in an era known for patronage, but the twentieth century ushered in more partisan insiders, hacks, and fixers,<sup>6</sup> just as the DOJ’s power grew enormously.<sup>7</sup> This shift was remarkably bipartisan, starting under President Woodrow Wilson, a Democrat, and then continuing immediately after under President Warren G. Harding, a Republican.<sup>8</sup> Perhaps this turn in the late 1910s started an era of partisan escalation as each political party pushed the norms as they rotated into power. This Article suggests that these trends have contributed to making the DOJ partisan and allowing some presidents to imagine the Attorney General as the president’s personal lawyer and fixer. In just over half of the past century, the Office of the Attorney General has been filled by a partisan insider.

This research revealed a number of especially surprising patterns. First, nineteenth-century America is known for the rise of the patronage party system. Formal professionalization—especially legal professionalization—emerged somewhat late in the nineteenth century.<sup>9</sup> Nevertheless, there were relatively few crony or patronage attorneys general in an era of patronage without professionalization or recently emerging professionalization. Second, the Progressive Era (roughly 1900 to 1920) is thought of as an era of reforming the partisan machine, of anti-patronage, and of anti-corruption. Yet, the rise of the crony or partisan campaign-insider Attorney General began in the Progressive Era under President Woodrow Wilson and escalated from there, including in the Roosevelt administration, which was also perceived as a shift to administrative expertise (e.g., the “Brain Trust”) or at least a team of established politicians.<sup>10</sup> The third surprise is just how

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DEPT’ T JUST., [https://www.justice.gov/ag/historical-bios?sort\\_by=field\\_dates\\_service\\_value2&sort\\_order=ASC](https://www.justice.gov/ag/historical-bios?sort_by=field_dates_service_value2&sort_order=ASC) [<https://perma.cc/5RDK-HU83>] (last visited Mar. 15, 2019) (providing biographies for each attorney general, including those who became Supreme Court justices).

5. These include Edmund Randolph, William Wirt, Caleb Cushing, William M. Evarts, Ebenezer R. Hoar, Homer Cummings, William Rogers, and Elliot Richardson. *Id.*

6. For a shorter version, see Jed Shugerman, *Think Matthew Whitaker Is a Hack? He’s One of Many*, WASH. POST (Dec. 14, 2018), [https://www.washingtonpost.com/opinions/think-matthew-whitaker-is-a-hack-hes-one-of-many/2018/11/16/5efbf47c-e8f7-11e8-b8dc-66cca409c180\\_story.html](https://www.washingtonpost.com/opinions/think-matthew-whitaker-is-a-hack-hes-one-of-many/2018/11/16/5efbf47c-e8f7-11e8-b8dc-66cca409c180_story.html) [<https://perma.cc/B9A5-M88N>].

7. *See generally* Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 170 (2014).

8. *Id.* at 170 n.277.

9. *See id.* at 121.

10. *See id.* at 170 n.277.

bipartisan the cronyism of the Attorney General has been in the twentieth century. Democrats accounted for more of the partisan insiderism of the mid-twentieth century, though the party balance has shifted toward the Republicans decisively since the Nixon-Reagan era.<sup>11</sup> The nepotism of the Kennedy administration with brother-protector Bobby Kennedy and the corruption of the Nixon administration are most famous to modern observers, but the origins go further back to a time perceived to be more progressive and professional.

In Part I, this Article presents an overview of that pattern among attorneys general, using the rough categories of “professional,” “politico,” and “insider” or “crony,” based on their background and how they became Attorney General rather than based upon their performance in the office. This Part highlights some major turning points toward cronyism during the Progressive Era: President Wilson’s Attorney General A. Mitchell Palmer and President Harding’s Attorney General Harry Daugherty. This focus will highlight how that rise of cronyism contributed to the abuses and corruption under those two attorneys general. Part II offers a preview of a historical critique of the unitary-executive theory on prosecution, exemplified in Justice Scalia’s dissent in *Morrison v. Olson*,<sup>12</sup> a position that would prevent many structural reforms.<sup>13</sup> That position seems to be incorrect in its historical assumptions.<sup>14</sup> Part III offers some preliminary suggestions for structural reform of the Office of the Attorney General and other parts of the DOJ, borrowing from the independent agency model, while remaining consistent with Article II’s Take Care and Vesting Clauses.<sup>15</sup> The breakdown of the norms of prosecutorial independence from partisanship is not a new phenomenon; it is a century in the making. The solutions borrow from some models that have grown elsewhere in the executive branch over that same century.

#### I. PROFESSIONALS, POLITICOS, AND PATRONAGE INSIDERS

I went through the list of every Attorney General who served at least one year, plus a few more with shorter but significant tenures, and excluded

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11. To illustrate this point, see *infra* Table 1 (listing every attorney general who served at least one year, with some exceptions, and categorizing each attorney general’s rise to the office).

12. 487 U.S. 654 (1988).

13. *Id.* at 696–97 (Scalia, J., dissenting). This Colloquium Article is a preview of historical arguments on the executive, prosecution, and *Morrison v. Olson* that will be developed more fully in a future article.

14. See Jed Shugerman, *Stare Scalia*, SLATE (Apr. 27, 2018), <https://slate.com/news-and-politics/2018/04/republican-senators-obsession-with-antonin-scalia-is-leading-them-to-make-sloppy-mistakes.html> [https://perma.cc/MW43-U4CF]. This Article draws from that short article and sketches the historical argument, which will be laid out in more detail in a future article.

15. See U.S. CONST. art. II, § 1, cl. 1; *id.* art. II, § 3. For new historical research on the Take Care Clause as limiting presidential discretion by the original meaning of “faithful execution,” see Andrew Kent, Ethan Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. (forthcoming June 2019).

acting attorneys general, except for Matthew Whitaker, whose appointment came at a particularly significant moment and was especially salient for this study. I checked their backgrounds to get a basic understanding of how these individuals rose to the office. Three categories emerged. First was the politico, a major elected official with established political clout, often as a sitting member of Congress. Sometimes the dynamic is “Team of Rivals,”<sup>16</sup> and sometimes it is party team player. But the salient feature is that this Attorney General had his or her independent electoral base of power and an already-established name. Second was the professional, a lawyer who had established himself or herself in private practice, government service, or in the judiciary. Sometimes they are veterans from the DOJ or get promoted from within the DOJ. If they had held elected office, it was brief or less prominent. They brought a reputation for skill to the office more than a reputation for power. The third category was the insider, a friend or direct supporter of the president who rises to power substantially because of his connection to the president or the president’s political faction. I sometimes use the word “crony” to describe these attorneys general, but that label is sometimes too pejorative. Once in office, some of these insider attorneys general would turn out to be more professional and independent, while others are simply fixers who get embroiled in scandal.

The first two models, the politico and the professional, dominate from the late eighteenth through the nineteenth century. The insider model pops up under Presidents Andrew Jackson and Ulysses Grant during Reconstruction, which should not shock students of either Jackson or Grant.<sup>17</sup> But the 1870s are surprising given that the Republicans created the DOJ in 1870 to promote professionalization and limit patronage.<sup>18</sup> The rest of the century returned to the professional-politico balance. Then the early twentieth century shifts back to insiders gradually and then overtakes the other models in the mid-twentieth century. After a post-Watergate return to the professional model, the last few decades have been a mix of all three.

Table 1, below, provides a quick overview, using “X” to signify the most salient category (or, in some cases, two categories that are equally salient) for each Attorney General and “\*” to signify a secondary category where appropriate. With regard to political party designation, “F” indicates Federalist, “D-R” indicates Democratic-Republican, “D” indicates Democrat, “W” indicates Whig, and “R” indicates Republican. Table 1 omits all but one acting attorney general and attorneys general with short,

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16. See DORIS KEARNS GOODWIN, *TEAM OF RIVALS* xvi (2005) (“It soon became clear, however, that Abraham Lincoln would emerge the undisputed captain of this most unusual cabinet, truly a *team of rivals*. The powerful competitors who had originally disdained Lincoln became colleagues who helped him steer the country through its darkest days.” (emphasis added)).

17. See Shugerman, *supra* note 7, at 124, 144 n.138.

18. See *id.* at 121 (“The founding of the DOJ had less to do with Reconstruction, and more to do with ‘retrenchment’ (budget cutting and anti-patronage reform). The DOJ’s creation was linked with major professionalization efforts . . . to make the practice of law more exclusive and more independent from partisan politics.”).

insignificant tenures, and it is followed by a short description of each of the insiders or cronies.

*Table 1: U.S. Attorneys General 1789–2019*

Attorney General	Tenure	Party	Professional	Politico	Insider/ Crony
Edmund Randolph	1789–94	F		X	
William Bradford	1794–95	F	X		
Charles Lee	1795–1801	F	X		
Levi Lincoln	1801–05	D-R	X		
John Breckinridge	1805–06	D-R		X	
Caesar Rodney	1807–11	D-R		X	
William Pinkney	1811–14	D-R		X	
Richard Rush	1814–17	F	X	X	
William Wirt	1817–29	D-R	X		
John M. Berrien	1829–31	D	X		
Roger B. Taney	1831–33	D		*	X
Benjamin Franklin Butler	1833–38	D			X
Felix Grundy	1838–40	D		X	
Henry D. Gilpin	1840–41	D	X		
Hugh S. Legaré	1841–43	D	X		
John Nelson	1843–45	W	X		
John Y. Mason	1845–46	D		X	
Nathan Clifford	1846–48	D	X		
Reverdy Johnson	1849–50	W	X	X	
John J. Crittenden <sup>19</sup>	1850–53	W		X	
Caleb Cushing	1853–57	D	X		
Jeremiah S. Black	1857–60	D	X		
Edward Bates	1861–64	R		X	
James Speed	1864–66	R			X
Henry Stanbery	1866–68	R	X		
William M. Evarts	1868–69	R	X		

19. Crittenden was close to Zachary Taylor, but he was the quintessential politico, having served two terms in the U.S. Senate, an additional two years of another Senate term, a term as Governor of Kentucky, and a short earlier stint as the U.S. Attorney General in 1841. He did not get his position as a crony insider. Paul Finkelman, *Crittenden, John J. (1787–1863)*, ENCYCLOPEDIA AM. CONST., <http://www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-and-maps/crittenden-john-j-1787-1863> [https://perma.cc/7M2N-3HFD] (last visited Mar. 15, 2019); *Crittenden, John Jordan, (1787–1863)*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000912> [https://perma.cc/379Q-NC3F] (last visited Mar. 15, 2019).

Attorney General	Tenure	Party	Professional	Politico	Insider/ Crony
Ebenezer R. Hoar	1869-70	R	X		
Amos T. Akerman	1870-71	R	X		
George Henry Williams	1871-75	R		X	X
Edwards Pierrepont	1875-76	R	X		X
Alphonso Taft	1876-77	R	X	X	
Charles Devens	1877-81	R	X		
Benjamin H. Brewster	1881-85	R	X		
Augustus Garland	1885-89	D		X	
William H. H. Miller	1889-93	R			X
Richard Olney	1893-95	D	X		
Judson Harmon	1895-97	D	X		
Joseph McKenna	1897-98	R	X		
John W. Griggs	1898-1901	R		X	
Philander C. Knox	1901-04	R	X		
William Henry Moody	1904-06	R		X	
Charles Bonaparte	1906-09	R		X	
George W. Wickersham	1909-13	R	X		
James C. McReynolds	1913-14	D	X		
Thomas Watt Gregory	1914-19	D	X		
A. Mitchell Palmer	1919-21	D			X
Harry M. Daugherty	1921-24	R			X
Harlan F. Stone	1924-25	R	X		
John G. Sargent	1925-29	R			X
William D. Mitchell	1929-33	R	X		
Homer Stille Cummings	1933-39	D	X		X
Frank Murphy	1939-40	D		X	
Robert H. Jackson	1940-41	D	X		X
Francis Biddle	1941-45	D	X		
Tom C. Clark	1945-49	D	X		X

Attorney General	Tenure	Party	Professional	Politico	Insider/ Crony
J. Howard McGrath	1949–52	D			X
James P. McGranery	1952–53	D	X		
Herbert Brownell Jr.	1953–57	R			X
William P. Rogers	1957–61	R	X		
Robert F. Kennedy	1961–64	D			X
Nicholas Katzenbach	1964–66	D	X		
Ramsey Clark	1966–69	D	X		
John N. Mitchell	1969–72	R			X
Richard Kleindienst	1972–73	R			X
Elliot Richardson	1973	R	*	X	
William B. Saxbe	1974–75	R		X	
Edward H. Levi	1975–77	R	X		
Griffin Bell	1977–79	D	X		
Benjamin Civiletti	1979–81	D	X		
William French Smith	1981–85	R	X		X
Edwin Meese	1985–88	R			X
Dick Thornburgh	1988–91	R		X	
William Barr	1991–93	R	X		
Janet Reno	1993–2001	D	X		
John Ashcroft	2001–05	R		X	
Alberto Gonzales	2005–07	R			X
Michael Mukasey	2007–09	R	X		
Eric Holder	2009–15	D	X		
Loretta Lynch	2015–17	D	X		
Jeff Sessions	2017–18	R		X	X
Matthew Whitaker (Acting)	2018–19	R			X
William Barr	2019– Present	R		X	

For just over half of the past century, the Attorney General of the United States has fit more in the partisan-insider mold than the professional or the politico molds. As this trend increased throughout the twentieth century, both sides eroded norms of political independence. Presidents Wilson and Harding touched off a new round of cronyism from opposing parties; the

cronyism then continued, alternating parties with Presidents Hoover, Franklin Roosevelt, Truman, Eisenhower, Kennedy, Nixon, Reagan, W. Bush, and then Trump.

Let us touch on each of these political operators to get a glimpse of their path to the office. Was it a professional path, a path of political power, or an inside track?

The first of the insiders was Roger Taney, the Attorney General under Andrew Jackson. Taney had been a minor political figure in Maryland (a state senator, then a county bank director) until he hitched himself to Jackson.<sup>20</sup> In the fractured election of 1824, Taney became an “ardent Jacksonian.”<sup>21</sup> When the split electoral college vote led to a House vote, Taney lobbied Maryland’s members of Congress to vote for Jackson. This alliance helped get him appointed as Maryland Attorney General, and then as chairman of the Jackson Central Committee of Maryland and an organizer of his political convention in Baltimore as part of his successful 1828 campaign.<sup>22</sup> Taney finished his term as Maryland Attorney General, then became Jackson’s acting Secretary of War and Attorney General from 1831 to 1833.<sup>23</sup> One of his biographers concludes, “No one as politically astute as General Jackson could have been ignorant of one who had taken such a prominent part on his behalf.”<sup>24</sup> Taney then served as a close advisor and an advocate for Jackson as his Attorney General. After the Senate rejected Taney’s nomination for Treasury Secretary, Jackson fought for a year to make him chief justice of the Supreme Court, an office he held for twenty-eight years, up through the Court’s monumental decision in *Dred Scott v. Sandford*,<sup>25</sup> and most of the Civil War.

Benjamin Butler followed Taney immediately as Attorney General and followed in his patronage footsteps.<sup>26</sup> Butler had joined the Albany Regency, Martin Van Buren’s Democratic Party movement turned political machine in the 1810s.<sup>27</sup> He advanced up through the party from Albany district attorney to state assemblyman.<sup>28</sup> Jackson plucked him out of the state assembly to

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20. *Attorney General: Roger Brooke Taney*, DEP’T JUST., <https://www.justice.gov/ag/bio/taney-roger-brooke> [<https://perma.cc/U4SV-CJEE>] (last updated July 7, 2017).

21. NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL’S OFFICE, 1789–1990*, at 67 (1992).

22. *Roger Brooke Taney (1777–1864)*, DICK. C. ARCHIVES & SPECIAL COLLECTIONS (2005), <http://archives.dickinson.edu/people/roger-brooke-taney-1777-1864> [<http://perma.cc/P762-QD4E>].

23. *Id.*

24. WALKER LEWIS, *WITHOUT FEAR OF FAVOR: A BIOGRAPHY OF CHIEF JUSTICE ROGER BROOKE TANEY* 122 (1965).

25. 60 U.S. (19 How.) 393 (1857).

26. See Shugerman, *supra* note 7, at 146 (noting that, even when he was a congressman, Butler was “a Radical who had a reputation for protecting political patronage”).

27. Arthur A. Ekirch Jr., *Benjamin F. Butler of New York: A Personal Portrait*, 58 N.Y. HIST., Jan. 1977, at 47, 53 (“He was now also one of the valued, though junior, members of Van Buren’s famed Albany Regency. This informal but politically potent group of advisers . . . were part of the Bucktail faction of the Democratic Republican Party.”).

28. *Attorney General: Benjamin Franklin Butler*, DEP’T JUST., <https://www.justice.gov/ag/bio/butler-benjamin-franklin> [<https://perma.cc/6TRZ-M5ZE>] (last updated July 7, 2017).

serve as Attorney General, surely serving the request of his Vice President Van Buren.<sup>29</sup> But the Jackson-Van Buren era of patronage was a short phase in terms of the Attorney General's office.

The Civil War and Reconstruction brought back some of this patronage. James Speed's brother Joshua was President Lincoln's closest friend from Illinois, and James had been a close friend of Lincoln's since 1841 while building a modest law practice and teaching.<sup>30</sup> He won a seat in the Kentucky Senate in 1861, and then ascended to the Attorney General's office.<sup>31</sup>

After Lincoln's assassination, President Andrew Johnson's administration was chaotic and marked by dramatic conflicts, both internally and with Congress over Reconstruction.<sup>32</sup> Johnson's Attorney General, Henry Stanbery, was a strange choice—a relatively insignificant lawyer and big player in Ohio politics. He had been Attorney General of Ohio from 1846 to 1851 but then was seemingly out of politics for fifteen years.<sup>33</sup> Johnson plucked him out of obscurity, and he must have found something wildly appealing because he first tried to appoint Stanbery as chief justice of the Supreme Court.<sup>34</sup> Looking at Stanbery's thin record, this is not only stunning to the historian in hindsight, but it was also a surprise to the Republican Senate.<sup>35</sup> The Senate rejected the nomination, mostly due to its opposition to Johnson and his hostility to Reconstruction.<sup>36</sup> In response, Johnson nominated Stanbery for Attorney General.<sup>37</sup> When U.S. attorneys tried to enforce civil rights laws in Kentucky, Stanbery cut them off.<sup>38</sup> When Johnson was impeached, Stanbery served as his defense counsel.<sup>39</sup> Johnson seemed to have gotten what he was looking for in Stanbery: fierce loyalty.

The Grant era started off with a remarkable set of professionals: William M. Evarts, Ebenezer R. Hoar, and Amos T. Akerman. The *New York Times* reported that Akerman, a Georgia district attorney, was a “Universal Surprise.”<sup>40</sup> Congress created the DOJ at this time.<sup>41</sup> The traditional view

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29. *Id.*; see also Ekirch, *supra* note 27, at 58.

30. DAVID HERBERT DONALD, LINCOLN 88, 299 (1995).

31. *James Speed*, FILSON HIST. SOC'Y, <https://filsonhistorical.org/james-speed/> [<https://perma.cc/NZ7Q-TCH7>] (last visited Mar. 15, 2019).

32. Shugerman, *supra* note 7, at 144–45 (listing various conflicts that arose between President Johnson's administration and Congress).

33. *Henry Stanbery (1866–1868)*, MILLER CTR., <https://millercenter.org/president/johnson/essays/stanbery-1866-attorney-general> [<https://perma.cc/TCZ6-VKWX>] (last visited Mar. 15, 2019).

34. *Id.*

35. Erick Trickey, *The History of “Stolen Supreme Court Seats,”* SMITHSONIAN MAG. (Mar. 20, 2017), <https://www.smithsonianmag.com/history/history-stolen-supreme-court-seats-180962589/> [<https://perma.cc/Z6G7-YF32>].

36. *Henry Stanbery (1866–1868)*, *supra* note 33; see also Trickey, *supra* note 35.

37. *Henry Stanbery (1866–1868)*, *supra* note 33; see also Trickey, *supra* note 35.

38. ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876, at 38–40 (1985).

39. *Henry Stanbery (1866–1868)*, *supra* note 33.

40. *Talk at the Capital About the Resignation of Mr. Hoar*, N.Y. TIMES, June 17, 1870, <http://timesmachine.nytimes.com/timesmachine/1870/06/17/87592028.pdf> [<http://perma.cc/4JKB-NMD3>].

41. Shugerman, *supra* note 7, at 122.

had been that Congress created the DOJ to increase the federal government's capacity to litigate a growing docket due to the Civil War and to enforce Reconstruction and civil rights.<sup>42</sup> To the contrary, it was really an effort to shrink and professionalize the federal government.<sup>43</sup> The creation of the DOJ was linked with major professionalization efforts, such as the founding of modern bar associations, to make the practice of law more exclusive and more independent from partisan politics.<sup>44</sup> The DOJ was created to promote the norms and structures of professional independence.<sup>45</sup> But after the DOJ's first Attorney General, Akerman, followed this aspiration, his successor George Williams was more of a Grant crony.

Williams was a senator who had been supportive of military Reconstruction, but by the 1870s, he had lost interest.<sup>46</sup> President Grant may have appointed Williams not for his help in a civil rights campaign, but rather for his help on Grant's 1872 reelection campaign.<sup>47</sup> Then Williams cut back on civil rights enforcement.<sup>48</sup> Edwards Pierrepont followed Williams, and his role can be categorized as a mix of professional and insider. Pierrepont had been the U.S. Attorney for the Southern District of New York, a significant position then as it is now.<sup>49</sup> But what distinguished Pierrepont was his prominent and enthusiastic support of President Grant in the election campaign of 1872. He gave a major campaign speech for Grant at the Cooper Union in New York, the same location as one of Abraham Lincoln's famous speeches,<sup>50</sup> and then traveled around New York, attacking the Democrats' Tammany Ring.<sup>51</sup> Pierrepont, a former Democrat, had led the prosecution of Tammany Hall, which was the patronage machine controlling New York City.<sup>52</sup> It was apparently his campaigning for Grant and prosecution of Democratic leaders that put Pierrepont in line for Attorney General. Pierrepont continued Williams's moratorium on prosecuting civil rights cases to protect former slaves, but he tried to combat corruption in the administration and in the Whiskey Ring.<sup>53</sup> A rumor spread that he had

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42. *Id.* at 121.

43. *Id.*

44. *Id.* at 123–24.

45. *Id.* at 125.

46. *Id.* at 144 n.138; see also KACZOROWSKI, *supra* note 38, at 76, 86.

47. KACZOROWSKI, *supra* note 38, at 80–81.

48. *Id.* at 85–87.

49. *Attorney General: Edwards Pierrepont*, DEP'T JUST., <https://www.justice.gov/ag/bio/edwards-pierrepont> [<https://perma.cc/YEV2-APBA>] (last updated July 5, 2017).

50. See Edwards Pierrepont, Speech of the Hon. Edwards Pierrepont, Delivered Before the Republican Mass Meeting, at Cooper Institute (Sept. 25, 1872).

51. See Bruce A. Kimball & R. Blake Brown, "The Highest Legal Ability in the Nation": Langdell on Wall Street, 1855–1870, 29 LAW & SOC. INQUIRY 39, 93 (2004).

52. Hon. Edwards Pierrepont on the Presidential and Gubernatorial Candidates Sound Arguments for the Support of the Republican Nominees, N.Y. TIMES, Oct. 31, 1872, <https://timesmachine.nytimes.com/timesmachine/1872/10/31/83216185.pdf> [<https://perma.cc/C4JS-KWG4>].

53. See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667, 765 (2003); Edwards Pierrepont (1875–1876), MILLER CTR., <https://millercenter.org/president/grant/essays/pierrepont-1875-attorney-general> [<https://perma.cc/M4Y8-HKP3>] (last visited Mar. 15, 2019).

violated his professional duties by helping a defendant in the corruption cases.<sup>54</sup> Ultimately, these tensions, along with coalition politics, led to his departure.<sup>55</sup>

For the next forty years, there were no crony attorneys general other than William Miller, who had been a close advisor to Benjamin Harrison.<sup>56</sup> The 1910s, however, were a turning point. President Woodrow Wilson's Attorney General, A. Mitchell Palmer, famous for the "Palmer Raids" during the Red Scare, had served as a congressman for only four years—not long enough to be a major congressional figure.<sup>57</sup> More importantly, he also was a deft patronage manager and later made connections while serving on the Democratic National Committee. He was known as a party insider.

Although he did not support Wilson initially in 1912, once Palmer understood that Pennsylvania Democrats were going to back Wilson, Palmer shifted enthusiastically to a "committed champion"<sup>58</sup> for Wilson and was then "inducted into the inner circle of Wilson's preconvention advisers."<sup>59</sup> Palmer helped Wilson win the decisive Pennsylvania primary and then became Wilson's floor leader in the contested 1912 Democratic convention, sacrificing some of his own political capital to help Wilson win the nomination.<sup>60</sup> He wanted to be Attorney General more than anything else but lost out to a more "professional" figure, James C. McReynolds. McReynolds also happened to be a close friend of one of Wilson's most trusted advisors and mentors, Colonel Edward House,<sup>61</sup> who disliked Palmer.<sup>62</sup> Palmer remained in Congress, then lost his race for the Senate in 1914.<sup>63</sup> Now out of Congress, Palmer campaigned vigorously for Wilson's reelection in 1916.<sup>64</sup>

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54. *Attorney General Pierrepont. Harmony Existing Between Himself and Secretary Bristow—an Indignant Denial of the Statement That He Furnished Evidence to Counsel for Defense in the Babcock Trial.*, N.Y. TIMES, Mar. 7, 1876, at 1, <http://timesmachine.nytimes.com/timesmachine/1876/03/07/81686814.html> [<http://perma.cc/D8ED-3BXG>].

55. See generally H. W. BRANDS, *THE MAN WHO SAVED THE UNION* (2012); RON CHERNOW, *GRANT* (2017); JEAN EDWARD SMITH, *GRANT* (2001); 8 WEST'S ENCYCLOPEDIA OF AMERICAN LAW *Pierrepont, Edwards* (2005).

56. CHARLES W. CALHOUN, *BENJAMIN HARRISON* 63 (2005).

57. *Attorney General: Alexander Mitchell Palmer*, DEP'T JUST., <https://www.justice.gov/ag/bio/palmer-alexander-mitchell> [<https://perma.cc/X6KH-27V5>] (last updated June 29, 2017).

58. BAKER, *supra* note 21, at 109.

59. STANLEY COBEN, *A. MITCHELL PALMER: POLITICIAN* 53–57 (1963).

60. *Id.* at 58–60.

61. Donald Johnson, *The Political Career of A. Mitchell Palmer*, 25 PA. HIST., Oct. 1958, at 345, 348–49.

62. *Id.* at 348. McReynolds, despite his bigotry, was considered an elite lawyer more than an insider at the time, and I categorize him here accordingly, but I could reconsider upon deeper study of him.

63. *Palmer, Alexander Mitchell*, HIST. ART & ARCHIVES U.S. HOUSE REPRESENTATIVES, <https://history.house.gov/People/Detail/19322> [<https://perma.cc/8LHH-7T87>] (last visited Mar. 15, 2019).

64. COBEN, *supra* note 59, at 124–26.

In the second Wilson administration, Palmer served first as Custodian of the Office of Alien Property, a wartime role with massive power over property and many opportunities to hand out jobs and access to that property.<sup>65</sup> And he did use his power to hire many political supporters to lay a foundation for his own future political campaign, as he had his eyes on running for president in 1920.<sup>66</sup> He was never charged with corrupt seizure of property, but his hires were, and he was blamed for irresponsible supervision.<sup>67</sup> In 1919, he finally got the job he had wanted for seven years: he became Attorney General. Wilson's private secretary counseled that the Office of the Attorney General had "great power politically" and that "[w]e should not trust it to any one who is not heart and soul with us."<sup>68</sup> It seems clear that Wilson chose Palmer due to assurances about partisan loyalty. The war was over, and the Red Scare of 1919 had begun. Palmer worked to foment the Scare and feed the public's panic about Communism, and he immediately abused the office's power to start a policy of mass arrests and mass deportations.<sup>69</sup> There were legitimate concerns: radicals had plotted major assassinations for May 1, 1919, which were then exposed and prevented.<sup>70</sup> Palmer's own house was bombed on June 2, 1919.<sup>71</sup> Palmer blamed immigrants rather than domestic sources.<sup>72</sup> Palmer ordered raids on Russian immigrants, which turned out to produce relatively small amounts of evidence of radicalism and few deportations, but the newspapers loved the raids.<sup>73</sup> Palmer increased his crackdowns in 1920 and warned of even bigger terror threats. But those warnings never led to any evidence, the Red Scare was settling down, and the public eventually grew tired of Palmer's self-promoting fear-mongering. Newspapers turned against him, and the leading legal minds of the time—Felix Frankfurter, Roscoe Pound, Zechariah Chafee, and Ernst Freund, followed by Harlan Fiske Stone and Charles Evans Hughes—condemned Palmer's abuse of power.<sup>74</sup> Nevertheless, he still announced his campaign for president in 1920 with significant support.<sup>75</sup> He had a sizable number of delegates at the divided 1920 convention, and he

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65. 50 U.S.C. § 4306 (2012); *Attorney General: Alexander Mitchell Palmer*, *supra* note 57.

66. *See* Johnson, *supra* note 61, at 362–63.

67. BAKER, *supra* note 21, at 110.

68. COBEN, *supra* note 59, at 150–54.

69. *See* BAKER, *supra* note 21, at 111–12.

70. *Find More Bombs Sent in the Mails; One to Overman*, N.Y. TIMES, May 2, 1919, at 1, <http://timesmachine.nytimes.com/timesmachine/1919/05/02/98284623.pdf> [<http://perma.cc/LS33-BUGQ>].

71. Johnson, *supra* note 61, at 367.

72. *See id.* at 356–57.

73. BAKER, *supra* note 21, at 112.

74. Alpheus Thomas Mason, *Harlan Fiske Stone: In Defense of Individual Freedom, 1918–20*, 51 COLUM. L. REV. 147, 166–67 (1951); *see also* Johnson, *supra* note 61, at 363–64 (explaining how lawyers, like Frankfurter, Pound, Chafee, and Freund, exemplified more frequent criticism of the mass Palmer raids to capture anarchists).

75. Johnson, *supra* note 61, at 363, 366 (“In spite of the attacks and exposures, Palmer’s campaign was reasonably successful.”).

stayed in through thirty-eight ballots before dropping out.<sup>76</sup> This ended his political career. Palmer's tenure as Attorney General was marked by his abuse of power to feed his political ambition.

Palmer's tenure illustrates one reason why the Office of the Attorney General became so politically salient: it built up tremendous power over immigration, deportation, and national security over the twentieth century. It is crucial to ensure that the president has sufficient command over those areas and that the Attorney General is politically accountable.

The path from party loyalty to Attorney General escalated in the next administration, which established a new norm: a president appointing his campaign manager as head of the DOJ. Harry M. Daugherty and Warren G. Harding had been close friends for twenty years—coming up through the same faction of the Ohio Republican Party (the “Foraker faction” in the state legislature).<sup>77</sup> President William McKinley was from Ohio, and Daugherty benefited from his close proximity to such power. In 1896, Daugherty had been one of McKinley's party insiders and convention managers.<sup>78</sup> When the Republican Party split between William Howard Taft and Theodore Roosevelt in 1912, Daugherty and Harding backed Taft, their fellow Ohioan, and played major roles in his campaign. Harding then won a seat in the U.S. Senate in 1914, but Daugherty lost his shot in 1916,<sup>79</sup> so Daugherty hitched himself to Harding's presidential ascendancy by serving as his campaign manager.<sup>80</sup>

Harding won and appointed Daugherty—one of his “Ohio Gang” insiders—Attorney General.<sup>81</sup> The Ohio Gang then engineered one of the most infamous corruption scandals in American history, the Teapot Dome scandal. Daugherty was never directly linked to the scandal, but he could not escape suspicions.<sup>82</sup> In fact, Daugherty used his power and his officials to retaliate against the members of Congress who were investigating him.<sup>83</sup> During prohibition, two of his friends, whom he had hired for DOJ offices, used their powers to remove seized liquor and sell it back on the street, sell scarce government liquor permits, sell government jobs, engage in financial fraud, and obstruct justice.<sup>84</sup> Historians have suggested that Daugherty must have known.<sup>85</sup> Daugherty also cracked down on railroad strikes aggressively, and criticism grew that he had been too punitive. The House Judiciary Committee began impeachment hearings on fourteen grounds.<sup>86</sup>

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76. *Id.* at 367.

77. JAMES N. GIGLIO, *H. M. DAUGHERTY AND THE POLITICS OF EXPEDIENCY* 82 (1978).

78. BAKER, *supra* note 21, at 115.

79. GIGLIO, *supra* note 77, at 81.

80. *Id.*

81. HERBERT HOOVER, *THE MEMOIRS OF HERBERT HOOVER* 48 (1951).

82. *Id.* at 54.

83. BAKER, *supra* note 21, at 118.

84. *Id.*

85. *Id.*; GIGLIO, *supra* note 77, at 124–30, 135–37; ROBERT K. MURRAY, *THE HARDING ERA* 432–33 (1969); C. VANN WOODWARD, *RESPONSES OF THE PRESIDENTS TO CHARGES OF MISCONDUCT* 244–47 (1974).

86. BAKER, *supra* note 21, at 118–19.

But then Harding died suddenly in 1923, and Calvin Coolidge became president.<sup>87</sup> Coolidge did not have any special connection to Daugherty, and meanwhile, the Teapot Dome scandal grew worse as the 1924 election approached.<sup>88</sup> Coolidge had more than enough reason to force Daugherty's resignation in 1924.<sup>89</sup>

After the consummate professional Harlan Fiske Stone cleaned up this mess in his one year as Attorney General, President Coolidge appointed his friend from childhood, John Sargent.<sup>90</sup> Sargent was a solid insurance lawyer and had served in Vermont state government for two years under his cousin, the governor, and then served for four years as Vermont's Attorney General.<sup>91</sup> He was not exactly a national name.

Franklin Roosevelt and Harry Truman ushered in another round of insider attorneys general. Homer Cummings was a prominent lawyer, a local leader in Connecticut, and had been chair of the Democratic National Committee.<sup>92</sup> After sitting out politics for decade, he returned to shepherd Roosevelt to the Democratic nomination in 1932 as convention floor manager and strategist.<sup>93</sup> When Roosevelt's first choice for Attorney General died right before his inauguration, he turned to Cummings.<sup>94</sup> Cummings served as a loyal manager and strategist for the New Deal and as the point person for Roosevelt's Court-packing plan of 1937.<sup>95</sup> Robert Jackson was famously professional in hindsight, but he, too, emerged from partisan insider connections. When Roosevelt was governor, Jackson served on his state commissions.<sup>96</sup> He had been an early supporter of FDR and served as chairman of Democratic Lawyers for Roosevelt.<sup>97</sup> Jackson was a key liaison during the campaign, became a close friend of Roosevelt's, then rose up the ranks of the DOJ to Attorney General.<sup>98</sup> Tom Clark, in addition to being a DOJ veteran professional, similarly ascended to Attorney General through his well-known close friendship with President Truman.<sup>99</sup> J. Howard

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87. *Id.* at 119.

88. *Id.*

89. *See id.*

90. FEDERAL WRITERS' PROJECT, VERMONT: A GUIDE TO THE GREEN MOUNTAIN STATE 255 (1934).

91. *Attorney General: John Garibaldi Sargent*, DEP'T JUST., <https://www.justice.gov/ag/bio/sargent-john-garibaldi> [<https://perma.cc/Q49B-XR2R>] (last updated June 29, 2017).

92. BAKER, *supra* note 21, at 21.

93. *See id.*

94. *Homer S. Cummings (1933–1939)*, MILLER CTR., <https://millercenter.org/president/fdroosevelt/essays/cummings-1933-attorney-general> [<https://perma.cc/6T4R-DVXK>] (last visited Mar. 15, 2019).

95. *Homer Cummings, Ex-U.S. Aide, Dies*, N.Y. TIMES, Sept. 11, 1956, at 35, <https://www.nytimes.com/1956/09/11/archives/homer-cummings-exus-aide-dies-attorney-general-193339-under.html> [<https://perma.cc/SU9W-JMLD>].

96. JOHN F. STACK, AT WAR WITH CIVIL RIGHTS AND CIVIL LIBERTIES 75 (2006).

97. A different Robert H. Jackson, of New Hampshire, served on the Democratic National Committee as secretary in 1932, causing some biographical confusion. ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT 227 n.8 (2003).

98. BAKER, *supra* note 21, at 78–79.

99. ALEXANDER WOHL, FATHER, SON AND CONSTITUTION—HOW JUSTICE TOM CLARK AND ATTORNEY GENERAL RAMSEY CLARK SHAPED AMERICAN DEMOCRACY 60–67 (2013).

McGrath was national party chair for Truman's uphill 1948 race and was nominated the following year.<sup>100</sup> Eisenhower, Kennedy, and Nixon did the same for their campaign managers: Herbert Brownell, Robert Kennedy, and John Mitchell, respectively.<sup>101</sup>

Of course, Robert Kennedy and John Mitchell are especially famous cases of nepotism and cronyism, but they each reflect the downhill fixation with fixers in the twentieth century. A recent biography of Robert Kennedy offered a striking narrative of how he made his way to Attorney General. Larry Tye reports that Joseph P. Kennedy Sr., the Kennedy patriarch, had been talking about having his son Jack as president and Bobby as Attorney General for three years before the election.<sup>102</sup> He wanted Bobby in the cabinet to protect Jack. However, Bobby was just 35, and he had never actually tried a case. Tye and Michael Beschloss offer a seemingly apocryphal quotation from Joe Sr. to the future president: "When you get to the White House there are two jobs you must lock up—Attorney General and director of the Internal Revenue Service."<sup>103</sup>

It turns out that this quotation comes from a *National Review* article in 1988, attributed to House Speaker John McCormack, so it should be taken with a grain of salt.<sup>104</sup> Bobby Kennedy continues to receive tremendous credit for his professional work as Attorney General as well as his commitment to civil rights and to national security issues. But it is worth noting that the Kennedy family's links to organized crime were never investigated in these years.<sup>105</sup>

With respect to Joe Sr.'s influence, one biographer wrote:

On the appointment of the attorney general, Joseph Kennedy had the first and last words. Driven by family pride and the desire to protect his personal investments in all of his sons, the father had publicly ordained Robert for the office in the 1956 *Saturday Evening Post* article. The family had humorously bandied the idea about for several years. Eunice Kennedy Shriver once playfully suggested that Robert be made attorney general "so he can throw all the people Dad doesn't like in jail. That means we'll have to build more jails."<sup>106</sup>

Another biographer observed:

As a business tycoon who lived his own life on the edge of lawlessness, Joe also grasped how useful it could be having America's chief law enforcement officer at his dinner table. . . . The capital teemed with the enemies, both Republican and Democratic, that Jack had made during his

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100. BAKER, *supra* note 21, at 21.

101. *Id.* at 20–21.

102. TYE, *supra* note 1, at 132.

103. *Id.* at 458 n.133.

104. Roche, *supra* note 1, at 34.

105. See, e.g., *Tina Sinatra: Mob Ties Aided JFK*, CBS NEWS (Oct. 5, 2000), <https://www.cbsnews.com/news/tina-sinatra-mob-ties-aided-jfk/> [https://perma.cc/J6FM-4AA4].

106. JAMES W. HILTY, ROBERT KENNEDY: BROTHER PROTECTOR 186–87 (1997).

swift climb to power, while skeletons continued to pile up in his bedroom closet.<sup>107</sup>

These accounts reflect tremendous pressure from Joe Sr. on John to appoint his brother as Attorney General.

When John eventually did, there was a wave of opposition from the public. The *New York Times* called it “most disappointing,” and prominent Yale Law Professor Alexander Bickel said he was “not fit for the office.”<sup>108</sup> Robert blamed his father, telling reporters it was “his father’s idea” and told them to call his father with their concerns.<sup>109</sup> Senators in confirmation hearings pointed out that he had never tried a case and was remarkably inexperienced even for his short ten years out of law school.<sup>110</sup> But he was confirmed with only one “no” vote, thanks to LBJ’s lobbying of his former colleagues.<sup>111</sup> Robert immediately announced a “war on crime” against racketeering and the mafia, building on his book *The Enemy Within*.<sup>112</sup> Robert’s five-point plan for combatting organized crime included expanding the DOJ’s Organized Crime Section.<sup>113</sup> And yet that plan never led to the Kennedy family’s ties to organized crime. There were constant rumors of the Kennedy family’s links to organized crime, John’s affair with a mafia party girl, and their friend Frank Sinatra’s clear mafia ties, “all of which imperiled the legitimacy and credibility of Kennedy’s anticrime program.”<sup>114</sup> In fact, Robert protected John from scrutiny: “Informed that [Sicilian gangster Sam] Giancana frequently stayed at [Sinatra’s] home in Palm Springs, where the president was scheduled to visit in March 1962, Robert insisted that his brother make other arrangements.”<sup>115</sup>

Robert made sure to push Sinatra away from the Kennedy family, protecting John but also limiting the investigations as well.<sup>116</sup> Organized crime figures mocked Robert as hypocritical and self-serving.<sup>117</sup> The FBI recorded gangster Vinnie Teresa saying, “[The Kennedys] used [Sinatra] to help them raise money. Then they turn around and say they’re great fighters against corruption. They criticize other people for being with mob guys. They’re hypocrites.”<sup>118</sup> The FBI investigation of the mob turned up evidence

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107. TYE, *supra* note 1, at 133.

108. HILTY, *supra* note 106, at 190.

109. *Id.*

110. *Id.* at 191.

111. *Id.*

112. *Id.* at 197.

113. *Id.*

114. *Id.* at 204.

115. *Id.* at 207.

116. See *Tina Sinatra: Mob Ties Aided JFK*, *supra* note 105 (noting that the Sinatra and Kennedy families attempted to limit the Kennedy family’s communication with the mafia even before the Sinatra family asked Giancana and the mafia to deliver the West Virginia union vote to John Kennedy).

117. See *id.* (explaining that the mafia was allegedly furious after delivering the union vote to then-Senator John Kennedy because the Kennedy administration and DOJ began cracking down on organized crime).

118. HILTY, *supra* note 106, at 208.

of the president's various affairs with mafia-connected women, but the FBI buried these facts.<sup>119</sup>

Lyndon Johnson's attorneys general were more in the professional model, but Nixon's were not. John Mitchell, a Nixon appointee, came out of nowhere politically to befriend Nixon and run his 1968 and 1972 presidential campaigns.<sup>120</sup> In the first campaign, he allegedly subverted the Paris Peace Accords, which had been progressing toward ending the Vietnam War.<sup>121</sup> When Nixon won, he persuaded J. Edgar Hoover not to conduct a background investigation of Mitchell as his Attorney General nominee.<sup>122</sup> After three years as Attorney General, undercutting civil rights and civil liberties, Mitchell resigned to become director of the Committee to Reelect the President (popularly known as "CREEP"), was implicated in the Watergate break-in, and was convicted of perjury and served nineteen months in prison.<sup>123</sup>

Richard Kleindienst replaced Mitchell after he departed to run the 1972 campaign.<sup>124</sup> Kleindienst had been Deputy Attorney General during the federal government's suit against International Telephone & Telegraph Corp. (ITT).<sup>125</sup> During Nixon's first term, he and his advisor and coconspirator, John Ehrlichman, had told Kleindienst to drop an antitrust suit against ITT, one of his biggest campaign donors, from which Nixon wanted more money.<sup>126</sup> In 1971, Kleindienst obliged, cutting a favorable deal for ITT.<sup>127</sup> Later, Kleindienst lied to Congress about the ITT case.<sup>128</sup> The fact that he

119. *Id.*

120. See BAKER, *supra* note 21, at 20.

121. Kent G. Sieg, *The 1968 Presidential Election and Peace in Vietnam*, 26 PRESIDENTIAL STUD. Q. 1062, 1069–70 (1996).

122. CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 616 (2001) ("But when Nixon told Hoover who the new AG would be, he did something unprecedented: he asked that the FBI *not* conduct a background investigation on Mitchell.")

123. See Lawrence Meyer, *John N. Mitchell, Principal in Watergate, Dies at 75*, WASH. POST (Nov. 10, 1988), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/stories/mitchobit.htm> [<https://perma.cc/J2WS-NJXQ>]; *Attorney General: John Newton Mitchell*, DEP'T JUST., <http://www.justice.gov/ag/bio/mitchell-john-newton> [<http://perma.cc/4K3U-E3DN>] (last updated June 28, 2017).

124. Bart Barnes, *Richard Kleindienst, Attorney General During Watergate, Dies*, WASH. POST (Feb. 4, 2000), <https://www.washingtonpost.com/archive/local/2000/02/04/richard-kleindienst-attorney-general-during-watergate-dies/3fd8559d-4eff-41b8-8302-6404ff8d449f/> [<https://perma.cc/QVD2-QPDH>]; *Attorney General: Richard Gordon Kleindienst*, DEP'T JUST., <http://www.justice.gov/ag/bio/kleindienst-richard-gordon> [<https://perma.cc/Z2X8-WVU2>] (last updated June 28, 2017).

125. See Nicholas Gage, *Nixon Reported to Have Ordered I.T.T. Settlement*, N.Y. TIMES, Oct. 30, 1973, at 1, <https://timesmachine.nytimes.com/timesmachine/1973/10/30/91022780.html> [<https://perma.cc/T4JK-KHVA>].

126. See *id.*; *Context of '1969: ITT Negotiates with Nixon Aides to Avoid Antitrust Lawsuit*, HIST. COMMONS, <http://www.historycommons.org/context.jsp?item=a1969ittlawsuit#a1969ittlawsuit> [<https://perma.cc/EF4P-FAC4>] (last visited Mar. 15, 2019).

127. *Context of '1969: ITT Negotiates with Nixon Aides to Avoid Antitrust Lawsuit*, *supra* note 126.

128. Anthony Marro, *Prosecutors Sought Felony Case Against Kleindienst, Records Say*, N.Y. TIMES, Jan. 22, 1978, at 43, <https://timesmachine.nytimes.com/timesmachine/1978/01/22/110774587.html> [<https://perma.cc/35JC-8LV5>].

was so cooperative with the president's corruption—and so compromised—made him a perfect Attorney General for Nixon, and in that role, Mitchell returned to him for help to cover up Watergate.<sup>129</sup> He resigned as the Watergate scandal escalated in 1973.<sup>130</sup> In 1974, he pleaded guilty to a minor offense in connection with the case.<sup>131</sup>

Other Watergate lawyers also went to jail for conspiring to obstruct justice. John Ehrlichman, Nixon's counsel, was found guilty of conspiracy to obstruct justice and perjury, and he served eighteen months in prison.<sup>132</sup> Ehrlichman's aide Egil Krogh had approved the burglary of Daniel Ellsberg's psychiatrist as part of Nixon's reaction to the leak of the Pentagon Papers, and Nixon's special counsel Charles Colson (i.e., Nixon's "hatchet man") also helped organize the burglary.<sup>133</sup> Krogh intended for the burglary to uncover information from Ellsberg's psychiatrist that could be used to discredit Ellsberg. Krogh was sentenced to two to six years, served four and a half months, and was disbarred.<sup>134</sup> Colson pleaded guilty to obstruction and served seven months.<sup>135</sup> John Dean, Nixon's White House Counsel, was convicted of obstruction of justice and served 127 days of a one to four year sentence.<sup>136</sup> Nixon's personal attorney, Herbert W. Kalmbach, raised campaign funds illegally for legally questionable dark political ops for Nixon.<sup>137</sup> Kalmbach served six months in jail and lost his law license.<sup>138</sup> Last but not least, G. Gordon Liddy, a former FBI lawyer and prosecutor,

129. See JAMES ROSEN, *THE STRONG MAN* 298–300 (2008).

130. Barnes, *supra* note 124.

131. Anthony Ripley, *Kleindienst Admits Misdemeanor Guilt over Testimony in Senate on I.T.T. Case*, N.Y. TIMES, May 17, 1974, at 24, <https://timesmachine.nytimes.com/timesmachine/1974/05/17/79659501.html> [<https://perma.cc/T4WY-9UVJ>]. See generally CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (1974); LEON JAWORSKI, *THE RIGHT AND THE POWER: THE PROSECUTION OF WATERGATE* (1976); RICHARD KLEINDIENST, *JUSTICE: THE MEMOIRS OF ATTORNEY GENERAL RICHARD KLEINDIENST* (1985).

132. Anthony Ripley, *Federal Grand Jury Indicts 7 Nixon Aides on Charges of Conspiracy on Watergate; Haldeman, Ehrlichman, Mitchell on List*, N.Y. TIMES, Mar. 2, 1974, at 1, <https://www.nytimes.com/1974/03/02/archives/federal-grand-jury-indicts-7-nixon-aides-on-charges-of-conspiracy.html> [<https://perma.cc/USS7-SLKA>]; *Key Players: John Ehrlichman*, WASH. POST, <http://www.washingtonpost.com/wp-srv/onpolitics/watergate/johnehrlichman.html> [<https://perma.cc/T958-ZLV3>] (last visited Mar. 15, 2019).

133. Bob Woodward & Carl Bernstein, *Break-In Memo Sent to Ehrlichman*, WASH. POST (June 13, 1973), <http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/061373-1.htm> [<https://perma.cc/444N-2VQU>]. Daniel Ellsberg was the individual who leaked the Pentagon Papers. See Kathleen Clark, *The Legacy of Watergate for Legal Ethics Instruction*, 51 HASTINGS L.J. 673, 674 (2000).

134. *In re Krogh*, 536 P.2d 578, 578 (Wash. 1975).

135. See Clark, *supra* note 133, at 679 n.3.

136. See *id.* at 680 n.6.

137. *Id.* at 678 nn.10–11; Stephen Miller, *Herbert Kalmbach, Nixon Lawyer Who Paid 'Hush Money,' Dies at 95*, BLOOMBERG (Sept. 30, 2017), <https://www.bloomberg.com/news/articles/2017-09-30/herbert-kalmbach-dies-95-nixon-lawyer-who-funneled-hush-money> [<https://perma.cc/382D-ALKH>] (noting that Kalmbach "paid 'hush money' to Watergate burglars" and "served six months in prison for illegal fundraising activities").

138. Clark, *supra* note 133, at 678, 680 n.11.

organized the Watergate burglary itself and served over four years in prison.<sup>139</sup>

Reagan's first Attorney General, William French Smith, was not as famously a partisan insider as Reagan's second, Edwin Meese, but he was still a buddy insider from Reagan's early days in California politics.<sup>140</sup> Smith was a prominent lawyer in Los Angeles, atop the major firm Gibson, Dunn & Crutcher.<sup>141</sup> Reagan and Smith met before Reagan's 1966 campaign for governor, and Smith became part of Reagan's "kitchen cabinet," his small group of close advisors.<sup>142</sup> Reagan appointed Smith to the University of California Board of Regents in 1968, and Smith would go on to serve three terms as chairman while also serving on the board of a number of major corporations in California and nationally.<sup>143</sup> He was a delegate representing California in the Republican National Conventions of 1968, 1972, and 1976, serving as the chairman of the delegation in 1968 and vice chairman in 1972 and 1976.<sup>144</sup> Reagan, uncoincidentally, challenged President Gerald Ford for the Republican nomination in 1976.<sup>145</sup> When Reagan eventually won in 1980, he immediately brought Smith with him to Washington as his Attorney General.<sup>146</sup>

Reagan's second Attorney General was Edwin Meese, his close friend and Chief of Staff during his governorship.<sup>147</sup> Meese was also his 1980 presidential campaign's senior official and transition head.<sup>148</sup> As "counsellor to the president,"<sup>149</sup> Meese was deeply involved with political strategy and outreach to the Evangelical community. His four years as Attorney General

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139. *Id.* at 679, 681 n.19.

140. Edward J. Boyer, *William French Smith, 73, Dies; Reagan Adviser and Atty. Gen.*, L.A. TIMES (Oct. 30, 1990), [http://articles.latimes.com/1990-10-30/local/me-3410\\_1\\_william-french-smith](http://articles.latimes.com/1990-10-30/local/me-3410_1_william-french-smith) [<https://perma.cc/8379-5M3L>] ("After meeting Reagan in 1963, Smith became the future President's personal lawyer, confidant and business adviser. He has been credited with engineering Reagan's rise to wealth at a time when the former actor's primary income was royalties from movies.").

141. *See id.*

142. *Id.*

143. *Attorney General: William French Smith*, DEP'T JUST., <https://www.justice.gov/ag/bio/smith-william-french> [<https://perma.cc/B88L-TZBE>] (last updated June 26, 2017).

144. *Appointment of William French Smith as a Member of the President's Foreign Intelligence Advisory Board*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM (Feb. 28, 1985), <https://www.reaganlibrary.gov/research/speeches/22885b> [<https://perma.cc/446R-EU3W>].

145. Lee Edwards, *Ronald Reagan vs. Gerald Ford: The 1976 GOP Convention Battle Royal*, NAT'L INT. (Apr. 16, 2016), <https://nationalinterest.org/blog/the-buzz/ronald-reagan-vs-gerald-ford-the-1976-gop-convention-battle-15818> [<https://perma.cc/JR55-EYGK>].

146. *Attorney General: William French Smith*, *supra* note 143.

147. *See Attorney General: Edwin Meese, III*, DEP'T JUST., <https://www.justice.gov/ag/bio/meese-edwin-iii> [<https://perma.cc/8N8A-PY2U>] (last updated June 26, 2017).

148. *Edwin Meese III*, HERITAGE FOUND., <https://www.heritage.org/staff/edwin-meese-iii> [<https://perma.cc/DV8Z-HFVU>] (last visited Mar. 15, 2019).

149. *Id.*

were tainted by Iran-Contra questions, the Bechdel scandal, and the Wedtech scandal, which led to his resignation in 1988.<sup>150</sup>

Since Meese, the trend shifted back to more professionals and politicians, until George W. Bush appointed Alberto Gonzales to follow John Ashcroft.<sup>151</sup> Previously, Gonzales had served as general counsel to Bush, and Bush elevated him to the Texas Supreme Court.<sup>152</sup> After two years, he resigned from the court to join the Bush administration as White House counsel in 2001<sup>153</sup> before Bush appointed him Attorney General in 2005.<sup>154</sup> He played the central role in the partisan firing of U.S. attorneys, which led to his resignation.<sup>155</sup>

President Trump's first Attorney General, Jeff Sessions, fits more as the established politician, but he was a campaign insider as well.<sup>156</sup> He was the first senator to endorse Trump, and his direct involvement with the campaign affiliated him with Russia contacts that led to his recusal from the special investigation into Russian interference in the 2016 election.<sup>157</sup>

This overview of attorneys general who advanced through personal or political connections is not meant to show that such backgrounds always lead to corruption. They do not seem to. But it does show that norms of independence of the DOJ from the president—either because of political clout or professionalism—once existed but have eroded significantly. Almost every president from FDR to Reagan appointed his campaign manager or national party chairman to be Attorney General at some point, and this problem has worsened.

Considering how these norms are crashing down all around us, what can be done structurally to protect independence? Can Congress change those structures—altering appointment powers, removal powers, or otherwise—to restore independence more formally by statute?

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150. See *Atty. Gen. Meese Resigns: Says He's Been Cleared and Leaves with Clean Name: Acts After Prosecutor Files Report*, L.A. TIMES (July 5, 1988), [http://articles.latimes.com/1988-07-05/news/mn-5430\\_1\\_meese-resigns](http://articles.latimes.com/1988-07-05/news/mn-5430_1_meese-resigns) [<https://perma.cc/L92S-7497>].

151. *Attorney General: Alberto R. Gonzales*, DEP'T JUST., <https://www.justice.gov/ag/bio/gonzales-alberto-r> [<https://perma.cc/ZGV2-8FGH>] (last updated June 26, 2017).

152. *Id.*

153. *Id.*

154. *Id.*

155. Steven Lee Myers & Philip Shenon, *Embattled Attorney General Resigns*, N.Y. TIMES (Aug. 27, 2007), <https://www.nytimes.com/2007/08/27/washington/27cnd-gonzales.html> [<https://perma.cc/P9ER-9N4M>].

156. See Eli Stokols, *Sen. Jeff Sessions Endorses Trump*, POLITICO (Feb. 28, 2016), <https://www.politico.com/story/2016/02/sen-jeff-sessions-endorses-trump-219939> [<https://perma.cc/XQ9V-7YZ5>].

157. Kevin Johnson, *Trump Fires Jeff Sessions, Names Matthew Whitaker as Interim Attorney General*, USA TODAY (Nov. 7, 2018), <https://www.usatoday.com/story/news/politics/2018/11/07/jeff-sessions-resigns-attorney-general-trump/512600001/> [<https://perma.cc/2MCX-E3EU>].

## II. ORIGINAL UNDERSTANDINGS AND ALTERNATIVE DESIGNS

Independent agencies originated soon after the creation of the DOJ in 1870.<sup>158</sup> Congress created the Interstate Commerce Commission (ICC) in 1887, the first commission with staggered terms and protection from at-will removal.<sup>159</sup> The ICC became a model for independent agencies, which grew in number during the Progressive Era and the New Deal.<sup>160</sup>

Could Congress apply some aspects of this model to the Office of the Attorney General and the Department of Justice? Before considering the details of those models, the first big-picture question is whether alternatives are possible. Must the Department of Justice fit the unitary-executive theory<sup>161</sup> in terms of complete control by the president for appointing, directing, and removal? Or can there be an alternative model consistent with Article II of the Constitution?

The Supreme Court's decision in *Morrison v. Olson*, upholding the constitutionality of the Office of Independent Counsel by a 7-1 vote,<sup>162</sup> indicates that the answer is yes. But today, many celebrate that lone dissent, written by Justice Antonin Scalia, and hail it as one of the greatest dissents in American history.<sup>163</sup> The majority allowed Congress to create a prosecutorial office as an inferior office, appointed and supervised by three circuit judges, and protected from presidential removal.<sup>164</sup> Justice Scalia made a series of historical assertions about the unitary executive for all prosecution and rejected the independent counsel structure.<sup>165</sup> However, Scalia's dissent made a number of incorrect assumptions about American history, which should be a fatal flaw on his own originalist terms.<sup>166</sup> I do not

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158. See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 770–71 (2013); Jed Handelsman Shugerman, *The Dependent Origins of Independent Agencies: The Interstate Commerce Commission, the Tenure of Office Act, and the Rise of Modern Campaign Finance*, 31 J.L. & POL. 139, 142 (2014).

159. Datla & Revesz, *supra* note 158, at 776.

160. *Id.* at 771 & n.2, 772, 776–77.

161. See *id.* at 831–32 (explaining that the unitary-executive theory “holds that Article II ‘is a grant to the president of all of the executive power, which includes the power to remove and direct all lower-level executive officials’” (quoting STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 3–4 (2008))); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 324 (2016) (“Proponents of what I would call the ‘hard version’ of the unitary executive thesis interpret the Constitution as guaranteeing the President plenary authorities, which Congress may not limit, both to discharge unelected executive administrators at will and to direct how they shall exercise any and all discretionary authority that those officials possess under law.”).

162. *Morrison v. Olson*, 487 U.S. 654, 696 (1988). Justice Anthony Kennedy took no part in the consideration or the decision of the case. *Id.* at 658.

163. See Terry Eastland, *Scalia's Finest Opinion*, WKLY. STANDARD (Mar. 11, 2016), <https://www.weeklystandard.com/terry-eastland/scalias-finest-opinion> [https://perma.cc/RRM3-KFP4].

164. *Morrison*, 487 U.S. at 655, 658, 661 n.3.

165. *Id.* at 727–32 (Scalia, J., dissenting).

166. I first published this historical argument in *Slate*. See Shugerman, *supra* note 14. Some of the language in this paper is excerpted from this article. This conference paper does not offer the complete historical argument, but I will be elaborating on it in a future article.

present the full argument in this piece, but I simply summarize some key points.<sup>167</sup>

Scalia's core argument in his *Morrison* dissent was that "[g]overnment investigation and prosecution of crimes is a quintessentially executive function."<sup>168</sup> He continued: "We should say here that the President's constitutionally assigned duties include *complete* control over investigation and prosecution of violations of the law, and that the inexorable command of Article II is clear and definite: the executive power must be vested in the President of the United States."<sup>169</sup>

The Supreme Court has rejected the unitary model where administrative officers exercise a mixed role of "quasi-judicial" or "quasi-legislative" authority.<sup>170</sup> This rule permits many vital independent agencies, such as the Securities and Exchange Commission and Federal Trade Commission, to function with a significant degree of independence.<sup>171</sup> But if prosecution has historically been exclusively an executive power, the proponents of the unitary executive contend that the president must have an unfettered power to appoint, direct, and remove those officers at will.<sup>172</sup> Historians have demonstrated that this view simply was not true in the founding era.<sup>173</sup> Scalia's dissent in *Morrison* is simply inconsistent with his purportedly originalist method.

First, for much of English and American history, most prosecution was not an executive function at all because it was a *private* enterprise.<sup>174</sup> In England, the vast majority of criminal prosecution was by private parties, as historians like John Langbein, Patrick Devlin, and many others have explained.<sup>175</sup> The vast majority of American prosecutions were still private

167. For more on opposing views on these questions and historical interpretations presented in my summary and initial preview in this Part, please see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005); and see also Steven G. Calabresi & Christopher S. Yoo, *Remove Morrison v. Olson*, 62 VAND. L. REV. EN BANC 103 (2009); and Stephanie A. J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069 (1990).

168. *Morrison*, 487 U.S. at 727–32 (Scalia, J., dissenting).

169. *Id.* at 710; see also Shugerman, *supra* note 14.

170. *Morrison*, 487 U.S. at 690–91 ("[I]t was not essential to the President's proper execution of his Article II powers that [quasi-legislative and quasi-judicial] agencies be headed up by individuals who were removable at will.").

171. See *id.* at 687–88 (explaining that executive removal powers over officers of independent agencies are not "illimitable" because such at-will removal exhibits "coercive influence" that "would 'threate[n] the independence of [the agencies]'").

172. *Id.* at 706 (Scalia, J., dissenting) ("Governmental investigation and prosecution of crimes is a quintessentially executive function.").

173. Dangel, *supra* note 167, at 1070 (1990) ("An analysis of the Framers' writings . . . shows that the Framers did not intend prosecution to be a core executive function . . . [The Framers] provided that most prosecution would be undertaken by *officials within the executive branch*, but not necessarily executive officials subject to presidential control through appointment, direction, and removal.").

174. See Shugerman, *supra* note 7, at 129 ("A significant number of the prosecutions were undertaken by private parties during [the founding era].").

175. See John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 317 (1973) ("For a very long time, really into the nineteenth century, the

through the mid-nineteenth century, as Allen Steinberg and many other historians have demonstrated.<sup>176</sup> The rough consensus is that the public prosecutor did not overtake private prosecution in America until after the Civil War, and yet private prosecution continued deep into the twentieth century.<sup>177</sup> Even today, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Virginia, and Texas allow private citizens to serve a role in criminal prosecutions.<sup>178</sup>

Second, Scalia hedged a bit by talking about “governmental” prosecutions,<sup>179</sup> but even this fallback position is inaccurate. Congressional committees investigate crimes with subpoena power, and Congress has authority to enforce these powers with its own legislative contempt proceedings.<sup>180</sup> Contempt of Congress is a criminal offense, and it has historically been prosecuted entirely within the legislature.<sup>181</sup>

Third, historians have pointed out that the Judiciary Act of 1789 undercuts Scalia further on his “governmental prosecution” claim.<sup>182</sup> The statute in the First Congress allowed deputy marshals to be removed by federal judges.<sup>183</sup>

English relied upon a predominant, although not exclusive, component of private prosecution.”); Michael T. McCormack, Note, *The Need for Private Prosecutors: An Analysis of Massachusetts and New Hampshire Law*, 37 SUFFOLK U. L. REV. 497, 500 n.27 (2004) (“Devlin states that although any English citizen may prosecute, most choose to complain to police and leave prosecution to them.” (citing PATRICK DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 10 (1958))).

176. See Allen Steinberg, *The “Lawman” in New York. William Travers Jerome and the Origins of the Modern District Attorney in Turn-of-the-Century New York*, 34 U. TOL. L. REV. 753, 753 (2003).

177. See Shugerman, *supra* note 7, at 129, 134.

178. See 234 PA. CODE § 506 (2018); *State v. Rollins*, 533 A.2d 331, 331 (N.H. 1987) (stating that, in New Hampshire, “[t]he common law . . . does not preclude the institution and prosecution of certain criminal complaints by private citizens”); *State v. Storm*, 661 A.2d 790, 792 (N.J. 1995) (holding that, in New Jersey, “whenever an attorney for a private party applies to prosecute a complaint in the municipal court, the court should determine whether to permit the attorney to proceed”); *Cronan ex rel. State v. Cronan*, 774 A.2d 866, 871 (R.I. 2001) (“[P]rivate misdemeanor prosecutions are valid in this jurisdiction.”); *Hott v. Yarbrough*, 245 S.W. 676, 678–79 (Tex. 1922) (“Equally clear is the right of any one who may consider himself aggrieved by the actual or supposed commission of a crime to call the matter to the attention of the grand jury for investigation and action. The law does not restrict the method by which this may be done.”); *Cantrell v. Commonwealth*, 329 S.E.2d 22, 26 (Va. 1985) (stating that, in Virginia, the common law “generally permits the appearance of private counsel to assist the prosecution”).

179. *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) (“*Governmental* investigation and prosecution of crimes is a quintessentially executive function.” (emphasis added)).

180. *Id.* at 665 (majority opinion) (stating, while describing how the Ethics in Government Act of 1978 functions, that when the House of Representatives subpoenaed an independent agency, but the administrator of the agency withheld the subpoenaed documents, the House voted to hold the administrator in contempt); see JOSH CHAFETZ, *CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 175, 180 (2017).

181. See *Jurney v. MacCracken*, 294 U.S. 125, 147–48 (1935).

182. See Dangel, *supra* note 173, at 1084 (“Although the final version of the Judiciary Act of 1789 vested the appointment of the Attorney General in the President, an earlier draft vesting this power in the Supreme Court indicates that its authors did not feel that presidential appointment was constitutionally compelled.”).

183. See *id.*

As Jennifer Mascott has explained, Congress designated for deputy marshals an executive law enforcement role, and their removability by judges “suggest[s] that the deputies had their own identity and their own measure of accountability apart from the primary marshals.”<sup>184</sup> At the same time, Mascott also indicates that deputy marshals may have had more limited subordinate roles, so until we know more about their function, we should not rely too heavily on this one example.<sup>185</sup>

Even today, federal judges have the power to appoint interim U.S. attorneys.<sup>186</sup> The first draft of the Judiciary Act also would have given the Supreme Court the power to appoint the Attorney General and gave district judges the power to appoint district attorneys.<sup>187</sup> These provisions were deleted and not replaced, so their appointment reverted to the default under the Constitution: presidential appointment.<sup>188</sup> But the First Congress showed in this draft that they did not think Scalia’s view was at all obvious, settled, or quintessential.<sup>189</sup> It certainly reflects that the role of the Attorney General and the U.S. attorneys was unsettled and fluid in this period.<sup>190</sup>

Fourth, observers in the early republic indicated the federal judges themselves led what appeared to be prosecutions during the Whiskey Rebellion of 1794, and initiated prosecutions under the Alien and Sedition Acts by convening and presiding over grand juries.<sup>191</sup>

Fifth, it is important to study what the states were doing at this time. The states are usually important for understanding original public meaning in order to provide context. But this is especially true for the question of law enforcement because so much federal law enforcement depended directly on

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184. Jennifer L. Mascott, *Who Are “The Officers of the United States”?*, 70 STAN. L. REV. 443, 518 (2018). Mascott also cites a statute indicating the deputy marshals had “powers” in executing federal law. *Id.* at 518 n.435 (“[T]he marshals of the several districts and their deputies, shall have the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states.” (quoting Act of May 2, 1792, ch. 28, § 9, 1 Stat. 264, 265 (repealed 1795))).

185. For more on these roles, see FREDERICK S. CALHOUN, *THE LAWYERS: UNITED STATES MARSHALS AND THEIR DEPUTIES, 1789–1989*, at 21 (1989); Aditya Bamzai, *The Constitutional Status of “Deputy” Officers*, YALE J. ON REG.: NOTICE & COMMENT (Apr. 16, 2018), <http://yalejreg.com/nc/the-constitutional-status-of-deputy-officers-by-aditya-bamzai/> [<https://perma.cc/QN8L-GRFA>]. For more on these debates, see generally Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359 (2017).

186. 28 U.S.C. § 546(d) (2012).

187. See Dangel, *supra* note 173, at 1086.

188. *Id.* at 1084–85.

189. *Id.* at 1085 (“[T]he Framers did not view presidential appointment of prosecutors as the obvious choice.”); see also *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) (“Governmental investigation and prosecution of crimes is a *quintessentially* executive function.” (emphasis added)).

190. For the best resource, see generally ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789 (Maeva Marcus ed., 1992). For other resources, see also JULIUS GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1801, at 490 (1971); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 108–09 (1923).

191. MARVIN E. FRANKEL & GARY P. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 12–13 (1977); Letter from Alexander Hamilton to George Washington (Nov. 19, 1794), in ALEXANDER HAMILTON AND THE FOUNDING OF THE NATION 491, 491 (Richard B. Morris ed., 1957).

the states.<sup>192</sup> The federal government had a minor role in criminal law in this era.<sup>193</sup> In some cases, Congress used criminal fines to achieve its limited regulatory goals, but it relied heavily on state officials and state courts, as well as private plaintiffs.<sup>194</sup> When Congress used criminal fines to enforce the Embargo Act of 1807, the government found that it had too few district attorneys, with too little time, to prosecute offenders, and the embargo was made a mockery.<sup>195</sup>

State constitutions reflect how the founding generation understood the role of law enforcement and how it actually enforced the law. They adopted separate branches and often declared a separation of powers explicitly, unlike the federal Constitution.<sup>196</sup> Nevertheless, many state constitutions did not reflect Scalia's formalism. Early state constitutions sometimes placed attorneys general and prosecutors under the judiciary article or judicial sections of their constitutions.<sup>197</sup> These constitutions grouped attorneys general together with judges and judicial officers.<sup>198</sup> These practices continued in many new frontier states established from the 1790s through the 1830s.<sup>199</sup> Moreover, some of the constitutions assigned the power of appointment of law enforcement officials to the legislature with no role for the governor, and some assigned this appointment power to judges.<sup>200</sup>

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192. Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 281 (1989) (“Despite the executive branch’s leading part, Congress, the courts, private citizens, and state officials have played significant supporting roles in federal criminal law enforcement.”).

193. *Id.*

194. JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 83 (2012).

195. *Id.* at 93, 101.

196. PROTECTIONS IN THE NEW YORK STATE CONSTITUTION BEYOND THE FEDERAL BILL OF RIGHTS 5 (Scott N. Fein & Andrew B. Ayers eds., 2017).

197. *See, e.g.*, MASS. CONST. ch. II, § 1, art. IX (describing restrictions on the office of “Attorney-General” as well as various state judgeships).

198. *See, e.g., id.* This includes Delaware, Georgia, New Jersey, and North Carolina; similarly, Maryland’s Constitution did not have specific articles and grouped the prosecutors with the judges. *See, e.g.*, GA. CONST. art. III, § 3 (establishing “a State’s Attorney and Solicitors” separately from the state judiciary).

199. These states are Tennessee, Ohio, Louisiana, Indiana, Illinois, and Michigan. *See, e.g.*, LA. CONST. of 1812, art. IV, § 7.

200. These states include New Hampshire, Connecticut, Virginia, North Carolina, New York, Tennessee, and Georgia. *See, e.g.*, GA. CONST. art. III, § 4. There was another alternative in appointing an expanding system of public prosecutors:

In 1777, New York created a Council on Appointments, which consisted of the governor and an annually rotating panel of four senators. The Council appointed all state officers, including justices of the peace, district attorneys, and sheriffs. The Council was designed to limit the governor’s control over the state bureaucracy, and also to limit popular democracy. From 1777 to 1821, the Council appointed 15,000 officers. It was heavily criticized, but if it had been designed better, I am curious if it could have been a successful model for a less partisan method of building a prosecutorial system. It certainly could have been a foundation for a more consensus-oriented, professionally-based system, as the council could have evolved to change the council membership but not the basic structure. On the other hand, any method of appointment might have succumbed to the Jacksonian democratic wave.

For example, Virginia's 1776 Constitution—drafted by James Madison, George Mason, and other key figures of the founding—gave the governor the power to appoint justices of the peace but gave the legislature the power to appoint attorneys general and gave judges the power to appoint sheriffs, coroners, and constables.<sup>201</sup> These founders did not share Scalia's assumptions.

For those who are skeptical of originalism, this history of prosecution may confirm how difficult it is to discern clear, stable interpretive binding meaning from nuanced, complicated, and multifaceted sources and practices. For those who subscribe to original public meaning, this history shows that the design of the executive branch is far more open-ended than many ostensible originalists have claimed.

### III. STRUCTURAL INDEPENDENCE FOR QUASI-JUDICIAL DOJ OFFICERS?

In 1870, Congress created the DOJ to reduce the partisan patronage in hiring government lawyers and to professionalize government lawyers.<sup>202</sup> Following the corruption scandals of the 1870s, Congress passed the Pendleton Act of 1883 to establish the civil service in the executive branch for lower bureaucratic appointments.<sup>203</sup> A few years later, Congress created the ICC, the model for independent agencies with job security and staggered, long terms, that proliferated through the twentieth century.<sup>204</sup> This wave of professional reform laid a foundation for independence from partisans in the executive branch, but these reforms were limited in their scope and extent.<sup>205</sup> It is time to debate whether to elevate these reforms into the upper echelons of the DOJ, from the Attorney General down to the U.S. attorneys. This Part offers an initial set of thoughts and proposals to suggest some structural reforms that I will elaborate in future work in more detail.

*Myers v. United States*<sup>206</sup> held that Congress cannot limit presidential power to remove executive officials.<sup>207</sup> But the equally canonical precedent *Humphrey's Executor v. United States*<sup>208</sup> distinguishes executive offices from “quasi-judicial” and “quasi-legislative” offices.<sup>209</sup> As noted in the introduction, the office of U.S. Attorney General has often been called “quasi-judicial” (or recognized as having “quasi-judicial” features) long

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Jed Shugerman, *The Founding of the DOJ and the Failure of Civil Service Reform, 1865–1870*, AM. B. FOUND., at 10, [http://www.americanbarfoundation.org/uploads/cms/documents/shugerman\\_doj\\_and\\_civil\\_service.doc](http://www.americanbarfoundation.org/uploads/cms/documents/shugerman_doj_and_civil_service.doc) [<https://perma.cc/TV4M-7W2T>] (last visited Mar. 15, 2019).

201. VA. CONST. of 1776.

202. See Shugerman, *supra* note 7, at 122.

203. See Shugerman, *supra* note 200, at 32.

204. Shugerman, *supra* note 158, at 144–45.

205. *Id.*

206. 272 U.S. 52 (1926).

207. *Id.* at 159.

208. 295 U.S. 602 (1935).

209. *Id.* at 624.

before *Humphrey's Executor*.<sup>210</sup> This was Attorney General Caleb Cushing's frequently cited formulation. Attorney General Edward Bates similarly wrote, "The office I hold is not properly *political*, but strictly *legal*; and it is my duty, above all other ministers of State to uphold the Law and to resist all encroachments, from whatever quarter, of mere will and power."<sup>211</sup> Other parts of the DOJ are quasi-judicial, such as the Office of Legal Counsel and the Solicitor General.

Thus, if the Attorney General and parts of the DOJ are quasi-judicial, they might be structurally removed from unitary control, so long as the structure does not intrude upon or obstruct the president's duty to take care that the laws be faithfully executed. In *Humphrey's Executor*, the Court held unanimously:

The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.<sup>212</sup>

Thus, Congress could take parts of the DOJ and refashion them in the model of independent commissions or other reforms, fixing the terms and forbidding their removal except for cause.

If one of the core problems is the crony-ization of the Office of Attorney General itself, can that office be redesigned for more independence? Could Congress forbid the removal of the Attorney General from office except for cause? Lower courts have confronted the problem of a single head of an agency who can be removed only for cause. In *PHH Corp. v. CFPB*,<sup>213</sup> the D.C. Circuit first held that a single head cannot have such insulation because it concentrates too much executive power in one person separate from presidential control.<sup>214</sup> The D.C. Circuit then reheard the case en banc and upheld the structure.<sup>215</sup> The CFPB appears to be more quasi-legislative and quasi-judicial than the DOJ, or at least judges are more likely to distinguish them. It is likely that courts would find such insulation of the Attorney General to interfere with the president's executive power under the Vesting Clause and his or her duties under the Take Care Clause.<sup>216</sup> Too much

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210. See CUSHING REPORT, *supra* note 2, at 6; see also Cushing Opinion, *supra* note 2, at 334. Cushing also noted that Congress established the Office of Attorney General "in organizing the judicial business of the United States." Cushing Opinion, *supra* note 2, at 330.

211. Arthur Selwyn Miller, *The Attorney General as the President's Lawyer*, in ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 41, 51 (Luther A. Huston et al. eds., 1968).

212. *Humphrey's Executor*, 295 U.S. at 629.

213. 839 F.3d 1 (D.C. Cir. 2016), *rev'd on reh'g*, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

214. *Id.* at 8.

215. See generally *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

216. See, e.g., *id.*

executive power would be concentrated in an insulated principal officer. Such a proposal seems unlikely to survive a challenge.

Could the Office of the Attorney General be turned into a commission with staggered terms to avoid the concentration problem in *PHH*? Could the Attorney General be turned into an Attorneys' Commission, or a Justice Commission with staggered terms? Article II does not explicitly forbid such a structure, but it might implicitly. The Appointment Clause states: "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."<sup>217</sup> A "head" of a department might not be limited to a single person, but it depends how one reads "head." It is unclear if a "head" of a department ever meant multiple people in England or at the American founding, and no department today is headed by a commission, even if there are many independent agencies under those departments. It is plausible to imagine such a commission of attorneys general with staggered terms. But it is more plausible that federal courts would find that this design violates Article II. In any case, the lesson from commissions is that an even number of commissioners leads to paralysis, so such a structure would probably need to be an odd number of commissioners to make sure the president can take care that the laws be faithfully executed.

Given the constitutional challenges that likely await such a novel design of department leadership, perhaps it makes more sense to focus on more plausible designs. Congress could retain the single Attorney General who serves at will, but other principal officers could be turned into a bipartisan staggered commission under the Attorney General, with the protection of for-cause removal. Principal officers can be given such job security.<sup>218</sup> Instead of a hierarchy of a Deputy Attorney General, an Associate Attorney General, and Assistant Attorneys General as heads of DOJ offices, imagine a Justice Commission under the Attorney General. The Attorney General and perhaps the Deputy Attorney General would remain from the old unitary structure, but they would join a commission of Assistant Attorneys General who supervise the offices. Because these are principal offices, the President would have to nominate and the Senate confirm them.<sup>219</sup> But a statute could require bipartisan membership. The terms also could be staggered and set for a number of years to have crossovers from an earlier administration.

One possible structure that would avoid interfering with the executive power would be members who serve five-year terms removable only for cause. Each president gets to name one at the beginning of his or her term, and then a new one each year. Let us imagine that there are five Assistant Attorneys General who are part of this independent structure and rotation, but there are four additional members who also sit and vote on the

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217. U.S. CONST. art. II, § 2.

218. *See, e.g.,* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 534–36 (2010).

219. *See* *Edmond v. United States*, 520 U.S. 651, 659–60 (1997); *cf. Lucia v. SEC*, 138 S. Ct. 2044, 2056 (2018) (Thomas, J., concurring).

commission: the Attorney General, a Deputy Attorney General, and two Associate Attorneys General. From the beginning of every presidential term, the president will have named five of the nine members—a majority. But one of those new appointees will be an assistant with job security, and thus may be more free to be a swing vote, a conscience on the committee, and perhaps a whistleblower. After that first year, the president gradually increases his or her majority. One key point is that the commission would always hold over from the previous administration to at least be a possible check on the DOJ, cronyism, or election-year rigging. That is why the terms would be five years. Putting someone on the inside of the DOJ from the opposing party is important even if his or her vote has limited power in the minority.

Even less complicated is the possibility of creating independent commissions within the DOJ that do not include the Attorney General.<sup>220</sup> The Office of Legal Counsel is more than quasi-judicial. It is self-conceived as almost-judicial. It has a norm of following precedent substantively, so perhaps that norm could be reinforced with staggered terms and entrenched officers from the last administration. One can imagine the Solicitor General being turned into an independent Solicitors' Commission to similar effect, which would encourage a more judicious, reliable, and consistent approach to cases. It would be slightly more difficult for the Solicitor General to reverse earlier positions if there are holdovers from a previous administration. The rule of law benefits from more consistency and from having a different perspective in the room to challenge ideological thinking.

There are other offices that could be recreated following such an independent model, such as the Office of Legal Policy or the Office of Legislative Affairs. The DOJ's Inspectors General have been praised for their independence and their role as watchdogs, and that norm can be reinforced structurally with job security.<sup>221</sup> The structure of the FBI reflects a part of the independence model. The director may be removed at will, as we now know, of course, but the director is appointed to a ten-year term.<sup>222</sup> The Inspectors General should have similarly long terms. But to be clear, the FBI may arguably be less appropriate for additional job security because its role is less quasi-judicial and more investigatory and executive.

Another possible reform is outside of Main Justice. A statute could protect the U.S. attorneys from presidential removal at will. Instead, they could be removable only for cause. This reform would limit the president's power to dictate law enforcement and prosecution, but it would acknowledge the

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220. For more on these themes, see generally BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 *YALE L.J.* 2314 (2006); and Andrew Kent, *Congress and the Independence of Federal Law Enforcement*, 52 *U.C. DAVIS L. REV.* (forthcoming 2019).

221. See Jack Goldsmith, *Independence and Accountability at the Department of Justice*, *LAWFARE* (Jan. 30, 2018, 2:16 PM), <https://www.lawfareblog.com/independence-and-accountability-department-justice> [<https://perma.cc/DX6Y-35YQ>].

222. See 28 U.S.C. § 532 note (2012) (Findings).

expectations of judicious and independent decision-making by prosecutors a bit more insulated from partisan pressures. Recall Alberto Gonzales and the 2006 firing scandal.<sup>223</sup> These reforms might frustrate a president, but that is the price of protecting prosecutorial fairness and independence from political pressures and partisanship.

#### CONCLUSION

“[The President] shall take Care that the Laws be faithfully executed.”<sup>224</sup> Officers take an oath to “faithfully execute” their offices.<sup>225</sup> Our current structures and norms of partisanship, self-dealing, and cronyism are not conducive to faithful execution. This historical overview of the Office of the Attorney General shows the erosion of the norms of professionalism and independence and a growing threat to the rule of law. But the history of the founding era was less rigid and formal about executive power and institutional design, which also suggests that we can be more flexible and creative about the design of these offices and the DOJ today. Congress should borrow from the independent commission-independent agency model to reinforce those norms and to restore professionalism, structural independence, and the impartial rule of law.

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223. As I have discussed in a draft excerpt from my forthcoming book:

In 2006, around the same time as the Nifong/Duke scandal, eight federal U.S. Attorneys were relieved of their duties, too. A report by the Inspector General of the Justice Department concluded that “there was significant evidence that political partisan considerations were an important factor” in the firings. The allegations are that the Attorney General Alberto Gonzales and other White House officials fired three prosecutors for investigating Republican politicians, two others were fired for not investigating Democratic politicians, and a sixth, then-New Jersey U.S. Attorney Chris Christie . . . avoided his firing by investigating Democrat Robert Menendez towards the end of his Senate Campaign (an investigation that resulted in no charges). Christ[ie] became governor three years later.

Also in 2006, U.S. Attorney Steven Biskupic prosecuted Georgia Thompson, a career civil servant in Wisconsin for allegedly steering a state contract to a travel agency owned by supporters of Democratic Governor Jim Doyle. Thompson’s conviction for mail fraud and misapplication of federal funds became a centerpiece in the Republican campaign against Doyle. A year later, the Seventh Circuit Court of Appeals overturned the conviction, finding that the prosecution’s case was “preposterous” and without evidence, that the agency had submitted the lowest bid, that there was “not so much of a whiff of impropriety,” and that Thompson was “innocent.” The Court ordered her immediate release. It turns out that, in 2005, U.S. Attorney Biskupic had been on a list of U.S. Attorneys to be considered for firing, compiled by the U.S. Attorney General’s chief of staff for not bringing voter fraud cases against Democrats. After Biskupic indicted Thompson, his name came off of that list.

JED SHUGERMAN, *THE RISE OF THE PROSECUTOR-POLITICIANS* (forthcoming) (manuscript at 4 n.9).

224. U.S. CONST. art. II, § 3.

225. For more on this argument, see Kent et al., *supra* note 15; and Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Two Legal Conclusions*, GEO. J.L. & PUB. POL’Y (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3177968](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3177968) [<https://perma.cc/85QT-9S7R>].