

CAN PROSECUTORS’ OFFICES PRESERVE PUBLIC CONFIDENCE IN THEIR NONPARTISANSHIP—AND, IF SO, HOW?

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INTRODUCTION

The public wants prosecutors to decide whom to investigate and prosecute, and to make other important decisions, by evaluating the evidence objectively, applying the right criteria, and not pursuing partisan advantage or political self-interest.¹ This expectation is codified in national criminal justice standards that state “[a] prosecutor should not use other improper

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1. See generally Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Progressive Prosecution*, 60 AM. CRIM. L. REV. 1431 (2023).

considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion.”²

There are over 2,000 prosecutors’ offices of varying sizes throughout the United States. Although most criminal prosecutions are conducted at the state and local level, federal prosecutors have set an example for prosecutions at all levels of government. For more than four decades, through 2024, the U.S. Department of Justice (DOJ or the “Department”) took the lead in assuring the public that criminal prosecutors use their power in nonpartisan fashion.³ For example, DOJ’s internal policies restricted federal prosecutors from discussing their cases with public officials outside the Department; only the attorney general and others in DOJ’s leadership were allowed to communicate with the White House and Congress.⁴ DOJ justified restrictions like this one as necessary procedure to “promote the rule of law and to ensure that the Department’s actions are free from the appearance of political influence,”⁵ as is necessary because “[t]he rule of law depends upon the evenhanded administration of justice.”⁶

Although some have espoused that as chief executive, the U.S. President may opt to direct DOJ’s work,⁷ contemporary U.S. Attorneys General recognized that, in making decisions about individual cases, DOJ should be independent of political actors, including the President.⁸ In a 1978 speech to DOJ lawyers, after leaving the federal bench to become President Jimmy Carter’s Attorney General, Griffin B. Bell acknowledged that “true institutional independence” is impossible for DOJ, because “in a Constitutional sense, the Attorney General remains responsible to the President,” but “the President is best served if the Attorney General and the lawyers who assist him are free to exercise their professional judgments.”⁹

2. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.6(a) (AM. BAR. ASS’N 2017), https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecution-function/ [https://perma.cc/8Q7U-KRXY].

3. See *Regulations, Authorities and Reference Materials*, U.S. DEP’T OF JUST. (Nov. 13, 2023), <https://www.justice.gov/jmd/regulations-authorities-and-reference-materials> [https://perma.cc/H9LQ-UYDB] (gathering sources).

4. See U.S. Dep’t of Just., Just. Manual § 1-8.200 (2019).

5. *Id.* § 1-8.100.

6. *Id.*

7. See, e.g., *Excerpts from Trump’s Interview with the Times*, NY TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/us/politics/trump-interview-excerpts.html> [https://perma.cc/FBJ4-3WYL] (“I have absolute right to do what I want to do with the Justice Department.”); Letter from Marc E. Kasowitz, Couns. to the President, to Robert S. Mueller, Special Couns. (June 23, 2017), <https://www.nytimes.com/interactive/2018/06/02/us/politics/trumplegal-documents.html> [https://perma.cc/HF37-C3Y7]; see also *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977, at 16 (“[W]hen the President does it, that means that it is not illegal.”).

8. See Merrick B. Garland, Att’y Gen., U.S. Dep’t of Just., Address to the Workforce: “An Independent Justice Department” (Sept. 12, 2024) (“Our democracy relies on an independent law enforcement agency — the Department of Justice — to ensure those protections.”).

9. Hon. Griffin B. Bell, Att’y Gen. of the U.S., Address Before Department of Justice Lawyers 5 (Sept. 6, 1978), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-06-1978b.pdf> [https://perma.cc/6DFC-6KWY].

And “[j]ust as important, they must be perceived by the American people as being free to do so.”¹⁰

In recent years, despite efforts to preserve public confidence in prosecutors’ impartiality and political independence, influential politicians and media figures have fueled the perception that prosecutors in fact use their power to promote partisan political objectives, engaging in “political witch hunts,” on the one hand, and political favoritism, on the other.¹¹ During President Donald J. Trump’s first administration, for example, many Democrats accused Attorney General William (“Bill”) P. Barr of playing politics when he refused to prosecute President Trump based on the investigative findings of Special Counsel Robert S. Mueller III.¹² During President Joseph R. Biden Jr.’s administration, many Republicans accused Special Counsel Jack Smith of playing politics in prosecuting President Trump, including for mishandling classified information in his Mar-a-Lago home, at the same time that a different Special Counsel, Robert K. Hur, recommended not prosecuting President Biden, who also mishandled classified information.¹³ State and local prosecutors were also accused of acting on political considerations, the most obvious examples being the local prosecutors in New York and Georgia who initiated cases against President Trump.¹⁴

These accusations were not entirely implausible because some prosecutors have been subject to political influence. On the eve of the 2024 presidential election, a news report revealed that during then-candidate Trump’s earlier presidential administration, he repeatedly tried to employ federal prosecutors and investigators to target his “rivals and perceived enemies,” including former Secretaries of State Hillary Clinton and John Kerry, Federal Bureau

10. *Id.*

11. See Ankush Khardori, *Trump Seems to Be the Victim of a Witch Hunt. So What?* POLITICO (Mar. 30, 2023, 7:14 PM), <https://www.politico.com/news/magazine/2023/03/30/trump-political-witch-hunt-indictment-00089011> [<https://perma.cc/C9HF-4FNZ>].

12. See REPUBLICAN STAFF OF H.R. COMM. ON THE JUDICIARY, 116TH CONG., EXAMINING DEMOCRAT ALLEGATIONS AGAINST ATTORNEY GENERAL WILLIAM P. BARR (Comm. Print 2020); cf. Pete Williams, *2,000 Former DOJ, FBI Officials Call on Barr to Resign over Michael Flynn Case*, NBC NEWS (May 11, 2020, 2:52 PM), <https://www.nbcnews.com/politics/justice-department/2-000-former-doj-fbi-officials-call-barr-resign-over-n1204601> [<https://perma.cc/C42E-N4JX>] (“Barr is using the Justice Department to further Trump’s personal and political interests, the letter said.”).

13. Congresswoman Elise Stefanik, Address at the House Republican Conference (Apr. 30, 2024), <https://stefanik.house.gov/2024/4/icymi-chairwoman-stefanik-democrats-corrupt-and-desperate-witch-hunts-against-president-trump-must-come-to-an-end> [<https://perma.cc/T2RC-N32X>] (“Democrats’ corrupt and desperate witch hunts against President Trump must come to an end. This is lawfare and blatant election interference, and the American people know it.”).

14. See Jared Gans, *Trump Campaign Blasts Manhattan DA ‘Witch Hunt’ as Possibility of Indictment Nears*, THE HILL (Mar. 16, 2023, 8:39 PM), <https://thehill.com/homenews/campaign/3904521-trump-campaign-blasts-manhattan-da-witch-hunt-as-possibility-of-indictment-nears/> [<https://perma.cc/3C72-Z7D8>]; *Trump Condemns Georgia Election Charges as ‘Witch Hunt’*, BBC NEWS (Aug. 31, 2023), <https://www.bbc.com/news/live/world-us-canada-66364230> [<https://perma.cc/4BF7-7D5U>].

of Investigation (FBI) Director James B. Comey, and others.¹⁵ Lawyers in the White House Counsel's office drafted memos discouraging President Trump from giving prosecutors direct orders, explaining that there is a "consensus . . . that a key component of ensuring fair criminal proceedings is avoiding even the appearance of political motivation for prosecution or criminal investigation."¹⁶ But President Trump's publicly expressed desires reportedly led "to prosecutorial action even without a formal order," including an investigation of Kerry later documented by former U.S. Attorney Geoffrey S. Berman.¹⁷ Although prosecutors' politicization of their authority can sometimes be uncovered and sanctioned, mechanisms of accountability are far from robust.¹⁸

Public accusations and reports that prosecutors are succumbing to political self-interest and outside political pressure undermine public confidence in prosecutors. Although President Trump announced his selection of Pam Bondi for Attorney General by promising that she would end the weaponization of DOJ,¹⁹ public mistrust of federal prosecutors is likely to increase in President Trump's second administration, given his threats on the campaign trail to prosecute political foes and others who had crossed him.²⁰ And skepticism about DOJ prosecutors' nonpartisanship may rub off on state and local prosecutors who are responsible for most criminal law enforcement.

How can prosecutors preserve the idea that prosecution is a lawful, constrained activity when confronted with a growing number of high-profile, politically charged criminal investigations and prosecutions? Given that prosecutors' offices cannot avoid addressing politically charged cases and other cases in which their nonpartisanship might be questioned, one might ask whether the appearance of partisanship is an intractable and unavoidable problem or whether there are measures that would help prosecutors maintain justifiable public trust in their work. We suggest that prosecutors' offices can do more to defend the legitimacy of criminal prosecutions. Prosecutors' offices have considerable discretion in how they deal with politically charged cases, and even more discretion in what they tell the public about their decision-making outside the context of any given case. There are

15. Michael S. Schmidt, *In Trump's White House, The Pursuit of Retribution*, N.Y. TIMES, Sept. 22, 2024, at A1.

16. Michael S. Schmidt, *Read Excerpts from Memos Written for Trump About His Powers to Prosecute*, N.Y. TIMES (Sept. 21, 2024), <https://www.nytimes.com/2024/09/21/us/politics/trump-powers-memos.html> [<https://perma.cc/8P4F-7888>].

17. Schmidt, *supra* note 15; see GEOFFREY BERMAN, HOLDING THE LINE: INSIDE THE NATION'S PREEMINENT US ATTORNEY'S OFFICE AND ITS BATTLE WITH THE TRUMP JUSTICE DEPARTMENT 64–72 (2022).

18. See generally Bruce A Green & Rebecca Roiphe, *Who Should Police Politicization of the DOJ?*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 671 (2021).

19. See Eric Tucker & Alanna Durkin Richer, *Trump Chooses Loyalist Pam Bondi for Attorney General Pick After Matt Gaetz Withdraws*, ASSOCIATED PRESS (Nov. 22, 2024, 3:46 AM), <https://apnews.com/article/gaetz-trump-fbi-justice-department-248b46ba0c882dd46d661568e8bd3bd7> [<https://perma.cc/EE7G-5SXE>].

20. See generally Ian Ayres & Saikrishna Bangalore Prakash, *A Bipartisan Approach to Political Prosecutions*, 16 J. LEGAL ANALYSIS 140 (2024).

opportunities for prosecutors' offices to adopt, implement and publicize additional policies and practices to promote their impartiality and the public's faith in it. Part I explores the current crisis of prosecutorial legitimacy. Part II considers how prosecutors might promote public confidence in their work in the difficult situations where the public is polarized on high-profile, political cases.

I. THE EROSION OF PUBLIC CONFIDENCE IN U.S. PROSECUTORS

A. *Expectations of Prosecutorial Neutrality, Nonpartisanship, and Independence*

Although U.S. prosecutors serve a very different function from judges, they are expected to conduct their work in a similarly neutral, nonpartisan fashion. Indeed, the characterization of prosecutors as “ministers of justice” analogizes them to judges.²¹ For each, neutrality and nonpartisanship are essential to their role in upholding and promoting the rule of law—that is, in ensuring that the government exercises its power in accordance with properly adopted laws, not arbitrarily. Judges promote the rule of law by employing accepted principles of legal interpretation to interpret the law and by fairly applying the law to the facts of the cases before them. Prosecutors do so, in part, by holding individuals accountable for criminal conduct through the adjudicative process, but also by employing the criminal process in accordance with the law and with general principles that the public would accept regarding the exercise of prosecutorial discretion.²²

By the early twentieth century, the idea that prosecutors, like judges, should stay above the political fray was prevailing wisdom, at least among the professional elite. Many lawyers and judges were trained on a legal ethics treatise authored by George Sharswood, a Pennsylvania Chief Justice whose mid-nineteenth century writings became the basis of the American Bar Association's (ABA) 1908 Canons of Professional Ethics (the “1908 Canons”).²³ He called the prosecutor's office “a public trust, which involves . . . the exertion of an almost boundless discretion, by an officer who stands as impartial as a judge.”²⁴ The 1908 Canons followed suit, stating

21. See MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR. ASS'N 2023) (stating that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

22. Green & Roiphe, *supra* note 1, at 1457 (“Discretionary decision making and the norms that guide it signal that partisan political considerations and other biases have not usurped the search for justice in its most basic form.”).

23. See Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1 (1999) (analyzing how the ABA both embraced and critically responded to the normative framework that Chief Justice Sharswood advanced in his 1854 treatise).

24. Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 612 (1999) (quoting GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 94 (F.B. Rothman 5th ed., 1993) (1854)).

simply that “[t]he primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done.”²⁵

Although Chief Justice Sharswood’s conception prefigured the modern understanding,²⁶ it may not have captured his contemporaries’ practice. With the election of state and local prosecutors beginning in 1832,²⁷ the public may have come to see prosecutors as partisan political actors, as some were. Late nineteenth and early twentieth century Manhattan prosecutors favored political bosses to whom they owed their offices,²⁸ as did Manhattan judges.²⁹ Although the popular understanding of prosecutors’ role may have been contested,³⁰ much of the public probably preferred nonpartisan prosecutors, which would explain the election of a Progressive-era prosecutor who campaigned on the promise to use his power honestly, not in obeisance to party bosses.³¹

By the mid-twentieth century, prosecutors’ political impartiality was a settled norm, if sometimes dishonored. In 1940, future U.S. Supreme Court Justice Robert H. Jackson, serving as President Franklin D. Roosevelt’s Attorney General, put the concept at the center of a speech he delivered to his U.S. Attorneys.³² “The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous,” Jackson told the group.³³ “While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.”³⁴ Among those base motives was political partisanship. U.S. Attorneys are political appointees, but once they take office, he said, prosecutors are expected, and to some extent legally required, to be nonpartisan,³⁵ employing their authority to “serve[] the law and not factional purposes.”³⁶ He enjoined the group to take, “as nearly as possible, a detached and impartial view of all groups in his community,” recognizing that it would be an “abuse of prosecuting power” to target people because

25. CANONS OF PRO. ETHICS Canon 5 (AM. BAR ASS’N 1908).

26. See Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 101, 112 (2020).

27. See Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528 (2012).

28. See, e.g., *id.* at 1565–66.

29. See Renee Lettow Lerner, *From Popular Control to Independence: Reform of the Elected Judiciary in Boss Tweed’s New York*, 15 GEO. MASON L. REV. 109, 126–30 (2007).

30. See Carolyn B. Ramsay, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1346 (2002) (“[W]e should not assume that the public prosecutor’s quasi-judicial role was a nineteenth-century tradition.”).

31. See Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 742, 747 (2020).

32. See Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3 (1940) (address at The Second Annual Conference of United States Attorneys, Washington, D.C., April 1, 1940).

33. *Id.* at 3.

34. *Id.* at 3.

35. See *id.* at 4–5.

36. *Id.* at 6.

they are “unpopular with the predominant or governing group” or “attached to the wrong political views.”³⁷

Prosecutors repeatedly avow their impartiality, in part, because it cannot be taken for granted. The ABA’s standards on the prosecution function state the principle that “[a] prosecutor should not use . . . improper considerations, such as partisan or political . . . considerations, in exercising prosecutorial discretion.”³⁸ This is not a distinctly American norm. Publications of the United Nations and other international nongovernmental organizations recognize that prosecutors should “make decisions rationally and impartially on the basis of the law and the evidence,”³⁹ uninfluenced by “concerns of a political nature,”⁴⁰ and that “[t]he use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and free from political interference.”⁴¹ But no one should think that prosecutors universally achieve this ideal: “The existence of systems of democratic control does not give a complete answer to the problem of politically inspired prosecutions.”⁴²

B. Public Confidence in U.S. Prosecutors’ Independence and Nonpartisanship

For decades, commentators have acknowledged the need to preserve, or restore, public trust in courts.⁴³ By contrast, prosecutors’ legitimacy became a widespread concern only recently. One reason may be that the public, encouraged by prosecutors, previously viewed the job as ministerial.⁴⁴ Prosecutors purported simply to apply the law to the facts, obscuring the

37. *Id.* at 5.

38. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.6(a) (AM. BAR. ASS’N 2017). These standards “reflect[] a professional consensus about how prosecutors should run their offices and exercise their authority.” Green & Roiphe, *supra* note 31, at 734.

39. U.N. OFF. ON DRUGS & CRIME, THE STATUS AND ROLE OF PROSECUTORS 9 (2014), https://www.unodc.org/documents/justice-and-prison-reform/14-07304_ebook.pdf [<https://perma.cc/GA4H-U72S>].

40. ORG. FOR ECON. COOP. & DEV., COMMENTARIES ON THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 14 (1997), <https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/fighting-foreign-bribery/Convention%20and%20commentaries%20booklet%202024.pdf> [<https://perma.cc/F6DJ-8ART>].

41. INT’L ASS’N OF PROSECUTORS, STANDARDS OF PROFESSIONAL RESPONSIBILITY AND STATEMENT OF THE ESSENTIAL DUTIES AND RIGHTS OF PROSECUTORS 4 (1999), [https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-\(1\)/English.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-(1)/English.pdf.aspx) [<https://perma.cc/A2AL-ZYMX>].

42. Eur. Comm’n for Democracy Through L., *Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service*, at 14, CDL-AD(2010)040 (2010), <https://rm.coe.int/1680700a60> [<https://perma.cc/4URY-RTSQ>].

43. See, e.g., Robert B. McKay, *The Judiciary and Nonjudicial Activities*, 35 LAW & CONTEMP. PROBS. 9 (1970). See generally Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 NYU ANN. SURV. AM. L. 497, 515–23 (2009) (discussing the loss of confidence leading to the first code of judicial conduct in 1922).

44. Cf. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 882, 895.

breadth and importance of their discretionary decision-making, which largely occurs out of view.⁴⁵ Prosecutors emphasized their courtroom role, and their high conviction rates seemed to validate their discretionary decisions, which focused on identifying who was provably guilty.

Public confidence seems to be eroding for various reasons.⁴⁶ Although prosecutors have become increasingly professional over time,⁴⁷ critics blame prosecutors' exercise of discretion for wrongful convictions, over-incarceration, racial disparities, and other perceived deficiencies of the criminal process.⁴⁸ There are more contested prosecutorial elections in which candidates attack each other, and other politicians are less inhibited about criticizing prosecutors.⁴⁹ Public criticism has amplified, in part because of the accessibility and growth of social media.⁵⁰

Our focus, however, is on public perceptions that prosecutors are using their discretionary power in a politically partisan fashion. By this, we do not mean that prosecutors are implementing criminal-justice or social policy preferences identified with one political party, although this may also erode public trust. We mean that prosecutors are perceived to be targeting public officials of the opposite party while overlooking identical criminal conduct by their own party's officials. To be clear, our view is not that prosecutors persistently "weaponize" their power as some might suggest. Rather, the problem is one of public perception fueled in large part by political rhetoric in politically charged cases. Representatives of both major political parties employ this rhetoric.⁵¹

45. Green & Roiphe, *supra* note 31, at 749 (Prosecutors "often depict themselves . . . like bloodhounds [who] just 'follow the evidence.'").

46. See Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 71 (2016) ("[T]he public and the media are coming to understand that prosecutors' decisions about whom to charge, what plea bargains to offer, or what sentences to pursue may be not simply unwise, but abusive, reflecting wrongdoing in an ordinary, if not legal, sense.").

47. See Green & Roiphe, *supra* note 31, at 726–30, 764.

48. See Green & Yaroshefsky, *supra* note 46, at 88–89 (The public perception of prosecutors has shifted partly because of a public "understanding of fault lines in the criminal justice system, including racial disparities in policing, police violence, over-criminalization, the reduction of judicial sentencing discretion, collateral consequences of criminal convictions, and mass incarceration.").

49. See Anita Snow, *Republican Prosecutor in Arizona Takes Swipe at New York District Attorney Prosecuting Trump*, ASSOCIATED PRESS (Feb. 21, 2024, 8:04 PM), <https://apnews.com/article/maricopa-county-arizona-mitchell-bragg-trump-1a4c62a7c805100e5151364f4be034db8> [<https://perma.cc/2CQL-LR2E>].

50. See generally Russell M. Gold & Kay L. Levine, *The Public Voice of the Defender*, 75 ALA. L. REV. 157 (2023) (describing how public defenders use social media to call attention to perceived deficiencies in the criminal law, including overzealous prosecutors); see also Green & Yaroshefsky, *supra* note 46, at 103–07.

51. See, e.g., 169 CONG. REC. S5949 (daily ed. Dec. 13, 2023) (remarks of Sen. JD Vance, Republican of Ohio) (accusing the Biden administration of turning DOJ into "a weapon for political intimidation as opposed to an instrument to prosecute justice in this country"); 167 CONG. REC. H7583 (daily ed. Dec. 9, 2021) (remarks of Rep. Peter DeFazio, Democrat of Oregon) (discussing the Protecting Our Democracy Act: "The Department of Justice needs to have a firewall between the White House and the Department of Justice. You can't have the President calling up the Department of Justice, telling them to prosecute people or make stuff

For the most part, accusations of partisanship are unavoidable: the charge can be made whenever one disapproves of the prosecutor's decisions in cases with political implications. The question is whether prosecutors can effectively respond. This question is particularly urgent when political polarization has led these charges to reach a frequency and pitch that threatens faith both in prosecutors and in courts—institutions that are critical to democracy.

II. PROMOTING PUBLIC CONFIDENCE

Prosecutors routinely protect their institution's legitimacy in the face of threats to the criminal justice process. For example, they investigate and prosecute those who lie, suborn perjury, or otherwise obstruct justice in criminal cases. Prosecutors' offices have a similar institutional responsibility to promote public confidence by protecting and defending their political impartiality and independence. This is important for obvious reasons. One is that, as we have discussed, prosecutors' work should not in fact be partisan; that is a principle that all would accept as a matter of prosecutors' legal legitimacy. Another reason is that the public is entitled to know whether it is adhering to professional norms, including those regarding nonpartisanship. In order to convey this message to the public, prosecutors' offices will need to create some transparency about how they do their work. And if the prosecutor's office is in fact acting properly, the office should effectively communicate that, so that public confidence is not unnecessarily and undeservedly eroded. This is important not only for public confidence in government but for the office to function effectively. It is harder to secure witnesses' cooperation and jurors' trust, and to preserve prosecutors' morale, if the public perceives that prosecutors extend political favors or pursue political vendettas.

Prosecutors are limited in what they can do to promote and protect their legitimacy.⁵² They cannot seek to punish criminal defendants who wrongly accuse them of acting on partisan motivations,⁵³ unless, of course, the defendant engages in some accompanying wrongdoing such as perjury, witness harassment or violation of a court order. Prosecutors might be tempted to retaliate and to deter others when defendants or their representatives falsely assert that prosecutors are weaponizing their power; for example, prosecutors might seek harsher sentences against the defendants

up."); 166 CONG. REC. S1212 (daily ed. Feb. 27, 2020) (remarks of Sen. Kevin Cramer, Republican of North Dakota) (discussing impeachment and asserting that federal prosecutors are "far from unbiased, and they are capable of weaponizing the tools and access they are given."); 166 CONG. REC. S977 (daily ed. Feb. 11, 2020) (remarks of Sen. Richard Blumenthal, Democrat of Connecticut) (accusing Attorney General Bill Barr, during the executive session, of "becoming an aider and abettor to that polarization and politicization of the Department of Justice").

52. See Bruce A. Green & Alafair S. Burke, *The Community Prosecutor: Questions of Professional Discretion*, 47 WAKE FOREST L. REV. 285, 316 (2012); see also Hon. J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1134 (2014).

53. See Wilkinson, *supra* note 52, at 1134.

or deny them favorable plea deals, or prosecutors might seek litigation sanctions if the baseless accusations are made in court rather than in the media.⁵⁴ But retaliating in this way might constitute vindictive prosecution in violation of due process or contravene the defendant's First Amendment right to free speech. Even if not, defendants are entitled to defend themselves, including by advocating in the court of public opinion,⁵⁵ and they should not be discouraged from making possibly legitimate arguments for fear of retaliation for advancing unfounded beliefs about prosecutors' motivation for initiating criminal cases.⁵⁶ Rather than punishing defendants who accuse them of partisanship, and thereby inviting further accusations that they are abusing their power, prosecutors should find ways to reassure the public that their work is in fact nonpartisan.

In former U.S. Attorney General Griffin B. Bell's 1978 speech to federal prosecutors, he identified three broad measures that federal prosecutors' offices might take to reassure the public: (1) "insur[ing] that lawyers in the Department are persons of good judgment and integrity," (2) establishing internal "procedures and principles" to prevent "improper considerations" from entering into prosecutors' judgments, and (3) instilling public "confidence in these procedures and principles."⁵⁷ Here, we explore what more might be done along each of these lines by state as well as federal prosecutors to promote public confidence in their institutions in light of questions about their political independence and neutrality.

A. *Staffing Investigations and Prosecutions with Political Implications*

At one time, the appointment of an independent counsel might have been expected to bolster, if not secure, public confidence that an investigation or prosecution of a political figure would be nonpartisan.⁵⁸ But although chief prosecutors should take care to assign politically charged cases to lawyers of good character and judgment without an axe to grind, no prosecutor is immune from charges of political bias, whether conscious or implicit.⁵⁹ Accusations of political bias have been made even when investigations and prosecutions are led by independent lawyers of exceptional stature, such as

54. See, e.g., *Young v. Ninth Jud. Dist. Ct.*, 818 P.2d 844 (Nev. 1991).

55. See, e.g., *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); *In re Grand Jury Subpoenas*, 265 F.Supp.2d 321 (S.D.N.Y. 2003).

56. See *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995) (finding that a lawyer could not be disciplined for statements falsely impugning a judge based on a statement of opinion or a statement that did not imply factual knowledge). See generally Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies They Tell*, 69 WASH. U. J.L. & POL'Y 37 (2022) (discussing constitutional limits on sanctioning lawyers for making false statements).

57. Bell, *supra* note 9, at 6.

58. See, e.g., *In re Nofziger*, 925 F.2d 428, 437 (D.C. Cir. 1991) ("The impartiality of independent counsel and the thoroughness of his investigation ensures that the public will have confidence that the investigation as a whole is unbiased and entitled to respect.")

59. Judges may be accused of bias with comparable ease. See generally Bruce A. Green, *Legal Discourse and Racial Justice: The Urge to Cry "Bias!"*, 28 GEO. J. LEGAL ETHICS 177 (2015).

Kenneth W. Starr and Lawrence E. Walsh, who had both served on the federal bench,⁶⁰ or Robert S. Mueller III, who had been Director of the FBI,⁶¹ all of whom were too old to have further political ambitions. When Starr, a registered Republican, left the appellate court to investigate President William (“Bill”) J. Clinton, a Democrat, he followed in a line of prosecutors, including independent counsel, assigned to investigate representatives of the opposing party,⁶² and his opposite party affiliation exposed him to accusations of political bias against the subject of the investigation.⁶³ But accusations of bias have also been leveled when respected lawyers investigated or prosecuted political figures from their own party—for example, when Walsh prosecuted individuals associated with President Ronald Reagan’s administration⁶⁴ and when Mueller investigated President Trump.⁶⁵ Assigning the task to a career prosecutor without significant past political engagement does not insulate against accusations of bias, as Jack Smith’s prosecutions of then-former President Trump show.⁶⁶

Moreover, state and local prosecutors may not be able to cede or delegate authority to a special prosecutor; they were elected to exercise authority and may not relinquish that authority without a good reason.⁶⁷ That being so, prosecutors—and especially chief prosecutors—should steer clear of partisan politics to the extent possible. We have recently discussed the importance of judges maintaining a professional identity that conveys their nonpartisanship,⁶⁸ and the same may be said of prosecutors. They should avoid conduct that erodes the appearance, and reality, that they exercise their authority in a principled, nonpartisan manner. For example, although elected

60. See Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 STAN. L. REV. 309, 339, 346 (1999).

61. See Derooy Murdock, *Mueller Sticks the Final Shiv in Russiagate*, NAT’L REV. (July 26, 2019, 4:25 PM), <https://www.nationalreview.com/2019/07/mueller-sticks-the-final-shiv-in-the-russiagate-hoax/> [<https://perma.cc/J2GP-Z3DX>].

62. See *Starr v. Mandanici*, 152 F.3d 741, 754 (8th Cir. 1998) (Beam, J., concurring) (“[S]ome of our most well-known and successful corruption fighters have been investigators and prosecutors who brought to the task highly partisan backgrounds and strong personal political ambitions.”).

63. See Amy Chozick, *Starr, Who Tried to Bury Clinton, Now Praises Him*, N.Y. TIMES, May 25, 2016, at A13.

64. See, e.g., Bruce Fein, Debate, *Walsh Must Go; Let Clinton Settle Iran-Contra*, USA TODAY, Dec. 30, 1992, at 10A (“Walsh’s prejudicial statements against Bush disqualify him as a trustworthy and fair-minded prosecutor in the investigation.”).

65. See, e.g., Eric Tucker, Michael Balsamo & Chad Day, *Trump Calls Mueller a ‘Never Trumper’ Who Led a Biased Probe: Asked About Impeachment by Congress, the President Called It a ‘Dirty Word’*, EVERETT HERALD (May 30, 2019), <https://www.heraldnet.com/nation-world/trump-calls-mueller-a-never-trumper-who-led-a-biased-probe/> [<https://perma.cc/9RKS-KJRH>].

66. See *infra* notes 99–100 and accompanying text. Moreover, internal Department of Justice regulations governing the appointment of a special counsel do not apply in all cases with political implications and, when they do apply, they are subject to constitutional challenge, as occurred in the Trump prosecutions. See *United States v. Trump*, No. 23-80101-CR, 2024 U.S. Dist. LEXIS 123552 (S.D. Fla. July 15, 2024).

67. See, e.g., *Schumer v. Holtzman*, 454 N.E.2d 522, 526–27 (N.Y. 1983).

68. See Bruce A. Green & Rebecca Roiphe, *Public Confidence, Judges, and Politics on and off the Bench*, 87 LAW & CONTEMP. PROBS. 183 (2024).

prosecutors cannot avoid campaigning for themselves, they should refrain from campaigning for others,⁶⁹ refrain from making public pronouncements on political issues unrelated to their own work,⁷⁰ and refrain from campaigning on how they will make future decisions in individual cases.⁷¹

B. Internal Policies and Practices

In politically charged cases, it may be hard to dispel perceptions that prosecutors have engaged in favoritism or weaponized their power, given prosecutors' vast discretion.⁷² If there is probable cause, they may initiate charges for virtually any reason, and they may decline to bring charges for virtually any reason no matter how strong the case.⁷³ Moreover, prosecutors are not obligated to explain how and why they made particular charging decisions, and they rarely do so.⁷⁴ Indeed, most prosecutors do not publicize their general decision-making criteria and processes.⁷⁵ Many have no consistently implemented criteria and processes. Prosecutors traditionally make ad hoc decisions based on the strength of their belief in the individual's guilt, the strength of the evidence, the perceived public importance of a prosecution, and a host of other considerations. There are no accepted professional understandings about how much weight each deserves.⁷⁶ When the public suspects that prosecutors may be insinuating partisan political considerations into their decision-making, and consequently treating cases with political implications differently from other similar cases, there is rarely anything tangible to dispel its suspicions. As then-former President Trump's Manhattan prosecution illustrates, even a criminal conviction does not

69. See, e.g., New York State Bar Ass'n Comm. on Pro. Ethics, Op. 683 (1996) ("[P]rosecutors must generally refrain from partisan political activity in order to ensure the appearance and reality of nonpartisan decisionmaking.").

70. For example, we think it was ill-advised for Attorney General Barr and other federal prosecutors in the Trump administration to criticize urban prosecutors who were regarded as progressive. See German Lopez, *The Trump Justice Department's War on Progressive Prosecutors, Explained*, VOX (Aug. 16, 2019, 1:10 PM), <https://www.vox.com/policy-and-politics/2019/8/16/20807544/william-barr-larry-krasner-philadelphia-trump-justice-department> [<https://perma.cc/E2B5-SULJ>].

71. It may violate the defendant's right to an impartial prosecutor for the prosecutor to make a political precommitment to prosecute a case. See *In re J.S.*, 436 A.2d 772, 773 (Vt. 1981); *Vermont v. Hohman*, 420 A.2d 852, 854–55 (Vt. 1980), *overruled on other grounds* by *Jones v. Shea*, 532 A.2d 571, 573 (Vt. 1987). Even if it does not, doing so raises legitimate questions about the prosecutor's neutrality.

72. See *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (acknowledging the breadth of prosecutorial discretion vested by the United States' legal system); see also Green & Roiphe, *supra* note 1, at 1437.

73. See Green & Zacharias, *supra* note 44, at 837–38 ("Few decisions prosecutors make are subject to legal restraints or judicial review.").

74. Cf. Green & Burke, *supra* note 52, at 316 (noting the rare instance of when the Manhattan District Attorney explained the office's decision to dismiss previously filed charges).

75. See *id.* at 294 ("Prosecutors may announce arrests, indictments, and convictions, but they traditionally do not publicly justify discretionary decisions or publicly announce and explain their internal policies.").

76. See, e.g., CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4 (AM. BAR. ASS'N 2017).

always retrospectively validate a prosecutor's charging decision because the public might mistrust the verdict or believe that the crime was too trivial to prosecute.⁷⁷

Prosecutors can promote public confidence by adopting, publicizing, and implementing internal mechanisms to reduce the risk, and appearance, that political considerations enter into their discretionary decisions. Prosecutors' offices can adopt both politically neutral criteria for making discretionary decisions (as DOJ has done to a significant extent in its DOJ Justice Manual) and politically neutral processes governing how they apply these criteria in particular cases.⁷⁸ Both substantive criteria and internal processes should be developed before politically fraught cases arise since otherwise, offices may appear to adopt internal policies with particular cases in mind.

1. Charging Criteria in Political Cases

Some take the view that prosecutors should attempt to approach cases that have political implications in precisely the same way they approach other cases because similarly situated cases should be treated similarly.⁷⁹ This would mean trying to ignore that the case is a high-profile, potentially controversial one. We question this approach, even assuming it can be realistically achieved. If prosecutors consider promoting public confidence in making charging decisions, the high-profile, politically charged nature of the case is relevant, if not critical, to that thought process. In general, we would put a thumb on the scale in favor of both avoiding an appearance of partisanship and avoiding political entanglement. Most often, this will counsel restraint in political cases. We recognize, in theory, the importance of prosecuting without regard to the political connections and positions of the accused: "The rule of law depends not only on the absence of politically motivated prosecutions but also on the premise that no person is above the law."⁸⁰ But as we have previously argued, "[T]he effect of underenforcement on democratic norms . . . is less dangerous than unwarranted political prosecutions."⁸¹ Further, conscious restraint will serve as a check on

77. See Cary London, *Trumped Up Charges: Unraveling the Unfairness of Political Prosecution*, N.Y. L.J. (May 1, 2024, 2:30 PM), <https://www.law.com/newyorklawjournal/2024/05/01/trumped-up-charges-unraveling-the-unfairness-of-political-prosecution/> [<https://perma.cc/DD6E-Z3XC>]; see also Ximena Bustillo, *Trump Is Sentenced in Hush Money Case—but Gets No Penalty or Fine*, NPR (Jan. 10, 2025, 12:00 PM), <https://www.npr.org/2025/01/10/nx-s1-5253927/trump-sentencing-new-york> [<https://perma.cc/Z3L6-ECN7>].

78. See *supra* notes 3–6 and accompanying text.

79. See KRISTY PARKER, JUSTIN FLORENCE & ANNE TINDALL, PROTECT DEMOCRACY, INVESTIGATING AND PROSECUTING POLITICAL LEADERS IN A DEMOCRACY 13 (2023), <https://protectdemocracy.org/wp-content/uploads/2023/05/Investigating-and-Prosecuting-Political-Leaders-in-a-Democracy-May-2023-formatted-paper.pdf> [<https://perma.cc/ZE2V-P8XV>].

80. Bruce A. Green & Rebecca Roiphe, *Depoliticizing Federal Prosecution*, 100 DENV. L. REV. 817, 833 (2023).

81. *Id.* This view is certainly not universally shared. See Eur. Comm'n for Democracy Through L., *supra* note 42, at 6. (The "more insidious, and probably commoner [abuse], is where the prosecutor does not bring a prosecution which ought to be brought.").

prosecutors' self-interest, which is likely to weigh in favor of initiating a high-profile, potentially career-making prosecution, and conscious restraint will also check unconscious political bias that may affect a prosecutor's choice in these sorts of cases.

This has implications for how prosecutors, in making charging decisions, evaluate the facts. Some prosecutors' offices, acknowledging their gatekeeping responsibilities, say that they generally do not charge cases unless the prosecutors are personally convinced beyond a reasonable doubt of the accused's guilt and conclude that there is sufficient evidence to secure a conviction.⁸² Especially when the public might suspect prosecutors of bringing charges for partisan reasons, a high threshold is warranted. When a criminal prosecution might plausibly be perceived as an act of partisanship, and particularly where it will be politically disruptive, prosecutors should give the individual the benefit of the doubt, and prosecutors should not initiate charges unless they are confident of being able to secure a conviction. Independent Counsel Lawrence E. Walsh exercised such restraint in declining to prosecute President Reagan in connection with the Iran-Contra matter,⁸³ and Special Counsel Robert K. Hur did so in concluding his investigation of President Biden for retaining classified documents.⁸⁴ Likewise, then-newly elected Manhattan District Attorney Alvin Bragg did so when he rejected prosecutors' recommendation that the office ask the grand jury to indict then-former President Trump for illegally manipulating the value of his assets.⁸⁵

A cautious approach that avoids suspicions of partisanship also calls for restraint in how prosecutors interpret uncertain criminal laws. Prosecutors tend to adopt aggressive or creative legal theories, or at least legally questionable theories, in politically charged cases. *Trump v. United States*,⁸⁶ in which the Supreme Court concluded that the indictment of President Trump for trying to overturn the legitimate results of the 2020 presidential election was overbroad if not unsustainable,⁸⁷ was only the most recent in a line of cases finding prosecutorial overreaching against public officials and

82. See Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 610–11 (2019) (quoting the Manhattan District Attorney's filing in moving to dismiss the indictment of Dominique Strauss-Kahn).

83. See 1 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 446–72 (1993).

84. See ROBERT K. HUR, SPECIAL COUNS. OFF., REPORT ON THE INVESTIGATION INTO UNAUTHORIZED REMOVAL, RETENTION, AND DISCLOSURE OF CLASSIFIED DOCUMENTS DISCOVERED AT LOCATIONS INCLUDING THE PENN BIDEN CENTER AND THE DELAWARE PRIVATE RESIDENCE OF PRESIDENT JOSEPH R. BIDEN, JR. 1, 4–5 (2024), <https://www.justice.gov/storage/report-from-special-counsel-robert-k-hur-february-2024.pdf> [<https://perma.cc/L5Z4-ATXK>] (finding that President Biden was not guilty beyond a reasonable doubt of knowingly retaining and disclosing classified documents after leaving the vice presidency).

85. See MARK POMERANTZ, PEOPLE VS. DONALD TRUMP: AN INSIDE ACCOUNT 209–10 (2023).

86. 144 S. Ct. 2312 (2024).

87. See *id.* at 2333–34, 2343.

their associates.⁸⁸ Aggressive or novel legal theories may justify or reinforce public suspicions of the prosecutors' motivations, whereas cases built on conventional legal theories, like the recent ones against Senator Robert Menendez of New Jersey and Representative George Santos of New York, are less susceptible to claims that defendants were politically targeted.⁸⁹

2. Decision-Making Processes

In general, decision-making in prosecutors' offices is unstructured. In large offices, chief prosecutors often delegate decision-making authority to subordinates who oversee investigations or to their supervisors. But chief prosecutors have the ultimate authority to make charging decisions and are likely to exercise it in high-profile, political cases after hearing from the subordinate prosecutor overseeing the investigation and from supervisors. Chief prosecutors should develop and publicize decision-making processes that will reduce the risk that political biases and preferences influence their discretionary decisions.

First, prosecutors making discretionary decisions should be insulated as much as possible from other political actors' influence. State and local prosecutors would do well to adopt internal policies, like those DOJ adopted after President Richard M. Nixon's Administration, to protect subordinate prosecutors' professional independence.⁹⁰ But these measures only go so far in the United States, where chief prosecutors are not apolitical careerists or bureaucrats as in some countries but are either political appointees or themselves elected office holders.⁹¹ Because chief prosecutors have their own political interests, alliances, and preferences, the public will find it plausible that they invoke partisan considerations in making decisions or in influencing subordinate prosecutors' decisions. Protecting subordinate prosecutors' independence does not protect them from chief prosecutors' partisan influence, and nothing prevents prosecutors from intuiting

88. *See, e.g.*, *Percoco v. United States*, 143 S. Ct. 1130 (2023) (overturning conviction of politically-connected individual for alleged improper influence over New York's governor); *Ciminelli v. United States*, 153 S. Ct. 1121 (2023) (overturning bid-rigging conviction of defendant associated with New York's governor); *Kelly v. United States*, 140 S. Ct. 1565 (2020) (overturning convictions of public officials tied to the New Jersey governor); *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (overturning Virginia former governor's conviction for fraud and extortion); *McNally v. United States*, 483 U.S. 350 (1987) (overturning Kentucky official's mail fraud conviction based on an alleged patronage scheme).

89. *See* Daniel Han & Ry Rivard, *Sen. Bob Menendez Found Guilty in Corruption Trial*, POLITICO (July 16, 2024, 1:03 PM), <https://www.politico.com/news/2024/07/16/sen-bob-menendez-found-guilty-in-corruption-trial-00168659> [<https://perma.cc/6AW4-MAEG>] ("Federal prosecutors accused Menendez of bribery, acting as a foreign agent for Egypt, obstruction of justice, extortion and conspiring to commit those crimes.").

90. *See supra* notes 3–6 and accompanying text.

91. Of states that elect district attorneys, only a small minority employ nonpartisan elections. *See* CARISSA BYRNE HESSICK, THE PROSECUTORS & POL. PROJECT, NATIONAL STUDY OF PROSECUTOR ELECTIONS (2020), <https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf> [<https://perma.cc/FEY3-9C9H>] (surveying all fifty states' methods for electing district attorneys).

politicians' preferences or honoring politicians' publicly expressed preferences, or from advancing their own political preferences.

Deliberation within the office regarding how to charge the case should be designed to avoid the influence of political considerations.⁹² Regardless of who makes the ultimate decision, multiple prosecutors should participate in discussions leading up to it, participants should be required to explain their views with reference to accepted criteria, the expression of opposing views should be encouraged if not required in the spirit of devil's advocacy, the ultimate decision-maker should have to articulate acceptable reasons for the decision, and the reasons should be recorded. None of this will necessarily prevent the influence of unarticulated motivations, including impermissible political ones, but a transparent and explicit process should reduce their sway. Even if the chief prosecutor is the ultimate decision-maker, having to be exposed to alternative views, to deliberate, and to explain one's thinking should make it harder to decide for improper reasons. Prosecutors' offices should focus on their training and culture around decision-making, so that it becomes experienced in employing a process designed to reach results for the right reasons.

C. Public Pronouncements

At least at one time, many prosecutors may have limited their extrajudicial discussions of investigations and prosecutions to avoid prejudicing proceedings and embarrassing individuals. Prosecutors routinely announced indictments and convictions, but otherwise they did their speaking in the courtroom, allowing the results to speak for themselves. In particular, it was rare for prosecutors to explain their discretionary decisions in individual cases. Until the recent advent of "progressive prosecutors,"⁹³ it was also generally unusual for state and local prosecutors to campaign on how they will make discretionary decisions or, once elected, to publicize their general charging or plea-bargaining policies.

As discussed above, a starting point is to adopt, announce, and employ policies for how decisions will be made in politically charged cases to convey that measures are implemented to resist the influence of political considerations. Some may challenge the selected decision-making criteria, and others may be skeptical of whether the adopted process for applying them is actually employed behind closed doors, but public confidence may be built over time if internal policies are faithfully followed.

Some have suggested that in high-profile political cases, prosecutors should more freely explain their decisions to the public. For example,

92. See Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 527–35 (2017) (arguing that some conflicts cannot be addressed by recusal and instead ought to be minimized by implementing a proper deliberative process for major decisions).

93. Green & Roiphe, *supra* note 31, at 736–46.

Kenneth W. Starr criticized Robert S. Mueller III for his reticence.⁹⁴ But there are limits on prosecutors' ability to publicly discuss their cases outside the formal proceedings.⁹⁵ Moreover, prosecutors have been accused of overstepping the lines, as when authorities publicly announced and explained their decisions not to bring or recommend charges against presidential candidate Hillary Clinton,⁹⁶ New York City Mayor Bill DeBlasio,⁹⁷ and President Biden.⁹⁸ In general, it is an abuse of government power for prosecutors to offer an explanation for a declination decision that implies that an uncharged individual committed a crime or otherwise behaved improperly, unless the decision is in the context of the individual's agreement to acknowledge wrongdoing.

Prosecutors have a stronger justification to explain decisions to initiate prosecutions. Further, when charges are filed, public confidence is more likely to be threatened by illegitimate claims of political influence because these claims are likely to continue much longer. This is not to suggest that prosecutors should hold press conferences explaining their internal decision-making, but rather that they should avail themselves of opportunities to do so in the context of judicial proceedings. When indicted defendants file motions challenging the prosecution's legal theories, asserting selective prosecution, and the like, prosecutors can accept the invitation to explain why the law and facts compelled the prosecution to pursue the charge. For example, Jack Smith said little when he announced his office's indictments of then-former President Trump but exploited the opportunity, in formal judicial filings, to publicly elaborate on the evidence supporting the criminal charges.⁹⁹ But even when given an opening to defend against explicit accusations of political bias, he was understandably restrained in doing so. Opposing Trump's defense request for documents that would ostensibly establish the prosecutors' political bias, the

94. See Roxanne Roberts, *Robert Mueller Is the Most Unknowable Man in Washington*, WASH. POST (Dec. 16, 2018), https://www.washingtonpost.com/lifestyle/style/robert-mueller-is-the-most-unknowable-man-in-washington/2018/12/14/9e37e1a0-fe41-11e8-ad40-cdfd0e0dd65a_story.html [<https://perma.cc/R4JN-NBCD>] (quoting Starr); see also Bruce A. Green, *Prosecutors in the Court of Public Opinion*, 57 DUQ. L. REV. 271, 272 (2019).

95. See Green, *supra* note 94, at 286; Bennett Gershman, *The Prosecutor's Duty of Silence*, 79 ALB. L. REV. 1183 (2016); R. Michael Cassidy, *The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle*, 71 LAW & CONTEMP. PROBS. 67 (2008).

96. See Meaghan Keneally, *Comey Admits 'Mistakes' in Describing Clinton's 'Really Sloppy' Handling of Classified Info*, ABC NEWS (Apr. 15, 2018, 10:13 PM), <http://abcnews.go.com/Politics/comey-admits-mistakes-describing-clintons-sloppy-handling-classified/story?id=54487996> [<https://perma.cc/VD5V-C6DC>].

97. See Benjamin Weiser, *Should Prosecutors Chastise Those They Don't Charge?*, N.Y. TIMES (Mar. 24, 2017), <https://www.nytimes.com/2017/03/24/nyregion/bill-de-blasio-campaign-finance.html> [<https://perma.cc/7P66-76W9>].

98. See Alexandra Marquez, *Democrats Blast Special Counsel Robert Hur's Biden Report as 'Inappropriate' and 'Politically Motivated'*, NBC NEWS (Feb. 9, 2024, 2:00 PM), <https://www.nbcnews.com/politics/white-house/democrats-blast-special-counsel-robert-hur-report-smear-cheap-shots-rcna138117> [<https://perma.cc/9DYP-KE49>].

99. See, e.g., *Government's Motion for Immunity Determinations at 1, United States v. Trump*, No. 23-cr-257 (D.D.C. Oct. 2, 2024) ("This motion provides a comprehensive account of the defendant's private criminal conduct.").

prosecutors' legal memorandum only briefly denied that they were partisan¹⁰⁰ and focused instead on why political bias is not a legitimate legal defense and other reasons why the requested materials were not discoverable.

CONCLUSION

Chief prosecutors and their offices should defend their legitimacy in response to claims that prosecutors are politically motivated. We have identified a range of salutary initiatives. Most importantly, prosecutors should adopt, implement, and publicize internal decision-making processes and policies designed to minimize the influence of partisan politics and project impartiality. In particular, prosecutors should take account of the legitimacy of their own offices in making charging decisions in high-profile political prosecutions. In doing so, prosecutors should employ caution by weighing the relative importance of holding an individual accountable for criminal conduct against the potential cost to the reputation of their office. They should avoid novel prosecutions, which can be especially suspect, and they should be confident that the evidence is even stronger than in a run-of-the-mill prosecution.

Of course, doing so will not entirely allay suspicions. It will often be expedient for politicians and others to assert either that prosecutors are bringing trivial or factually baseless charges for partisan advantage or that prosecutors are failing to bring well-deserved charges out of political favoritism. And some members of the public will credit these sorts of allegations, no matter how unfounded, both because many in the public are politically receptive to these sorts of allegations and because there are limits to prosecutors' ability to explain how they reached decisions in individual cases. The problem of public mistrust is compounded because, at times, accusations of political partisanship will be legitimate, fostering mistrust of all prosecutors. Just as the apparent partisanship of individual judges,¹⁰¹ and especially of U.S. Supreme Court Justices, undermines public confidence in U.S. judiciaries as institutions,¹⁰² individual abuses of power in high-profile cases with political implications undermine public confidence in institutions of criminal prosecution in general.

100. Government's Response in Opposition to Defendant's Motion to Compel Discovery at 30, *United States v. Trump*, No. 23-80101-CR (S.D. Fla. Feb. 2, 2024) ("To be clear, the defendants' requests are predicated on a false narrative. The investigation and prosecution of this case have been appropriately driven by the facts and the law, not by any form of political bias.").

101. See Green & Roiphe, *supra* note 68, at 185–93.

102. See Adam Liptak, *A Rebuke to Trump Provides a Telling Portrait of a Divided Supreme Court*, N.Y. TIMES (Jan. 9, 2025), <https://www.nytimes.com/2025/01/09/us/supreme-court-trump-hush-money.html?searchResultPosition=6> [https://perma.cc/Z9NE-D4H3]; see also Adam Liptak, *Confidence in U.S. Courts Plummets to Rate Far Below Peer Nations*, N.Y. TIMES (Dec. 17, 2024), <https://www.nytimes.com/2024/12/17/us/gallup-poll-judiciary-courts.html> [https://perma.cc/9B37-652P].

In the case of the judiciary, the organized bar occasionally defends it against unwarranted attacks,¹⁰³ but it is unlikely that the bar will defend prosecutors. This is in part because the bar is less dependent on the goodwill of prosecutors and in part because the opacity of prosecutors' decision-making makes it hard for outsiders to defend it. Prosecutors are on their own.

Prosecutors' offices might conceivably band together to promote public confidence, not so much by defending peers' conduct in individual cases, but by coalescing around a common set of principles and processes for making decisions in politically charged cases. Prosecutors' offices do not ordinarily collaborate in this way. There are over 2,000 independent, somewhat insular, prosecutors' offices of varying sizes around the country. Different chief prosecutors have different criminal justice philosophies, and sometimes these offices are rivalrous. The ABA has encouraged prosecutors to come together around criminal justice standards designed, in part, to promote public trust,¹⁰⁴ but it has had limited success, because many prosecutors distrust the ABA and the norms it promotes.¹⁰⁵ If prosecutors' offices reject the ABA standards, they should agree on other principles and practices that reassure the public of their nonpartisanship. On other issues, prosecutors have occasionally acted collectively, and promoting public confidence in their institutions is another cause around which they should be able to come together.

103. See generally Leslie C. Levin, *Mere Words: The Role of Bar Organizations in Maintaining Public Support for the Judiciary*, 87 LAW & CONTEMP. PROBS. 213 (2024).

104. See *supra* notes 24–25 and accompanying text.

105. See generally Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873 (2012) (documenting prosecutors' opposition to the ABA's proposed regulation).