Protecting the Department of Justice from Political Interference after *Trump v. United States*

Exploring the constitutional principles at stake

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Introduction

At the end of its October 2023 term, the Supreme Court profoundly changed the relationship between the president and the law, holding in *Trump v. United States* that former presidents are immune from criminal prosecution for some official acts. What is less clear, however, is how the decision changed the relationship between the president and those who enforce federal criminal law — the employees of the Department of Justice.

The majority opinion declared that the Constitution empowers the president to "discuss potential investigations and prosecutions with his Attorney General and other Justice Department officials," challenging a deeply rooted constitutional norm and undermining official executive branch policy dating to the Ford administration.[1] That norm — that the president should not interfere in specific investigative or prosecutorial decisions of the Department of Justice — appears brushed aside by the majority's assertion that the president may involve himself in those decisions. Even more consequential, perhaps, is the majority's statement that the president possesses "exclusive authority over the investigative and prosecutorial functions of the Justice Department and its officials"[2] — dictum suggesting that longstanding acts of Congress (some dating to the First Congress) which structure the Department of Justice, delegate enforcement power to subordinate officials, and prohibit prosecutions in certain circumstances, may unconstitutionally intrude on the president's "exclusive" power.[3]

But despite these intimations, the majority's language is circumspect, saying only that the president may "discuss" matters with DOJ officials, and its holding is limited, for now, to the question presented in the case: whether and to what extent a former president is immune from criminal prosecution. The majority stopped short of declaring that the president has the power under the Constitution to direct the Department of Justice to investigate and prosecute specific individuals, a power often associated with autocratic and illiberal regimes where political leaders use the powers of the state to advance their personal agendas. And while the majority's sweeping declarations about the president's "exclusive authority" over DOJ's prosecutorial functions and officials may seem to imply that such a power exists, there are good reasons the Court should not extend its holding.

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[1] *Trump v. United States*, 603 U.S. ––, 144 S. Ct. 2312, 2335 (2024).

[2] *Id*.

[3] A number of legal commentators have noticed the uncertainty created by the Court's holding. *See, e.g.,* Steve Vladeck, *The Broader Article II Implications of the Trump Immunity Ruling*, Substack (July 22, 2024), https://tinyurl.com/mr48hten; Jack Goldsmith, *The Relative Insignificance of the Immunity Holding in Trump v. United States (and What Is Really Important in the Decision)*, Lawfare (Sept. 23, 2024), https://tinyurl.com/2hbytvm2; Carrie Johnson, *Supreme Court's Immunity Ruling Could Hurt Justice Department*, NPR (July 3, 2024), https://tinyurl.com/3m9hdsmy.

Granting the president this power would create an executive power incompatible with the guarantees of the Bill of Rights. It would expand Article II contrary to the text and structure of the Constitution. It would break with the nation's historical norm of non-interference, a norm that Congress, courts, and presidents have viewed as rooted in the Constitution. And it would place DOJ attorneys in a professionally untenable position.

This paper explores in detail each of these reasons to preserve the norm of non-interference, and explains why this norm is not only constitutional in character, but vital to the rule of law and to our democracy. It also discusses the role that Congress, the Department of Justice itself, and courts can play in reinforcing the long-standing norm of non-interference without transgressing the Supreme Court's holding in *Trump v. United States*.

The Norm of Non-Interference

The notion that the White House should not interfere in specific civil and criminal enforcement matters is deeply rooted in our constitutional culture and our nation's history. It is what legal scholars call a "constitutional norm" or "constitutional convention" — a practice that is reflective of a well-settled and widely accepted view on the limits of governmental power that is found, though nowhere written down, in the Constitution.[4] The norm reflects not only expectations of private citizens as to how their government should act, but also expectations between the various branches of government about the limits of the other's power that have been negotiated through statecraft.[5]

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>
> REPRESENTATIVE THOMAS JENCKES, SPONSOR OF THE BILL CREATING DOJ

The modern norm of non-interference emerged following the scandals of the Watergate era, when President Nixon's attempts to end the criminal investigation into his campaign and his interference in cases involving his political allies prompted public outrage and wide-ranging calls for protections against White House interference in specific enforcement matters.[6] One of

[4] Daphna Renan, *Presidential Norms and Article II*, 131 Harv. L. Rev. 2187 (2018); Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 Mich. L. Rev. 1361 (2022); Adrian Vermeule, *Conventions of Agency Independence*, 113 Colum. L. Rev. 1163, 1202 (2013).

[5] Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 Calif. L. Rev. 1913, 1927 (2020); William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 18-20 (2019).

[6] During the House impeachment investigation, Congress learned that Nixon had pressured the DOJ antitrust division to drop an appeal that was blocking a merger involving International Telegraph and Telephone, a company which had donated $400,000 to fund the 1972 Republican National Convention. Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 Ala. L. Rev. 3, 62 (2018).

the key reforms to emerge was a "contacts policy" or "contacts memo" — a policy promulgated by every administration since Nixon's that channels all communications between the White House (or Congress) and the Department of Justice about particular cases through the attorney general's office.[7] Assistant attorneys general and U.S. attorneys, who are primarily responsible for the prosecution of particular cases, generally may not contact or be contacted by the political branches. But the norm of non-interference embodied in this policy has deeper roots in American history, dating back to the early days of the republic.

Throughout the nation's history, federal criminal law enforcement has been conducted with a significant degree of independence from the chief executive. Until the creation of the Department of Justice in 1870, federal prosecutorial power was not centralized in an executive department. Rather, private citizens, states, and federal district attorneys (who were not under the superintendence of the attorney general) enforced federal criminal and civil law. The Department of Justice was established after the Civil War during an era of increased professionalization of the federal government, where expertise, independence, and professional ethical obligations were seen as critical to combatting cronyism, political influence, and corruption.[8] As Representative Thomas Jenckes, who introduced the bill creating DOJ, put it: "The humblest servant of the Government should not be at the mercy or the caprice of the most distinguished politician. Let every man who may receive a commission from the United States know that he holds it from the people, in service of the people."[9] This ideal of professional independence remained central to public and official understandings of prosecutorial power through the twentieth century, even as federal regulatory power expanded and consolidated into DOJ and other executive agencies with the advent of the modern administrative state. The response to the Watergate scandal, and the policies which emerged, thus continued a longstanding and deeply-rooted tradition that views DOJ's prosecutorial independence as "a crucial part of the constitutional culture of the presidency."[10]

Indeed, both Congress and the courts have exercised their own constitutional powers with an understanding that the president's executive power does not empower him to interfere in DOJ's investigative and prosecutorial decision-making.

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[7] *See An Address by the Honorable Griffin B. Bell Attorney General of the United States Before Department of Justice Lawyers,* at 7 (Sept. 6, 1978), https://tinyurl.com/5bzwhvz2; Renan, *supra* note 4 at 2210 n.114 (collecting contacts memos); Donald F. McGahn, *Memorandum to All White House Staff re: Communications Restrictions with Personnel at the Department of Justice,* The White House (Jan. 27, 2017), https://tinyurl.com/42b36xph. The contacts policy was invoked by Trump officials resisting the efforts by Trump and some members of DOJ to overturn the 2020 election, underscoring the crucial nature of the policy. *See* Senate Committee on the Judiciary, *Subverting Justice: How the Former President and His Allies Pressured DOJ to Overturn the 2020 Election* at 34 (Oct. 2021), https://tinyurl.com/55dfu2my.

[8] Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 Stan. L. Rev. 121, 124 (2014).

[9] *Address of Hon. Thos. A. Jenckes, of Rhode Island, Before the American Social Science Association in Boston*, The Boston Post (Dec. 31, 1868), reprinted in The New York Times (Jan. 3, 1869).

[10] Ahmed, *supra* note 4 at 1414.

Congress has long legislated presuming that the criminal laws will be enforced without political interference. For instance, Section 230 of the Communications Decency Act grants civil immunity to internet service providers for third-party content, but not criminal immunity.[11] Congress's concern that the prospect of civil liability would lead to a proliferation of lawsuits that would stifle innovation did not extend to criminal liability. Rather, Congress viewed "promot[ing] the continued development of the Internet" and "vigorous enforcement of Federal criminal laws," as perfectly compatible — a conclusion reachable only if one presumes a prosecutor to be disinterested in a way a private civil litigant is not.[12]

Similarly, Federal Rule of Criminal Procedure 6 forbids anyone — including federal prosecutors — from disclosing grand jury matters to any other government official except in narrow circumstances where doing so would "assist an attorney for the government in performing that attorney's duty to enforce federal criminal law."[13] As the rule makes clear, no government official, including White House officials, may be involved in grand jury proceedings unless necessary to assist the prosecuting attorney in the exercise of her enforcement powers. In approving this rule,[14] Congress thus adopted a procedure that includes a default prohibition on White House involvement in the charging phase of a prosecution, and nothing in the legislative history of the rule indicates a concern that this would intrude on the president's constitutional prerogatives.

> "Congress and the courts have exercised their own constitutional powers against the background of the norm of non-interference.

The Supreme Court has also crafted judicial doctrine in reliance on the norm of prosecutorial independence. The "presumption of regularity" courts apply to their review of prosecutors'

[11] 47 U.S.C. § 230(e)(1).

[12] *Id.* § 230(a).

[13] Fed. R. Crim. P. 6(e)(3)(B) (emphasis added).

[14] Federal rules of procedure are promulgated by the Supreme Court under the Rules Enabling Act, 28 U.S.C. § 2701 et seq., but may be rejected or modified by Congress via legislation, § 2704; *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

charging decisions — a rule that prosecutorial decisions are presumed constitutional absent clear evidence to the contrary — "rests in part on an assessment of the relative competence of prosecutors and courts."[15] The specific comparative competency of prosecutors is that they are "assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."[16] In other, non-prosecutorial contexts, the Court's extension of a presumption of regularity to executive branch actions is justified by the executive agency possessing "structured processes and intricate guidelines that might help to guarantee fairness for individual[s], accountability to law and to political actors, and consistent, effective outcomes."[17] These deference doctrines rest on the presumption that prosecutorial power will be wielded fairly, neutrally, and independently.

The norm of non-interference is not categorical, however. Presidents do have the constitutional power to set policies for the Department of Justice, including prioritizing the enforcement or non-enforcement of certain criminal laws and the establishment of task forces to investigate certain issues or events. Exercising this policy-setting power naturally affects what criminal cases DOJ brings or declines to bring, and in this sense the president is involved in prosecutorial decision-making. But setting prosecution policy is different in kind than directing that a specific person or entity be prosecuted. The former is based on generally applicable criteria selected to advance a particular policy goal. The latter is not, allowing room for personal animus and other improper considerations to form the basis of prosecutorial decision-making.

Additionally, the Constitution confers particular authorities and obligations on the president which require at times that he be involved in specific enforcement matters. For instance, the Constitution grants the president certain responsibilities over national security and foreign policy.[18] Some specific-party enforcement matters may implicate these constitutional duties. For example, in furtherance of the president's foreign policy and national security responsibilities, it may be appropriate for the White House to be involved if the government is considering arresting a foreign national; if an enforcement action against a foreign corporation has economic consequences for a foreign country; or if a criminal prosecution involves intelligence sources and methods. The Constitution also specifically empowers the president to grant pardons for certain offenses.[19] Accordingly, it is appropriate for the White House to be involved in clemency decisions for specific individuals. However, as Protect Democracy has written recently, the pardon power is not unbounded.[20] It must be exercised in the public interest and should not be used to place the president or his associates above the law. Crucially these

[15] *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

[16] *Withrow v. Larkin*, 421 U.S. 35, 55 (1975) (internal citation omitted).

[17] Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 Harv. L Rev. 2431, 2447 (2018).

[18] *See, e.g.*, *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2085-86 (2015).

[19] U.S. Const., Art. II § 2, cl. 1.

[20] Grant Tudor & Justin Florence, *Checking the Pardon Power: Constitutional Limitations and Options for Preventing Abuse* (April 2024), https://tinyurl.com/j6tt5bz6.

limited exceptions have clear textual bases in the Constitution; a freewheeling power to direct criminal prosecutions, on the other hand, does not.

The norm of non-interference is rooted in a long historical tradition of federal criminal law enforcement independent of the office of the president. From the colonial practice of criminal prosecutions by states and independent federal district attorneys, to the establishment of the Department of Justice after the Civil War as an agency staffed by professional lawyers, to the post-Watergate policy adopted by every administration since Nixon's formally limiting communications between the White House and DOJ, federal criminal laws have been enforced in specific cases without White House involvement. This historical tradition gathers the weight of constitutional principle when it conforms, as discussed more below, "with our constitutional structure" and express textual provisions.[21]

[21] *Seila Law LLC v. CFPB*, 591 U.S. 197, 222 (2020).

The Bill of Rights

One of the primary justifications for the norm of non-interference is that White House involvement risks introducing impermissible motives or considerations to DOJ's decisions as to who to prosecute. An investigation or prosecution initiated in retaliation for the exercise of constitutionally protected speech or because of the target's political affiliation — or even for a benign but nonetheless arbitrary reason — violates the constitutional rights of the defendant and should be dismissed by the court overseeing the case. An expansive reading of *Trump v. United States* as to presidential power over prosecutions thus runs headlong into the Bill of Rights.

Numerous provisions in the Bill of Rights[22] prohibit arbitrary and retaliatory criminal prosecutions. In particular, three constitutional liberties are at risk when the White House interferes in a criminal matter: the Due Process Clause's guarantee of fundamental fairness; the Equal Protection Clause's prohibition against differential treatment based on protected characteristics or the exercise of constitutional rights; and the First Amendment's protections for expressive and associational freedoms.[23]

First, the Due Process Clause "requires a disinterested prosecutor."[24] "It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters."[25]

Because of this, prosecutions motivated by a "personal interest, financial or otherwise…raise serious constitutional questions."[26] Recognizing such due process concerns, Congress has disqualified any prosecutor or DOJ employee with a "personal, financial, or political conflict of interest, or the appearance thereof" from participation in particular investigations or

[22] The Equal Protection Clause, discussed below, is found in the Fourteenth Amendment, which is not part of the original Bill of Rights. However, the clause's equal protection principles, which apply against the states, have been incorporated into the Fifth Amendment's Due Process Clause to apply identically against the federal government. *See United States v. Windsor*, 570 U.S. 744, 774 (2013) ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.").

[23] A person targeted for retaliatory investigation or prosecution would bring what the case law calls a "selective prosecution" claim. While the courts apply an analytical framework developed from equal protection jurisprudence to these kinds of claims, *Wayte v. United States*, 470 U.S. 598, 608 (1985), the liberty interests encompassed in a selective prosecution claim are much broader than those sounding in equal protection, implicating due process concerns and, in the case of politically-motivated prosecutions, the First Amendment.

[24] *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 815 (1987) (Blackmun, J., concurring)

[25] *Id*. at 810 (emphasis added).

[26] *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249–50 (1980).

prosecutions.[27] A court may do so as well, and may go even further by vacating a conviction or dismissing a prosecution brought in violation of this precept of due process.[28]

More generally, the Due Process Clause protects against arbitrary and unjustified prosecutions. "The touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness or in the exercise of power without any reasonable justification."[29] A prosecution brought for personal retribution or as political retaliation would lack a "reasonable justification" and qualify as an arbitrary and illegal exercise of government power.

> "Our governmental institutions, including the norms governing the administration of the law, must conform to the fundamental liberties that the Constitution guarantees.

The Equal Protection Clause also prohibits criminal prosecutions against individuals who have been singled out based on a protected characteristic like race or the exercise of a constitutionally protected right such as political association or speech.[30]

But equal protection, like due process, also extends to forbid any illegitimate exercise of governmental power, not just government action which targets protected classes or protected conduct. "[N]either in terms nor in interpretation is the clause limited to protecting members of identifiable groups. It has long been understood to provide a kind of last-ditch protection against governmental action wholly impossible to relate to legitimate governmental objectives."[31] And

[27] 28 U.S.C. § 528.

[28] *Jackson v. Rosen*, No. 20-cv-2842, 2020 WL 3498131, at *6 (E.D. Pa. June 26, 2020); *Wayte*, 470 U.S. at 604; *Young*, 481 U.S. at 790.

[29] *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998) (cleaned up).

[30] *Wayte*, 470 U.S. at 608 ("Although prosecutorial discretion is broad, it is not unfettered…In particular, the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights.") (cleaned up).

[31] *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995) (Posner, J.).

this includes the exercise of prosecutorial power for purely personal or political ends. "If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court."[32]

In a foundational selective enforcement case, the Supreme Court explained that the prohibition against selective prosecution is not only found in the text of the Bill of Rights, but also reflected in the structure and history of American governmental institutions:

> When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.[33]

The design of our governmental institutions, including the norms governing the administration of the law, must conform to the fundamental liberties that the Constitution guarantees. In the realm of criminal law enforcement, where the full power of the state is brought to bear on private citizens, the Constitution requires that the laws be enforced neutrally, objectively, and without personal animus or purpose of personal gain. In other words, prosecutorial decisions must be made independent of any pressure or influence towards these prohibited ends. In this sense, a Department of Justice that makes independent investigative and prosecutorial decisions in particular cases is corollary to the Due Process and Equal Protection clauses.

Finally, the First Amendment protects the speech and associational freedoms that are targeted for restriction in a retributive criminal prosecution. As the Supreme Court has made clear, "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out."[34] Therefore, "[i]t is possible to base an action for selective prosecution…if the reason for selecting the particular person charged was to chill the exercise of that person's First Amendment rights."[35]

In the 1980s, Attorney General Edwin Meese assembled the National Obscenity Enforcement Unit (NOEU), an aggressive task force whose "avowed mission" was to employ "prosecutorial methods designed to put distributors of sexually oriented materials out of business."[36] Multiple courts intervened, finding that the NOEU had used actual or threatened criminal prosecutions to shut down business activity that the government conceded was constitutionally protected, in

[32] *Id*. at 179.

[33] *Yick Wo v. Hopkins*, 118 U.S. 356, 369–70 (1886).

[34] *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

[35] *United States v. Vazquez*, 145 F.3d 74, 82 n.5 (2d Cir. 1998) (Calabresi, J.).

[36] *Freedberg v. U.S. Dep't of Just.*, 703 F. Supp. 107, 108 (D.D.C. 1988).

violation of the First Amendment and the Due Process Clause of the Fifth Amendment.[37] The courts halted the NOEU's program of bad faith prosecutions, and the unit shifted its focus to enforcing child sexual abuse laws.[38]

The NOEU cases are noteworthy for another reason. In some of them, the courts enjoined criminal investigations being conducted by grand juries. Generally, courts are disinclined to interfere with grand jury investigations.[39] Respect for the independence of the grand jury, as well as deference to the superior institutional competence of the executive branch in investigating and prosecuting criminal violations underlie the requirement of a high showing that the investigation is brought in bad faith to harass and curtail constitutionally protected conduct.[40] But a criminal investigation, no less than a criminal prosecution, may have devastating consequences for the subject of the investigation. She may be questioned, have her property seized and searched, be hauled before a grand jury, and even if never charged, her personal and professional reputation may forever be damaged. As one former U.S. attorney put it: "The power to investigate and prosecute is the power to destroy."[41]

The Bill of Rights thus limits how the government may wield its investigative and prosecutorial powers. Prosecutorial decision-making must be neutral and the decision-maker disinterested. Retaliation, and even arbitrary selection for prosecution, are prohibited. Thus, to the extent *Trump v. United States* suggests that the Constitution empowers the president to control prosecutions, the Bill of Rights limits the exercise of this power significantly.

[37] *See id*. at. 110; *PHE, Inc. v. U.S. Dep't of Just.*, 743 F. Supp. 15, 24 (D.D.C. 1990) ("The Supreme Court long ago recognized that 'the cruelty of harassment by multiple prosecutions' can violate the Due Process clause of the Fifth Amendment.") (quoting *Bartkus v. Illinois*, 359 U.S. 121, 127 (1959)); *United States v. PHE, Inc.*, 965 F.2d 848, 849 (10th Cir. 1992) ("The First Amendment bars a criminal prosecution where the proceeding is motivated by the improper purpose of interfering with the defendant's constitutionally protected speech.").

[38] Jim McGee, *U.S. Crusade Against Pornography Tests The Limits of Fairness*, The Washington Post, (Jan. 10, 1993), https://tinyurl.com/mz36muc7.

[39] *See Metro Med. Supply, Inc. v. Shalala*, 959 F. Supp. 799, 802 (M.D. Tenn. 1996) ("Obtaining an injunction against a criminal investigation or prosecution is very difficult. Courts are extremely reluctant to enjoin criminal investigations and prosecutions.").

[40] *In re Application to Terminate Grand Jury Proceedings*, 437 F. Supp. 2d 266, 271 (D.N.J. 2006); *see also North v. Walsh*, 656 F. Supp. 414, 421 (D.D.C. 1987) (discussing "the rationale behind the judicial policy against intervening in a criminal investigation").

[41] Joseph E. DiGenova, *Investigated to Death*, The New York Times (Dec. 5, 1995), https://tinyurl.com/4k4kf75w.

Congressional Powers

In addition to the Bill of Rights, there are constitutional provisions granting and limiting the relative powers of the three branches of the federal government. Though the Court in *Trump v. United States* interpreted Article II as granting the president exclusive authority over the prosecutorial functions of the Department of Justice, the opinion did not contend with the countervailing powers the Constitution grants Congress. Article I gives Congress power to both structure the executive branch and circumscribe the power of executive branch officials, as well as the power to substantively determine what conduct is deserving of criminal sanction. The majority opinion's sweeping view of executive power is in tension with the Constitution's clear reservation of this substantial power to Congress, and with the Court's own precedent recognizing Congress's power to delegate prosecutorial authority — and the control of that authority — to subordinate DOJ officials who may act independently of the White House.

To begin, Article II itself reinforces Congress's legislative supremacy — the principle that the president merely implements the law, while Congress determines the law's substance — and this has special salience for the question of how the president can direct specific enforcement matters. Article II names the president as the head of the executive branch, vesting in him "[t]he executive power," but also imposing a duty that he "take Care that the Laws be faithfully executed."[42] The Supreme Court has held that the president cannot forbid the enforcement of federal laws that he disagrees with for policy reasons, though the setting of enforcement priorities and the exercise of prosecutorial discretion will necessarily result in the underenforcement of some laws in exchange for the robust enforcement of others.[43] Still, the president lacks the royal power of "dispensation" and "suspension" — that is the power to simply forbid the execution of a valid law because he disagrees with it.[44] Second, Congress has exclusive authority to write the law, including the criminal law. The president may not prosecute someone for conduct which Congress has not proscribed by law.[45] As with the Bill of Rights' limits on the exercise of prosecutorial power, presidential interference in specific criminal prosecutions risks exceeding these structural constitutional limits on executive power.

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[42] U.S. Const. art. ii §§ 1, 3.

[43] *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 613 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.").

[44] Saikrishna B. Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 Geo. L.J. 1613, 1658 (2008); Andrew Kent, et al., *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111 2184-88 (2019). Additionally, the president may possess the power to decline to enforce laws that he concludes are unconstitutional. *See* Dawn W. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 L. & Contemp. Probs. 7 (2000).

[45] *See Youngstown Sheet & Tube Co.*, 343 U.S. at 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").

In addition to Congress's plenary power to make law, the Constitution confers on Congress broad powers "to structure the Executive Branch as it deems necessary."[46] Congress may establish executive offices, determine "their functions and jurisdiction," and circumscribe their duties.[47]

In structuring DOJ, Congress distributed criminal enforcement power in a deliberate and specialized manner among the department's subordinate officers and component divisions and sections. And while the officers and components operate "under the direction of the Attorney General,"[48] and the attorney general is appointed and removable by the president, the Supreme Court has recognized that prosecutorial decision-making power still rests principally with the attorney general, not the president.[49]

> "The Supreme Court has repeatedly recognized that litigating decisions are to be made by prosecutors in the Department of Justice.

In DOJ's authorizing statute, Congress explicitly "reserve[d] for officers of the Justice Department" the authority to conduct "litigation in which the United States, an agency, or an officer thereof is a party."[50] Congress further allocated specific enforcement authority to different components of DOJ, structuring federal enforcement authority into a departmental form, rather than reposing it singularly with the president. For instance, U.S. attorneys are authorized to prosecute all criminal and civil offenses that occur in their judicial districts,[51] the

[46] *Collins v. Yellen*, 141 S. Ct. 1761, 1804 (2021) (Sotomayor, J., concurring in part and dissenting in part).

[47] *Myers v. United States*, 272 U.S. 52, 129 (1926); *see also Mistretta v. United States*, 488 U.S. 361, 372 (1989).

[48] 28 U.S.C. § 516. For an argument that this statute does not clearly confer total control on the attorney general, *see* Green & Roiphe, *supra* note 6 at 35-36.

[49] *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("The Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws. They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'") (internal citations omitted).

[50] 28 U.S.C. § 516 (emphasis added).

[51] *Id*. § 547.

attorney general and FBI have the power to investigate and prosecute government officials and employees,[52] and the attorney general may designate special counsels to investigate and prosecute high-level executive officers, including the president.[53]

The Supreme Court has repeatedly recognized that litigating decisions are to be made by prosecutors in the Department of Justice. In *United States v. Armstrong*, the Court stated that "[t]he Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws."[54] Notably, the Court did not say the president has such discretion — only that DOJ officials do. As the Court explained, DOJ lawyers "have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'"[55] The Court expressed no skepticism that it was proper for Congress to place such decisions in the hands of DOJ officials rather than the president.

In an earlier decision, *United States v. Nixon*, the Court likewise observed that, "[u]nder the authority of Art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government."[56] In that case, the Court explained that the attorney general, acting pursuant to statute, had delegated authorities to a specific prosecutor (there, the Watergate special prosecutor), who was authorized to make certain evidentiary decisions. And the Court decisively rejected President Nixon's assertion that "that a President's decision is final in determining what evidence is to be used in a given criminal case."[57] Instead, the Court concluded that such decisions had been validly assigned by Congress to DOJ officials. Had the Constitution conferred on the president an absolute power to control individual prosecutions, Congress could not have done so. But the Court rejected such an expansive notion of executive power over criminal prosecutions.

Under the Supreme Court's own precedent then, the Constitution gives Congress significant power to determine how the executive's prosecutorial power is exercised, how it may be delegated to subordinate officials within the Department of Justice and how the department itself may be structured and organized. The notion expressed in *Trump v. United States* that the president's power over prosecutorial functions is "exclusive" is puzzling in light of this precedent, and the decision does not grapple with the Constitution's clear assignment of countervailing powers to Congress.[58]

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[52] *Id*. § 535.

[53] *Id*. § 591.

[54] *Armstrong*, 517 U.S. at 464.

[55] *Id*. (emphasis added) (citing the *Take Care Clause* and 28 U.S.C. §§ 516, 547).

[56] *United States v. Nixon*, 418 U.S. 683, 694 (1974) (citing 28 U.S.C. § 516).

[57] *Id*. at 693.

[58] *See also* Shalev Roisman, *Trump v. United States and the Limits of Separation of Powers Formalism*, Lawfare (Dec. 4, 2024), https://tinyurl.com/sspe5cdr.

Prosecutors' Ethical Obligations

Just as presidential involvement in DOJ's decision-making risks creating unconstitutionally selective prosecutions, presidential direction of federal prosecutors also risks creating serious professional dilemmas for those attorneys. DOJ prosecutors have a host of independent, enforceable ethical and constitutional obligations that outweigh whatever responsibility they might have as employees to follow a superior's instructions. If the White House or a political appointee were to order a line attorney to initiate an investigation for retributive reasons or without an adequate basis in law or fact, that attorney would be required by departmental rules, professional ethical codes, and her oath to the Constitution to refuse the order. Following the unlawful order could result not only in professional sanction or loss of a law license, but in extreme circumstances civil or criminal liability.[59] But refusing to follow the order could result in adverse employment action and perhaps public attention, exposing her to harassment and intimidation. Licensing White House interference in DOJ's decision-making thus risks putting DOJ's employees in a professionally untenable position.

This conflict was common in the first Trump administration, but not unique to it. The showdown between President Trump and senior members of DOJ over his attempt to overturn the results of the 2020 election is a notable example — and one which illustrates the professional and legal consequences of obeying an unlawful order from the president.[60] Nearly fifty years earlier, in the infamous "Saturday Night Massacre," President Nixon fired two attorneys general who refused to follow his orders to terminate the Watergate special prosecutor and end the investigation into his administration's involvement in the break-in. Instances of chief executives ordering their subordinates to break the law or violate ethical obligations unfortunately do occur under our system of checks and balances. The Supreme Court's intimation that the Constitution may actually require that the president wield this level of power over the executive branch is surely an invitation to more misconduct and conflict.

Protect Democracy has published guidance on the ethical and legal standards which govern DOJ attorneys' conduct and which could be implicated by the White House's involvement in specific enforcement matters. *Supporting and Defending the Constitution: A DOJ attorney's guide to upholding ethical obligations and the rule of law* provides an overview of the laws, regulations, rules, and policies governing attorney conduct that may be implicated by political

[59] *See* note 60, *infra*.

[60] Barbara Sprunt, *Former DOJ Officials Detail Threatening to Resign En Masse in Meeting with Trump*, NPR (June 23, 2022), https://tinyurl.com/37yb3v9e. An ally of Trump's who pushed to execute this scheme, Jeffrey Clark, has been indicted for election interference in Georgia and may be disbarred. Kyle Cheney, *Key Trump Ally in 2020 Should Lose Law License for Two Years, DC Disciplinary Panel Rules*, Politico (Aug. 1, 2024), https://tinyurl.com/2tvumz4b.

interference.[61] It also addresses prosecutors' options for responding to potential violations, including guidance on reporting misconduct. .

But reporting misconduct, even when doing so is statutorily protected and ethically mandated, can come with significant personal consequences. The CIA analyst who filed the whistleblower report that led to Donald Trump's first impeachment was given a security detail and had to go into hiding after an extremist threatened to reveal his identity.[62] And the national security executives who protected the whistleblower's identity from the president were all fired.[63] But going along with an illegal order can be just as consequential. Nixon's attorney general and several other high-ranking aides were convicted and served prison sentences for their roles in carrying out and attempting to cover up the Watergate break-in. And key members of the Trump administration who attempted to use DOJ to overturn the 2020 election have been indicted and lost their law licenses.[64]

Constitutionalizing White House interference in DOJ's prosecutorial decision-making thus risks putting DOJ attorneys in a professionally untenable position — follow an illegal order in violation of ethical and constitutional obligations and risk serious personal and professional consequences, or refuse the order, report the misconduct, and likewise risk serious consequences. The sweeping vision of presidential power articulated by the majority in *Trump v. United States* is therefore at odds with the limitations on state power imposed by rules of ethics and the Constitution itself, and an invitation to abuses of power that may impact not only the targets of retributive prosecutions, but DOJ prosecutors themselves.

[61] Protect Democracy, *Supporting and Defending the Constitution: A DOJ attorney's guide to upholding ethical obligations and the rule of law* (December 2024), https://tinyurl.com/33n3jj5n.

[62] Greg Jaffe, *The CIA Analyst Who Triggered Trump's First Impeachment Asks: Was It Worth It?*, The Washington Post (Oct. 20, 2024), https://tinyurl.com/44pv9b9p.

[63] *Id*.

[64] *See* note 60, *supra*; Wayne Schutsky, *Meadows, Giuliani, 11 'Fake Electors' from 2020 Are Among Those Indicted in Arizona*, NPR (Apr. 26, 2024), https://tinyurl.com/bdeu9nz3; Kate Brumback, *Lawyer Kenneth Chesebro Pleads Guilty over Efforts to Overturn Trump's 2020 Loss in Georgia*, Associated Press (Oct. 20, 2023), https://tinyurl.com/bx36dvs7.

Guarding against Political Interference after *Trump v. United States*

All three branches of government have played critical roles in the development of the norm of non-interference, and all three can play critical roles in upholding it in the face of an emboldened chief executive.

Congress possesses considerable oversight and legislative powers, and may constitutionally exercise both to reinforce the norm of non-interference without transgressing the Court's ruling *Trump v. United States*. And the Department of Justice itself still possesses the power to promulgate regulations codifying the White House contacts policies, defining improper political interference (and providing clear paths for DOJ staff to avoid it), and formalizing other guardrails that have long existed as norms and informal policy.

Until they do so however, the work of protecting against political interference may fall first to federal prosecutors (and the many professional staff who work with them). It will be incumbent on these attorneys to honor their oaths and their ethical obligations.

Ultimately, however, the federal courts will be the final fora of investigations and prosecutions. The courts will be responsible for upholding the constitutional rights of the targets of grand jury investigations, and for ensuring that the government conducts its prosecutions within the boundaries of the law. Nothing in the majority opinion in *Trump v. United States* curtailed the liberties and rights of those subject to criminal law enforcement or expanded the executive's power in this sphere.

Conclusion

The Department of Justice's ability and obligation to pursue specific cases free from political interference by the White House is established by historical tradition, constitutional text and principle, and the institutional design and policy choices negotiated between Congress and the executive branch. It is a fundamental part of American constitutionalism, despite the Supreme Court's recent intimations to the contrary.

Recent pledges to abandon this norm and use federal law enforcement to exact retribution against the president's perceived enemies are properly greeted with alarm and denouncement. They are pledges to exercise an unchecked power that "we associate with regimes we revile as unjust"[65] and that runs counter to constitutional principles and norms, as well as basic democratic concepts like the rule of law. Such an abuse of executive power should thus not only be viewed as anti-democratic, but also anti-constitutional.

[65] *Ragbir v. Sessions*, No. 18-cv-236, at *1 (S.D.N.Y. Jan. 29, 2018).