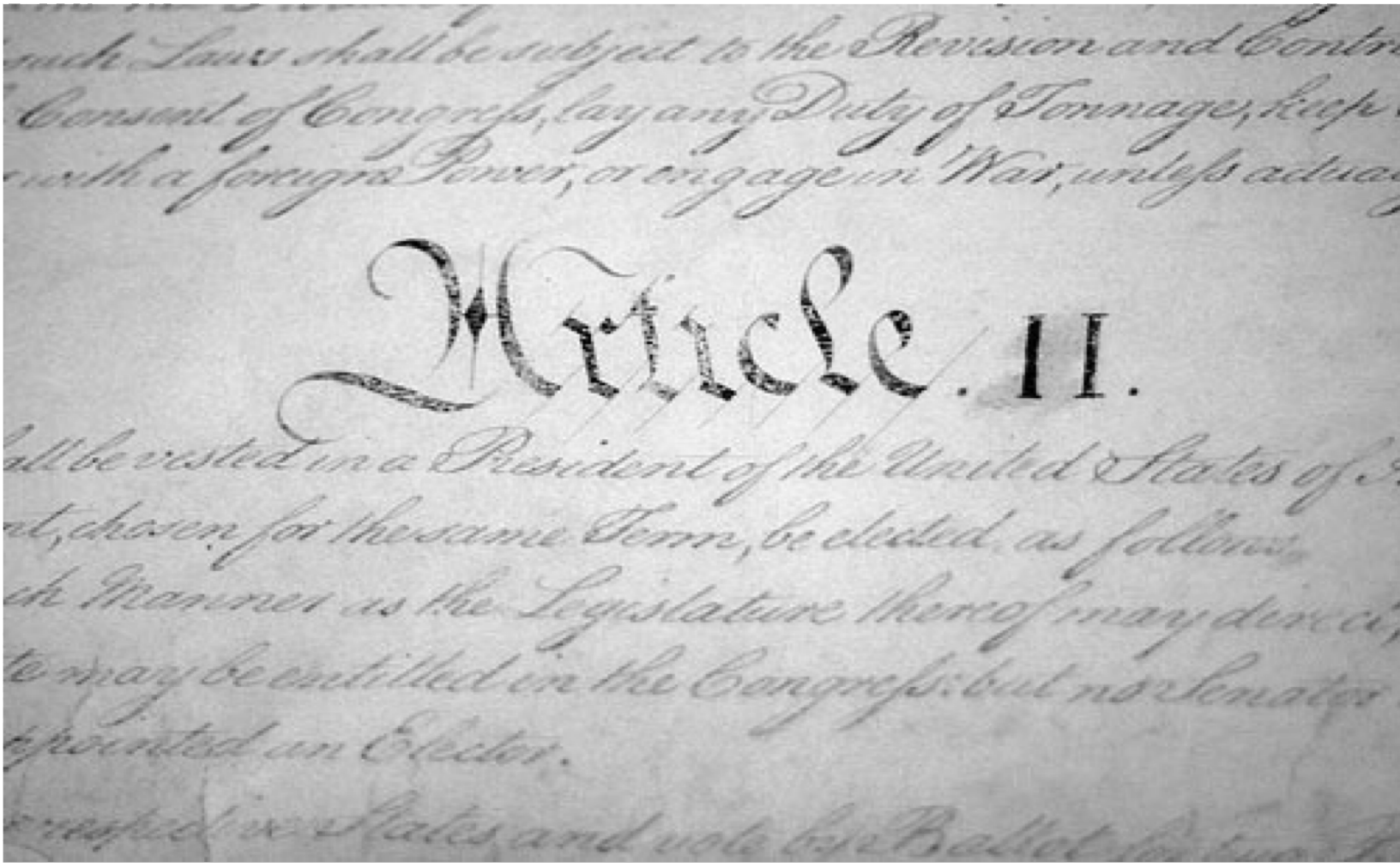
No "Absolute Right" to Control DOJ: Constitutional Limits on White House Interference with Law Enforcement Matters



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Executive Summary

In a constitutional democracy, those in office should not wield the powers of the state to benefit their political allies and punish their opponents. In keeping with this principle, for 40 years, Administrations led by both parties have maintained policies limiting contacts between the White House and the Justice Department ("DOJ") on law-enforcement matters involving specific parties.

These policies reflect constitutional principles that limit the situations in which the White House may interfere in law-enforcement matters involving specific parties. In short, it is constitutionally appropriate for the President to set generally applicable policies and priorities in order to enforce the laws that Congress has enacted. But in most types of cases it is likely to conflict with the Constitution for the White House to intervene in the Justice Department's handling of an enforcement matter involving a specific party. And White House interventions based on the President's personal or corrupt interests are always unconstitutional.

The constitutional analysis in this paper has four practical applications.

Negating the President's defense to obstruction charges. First, we expect the President to continue to assert that he has an unfettered constitutional power to intervene in the affairs of the Justice Department, for any reason or for no reason, and that this provides him a defense in any congressional or judicial proceedings that are based on his obstruction of the Russia-election-interference investigation. This is wrong. The President's office cannot absolve him of the consequences of his obstructing or otherwise interfering with law-enforcement matters—whether in court or in congressional impeachment proceedings. The first specific application of this paper, therefore, is to negate this defense by showing that the Constitution itself limits the President's ability to intervene in law-enforcement matters involving specific parties—especially for self-interested reasons.

Offering a defense to parties harmed by White House interference. Second, this paper outlines a defense available to any party targeted by a White House intervention in a specific-party Justice Department enforcement matter. As this paper explains, such interference runs a serious risk of violating the Constitution, and courts can apply numerous doctrines to address these violations and protect the constitutional rights of affected parties. Accordingly, we identify a targeted set of interventions that courts are well-suited to, and often do, undertake in these circumstances.

Providing a constitutional framework for legislation. Third, this Administration's conduct suggests that it no longer makes sense to leave it to the White House to enforce the policies that have traditionally limited improper White House interference in specific-party enforcement matters. Instead, Congress may

wish to legislate on this matter. Congress has enacted analogous legislation restricting White House contacts with the IRS on specific-party matters. This paper provides Congress with a constitutional framework for enacting legislation to restore, and to an extent formalize, the norms that long governed the White House-Justice Department relationship.

Deterring criminalization of the President's political opponents. Finally, some commentators have warned that if current patterns continue, President Trump is likely to call for a criminal investigation or prosecution of his opponent in the next election—no matter who that opponent is or whether they have done anything that might conceivably merit DOJ investigation. The President and his lawyers should know that doing so would violate the President's constitutional duties. It is inappropriate for a presidential candidate to lob "lock her up" charges against an opponent; it is unconstitutional for a sitting President to do so. DOJ officials, including the Inspector General and Office of Professional Responsibility, and Congressional oversight committees, should act accordingly.

The analysis proceeds as follows.

I. The Constitution Restricts White House Involvement in Specific-Party Enforcement Matters.

In a *New York Times* interview, President Trump claimed an "absolute right to do what I want to do with the Justice Department." Article II of the Constitution places the President at the head of the Executive Branch, but it does not cloak the President with unlimited authority to intervene in how the law is enforced against specific parties. Article II, Section 3 states, among other things, that the President "*shall take Care that the Laws be faithfully executed*." Nothing in that Clause gives the President an "absolute right" to control specific enforcement matters at DOJ.

Rather, the Take Care Clause places concrete limitations on how the President may enforce the law. The President must act faithfully, in keeping with his Oath of Office to "preserve, protect, and defend the Constitution" to the best of his ability. He may not act for corrupt or self-interested reasons. And he must enforce the laws Congress has enacted, not subvert those laws. While he may shape generally applicable enforcement priorities, he may not prevent the enforcement of the laws that Congress has enacted against himself or his allies.

The Bill of Rights enshrines additional constitutional principles that constrain the President's interactions with the Justice Department. Even when the Constitution empowers a branch of government to act, it may not do so in contravention of the Bill of Rights.

- The Fifth Amendment's Due Process Clause requires the government to follow fair and neutral procedures before denying people important interests. It prohibits public pronouncements of guilt, prosecutions by interested officials, threats of vindictive prosecution, and other forms of prosecutorial misconduct.

- The Fifth Amendment—which prohibits the federal government from denying to any person the equal protection of the laws—also precludes the White House from intervening in specific-party matters to direct prosecution of disfavored persons or groups or non-enforcement of the law against favored ones.
- The First Amendment prohibits retaliation based on speech, association, or political activity. Therefore, it would violate the First Amendment for the White House to intervene in a specific-party matter in order to respond to political participation or discourage First Amendment protected activity.

II. The Justice Department Maintains Key Structures and Procedures to Uphold the Constitutional Principles Described Above; the White House Lacks these Safeguards, Creating a Serious Risk of Unconstitutionality When It Interferes in a Specific-Party Matter.

Key features of the Justice Department have both the purpose and effect of protecting the constitutional principles described above—including faithful execution of the law, due process, equal treatment, and protection of political speech and participation.

- The Justice Department is statutorily directed and authorized to handle and litigate specific enforcement matters.
- The Justice Department is staffed almost entirely by individuals who are either civil servants or subject to a Senate confirmation process.
- The Justice Department is organized, structured, and scaled to handle specific-party enforcement matters in a consistent manner, including with internal oversight offices.
- The Justice Department maintains—and often makes public—an extensive set of rules and guidelines designed to ensure regularized and fair consideration of specific-party matters.

The White House lacks these features that safeguard adherence to the constitutional principles set forth above. It does not have statutory authority to handle specific matters; it is staffed with political appointees who serve the President; it lacks the institutional structures and scale to ensure fair and consistent treatment of all parties; and it does not maintain procedures and guidelines for how to enforce the law against specific parties. Indeed, the only policies that the White House traditionally maintains are those that restrict White House involvement in specific-party matters.

The following consequences follow because the White House lacks the institutional features that the Justice Department maintains to ensure constitutional enforcement of the laws against specific parties.

- White House involvement in DOJ enforcement matters involving specific parties is constitutionally suspect in most situations. Other than in narrow categories of cases, it will likely violate constitutional commands for the White House to intervene in a specific enforcement matter.
- There is a narrow set of categories relevant to the President's specific constitutional duties—such as clemency, national-security matters, and cases that would set generally applicable policy—where the Constitution permits White House involvement in specific-party matters. Even then, though, White House intervention would violate the Constitution if it is for corrupt reasons.
- The White House should follow careful procedures and policies to ensure that any interventions in specific-party matters are constitutionally permissible.

III. DOJ Officials, Congress, and the Courts Each Have a Role to Play in Preventing Improper White House Interference with DOJ's Handling of Specific Matters.

When the President and the White House violate the constitutional principles that maintain apolitical law enforcement, other institutional actors must fill the void to protect the Constitution and the rule of law in our democracy. In particular:

- Justice Department officials should resist improper interference from the White House in specific matters. And guarding against such interference should be a major focus of the Department's internal watchdogs, such as the Office of the Inspector General and Office of Professional Responsibility.
- Congress has a variety of tools to deploy. It should conduct serious oversight of improper White House interference and use the executive- and judicial-branch confirmation process to secure commitments that the White House will not interfere with DOJ inappropriately. It also should consider legislation to limit improper White House intervention in specific-party enforcement matters.
- In cases that come before them, the federal courts can also check improper White House interventions in DOJ enforcement matters. A series of existing doctrines—prohibiting, for example, selective or vindictive prosecutions and First Amendment retaliation—all can be applied in these circumstances in appropriate cases.

Introduction

In a constitutional democracy, officeholders should not wield the powers of the state to benefit their political allies and punish their opponents. In keeping with this principle, for 40 years, Administrations led by both parties have maintained policies limiting contacts between the White House and the Justice Department ("DOJ") on law-enforcement matters involving specific parties.[1] A year ago, we released a legal memo describing these policies and calling on the Trump White House to observe them.[2]

Since then, the Trump White House has violated settled understandings of the appropriate interaction between the White House and DOJ in matters involving specific parties. Although President Trump's White House issued a memorandum limiting White House communications with the Department of Justice,[3] the White House has failed to comply with or enforce that policy.[4] Even more alarmingly, the President has claimed to have the authority to instruct the Department of Justice to halt investigations into close Trump associates[5] as well as to open investigations into his political rivals. Or, as President Trump recently asserted, he has an "absolute right to do what I want to do with the Justice Department."[6]

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[1] This paper focuses on DOJ, but the principles discussed also apply to other law-enforcement agencies, for example those within the Department of Homeland Security (DHS).

[2] *See* Memorandum from United to Protect Democracy to Interested Parties (Mar. 8, 2017), *available at* https://protectdemocracy.org/agencycontacts/.

[3] *See* Memorandum from Donald F. McGahn II to all White House Staff (Jan. 27, 2017). *available at* https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000.

[4] *See, e.g.*, Philip Bump, *Trump's Press Secretary Offers Suggested Punishments for Two Trump Critics*, Wash.Post (Sept. 13, 2017), https://www.washingtonpost.com/news/politics /wp/2017/09/13/ trumps-press-secretary-offers-suggested-punishments-for-two-trump-critics/?utm_term=.a6ae7a48730d; Ryan Lizza, *Anthony Scaramucci Called Me to Unload About White House Leakers, Reince Priebus, and Steve Bannon*, New Yorker (July 27, 2017), https://www.newyorker.com/news/ryan-lizza/anthony-scaramucci-called-me-to-unload-about-white-house-leakers-reince-priebus-and-steve-bannon; Michael S. Schmidt, *Comey Memo Says Trump Asked Him to End Flynn Investigation*, N.Y . Times (May 16, 2017), https: // www.nytimes.com / 2017 /05/16/us /politics/james-comey-trump-flynn-russia- investigation.html ; Jim Scuitto, et al., *FBI Refused White House Request to Knock Down Recent Trump-Russia Stories*, CNN (Feb. 24, 2017), http://www.cnn.com/2017/02/23/politics/fbi-refused-white-house-request-to-knock-down-recent-trump-russia-stories/index.html; Harry Siegel, *Stephen Miller Called Brooklyn U.S. Attorney at Home and Told Him How to Defend Travel Ban in Court,* N.Y. Daily News (Feb. 18, 2017), http://www.nydailynews.com/opinion/stephen-miller-called-u-s-attorney-travel-ban-defense-article-1.2975873

[5] *See* Brad Heath and David Jackson, *Trump's Lawyers Mount a New Defense: A President Cannot Obstruct Justice. Is That True?*, USA Today (Dec. 5, 2017), https://www.usatoday.com/story/news/politics/2017/12/04/trumps-lawyers-mount-new-defense-president-cant-obstruct-justice-true/921380001/.

[6] *Excerpts From Trump's Interview With The Times*, N.Y. Times (Dec. 28, 2017), https://www.nytimes.com/2017/12/28/us/politics/trump-interview-excerpts.html.

President Trump's approach to specific-party enforcement matters violates not only well-established bipartisan norms, but also key constitutional principles. While the Constitution places the President at the head of the Executive Branch, it does not cloak him with unlimited authority to intervene in how the law is enforced against specific parties. On the contrary, it imposes upon him a duty to ensure faithful execution of the laws. And core constitutional principles requiring due process, equal treatment, and the ability of all to participate in our political process all conflict with the President's view that he can intervene in any DOJ matter however he likes.

This white paper describes these limiting constitutional principles and sets out what the different institutions of our government can do to uphold them. [7] In short, it is constitutionally appropriate for the President to set generally-applicable policies and priorities to enforce the laws of Congress. There are also some narrow categories—such as national-security coordination and clemency—in which it may be appropriate for the White House to intervene in specific-party enforcement matters. Outside those narrow categories, however, it is likely to violate the Constitution for the White House to intervene in DOJ's handling of an enforcement matter involving a specific party. And no matter the circumstance, White House intervention always is unconstitutional if based on personal or corrupt interests.

There is a deeper point as well. If those in power can wield the enforcement authority of the state to punish their critics or opponents—or to turn a blind eye to law-breaking by their friends—we have lost the rule of law. Thomas Jefferson observed, and the Justice Department quotes on its website, "The most sacred of the duties of government [is] to do equal and impartial justice to all its citizens."[8] Each time the White House intervenes with the Justice Department's handling of a specific-party matter, it risks violating that sacred duty.

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[7] There has been a recent burst of important and insightful legal scholarship on the relationship between DOJ and the White House. *See*, e.g., Andrew McCanse Wright, *Justice Department Independence and White House Control,* Social Science Research Network (Feb. 18, 2018), https://ssrn.com/ abstract=3125848 (identifying anti-interference principles in the Take Care Clause and the Oath Clause, and comprehensively cataloguing recent violations of DOJ independence); Daphna Renan, *Presidential Norms and Article II*, HARV. L. REV. (forthcoming 2018), *available at* https://ssrn.com/abstract=3123780 (assessing norms that have governed the Presidency and the proper judicial role in enforcing such norms); Rebecca Roiphe and Bruce A. Green, *Can the President Control the Department of Justice?* ALA. L. REV. (forthcoming 2018), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126856 (arguing, from a historical basis, that DOJ decisions in specific cases should be immune from Presidential interference).

[8] U.S. Department of Justice, *About DOJ*, https://www.justice.gov/about (accessed Mar. 6, 2018).

Short Background

For four decades, Administrations led by both parties have maintained independence between the White House and the Justice Department in the handling of law-enforcement matters involving specific parties. This norm has been guarded by formal policies issued and enforced by each Administration. These policies define the situations in which it is permissible for White House officials to contact the Justice Department and which officials are permitted to do so. Protect Democracy's March 2017 memo describes the core characteristics of these policies.[9] The Justice Department traditionally also has had in place and observed a parallel policy to guide its personnel in their interactions with the White House.[10]

The Trump White House has shattered the norms that have traditionally separated DOJ and the White House. We do not catalogue all of the examples here; Protect Democracy's website includes a tracker that collects these violations.[11] They fall into several categories. Some involve White House staff who have contacted DOJ about specific-party matters without following the proper protocols. Many involve the President himself. He has intervened in the ongoing investigation of Russian interference in the 2016 election and his campaign's role therein; has called for DOJ to take enforcement actions in specific criminal matters, including against his former political opponents; and has called for DOJ to take retaliatory antitrust enforcement action against a media company that he sees as critical of him. He has also breached other related norms that protect the independence of the Justice Department—for example by personally interviewing U.S. Attorney candidates in certain districts and by having Justice Department law enforcement officials speak about enforcement actions from the White House podium.

The President's repeated actions to intervene in DOJ matters reflects his view, as stated in an interview with the *New York Times*, that he has an "absolute right to do what I want to do with the Justice Department."[12] As we explain, that is an incorrect statement of U.S. constitutional law. The Constitution accords the President no such power; instead, it places a series of restrictions on his authority to intervene with how the Justice Department handles specific enforcement matters.

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[9] *See* Memorandum from United to Protect Democracy to Interested Parties (Mar. 8, 2017), *available at* https://protectdemocracy.org/agencycontacts/.

[10] The Justice Department confirmed in response to Protect Democracy's FOIA Request that the Holder memo remains in place. *See* FOIA Response on Behalf of the Offices of the Attorney General and Deputy Attorney General from the U.S. Department of Justice Office of Information Policy to Protect Democracy (May 15, 2017), *available at* https://protectdemocracy.org /wp-content/uploads/2018/01/0085-All.pdf (attaching the Holder Memo).

[11] *See* Protect Democracy, *Protecting Independent Law Enforcement: Timeline of Violations*, https://protectdemocracy.org/independent-law-enforcement/doj-interference-tracker/; *see also* Wright, *supra*, n.11 (thoroughly cataloguing White House – DOJ relations in Trump's first year in office).

[12] *See supra* n.6.

Legal Analysis

I. The Constitution Restricts White House Involvement in Specific-Party Law-Enforcement Matters.

A. Article II does not grant the President the authority to do whatever he wants with the Justice Department.

Article II makes the President the head of the executive branch and vests in him the executive power. But even the King did not wield the type of executive power that President Trump seems to claim. And the Take Care Clause in Article II, Section 3 of the Constitution requires that the President "***shall take Care that the Laws be faithfully executed***." Nothing in that Clause gives the President an "absolute right" to control specific-party enforcement matters at DOJ. Rather, the Take Care Clause places several limitations on when he may do so.

1. The President is not a King, and even the King's power was limited.

President Trump's assertion that he has an absolute right to do what he wants with the Justice Department, although echoed by some commentators,[13] is founded on an extreme view of the "unitary executive theory."

According to the more modest and uncontroversial version of that theory, the framers' decision to grant the President the "executive [p]ower," U.S. Const., Art. 2 § 1, makes him the nation's chief law-enforcement officer. That part is unobjectionable. Everyone agrees that the Constitution makes the President the head of the executive branch. But things get more controversial when President Trump and his lawyers claim that his authority as the nation's chief enforcement officer empowers him to enforce the law however he wants.

Most rebuttals to the unitary-executive theory focus on explaining that we have a President and not a King. But President Trump's understanding of his constitutional authority—*i.e.*, the power to do whatever he likes with the Justice Department—is so broad that even a king couldn't invoke it.

Not even King George III had the ability to enforce the law however he chose. It is nearly impossible to imagine that the Founding Fathers would have chosen to vest the presidency with even greater powers than the English King who drove them to rebellion.[14]

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[13] *See, e.g.,* Carson Holloway, *No Easy Task for a President to 'Abuse' His Authority Over the Justice Department*, The Hill (Mar. 2, 2018), http://thehill.com/opinion/white-house/376434-no-easy-task-for-a-president-to-abuse-his-authority-over-the-justice.

[14] *See* Max Farrand, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES at 162 (1913), *available* at https://archive.org/stream/framingofconstit00farr/framingofconstit00farr_djvu.txt

King George was not an absolute monarch at the time of the American Revolution. Rather, his powers were created by—and subordinate to—the law. Under the unwritten English Constitution, there were certain inherent limits on the King's executive powers to enforce the law. For example, the King could not order his agents to imprison English subjects without cause, *see Boumediene v. Bush*, 553 U.S. 723, 742 (2008); nor could he order his agents to disarm Protestants, *see District of Columbia v. Heller*, 554 U.S. 570, 592–94 (2008).

These constitutional prohibitions not only governed substantive rights—they also denied the King the discretion to refuse to enforce the law.[15] As explained in one oft-cited English speech,[16] the power to *execute* the law does not carry with it the power *not* to do so:

> I can never conceive the prerogative to include a power of any sort to suspend or dispense with laws, for a reason so plain that it cannot be overlooked unless because it is plain; and that is, that the great branch of the prerogative is the executive power of government, the duty of which is to see to the execution of the laws, which can never be done by dispensing with or by suspending them.[17]

In short, President Trump's understanding of his constitutional authority fails at the outset: we know that the President's understanding of his "executive [p]ower," U.S. Const., Art. II § 2, must be wrong for the simple reason that it grants the presidency more authority that its English counterpart at the time of the American Revolution. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (colonial denunciation of King George in the Declaration of Independence "leads me to doubt that they were creating their new Executive in his image"). If the English King's executive power did not confer unlimited discretion on him when enforcing the law, it follows that the U.S. President also lacks such discretion.

(describing absolute resolve of the Constitution's drafters to guard against the presidency's becoming "a future Monarchy like the European or Asiatic Monarchies either an[c]ient or modern").

[15] *See English Bill of Rights*, 1 W. & M., sess. 2, ch. 2 (1689) *available at* http://avalon.law.yale.edu/17th_century/england.asp ("That the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal; That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.").

[16] The remarks are often attributed to the eminent English jurist Lord Mansfield, but their exact provenance is unclear, as the speech was written by a third-party recounting points likely made by Mansfield.

[17] "A Speech in [sic] Behalf of the Constitution Against the Suspending and Dispensing Prerogative," T. C. Hansard and William Cobbert (eds.), The Parliamentary History of England to 1803, vol. XVI, 1765-1771, p. 267 (London, 1813).

2. Supreme Court precedents confirm the President must enforce the laws Congress enacted—not subvert or rewrite them.

Supreme Court precedents confirm that the President's executive power can only be exercised within the limits of the law.

For example, the President cannot instruct his subordinates in the Departments to subvert the law. An early example of this constraint is found in *Little v. Barreme*, 2 Cranch 170 (1804), where the Supreme Court (per Chief Justice Marshall) held a Naval commander liable for damages resulting from his execution of an illegal Presidential order. Marshall and his brethren concluded that the order could not "change the nature of the transaction, or legalize an act which without [that order] would have been a plain trespass." *Id*. at 179. Thus, even where the President's constitutional authority was at its highest—i.e., when issuing a military order bearing on foreign policy—the President had no power to issue or demand obedience to an ***illegal*** order; nor could his subordinate invoke that order to evade responsibility for committing an illegal act. The Court thus implicitly held that the Take Case Clause is not a license to assume powers beyond what Congress has authorized by statute, where Congress has chosen to legislate on the subject matter in question.

In *Youngstown*, the Supreme Court returned to these principles, when it held that the President lacked the power to effectively enact his own laws by ordering his Secretary of Commerce to take possession of and operate most of the nation's steel mills.

To avert a nationwide steelworkers' strike that he believed might endanger the prosecution of the Korean War, President Truman on April 8th, 1952 ordered the Secretary of Commerce to seize and operate most of the nation's steel mills. But the Supreme Court rejected the President's claim to authority.

Justice Black's opinion for the Court, after rejecting the President's arguments under the Commander-in-Chief Clause, further reasoned: "Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. 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." 343 U.S. at 587 (emphasis added). Having endorsed a constraining view of the Take Care Clause, Justice Black explained that the President had far overstepped the line between enforcing laws enacted by Congress and becoming a law unto himself: "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." *Id*. at 588. The President's conduct summoned up all "the fears of power and the hopes for freedom that lay behind" the framer's decision to "entrust[ ] the law making power to the Congress alone in both good and bad times." *Id*. at 589.

Two notable concurrences bolstered the view that the Take Care Clause, rather than granting the President a license to use the executive branch as he pleases, imposes significant constraints on Presidential power.

Justice Jackson's concurrence rejected the argument that the first clause of Article II, which states that "[t]he executive Power shall be vested in a President of the United States of America," constitutes "a grant of all the executive powers of which the Government is capable.'" *Id.* at 640. "If that be true," Jackson reasoned, "it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones," such as the power to require written opinions of cabinet members or to commission officers of the United States. *Id.* at 640-41, n.9. "Matters such as those," Jackson observed, "would seem to be inherent in the Executive if anything is." *Id.* at 641, n.9. Justice Jackson "[could not] accept the view that this clause is a grant in bulk of all conceivable executive power but regard[ed] it as an allocation to the presidential office of the generic powers thereafter stated" in Article II. *Id.* at 641.

Reaching the Take Care Clause, Justice Jackson explained that any authority conferred by that clause "must be matched against words of the Fifth Amendment that 'No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.' One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther." *Id.* at 646 (elisions by Jackson). This approach envisions a Presidential authority inherently constrained by law (and doubly checked by the right of private citizens to enforce the requirements of due process). These provisions, Justice Jackson added, "signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules." *Id.*

Justice Frankfurter's concurrence likewise envisioned a constraining role for the Take Care Clause: "'The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.'" 343 U.S. at 610 (Frankfurter, J., concurring) (quoting *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J.)). Frankfurter added: "The powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution gives essential content to undefined provisions in the frame of our government." 343 U.S. at 610.

This constraining view of the Take Care Clause stands in stark contrast to President Trump's sweeping view of his own powers, which treats Article II as a license for the President to have his unbridled way with the executive branch. In short, the President's executive power is ultimately subordinate to the supreme law from which it emanates—the Constitution. *See Youngstown*, 343 U.S. at 646 ("[O]urs is a government of laws, not of men, and . . . we submit ourselves to rulers only if under rules.").

B. The text and structure of Take Care Clause, in addition to requiring the President to follow the law, provide instruction on how the law is to be enforced.

As the prior section describes, Article II most certainly does not give the President absolute power over the Justice Department. In fact, Article II includes instructions for how the President should exercise his authority, and these instructions guide the proper interactions between the President and DOJ.

1. The Take Care Clause instructs the President to preside over the Departments—not to personally implement the laws.

The passive phrasing of the Take Care Clause (requiring care that the laws "be faithfully executed") is both unique and significant. Nowhere else does the document employ a similar construction to describe the duties of a Constitutional officeholder. This phrasing suggests that the President oversees the execution of the Laws, but does not execute them himself.[18] For if the President were charged with executing the Laws himself, the clause would instead read: "he shall faithfully execute the laws." Instead, the constitutional text suggests that actual hands-on execution is left to the Officers of the executive Departments;[19] it is the President's job to ensure that ***they*** "faithfully execute" the Laws.

Of course, this phrasing may reflect the reality that one person can't run the government alone and that the President inevitably will have many other people working under him to effectuate Presidential policy and to carry out the will of Congress. But it is striking that there is no other "take care" clause in the Constitution, even though the document likewise assigns powers and responsibilities to the legislative branch that cannot be carried out without the aid of others.[20] Thus, the unique phrasing of the Take Care Clause connotes that the President's primary function in relation to the Departments is not to execute the Laws himself, but to ensure that the executive Officers do so "faithfully."

The President, as the name of the office itself suggests, is to exercise the executive power by ***presiding over*** the Departments and serving as their Constitutional conscience—not by reaching down ***into*** the Departments to place a corrupt or preferential finger on the scales of all their deliberations. This conclusion is reinforced by the fact that the Constitution authorizes the President to supervise

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[18] *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L. J. 1836, 1875-76 (2015) (observing that "the [Take Care] Clause's use of the passive voice and the sheer practical impossibility of any other result" demonstrate that "the actual execution of the laws will be done by others" and that, "[d]espite vesting the executive power in the President, the Framers did not expect that the President would be personally implementing the laws[.]") (footnote omitted).

[19] *See* Farrand, *supra*, at 166 ("No such departments were provided for in the constitution, but it was assumed that they would be established and that there would be a single officer at the head of each.")

[20] These include collecting taxes, duties, imposts, and excises; regulating international and interstate commerce; coining money; and raising and supporting a military. *See* U.S. Const., Art. I § 8.

those Officers by requiring written opinions from them "upon any Subject relating to the Duties of their respective Offices."[21] Including the Opinions Clause would have made little sense if the framers meant to grant the President full authority to reach into the Departments to direct their activities.

2. The President must execute his supervisory powers "faithfully"—not for corrupt or self-protective reasons.

As discussed above, the Take Care Clause tasks the President with presiding over the Departments to ensure that they "faithfully execut[e]" the laws. But what does "faithfully execute" mean?

The phrase "faithfully execute" appears only one other time in the Constitution, namely in Article II, Section 1, Clause 8, which prescribes the President's oath of office:

> Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

The oath leaves no doubt that at least one component of "faithfully executing" the Office of the President is to preserve, protect, and defend the Constitution to the best of one's ability.

So too, the term "faithfully" carries its own constraining meaning. Some commentators have construed it "as imposing a duty of good faith."[22] This is undoubtedly the case, and so includes prohibitions on "dishonesty, disloyalty, and lack of fair dealing."[23] Samuel Johnson's Founding-era dictionary defines "faithfully" (among other things) to require acting with "[s]trict adherence to duty and allegiance"; "[w]ithout failure of performance; hone[s]tly; exactly"; and "without fraud, trick or ambiguity."[24] Another way to view the "faithfulness" requirement is through well-established legal rules governing the obligations that an agent owes to

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[21] U.S. Const., Art. II § 2, cl. 1; *see also Youngstown*, 343 U.S. at 640-41 and n.9 (1952) (Jackson, J., concurring).

[22] *See, e.g.*, David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 8856, 907 (2016), *available at* https://harvardlawreview.org/2016/02/constitutional-bad-faith/; *see also* Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), *accessible at* http://webstersdictionary 1828.com/Dictionary/faithfully (defining "faithfully" as meaning "with good faith").

[23] *See* Pozen, *supra*, at 888.

[24] 1 Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE at 763 (1755), *accessible at* http://johnsonsdictionaryonline.com/page-view/?i=763; *see also* Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 215, 230-31 (2015), *available at* https://judiciary.house.gov/wp-content/uploads/2016/03/Blackman-Supplemental-5.pdf (collecting dictionary definitions).

a principal.[25] In this case, that means the President must act in the interests of the laws that Congress has written; not for his own separate purposes.

The requirement of faithfulness also invokes the high obligations of a fiduciary to the public trust. Thus, in the *Federalist Papers* No. 62, James Madison warned, "It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents, and prove *unfaithful to their important trust*."[26] (emphasis added). And at the Convention, Nathaniel Gorham noted that "the Executive will be responsible in point of character at least, for a judicious and faithful discharge of his trust."[27]

Thus, when the President intervenes in an individual prosecution to influence it for corrupt or self-protective purposes, he violates the Take Care Clause and his oath. He is not preserving, protecting, and defending the Constitution to the best of his ability—indeed, he is undermining it—and he is doing so through involving himself at a level of execution that the Constitution does not contemplate (*see supra* I.B.1).

3. The President's duty to enforce the laws as Congress wrote them extends to laws that apply to him, his family, and his friends.

As described above, the President is constitutionally commanded to take care to oversee enforcement of the laws that Congress has enacted. And he must act with strict adherence to the duty he owes the public in seeing to the faithful execution of the laws. It follows that one thing that he absolutely cannot do is to exempt himself or his allies from laws that apply to him personally. This would, by definition, not be taking care to the faithful execution of the laws. For example, he cannot accept bribes or inducements from foreign powers (or from anyone else), *see, e.g.*, 18 U.S.C. § 201; and he cannot obstruct justice by intervening in a criminal investigation into his own conduct in violation of federal obstruction statutes, *see, e.g.*, 18 U.S.C. § 1501-1521. No one could argue with a straight face that a President who behaves this way is taking care ensure to the faithful execution of the laws or acting "to the best of his ability" to preserve, protect, and defend the Constitution.

The President, of course, possesses many tools for influencing the Justice Department's enforcement of the law generally. The President's supervisory role over the Departments, conferred by the Executive Power Clause and constrained by

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[25] Zach Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 698 (2014) *available at* https://www.vanderbiltlawreview.org/wp-content/uploads/sites/89/2014/05/67-Vand.-L.-Rev.-671-Price.pdf (explaining that the term "evokes a notion of 'faithful agency,' in which the agent's proper discharge of his or her duties may depend on an implicit understanding of the principal's expectations as much as on any explicit directives.").

[26] The Federalist No. 62 (James Madison).

[27] 2 Max Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 66 (1911).

the Take Care Clause, unquestionably grants him the power to direct generally applicable law-enforcement priorities to enforce the laws of Congress—if he does so "faithfully." For example, if the President concludes that the United States is suffering from an opioids crisis, he can instruct the Attorney General to prioritize law-enforcement efforts against people and entities involved in illegal opioids distribution. But the President cannot (for example) conceal his personal investments in opioid manufacturers and then direct law-enforcement policy so as to increase the value of his holdings.[28]

The President may also select and remove certain officials within the Justice Department pursuant to the Constitution's Appointments Clause. *See* U.S. Const., Art. II § 2, cl. 2.[29] Of course, he must do so consistent with other constitutional and statutory obligations, including the Take Care Clause, the Oath and acts of Congress, *see Morrison v. Olson*, 487 U.S. 654 (1988). Thus, the President lacks authority to select or remove DOJ officials (including U.S. Attorneys or the FBI Director) for reasons that are not faithful to his oath and obligations under the Constitution. Accordingly, the President cannot take a personnel action for the purpose of improperly intervening in a specific-party enforcement matter.

We note here that some commentators have argued that Justice Scalia's lone dissent has the better of the argument in *Morrison*, and that a future Supreme Court would come out the other way.[30] For context, in that case a 7-1 majority of the Court upheld the constitutionality of the independent counsel provisions of the Ethics in Government Act, which gave the judiciary a role in appointment of an independent counsel. Justice Scalia, in dissent, argued that the Act impermissibly intruded on the Executive Branch. For at least three reasons, even if Justice Scalia's 1-vote dissent in *Morrison* were to become a majority opinion, that would not permit the President to intervene without constraint in specific-party enforcement matters.

First, *Morrison* concerns taking the power to appoint prosecutors outside of the executive branch; nothing in this white paper addresses *who* may appoint prosecutors.

Second, even assuming that all of that executive power is vested in the President, the Take Care Clause, the Bill of Rights, and other Constitutional provisions still constrain how that power may be exercised. Just because the President has the Commander-in-Chief power, for example, does not mean that he

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[28] Of course, absent complete and accurate financial disclosure by the President, there is no way to know whether he is setting policy in the national interest or corruptly.

[29] *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010) (describing the President's Take Care Clause obligations as including oversight of "the faithfulness of the officers who execute" the laws).

[30] *See*, e.g., Adrian Vermeule, *Morrison v. Olson is Bad Law*, Lawfare (June 9, 2017), https://www.lawfareblog.com/morrison-v-olson-bad-law.

can quarter soldiers with civilians, order air-strikes against his electoral opponents, or seize the nation's steel mills.

Third, the executive power obligates the President to enforce the laws Congress has enacted; and some of those laws impose procedural restrictions on how the executive branch enforces other laws. For example, the Administrative Procedures Act (APA) dictates what procedures the executive branch must use in certain functions.[31] Numerous laws assign enforcement duties to different agencies, including assigning the law-enforcement litigation function to DOJ (as discussed below). Civil-service laws govern the ability to hire, fire, or discipline many DOJ lawyers and investigators, even though those employees are located within the executive branch. And Congress has subjected federal government attorneys to state ethics laws, thereby regulating how these executive branch officials execute the law.[32]

Thus, President Trump's lawyers would be mistaken to believe that if Justice Scalia's *Morrison* dissent were to become law, it would vindicate his views about his constitutional authority to control the Justice Department.

C. The Bill of Rights further constrains the President's authority to intervene in Justice Department handling of specific-party matters.

As set forth above, Article II of the Constitution does not grant the President blanket authority to control the Justice Department. The Bill of Rights enshrines additional constitutional principles that constrain the President's interactions with the Justice Department.

For example, it would be unconstitutional for the President to instruct the Justice Department to prosecute or investigate "based on an unjustifiable standard such as race, religion, or other arbitrary classification." *United States v. Armstrong*, 517 U.S. 456, 464 (1996). So the President neither could order the Justice Department to prosecute someone because of an individual's decision to "exercise . . . protected statutory and constitutional rights," *Wayte v. United States*, 470 U.S. 598, 608 (1985), nor order a person prosecuted simply because of personal animus, *cf. United States v. Windsor*, 133 S. Ct. at 2693 ("The Constitution's guarantee of equality must at the very least mean that a bare . . . . desire to harm . . . cannot justify disparate treatment . . . ."). In either instance, the bounds of presidential discretion cannot be unlimited, because "selectivity in the enforcement of [the] law is [] subject to constitutional constraints." *Wayte*, 470 U.S. at 608.

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[31] The Court has suggested Congress could apply the APA to the President. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-801 (1992) ("Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.").

[32] 28 U.S.C. § 530B.

Three key constitutional directives in the Bill of Rights constrain the President's power to intervene in the Justice Department's handling of specific-party matters: the guarantee of due process; the requirement of equal treatment; and the protection of free speech and political participation.

1. The Due Process Clause requires fair and neutral procedures.

The Fifth Amendment's Due Process Clause requires the government to follow fair and neutral procedures before denying people important interests. Accordingly, the Clause limits the government's ability to exert political influence over enforcement actions and requires objective government decision-making processes that affect specific parties. White House intervention into specific-party matters—an intervention that almost inevitably will disrupt the Justice Department's standardized processes for enforcing the law—raises numerous due-process concerns.

For example, each of the following unfair practices can violate the Due Process Clause:

- ***Public pronouncements of guilt.*** The Due Process Clause bars prosecutors from making public pronouncements of guilt ("Lock her up!") without providing a proper forum for vindication.[33] So the White House cannot publicly proclaim—even on Twitter—that a particular American is a criminal without giving that American a forum in which he or she can rebut the accusation.
- ***Prosecutions involving interested prosecutors or officials.*** Prosecutions by interested officials undermine fundamental fairness, create an appearance

[33] *See, e.g.*, *Doe v. Hammond*, 502 F. Supp. 2d 94, 101 (D.D.C. 2007) ("The Due Process Clause of the Fifth Amendment protects an individual from governmental accusations of criminal misconduct without providing a proper forum for vindication."); *see also id.* at 102 ("[D]ue process protection is not limited to accusations against the uncharged in an indictment, but rather extends to other criminal accusations . . . including accusations in factual proffers and other court memoranda."); *In re Smith*, 656 F.2d 1101, 1107 (5th Cir. 1981) ("The presumption of innocence, to which every criminal defendant is entitled, was forgotten by the Assistant United States Attorney in . . . implicat[ing] the Petitioner in criminal conduct without affording him a forum for vindication."); *Klopfer v. North Carolina*, 386 U.S. 213, 227 (1967) (Harlan, J., concurring in the judgment) (putting "a person under the cloud of an unliquidated criminal charge for an indeterminate period, violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment"); *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987) ("It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters. We have always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty.").

of impropriety,[34] and may violate due process,[35] particularly where the prosecutor intervenes to further his personal self-interest.[36] So the White House cannot intervene in a single-party matter so as to deny a criminal defendant an independent prosecutor.

- ***Threats of vindictive prosecution.*** Threatening vindictively to prosecute or impose a greater sentence on someone who hasn't broken the law violates due process.[37] So the White House cannot intervene in a single-party matter to order the Justice Department to retaliate against an individual for taking lawful actions that the White House didn't like.
- ***Prosecutorial misconduct***. Individuals cannot be deprived of liberty based on evidence that a prosecutor knows is false.[38] So the White House cannot

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[34] *See, e.g., Young*, 481 U.S. at 811 ("We may require a stronger showing for a prosecutor than a judge in order to conclude that a conflict of interest exists. Once we have drawn that conclusion, however, we have deemed the prosecutor subject to influences that undermine confidence that a prosecution can be conducted in disinterested fashion. If this is the case, we cannot have confidence in a proceeding in which this officer plays the critical role of preparing and presenting the case for the defendant's guilt. Furthermore, appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general."); *United States v. Siegelman*, 786 F.3d 1322, 1329 (11th Cir. 2015) ("*Young* categorically forbids an interested person from *controlling* the defendant's prosecution…") (emphasis in original).

[35] *See, e.g.*, *Young*, 481 U.S. at 815 (Blackmun, J., concurring) (explaining that "due process" mandates "a disinterested prosecutor").

[36] *See, e.g.*, *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967) ("We think the conduct of this prosecuting attorney in attempting at once to serve two masters, the people of the Commonwealth and the wife of Ganger, violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment.").

[37] *See United States v. Robison,* 644 F.2d 1270, 1273 (9th Cir. 1981) ("In vindictive prosecution cases, it is the Government's attempt *or threat to* 'up the ante' by bringing new or more serious charges in response to the exercise of protected rights that violates the due process guarantee. That practice is proscribed to prevent prosecutors from chilling defendants' exercise of procedural rights through the *threat* that more severe or additional charges will be brought in retaliation.") (emphases added); *United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."); *Blackledge v. Perry*, 417 U.S. 21, 28 (1974) ("Due process of law requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered appellate process."); *United States v. Bourque*, 541 F.2d 290, 293 (1st Cir. 1973) ("[P]ersonal vindictiveness on the part of a prosecutor or the responsible member of the administrative agency recommending prosecution would also sustain a charge of discrimination.").

[38] *See Hurt v. Wise*, 880 F.3d 831, 841 (7th Cir. 2018) ("The Fourteenth Amendment's Due Process Clause . . . forbids the state from depriving a person of liberty (including by pre-trial detention) based on manufactured evidence."); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (due process "cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."); *cf. Albright v. Oliver*, 510 U.S. 266, 286 (1994) (Kennedy, J., concurring in the

intervene in a single-party manner to order the Justice Department to take action based on what the Department believes to be false or perjured evidence.

2. The Equal Protection Clause prohibits arbitrary or discriminatory treatment of specific parties.

The Fifth Amendment—which precludes the federal government from denying to any person the equal protection of the laws[39]—also restricts the White House from improperly intervening in single party matters to order the prosecution of disfavored persons or groups or the non-prosecution of favored ones.[40]

Regardless of a particular individual's race or sex, the government cannot treat one person worse than others without a rational justification. Unsurprisingly then, Supreme Court precedents "have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).[41]

Thus, it would be unconstitutional under the Fifth Amendment for the White House to irrationally or maliciously order the Department of Justice to use its law-enforcement powers against any specific party or individual.[42] Although a law enforcement agency is "necessarily afforded wide discretion in performing [its] duties, that discretion does not extend to discriminating against or harassing people."[43] Accordingly, if the White House decides to wield its power against an individual "merely because" the President "harbors a malignant animosity toward

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judgment) ("[I]f a State did not provide a tort remedy for malicious prosecution, there would be force to the argument that the malicious initiation of a baseless criminal prosecution infringes an interest protected by the Due Process Clause and enforceable under § 1983.").

[39] *See Bolling v. Sharpe,* 347 U.S. 497, 499 (1954) (employing doctrine of "reverse incorporation" to apply Fourteenth Amendment equal protection to the District of Columbia through the Fifth Amendment's due-process clause); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213–18 (1995).

[40] *See Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (unequal pattern of enforcement against Chinese laundries violated equal protection); *United States v. Alleyne,* 454 F. Supp. 1164, 1174 (S.D.N.Y. 1978) (ordering hearing to investigate claim that black defendant was singled out for environmental enforcement because of his race).

[41] Such claims require that there be "clear standard[s]" for judging whether individuals have been intentionally treated differently." *Engquist v. Or. Dep't of Agr.*, 553 U.S. 591, 602 (2008). *Compare Caesars Mass. Mgmt. Co LLC v. Crosby*, 778 F.3d 327, 337 (1st Cir. 2015) (no class-of-one claim where executive had "virtually plenary discretion") *with Analytical Diagnostic Labs v. Kusel*, 626 F.3d 135, 142 (2d Cir. 2010) (class-of-one claim available when regulatory agency "[did] not possess unfettered discretion").

[42] *See Geinosky v. City of Chi.*, 675 F.3d 743, 747 (7th Cir. 2012).

[43] *Id.*; *see also Hilton v. City of Wheeling*, 209 F.3d 1005, 1007 (7th Cir. 2000).

him, the individual ought to have a remedy in federal court."*Esmail v. Macrane*, 53 F.3d 176, 179 (7th Cir. 1995).[44]

3. The First Amendment prohibits retaliation based on speech or political activity.

Governmental retaliation against individuals for expressing disfavored views or for participating in the political process implicates core values protected by the First Amendment.[45] Accordingly, "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." *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

Because the Government cannot base a prosecution on an individual's exercise of their First Amendment rights, "it is possible to [bring] an action for selective prosecution . . . if the government's motivation was an unconstitutional one—e.g., if the reason for selecting the particular person charged was to chill the exercise of that person's First Amendment rights." *United States v. Vazquez*, 145 F.3d 74, 82 n.5 (2d Cir. 1998) (Calabresi, J.).[46] And the same is true if the Government chooses to investigate someone in retaliation for First Amendment protected speech or association.[47] Therefore, it would violate the First Amendment for the White House to intervene in a specific-party matter in order to respond to political participation or discourage First Amendment protected speech or association.

II. The Justice Department Maintains Key Structures and Procedures to Uphold the Constitutional Principles Described Above; the White House Lacks these Safeguards, Creating a Serious Risk of Unconstitutionality When It Interferes in a Specific-Party Matter.

As the prior Part describes, Article II does not grant the President the absolute right to use the Justice Department as he pleases. Just the opposite, in fact: Article II's Take Care Clause indicates that others should enforce the law, and places a faithfulness requirement on the President, requiring a commitment to the rule of law and prohibiting actions motivated by personal, pecuniary, or corrupt considerations. The First and Fifth Amendments to the Constitution further circumscribe the White House's power to intervene in specific enforcement actions

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[44] *See also Burt v. City of N.Y.*, 156 F.2d 791 (2d Cir. 1946) (Hand, J.).

[45] *See Elrod v. Burns*, 427 U.S. 347, 359 (1976) (plurality).

[46] *See also United States v. Crowthers*, 456 F.2d 1074, 1080 (4th Cir. 1972).

[47] *See Anderson v. Larpenter*, No. 16-13733, 2017 WL 3064805, at *12 (E.D. La. 2017), *appeal dismissed*, No. 17-30666, 2017 WL 7689601 (5th Cir. Sept. 22, 2017) ("[A] 'person of ordinary firmness' would face a considerable chill—perhaps even to the point of a freeze—if the consequence of speaking up and speaking out about public officials was the search of one's home and seizure of one's personal property by law enforcement.").

by requiring a regularity of process, by barring the White House from arbitrarily or vindictively singling out parties for special treatment, and by prohibiting actions that target parties based on their free expression or participation in the political process.

Administrations led by both parties have long understood these restrictions and reacted to them by carefully structuring not only the White House-DOJ relationship, but also the relative institutional capacities of those two entities so that each could perform its constitutional responsibilities faithfully. The DOJ was founded in 1870. Since that time, the White House and DOJ have developed different staffing, structures, expertise, and governing policies that reflect a deeply considered view of the President's constitutional role in law enforcement. Examining those structures and capabilities is instructive for two reasons: ***first***, it confirms the view outlined above that the Constitution places real limitations on the President's ability to intervene in specific law-enforcement matters; and ***second***, it demonstrates that the White House—quite unlike the DOJ—is institutionally ill-equipped to engage directly in law enforcement without running afoul of those constitutional limitations. The White House simply is not structured to intervene in specific-party matters, and its doing so risks partisan favoritism and arbitrary, unequal justice—both of which run contrary to the fundamental American belief that all Americans are entitled to equal justice under the law.

Indeed, it is because of these key institutional differences that we can and should presume that (outside of certain narrow categories) White House intervention in a specific enforcement matter is constitutionally problematic. That is, we should not start with the assumption that the White House is taking care to faithfully execute the law—and acting in accord with the Bill of Rights—when it intervenes in a specific matter. Rather, such interventions are so discordant with the procedures developed to safeguard constitutional enforcement of the laws that they are presumptively problematic and the White House has a burden to show why they are appropriate (again, other than in narrow categories described below).

A. The Justice Department is institutionally structured to handle specific-party enforcement matters, while the White House is not.

Four institutional characteristics of the Justice Department—statutory authorization, political insulation, subject-matter expertise flowing from scale and organizational structure, and standardized policies and practices—make the Justice Department institutionally superior to the White House for handling specific-party matters.

1. The Justice Department is statutorily directed and authorized to handle and litigate enforcement matters, while the White House is not.

As described above, the Take Care Clause does not direct the President to personally enforce the law. The Departments are set up to do that. The Justice Department's mission is to "enforce the law and defend the interests of the United

States according to the law; . . . to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans."[48] This mission includes enforcement power over specific individuals and matters. The Department's authorizing statute explicitly "***reserves*** 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," unless Congress says otherwise. 28 U.S.C. § 516 (emphasis added). And the statute expressly allocates the authority to litigate enforcement matters among the Justice Department's major players.[49] Thus, when Justice Department lawyers appear in court, they do so on behalf of "the United States" and not on behalf of any one politician or political party.

The Supreme Court has repeatedly recognized that litigating decisions are to be made by prosecutors in the Justice Department. 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." 517 U.S. 456, 464 (1996). Notably, the Court did not say the President has such discretion—only that Justice Department officials do. And as the Court explained, Justice Department 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.'" *Id.* (citing the Take Care Clause and 28 U.S.C. §§ 516, 547). The Court expressed no skepticism that it was proper for Congress to place such decisions in Justice Department officials' hands rather than the President's.[50]

In an earlier decision, *United States v. Nixon*, the Court likewise observed that, "[u]nder the authority of Art. II, s 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government." 418 U.S. 683, 694 (1974) (citing 28 U.S.C. § 516). In that case, the Court explained that the Attorney General, acting pursuant to § 516, 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." *Id.* at 693.

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[48] *See* U.S. Department of Justice, *About DOJ,* https://www.justice.gov/about (last visited Mar. 6, 2018).

[49] *See* 28 U.S.C. §§ 535, 540, 540A, 540B (granting the Attorney General and the FBI investigative or prosecutorial authority in criminal matters involving government officials); 28 U.S.C. § 547 (granting United States Attorneys the power to litigate); 28 U.S.C. § 566 (granting United States Marshals the power to enforce court orders); 28 U.S.C. § 594 (granting independent counsel the power to prosecute and litigate).

[50] In an earlier case on enforcement discretion in civil matters, also referencing the Take Care Clause, the Court noted that "an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Again, the decision belonged to the prosecutor, not to the President.

Instead, the Court concluded that such decisions had been validly assigned by Congress to Justice Department officials.

In contrast to the Justice Department, the White House has no statutory power to litigate specific-party enforcement matters. The word "***reserved***" in § 516 indicates that the Justice Department is exclusively empowered to litigate when the United States is a party. This comports with our common-sense understanding about the realities of running the government. The White House has a whole country to run. It generally would make no sense for the White House to involve itself in specific-party enforcement matters.

2. The Justice Department's staff is insulated from partisan politics, while the White House's staff is not.

The Justice Department is staffed almost entirely by individuals who are either civil servants or go through a Senate confirmation process. The great majority of the Department's 100,000-plus-strong workforce consists of attorneys, investigators, and professional staff who were hired based on non-partisan and non-ideological factors and who serve the Department and the United States through Administrations of both parties.

These civil servants work under politically appointed leadership at the Department. Those at the top of the hierarchy, including the Attorney General, Deputy Attorney General, Solicitor General, head of the Office of Legal Counsel, heads of the litigating Divisions, heads of the investigating divisions, and all U.S. Attorneys go through the Senate confirmation process. That means that Congress can assess the qualifications and impartiality of these officials before they become involved in specific-party enforcement matters. In his confirmation hearing, now-Attorney General Sessions assured the Judiciary Committee that "[t]he Office of the Attorney General of the United States is not a political position, and anyone who holds it must have total fidelity to the laws and the Constitution of the United States."[51]

In contrast, very few people on the White House staff are either civil servants or Senate-confirmed. The core White House staff turns over almost entirely with each new President (if not sooner); lawyers within the White House Counsel's Office are selected by the President and serve at his pleasure. Nearly every White House employee may be hired or fired based on the President's political considerations. The White House Counsel's office represents the President and his office, not the United States.

None of this is to cast aspersions on those who work in the White House. They have important roles to play in advising and assisting the President in the execution of his constitutional duties. They are—by design—meant to be entirely

[51] Mike Levine, *Sen. Jeff Sessions' Confirmation Hearing: The Key (and Controversial) Moments*, ABC News (Jan. 10, 2017), http://abcnews.go.com/Politics/jeff-sessions-dismisses-racism-claim-hints-trump-justice/story?id=44667596.

dependent on the President so as to protect the institutional independence of the Office of the President. But White House employees' roles are markedly different from that of the attorneys and officials serving in the Justice Department.

3. The Justice Department's size, scale, and structure give it superior subject-matter expertise and the ability to handle specific-party matters with a regular and consistent process, all of which the White House lacks.

The Justice Department is organized and scaled to handle specific-party enforcement matters. It has structured its workforce into dozens of investigative and litigating units. As a result, the Department's employees have developed deep subject-matter expertise in the matters that it litigates; and that expertise helps ensure that matters are handled in a fair and consistent fashion.

For example, the vast majority of the Department's criminal cases are handled by 93 U.S. Attorney's Offices spread across the country and staffed by career prosecutors under a single political appointee. This structure ensures that criminal cases are handled by experienced career, non-partisan prosecutors, and that the criminal law is enforced in a uniform matter in each judicial district.

In addition, the Justice Department has created specialized units to handle cases involving certain topics and subject matters.[52] Take the Antitrust Division, for example. It handles antitrust merger reviews and enforcement activity across the country. It is divided into different sections, which oversee specific sectors and industries. So, the very same supervisors, lawyers, and even economists will work on all antitrust matters involving a particular industry. This leads to specialized knowledge about the governing legal standards and enables the Department to apply those standards even-handedly and consistently. Several other such units exist—for example, the Criminal Division has sections focusing on organized crime, computer crime, and public integrity; the Civil Rights Division handles civil and voting rights cases across the country; and the same is true of the Environmental and Natural Resources Division in cases within its area of expertise.

In contrast to all this, there is a small number of lawyers within the White House—generally only a few dozen people at a time. Those lawyers do not cover geographic areas or enforcement matters in specific subject categories. Rather, the White House legal staff focuses on the policy issues that the White House is facing and performs in-house-counsel roles for the President and other White House employees.

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[52] To illustrate the range of specific offices, consider the Department's general organization chart, *available at* https://www.justice.gov/agencies/chart, or that for its Criminal Division, *available at* https://www.justice.gov/criminal/sectionsoffices/chart.

4. The Justice Department has adopted standardized processes and procedures to govern enforcement matters; the White House has not.

The Justice Department maintains—and in many situations makes public—an extensive set of rules and guidelines designed to ensure regularized and fair consideration of specific-party matters. These procedural guidebooks describe a wide range of scenarios that may arise; and they guide Department personnel on how to handle those scenarios. For example, the United States Attorneys' Manual provides a comprehensive set of guidelines for managing criminal cases;[53] the FBI's Domestic Investigations and Operations Guide provides a set of guidelines for performing domestic law-enforcement investigations;[54] and the Antitrust Division Manual provides a comprehensive guide for managing antitrust cases.[55]

In addition, the Department also regularly issues to the public additional guidance on how it will handle certain categories of enforcement matters.[56] These memoranda provide members of the public with notice about how the law will be applied and promote nationwide consistency. By setting forth in detail what standards the Department will apply and what its priorities (and non-priorities) will be, these memoranda ensure at least some degree of regularity and consistency across cases. In other words, the memos help the Department's officials treat like cases alike.

Those guidelines are then enforced by internal watchdogs at the Department—in particular, the statutorily created Office of Inspector General and Office of Professional Responsibility—that are set up to investigate and respond to complaints of wrong-doing by the Department's personnel. If, for example, the Department mishandles a specific-party investigation or prosecution, then these watchdogs can step in to provide oversight and correction in a public and transparent fashion.

In contrast, the White House maintains no such guidelines and safeguards. Precisely because the White House historically has strictly limited communications between the itself and the Justice Department, the White House has not developed a set of rules and guidelines to govern prosecutions. Developing and applying such

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[53] Office of the United States Attorneys, *U.S. Attorneys' Manual* (revised 1997), *available at* https://www.justice.gov/usam/united-states-attorneys-manual.

[54] Federal Bureau of Investigation, *Domestic Investigations and Operations Guide* (updated Oct. 16, 2013), *available at* https://goo.gl/9bcMB9.

[55] U.S. Department of Justice, *Antitrust Division Manual* (updated August 2017), *available at* https://www.justice.gov/atr/division-manual.

[56] *See*, e.g., Memorandum from James M. Cole, Deputy Attorney General, "Subject: Guidance Regarding Marijuana Enforcement," (Aug. 29, 2013), *available at* https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf ; Memorandum from Sally Quillian Yates, Deputy Attorney General, "Subject: Individual Accountability for Corporate Wrongdoing," (Sept. 9, 2015), *available at* https://www.justice.gov/archives/dag/file/769036/download.

rules and procedures is the role of the Justice Department, not the White House. As a result, if the White House were to start weighing in on specific-party matters, not only would it lack any sort of guidelines to ensure that it was treating like cases alike, but it also would lack any internal watchdogs to ensure that it is complying with those guidelines.

B. White House intervention in specific-party enforcement matters, in most types of cases, is likely to violate the Constitution.

As described above, key institutional features of the Justice Department are designed to ensure enforcement of the laws against specific parties in a manner consistent with constitutional requirements. And the White House lacks these features. As a result, White House intervention into the Justice Department's handling of specific-party matters risks violating the constitutional principles described in Part II, above. In many situations, it will both fall outside of the President's constitutional power and violate other constitutional commands for the White House to intervene in a specific enforcement matter. There is a narrow set of situations in which the Constitution permits such interventions—but only if the President is acting in a manner consistent with faithfully executing the laws and not for corrupt or self-interested reasons.

1. White House involvement in most types of specific-party matters is likely to conflict with one or more constitutional principles.

Recall the key constitutional principles described in Part I above:

- Article II requires the President to oversee the enforcement of the laws, not to undermine or subvert them. *Supra* I.A.
- The Take Care Clause, framed in the passive voice, envisions that the President will see that the law is faithfully executed by others, not enforce the law himself. *Supra* I.B.1.
- That Clause and the President's Oath require that he work to the best of his ability to defend and uphold the Constitution. These Clauses require the President to act faithfully—that is, in the national interest and not his own personal interest. *Supra* I.B.2.
- The Take Care Clause requires the President to enforce all of the laws enacted by Congress, including against his friends and allies, not to act on his own whims. *Supra* I.B.3.
- The Due Process Clause requires fair procedures and procedural regularity in enforcement matters. *Supra* I.C.1.
- The Equal Protection Clause prohibits arbitrary or discriminatory treatment of similarly situated parties. *Supra* I.C.2.
- The First Amendment prohibits government action that disfavors a party because of its speech, association, or political participation. *Supra* I.C.3.

In most types of cases, there is no reason for the White House to be involved in a specific-party matter. Since Congress has assigned enforcement duties to DOJ—which has the structure, staff, and expertise to perform this function—it is suspect for the White House to take over that role. Indeed, other than for a narrow set of cases (described below), it is hard to see how the President would be taking care to ensure faithful execution of the law to the best of his ability if he removes specific-party matters from a Department that is designed and statutorily directed to handle them. In most situations, then, White House involvement will be contrary to the President's constitutional role.

In addition, outside of narrow categories, White House involvement is likely to lead to unequal treatment, regardless of whether the White House is weighing in to support leniency for one party or calling for more stringent enforcement against another. White House involvement usually also deviates from standardized procedures that ensure due process, since the White House lacks DOJ's extensive systems and protocols in place to make decisions on specific cases. White House involvement also risks compounding the unequal treatment with arbitrary decision-making because the White House does not and cannot have the same deep perspective and experience on a given issue that the Justice Department has.

In addition, the White House's more political role and staffing creates a substantial risk of unconstitutional intervention implicating the First Amendment. This concern becomes greatly magnified if the White House were to intervene to either aid the President's friends and allies, on the one hand, or to punish his political or electoral opponents on the other. So too if the White House intervention is in a matter involving a media entity or otherwise implicating a party's exercise of First Amendment free-speech rights.

For all of these reasons, even if the White House is disinterested and appears to be operating with Constitutional faithfulness, there is a substantial possibility of a constitutional violation for the White House to intervene in a specific-party matter. That is so whatever the means of intervention. The constitutional interests are the same whether the President intervenes by way of his twitter account, a phone call to a DOJ employee from a White House official, or a White House-directed personnel move at DOJ made for the purpose of affecting a specific-party matter for corrupt or self-interested purposes. And those constitutional interests remain the same whether the White House is intervening for the purposes of pushing more aggressive enforcement action or more lenient action with respect to a specific party.

2. In narrow categories, White House involvement in specific-party matters may be constitutionally appropriate.

In some categories of cases, grounded in the President's specific constitutional duties, it is constitutionally appropriate for the White House to be involved in a specific-party enforcement matter—so long as that involvement is faithful and does not violate other constitutional provisions. We are aware of three such categories:

Specific cases that set generally applicable policy. As noted above, it is appropriate for the White House to be involved with setting generally applicable policies and priorities to enforce the laws Congress has enacted. In some situations—for example, in a case pending on appeal or if a party challenges a regulation or statute—a specific-party matter may determine generally applicable policy. In that situation, it may be appropriate for the White House to be involved.

National-security matters. The Constitution also grants the President certain responsibilities over national security and foreign policy. *See, e.g.*, *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2085-86 (2015) (holding that the President has exclusive power under the Constitution to recognize foreign states). Some specific-party enforcement matters may implicate these constitutional duties. For example, it *may* be appropriate for the White House to be involved in furtherance of the President's foreign policy and national security responsibilities 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.

Clemency. The Constitution specifically empowers the President to grant pardons for certain offenses. U.S. Const., Art. II § 2, cl. 1. Accordingly, it is appropriate for the White House to be involved in (indeed, to make) clemency decisions for specific individuals.

To be clear, however, the White House's authority to intervene in an enforcement matter is not unlimited in these categories—as we explain in the following section.

3. White House involvement in a specific-party matter based on the President's personal, financial, or partisan interests is never constitutionally permissible.

In all situations, including the narrow categories in which White House involvement in a specific matter may be appropriate, constitutional limitations still apply. In particular, White House intervention will never be constitutional if the President or other White House personnel are not acting faithfully in the national interest.

If the President or relevant White House staff is not disinterested in the matter, intervention is necessarily inconsistent with the President's constitutional obligations. Thus, for example, if the White House intervenes with DOJ seeking

leniency in an enforcement matter involving the President, his campaign, or his business interests, the action cannot be consistent with the President's Take Care Clause obligations. Just as the President lacks the power to self-pardon,[57] the President lacks the authority to order prosecutors and investigators to ignore presidential lawbreaking.[58] So too it will necessarily run afoul of the protections of the First Amendment, Due Process Clause, and Equal Protection Clause if the President or White House staff intervenes with the Justice Department in an enforcement matter to target the President's critics, electoral or political opponents, or business competitors.

4. The White House should follow careful procedures and policies to ensure that any interventions in specific-party matters are constitutionally permissible.

The preceding analysis demonstrates that whenever the White House intervenes in DOJ's handling of a specific-party matter, it risks violating the Constitution. For this reason, the President and other White House officials should exercise extreme care and caution before intervening on a specific-party matter. For 40 years, White Houses run by both Democrats and Republicans have issued and enforced policies that carefully regulate any contacts between White House and DOJ personnel, for example by requiring the involvement of White House lawyers. (Protect Democracy's March 2017 memorandum describes these in detail.) Close adherence to robust contacts policies are the most immediate line of defense against unconstitutional interventions in DOJ's handling of specific-party enforcement matters.

As described in the following section, however, when the White House fails to abide by these policies it falls to other institutions—DOJ, Congress, and the Courts—to protect these important constitutional safeguards.

III. DOJ officials, Congress, and the Courts Each Have a Role to Play in Preventing Improper White House Interference with DOJ's Handling of Specific Matters.

As explained above, except in narrow categories of cases, it will likely conflict with constitutional principles for the White House to intervene in DOJ's handling of specific-party enforcement matters. Yet President Trump persists in doing so—with potentially authoritarian consequences. Because we cannot count on the White House to stop the President's imprudent and unconstitutional conduct, we must

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[57] *See* Memorandum Opinion for the Deputy Attorney General from Mary C. Lawton, Acting Assistant Attorney General, "Presidential or Legislative Pardon of the President," O.L.C. (Aug. 5, 1974), *available at* https://www.justice.gov/file/20856/download [hereinafter *OLC Self-Pardon Memo*].

[58] *See* Daniel J. Hemel and Eric A. Posner, *Presidential Obstruction of Justice*, 106 Cal. L. Rev. (forthcoming), at 50 ("[I]f the president lacks the 'greater' power to self-pardon, then presumably he also lacks the 'lesser' power to obstruct an investigation of which he is a target.").

look to other institutions to fill the void and check President Trump's efforts. Thankfully, several institutions are well positioned to do so.

A. DOJ Officials

One line of defense against potentially unconstitutional presidential interference is the Justice Department itself. Officials throughout the Department—from the political leadership to line attorneys and investigators to the Department's internal watchdogs—have a critical role to play in standing up to the White House.

Resisting White House entreaties. First, the Department of Justice should ignore White House interventions on specific-party matters outside the narrow set of categories described above. If, for example, the President tweets or his staff secretary calls about looking into an antitrust action involving a specific party, the Department officials should simply ignore the outreach. The President may try to fire his political appointees for this, but civil servants are protected from retribution and so can resist.

Inspector General and Office of Professional Responsibility Oversight. Second, Justice Department officials should report any entreaties to the Department leadership and to internal watchdogs, including the Inspector General and the Office of Professional Responsibility (OPR). It violates DOJ policy and attorney rules of responsibility to act based on political considerations from the White House.[59] If a DOJ employee observes a fellow DOJ employee acting based on improper White House influence in a specific matter, there is an important role for both the OIG and OPR to play. These offices should investigate any and all instances where the White House seeks to interfere with the Justice Department handling of specific-party enforcement matters outside of the appropriate contours of DOJ's own White House contacts policy and the narrow set of cases where these contacts are permissible. DOJ officials who witness improper White House attempts to influence specific cases also should report those attempts to the relevant Congressional oversight committees.

B. Congress

The most powerful line of defense to White House meddling in specific-party matters is Congress. Congress has several tools to protect the independence of federal law enforcement—and should use them.

Oversight. The first tool is Congress's standard oversight powers. The Senate and House Judiciary Committees should investigate improper contacts between the White House and Justice Department involving specific matters,

[59] *See* Memorandum from Protect Democracy to Hon. Michael E. Horowitz and Robin C. Ashton (Jan. 4, 2018), *available a*t http://protectdemocracy.org/wp-content/uploads/2018/01/PD-letter-to-DOJ-IG-and-OPR-re-WH-interference-01042018.pdf.

issuing subpoenas if necessary. Those committees should call Justice Department and White House witnesses to testify on these issues.

Confirmations. The Senate's advice-and-consent power can help check White House interference. Senators occasionally ask nominees to the Justice Department questions about independence from the White House. Senators should continue to demand such commitments—both for nominees to the Justice Department and to the federal bench. In doing so, senators can signal that they will not confirm White House nominees so long as the White House continues to intervene in specific law-enforcement matters. That can provide a powerful check on improper White House actions.

Legislation. Congress should consider legislation to regulate White House contacts with the Justice Department to ensure compliance with the constitutional principles set forth above. That legislation could include clear prohibitions to ensure that there is no doubt about the proper lines; notice-and-reporting requirements so that Congress is aware of violations; and rights for private litigants to challenge improper White House interference. A potential model for such legislation is 26 U.S.C. § 7217, a reform born out of President Nixon's use of the IRS to target enemies for auditing. That statute makes it unlawful for specified executive-branch officials, including the President, to "request, directly or indirectly, any officer or employee of the Internal Revenue Service to conduct or terminate an audit or other investigation of any particular taxpayer with respect to the tax liability of such taxpayer." *Id*., § 7217(a) and (e). So too, Congress could permissibly regulate the situations in which the White House may interfere with DOJ's handling of specific-party enforcement matters.[60] Such legislation also could identify specific categories of cases (as described above) in which White House involvement is appropriate. Another more modest, but still useful, legislative approach has previously been approved by the Senate Judiciary Committee on a bipartisan basis. It would require reporting (and so permit oversight) of irregular contacts between the White House and DOJ.

Impeachment proceedings. Congress holds the power to pursue censure or impeachment proceedings. While not every improper White House intervention in the Justice Department's handling of a specific matter would rise to the level of an impeachable offense, some could. The articles of impeachment against President Nixon included the allegation that the President interfered "with the conduct of investigations by the Department of Justice of the United States, the Federal Bureau of Investigation, the office of Watergate Special Prosecution Force, and Congressional Committees." If the President were to interfere with an investigation directed at himself or if he were to order a DOJ investigation or enforcement

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[60] *See*, *e.g.*, S.1845, *Security from Political Interference in Justice Act of 2007*, S. Rept. 110-203, 110th Congress (Oct. 23, 2007), available at https://www.congress.gov/bill/110th-congress/senate-bill/1845/all-info (which, in various forms, either limited White House-DOJ contacts or required reporting to Congress).

against a political opponent, that conduct likewise would warrant impeachment proceedings. And the President's constitutional role would provide him no defense.[61] For all the reasons described above, the Constitution prohibits the President's interference in such matters.

C. The Courts

The final line of defense against unlawful presidential meddling in specific law enforcement matters is the courts. In many situations, there will be no case or controversy allowing an Article III court to consider the constitutionality of the President's interference with DOJ's handling of specific-party enforcement matters. But when presented with an appropriate case, courts should reject the idea that the President has an absolute right to do whatever he wants with the Justice Department in specific-party matters. While precedent for judicial enforcement of the Take Care Clause is modest,[62] there is ample precedent for judicial enforcement of other constitutional principles—including due process and equal protection—implicated by improper White House interference in party-specific enforcement matters.

Constitution is no defense to obstruction by the President. Federal courts should reject any attempt by the President to assert a constitutional defense to obstruction-of-justice liability for interfering with a DOJ enforcement matter.[63]

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[61] Professors Josh Blackman and Alan Dershowitz have argued that a President cannot be impeached for obstructing justice if he is exercising lawful Article II authority. *See, e.g.*, Josh Blackman, *Obstruction of Justice and the Presidency: Part I*, Lawfare (Dec. 5, 2017), https://www.lawfareblog.com/obstruction-justice-and-presidency-part-i ; Alan Dershowitz, *No Case for Obstruction of Justice Against Trump Would Be Constitutional*, https://www.realclearpolitics.com/video/2017/12/04/dershowitz_no_case_for_obstruction_of_justice_against_trump_would_be_constitutional_crisis.html. Both scholars therefore contend that President Trump cannot be impeached for firing FBI Director Comey. They are mistaken.

Professor Blackman concedes that violations of the presidential oath are a "per se ground for impeachment." *See, e.g.*, Josh Blackman, *Obstruction of Justice and the Presidency: Part II*, Lawfare (Dec. 12, 2017), https://www.lawfareblog.com/obstruction-justice-and-presidency-part-ii ("[S]elective persecution cannot comport with the law of the land. This action would amount to a high crime and misdemeanor.") [hereinafter *Part II*]. Firing the FBI Director in order to intervene in a specific-party enforcement matter therefore is a proper ground for impeachment because doing so violates the presidential oath by not "faithfully" enforcing the law. *See supra* Subsection I.B.2. That conclusion stands even if one accepts the dubious assertion that it would be unconstitutional to prosecute the President for obstruction because it would intrude on the President's foreign-affairs power and his power to fire principal officers. *See supra* Subsection I.B.3 (President's power over foreign affairs does not allow the President to contravene domestic law when Congress has overlapping authority to regulate); *infra* Section III.C (President is not constitutionally immune from obstruction liability).

In addition, we note that even Professor Blackman concedes that the President can be impeached for directing the prosecution of particular individuals. *See* Blackman, Part II.

[62] *See* Jack Goldsmith and John F. Manning, *The Protean Take Care Clause*, 164 U. Penn. L. Rev. 1835, 1837 (2016) (assessing Supreme Court precedent referencing the Clause).

[63] This paper does not address the question of whether a *sitting* President can be indicted.

As explained above, the President's executive power does not allow him to subvert the law through self-interested bad-faith enforcement or non-enforcement against specific parties. Therefore, the Constitution provides the President with no shield at all if he takes self-interested actions to protect his friends, supporters, and family from criminal prosecutions.[64]

Just as Congress can require "good cause" before the President may fire certain executive-branch employees, *see Morrison v. Olson*, 487 U.S. 654, 725 (1988), it can also circumscribe the President's authority to take actions on the basis of corrupt, self-interested motives—including through orders to executive-branch officials. The criminal obstruction-of-justice statute does just that. 18 U.S.C. § 1501 et seq. Therefore, courts should be absolutely clear that President can no more legally fire a prosecutor on the basis of presidential self-interest in a specific-enforcement matter than the President can legally fire a prosecutor on the basis of a presidential bribe.[65]

Allow discovery about White House interference. Because White House interference is relevant to a variety of constitutional and equitable claims and defenses, courts should not hesitate to permit discovery into the full extent of White House influence on DOJ's handling of an enforcement matter in litigation. The Justice Department is, of course, likely to insist that even if the White House improperly involved itself in the Department's consideration of a specific matter, the Department's enforcement action was still justified. But it is well accepted in various doctrinal contexts under the First, Fourth, Fifth, and Sixth Amendments that unconstitutional conduct in the course of an investigation or prosecution can invalidate an enforcement action; and it is equally well accepted that inequitable behavior during an enforcement matter may require dismissal. *See Heckler v. Comm'ty Health Servs.* 467 U.S. 51, 60–61 (1984). These doctrines arose to deter improper governmental conduct and could serve the same role in deterring improper White House involvement in specific Justice Department cases.

Breaching the presumption of regularity if the White House interferes. Various constitutional doctrines guard against unconstitutional selective enforcement. Those doctrines have lain dormant for nearly 50 years because every post-Watergate White House, until now, has abstained from trying to influence the Department of Justice inappropriately in specific-party manners. As a result, the courts—secure in the knowledge that federal prosecutions were being handled in a professional and non-partisan manner—have applied a post-Watergate "presumption of regularity" when analyzing claims of selective prosecution. *See, e.g.*, *Armstrong*, 517 U.S. at 464. As described above, *Armstrong* presumes that the

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[64] *Cf. OLC Self-Pardon Memo* ("[T]his raises the question whether the President can pardon himself. Under the fundamental rule that no one may be a judge in his own case, it would seem that the question should be answered in the negative.").

[65] *See* Hemel & Posner, *supra*, at 21 ("The president would commit bribery if he called off an investigation in exchange for a payment from a suspect.").

Attorney General and U.S. Attorneys are conducting their congressionally-assigned functions.

Now that President Trump has broken with post-Watergate precedent and has publicly instructed the Department of Justice to open politically motivated prosecutions of his political opponents, the presumption of regularity should be applied more sparingly. After all, the President should not benefit from post-Watergate precedents when he refuses to comply with post-Watergate norms; and courts especially should not defer to the good faith of a White House that refuses to comply with its own attorney's conclusion that contact prohibitions are necessary "*to ensure that DOJ exercises its investigatory and prosecutorial functions free from the fact or appearance of improper political influence*."[66] So in cases involving White House interference, courts should apply the following rule: when the White House weighs in on the Justice Department's handling of a specific-party matter, the presumption of regularity does not apply.[67]

Employing the Doctrine of Unclean Hands. The doctrine of unclean hands derives its name from the ancient maxim that "'he who comes into equity must come with clean hands.'" *Bartko v. S.E.C.*, 845 F.3d 1217, 1227 (D.C. Cir. 2017). The doctrine "requires that a party seeking equitable relief show that his or her conduct has been fair, equitable, and honest as to the particular controversy in issue." *Id.* "If a plaintiff does not act 'fairly and without fraud or deceit,' the unclean hands doctrine affords a defendant a complete defense." *Id.* And *Heckler v. Community Health Services* permits equitable defenses to be asserted against the government when the public's interest in law enforcement is "outweighed" by the "countervailing interest of citizens in some minimum standard of decency, honor,

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[66] *See* Memorandum from Donald F. McGahn II to all White House Staff (Jan. 27, 2017). *available at* https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000 (emphasis in original).

[67] See, e.g., *United States v. Hoover*, 727 F.2d 387, 391 (5th Cir. 1984) (use of "unusual or extraordinary procedures" can provide evidence of unlawful selective prosecution); *United States v. Ojala*, 544 F.2d 940, 943 (8th Cir. 1976) ("Appellant also made a convincing showing that his case did not emanate from a routine processing through the Collection Division or Audit Division of the Internal Revenue Service but was rather initiated in the Intelligence Division immediately following his public announcement. We think appellant satisfied the first prong of the test for a prima facie showing of selective prosecution." (footnote omitted)); *United States v. Falk*, 479 F.2d 616, 622 (7th Cir. 1973) (en banc) ("We think the unsolicited reply is itself some evidence that Falk was singled out for special prosecution. Apparently in an effort to show that his own participation in the process of deciding to prosecute was inconsequential, the Assistant noted that the indictment against Falk was approved not only by him, but also by the Chief of the Criminal Division of the United States Attorney's Office, the First Assistant United States Attorney, the United States Attorney and the Department of Justice in Washington. It is difficult to believe that the usual course of proceedings in a draft case requires such careful consideration by such a distinguished succession of officials prior to a formal decision to prosecute."); *United States v. Haggerty*, 528 F. Supp. 1286, 1292-95 (D. Colo. 1981) (departure from normal prosecutorial process and unusual involvement from Washington D.C. limiting local discretion suggests unconstitutional selective prosecution); *United States v. Steele*, 461 F.2d 1148, 1151–52 (9th Cir. 1972) (no presumption of regularity in case where government followed "a discretionary procedure not followed with any other offenders").

and reliability in their dealings with their Government." 467 U.S. 51, 60-61 (1984). As a result, if White House intervention in a specific-party matter is "'egregious'" and "'the resulting prejudice to the defendant rise[s] to a constitutional level,'" *Bartko*, 845 F.3d at 1227—as when the White House intervenes in a specific-party matter to punish a political opponent—a court should dismiss the action under the doctrine of unclean hands.

Applying the presumption of vindictiveness in select cases. Courts might also apply a presumption of vindictiveness when the White House intervenes in a specific-party matter outside of that narrow category of cases in which the White House has a constitutional role to play. This approach would be consistent with Supreme Court case law. Though the Court has cautioned against "adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting," *United States v. Goodwin*, 457 U.S. 368, 380 (1982), it has recognized that a presumption of vindictiveness is nonetheless appropriate when the prosecutor has a "personal stake" in a trial, *id.* at 383, that creates the *appearance*[68] of "a reasonable likelihood of vindictiveness." *Id.* at 373; *see, e.g.*, *United States v. Meyer*, 810 F.2d 1242, 1247 (D.C. Cir. 1987) (applying presumption in pretrial setting after government took a highly coercive position after learning, among other things, defendants planned to raise a First Amendment defense), *vacated*, 816 F.3d 695 (D.C. Cir. 1987), *reinstated*, 824 F.2d 1240 (D.C. Cir. 1987).

Specific White House involvement in a potential prosecution creates an appearance of vindictiveness. Not only does such a process short-circuit the Justice Department's standardized procedures for ensuring that prosecutions and enforcement actions[69] are brought only when appropriate, but government officials might reasonably believe that their jobs depend on following the White House's wishes. *Cf. United States v. Slatten*, 865 F.3d 767, 799 (D.C. Cir. 2017) (noting effect of Vice President Biden's comments on a case, and observing that a "high-profile" matter . . . has "far greater potential to give rise] to a vindictive motive" than a garden-variety civil case). Once a presumption of vindictiveness applies, the government then has the burden of coming forward with objective information demonstrating that it is not acting vindictively. *North Carolina v. Pearce*, 395 U.S. 711, 725–26 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989); *Texas v. McCullough*, 475 U.S. 134, 141 (1986). Applying a presumption preserves the White House's ability to weigh in specific-party manners when special circumstances are present, while at the same time preventing the White House from intervening on the basis of an unconstitutional conflicted or corruptive motive.

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[68] The presumption of vindictiveness is triggered by an "appearance" of vindictiveness out of concern that the appearance of vindictiveness can unconstitutionally deter the exercise of constitutional rights. *See, e.g.*, *Blackledge v. Perry*, 417 U.S. 21, 28 (1974).

[69] Though the vast majority of vindictiveness cases are criminal matters, the doctrine is rooted in the Due Process Clause, which applies in both civil and criminal cases. Accordingly, the doctrine also has been considered in civil enforcement actions. *See, e.g.*, *Envt'l Protection Servs. v. EPA*, 353 F. App'x 448, 449 (D.C. Cir. 2009).

Conclusion

President Trump's claim to have the power to use the Justice Department however he likes has no basis in the Constitution. In fact, the Constitution imposes a series of obligations and constraints on the President's interactions with the Justice Department. Only in limited circumstances is it constitutionally permissible for the President or White House staff to intervene in the Justice Department's handling of a specific-party enforcement matter. And they may never do so when acting to further the President's personal or partisan interests. To avoid constitutional violations, the White House should rigorously police interactions between White House and DOJ personnel on specific-party matters. When the White House fails to do so, DOJ officials, Congress, and the courts should all take actions to uphold the Constitution.