DEPOLITICIZING FEDERAL PROSECUTION

BRUCE A. GREEN AND REBECCA ROIPHE†

ABSTRACT

There is broad agreement that federal prosecutors should not use their power to pursue partisan political objectives, but there is stark disagreement about how to prevent them from abusing their power in this way. Geoffrey Berman, a former U.S. Attorney for the Southern District of New York, recently argued that U.S. Attorneys should have complete autonomy and independence from the Attorney General and administration. Attorney General Bill Barr, in contrast, has insisted that Attorneys General should have full control over prosecutors so the administration can be held politically accountable. Neither view fully addresses the problem. Barr minimizes the significant risk that the Attorney General will undermine the interests of justice by doing the bidding of the administration, and Berman ignores the possibility that U.S. Attorneys will act on their own inappropriate political bias.

We propose a system of checks and balances in which prosecuting a politically sensitive case would require approval from both the Attorney General and the U.S. Attorney. Recognizing Berman's argument that the greatest threat of politicization comes from the Attorney General, we offer two additional proposals to help preserve the independence and integrity of U.S. Attorneys. First, Congress should clarify that the President and Attorney General lack the authority to remove and replace U.S. Attorneys who are appointed by district courts prior to the confirmation of presidential nominees; and second, the Attorney General should be restricted from handpicking partisan prosecutors to oversee politically charged investigations and prosecutions. While there is no simple solution to the politicization of federal prosecution, restructuring prosecutorial and political power within the DOJ to reduce partisanship, both real and apparent, is, as Berman recognizes, an important component.

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† Bruce A. Green is the Louis Stein Chair and the Director of the Louis Stein Center for Law and Ethics at Fordham Law School. Rebecca Roiphe is the Joseph Solomon Distinguished Professor of Law at New York Law School.

INTRODUCTION

Geoffrey Berman was the U.S. Attorney for the Southern District of New York (SDNY) during much of the Trump Administration, although he was never nominated and confirmed for the position.[1] Rather, Berman was appointed on an interim basis by the Attorney General and then reappointed by the district court.[2] Berman has now published an account of his experience in office.[3] Prosecutors' tell-all accounts are becoming increasingly common,[4] but this one is unusual in that it was written to settle a score—and not with a criminal defendant. Rather, Berman takes on the Department of Justice (DOJ) and its head, Attorney General Bill Barr.[5] Berman's claim is that Barr repeatedly interfered in the SDNY's cases "in ways that would benefit or please Trump"[6]—a credible complaint given Barr's role in other politically charged federal prosecutions involving individuals close to President Trump.[7]

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1. Benjamin Weiser, *With No Nomination From Trump, Judges Choose U.S. Attorney for Manhattan*, N.Y. TIMES (Apr. 25, 2018), https://www.nytimes.com/2018/04/25/nyregion/geoffrey-berman-us-attorney-manhattan.html.

2. *Id.*

3. GEOFFREY BERMAN, HOLDING THE LINE (2022).

4. *See generally, e.g.*, PREET BHARARA, DOING JUSTICE: A PROSECUTOR'S THOUGHTS ON CRIME, PUNISHMENT, AND THE RULE OF LAW (2019); LOTHAR R. GENGE, IN THE PURSUIT OF JUSTICE: A PROSECUTOR'S MEMOIR (2019); TERRY JONES, MR. PROSECUTOR (2019); ROBERT B. FISKE, JR., PROSECUTOR DEFENDER COUNSELOR (2014); JOHN KROGER, CONVICTIONS: A PROSECUTOR'S BATTLES AGAINST MAFIA KILLERS, DRUG KINGPINS, AND ENRON THIEVES (2008); MARK POMERANTZ, PEOPLE VS. DONALD TRUMP: AN INSIDE ACCOUNT (2023).

5. Barr's own account of his leadership is unconcerned with Berman. WILLIAM P. BARR, ONE DAMN THING AFTER ANOTHER: MEMOIRS OF AN ATTORNEY GENERAL (2022). For a different take on Barr's leadership, see ELIE HONIG, HATCHET MAN: HOW BILL BARR BROKE THE PROSECUTOR'S CODE AND CORRUPTED THE JUSTICE DEPARTMENT (2021).

6. BERMAN, *supra* note 3, at 302. The following quote from the book's Preface, included on the book's back cover, makes this theme evident: "Throughout my tenure as U.S. attorney, Trump's Justice Department kept demanding that I use my office to aid them politically, and I kept declining—in ways just tactful enough to keep me from being fired." *Id.* at x.

7. For example, Barr overrode a sentencing recommendation for President Trump's friend and advisor, Roger Stone, insisting on a more lenient sentence. Katie Benner, Sharon LaFraniere,,& Adam Goldman, *Prosecutors Quit Roger Stone Case After Justice Dept. Intervenes on Sentencing*, N.Y. TIMES (July 8, 2020), https://www.nytimes.com/2020/02/11

The dramatic climax of Berman's book, and its most revelatory chapters, revolve around two related events. First, Barr interfered with the prosecution of Turkey's leading bank, evidently to avoid embarrassment for the President of Turkey, who was momentarily a favorite of President Trump. Second, after Berman balked at Barr's interference, Barr attempted to persuade him to take another job and fired Berman when he refused. Barr's apparent objective was to replace Berman with a more subservient lawyer who would protect President Trump's Republican allies and pursue Democrats instead. Berman's account of both events raises the question of what, if anything, should be done to minimize the risk that federal prosecutorial power will be used toward partisan political ends. Berman concludes his book with some suggestions, chief among them being that structural changes should be made to protect the independence of United States Attorneys, like Berman, from the DOJ.[8]

As Attorney General, Bill Barr promoted the opposite view of how federal prosecutorial power should be exercised to minimize politicization and other abuses. He insisted that, "When something goes wrong at the Department of Justice, the buck stops at the top[.] And because I am ultimately accountable for every decision the department makes, I have an obligation to ensure we make the correct ones . . . . Anything less is an abdication."[9] Barr challenged his audience to: "Name one successful organization where the lowest-level employees' decisions are deemed sacrosanct. There aren't any[.]"[10] Although Barr was speaking about the DOJ's internal organization, not its relationship to the President, his reasoning echoes the views proponents of a unitary executive hold: namely, that a top-down structure is the only way to facilitate public accountability.[11]

/us/politics/roger-stone-sentencing.html. Barr also directed prosecutors to drop a criminal case against President Trump's former National Security Advisor, Michael Flynn. Aruna Viswanatha,& Sadie Gurman, *Justice Department to Drop Case Against Michael Flynn*, WALL ST. J. (May 7, 2020, 10:38 PM), https://www.wsj.com/articles/justice-department-to-drop-case-against-mike-flynn-11588878267.

8. *See* BERMAN, *supra* note 3, at 285–88. Berman's principal recommendation is "to devolve more power to the nation's ninety-three US attorney's offices" by limiting the grounds on which indicted defendants can appeal to Main Justice, denying Main Justice the authority to overturn a U.S. Attorneys Office's decision not to indict and generally scaling back reporting to Main Justice. *Id.* at 286. Additionally, Berman argues that "[t]he most powerful way to depoliticize [the] DOJ would be for Congress to affirm that prosecutors can apply obstruction statutes to officials—up to the president—who try to corruptly interfere in charging decisions for political purposes." *Id.* at 287. Finally, he argues that presidents should be allowed to appoint U.S. Attorneys on an interim basis only at the beginning of their term, so that neither the President or Attorney General can "foist an outsider on a district to stop a pending investigation or indictment." *Id.* at 287–88.

9. James Hohmann, *The Daily 202: Comparing Prosecutors to Preschoolers, Barr Defends Political Interference at the Justice Department*, WASH. POST (Sept. 17, 2020), https://www.washingtonpost.com/politics/2020/09/17/daily-202-comparing-prosecutors-preschoolers-barr-defends-political-interference-justice-department; *see also* Katie Benner, *Barr Defends Right to Intrude in Cases as He Sees Fit*, N.Y. TIMES (Sept. 22, 2020), https://www.nytimes.com/2020/09/17/us/politics/william-barr-justice-department-authority.html.

10. Hohmann, *supra* note 9.

11. *See* STEPHEN G. CALEBRESI,& CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3–36 (2008) (arguing that a unitary executive is necessary to ensure public accountability).

Of course, the DOJ is not like private organizations. The autonomy of U.S. Attorneys and their subordinates is both grounded in history and a logical antidote to an Administration's effort to meddle in prosecutors' work.[12] As we have argued elsewhere, political accountability does not work well as a means of holding federal prosecutors responsible for their decisions.[13] But Barr has a point that the President is more accountable for prosecutorial decisions when the Attorney General takes both control and responsibility.

Even if one were skeptical that concentrating power in the Attorney General promotes public accountability, distributing power downward to the U.S. Attorneys and subordinate prosecutors fails to address concerns that prosecutors other than the Attorney General might let their own partisan political ties affect their decisions. Between the two, a local U.S. Attorney is less likely than the Attorney General or other high-ranking DOJ political appointee to be motivated by political aspirations or connections. But prosecutorial decision-making processes should protect against both threats.

Recognizing that the problem of politicized federal prosecutions is not confined to the DOJ's leadership, we offer several structural responses. These suggestions are consistent with Berman's intuition that the Attorney General poses the most significant threat of partisanship and that an essential response is to enhance the role of the U.S. Attorneys, to preserve their independence, and to promote their nonpartisanship. At the same time, these suggestions acknowledge the importance of political accountability and the reality that a prosecutor at any level could be improperly motivated by politics.

In Part I, we begin by describing the problem of political partisanship in federal criminal prosecutions. In Part II, we follow with a discussion of existing mechanisms and proposals to address this problem. We then make three further proposals. Part III sets forth our main argument to restructure decision-making so that the Attorney General and U.S. Attorneys serve as checks on each other in politically charged cases. To minimize the risk of politicization from an Administration as well as improper partisan motivation by U.S. Attorneys, Part III advocates a system of checks preventing both the Attorney General and U.S. Attorneys from bringing criminal charges in a case with strong partisan interest or implications without approval from the other.

Recognizing Berman's argument that the Attorney General poses the greatest threat of politicization, in Part IV we make two further proposals to ensure that U.S. Attorneys can serve as an effective check on an Administration. First, we argue that Congress should protect U.S. Attorneys'

12. Bruce A. Green,& Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 38–69 (2019).

13. *Id.* at 69–74; *see also* Bruce A. Green,& Rebecca Roiphe, *Who Should Police Politicization of the DOJ?*, 35 NOTRE DAME J. L. ETHICS,& PUB. POL'Y 671, 676 (2021).

independence by clarifying that the President and Attorney General lack authority to remove and replace U.S. Attorneys appointed by district courts prior to the confirmation of presidential nominees. Second, we propose limiting the Attorney General's ability to handpick partisan prosecutors to oversee politically charged investigations and prosecutions. While there is no simple solution to the politicization of prosecution, restructuring prosecutorial and political power within the DOJ to reduce both real and apparent partisanship is, as Berman recognizes, an important component.

I. POLITICAL PARTISANSHIP IN FEDERAL CRIMINAL PROSECUTIONS

In 1940, Attorney General (and future Supreme Court Justice) Robert Jackson reminded U.S. Attorneys that "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America," and that prosecutors' power is largely a function of their "tremendous" discretion to decide whom to investigate, charge, and prosecute.[14] Prosecutors are not obligated to prosecute every possible case, but are expected "to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain."[15] The criminal process relies on the professional judgment of prosecutors to exercise care in deciding when to make a charge, to consider relevant factors, and to treat like cases alike.

Although Jackson called on prosecutors to adopt "as nearly as possible, a detached and impartial view of all groups in [the] community,"[16] that is easier said than done. Many things may distort prosecutors' discretionary judgment. Conscious and unconscious biases, personal and professional ambitions, and ideological or partisan sympathies all may influence a prosecutor's decision whether to pursue a criminal case.[17] We largely rely on prosecutors' ethical obligations, norms, and traditions of the office along with structural safeguards to protect the public from prosecutors who rely on such improper considerations.[18]

Our focus is on one particular problem: prosecutors' potential to abuse their power toward political ends—either their own or others'. The politicization of criminal prosecution poses essentially two problems, which may require different responses. The first problem is that the government lawyers making charging decisions or other discretionary decisions will be swayed by their *own* partisan political interests; the other is that those decision makers will be swayed by *others* who are pursuing partisan political interests. The first is a greater problem for the Attorney General, U.S. Attorneys, and other high-up political appointees than for subordinate prosecutors, especially career prosecutors. The second is a greater

14. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L.,& CRIMINOLOGY 3, 3 (1940).
15. *Id.* at 5.
16. *Id.*
17. *See* Bruce A. Green,& Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 467–87 (2017).
18. *Id.*

problem for subordinate prosecutors who are more susceptible to external influence.

These were among Jackson's principal worries. He did not cite specific historical examples but noted generally that the public tended to "cry for the scalps" of those with disfavored political views, and that those in power tended to regard people "who would bring about a change of administration" as "subversive."[19] Jackson underscored the risk that prosecutors might target individuals whose "real crime [is] that of being unpopular with the predominant or governing group, [or of] being attached to the wrong political views."[20] He found some comfort in new federal law—the Hatch Act—which forbid federal prosecutors "from engaging in political activities."[21]

Because a large part of federal criminal jurisdiction is directed at election and government integrity, the opportunities for politicized prosecution are considerable, and as Jackson recognized, it is important to vigorously enforce "laws which protect our national integrity and existence."[22] Moreover, prosecutions may have political implications because of the defendant's identity or for other reasons unrelated to the specific criminal law at issue.[23] While Berman is right that the threat of politicization is greater the closer the prosecutor is to the Administration, U.S Attorneys often have political aspirations, and even line prosecutors or Federal Bureau of Investigation (FBI) agents can have strong partisan ties that might improperly affect charging decisions.

One can only guess how often or extensively partisan political considerations have influenced federal and state prosecutors' decisions over the past two centuries. But for a combination of reasons, it is certain that there is a considerable potential for political influence. First, the decision whether to investigate or prosecute a case where there is sufficient evidence is largely discretionary, and the standard of proof required to justify a prosecution—probable cause—is low.[24] Further, prosecutors exercising discretion may legitimately take into account a variety of considerations.[25] Prosecutors are not obligated to explain their decisions, and may even be restricted from doing so, making it difficult to detect when a prosecutor has relied on improper ones.[26]

There is also considerable potential for outside partisan influence on prosecutors' decision-making. Although contemporary DOJ policies

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19. Jackson, *supra* note 14, at 5.
20. *Id.*
21. *Id.* at 4–5.
22. *Id.* at 6.
23. *Id.* at 5.
24. *See* MODEL RULES OF PRO. CONDUCT r. 3.8(a) (AM. BAR ASS'N 2020).
25. *See, e.g.*, CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4 (AM. BAR ASS'N 2017) (identifying multiple "factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge.").
26. *Id.* at § 3-1.10.

express the department's commitment to nonpartisanship[27] and attempt to avoid outside partisan influence,[28] its prosecutors cannot entirely escape illegitimate political pressure. Recent attention has understandably focused on the White House,[29] but officials elsewhere in the Executive Branch may also seek to improperly influence prosecutors. Since a prosecution may implicate public policy considerations beyond those related to criminal justice, prosecutors often interact with public officials in other agencies. As Brian Richardson has argued, it is undesirable and unnecessary for prosecutors to ignore public policy considerations or to resolve them without regard to what other policymakers think.[30] One may believe, as we do, that federal prosecutors are, and should be, ultimately entrusted to decide how to use federal criminal power. But even so, they may and often should consider the views of officials at the Securities and Exchange Commission, Environmental Protection Agency, Internal Revenue Service, and other public agencies with expertise on financial, environmental, tax, and other public policy matters implicated by a criminal case. Prosecutors are susceptible to partisan influence in part because they cannot easily judge the extent to which others' expressed views are the product of unexpressed political interests.

Of particular note, criminal prosecutions in the U.S. and abroad can have international implications. Consequently, the State Department encourages and provides financial support for other countries' investigations and prosecutions of government corruption, money laundering, drug dealing and other criminal conduct.[31] In the U.S., federal prosecutors' work may implicate foreign-policy objectives in various ways, including when

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27. *See, e.g.*, Memorandum from Eric H. Holder, U.S. Att'y Gen., on Election Year Sensitivities to All Dep't Emps. (Mar. 9, 2012) [hereinafter Holder March 9 Memorandum] (available at https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-election-year-sensitivities.pdf) ("[P]olitics must play no role in the decisions of federal investigators or prosecutors regarding any investigations or criminal charges.").

28. *See, e.g.*, Memorandum from Michael B. Mukasey, U.S. Att'y Gen., on Communications with the White House and Congress to Heads of Dep't Components All U.S. Att'ys (May 11, 2009) (available at https://www.justice.gov/oip/foia-library/communications_with_the_white_house_and_congress_2009.pdf/download) (establishing guidelines for communications between DOJ representatives and representatives of the White House and Congress).

29. *See, e.g.*, Green,& Roiphe, *supra* note 12; Todd David Peterson, *Federal Prosecutorial Independence*, 15 DUKE J. CONST. LAW,& PUB. POL'Y 217, 285–87 (2020) (arguing for federal prosecutors' independence based on separation-of-powers principles and proposing laws regulating contacts between the DOJ and the White House); Peter M. Shane, *Prosecutors at the Periphery*, 94 CHI.-KENT L. REV. 241 (2019) (based on an originalist interpretation of Article II, arguing that Congress has authority to protect federal prosecutors' independence from the President).

30. *See* Brian Richardson, *The Imperial Prosecutor?*, 59 AM. CRIM. L. REV. 39, 93 (2022).

31. *See* CRIM. DIV. OF THE U.S. DEP'T OF JUST.,& THE ENF'T DIV. OF THE U.S. SEC.,& EXCH. COMMISSION, A RESOURCE GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT 6 (Nov. 14, 2012) (available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf) ("The Department of State promotes U.S. government interests in addressing corruption internationally through country-to-country diplomatic engagement; development of and follow-through on international commitments relating to corruption; promotion of high-level political engagement (e.g., the G20 Anticorruption Action Plan); public outreach in foreign countries; and support for building the capacity of foreign partners to combat corruption. In fiscal year 2009, the U.S. government provided more than $1 billion for anti-corruption and related good governance assistance abroad.").

the DOJ enforces federal criminal laws with extraterritorial reach.[32] Just as U.S. officials encourage other nations' authorities to pursue specific investigations and prosecutions, they may also weigh in on domestic investigations and prosecutions that implicate U.S. foreign policy. When the President or others exert influence on investigations and prosecutions with foreign policy implications, as they did in the Turkish bank case discussed by Berman,[33] it may be uncertain whether they are covertly serving their own personal or political interests.[34]

There is no comprehensive account of how and when U.S. prosecutors have used their power to advance their own or others' political interests. But there is unquestionably a history, including a recent history, of attempts to use prosecutorial power for political ends. Congressional investigations exposed President Trump's efforts to influence federal criminal investigations and prosecutions,[35] including at the end of his Administration when he tried to enlist a partisan DOJ official to help reverse the result of the 2020 presidential election.[36] While President Trump's efforts often failed, there is evidence that his Attorney General, Bill Barr, improperly exerted political or partisan influence on President Trump's behalf in the Turkish bank case and others.[37] A federal prosecutor who helped convict Roger Stone, Trump's political advisor and close associate, testified in Congress that Barr's office pressured prosecutors to change their sentencing recommendation for "political reasons."[38] The DOJ was also accused of promoting political objectives in investigating the FBI's inquiry

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32. Steven Arrigg Koh, *The Criminalization of Foreign Relations*, 90 FORDHAM L. REV. 737, 787 (2021).

33. *See supra* note 6 and accompanying text.

34. Referring to the Turkish President's unsuccessful efforts to persuade the Trump Administration to drop a prosecution of Turkish nationals, Ryan Scoville recently observed that the "DOJ's tradition of independence from politics in criminal matters . . . sharply limits the utility of external political pressure for or against any particular prosecution." Ryan M. Scoville, *U.S. Foreign Relations Law from the Outside In*, 47 YALE J. INT'L L. 1, 33 (2022). While this is true, the observation should be qualified by two others. First, prosecutors may be persuaded by legitimate foreign policy considerations which could be hard to distinguish from political motivations. Second, even if prosecutors are supposed to withstand political pressure, they may succumb. *See In re* Grand Jury Subpoenas Dated March 24, 2003*,* 265 F. Supp. 2d 321, 330 (S.D.N.Y. 2003) ("it would be unreasonable to suppose that no prosecutor ever is influenced by an assessment of public opinion").

35. Peterson, *supra* note 29, at 273–83.

36. Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. TIMES (Oct. 13, 2022), https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html.

37. *See* Erica Newland,& Kristy Parker, *Politically-Motivated Prosecutions Part I: Legal Obligations and Ethical Duties of Prosecutors*, JUST SECURITY (July 27, 2020), https://www.justsecurity.org/71631/politically-motivated-prosecutions-part-i-legal-obligations-and-ethical-duties-of-prosecutors/.

38. *Oversight of the Department of Justice: Political Interference and Threats to Prosecutorial Independence: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. 61–62 (2020) (statement of Aaron S. J. Zelinsky, Assistant U.S. Att'y); *see also* Aaron Blake, *5 Takeaways From the Scathing Testimony About William Barr's Justice Department*, WASH. POST (June 24, 2020, 4:49 PM), https://www.washingtonpost.com/politics/2020/06/24/takeaways-zelinsky-testimony-barr/. *See also* Katie Benner,& Adam Goldman, *D.C. Prosecutors' Tensions With Justice Dept. Began Long Before Stone Sentencing*, N.Y. TIMES (Apr. 29, 2020), https://www.nytimes.com/2020/02/23/us/politics/justice-department-dc-prosecutors.html.

into the Trump campaign's Russian ties,[39] such as when the DOJ targeted FBI official Andrew McCabe, who President Trump himself had publicly targeted.[40]

Allegations involving the Trump Administration's abuses called to mind earlier abuses of prosecutorial power. Many recalled President Nixon's attempts to use the DOJ and FBI to further his political goals and his decision to fire Watergate special prosecutor Archibald Cox.[41] Some remembered that President Truman's Attorney General fired a zealous prosecutor investigating corruption in the Truman Administration.[42] Attorneys General, many of whom have been cronies of the President, [43] may be motivated to use the DOJ's power to advance the President's political interests unbidden. Cronyism, and political partisanship generally, are hardly a uniquely federal problem. In earlier times, some local prosecutors' offices were essentially an arm of the political machine in power.[44]

The problem of politicized prosecution goes beyond the occasional case where prosecutors' decisions are, or appear to be, wrongly motivated or improperly influenced. These cases lend credence to claims of "political prosecution" leveled against other federal and state investigations and prosecutions.[45] Because both the reality and the appearance of partisan

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39. Katie Benner,& Adam Goldman, *Justice Dept. Is Said to Open Criminal Inquiry Into Its Own Russia Investigation*, N.Y. TIMES (Aug. 14, 2020), https://www.nytimes.com/2019/10/24/us/politics/john-durham-criminal-investigation.html.

40. Adam Goldman, *Prosecutors Near Decision on Whether to Seek an Andrew McCabe Indictment*, N.Y. TIMES (Oct. 14, 2021), https://www.nytimes.com/2019/08/26/us/politics/andrew-mccabe-indictment-decision.html.

41. *See, e.g.*, Dylan Matthews, *Richard Nixon Also Fired the Person Investigating his Presidential Campaign*, VOX (May 10, 2017, 12:40 PM), https://www.vox.com/policy-and-politics/2017/5/10/15603886/saturday-night-massacre-explained-nixon-watergate-archibald-cox; Robert Reich, *With Barr as his Enabler, Trump has Out-Nixoned Nixon*, BERKELEY BLOG (Feb. 18, 2020), https://blogs.berkeley.edu/2020/02/18/with-barr-as-his-enabler-trump-has-out-nixoned-nixon/.

42. *See* Andrew Coan, *How Do You Fire a Special Prosecutor? Ask Harry Truman*, ALTERNET (Feb. 18, 2019), https://www.alternet.org/2019/02/how-do-you-fire-a-special-prosecutor-ask-harry-truman; David Kurlander, *'Blow the Lid Off': The Fall of Attorney General Howard McGrath*, CAFE (Dec. 11, 2020), https://cafe.com/article/blow-the-lid-off-the-fall-of-attorney-general-howard-mcgrath/.

43. Jed Handelsman Shugerman, *The Varied Roles, Regulation, and Professional Responsibilities of Government Lawyers: Professionals, Politicos, and Crony Attorneys General: A Historical Sketch of the U.S. Attorney General as a Case for Structural Independence*, 87 FORDHAM L. REV. 1965, 1966 (2019).

44. *See* Allen Steinberg, *The Public Prosecutor as Representational Image: The "Lawman" in New York: William Travers Jerome and the Origins of the Modern District Attorney in Turn-of-the-Century New York*, 34 U. TOL. L. REV. 753, 754 (2003) (in New York, "the Tammany Hall Democratic organization, and in the largest sense the criminal justice system around 1900 existed to further the private ends of Tammany and its members"); *see also Charges Against Asa Bird Gardiner: Deputy Attorney General Accuses Him of Malfeasance: It May Mean His Removal: Has But Five Days in Which to Answer or Appear in Person Before the Governor*, N.Y. TIMES (Dec. 18, 1900) (describing allegations against the Manhattan District Attorney for corruptly failing to prosecute election fraud cases in a timely manner).

45. *See, e.g.*, James Gilbert, *30-day Jail Sentence Ordered in Ballot Harvesting Case*, YUMA SUN (Yuma, Ariz.), Oct. 14, 2022 (quoting both a lawyer and the convicted defendant's family member who said that the illegal balloting case was a "political prosecution"); Rick Manning, *Special Counsel Jack Smith's Political Prosecution History is Dangerous*, THE CROWLEY POST-SIGNAL (L.A.), Nov. 27, 2022 (asserting that the DOJ appointee to investigate President Trump "is just another

influence can lead to injustice and erode public trust, it is important to find ways to reduce the risk that prosecutions will be politicized, with a clear understanding that it likely cannot be eliminated entirely.[46]

II. EFFORTS TO PREVENT PARTISANSHIP IN FEDERAL PROSECUTORS' DECISIONS

The concern about politicization of federal prosecution is not new, nor are the efforts to address it. While these solutions have minimized the problem to some extent, they have not forestalled allegations that partisan interest has infiltrated prosecutorial decision making[47] and they have failed to address the proper balance of power between the politically appointed Attorney General and U.S. Attorneys and career prosecutors.

Jackson's answer to the problem of politicization was to hire only prosecutors with good character. While clearly important, this is an inadequate and incomplete answer given the difficulty of identifying and hiring only decent candidates. Relatedly, some scholars have called for changes in the culture or structure of prosecutors' offices to encourage independence and impartiality.[48] Even if one could do so, it would be insufficient to prevent partisanship and preserve public confidence in the criminal justice system. As increasingly large sectors of the population become critical of elite education and expertise this solution will be even less effective at convincing the public that prosecutions are not unfairly partisan.[49]

After Watergate, Congress held hearings on several bills that would have made the DOJ independent of the Executive Branch.[50] These proposals were ultimately rejected because a powerful prosecutorial agency

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corrupt part of the Justice Department's political hit squad" and referring to "the left's abuse of federal governmental prosecutorial power in their never-ending Get Trump obsession"); Ron Wilkins, *Ex-Wabash Township Trustee Jennifer Teising: 'I am vindicated'*, LAFAYETTE JOURNAL,& COURIER (Dec. 16, 2022, 10:10 AM), https://www.jconline.com/story/news/crime/2022/12/15/ex-wabash-township-trustee-jennifer-teisings-convictions-overturned/69730562007/ (acquitted township trustee expressed disappointment that the prosecutor "waste[d] taxpayer dollars on this political prosecution").

46. *See* Jace Jenican, *Current Developments 2020-2021: The Roger Stone Affair: An Examination of the Legal, Normative, and Ethical Restraints on Presidential Interference in Prosecutorial Decisions*, 34 GEO. J. LEGAL ETHICS 1057, 1072 (2021) ("The Roger Stone Affair makes it clear that there are not sufficient safeguards against political interference in federal prosecutions . . . [T]he Trump administration has left in its wake an overly politicized Department of Justice and something must be done to remedy this mistake before another President commits an even more egregious contravention of justice.").

47. *Has America's Department of Justice Been Politicised?*, THE ECONOMIST (June 24, 2020), https://www.economist.com/united-states/2020/06/24/has-americas-department-of-justice-been-politicised.

48. Green,& Roiphe, *supra* note 17, at 537–38; Joyce White Vance, *Treat Every Defendant Equally and Fairly: Political Interference and the Challenges Facing the U.S. Attorneys' Offices as the Justice Department Turns 150 Years Old*, 130 YALE L.J. F. 516, 533–35 (2021).

49. *See* Julian A. Cook, III, *Prosecuting Executive Branch Wrongdoing*, 54 U. MICH. J.L. REFORM 401, 408–12 (2021) (detailing the background and provisions of independent counsel laws).

50. *See* J. Richard Broughton, *Politics, Prosecutors, and the Presidency in the Shadows of Watergate*, 16 CHAP. L. REV. 161, 165–66 (2012).

unmoored from the Executive Branch poses its own threats.[51] In its place, the new Attorney General, Edward Levi, set out to restore faith in the DOJ and minimize political influence on career prosecutors.[52] For instance, Attorneys General have issued guidance, limiting career prosecutors' contact with top administration officials.[53] These provisions are designed to enable Attorneys General and their deputies to buffer any politician's effort to meddle in prosecutorial decisions and protect career prosecutors from such inappropriate pressure. However, the guidance regarding contact from political actors is not binding and does not prevent situations in which the Attorney General has partisan biases or has become an emissary of the White House.[54]

In past Administrations, Attorneys General have also issued guidance restricting prosecutorial steps that could affect an upcoming election. The policy states that prosecutors and investigators "may never select the timing of investigative steps or criminal charges for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party."[55] The memos go on to urge prosecutors to consult with the Public Integrity Section of the Criminal Division about the timing of any "charges or overt investigative steps near the time of a primary or general election."[56] This is often referred to as the "60-Day Rule," though the memo does not specify timing.[57] In addition to its ambiguity, the rule only covers overt acts that could affect the outcome of an

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51. Green,& Roiphe, *supra* note 12, at 64, 69. In the wake of former President Trump's efforts to use the DOJ for his own personal or partisan ends, some critics have renewed calls for greater independence. Garrett Epps, *Why We Should Make Attorney General an Elective Office*, SALON (Mar. 9, 2007, 12:30 PM), http://www.salon.com/2007/03/09/attorney_ general.

52. Jed S. Rakoff, *Constitutional Foundation: Institutional Design and Community Voice: Why Prosecutors Rule the Criminal Justice System–And What Can Be Done About It*, 111 NW. U. L. REV. 1429, 1435 (2017).

53. This policy was first announced in an address by Attorney General Griffin Bell and repeated in memorandums by subsequent Attorneys General. Griffin B. Bell., U.S. Att'y Gen., Address Before Department of Justice Lawyers 3 (Sept. 6, 1978) (available at www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-06-1978b.pdf). Attorney General Benjamin Civiletti reiterated the same policy. Memorandum from Benjamin R. Civiletti, U.S. Att'y Gen., on Communication from the White House and Congress to Heads of Offs., Bds., Bureaus,,& Divs. 1 (Oct. 18, 1979) (available at http://www.justice.gov/ag/aghistory/civiletti/1979/10-18-1979.pdf). For a summary of these policies, see *White House Communications with the DOJ and FBI*, UNITED TO PROTECT DEMOCRACY (Mar. 8, 2017), http://protectdemocracy.org/agencycontacts/.

54. Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO STATE. J. CRIM. L. 369, 437 (2009) (pointing out that the guidance has been ignored on at least one occasion).

55. Memorandum from Michael B. Mukasey, U.S. Att'y Gen., on Election Year Sensitivities to All Dep't Emps. (Mar. 5, 2008) (available at https://www.justice.gov/sites/default/files/ag/legacy/2009/02/10/ag-030508.pdf); Holder March 9 Memorandum, *supra* note 27; Memorandum from Loretta E. Lynch, U.S. Att'y Gen., on Election Year Sensitivities to All Dep't Emps. (Apr. 11, 2016) (available at https://s3.documentcloud.org/documents/4439553/Election-Year-Sensitivities-2016.pdf).

56. *See* sources cited *supra* note 55.

57. U.S. DEP'T OF JUSTICE, OFF. OF THE INSPECTOR GEN., A REVIEW OF VARIOUS ACTIONS BY THE FEDERAL BUREAU OF INVESTIGATION AND DEPARTMENT OF JUSTICE IN ADVANCE OF THE 2016 ELECTION 17 (June 2018); Charlie Savage, *The Justice Department's '60-Day Rule*,*'* N.Y. TIMES, https://www.nytimes.com/interactive/2022/09/27/us/politics/what-is-60-day-rule.html.

election, not other politically motivated prosecutorial decisions, and it relates only to the timing of these acts.[58]

Congress has, in a number of iterations, provided for the appointment of independent counsel when the Attorney General would have an actual or perceived conflict of interest.[59] While this has eased the tension in some cases, it is an imperfect solution for several reasons. First, the special counsel provisions typically apply only when the DOJ is investigating top executive officials and do not address the problem when other politicians or individuals with ties to powerful political actors are the subject of a criminal probe.[60] Second, these efforts rarely achieve the perfect balance between independence and accountability.[61] Lawyers serving as special counsel can be too independent—harboring their own political ambitions or goals while remaining unaccountable to the electorate. Some critics claimed that this defect in the statue enabled Independent Counsel Ken Starr's investigation and prosecution of Bill Clinton.[62] On the other hand, successor statutes and regulations, like the one in effect today, that embed the appointment of a special counsel within the DOJ suffer from the opposite problem: a special counsel still reports to the Attorney General who retains control over the lawyer's work, enabling actual or perceived meddling by the Administration or politically motivated Attorney General.[63]

The DOJ Manual recognizes the need to balance the independence of U.S. Attorneys with centralized control.[64] Thus, certain kinds of cases, including civil rights crimes, terrorist related prosecutions, federal racketeering charges, and death penalty cases, require approval from the DOJ's central leadership.[65] But these are exceptions to the general rule that U.S. Attorneys have broad authority to make their own discretionary decisions.[66] Perhaps more importantly, these exceptions only operate as a

58. U.S. DEP'T OF JUSTICE, *supra* note 57, at 16–17.

59. *See* Julian A. Cook, III, *Prosecuting Executive Branch Wrongdoing*, 54 U. MICH. J. L. REFORM 401, 408–13 (2021) (detailing background and provisions of independent counsel laws).

60. CONG. RSCH. SERV., R44857, SPECIAL COUNSEL INVESTIGATIONS: HISTORY, AUTHORITY, APPOINTMENT AND REMOVAL 5 (Mar. 13. 2019).

61. Cook, *supra* note 59, at 430.

62. Morrison v. Olson, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting); Robert W. Gordon, *The Independent Counsel Investigation, the Impeachment Proceedings, and President Clinton's Defense: Inquiries into the Role and Responsibilities of Lawyers, Symposium, Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair*, 68 FORDHAM L. REV. 639, 640–41 (1999).

63. This scenario played out when special counsel Robert Mueller submitted his report to Attorney General Bill Barr. While the Attorney General was insulated from Mueller's investigation, Mueller was required to submit his final product to Barr, giving Barr control over how the report was initially characterized. Many believe that Barr exploited this aspect of the regulations and distorted the contents of the report to benefit former President Trump. *See* Jack Goldsmith, *Thoughts on Barr and the Mueller Report*, LAWFARE BLOG (May 4, 2019, 2:50 PM), https://www.lawfareblog.com/thoughts-barr-and-mueller-report.

64. *See* U.S. Dep't of Just., Just. Manual § 3-1.130 (2018).

65. *Id.* at §§ 9-85.200, 9-2-400, 9-10.040, 9-10.120, 9-10.160. 9-7.100 (2018).

66. *Id.* at § 9-2.001.

check on U.S. Attorneys, not as a limit on the power of the White House or the Attorney General.[67]

Senatorial confirmation also serves as a partial but incomplete answer. U.S. Attorneys are ordinarily nominated by the President and confirmed by the Senate.[68] The confirmation process gives the Senate a chance to weed out nominees it fears will succumb to improper political influence. For this reason, the 2007 Preserving United States Attorney Independence Act[69] sought to prevent presidents from circumventing the confirmation process by filling vacancies on an "interim" basis for excessive periods.[70] We discuss some of the defects of this process below.[71] Even if the law were amended to fix these problems, if the Senate's political makeup matched the President's, the Senate itself could abdicate the role, or the Senate might be unable to identify or block a U.S. Attorney who might succumb to political pressure or ideological motivation.

Federal prosecutors are, of course, subject to state ethics rules, which mandate recusal when the lawyers' personal interests could materially limit their work on behalf of a client.[72] These rules are not well suited to situations in which the personal interest is the ideological or political ambitions of a U.S. Attorney.[73] The rules invite regulators to question when a personal belief or commitment would impair the prosecutor's ability to be impartial, but defined in this way, conflicts are pervasive and hard to identify. The law presupposes that prosecutors are able to put their own beliefs aside and is not good at identifying instances when this expectation of impartiality will fail.[74]

One can try to hold prosecutors accountable after the fact. In the federal context, the DOJ Inspector General has the responsibility to investigate and address politicization in the DOJ.[75] But after-the-fact review is limited.[76] And even if it could be more effective, it would not entirely deter or remedy partisanship. Some political motivation would be impossible to detect, and courts might be reluctant to remedy the situation without overwhelming proof. Even if the Inspector General could unearth and address

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67. *See id.* at § 3-1.130 (addressing that U.S. Attorneys are to carry out the policy of the Department of Justice).

68. Federal Vacancies Reform Act of 1998, 28 U.S.C. § 541. The Act provides:

> (a) The President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district.
>
> (b) Each United States attorney shall be appointed for a term of four years. On the expiration of his term, a United States attorney shall continue to perform the duties of his office until his successor is appointed and qualifies.
>
> (c) Each United States attorney is subject to removal by the President.

Id.

69. 28 U.S.C. § 546.

70. *Id.*

71. *See infra* Part IV.A.

72. Model Rules of Pro. Conduct r. 1.7(a) (Am. Bar Ass'n 1983).

73. Green,& Roiphe, *supra* note 17, at 504–14 (2017).

74. *Id.* at 484–501.

75. *See* Green,& Roiphe, *supra* note 13, at 688–97.

76. *Id.*

all instances of improper bias, the damage of a wrongful investigation and prosecution itself would have already been done.

III. SHARED DECISION-MAKING AS A CHECK ON PARTISAN INFLUENCE

Berman proposes giving almost absolute authority to U.S. Attorneys, while former Attorney General Bill Barr suggests concentrating power with the Attorney General.[77] For reasons we discuss above, both extremes have significant defects. Berman's proposal does not solve the problem if the U.S. Attorney or other career prosecutors are politically motivated.[78] Barr's proposal has the opposite problem. It is ineffective if the Attorney General is personally biased or has succumbed to the efforts of the current Administration to meddle in criminal cases.[79] In this Section we suggest two related solutions. To supplement the strategies laid out in Part II for addressing politicization, this Section proposes a new policy that would require both the Attorney General and a U.S. Attorney to sign off on prosecutions in sensitive or politically charged cases. While this will likely result in fewer prosecutions of public officials and their allies, and of suspects and targets in other cases with political implications, it will also renew faith in the cases that do go forward. By requiring the approval of both officials in sensitive cases, our proposal reduces the risk of a politically motivated prosecution spearheaded by either one.

Requiring approval from both the Attorney General and U.S. Attorney involves a risk that improper partisan interests of one of the two will result in the failure to bring appropriate charges. If either one of the two officials has a bias in favor of the suspect, the prosecution would not go forward. While the failure to hold public officials responsible for corrupt or otherwise illegal conduct takes a toll on democracy, it is significantly less dangerous than the alternative—prosecuting innocent political rivals. Even the perception that the DOJ has been weaponized to pursue political adversaries is corrosive.[80] The system of checks will also reduce infighting in the DOJ that can similarly erode public faith in the criminal justice system.

The prosecution of President Trump's former National Security Advisor, General Michael Flynn, offers a good example of the benefits and drawbacks of our proposal. In 2017, General Flynn pled guilty to making a false statement to the FBI regarding his interactions with Russian Ambassador Sergei Kislyak before he assumed his position in the

77. *Compare* BERMAN, *supra* note 3, at 285–87 *with* BARR, *supra* note 5, at 263–64.

78. *See supra* Part I.

79. *See supra* Introduction.

80. Michael J. Klarman, *Foreword: The Degradation of American Democracy – and the Court*, 134 HARV. L. REV. 1, 23 (2020) (discussing how central the politicization of law enforcement is to autocrats and dictators); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 578 (2018) (arguing that the new authoritarians do not go as far as their twentieth century counterparts to jail their political opponents but may bring some criminal cases).

Administration.[81] After switching counsel, General Flynn moved to withdraw his guilty plea based on allegations of government misconduct.[82] Before the court ruled on his motion, the Government filed its own motion to dismiss the charge with prejudice.[83]

The reversal in the DOJ's position occurred after Attorney General Bill Barr had chosen Trump-appointed U.S. Attorney for St. Louis Jeffrey Jensen to review the case.[84] The motion to dismiss the charges was made by the interim U.S. Attorney for Washington, D.C., Timothy Shea, who was a friend and advisor to Bill Barr.[85] The about-face prompted the lead prosecutor to resign from the case.[86] Neither of the other two prosecutors assigned to the case signed onto Shea's motion.[87] This episode prompted much concern and speculation about the politicization of the DOJ, including an open letter signed by thousands of former federal prosecutors urging the judge to question Barr's involvement and the DOJ's decision.[88] Before ruling on the Government's motion, the judge asked for an independent assessment from retired judge John Gleason, who also condemned the DOJ's conduct.[89]

If both the Attorney General and U.S. Attorney had been required to sign off on the prosecution of Flynn, the case would likely never have been charged. This would have been a loss since Flynn would not have been held accountable for his criminal conduct. However, in the end Flynn was not held accountable anyway. On the other hand, it would have spared the country the speculation and public infighting that no doubt eroded the legitimacy of the DOJ. It is possible but not certain that someone in the DOJ would have leaked the fact that Flynn was given a free pass. Either way, the failure to hold a political actor accountable is a better result than the politically motivated prosecution of an innocent rival, which could occur if there were no check. It is similarly outweighed by the loss of faith in

81. Michael D. Shear,& Adam Goldman, *Michael Flynn Pleads Guilty to Lying to the F.B.I. and Will Cooperate with Russia Inquiry*, N.Y. TIMES (Dec. 1, 2017), https://www.nytimes.com/2017/12/01/us/politics/michael-flynn-guilty-russia-investigation.html.

82. Adam Goldman, *Michael Flynn Moves to Withdraw Guilty Plea in About-Face After Extensive Cooperation*, N.Y. TIMES (June 2, 2020), https://www.nytimes.com/2020/01/14/us/politics/michael-flynn-withdraws-guilty-plea.html.

83. Adam Goldman,& Katie Benner, *U.S. Drops Michael Flynn Case, in Move Backed by Trump*, N.Y. TIMES (June 10, 2020), https://www.nytimes.com/2020/05/07/us/politics/michael-flynn-case-dropped.html.

84. Charlie Savage, Adam Goldman,& Matt Apuzzo, *Barr Installs Outside Prosecutor to Review Case Against Michael Flynn, Ex-Trump Adviser*, N.Y. TIMES (May 7, 2020), https://www.nytimes.com/2020/02/14/us/politics/michael-flynn-prosecutors-barr.html.

85. Goldman,& Benner, *supra* note 83.

86. Sarah N. Lynch, *U.S. Moves to Drop Case Against Trump Ex-Adviser Flynn, Who Admitted to Lying to FBI*, REUTERS (May 7, 2020, 1:50 PM), https://www.reuters.com/article/uk-usa-trump-russia-flynn-idAFKBN22J38B.

87. Goldman,& Benner, *supra* note 83.

88. C. Ryan Barbar, *Thousands of Ex-Prosecutors Urge Flynn Judge to Question Barr's Move to Drop Case*, LAW.COM (May 11, 2020, 1:51 PM), https://www.law.com/nationallawjournal/2020/05/11/thousands-of-ex-prosecutors-urge-flynn-judge-to-question-barrs-move-to-drop-case/.

89. Josh Gerstein,& Kyle Cheney, *'Everything About This is Irregular': Ex-Judge Tapped to Review Flynn Case Blasts Trump DOJ,* POLITICO (June 10, 2020, 1:13 PM), https://www.politico.com/news/2020/06/10/gleeson-flynn-sullivan-barr-justice-department-311018.

that prosecution, and the subsequent erosion of the legitimacy of the DOJ, when each side accuses the other of improper political motivation and it is difficult if not impossible to resolve the dispute.

Those who favor the unitary executive, like former Attorney General Bill Barr, might argue that as the chief executive, the President has the right to control prosecutors because the DOJ is within the executive branch.[90] They would challenge this sort of limitation as an unconstitutional interference with executive power and would argue that if presidential meddling is perceived as improper then the public can hold the President responsible at the ballot box.[91] As we have argued elsewhere, this solution is unrealistic, and this description of presidential power is inconsistent with the history and structure of federal prosecution.[92]

The issue is more complicated when it comes to federal prosecutions with foreign policy implications, like the incident that Berman described with the Turkish bank.[93] While prosecution is clearly delegated to the DOJ, foreign policy is central to the chief executive's role.[94] When a prosecution involves both a breach of criminal laws and important foreign policy implications, it makes more sense to allow the Attorney General to weigh in and voice the President's foreign policy interest. That said, the final decision on whether to go forward with a prosecution authorized by the Attorney General should belong to the career prosecutor to ensure that no innocent person is prosecuted, even when doing so would further an important foreign policy goal. Our proposed system of checks would work to preserve this principle. While the Attorney General could be involved in the investigation and voice the Administration's foreign policy interests, the Attorney General could never insist on a prosecution over the objection of the U.S. Attorney who would presumably preserve the traditional criminal justice policy goal of preventing the prosecution of innocent people.

Berman's example, involving whether to indict the Turkish bank for helping Iran evade economic sanctions, illustrates the point. The decision implicated not only traditional criminal justice principles—e.g., is this a serious crime and is there sufficient proof—but also foreign policy considerations. The local prosecutors were likely to undervalue foreign policy concerns. The Attorney General, as a cabinet member, and as the head of the DOJ which more often balances criminal law enforcement and foreign policy interests (e.g., in the national security section), presumptively had

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90. *See* CALEBRESI,& YOO, *supra* note 11, at 10, 12, 15; Steven G. Calabresi,& Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992) (proposing a strong version of the unitary theory in which the President can control all agencies and subordinate officers).

91. Calebresi,& Rhodes, *supra* note 90, at 1165–66.

92. Green,& Roiphe, *supra* note 12; *see also* Green,& Roiphe, *Colloquium: The Varied Roles, Regulation, and Professional Responsibilities of Government Lawyers: May Federal Prosecutors Take Direction From the President?*, 87 FORDHAM L. REV. 1817 (2019) (arguing that federal prosecutors cannot follow the President's direction).

93. *See* BERMAN, *supra* note 3 at 76–77 and accompanying text.

94. *Id.*

more expertise to deal with whether an indictment would undermine foreign policy interests. To be sure, as Berman argues, this particular Attorney General may have simply been serving President Trump's illegitimate interest in cozying up to the Turkish President for personal reasons.[95] But absent clear evidence of corruption on the part of the President, on balance, it is better to take this risk, in part, because overcharging is more of a problem than undercharging, and in part because the official with greater expertise should hold the trump card over whether to bring a prosecution that might undermine national interests unrelated to criminal law enforcement.

For the same reason, once the two officials have signed off on the prosecution, the Attorney General should leave discretionary decisions to U.S. Attorneys. It would be too cumbersome to require multiple approvals along the way, and as the decisions become more intricate and fact dependent, the U.S. Attorney's expertise is generally greater.[96] To avoid the destabilizing disagreement that characterized the DOJ's conduct in the Flynn case, it is preferable to allow the U.S. Attorney to make these decisions unless the decision requires approval according to existing DOJ policy.[97] This does not mean that the Attorney General would be without recourse if those decisions appeared to be made in an improperly political way. The DOJ Inspector General could be involved in such instances.

The system of checks and balances we propose is not without cost. Because both the Attorney General and U.S. Attorney would have to approve of prosecution in sensitive cases, there is a significant risk that one or the other would either consciously or unconsciously allow political bias to inform the charging decision, resulting in the underenforcement of the criminal law. We do not underestimate this cost. The rule of law depends not only on the absence of politically motivated prosecutions but also on the premise that no person is above the law.

That said, there is no way to eliminate concerns about politicization.[98] The best we can do is to minimize the impact of such bias.[99] While the effect of underenforcement on democratic norms is not negligible, it is less dangerous than unwarranted political prosecutions. In addition, even if there is no actual political bias, our current approach breeds suspicion of such illicit motivation, and this distrust similarly damages the rule of law. If both the Attorney General and U.S. Attorney must approve of a sensitive political prosecution before it goes forward, trust in the propriety of any

95. *Id.*

96. Some Attorneys General have no experience trying criminal cases. Bill Barr, for instance, was never a prosecutor. *See generally*, BARR, *supra* note 5.

97. *See, e.g.*, U.S. Dep't of Just., Just. Manual §§ 9-10.060–180 (2023) (requiring U.S. Attorneys to obtain approval if they are seeking the death penalty). For a summary of when approval from the Assistant Attorney General is required, see U.S. DEP'T OF JUST., ABOUT THE CRIMINAL DIVISION: APPROVALS, CONSULTATIONS, AND NOTIFICATIONS (July 29, 2021), https://www.justice.gov/criminal/approvals-consultations-and-notifications.

98. *See* supra Part I.

99. Green,& Roiphe, *supra* note 17, at 515.

resulting prosecutions will be higher.[100] At the same time, Congressional oversight, the DOJ Inspector General, and the other mechanisms identified in Part II can help reduce the chances that guilty individuals will go unpunished because of their political ties to either the U.S. Attorney or the Attorney General.[101]

IV. ENSURING THAT U.S. ATTORNEYS SERVE AS EFFECTIVE INDEPENDENT CHECKS

The proper functioning of any system of checks and balances presumes that one side is not powerful enough to capture the other. As Berman convincingly argues, the greatest threat of improper political influence comes from the Attorney General, who is closely linked to and chosen by the President.[102] This Part presents two further proposals to ensure that the U.S. Attorneys serve as an independent check on the Attorney General. In Section A, we argue that Congress should prevent the President from relying on serial appointments of interim U.S. Attorneys, thereby strengthening the confirmation process as a mechanism to help ensure that U.S. Attorneys are qualified and independent of the Administration. In Section B, we propose a new DOJ policy that would prevent the Attorney General from hand picking U.S. Attorneys to investigate and prosecute politically sensitive cases.

A. Strengthening the Confirmation Process for U.S. Attorneys

U.S. Attorneys are ordinarily nominated by the President and confirmed by the Senate.[103] The confirmation process gives the Senate a chance to weed out nominees it fears will succumb to improper political influence.[104] However, a president might attempt to circumvent senatorial oversight by appointing "interim" U.S. Attorneys when vacancies arise and then not nominating their replacements. The 2007 Preserving United States Attorney Independence Act[105] is meant to impede that stratagem.[106] Although the President may appoint an acting U.S. Attorney temporarily when a vacancy first arises,[107] and the Attorney General may appoint an interim U.S. Attorney to fill a vacancy for 120 days,[108] the law authorizes

100. *Cf. id.* at 499 (arguing that prosecutors need robust systems of self-governance to be trusted to act objectively, neutrally, and disinterested).

101. *See supra* Part II.

102. Shugerman, *supra* note 43, at 1966, 1984.

103. Federal Vacancies Reform Act of 1998, 28 U.S.C. § 541.

104. *See supra* Part II.

105. Preserving United States Attorney Independence Act of 2007, Pub. L. No. 110-34, 121 Stat. 224 (2007).

106. JOHN CONYERS, INTERIM APPOINTMENT OF UNITED STATES ATTORNEYS, H.R. REP. NO. 110-58, at 2–5 (2007) [hereinafter H.R. REP. 110-58].

107. 5 U.S.C. §§ 3345–47.

108. 28 U.S.C. § 546. The current version of the statue, which has been in effect since 2007, provides in full:

> (a) Except as provided in subsection (b), the Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant.

the district court to fill the vacancy afterwards if no one has been confirmed.[109] The court may decline to exercise this power or reappoint the interim chief prosecutor if it is satisfied with the interim appointee, but the court may also appoint a different lawyer if, for example, the Attorney General's appointee has been exposed as an incompetent hack.[110]

The law allows the President to remove a U.S. Attorney who was confirmed by the Senate,[111] but it does not expressly state whether the President or Attorney General may fire a court-appointed U.S. Attorney, or whether the President can replace the court's appointee only by securing a nominee's confirmation.[112] Berman's account of his last days in office alludes to the possibility of litigation which would have presented this question because of Berman's unusual status.[113] Soon after taking office, President Trump requested the resignation of many holdovers from the Obama Administration, including Preet Bharara, who had gained fame leading the SDNY U.S. Attorney's Office in conducting various politically sensitive investigations and could be expected to undertake others in the coming years.[114] When Bharara refused to resign, he was fired, and soon after, the Attorney General appointed Berman to fill the vacancy on an interim basis.[115] After 120 days, the district court reappointed Berman.[116] Perhaps thinking that Berman would be more subservient or easier to replace if he remained unconfirmed, President Trump left Berman in place without seeking his confirmation. According to Berman, when Barr later tried to persuade or pressure him to take another job in the Administration and then threatened to fire him if he did not resign, Berman was initially prepared to litigate whether the Trump Administration could remove him.[117] Berman resigned only after Barr agreed to replace him with Audrey Strauss, Berman's highly regarded deputy, rather than an outsider.[118]

(b) The Attorney General shall not appoint as United States attorney a person to whose appointment by the President to that office the Senate refused to give advice and consent.
(c) A person appointed as United States attorney under this section may serve until the earlier of—
(1) the qualification of a United States attorney for such district appointed by the President under section 541 of this title; or
(2) the expiration of 120 days after appointment by the Attorney General under this section.
(d) If an appointment expires under subsection (c)(2), the district court for such district may appoint a United States attorney to serve until the vacancy is filled. The order of appointment by the court shall be filed with the clerk of the court.

109. *Id.*
110. *See id.*
111. 28 U.S.C. § 541(c), *supra* note 103.
112. *Id.*
113. BERMAN, *supra* note 3, at 292–93.
114. Charlie Savage,& Maggie Haberman, *Trump Abruptly Orders 46 Obama-Era Prosecutors to Resign*, N.Y. TIMES (Mar. 10, 2017), https://www.nytimes.com/2017/03/10/us/politics/us-attorney-justice-department-trump.html.
115. Tina Moore,& Priscilla DeGregory, *Trump Picks Preet Bharara's Replacement*, N.Y. POST (Jan. 3, 2018, 3:24 PM), https://nypost.com/2018/01/03/trump-to-name-preet-bhararas-replacement/.
116. Weiser, *supra* note 1.
117. BERMAN, *supra* note 3, at 293–95.
118. *Id.* at 300.

The story exposes an ambiguity in the U.S. Attorney succession law that jeopardizes its ability to protect U.S. Attorneys' independence from higher-ups' partisan intermeddling. The 2007 law followed on the heels of congressional hearings into the forced resignations of eight U.S. Attorneys, apparently for partisan political reasons—namely, to influence the direction of public corruption investigations and prosecutions, or to retaliate for how such investigations and prosecutions were conducted.[119] The succession law at the time, which turned out to be short-lived, made this possible by allowing the Administration to remove professionally independent prosecutors with whom it was politically displeased and award its own allies with the position.[120] A chorus of Senators condemned this as a partisan abuse of power compromising U.S. Attorneys' independence.[121]

The 2007 law resurrected a court appointment process with a lengthy pedigree. Congress first gave federal courts a role in appointing U.S. Attorneys in 1863.[122] In 1966, Congress codified federal courts' role in 28 U.S.C. § 546.[123] The 1986 version of § 546, which became the foundation of the 2007 (and still current) version, authorized the Attorney General to appoint an interim U.S. Attorney to serve for 120 days, after which "the district court for such district may appoint a United States attorney to serve until the vacancy is filled."[124] That remained the process until March 2006, when the USA PATRIOT Improvement and Reauthorization Act of 2005 took effect.[125] A provision added without congressional debate vested the Attorney General with the sole authority to appoint interim U.S. Attorneys

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119. *See Preserving Prosecutorial Independence: Is The Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Charles Schumer, Sen. of the United States, regarding how politicized the Department of Justice has become); *Restoring Checks and Balances in the Confirmation Process of United States Attorneys*: *Hearing on H.R. 580 Before the Subcomm. on Com.,& Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. (2007).

120. H.R. REP. NO. 110-58, *supra* note 106, at 5.

121. *See* 153 CONG. REC. 3294 (Mar. 20, 2007) (statement of Sen. Cardin) ("The U.S. attorneys must work independently. . . . A U.S. attorney has enormous power to determine who should be investigated, who should be prosecuted, and what type of punishment should be recommended. It is a tremendous amount of power which must be exercised with total independence."); 153 CONG. REC. 5553 (May 22, 2007) (statement of Rep. Conyers) ("We, in this country, must have full confidence that these [prosecutorial] powers are exercised with complete integrity and free from improper political influence."); 153 CONG. REC. 3298 (Mar. 20, 2007) (statement of Sen. Feinstein) ("I believe strongly that once the U.S. attorney takes that oath of office, they must be independent, objective, and follow facts wherever they lead them in the pursuit of justice."); 153 CONG. REC. 3040 (Mar. 26, 2007) (statement of Rep. Jackson-Lee) ("Largely a result of its origins as a distinct prosecutorial branch of the Federal Government, the office of the United States Attorney traditionally operated with an unusual level of independence from the Justice Department in a broad range of daily activities. That practice served the Nation well for more than 200 years. The practice that has been in place for less than 2 years has served the Nation poorly. It needs to end.").

122. Act of Mar. 3, 1863, ch. 93, § 2, 12 Stat. 768 (1863).

123. Pub. L. No. 89-554, § 4(c), 80 Stat. 618 (1966). The 1966 version of § 546 provided in full: "The district court for a district in which the office of United States attorney is vacant may appoint a United States attorney to serve until the vacancy is filled. The order of appointment by the court shall be filed with the clerk of the court." *Id.*

124. Pub. L. No. 99-646, § 69, 100 Stat. 3616 (1986).

125. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, tit. V, § 502, 120 Stat. 246 (2006).

and eliminated the 120-day limit on an interim U.S. Attorney's service.[126] A year later, Congress reallocated authority between the Administration and the district courts to prevent a recurrence of the partisan political removals and appointments that precipitated it.[127]

Although the 2007 law was silent as to whether the President or Attorney General could fire and replace the court's appointee, one could argue that that, absent a clear contrary expression of congressional intent, a district court order appointing a U.S. Attorney to fill a vacancy cannot be nullified by acts of the President or Attorney General, who have no general authority to nullify court orders.[128] Further, the evident purpose of § 546 would be thwarted if the President could remove a court-appointed U.S. Attorney immediately after the appointment took effect and direct the Attorney General to appoint a different lawyer or to reappoint the very one removed by the district court. The federal courts would then have no meaningful role in ensuring U.S. Attorneys' qualifications when the Senate has not confirmed the appointment.[129] This is at odds with the 2007 law's intent to give the district court the responsibility to replace an interim U.S. Attorney after 120 days if the lawyer has proven unqualified, whether by virtue of a lack of professional independence or because of other deficiencies.[130] The court's role as a check on the Attorney General's appointment of an unqualified, partisan, or politically subservient lawyer would be

126. *Id.*; *see generally* LEGISLATIVE HISTORY OF THE PATRIOT ACT, https://www.congress.gov/bill/109th-congress/house-bill/3199/all-actions (select "Actions" tab to see all provisions which were debated) (showing that the stated provision was never debated or challenged).

127. Ari Shapiro, *Timeline: Behind the Firing of Eight U.S. Attorneys*, NPR (Apr. 15, 2007), https://www.npr.org/templates/story/story.php?storyId=8901997.

128. The 2007 law does not authorize the President to remove a U.S. Attorney appointed by the district court pursuant to § 546. When a vacancy arises, § 546(d) authorizes the district court to appoint a U.S. Attorney 120 days after the Attorney General's appointment of an interim U.S. Attorney. This means that an Administration cannot unilaterally appoint an interim U.S. Attorney to serve indefinitely, thereby circumventing the senatorial confirmation process. § 546 does not authorize the President to remove a court-appointed U.S. Attorney other than through the nomination and confirmation process.

Section 546(c)(1) provides that a court-appointed U.S. Attorney "may serve until . . . the qualification of a United States attorney for such district appointed by the President under section 541 of this title." Once the district court issues its appointment order, § 541(c) leaves the decision whether to serve to the discretion of the court-appointed U.S. Attorney unless and until a successor is "qualified"—that is, confirmed by the Senate. The U.S. Attorney "may" elect to resign if requested to do so by the President or Attorney General, or on the lawyer's own initiative, but § 546 does not require that lawyer to do so. And, pointedly, while § 546 specifically refers to the nomination-and-confirmation process established by § 541, § 546 makes no reference to the possibility of presidential removal under § 541(c).

Likewise, § 541, which authorizes the President to remove U.S. Attorneys who have been confirmed by the Senate, makes no reference to § 546. To the extent that there seems to be tension between §§ 541(c) and 546, which specifically authorizes the court-appointed U.S. Attorney to continue to serve until a successor is confirmed by the Senate, one must conclude that § 546 supersedes § 541(c) both because it is later in time and because it deals specifically with court-appointed U.S. Attorneys, not with U.S. Attorneys who are confirmed by the Senate or U.S. Attorneys generally.

129. 28 U.S.C. § 546.

130. *Id.*

nullified if the law allowed a president to remove the court-appointed U.S. Attorney.[131]

The legislative history reinforces the understanding that the 2007 law was meant "to protect the independence of our U.S. attorneys"[132] by preventing an Administration from unilaterally appointing acting or interim U.S. Attorneys for indefinite lengths of time or in succession.[133] As the Chair of the House Judiciary Committee explained shortly before the House voted to adopt the 2007 law:

> [W]hat this measure does is to restore the checks and balances that have historically provided a critical safeguard against politicization of the Department of Justice and the United States attorneys, limiting the Attorney General's interim appointments to 120 days only, then allowing the district court for that district to appoint a U.S. attorney until the vacancy is filled, with Senate confirmation required, as historically has been the case.[134]

Congress perceived the law, which provided for a court-appointed U.S. Attorney to serve until a successor was confirmed, as a necessary check on Executive Branch power.[135] The senatorial confirmation process was the preferred check,[136] but the district court's role functioned as both an alternative check on administrative abuse[137] and as an inducement to an Administration to employ the nomination-and-confirmation process.[138]

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131. To put it slightly differently, a statutory regime in which the court can appoint a U.S. Attorney but the President can remove that U.S. Attorney would make little sense and provide little benefit. If an Administration can remove and replace any court-appointed lawyer whom it does not support, it is hard to see why Congress would give the district court any responsibility for selecting U.S. Attorneys. As a practical matter, the appointment would be made by an Administration, not by the district court, because an Administration could give notice that the President would remove anyone it disfavored. The district court might then put its imprimatur on someone whom an Administration favored, creating the false appearance that the selection was made by the district court. Or the district court might reject an Administration's favorite, leading the President to remove the court's appointee, creating tension between the executive and judicial branches toward no good end.

132. 153 CONG. REC. S3303 (Mar. 20, 2007) (statement of Sen. Boxer); 153 CONG. REC. H3036 (Mar. 26, 2007) (statement of Rep. Conyers) ("[T]he gaping vulnerability on the law, which has placed the independence and integrity of our prosecutorial system in jeopardy, needs to be repaired as quickly as possible; and that is what we are here to do today.").

133. 153 CONG. REC. H5553 (May 22, 2007) (statement of Rep. Conyers).

134. *Id.*

135. H.R. REP. NO. 110-58, *supra* note 106, at 5–6.

136. *See, e.g.*, 153 CONG. REC. S3300 (Mar. 26, 2007) (statement of Sen. Leahy) (quoting Robert H. Jackson) ("'Because of [the] immense power to strike at citizens, not with mere individual strength, but with all the force of government itself, the post of Federal District Attorney from the very beginning has been safeguarded by presidential appointment, requiring confirmation of the Senate of the United States.'"); 153 CONG. REC. S1993-01 (Feb. 15, 2007) (statement of Sen. Leahy).

137. H.R. REP. 110-58, *supra* note 106, at 4 (statement of Rep. Jackson-Lee) ("By retaining a role for the district court in the selection of an interim United States Attorney, former section 546(d) allowed the Judicial Branch to act as a check on Executive power."); H.R. REP. 110-58, *supra* note 106, at 5 (statement of Rep. Jackson-Lee) ("Vesting residual power to appoint an interim United States Attorney in the Federal district court in which the vacancy occurs constitutes an important judicial check on executive power.").

138. 153 CONG. REC. S3294 (Mar. 20, 2007) (statement of Sen. Cardin) ("[The law] will encourage the Department of Justice to work with this body . . . ."); *see* 153 CONG. REC. S7647 (June 13,

Congressional proponents regarded the process established by § 546 as the exclusive one for appointing interim U.S. Attorneys,[139] and at least in the Senate, opponents of the law did not contest this.[140] On the contrary, senatorial opponents' objection that judges were not best qualified to appoint U.S. Attorneys[141] would have been of no concern were it thought that the President could simply remove a court-appointed U.S. Attorney who seemed unqualified. Some opponents in the House thought the law might allow the Administration to remove court-appointed U.S. Attorneys and put others in their place,[142] but proponents of the law discredited this possibility. Senator Leahy, one of the Bill's authors, stated: "[The law] is not designed or intended to be used repeatedly for the same vacancy. These double dipping approaches run afoul of congressional intent, the law and our bill. Our bill should put a stop to that, too."[143] Congress thought it was closing a loophole, not opening one.[144]

Further, Congress was not writing on a blank slate but was restoring the process established by the 1986 law.[145] Although U.S. Attorneys

2007); *cf.* 153 CONG. REC. H3037 (Mar. 26, 2007) (statement of Rep. Conyers) (observing that, historically, district courts' appointments of United States Attorneys on an interim basis to fill vacancies "was a neutral means of ensuring that permanent appointments remained the shared responsibility of the President and the Senate –[sic] to encourage the President to send a nomination to the Senate promptly, and to encourage the Senate to act promptly on the nomination").

139. 153 CONG. REC. H3037 (Mar. 20, 2007) (statement of Rep. Conyers) ("[T]he bill clarifies that section 546 is the only way to make interim U.S. Attorney appointments."); 153 CONG. REC. H3038 (Mar. 20, 2007) (statement of Rep. Sanchez) ("The bill also closes other potential loopholes through which Senate confirmation could be bypassed. It clarifies that section 546 . . . is the exclusive means of appointing interim U.S. Attorneys."). A proposed amendment to the bill would have added a subsection explicitly providing that: "This section is the exclusive means for appointing a person to temporarily perform the functions of a United States attorney for a district in which the office of United States attorney is vacant." H.R. REP. 110-58, *supra* note 106, at 2.

140. Senator Kyl, a principal opponent in the Senate, noted that the Attorney General could appoint the same individual to serve, first, as an acting U.S. Attorney and then as an interim U.S. Attorney, "which would allow an individual to serve as U.S. attorney for nearly a year without confirmation." 153 CONG. REC. S3295 (Mar. 20, 2007) (statement of Sen. Kyl). But in identifying the bill's infirmities and limitations, he did not include the possibility that the President could remove a court-appointed U.S. Attorney. 153 CONG. REC. S3295–97 (Mar. 20, 2007) (statement of Sen. Kyl).

141. *See, e.g.*, 153 CONG. REC. S3295 (Mar. 20, 2007) (statement of Sen. Jon Kyl).

142. H.R. REP. 110-58, *supra* note 106, at 16 (Supplemental Views of Rep. Lamar Smith et al.) ("All of the witnesses acknowledged that the President could lawfully respond to the judicial appointments authorized by this bill by simply terminating the court-appointed interim U.S. Attorney, thus allowing the Attorney General to make a new 120-day appointment."); 153 CONG. REC. H3037 (Mar. 26, 2007) (statement of Rep. Howard Coble) ("Th[e] process [established in 1986] was not infallible. Some said authorizing the judiciary to appoint the prosecutors before their court created a conflict of interest, and I think a good argument can be made for that. Others said the Executive could maneuver the Constitution by terminating a court-appointed interim by repeatedly substituting its own interim for 120-day stints. A good argument could well be made for that as well.").

143. 153 CONG. REC. S3299 (Mar. 20, 2007) (statement of Sen. Patrick Leahy).

144. *See, e.g.*, *id.* at 3298–99 ("We have to close a loophole that has been exploited by the Department of Justice and the White House—a loophole that led to the mass firings of U.S. attorneys."); 153 CONG. REC. H3040 (Mar. 26, 2007) (statement of Rep. Sheila Jackson-Lee) ("[The 2006 law] created a possible loophole that permits United States Attorneys appointed on an interim basis to serve indefinitely without ever being subjected to a Senate confirmation process, which is plainly a result not contemplated by the Framers.").

145. *See, e.g.*, 153 CONG. REC. S3298 (Mar. 20, 2007) (statement of Sen. Feinstein) (observing that the previous process "worked with virtually no problems for 20 years"); *see also* 153 CONG. REC. S1993-01 (Feb. 15, 2007) (statement of Sen. Leahy); 153 Cong. Rec. S 3299 (Mar. 20, 2007)

customarily tendered their resignations at the start of a new Administration, the President had never removed a court-appointed U.S. Attorney. As the law was implemented over the course of two decades, district court appointments effectively limited Executive Branch authority to appoint U.S. Attorneys, not vice versa.[146] Senator Kyl, who opposed the bill, recalled an occasion when a court-appointed U.S. Attorney "did not work well at all."[147] However, even then the President did not remove the U.S. Attorney—as the President presumably would have, if he believed he had the legal authority to do so.[148]

The problem, however, is that if a court-appointed U.S. Attorney fired by the President brought a legal challenge, as Berman contemplated, a court might defer to executive power to avoid the constitutional question that it would otherwise have to answer. The President's constitutional argument probably would not be that the Constitution authorizes the President to appoint or remove all U.S. Attorneys,[149] because, on the contrary, it expressly allows Congress to decide who may appoint "inferior Officers," which U.S. Attorneys are,[150] and at least implicitly allows Congress

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(statement of Sen. Leahy) ("There is no record of problems with the appointment of interim [United States Attorneys] by the district court."); 153 CONG. REC. S1993-01 (Feb. 15, 2007) (statement of Sen. Leahy).

146. There is no indication that under the 1986 and 2007 versions of § 546, Presidents removed court-appointed U.S. Attorneys other than through the senatorial confirmation process. A 1979 opinion of the Office of Legal Counsel concluded that § 541(c) authorized the President to remove a U.S. Attorney appointed by the district court under the 1966 version of § 546, but no President tested this authority under the 1966 law. U.S. Attorneys—Removal of Court-Appointed U.S. Attorney (28 U.S.C. §§ 541, 546), 3 OP. O.L.C. 448, 448–49 (1979)). It does not appear that the DOJ regarded this opinion as useful authority after § 546 was amended in 1986, and there is some indication that prior to the short-lived Patriot Act amendment the Department doubted the President's authority to appoint successive interim U.S. Attorneys by removing court-appointed U.S Attorneys. *See id.* at 450; *see also* Ross E. Wiener, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN. L. REV. 363, 402 (2001) (citing Memorandum from Samuel A. Alito, Jr., Deputy Assistant Att'y Gen., Off. of Legal Couns., to William P. Tyson, Dir., Exec. Off. for U.S. Att'ys (Nov. 13, 1986)). In any event, until now, presidents have not tested the District Court's authority under § 546.

147. 153 CONG. REC. S3301–02 (Mar. 20, 2007) (statement of Sen. Jon Kyl).

148. Another opponent, Senator Sessions, unsuccessfully offered an amendment to address the occasional problem that, "Federal judges, given the power of appointment, have appointed individuals who do not have security clearances and aren't able to function in the office, aren't able to participate in sensitive cases." *Id.* at 3302 (statement of Sen. Jeff Sessions). This would not be a subject of concern if the President could simply remove and replace the court-appointed office holder.

149. U.S. CONST., art. II, § 2, cl. 2 ("[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, *in the Courts of Law*, or in the Heads of Departments.") (emphasis added). Article II, Section 2 allows Congress to decide to authorize a federal court, not the President, to appoint a U.S. Attorney (among others). Thus, Congress's power to establish the framework for the selection of inferior officers, which provides the constitutional basis for 28 U.S.C. § 546, is recognized in the constitutional text. United States v. Baldwin, 541 F. Supp. 2d 1184, 1197–98 (D.N.M. 2008). Further, the original understanding was that, if it wished, Congress could place U.S. Attorneys entirely within the judicial branch. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 108–09 (1923). An early draft of the Federal Judiciary Act of 1789 "provided that each District Court should appoint 'a meet person learned in the law, to act as Attorney of the United States in such district.'" *Id.* at 108.

150. That U.S. Attorneys are "inferior Officers" within the meaning of this constitutional provision is by now well-established. *See, e.g.*, *Morrison*, 487 U.S. 676–77.

to decide who may remove them.[151] One might argue, however, that, if Congress gives the district court authority to appoint a U.S. Attorney (as it has in § 546), it must give the President authority to remove the court-appointed U.S. Attorney. Otherwise, the statute arguably creates a separation of powers problem by giving federal courts too much power over, or involvement with, the conduct of federal prosecutions, or by giving the U.S. Attorney too much independence from Executive Branch oversight. In *United States v. Hilario*,[152] an appellate court gave credence to this argument, rejecting a constitutional challenge to judicial appointments of U.S. Attorneys based in part on the assumption that the President can remove a district court's appointee.[153] This constitutional argument should not prevail, in our view.[154] But federal courts might prefer to avoid it by

151. The President's removal power is not textually recognized in the Constitution and the Supreme Court has found it to be subject to limitations. Humphrey v. United States, 295 U.S. 602, 629 (1935) ("We think it plain under the Constitution that illimitable power of removal is not possessed by the President . . . ."). It would be inconsistent with the constitutional allocation of authority if the President could unilaterally remove a court's appointee without congressional authorization and contrary to congressional intent.

Further, presidential interference with federal court action—in effect, nullifying a court order issued pursuant to explicit statutory authority—itself presents a separation of powers problem. It would present a conflict between Executive Branch authority, on one hand, and both congressional and judicial authority on the other. *Id.* at 629–30.

Finally, the ordinary authority of the President is to take care to faithfully *execute* the law, not to subvert it. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 147 (2nd ed. 1829). Removing a court-appointed U.S. Attorney does not entail the execution of any law for which the President is assigned responsibility. On the contrary, as a general matter, the President's removal of a court-appointed U.S. Attorney undermines the process established by § 546.

152. 218 F.3d 19 (1st Cir. 2000).

153. *Id.* at 27 ("[Under the 1986 version of § 546,] the Executive Branch holds all the trump cards [because] . . . the President may override the judges' decision and remove an interim United States Attorney."); *compare* United States v. Rose, 537 F. Supp. 2d 1172, 1176–77 (D.N.M. 2008) ("And it goes without challenge that the power to remove a United States Attorney is vested exclusively in the President, who may exercise that power for any reason.") *with* United States v. Baldwin, 541 F. Supp. 2d 1184, 1194 (D.N.M. 2008) ("[A]n interim United States Attorney must relinquish the position when a Presidential appointee becomes qualified, either through the nomination and confirmation process or through a recess appointment.").

154. It is not persuasive to contend that the district court's appointment authority must be accompanied by presidential removal authority because otherwise the district court would have too much power over the U.S. Attorney or would be too entangled in the work of the U.S. Attorney. The underlying assumption must be that if the President cannot unilaterally remove the U.S. Attorney, then it follows that the district court can. This does not necessarily follow, however. When Congress authorizes federal courts to appoint administrative officials, whether relating to the administration of justice (as here) or not, it has not ordinarily been required to authorize the President to remove the officials. *See, e.g.*, *Ex parte* Siebold, 100 U.S. 371, 397 (1879) (upholding a statute providing for court appointment of election officials); Hobson v. Hansen, 265 F. Supp. 902, 919 (D.D.C. 1967) (three-judge panel) (upholding statute providing for court appointment of members of D.C. board of education).

Further, if one assumes that the President must be able to remove a U.S. Attorney, it need not be via summary power. Here, the President can remove a U.S. Attorney and put a new one in place via the ordinary confirmation process. That is precisely what § 546 contemplates.

And even if one assumes that, unless the President has this power, the district court must be able to remove a court-appointed U.S. Attorney—presumably for incompetence or malfeasance—this would not imply full-fledged judicial administration or supervision of criminal prosecutions, and it would add little to district courts' unarguable regulatory authority over all U.S. Attorneys. Although U.S. Attorneys are Executive Branch officials, they are also lawyers who serve as officers of the court subject to judicial licensing and regulation, and who appear before the court subject to court rules and rulings. 28 U.S.C. § 547. District courts regulate U.S. Attorneys' conduct pursuant to the courts' supervisory authority over criminal cases and their inherent authority to regulate the bar. Fred C.

recognizing a president's statutory authority to fire a court-appointed U.S. Attorney, notwithstanding Congress's contrary expressions of intent.

Given the law's uncertainty, Congress should amend the 2007 law to provide explicitly that the President and Attorney General lack authority to fire a court-appointed U.S. Attorney. It should be clarified that the way for the President to replace the court's appointee is to nominate a lawyer who gains senatorial confirmation. The amendment would be consistent with Congress's earlier intent. It would protect the Senate's ability to employ the confirmation process to ensure that presidential nominees wielding the federal government's awesome prosecutorial power are not partisan political hacks.

B. Preventing the Attorney General from Handpicking U.S. Attorneys for Sensitive Cases

U.S. Attorneys are less likely to serve as an effective check if their politics, ideology, and personal ties align with those of the Attorney General. When an Attorney General selects a particular U.S. Attorney to investigate a sensitive politically charged case, that U.S. Attorney would likely share the same political biases as the Attorney General. Even if the U.S. Attorney was capable of putting these preconceptions aside, the public might reasonably suspect that the handpicked U.S. Attorney is not sufficiently independent from the Attorney General and the current Administration to serve as an adequate check.

This was the case in the Flynn prosecution discussed above.[155] The fact that Attorney General Bill Barr selected a Trump-appointed U.S.

Zacharias,& Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303, 1309–11 (2003). They have authority, where necessary, to disqualify U.S. Attorneys for conflicts of interest or other improprieties, to hold them in contempt, or otherwise to sanction them. *Id.* at 1340. They also have authority to appoint lawyers for indigent defendants and remove them for cause, but this does not unconstitutionally entangle courts in the conduct of a criminal defense. *Id.* at n.207. The removal authority would be of a piece with the judiciary's ordinary, everyday supervisory authority.

Likewise, it would be unpersuasive to contend that a U.S. Attorney who is not subject to presidential removal will be too independent. The question of whether, and to what extent, U.S. Attorneys may act independently of the Attorney General or the President is a question for Congress to decide. Congress has established other federal agencies that act independently of the President and other federal officials who are not subject to presidential removal. Bruce A. Green,& Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 26 (2018). U.S. Attorneys were not always subject to oversight by the Attorney General, and the Constitution does not require that they be so. *Id.* at 32–33. U.S. Attorneys have historically had significant independence from the President as well. Congress was entitled, in amending § 546, to restore the district courts' authority to appoint U.S. Attorneys, in part for the very purpose of protecting prosecutorial independence. *See* Warren, *supra* note 149, at 108.

In any event, the court-appointed U.S. Attorney's greater independence, if not subject to summary presidential removal, is only a slight matter of degree. The President can still remove the court-appointed U.S. Attorney by nominating a successor whom the Senate confirms. Charlie Savage, *Who Can Fire a Court-Appointed U.S. Attorney? An Abrupt Legal Fight, Explained*, N.Y. TIMES (June 20, 2020), https://www.nytimes.com/2020/06/20/us/politics/geoff-berman-who-can-fire.html. Further, the Attorney General can decline to assign cases to the U.S. Attorney's office, limit the office's funding, and take other measures to regulate its work. And the U.S. Attorney is subject to the ordinary regulatory authority of the federal courts.

155. Shear,& Goldman, *supra* note 81.

Attorney to review the prosecution undermined the legitimacy of the process.[156] Creating further distrust, the U.S. Attorney in Washington, D.C., who implemented the new decision to withdraw charges, was an interim U.S. Attorney also chosen by President Trump.[157] Of course, it did not help that President Trump was so vocal about his desired outcome in the case, but the DOJ ought to be organized to withstand this kind of pressure to the extent possible and convey impartiality in the face of it.[158]

The issue arose again when Attorney General Barr picked U.S. Attorney John Durham to open a criminal investigation into the origins of the DOJ's probe into President Trump's campaign ties to Russia.[159] While Barr ultimately named Durham to serve as special counsel, the investigation began when Barr tapped Durham for the job.[160] Barr was also involved in the daily operations of the investigation in a way that undermined the notion that the U.S. Attorney was acting independently.[161] There is no evidence that Durham's investigation was tainted by political bias, but Bill Barr did seek to influence the investigation, and it was reasonable for the public to speculate about Durham's motivation given that he too was a Trump appointee.[162]

Attorney General Merrick Garland, who set out to restore faith in the DOJ, apparently understood the value of selecting a U.S. Attorney with ties to the opposing political party when he assigned the investigation of Hunter Biden to David Weiss, U.S. Attorney of Delaware, who was appointed by former President Trump.[163] When classified documents were

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156. Savage, Goldman,& Apuzzo, *supra* note 84.

157. Daniel Chaitin, *'Plot Thicken's: Maddow Suggests Barr Pick for Top Prosecutor Tied to Michael Flynn Case*, WASH. EXAM'R (Jan. 30, 2020), https://www.washingtonexaminer.com/news/plot-thickens-maddow-suggests-barr-pick-for-top-prosecutor-tied-to-michael-flynn-case.

158. *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 30, 2020, 7:47 AM) https://twitter.com/realDonaldTrump/status/1255826177350144001 ("What happened to General Michael Flynn, a war hero, should never be allowed to happen to a citizen of the United States again!").

159. Kevin Johnson, *Attorney General Taps Top Connecticut Federal Prosecutor for Review of Trump-Russia Inquiry*, U.S.A. TODAY (May 14, 2019, 3:20 PM), https://www.usatoday.com/story/news/politics/2019/05/13/attorney-general-barr-john-durham-us-attorney-connecticut-review-trump-russia-investigation-origin/1195462001/.

160. Kyle Cheney,& Josh Gerstein, *Barr Taps Durham as Special Counsel, Pushing Probe Into Biden Era*, POLITICO (Dec. 1, 2020, 5:00 PM), https://www.politico.com/news/2020/12/01/william-barr-john-durham-special-counsel-russia-441872.

161. Katelyn Polantz,& Marshall Cohen, *Exclusive: Barr Met With Prosecutor Now Reviewing Russia Probe Immediately After Mueller Investigation Ended, Documents Reveal*, CNN (May 20, 2020, 9:00 AM), https://www.cnn.com/2020/05/20/politics/barr-russia-prosecutor-mueller/index.html; Mark Mazzetti, Adam Goldman,,& Katie Benner, *Barr and a Top Prosecutor Cast a Wide Net in Reviewing the Russia Inquiry*, N.Y. TIMES (Dec. 9, 2019), https://www.nytimes.com/2019/10/06/us/politics/barr-and-a-top-prosecutor-cast-a-wide-net-in-reviewing-the-russia-inquiry.html.

162. Charlie Savage, Adam Goldman,& Katie Benner, *How Barr's Quest to Find Flaws in the Russia Inquiry Unraveled*, N.Y. TIMES (Jan. 26, 2023), https://www.nytimes.com/2023/01/26/us/politics/durham-trump-russia-barr.html.

163. Brooke Singman,& David Spunt, *Hunter Biden Investigation: AG Garland Taking Hands-Off Approach, Leaves Charging Decisions to Weiss*, FOX NEWS (Oct. 7, 2022), https://www.foxnews.com/politics/hunter-biden-investigation-ag-garland-taking-hands-off-approach-leaves-charging-decisions-weiss.

found at President Biden's office, Garland again chose a Trump-appointed U.S. Attorney to lead the probe.[164] Presumably, he did so to help preserve an independent investigation and promote trust in the outcome.

To avoid the potential erosion of the U.S. Attorneys' role as a check on the politicization of DOJ, the choice of special counsel ought not to be left to the discretion of the Attorney General. Internal regulations should provide that whenever Attorneys General assign an investigation in a sensitive case, involving potential conflicts of interest for an Administration,[165] they should select a U.S. Attorney appointed by a president of the opposing party or a private lawyer with ties to the opposing party.[166] Once the assignment has been made, the Attorney General should neither directly participate in the investigation and prosecution nor take part in discretionary decisions.

CONCLUSION

Geoffrey Berman and Bill Barr have offered opposing solutions to address the politicization of the DOJ. Neither account fully addresses the problem. Barr is correct in noting that politicization can occur at any level within the DOJ, but he is wrong to insist that the Attorney General must therefore have full power over all prosecutorial decisions. Berman is correct in arguing that the greatest threat of politicization comes from an Administration and the Attorney General, but he is wrong to insist that U.S. Attorneys should therefore be fully independent of the Administration in which they serve. Our proposals address the problem of politicization, taking into consideration the strengths and weaknesses of Barr's and Berman's accounts.

It is impossible to eradicate political influence in prosecution. Sometimes political motivations are unconscious, and even the prosecutor will not be able to recognize them.[167] Other times, political influence will be so well disguised that it is hard to identify.[168] In addition, the individuals charged with policing such politicization likely have their own political

164. Anders Hagstrom, David Spunt,& Bill Mears, *DOJ Taps Trump-Appointed Attorney to Investigate Classified Documents Found at Biden Think Tank*, FOX NEWS (Jan. 10, 2023), https://www.foxnews.com/politics/doj-taps-trump-appointed-attorney-investigate-classified-documents-found-biden-think-tank.

165. While there certainly could be a dispute about what constitutes a "sensitive case," the point is to raise the issue in high profile cases with important political implications.

166. This approach has a long historical pedigree which was outlined in a federal appellate decision rejecting a challenge to Ken Starr's appointment to investigate President Clinton. *See* Starr v. Mandanici, 152 F.3d 741, 753–55 (8th Cir. 1998) (Loken, J., concurring) (describing history of appointing a member of the opposition party to investigate officeholders).

167. Prosecutors have their own biases that are often unconscious. For a discussion of such biases, see Alafair Burke, *Brady's Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 CASE W. RES. L. REV. 575 (2007); Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481 (2009); Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475 (2006).

168. For an example of such well disguised influence, see *Rachel Maddow Presents: Ultra*, SPOTIFY (Oct. 2022), https://open.spotify.com/show/3ImqTb6CcfZINTgByeAThh.

beliefs that could affect their judgment.[169] Finally, democratic accountability requires some proximity and interaction between political actors and prosecutors, making it difficult to disentangle politics from prosecution entirely.[170]

Recognizing this inevitability, our proposed system of checks and balances minimizes the negative impact of politicization both on the criminal justice system and on democratic norms generally. By requiring that both the Attorney General and U.S. Attorney sign off on prosecutions in politically charged cases, our proposal would reduce the number of politically motivated prosecutions. It would inevitably result in more politically motivated decisions not to charge, but shifting the risk in this way is preferable. A well-functioning criminal justice system presupposes that some, if not many, guilty people will not be prosecuted and imprisoned. While no system is perfect, it is more concerning when an innocent person is convicted for improper reasons than when an individual unjustifiably goes free.

Similarly, politicization of prosecution presents two different concerns for democracy. First, there is the concern that powerful political actors can control the criminal justice system and evade accountability for corruption and other bad acts. Second, political actors can weaponize the criminal justice system to pursue and weaken their political adversaries. While these are both significant concerns, the latter poses a more immediate and existential threat to democratic principles. Ideally, no powerful politician or prosecutor abuses the criminal justice system for political ends, but if one does, using it as a shield rather than a sword is preferable. A lack of criminal liability for powerful political actors is inconsistent with democratic principles, but the use of the criminal justice system to cripple or disable political adversaries poses a more immediate and potentially fatal threat.

Because Berman was correct in arguing that the greatest threat of politicization comes from the White House and others in an Administration, it is essential to protect U.S. Attorneys' independence. If they are susceptible to capture, they cannot serve as an effective check on the Attorney General. Thus, we argue that the confirmation process ought to be altered to help ensure that U.S. Attorneys are qualified and independent. We also suggest a change to DOJ policy that would limit the ability of Attorneys General to select a like-minded U.S. Attorney to preside in politically charged cases.

Our proposals would not eliminate improper political influence on criminal prosecutions, but, along with the other mechanisms discussed in

169. *See generally*, Green,& Roiphe, *supra* note 13 (arguing that some actors are more likely than others to have their own political motivations and therefore are ill-suited to policing politicization of the DOJ).

170. For a discussion of political accountability in prosecution, see Bruce A. Green,& Rebecca Roiphe, *A Fiduciary Theory of Progressive Prosecution*, 69 AM. U. L. REV. 805, 849–852 (2020).

Part II, implementing them will blunt the effect and minimize the harm of political pressure. The proposed system of checks and balances should also help maintain faith in any prosecution that does go forward, making it harder for accused individuals and their allies to claim that a prosecution is a political witch hunt. As we have seen in the recent past, these allegations alone can inflict substantial damage to the legitimacy of the criminal justice system and to democratic norms generally.