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The President, Prosecutorial Discretion, Obstruction of Justice, and Congress

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INTRODUCTION

The executive power of the United States is vested in the President of the United States.[1] That power includes prosecutorial discretion—the power to prosecute or decline to prosecute.[2] Consequently, the President would appear to have the constitutional authority to initiate or end a federal criminal prosecution or investigation. This would seem particularly so in an era in which executive power arguably continues to expand. Nonetheless, an ongoing debate exists regarding whether a President obstructs justice when he attempts to end a criminal investigation for improper reasons.[3] Those who argue in favor of the possibility of obstruction of justice suggest that a President can so misuse a power that has been given to the office that the exercise of the power is an act of malfeasance, criminality, or both.[4] Those who argue against the possibility of obstruction tend to rely on the President's executive

* Austin E. Owen Research Scholar & Professor of Law, University of Richmond School of Law. The author thanks all involved in conceiving and executing this fabulous symposium. I am grateful to my colleagues at the University of Richmond School of Law for their thoughtful comments on this essay.

1. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

2. *See* United States v. Nixon, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ."); United States v. Fokker Servs. B.V., 818 F.3d 733, 737 (D.C. Cir. 2016) ("The Constitution allocates primacy in criminal charging decisions to the Executive Branch. The Executive's charging authority embraces decisions about whether to initiate charges, whom to prosecute, which charges to bring, and whether to dismiss charges once brought."); *see also* Wayte v. United States, 470 U.S. 598, 607 (1985) (discussing broad discretion given to prosecutors with respect to decisions to prosecute or decline to prosecute).

3. *See* Katie Bo Williams, *Trump's Lawyer Sparks Intense Debate on Obstruction of Justice*, THE HILL (Dec. 5, 2017), http://thehill.com/policy/national-security/363220-trumps-lawyer-sparks-intense-debate-on-obstruction-of-justice.

4. *Can the President Obstruct Justice?*, POLITICO MAG. (Dec. 4, 2017), https://www.politico.com/magazine/story/2017/12/04/can-the-president-obstruct-justice-216008.

power.[5] The debate is too large to fully resolve in this brief essay. Instead, this essay sketches the contours of the debate and briefly considers which questions surrounding the debate are particularly difficult to resolve and which are not.

Part I discusses executive power. Part II addresses the President's control over prosecutorial decision-making. Part III explores when a President's attempt to end a criminal prosecution or investigation might obstruct justice. Part IV considers whether Congress's independent ability to investigate a matter should be relevant to whether presidential action ending a criminal investigation should be considered an obstruction of justice.

I. EXECUTIVE POWER

The Constitution confers the President enormous authority by vesting executive power in the office of the President. The precise breadth of executive power is unclear because the Constitution does not define executive power.[6] The Supreme Court may limit the content of executive power directly by defining it narrowly, or indirectly by defining congressional power or judicial power broadly enough to impinge on the executive power.[7] The Court may also limit the President's power by allowing Congress to regulate how the executive power is exercised, such as by letting Congress deem certain officials other than the President responsible for making certain executive branch decisions.[8] In addition, Congress may limit the President's power indirectly by influencing the President through use of congressional powers, such as the power of the purse.[9] Conversely, a broad reading of the vesting clause might leave the President's power unregulated by treating the President

5. *See, e.g.*, Andrew C. McCarthy, *The President's Power to End a Criminal Investigation*, NAT'L REV. (May 20, 2017), http://www.nationalreview.com/article/447801/obstruction-justice-president-can-end-criminal-investigation.

6. *See* U.S. CONST. art. II, § 1, cl. 1.

7. Legislative powers and other powers are given to Congress primarily in Article I of the Constitution. *Id.* art. I, § 1. Judicial power is not defined, but is given to the federal courts in Article III of the Constitution. *Id.* art. III, § 1. Defining a clean line between and among powers can be difficult. *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935) (noting quasi-legislative and quasi-judicial aspects of the Federal Trade Commission and distinguishing them from executive functions); *see also, e.g.*, Buckley v. Valeo, 424 U.S. 1, 137–38 (1976).

8. Congress may do so if congressional action does not infringe the President's ability to control executive power. *See* Morrison v. Olson, 487 U.S. 654, 689–90 (1988).

9. Congress can restrain the President's ability to fire individuals. *See id.* at 691–92; *see also* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1344–45 (1988).

as ultimately responsible for all executive branch decisions, and giving the President the latitude to make all executive decisions personally or to decide when to delegate the decisions to others. Whether or not that broad reading is plausible, it has not been endorsed by the Supreme Court.[10]

A recent case may affect how broad the scope of executive power may become and may limit how Congress may regulate the President's use of executive power. In *Zivotofsky v. Kerry*, the Supreme Court decided that the executive alone is empowered to determine what countries the United States recognizes and the territorial boundaries of those countries.[11] Though the decision focuses on foreign policy, the Court's approach to executive power need not be limited to the foreign policy arena. In *Zivotofsky*, the Court considered which branch—the executive or the legislative—is empowered to determine how the country of birth of an American passport holder who was born in Jerusalem will be listed on an American passport.[12] Congress passed legislation stating that an American passport holder born in Jerusalem who requested that her place of birth be listed as Israel on her passport would be allowed to list her place of birth as Israel.[13] That legislation contravened longstanding executive branch policy that required that such a passport holder's place of birth be listed as Jerusalem.[14] The policy stemmed from the United States' historical refusal to recognize Jerusalem as Israel's sovereign territory.[15] On signing the legislation, President George W. Bush issued a signing statement noting that the legislation was unconstitutional if it required the President to list Israel as the passport holder's place of birth, because that would invade the President's right to recognize countries on the United

10. *See* David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 73, 79 (2009) (suggesting that the Court has rejected a strong vision of a unitary executive).

11. 576 U.S. __, __, 135 S. Ct. 2076, 2087, 2096 (2015).

12. *See id.* at __, 135 S. Ct. at 2081.

13. *See id.* at __, 135 S. Ct. at 2082.

14. *See id.* at __, 135 S. Ct. at 2082.

15. *See id.* at __, 135 S. Ct. at 2081.

States' behalf.[16] He further noted that the legislation would be constitutional if it merely provided the President the discretion to list either Jerusalem or Israel as the passport holder's place of birth.[17]

The Court agreed with President Bush. Though the Constitution does not explicitly give the President the sole authority to recognize nations,[18] the Court ruled that the Constitution's Reception Clause—which assigns the President the duty to "receive Ambassadors and other public Ministers"[19]—coupled with past practice, provides the President the sole power to recognize foreign countries.[20] The *Zivotofsky* Court's approach, which gives the President the exclusive authority to recognize foreign countries and their territorial boundaries, allows an expansive reading of executive power based on constitutional principles and scant constitutional text. The *Zivotofsky* Court's embrace of a broad reading of executive power based on weak constitutional text may invite other broad readings of executive power and may suggest that the President should be allowed to deem an increasing number of executive decisions to be within the executive branch's exclusive decision-making authority. In addition, the *Zivotofsky* Court noted that Congress has no right to directly limit how the President makes a recognition decision.[21] Congress can seek to influence the executive through use of its own legislative powers but cannot force the President to do anything. By defining executive power broadly and limiting congressional power to infringe the President's exercise of executive power, the Court risks the accumulation of power in the executive branch and in the executive. *Zivotofsky* gives the President wide latitude to execute policy regarding matters that the Constitution only arguably places inside the executive power. The case may provide the President even greater latitude to make decisions regarding matters that are clearly within the executive power, such as prosecutorial discretion.

16. *See id.* at __, 135 S. Ct. at 2082 (quoting Presidential Statement on Signing the Foreign Relationships Authorization Act, Fiscal Year 2003, 38 WEEKLY COMP. PRES. DOC. 1658, 1659 (Sept. 30, 2002)).

17. *See id.* at __, 135 S. Ct. at 2082 (quoting Presidential Statement on Signing the Foreign Relationships Authorization Act, Fiscal Year 2003, 38 WEEKLY COMP. PRES. DOC. 1658, 1659 (Sept. 30, 2002)).

18. *See id.* at __, 135 S. Ct. at 2084–85.

19. U.S. CONST. art. II, § 3.

20. *See Zivotofsky*, 576 U.S. at __, 135 S. Ct. at 2091–94.

21. *Id.* at __, 135 S. Ct. at 2087.

In addition to providing the President great authority, the Constitution also places enormous responsibility on the President to use that authority appropriately. The President's oath of office requires that the President preserve, protect, and defend the Constitution of the United States and faithfully execute the office of President.[22] The office of President requires, in part, that the President take care that the laws be faithfully executed.[23] The Take Care Clause requires that the President enforce the nation's laws. It can be interpreted as a command to the President to enforce the laws, a command to the President to make sure that executive branch officers execute the laws properly, or both.[24] Regardless of the precise nature of the command, it likely comes with a grant of discretion. If the President has not been provided sufficient resources to enforce every law fully, the command to take care that the laws be enforced may require the President to choose which laws to enforce or how best to enforce those laws.[25]

The Take Care Clause makes the President the nation's top law enforcement officer. Though some may consider the United States Attorney General the nation's chief law enforcement officer,[26] the Attorney General answers to the President and has an obligation to defend the nation's laws consistent with the President's vision of executive power.[27] An Attorney General who cannot do that can resign or be fired, even if the Attorney General believes that following the President violates the Attorney General's oath.[28] Conversely, the President is subservient to no one and nothing other

22. U.S. CONST. art. II, § 1, cl. 7.

23. *See id.* art. II, § 3.

24. For general discussion of the Take Care Clause, see Henry L. Chambers, Jr., *Lincoln, the Emancipation Proclamation, and Executive Power*, 73 MD. L. REV. 100, 121–24 (2013).

25. *See* Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U.L. REV. 489, 490, 492 (2017) (noting link between resource constraints and need to determine which laws to enforce).

26. The Department of Justice suggests that the Attorney General is the nation's chief law enforcement officer. *About the Office*, DEP'T OF JUST. (Sept. 15, 2015), https://www.justice.gov/ag/about-office ("The Judiciary Act of 1789 created the Office of the Attorney General which evolved over the years into the head of the Department of Justice and chief law enforcement officer of the Federal Government."); *see* 28 U.S.C. § 503 (2012) (making the Attorney General the head of the Department of Justice).

27. The Attorney General takes an oath, as all executive officers of the United States do, to support the Constitution. *See* U.S. CONST. art. VI, cl. 3; *see also* 5 U.S.C. § 3331 (2012). Consequently, the oath may require that the Attorney General decline to do what the President has ordered the Attorney General to do.

28. That may trigger an unfortunate clash. *See* Driesen, *supra* note 10, at 85–86 (suggesting that executive branch officers have an obligation to disobey the President when they

than the Constitution. Indeed, a President who disagrees with Congress may have an obligation to defy Congress if the President believes that following Congress violates his oath of office.[29]

The President's authority, coupled with his responsibility, may lead the President to believe he has ultimate control over every decision the executive branch makes. That could be problematic when the President becomes involved in areas where other members of the executive branch are better prepared to make decisions than the President. That is the situation with respect to the exercise of prosecutorial discretion.

II. PROSECUTORIAL AND INVESTIGATIVE DISCRETION

The President has a broad law enforcement responsibility that involves setting law enforcement priorities that will affect prosecutorial and investigative decision-making. Indeed, the President arguably has the authority to exercise prosecutorial discretion directly, given that the executive power includes the power to prosecute and the power to decline to prosecute.[30] The Take Care Clause may appear to suggest that the executive power includes the obligation to prosecute every federal crime.[31] However, a President never has sufficient resources to investigate and prosecute every possible federal crime.[32] The discretion to determine whether federal power will be used to prosecute violations of federal criminal law is a part of taking care that the laws be faithfully executed.[33]

The President has a policymaking role with respect to prosecutorial decision-making, but generally should not be involved in individual decisions to prosecute or not to prosecute individual

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believe that their oath to support the Constitution requires it).

29. The President's obligation to follow his oath can lead to difficult choices for the chief executive. *See* Henry L. Chambers, Jr., *Presidential Constitutional Interpretation, Signing Statements, Executive Power, and* Zivotofsky, 87 U. COLO. L. REV. 1183, 1191–95 (2016) [hereinafter Chambers, *Presidential Constitutional Interpretation*] (discussing how Presidents may address laws they believe are unconstitutional consistent with duty to take care that laws are faithfully executed).

30. *See* United States v. Fokker Servs. B.V., 818 F.3d 733, 737 (D.C. Cir. 2016) (discussing executive branch authority over prosecutions).

31. *See* Chambers, *Presidential Constitutional Interpretation*, *supra* note 29, at 1191.

32. *See* Markowitz, *supra* note 25, at 492–93.

33. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (noting link between prosecutorial discretion and President's responsibility to take care that the laws are faithfully executed); *see also Fokker Servs. B.V.*, 818 F.3d at 741 (linking prosecutorial discretion and take care duties).

cases.[34] Executive power flows through the President, but the President need not make every executive branch decision. Prosecutorial decisions in individual cases should be made primarily by prosecutors who can attempt to apply consistent prosecutorial standards across the general run of cases. The Department of Justice ("DOJ") does and should make individual prosecution decisions largely through local United States Attorney offices.[35] The same is true of criminal investigations. The President's policy decisions may affect individual investigations, but the President should not generally be involved in deciding how individual investigations proceed.

Suggesting that the President's role in prosecutorial decision-making should be limited may seem odd, as the Constitution explicitly gives the President the most powerful tool of prosecutorial discretion imaginable—the power to pardon.[36] The pardon power allows the President to erase federal criminal liability for individuals or groups.[37] However, that power should only be used in special circumstances, and its use arguably should be considered a deviation from the standard application of the law.[38] Even though the exercise of the pardon power may have the same practical effect as a decision to decline to prosecute, when used to pardon an individual, the pardon power arguably is of a different quality than a specific, individual prosecutorial decision made by a prosecutor based on general prosecutorial policy.

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34. Of course, states tend to divide prosecutorial and executive functions. *See generally* William P. Marshall, *Break up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446 (2006) (discussing the benefits and potential limitations of separating the prosecutorial function from the executive function as occurs when independent state attorneys general serve with elected governors).

35. U.S. DEP'T OF JUST., U.S. ATTORNEYS' MANUAL § 9-2.001 (2015) [hereinafter U.S.A.M.], https://www.justice.gov/usam/united-states-attorneys-manual (explaining authority of the United States Attorney in criminal division matters and prior approvals).

36. *See* U.S. CONST. art. II, § 2, cl. 1 ("The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.").

37. *See Ex parte* Garland, 71 U.S. 333, 340 (1867) (discussing the effect of the presidential pardon); *see, e.g.*, Todd D. Peterson, *Congressional Power over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1240 (2003) (discussing pardons of Vietnam-era draft avoiders).

38. *See* Henry L. Chambers, Jr., *The President as Spiritual Leader: Pardons, Punishment, Forgiveness, Mercy, and Justice*, *in* FRONTIERS IN SPIRITUAL LEADERSHIP 69, 74 (Scott Allison, Craig Kocher & George Goethals eds., 2016) [hereinafter Chambers, *President as Spiritual Leader*] (noting that the pardon "can be thought to operate in derogation of the law").

A. *The Pardon Power*

The Constitution gives the President the power to pardon, allowing the President to eliminate the specter of punishment for conduct that violates federal criminal law.[39] Though the pardon power may not appear consistent with the President's take care obligation, it arguably is.[40] The Take Care Clause obligates the President to enforce federal law.[41] The pardon power can be considered a recognition that not prosecuting or punishing conduct, even in cases where guilt has been or could be proven, may be consistent with properly enforcing federal law as a whole and doing justice.[42]

The pardon power consists of five powers: (1) the power to reverse a conviction or eliminate the possibility of conviction, (2) the power to commute or shorten a sentence, (3) the power to reverse fines and forfeitures, (4) the power to grant a reprieve to postpone punishment, and (5) the power to grant amnesty to a class of potential offenders.[43] It can be used narrowly to provide individual relief to particular offenders, as with President Ford's pardon of President Nixon, or it can be exercised broadly to grant relief to a group of offenders, as with President Carter's amnesty for some classes of Vietnam draft avoiders.[44] Given the different ways the pardon power may be used, it reflects total prosecutorial discretion both at the granular level with respect to individual pardons and at the policy level with respect to group pardons. It also reflects the President's power to negate a prosecution post verdict or to obviate the need for a prosecution before a prosecution begins.

However, the pardon power has limits, and a pardon's effect is limited. Though a pardon may end criminal liability for an individual or group of people, a pardon does not necessarily end all crimi-

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39. *See id.* at 75, 81.

40. *See In re* Aiken Cty., 725 F.3d 255, 262–63 (D.C. Cir. 2013) ("The Presidential power of prosecutorial discretion is rooted in Article II, including the Executive Power Clause, the Take Care Clause, the Oath of Office Clause, and the Pardon Clause. The President may decline to prosecute certain violators of federal law just as the President may pardon certain violators of federal law." (footnote omitted) (citations omitted)).

41. *See* Ted Cruz, *The Obama Administration's Unprecedented Lawlessness*, 38 HARV. J.L. & PUB. POL'Y 63, 65–66 (2015).

42. For a general discussion on pardons, see Chambers, *President as Spiritual Leader*, *supra* note 38, at 69–75.

43. *See id.* at 74.

44. *See* Peterson, *supra* note 37, at 1235–36, 1240 (discussing President Ford's pardon of President Nixon and pardons of Vietnam draft avoiders).

nal or civil investigation related to the subject matter of the pardon.[45] A pardon also cannot save a public official from impeachment.[46] Pardons can wipe away criminal liability, but they do not necessarily wipe away all consequences of criminal behavior. In addition, the scope of the pardon power is not clear. Whether the President can self-pardon has not been resolved.[47] Similarly, the conditions under which a pardon may be voided are unclear.[48] Nonetheless, the pardon power suggests that the President has an important and direct role in the federal criminal justice system.

B. *Prosecutorial Discretion and Policy*

The President can affect prosecutorial policy at the DOJ. Prosecutorial policy is within the executive power and arguably should reflect a President's policy preferences. Policy may guide individual prosecution decisions. However, those decisions reflect the application of the policy to a specific set of facts, not the President's desire to end a specific prosecution. In that way, the President may reasonably and sensibly influence individual prosecution decisions without making those prosecution decisions on his own.

The Cole Memorandum[49] ("Cole Memo") and the Filip Memorandum[50] ("Filip Memo") illustrate the role policy can play in prosecutorial decision-making. Before it was recently withdrawn by Attorney General Sessions, the Cole Memo stated the DOJ's prosecutorial policy regarding marijuana-related violations under the Controlled Substances Act ("CSA").[51] The Filip Memo addresses

45. *Cf.* Kristen H. Fowler, *Limiting the Federal Pardon Power*, 83 IND. L.J. 1651, 1665 (2008) (discussing continuation of investigations after gubernatorial pardons).

46. See U.S. CONST. art. II, § 2, cl. 1 (noting that pardon power does not extend to impeachment cases).

47. *See, e.g.*, Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197, 199 (1999); Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85, 149 (2002).

48. *See* Strasser, *supra* note 47, at 144–48 (discussing the possible voidability of state and federal pardons).

49. Memorandum on Guidance Regarding Marijuana Enforcement from James M. Cole, Deputy Attorney Gen. of the U.S., to All U.S. Attorneys (Aug. 29, 2013) [hereinafter Cole Memo], www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf.

50. Memorandum on Principles of Federal Prosecution of Business Organizations from Mark Filip, Deputy Attorney Gen. of the U.S., to Heads of Dep't Components, U.S. Attorneys (Aug. 28, 2008) [hereinafter Filip Memo], www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.

51. Cole Memo, *supra* note 49, at 1; *see also* Memorandum on Marijuana Enforcement from Jefferson B. Sessions, III, Attorney Gen. of the U.S., to All U.S. Attorneys (Jan. 4, 2018)

white collar crime prosecutions in the context of organizational crime.[52] Issued by the DOJ to local United States Attorneys' offices, the memos are guides to the application of prosecutorial discretion.[53] They reflect and crystallize enforcement priorities, and signal how executive power and prosecutorial authority may be exercised.

1. The Cole Memo

The Cole Memo provided "guidance to federal prosecutors concerning marijuana enforcement under the [CSA]."[54] The Cole Memo applied in all states, but was prompted by state laws that made some forms of marijuana possession legal under state law and created regulatory structures allowing the production and sale of marijuana.[55] It is a policy- and priorities-based memo that explains that the federal government's enforcement priorities with respect to marijuana production and sale govern its prosecutorial discretion and resource use regarding marijuana prosecutions, even though the CSA bans marijuana production and sale.[56] The Cole Memo memorialized the choices the federal government had made regarding marijuana enforcement and suggested that federal prosecutorial policy would likely be consistent with those choices.[57] It explained the DOJ's enforcement priorities regarding marijuana and noted the circumstances under which the DOJ would likely not

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[hereinafter Sessions Memo], https://www.justice.gov/opa/press-release/file/1022196/download. Some view this form of prosecutorial discretion to be problematic. *See* Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 783 (2013) (suggesting that a precursor memo to the Cole Memo was an abdication of the take care responsibility rather than an application of it); *see also* Markowitz, *supra* note 25, at 492 ("At what point does a nonenforcement policy cross the line between the executive discretion properly vested in the President and instead become violative of the President's constitutional duty to 'take care that the laws be faithfully executed'?").

52. *See* Filip Memo, *supra* note 50, at 1.

53. The Attorney General sets litigation policy for the DOJ and directs United States Attorneys in litigation matters. 28 U.S.C. § 519 (2012).

54. Cole Memo, *supra* note 49, at 1.

55. *Id.*

56. *See id.* at 1–2 ("The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way.").

57. *See id.* at 2. The Cole Memo notes that its bullet-pointed "priorities will continue to guide the [DOJ's] enforcement of the CSA . . . [and] serves as guidance to [DOJ] attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state law." *Id.*

attempt to prosecute people or entities who were clearly violating the CSA.[58] The DOJ's enforcement priorities included preventing harms that are ancillary to the sale and use of marijuana, such as, "[p]reventing the distribution of marijuana to minors," "[p]reventing revenue from the sale of marijuana from going to criminal enterprises," and "[p]reventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use."[59]

The Cole Memo reflected presidential control over a broad law enforcement policy tempered by federalism concerns. As long as states attempted to stop behavior that triggered the federal government's enforcement priorities, state and local law enforcement would largely be left to address marijuana-related activity.[60] The Cole Memo concluded by indicating that it did not guarantee that CSA violations that did not contravene the DOJ's enforcement priorities would be immune from prosecution.[61] Though the Cole Memo necessarily led to the declination to investigate and prosecute in certain situations, it did so based on the application of a broad and clear policy that reflected the President's priorities through the DOJ. Though written to United States Attorneys, the Cole Memo also served to inform potential defendants how to avoid the DOJ's prosecutorial gaze. Though some might argue that the memo violated the nature of the Take Care Clause, that is the nature of policy-based prosecutorial discretion. Attorney General Sessions's memo withdrawing the Cole Memo did not eliminate prosecutorial discretion. It merely directed prosecutors to apply established prosecutorial discretion policy to marijuana cases.[62]

2. Filip Memo

The Filip Memo is an internal DOJ memo that is part of the DOJ's *United States Attorneys' Manual*.[63] It provides guidance on

58. *See id.* at 4 ("[T]his memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.").

59. *Id.* at 1–2.

60. *See id.* at 3.

61. *Id.* at 4 ("Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.").

62. *See* Sessions Memo, *supra* note 51.

63. Filip Memo, *supra* note 50, at 1. The memo has been revised, in part, by the Yates Memorandum, issued in 2015. *See* Memorandum on Individual Accountability for Corporate Wrongdoing from Sally Quillian Yates, Deputy Attorney Gen. of the U.S., to Assistant U.S.

how and whether to prosecute organizations in the context of business crime.[64] The Filip Memo considers whether a prosecutor should prosecute a business organization based on broad culpability concerns.[65] It memorializes the DOJ's prosecutorial discretion with respect to business organizations.[66] The prosecutors to whom the Filip Memo is addressed have expertise in making decisions that are consistent with federal law and prosecutorial practice, expertise a President generally does not have.[67] The President may reasonably be involved in setting policy regarding the prosecution of business organizations. However, the President should not decide which individual companies or company officials should or should not be prosecuted, even if the prosecutors who exercise prosecutorial discretion merely exercise a portion of the executive power the Constitution vests in the President.

The decision to prosecute or decline to prosecute a business organization tracks the decision to prosecute or decline to prosecute an individual.[68] The decision to prosecute an individual requires that the prosecutor believe the prospective defendant has committed a crime, that sufficient evidence to support a conviction exists, and "that a substantial federal interest would be served by the prosecution."[69] Part of the determination whether a substantial federal interest exists rests on whether prosecution would serve "[f]ederal law enforcement priorities, including any federal law enforcement initiatives or operations aimed at accomplishing those priorities."[70] Additional factors include the "nature and seriousness of the offense; . . . [t]he deterrent effect of prosecution; . . . [t]he person's history with respect to criminal activity; . . . [and t]he person's willingness to cooperate in the investigation or prosecution of others."[71] The factors focus on issues that are extraneous to guilt,

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Attorneys Gen., Dir. of Fed. Bureau of Investigation, Dir. of Exec. Office for U.S. Tr., All U.S. Attorneys (Sept. 9, 2015) [hereinafter Yates Memo], www.justice.gov/archives/dag/file/769036/download. Consequently, the Filip Memo is the Filip Memo as revised by the Yates Memo.

64. *See* Filip Memo, *supra* note 50, at 1.

65. *See id.*

66. *Id.*

67. *See id.* ("[T]here is no substitute for the application of considered judgment by line prosecutors and United States Attorneys.").

68. *See* U.S.A.M., *supra* note 35, § 9-28.300(A).

69. *Id.* § 9-27.220(A).

70. *Id.* § 9-27.230(A).

71. *Id.*

but are relevant to whether federal power and resources should be expended on a prosecution.

The Filip Memo provides a similar set of factors to consider when determining whether to charge a business organization. Those additional factors include:

> the corporation's timely and voluntary disclosure of wrongdoing; . . . the corporation's . . . willingness to cooperate in the investigation of its agents; . . . [and] collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution.[72]

As with the factors deemed relevant in prosecuting individuals, the factors relevant to prosecuting corporations assume guilt can be proven, then ask what value the prosecution provides the federal government. The Filip Memo tells prosecutors to consider the factors but does not tell them how to weigh the factors. The decision to prosecute or decline to prosecute tends to rest with the prosecutor.[73]

The Cole Memo and the Filip Memo demonstrate two different ways that policy can affect prosecutorial decision-making. The Cole Memo focuses on broad policy priorities that will potentially affect what resources will be used to investigate and prosecute clear violations of the law. The question is whether the government will look for certain conduct that violates the law. The executive ought to make, or be involved in making, the general policy expressed in the Cole Memo. Conversely, the Filip Memo provides guidance to individual prosecutions after an investigation is complete. The Filip Memo reflects executive branch policy, but the principles underlying it are directed toward prosecutors making discrete decisions about individual prosecutions that should be completely insulated from presidential decision-making.

The President is vested with executive power, but should not generally make individual prosecutorial decisions. Typical prosecutorial decisions ought to be made by career prosecutors, if only to attempt to produce more consistent decisions than might be made if random decision makers unschooled in the general run of

72. Filip Memo, *supra* note 50, at 4 (citations omitted).

73. The United States Attorney is usually authorized to prosecute or decline to prosecute. *See* U.S.A.M., *supra* note 35, §§ 9-2.020(B), 9-2.030(J). A line prosecutor may also be authorized to prosecute or decline to prosecute. *See id.* § 9-28.200(B).

cases made specific prosecution decisions. However, an irony remains. As a prosecutorial decision becomes more policy laden, the final decision to prosecute or to decline to prosecute may need to be made at a higher level than the line prosecutor.[74] Of course, whether a decision is so policy laden that it should be made by higher-level career prosecutors or by political appointees in the DOJ is itself a policy decision that may need to be made by the political appointees in the DOJ.

C. *The President's Role in Investigative Decision-Making*

As in the prosecutorial decision-making area, the President may sensibly promulgate policies that may affect or forestall individual investigations. However, the President should not directly influence individual investigations. Nonetheless, the President is vested with executive power, and may wish to be involved in decisions regarding individual investigations. Investigative decision-making and prosecutorial decision-making are related, but attempts to end investigations are potentially more troublesome than attempts to stop prosecutions. A decision to end an investigation may occur before sufficient information regarding a matter exists to make an informed decision to decline to prosecute. An attempt to end an investigation may be a preemptive and ill-considered exercise of prosecutorial discretion. In addition, ending an investigation is more difficult than it seems. The DOJ may begin most investigations without presidential approval.[75] Consequently, even after an investigation ends, another may begin if unresolved or new facts merit a new or reopened investigation.[76] Rather than seeking to end an investigation directly, a President may attempt to end an investigation indirectly by removing the investigator or the counsel running the investigation.[77] That can trigger serious problems.

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74. *See, e.g., id.* § 9-2.136(J) (certain terrorism-related matters need to be approved by the Attorney General).

75. *See id.* § 9-2.010. Prosecutors may be limited in initiating some prosecutions. *See, e.g., id.* § 9-2.112.

76. *See, e.g.*, Stephen Dinan, *FBI Reopens Clinton E-mail Investigation*, WASH. TIMES (Oct. 28, 2016), https://www.washingtontimes.com/news/2016/oct/28/james-comey-fbi-director-reopens-clinton-email-inv/.

77. *See* William H. Simon, *The Professional Responsibilities of the Public Official's Lawyer: A Case Study from the Clinton Era*, 77 NOTRE DAME L. REV. 999, 1011 (2002).

Generally, the President has the power, as the head of the executive branch, to remove executive branch officials whose jobs are not covered by civil service or similar protections.[78] Even if the President should not make every decision in the executive branch, the President may not be able to exercise sufficient control over the executive branch without the ability to remove people who do not execute the laws as the President reasonably requires. The power to remove arguably is the power to control, at least when executive branch officials are inclined to follow the President's orders rather than resign.[79] The President has significant power to control officials who perform executive functions, but does not invariably have full control over them. Congress can limit the President's ability to remove executive branch officers in some circumstances.[80]

The President's removal power can be powerful, but may come with its own practical limitations. Indirectly affecting an investigation by removing the person running the investigation can be problematic. The recent dismissal of former Federal Bureau of Investigation ("FBI") Director James Comey is instructive. Though the FBI Director has a ten-year term, he can be removed without cause by the President.[81] Director Comey's removal was lawful and consistent with a vision of executive power that allows a President to manage executive branch officials. However, the removal triggered the somewhat unexpected naming of Robert Mueller as special counsel for the investigation Comey had led.[82] That response came from inside of the executive branch. A response could have as

78. *See* Myers v. United States, 272 U.S. 52, 192 (1926) (noting that the President has the right to remove most politically appointed executive branch officers at will, unless Congress specifies otherwise).

79. *See* Jeffrey Frank, *Comey's Firing Is—and Isn't—Like Nixon's Saturday Night Massacre*, NEW YORKER (May 9, 2017), https://www.newyorker.com/news/daily-comment/comeys-firing-is-and-isnt-like-nixons-saturday-night-massacre (discussing President Nixon's firings of officials until he found one who would dismiss the Watergate special prosecutor Archibald Cox).

80. The President may be required to have cause to remove some federal officers who are not covered by civil service protections. *See* Morrison v. Olson, 487 U.S. 654, 692 (1988) (allowing Congress to limit the grounds on which an independent counsel can be removed).

81. VIVIAN S. CHU & HENRY B. HOGUE, CONG. RESEARCH SERV., R41850, FBI DIRECTOR: APPOINTMENT AND TENURE 15 (2014) (noting "the President may remove the Director of the FBI at will").

82. Appointment of Special Counsel, Att'y General Order No. 3915-2017 (May 5, 2017), https://www.justice.gov/opa/press-release/file/967231/download (noting that Special Counsel Mueller was appointed to continue the investigation FBI Director James Comey mentioned "in testimony before the House Permanent Select Committee on Intelligence on March 20, 2017").

easily come from other constitutional actors in the form of congressional threats to use its power of the purse or other powers to restart the investigative process.

Ironically, by exercising the presidential prerogative to remove Director Comey, President Trump must contend with a special counsel he cannot fire directly. The Attorney General, or his designee, can remove the special counsel, but only for "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause."[83] The good cause limitations track those that applied to the independent counsel, which limitations the Supreme Court reviewed in *Morrison v. Olson*.[84] In *Morrison*, the Court addressed how much Congress could limit the executive branch's control over an independent counsel who, by statute, operated somewhat outside of the DOJ.[85] The Court determined that the Attorney General's oversight over the independent counsel, e.g., the initial decision to seek or decline to seek an independent counsel and the ability to remove the counsel for good cause, was sufficient to give the executive branch adequate supervision over the independent counsel that the President's responsibility to exercise executive power was not infringed by the President's inability to remove the independent counsel at will.[86]

Limiting the President's prerogative to remove an independent or special counsel is sensible given that the appointment of such counsel only occurs when the executive branch has a conflict with an investigation that makes running the investigation through the normal DOJ channels problematic.[87] However, given that the President cannot fire the special counsel directly, whether the President should be allowed to fire the special counsel indirectly by directing the Attorney General or his designee to do so is an issue. Of course, the removal of the special counsel would not necessarily end the investigation. If a special counsel were dismissed, the need for a new special counsel or the need to continue the investigation through the DOJ's regular channels arguably would remain. Nonetheless, removing a special counsel might practically end a DOJ

83. *See* 28 C.F.R. § 600.7(d) (2012).

84. 487 U.S. 654, 659–60 (1988).

85. *Compare* 28 C.F.R. § 600.7 (explaining that the Attorney General can remove a special counsel for good cause), *with Morrison*, 487 U.S. at 658, 685–97 (explaining that the good cause removal limitation does not "unduly trammel[] on executive authority").

86. *Morrison*, 487 U.S. at 691–93.

87. *See* 28 C.F.R. § 600.1 (noting the conditions under which a special counsel can be appointed).

investigation if the Attorney General who removed the special counsel was also willing to end the investigation or refuse to authorize further investigation.

Whether a President should be allowed to end an investigation, either directly by firing the chief investigator—the FBI Director—or indirectly by firing a special counsel is unclear. Generally, such action constitutes the injudicious use of a power that the President arguably has been given under the Constitution. The President appears to have been given the power to make individual prosecutorial and investigative decisions, even though the President should resist the urge to make those decisions. The bigger issue becomes what to do when the President uses a power he possesses—the removal power—to indirectly make a prosecutorial or investigative decision that he should not make, but is allowed to make. That question may seem to focus only on the wisdom of the President's decision to use the removal power to make a prosecutorial or investigative decision. However, if the President's actions are so antithetical to their proper exercise that they become a serious misuse of power, their use may trigger constitutional repercussions. That leads to a somewhat different framing of the question: When, if ever, might the President's actions to end a prosecution or investigation become so improper that the President should be deemed to have obstructed justice? That introduces the next part of this essay.

III. OBSTRUCTION OF JUSTICE

An important debate exists regarding whether a President may obstruct justice by attempting to end an investigation for improper purposes.[88] The answer is unclear, in part, because obstruction of justice is a tricky crime and, in part, because a President's ability to affect a criminal investigation is *sui generis*. For example, the President's pardon power is explicitly granted in the Constitution. That power may be used to stop an individual from being brought to justice and punished for a crime clearly committed. Colloquially, that obstructs justice but, legally, it does not obstruct justice. Presidential obstruction of justice is a difficult issue.

88. For competing arguments, see McCarthy, *supra* note 5; Editorial, *Yes, The President Can Obstruct Justice*, N.Y. TIMES (Dec. 4, 2017), https://www.nytimes.com/2017/12/04/opinion/president-trump-obstruction-justice.html.

Federal obstruction of justice covers a wide range of conduct, criminalizing both conduct well defined by statute, and conduct undefined by statute, aimed at obstructing the administration of justice.[89] For example, attempting to influence a grand juror by threats of force is deemed obstruction of justice.[90] However, obstruction of justice also includes any conduct that "corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice."[91] The President clearly may engage in well-defined conduct constituting obstruction of justice, e.g., witness tampering, when not exercising executive power. Unless the President is above the law, the President should be able to be criminally prosecuted for such crimes after leaving office.[92] The more difficult issue is whether the President should be subject to obstruction of justice charges when exercising executive power. For example, when, if at all, does the President obstruct justice when he uses executive power, e.g., the power to remove an executive branch official, to influence or end an investigation, when such action does not constitute specifically-drawn conduct that obstructs justice? That almost certainly depends on whether the President has acted corruptly.

Under 18 U.S.C. § 1503, the main obstruction of justice statute, "corruptly" is not defined, though "corruptly" is defined under some other obstruction statutes.[93] Courts have interpreted corruptly under § 1503 to require various mens rea, including evil motive or improper motive with intent to gain unfair advantage.[94] For the purposes of this essay, the precise definition of corruptly is less important than that corruptly suggests wrongdoing or lawlessness.[95]

89. *See, e.g.*, 18 U.S.C. § 1503 (2012) (criminalizing the act of influencing or injuring officer or juror); *id.* § 1512 (criminalizing the act of tampering with a witness, victim, or an informant). Other forms of obstruction include obstruction of Congress and departments and agencies. *Id.* § 1505.

90. *Id.* § 1503(a).

91. *Id.* Federal law also prohibits a person from "corruptly . . . obstruct[ing], influenc[ing], or imped[ing] any official proceeding, or attempt[ing] to do so." *Id.* § 1512(c)(2).

92. Of course, the President is not above the law. *See* United States v. Nixon, 418 U.S. 683, 715 (1974).

93. 18 U.S.C. § 1515(b) defines "corruptly" to mean, with respect to 18 U.S.C. § 1505, "acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information."

94. For a discussion of various definitions of "corruptly," see United States v. Haas, 583 F.2d 216, 220 (5th Cir. 1978).

95. *See* United States v. Matthews, 505 F.3d 698, 705–06 (7th Cir. 2007) (finding jury instruction defining corruptly as "wrongfully impeding the due administration of justice" acceptable (emphasis omitted)).

Clearly, the President can act corruptly and obstruct justice when not using executive power, e.g., by threatening a witness without referencing executive power.[96] Just as clearly, the President can act corruptly while using executive power, for example, by selling pardons.[97] The act may be corrupt and may obstruct justice, but selling a pardon is independently unlawful because it also constitutes bribery.[98] The harder question is whether a President can act corruptly and obstruct justice while using executive power in a manner that does not violate any other laws. It is not clear that ending a criminal or civil investigation through the use of mere executive power would be wrongful unless ending the investigation involved independently wrongful behavior.

The obstruction statutes recognize that some lawful and affirmatively acceptable behavior may appear to obstruct justice, but does not. The statutes tend to provide an explicit defense for such behavior.[99] For example, legitimate legal advice that may appear to obstruct justice may not.[100] Similarly, prosecutorial offers of leniency in exchange for truthful testimony do not constitute obstruction of justice or bribery.[101]

A President's use of executive power to end an investigation does not necessarily suggest that the President has acted corruptly or wrongfully. If the President believes that an investigation is a waste of time and resources, even if there is disagreement about the investigation's value, ending it is not necessarily corrupt. Ending the investigation would appear to be within the President's power and consistent with the President's proper conservation of federal resources. Similarly, the President's use of executive power to indirectly end an investigation may not appear inappropriate. A President would appear within reasonable bounds if he ordered an executive branch officer to end an investigation and threatened to

96. *See* United States v. Bazazpour, 690 F.3d 796, 806 (6th Cir. 2012).

97. Jaired Stallard, *Abuse of the Pardon Power: A Legal and Economic Perspective*, 1 DEPAUL BUS. & COM. L.J. 103, 132 (2002) (discussing the impeachment of two state governors after they abused the pardon power by selling pardons).

98. 18 U.S.C. § 201(b)(2) (criminalizing sale of official acts).

99. *See, e.g.*, *id.* § 1512(e) ("In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.").

100. *Id.* § 1515(c) ("This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.").

101. United States v. Singleton, 165 F.3d 1297, 1298, 1302 (10th Cir. 1999).

remove the officer (assuming the officer serves at the President's pleasure) if the officer declined. That behavior would appear consistent with the proper use of executive power if the President reasonably believed that the investigation was a waste of time and the executive branch officer merely disagreed with the President's assessment.

However, if a President's goal in ending an investigation were nefarious, the use of executive power would be more problematic. If the President planned to end an investigation so that friends or family would not face justice, the use of executive power would be inappropriate and would appear to lean toward an obstruction of justice.[102] However, the pardon power may be relevant. The President can issue a valid pardon for an impure reason, such as so friends or family could avoid justice.[103] Should a valid pardon be deemed an obstruction of justice when it does not constitute conduct separately and clearly defined as an obstruction of justice? If not, should ending a criminal investigation for the same or similar reasons be deemed an obstruction of justice?[104] The question becomes more difficult as executive power expands.

The issue is not whether a President should be prosecuted for obstruction of justice, it is whether the President has engaged in criminal behavior at all. Surprisingly, the answer to that question may depend on the other ways in which the President's conduct could be addressed.

IV. CONGRESSIONAL RESPONSES TO THE USE OF EXECUTIVE POWER

Congress's ability to respond to a President's attempt to end an investigation through the use of executive power may be relevant to whether the attempt, successful or not, ought to be considered an obstruction of justice. Though the President has affirmatively stopped an investigation, functionally, the President has refused

102. *Cf.* Strasser, *supra* note 47, at 149–50.

103. *See id.* at 148 (noting that improper reasons for a pardon that may not void a pardon); *see also* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 276 (1998) (noting courts rarely review grants of pardon and clemency, and should not do so).

104. For a discussion of personal, pecuniary, or partisan reasons that might fairly trigger obstruction of justice charges against a President, see Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 108 CAL. L. REV. (forthcoming 2018) (manuscript at 5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004876.

to allow his law enforcement agents investigate or prosecute. Congress has four options. It can encourage or attempt to force the President to investigate. That option is likely a non-starter, though it is the preferred solution, given what the President has likely expended to stop the investigation. It can remove the President from office. It can investigate the matter on its own. It can wait until the President leaves office and see if the next President investigates.

Congress can impeach the President for "high Crimes and Misdemeanors."[105] Though those terms are not defined, they need not be interpreted to require criminal behavior.[106] Congress should not deem every presidential misstep an impeachable offense, but it is free to deem behavior that breaks presidential norms impeachable even if the behavior is not criminal.[107] That may apply to improper attempts to end criminal investigations.

Congress may begin or continue to investigate the underlying matter to determine what occurred. Not only may Congress investigate, obstruction of that inquiry is a federal crime.[108] If the President has issued pardons, those pardoned may still need to speak with the congressional investigators.[109] After a pardon has been issued, the person pardoned has no Fifth Amendment privilege to refuse to testify regarding the actions for which the person was pardoned because the person cannot self-incriminate by providing evidence that might otherwise lead to a conviction.[110] If pardons have not been issued, the congressional inquiry would proceed through its normal course. In the absence of pardons, a future President might be able to revive the criminal investigation against those the prior President sought to protect.

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105. U.S. CONST. art. II, § 4.

106. *See* THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (suggesting that impeachable offenses tend to stem from "the misconduct of public men" denominated violations of public trust); *see also* Laurence H. Tribe, *Defining "High Crimes and Misdemeanors": Basic Principles*, 67 GEO. WASH. L. REV. 712, 722 (1999).

107. Julie R. O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2193, 2210 (1998) ("The Framers' debates demonstrate their understanding that this term was not defined by reference to the criminal law alone; it neither included all crimes nor covered only crimes, but rather described a variety of political misconduct incapable of codification.").

108. 18 U.S.C. § 1505 (2012).

109. Andy Wright, *Possible Presidential Pardon Scenarios*, JUST SECURITY (July 9, 2017), https://www.justsecurity.org/43308/presidential-pardon-scenarios/.

110. Those who face no legal jeopardy, e.g., those given immunity, cannot self-incriminate. Kastigar v. United States, 406 U.S. 441, 453 (1972).

After the President has left office, a future President may open or reopen the investigation that was closed. If the statute of limitations has not run and pardons have not been issued, the original potential defendants may yet be brought to justice. In addition, barring a self-pardon that the Supreme Court is willing to accept, a future President may be able to prosecute the former President for obstructing behavior that does not involve the use of executive power, if the ex-President engaged in such conduct. Justice may be delayed, but it may not be denied.

The use of executive power that appears to shade toward obstruction of justice may be distasteful, but may not be such a deviation from a standard use of the executive power that it should be deemed criminal. If the President has merely used one executive power—the power to remove an executive branch official—to exercise another executive power—the power of prosecutorial discretion—the President's poor or inappropriate use of executive power may not make the actions criminal. Congress may discipline the President through impeachment if it deems the President's behavior sufficiently problematic.[111] Congress may continue to investigate the underlying matter, with the truth eventually being discovered. Given the tools Congress and a future President can use to respond to and blunt the effect of a President's improper ending of a criminal investigation, it is not clear that the President's behavior is such a deviation from what should be expected or can cause so much more harm than the President could cause through the use of the pardon power that the behavior should be treated as a criminal act rather than as official malfeasance. However, this is a matter of debate.

CONCLUSION

As the breadth of executive power increases, the likelihood that a President will attempt to make whatever executive branch decisions he can make—including discrete prosecutorial decisions—increases. Though the federal executive power includes the exercise of prosecutorial discretion, that discretion should be exercised by executive branch officers other than the President. Functionally, DOJ prosecutorial decision-making should be insulated from the President. However, in a context of expanding executive power and

111. An abuse of the pardon power might reasonably lead to impeachment. *See* Cass R. Sunstein, *President's Pardon Power*, RICH. TIMES-DISPATCH, Aug. 9, 2017, at A9.

the possible consolidation of decision-making in the President, that may be unlikely.

Usually, politics and prosecutorial discretion can be separated. However, that is not always the case. When choices must be made regarding what crimes or conduct should be prosecuted (even when statutes make the behavior criminal), prosecutorial discretion and politics can collide. The Constitution suggests that the President has the latitude to determine how to exercise prosecutorial discretion generally, though other executive branch officials may make granular prosecutorial decisions to try to ensure consistent decision-making.

Though separating politics from prosecutorial discretion is important, separating prosecutorial discretion from self-dealing is crucial. That might suggest criminalizing the prosecutorial equivalent of self-dealing—the presidential termination of an investigation that may harm the President or the President's family or friends—as obstruction of justice. However, such criminalization may only be appropriate if the President's behavior is criminal apart from the President's use of executive power. Arguably, the President is allowed to obstruct justice colloquially through prosecutorial discretion and the use of the pardon. The misuse of executive power in a manner that shades toward the actual obstruction of justice may call for removal from office, but may not call for criminal sanction.

This area is tricky. The President is not above the law.[112] However, the vesting of executive power (and the power to forestall justice) in the President suggests that the President may stand apart from the law on occasion. The proper response may not be to threaten criminal sanction if the President steps out of line, but to make sure that Americans elect Presidents who always act under the law even as they may stand apart from the law when applying the law.

112. *See* O'Sullivan, *supra* note 107, at 2193–94.

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