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## THE TAKE CARE CLAUSE, JUSTICE DEPARTMENT INDEPENDENCE, AND WHITE HOUSE CONTROL

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### ABSTRACT

*Problematic relations between the White House and the U.S. Department of Justice stand out even amidst the broader tumult of President Donald Trump’s first year in office. With respect to written policy restricting contacts between the White House staff and the Department, the Trump White House has followed the general contours of predecessor administrations. Those policies recognize that White House contacts restrictions vary with the Department’s complex functions, restrict channels of contact, and restrict personnel authorized to make contacts. They also grant limited exceptions where White House-Department contact is required to assist the President in the performance of a constitutional duty and contact would be appropriate from a law enforcement perspective. A number of episodes, however, suggest that the President and senior administration officials have not honored the spirit, and in some cases the letter, of that contacts policy.*

*One of the frequent criticisms leveled against President Trump is that he disregards many norms and traditions that have been observed by presidential administrations of both parties for decades. Restrictions on White House interference in criminal investigations do not merely protect norms. Rather, those policies seek to prevent unconstitutional conduct by the President and his political appointees. This Article demonstrates that political interference by the President undertaken in bad faith could violate the Take Care Clause even in the absence of a criminal statute. Obstructive behavior is even worse. Whether or not the President is indictable for the commission of a statutory criminal offense of obstruction of justice during his tenure in office, this Article explains why the President may violate the Take Care Clause independently of criminal offenses.*

*A principle of political noninterference by the White House in the federal prosecution function in particular matters is consistent with Article II. Neither the Vesting Clause, the President’s position atop the Executive Branch, nor the President’s broader enforcement discretion defeat the anti-interference principles commanded by the Presidential Oath and the Take Care Clause. It is a question that goes to the very concept of Rule of Law itself. However, political*

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*processes, rather than justiciable legal proceedings, serve as the presumptive source of Take Care Clause enforcement.*

*But in a constitutional sense, the Attorney General remains responsible to the President, and the President to the public. Although true institutional independence is therefore impossible, the President is best served if the Attorney General and the lawyers who assist him are free to exercise their professional judgments. Just as important, they must be perceived by the American people as being free to do so.<sup>1</sup>*

## I. INTRODUCTION

Over the course of the American experiment, it has become increasingly clear that independence of the prosecutorial function from political intermeddling is an essential ingredient to democracy grounded in the rule of law. Insulation of the federal prosecution function from partisan politics is a fundamental liberal value. Watergate was a particularly meaningful watershed. In its wake, Attorney General Griffin Bell declared “the law has to be neutral, and in our form of government there are things that are nonpartisan, and one is the law and one is foreign intelligence.”<sup>2</sup>

Since then, for nearly 40 years, Presidents of both political parties have established policies designed to prevent inappropriate contact between the White House and the U.S. Department of Justice.<sup>3</sup> Congress, scholars, and commentators have likewise affirmed the importance of prosecutorial and law enforcement independence from White House interference.

This longstanding bipartisan tradition is under threat. First, notwithstanding its written policy, the Trump Administration has undertaken a series of actions that casts significant doubt on its commitment to the principles of nonpartisan noninterference in prosecutorial, law enforcement, and intelligence functions of the Department. Second, the criminal and counterintelligence investigations of Trump Administration officials and campaign associates in relation to Russia’s interference in the 2016 presidential campaign present investigative integrity and conflict-of-interest problems unseen since Watergate.

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<sup>1</sup> Griffin B. Bell, Address to Department of Justice Lawyers on Independence of the Department 5 (Sept. 6, 1978) [hereinafter the Bell Address] (transcript available at the U.S. Department of Justice).

<sup>2</sup> *Id.* at 3.

<sup>3</sup> In this Article, I refer to the U.S. Department of Justice as “the Department” and specify other departments and agencies of the federal government by their names. In addition, I refer to such policies collectively as “White House contact policies,” which are discussed more fully in the Article. See *infra* Section IV.A.1.

Every administration since President Jimmy Carter has, at some point, been accused of inappropriate contact or political influence on pending investigative matters.<sup>4</sup> Such controversies have been episodic and generally served to underscore the overall political consensus that the Department be free from undue political influence. However, early moves by President Donald Trump, Attorney General Jeff Sessions, and White House subordinates differ in magnitude and kind from modern predecessors.<sup>5</sup>

The relationship between the White House and Department of Justice is delicate and fraught. The Department is complex. It has a number of roles and functions that stand in very different relation to White House political leadership. Evenhanded administration of the law, due process interests, and public confidence require that rank political considerations do not drive prosecutorial decisions. However, there are legitimate roles for political leadership with respect to many Department functions. For example, the President has a constitutional mandate to shape criminal justice policy and proposed legislation. Similarly, the Federal Bureau of Investigation is both a Department component and a member of the U.S. Intelligence Community.<sup>6</sup> In that role, the FBI has an obligation to report to the President and his national security advisors about threats.<sup>7</sup> Moreover, too much independence from political accountability can hamper law enforcement accountability on a path to impunity.<sup>8</sup>

This Article focuses on the constitutional considerations that inform the need to insulate prosecutorial decisions from undue political interference. I

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<sup>4</sup> See, e.g., Matt Apuzzo & Michael S. Schmidt, *Obama's Comments About Clinton's Emails Rankle Some in the F.B.I.*, N.Y. TIMES (Oct. 16, 2015) (noting the White House assurances that Obama “had not been trying to influence the investigation” after his public remarks that Hillary Clinton’s use of a private server did not endanger America’s national security); Carol D. Leonnig, *Prosecutor Says Bush Appointees Interfered with Tobacco Case*, WASH. POST (Mar. 22, 2007); Don Van Natta, Jr., *Analysis: White House Continues to Attack Starr*, N.Y. TIMES (Mar. 2, 1998) (observing the Clinton White House defense strategy included public attacks on Independent Counsel Ken Starr).

<sup>5</sup> See *infra* Part II.

<sup>6</sup> See *Members of the IC*, OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, <https://www.dni.gov/index.php/what-we-do/members-of-the-ic#fbi> (last visited Nov. 1, 2018) (“The FBI, as an intelligence and law enforcement agency, is responsible for understanding threats to our national security and penetrating national and transnational networks that have a desire and capability to harm the U.S.”).

<sup>7</sup> See *Intelligence Branch*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/about/leadership-and-structure/intelligence-branch> (last visited Oct. 5, 2018). “FBI intelligence products are provided daily to the attorney general, the president, and to customers throughout the FBI and in other agencies.” See OFF. OF THE INSPECTOR GEN., DIRECTORATE OF INTELLIGENCE: MISSION STATEMENT, STRATEGIC GOALS, AND INTELLIGENCE PROCESS, AUDIT REPORT 07-30 (2007), <https://oig.justice.gov/reports/FBI/a0730/app2.htm>.

<sup>8</sup> See Justin Walker, *FBI Independence as a Threat to Civil Liberties: An Analogy to Civilian Control of the Military*, 86 GEO. WASH. L. REV. 1011 (2018).

reinforce the bipartisan tradition that holds such independence, as properly understood, is an essential feature of the rule of law in American democracy. I seek to use the Article as a reminder of the theoretical underpinnings of this principle, which is built on hard lessons of historical experience.

The President enjoys democratic legitimacy and faces political accountability derived from election to national constitutional office. He serves as the chief executive officer of the executive branch, sitting with a constitutionally vested executive power to manage the branch.<sup>9</sup> Unitary executive theory, however, does not account for the paradox created by Take Care Clause obligations. Federal prosecutors and law enforcement officials derive their power from the President's constitutional obligation to "take care that the laws be faithfully executed"<sup>10</sup> as further provided for by Congress.<sup>11</sup> Here, I argue that, where the law creates a substantive criminal law and a prosecutorial function, the Take Care Clause obligates the President to protect the integrity of that criminal investigation from political interference, including interference by the President himself. The same unitary executive—the Take Care Paradox—applies to other Department functions such as counterintelligence threat assessments, enforcement actions, and objective legal analysis. By the same token, if the President interferes with the investigative or prosecutorial function in bad faith,<sup>12</sup> he can violate the Take Care Clause and his Oath of Office.

While the principle of nonpartisan noninterference is sound, its scope and constitutional underpinning are complicated. Almost all commentators agree that a degree of prosecutorial noninterference is a public good. Some even ascribe Department legal pronouncements near Delphic Oracle status. Others, while valuing the principle of prosecutorial integrity, argue that the Department sits in the midst of the command and control of a unitary executive headed by the President. To them, democratic accountability must be derived from the President's role as an elected supervisor, and warn about the dangers posed by

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<sup>9</sup> See U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

<sup>10</sup> *Id.* § 3.

<sup>11</sup> See, e.g., Act of June 22, 1870, ch. 150, § 1, 16 Stat. 162 (establishing the Department of Justice and articulating various Department officers' statutory authorities and obligations). See Part III for a more fulsome discussion of the 1870 Act.

<sup>12</sup> See David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 886, 888 (2016) ("Although the concept of bad faith can be slippery, its core meanings are fairly consistent throughout the law and center on dishonesty, disloyalty, and lack of fair dealing."); see also Andrew M. Wright, *Constitutional Good Faith*, 93 N.Y.U. L. REV. ONLINE 41 (2018) (critiquing the view that Madison's ambition-versus-ambition arguments in the Federalist Papers amount to a normative good rather than a prophylactic hedge; instead, the Constitution is an engine requiring the institutional good faith of its officers in order to prevent the gears from grinding and, over time, the engine from seizing up).

federal law enforcement unaccountable to the President.<sup>13</sup> There is largely agreement on the topline principle; there is disagreement as to the scope of the independence principle, the existence of the President's legal authority to engage the Department on any matter he deems fit, the wisdom of doing so on certain matters, and his de facto power to interfere notwithstanding.

Accepting, at a minimum, that nonpartisan prosecutorial independence is a modern constitutional value, how is it enforced? This question implicates both *regulatory authority* and *regulatory actors*. Regulatory authority may be grounded in constitutional law, statute, regulation, policy, and political norms. Regulatory actors could include the President, agency heads, civil servants, inspectors general, congressional actors, the media, and the constituent public. The nature of regulatory authority will also bear on the relevant regulatory actors.

I conclude that functional Department independence relies largely on executive branch policy, cultural norms, and political context rather than formal legal rules. A formal legal "for cause" limitation on the President's removal power of senior Department appointees who serve as "Officers of the United States" under Article II may be unconstitutional.<sup>14</sup> As such, the threat posed by the Trump Administration will largely be limited, if at all, by political pressure. The Take Care Clause is largely enforced by Congress rather than the Judiciary. Thus, policing the President's good faith execution of laws will require significant political courage by Department insiders and congressional majorities.

Part II of this Article outlines some illustrative episodes reflecting challenges in White House-Department relations challenges during the Trump Administration's first term, as well as a few problematic instances in prior administrations. Part III turns to the Take Care Clause and its interaction with President's vested powers to manage the Executive Branch. Part IV analyzes White House-Department contacts policies dating back to the Ford Administration. There, I discuss the formal and informal methods of enforcement of the independence principle.

## II. WHITE HOUSE-DEPARTMENT OF JUSTICE RELATIONS IN TRUMP

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<sup>13</sup> See Walker, *supra* note 8.

<sup>14</sup> See *Myers v. United States*, 272 U.S. 52 (1926) (holding unconstitutional a legislative restriction requiring Senate advice and consent on the President's removal of a postmaster). Cf. *Humphrey's Ex' v. United States*, 295 U.S. 602 (1935) (upholding a "for cause" removal restrictions for Federal Trade Commissioners in light of their quasi-legislative and quasi-judicial independent agency functions). In *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court treated an Independent Counsel under the now-expired Independent Counsel Act as an inferior officer for constitutional purposes. That reasoning undergirded the Court's holding that the imposition of a good cause standard for removal did not unduly impede the President's ability to perform constitutional duties. See *id.*

## ADMINISTRATION YEAR ONE

Problematic relations between the White House and the Department of Justice stand out even when measured against the broader tumultuous first year of the Trump Administration. The Russia investigation, the travel ban, the immigration crackdown, and the President's pardon of disgraced former Arizona sheriff Joe Arpaio have brought great stress to bear on already structurally delicate relations between Main Justice (i.e., the headquarters and front office of the Justice Department), the FBI, and the White House. Adding to these tensions, President Trump offered frequent public criticism of senior Department officials.<sup>15</sup> Numerous commentators and former officials have criticized the Trump White House for mismanagement of Department contacts.<sup>16</sup> In the face of such criticism, President Trump declared "I have the absolute right to do what I want with the Justice Department."<sup>17</sup>

This Section sets forth some of the recurring challenges presented by actions taken by the President and other White House officials. Through sustained criticism and assertions of categorical authority, President Trump has brought tensions with the Justice Department to their highest levels since

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<sup>15</sup> See *infra* Section II.B (citing President Trump's criticisms of various current and former officials and political opponents).

<sup>16</sup> See, e.g., Carrie Johnson, *Obama's White House Counsel Weighs in on Trump's Lawyers*, NPR (Sept. 19, 2017), <http://www.npr.org/2017/09/19/552169759/obamas-white-house-counsel-weighs-in-on-trumps-lawyers> (reporting that Neil Eggleston used a speech at Columbia Law School to "urge his successor to do more to police contacts between the White House and the Department of Justice," noting "[d]iscussions of policy and national security are appropriate, he said, but reports that Trump and other officials had asked the FBI about criminal investigations would not have happened during Obama's tenure"). Preet Bharara, the former U.S. Attorney for the Southern District of New York who was among those fired by President Trump, states:

The Justice Department, the FBI, the DEA, the U.S. Attorneys' Offices are all in the executive branch in a particular branch that is different than all other branches. It's the Department of Justice. It's not like the Department of Education or Department of Weights and Measures or whatever else, ya know, where policy is the most important thing. Here for us not to become a banana republic it should be the case—it's the norm, and it should remain the norm—that a President of the United States cannot dictate, by name, who should be prosecuted because they're a political adversary, or who should be protected because they're a political ally. And there are bits and pieces of evidence that that, I think, norm—you know, that sacred standard that allows people to have faith in whether or not justice is being done and is seen being done—is being eroded.

*Pod Save America: No Blood for Ego*, CROOKED MEDIA (Oct. 16, 2017) (downloaded using iTunes).

<sup>17</sup> *Excerpts from Trump's Interview with The Times*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/us/politics/trump-interview-excerpts.html>. President Trump continued: "But for purposes of hopefully thinking I'm going to be treated fairly, I've stayed uninvolved with this particular [Russian interference investigation] matter." *Id.*



President Nixon. But other Presidents in that period have also had trouble navigating these choppy law enforcement waters.

President Trump has made unorthodox private contacts with Department officials with responsibility for criminal investigations touching on his interests; publicly criticized senior Department officials for prosecutorial and investigative judgments; and accused former officials, including his predecessor, of politically motivated surveillance and criminal conduct. All of these comments will be heard by the FBI and others in the Department conducting investigations touching on President Trump's personal and political interests. It exacerbates an already charged political climate that presents challenges to the exercise of independent professional judgment on the part of law enforcement and prosecutors.

This kind of rhetoric from the chief executive further strains the underlying tensions inherent in the White House relations with the Department. While the White House issued a formal policy restricting White House staff contacts with the Department, it proved inadequate to early administration challenges.<sup>18</sup> The threats White House contacts policies are designed to address are particularly acute in the early days of the Trump Administration. Moreover, as argued below, a formal policy is merely a prophylactic against violations of the President's obligations under the Take Care Clause.

*A. Background: Investigations into Russian Election Interference and Hush Money Payments*

Two investigations conducted by federal law enforcement have shaped toxic dynamics between President Trump, the White House, and the Department. The first investigation relates to Russian election interference.<sup>19</sup> The other investigation of particular consequence relates to financial transactions designed to buy confidentiality as to allegations of sexual conduct involving President Trump before he took office.<sup>20</sup> President Trump has concrete interests in both of these investigations, and they have already resulted in criminal convictions of personal and political allies.<sup>21</sup>

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<sup>18</sup> See *supra* Part II.

<sup>19</sup> Referred to in this Article as the "Russia investigation."

<sup>20</sup> Referred to in this Article as the "Hush Money investigation."

<sup>21</sup> Federal prosecutors from the Special Counsel's office and U.S. Attorney's Office for the Southern District of New York obtained convictions and guilty pleas from a number of people in President Trump's orbit, including the President's campaign chairman, deputy campaign chairman, national security advisor, and personal lawyer. For a list of criminal indictments and convictions in the Russia investigation and Hush Money investigation, see Andrew Prokop, *All of Robert Mueller's Indictments and Plea Deals in the Russia Investigation So Far*, VOX, <https://www.vox.com/policy-and-politics/2018/2/20/17031772/mueller-indictments-grand-jury> (last updated Oct. 10, 2018).

## 1. The Russia Investigation

In 2016, it became increasingly clear to the U.S. Intelligence Community that Russia undertook a complex, multi-pronged effort to influence the presidential election between Hillary Clinton and Donald Trump.<sup>22</sup> In response, officials launched a number of parallel and overlapping congressional, counterintelligence, and criminal investigations into Russian election interference.<sup>23</sup> These inquiries, to varying degrees, have also turned attention to Russian ties to President Trump as well as individuals and organizations associated with him. It led to the appointment of a Special Counsel under Department regulations designed to insulate, to a degree, investigations that could focus on senior White House or Department officials.<sup>24</sup> As discussed below, the Special Counsel has drawn the sustained ire of President Trump.<sup>25</sup>

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<sup>22</sup> See generally OFF. OF THE DIR. OF NAT'L INTELLIGENCE, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT U.S. ELECTIONS (UNCLASSIFIED) (2017). The Intelligence Community issued the following top-line assessment:

We assess Russian President Vladimir Putin ordered an influence campaign in 2016 aimed at the US presidential election. Russia's goals were to undermine public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency. We further assess Putin and the Russian Government developed a clear preference for President-elect Trump. We have high confidence in these judgments.

*Id.* at ii.

<sup>23</sup> President Barack Obama directed the Intelligence Community to assess Russian interference in the U.S. presidential election. See generally *id.* At a March 20, 2017, congressional hearing, then-Director James B. Comey confirmed the existence of a formal Federal Bureau of Investigation counterintelligence investigation. Due to some of the irregular White House-Department contacts and conflicts of interest set forth in this section, on May 17, 2017, Acting Attorney General Rod Rosenstein appointed Robert S. Mueller III as Special Counsel in order "to ensure a full and thorough investigation of the Russian government's efforts to interfere in the 2016 presidential election." Office of the Deputy Att'y Gen., Order No. 3915-2017, Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters (May 17, 2017), <https://www.justice.gov/opa/press-release/file/967231/download>. Several congressional committees, including the Senate Select Committee on Intelligence, the House Permanent Select Committee on Intelligence, and the Senate Judiciary Committee launched investigations related to Russian interference in the U.S. presidential election, although they vary in scope, jurisdiction, and level of hindering partisanship. See generally OFF. OF THE DIR. OF NAT'L INTELLIGENCE, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT U.S. ELECTIONS (UNCLASSIFIED) (2017).

<sup>24</sup> See General Powers of the Special Counsel, 28 C.F.R. § 600 (1999), <https://www.gpo.gov/fdsys/pkg/CFR-2001-title28-vol2/pdf/CFR-2001-title28-vol2-part600.pdf>

<sup>25</sup> See Linda Qiu, *Truth-Testing Trump's 250-Plus Attacks on the Russia Inquiry*, N.Y. TIMES (Aug. 18, 2018), <https://www.nytimes.com/2018/08/18/us/politics/fact-check-trump-russia-election-interference-.html>.

## 2. The Hush Money Investigation

Federal prosecutors in the Southern District of New York led an investigation into a series of complex financial transactions orchestrated by President Trump's former personal lawyer, Michael Cohen. These transactions related to women alleging extramarital affairs with Donald Trump, either by means of confidentiality agreements or "catch-and-kill" purchases of their stories by media companies with ties to President Trump.<sup>26</sup> Eventually, Cohen pleaded guilty to eight criminal counts related to tax offenses, bank fraud, and campaign finance violations.<sup>27</sup> In an astonishing moment during his allocution of guilt, Cohen directly implicated President Trump in a criminal conspiracy.<sup>28</sup> While Cohen's plea agreement did not include a cooperation agreement, subsequent reports indicate he has been providing information to prosecutors, presumably about the President.<sup>29</sup>

Many of the Trump White House-Department relations challenges relate to the Russia and Hush Money inquiries, and President Trump's reactions to them. President Trump has also asserted categorical power beyond any of his recent predecessors, declaring he has "the absolute right to do what I want with the Justice Department."<sup>30</sup> While President Trump has been more disruptive to the Department, he is not the only President to engage in questionable contacts with, or exert inappropriate influence on, the Department.

### B. White House Conduct Problem Areas

There are many ways the President and White House staff can bring influence to bear on the Justice Department. In many areas, it is perfectly appropriate for the President and his staff to influence the Justice Department: national enforcement priorities, legislative proposals to modify the criminal

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<sup>26</sup> See Brian Stelter, "Catch and Kill": How a Tabloid Shields Trump from Troublesome Stories, CNN MONEY (Feb. 16, 2018), <https://money.cnn.com/2018/02/16/media/trump-catch-and-kill/index.html>.

<sup>27</sup> Press Release, Dep't of Justice, Michael Cohen Pleads Guilty in Manhattan Federal Court to Eight Counts, Including Criminal Tax Evasion and Campaign Finance Violations (Aug. 21, 2018), <https://www.justice.gov/usao-sdny/pr/michael-cohen-pleads-guilty-manhattan-federal-court-eight-counts-including-criminal-tax>.

<sup>28</sup> See Josh Gerstein, Laura Nahmias & Josh Meyer, *Cohen Says He Paid Hush Money at Candidate Trump's Direction*, POLITICO (Aug. 21, 2018), <https://www.politico.com/story/2018/08/21/michael-cohen-strikes-plea-deal-with-prosecutors-790646>.

<sup>29</sup> See Emily Jane Fox, *Michael Cohen Is the Latest Former Trump Ally to Talk to Mueller*, VANITY FAIR (Sept. 14, 2018), <https://www.vanityfair.com/news/2018/09/michael-cohen-mueller>.

<sup>30</sup> *Excerpts from Trump's Interview with The Times*, *supra* note 17. President Trump continued: "But for purposes of hopefully thinking I'm going to be treated fairly, I've stayed uninvolved with this particular [Russia interference investigation] matter." *Id.*

code, national budget resources, prison and detention policies, and interagency coordination all call for national leadership. The President has appointment and removal power for positions requiring Senate confirmation as well as a number that do not. In addition, like all agencies in the federal government, the White House may seek legal guidance from the Department.

However, things change as specific law enforcement cases and investigations become the subject of White House influence efforts. As discussed more fully below, White House influence can raise constitutional problems where the laws or functions at issue call for a presumption of noninterference by political actors. Federal law enforcement's investigative decisions in specific matters with specific parties are at the center of these concerns. Moreover, at times, executive acts that would normally be within the presidential authority become constitutionally suspect if undertaken in bad faith.

Below are particularly significant areas of problematic behavior if undertaken by a President or his White House staff in order to inject narrowly partisan or personal interests into federal law enforcement action. This Article does not advance an argument that the means of White House influence identified are categorically prohibited. Rather, they are presumptively prohibited, and that presumption may be overcome if the influence is undertaken in the justifiable service of the President's other constitutional duties.

### 1. White House Investigation Intervention

It would be particularly inappropriate for the President or White House staff to direct federal law enforcement's investigative decisions without an overriding justification. Decisions such as whether to initiate a criminal investigation, seek a search warrant, seek a grand jury indictment, provide witness immunity or protection, or agree to a plea deal are presumptively the province of career prosecutors. The relatively few political appointees at the Department along with the U.S. attorneys traditionally adhere to the same set of guiding principles as the career agents and prosecutors—that law, facts, and broader enforcement priorities, rather than partisan political considerations, inform their investigative choices in specific cases.

As the Department considered Attorney General Jeff Sessions' legal obligation to recuse himself from campaign-related investigations, President Trump reportedly directed White House Counsel McGahn to prevent recusal.<sup>31</sup> McGahn reportedly carried out the President's orders, lobbying Sessions not to

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<sup>31</sup> Michael S. Schmidt, *Obstruction Inquiry Shows Trump's Struggle to Keep Grip on Russia Investigation*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/us/politics/trump-sessions-russia-mcghahn.html> ("President Trump gave firm instructions in March to the White House's top lawyer: stop the attorney general, Jeff Sessions, from recusing himself in the Justice Department investigation into whether Mr. Trump's associates had helped a Russian campaign to disrupt the 2016 election.").

recuse.<sup>32</sup> On March 2, 2017, Sessions formally recused himself from “any existing or future investigations of any matters related in any way to the campaigns for President of the United States.”<sup>33</sup> In Senate testimony, Sessions indicated that his recusal was required by Department regulations.<sup>34</sup>

## 2. White House Contacts

White House communications with the Department short of directives to control particular investigative decisions can become conduits for political interference. The White House staff can exert pressure on Department officials by means of threats, incentives, or information demands. White House demands for information about specific cases could implicate secret grand jury materials, information about confidential informants, undercover operations, or other sources of information at risk of harm. Sometimes contacts can be appropriate or innocuous, but they can also be implements of interference. Distorting White House influence can even be inadvertent.<sup>35</sup> That is why every administration since President Nixon left office has regulated White House contacts.<sup>36</sup>

According to then-FBI Director James Comey, President Trump pressured him to drop the FBI’s investigation of then-National Security Adviser

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<sup>32</sup> *Id.* Based on my experience as one of the few White House Counsel’s Office attorneys authorized, under limited circumstances, to communicate with the Justice Department, I see no appropriate role for the Counsel to the President in a Department recusal determination.

<sup>33</sup> Press Release, Dep’t of Justice, Attorney General Sessions Statement on Recusal (Mar. 2, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-statement-recusal>.

<sup>34</sup> *Open Testimony of Attorney General of the United States, Jeff Sessions Before the S. Select Comm. on Intelligence*, 115th Cong. (2017) [hereinafter *Testimony*] (statement of Att’y. Gen. Sessions). Sessions testified: “Importantly, I recused myself not because of any asserted wrongdoing on my part during the campaign, but because a Department of Justice regulation, 28 C.F.R. § 45.2, required it.” That provision prohibits a Department employee, including the Attorney General, from participation in a “criminal investigation or prosecution if he has a personal or political relationship with . . . an elected official, a candidate (whether or not successful) for elective, public office, a political party, or a campaign organization.” 28 C.F.R. § 45.2(c)(1) (1996). During the presidential campaign, Sessions, then a Republican Senator representing Alabama, was an early endorser and regular advisor to Trump. See Michael M. Memoli & Brian Bennett, *How Jeff Sessions Came to Be an Integral Part of Trump’s Administration*, L.A. TIMES (Mar. 2, 2017), <http://beta.latimes.com/politics/la-na-pol-trump-sessions-20170302-story.html> (outlining Sessions’ early endorsement and active campaigning on behalf of the Trump campaign).

<sup>35</sup> As Attorney General Benjamin Civiletti put it, the President and other senior officials “unintentionally can exert pressure by the very nature of their positions.” Memorandum from Att’y Gen. Benjamin Civiletti on Communication from the White House and Cong. (Oct. 18, 1979), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/10-18-1979.pdf>.

<sup>36</sup> See *infra* Part IV.A.1.

Michael Flynn.<sup>37</sup> According to Comey, President Trump asked if Comey could see his “way clear to letting this go, to letting Flynn go.”<sup>38</sup> At that point, President Trump almost certainly knew that Flynn had lied to the FBI agents who had questioned him about the substance of conversations with Russian Ambassador Sergey Kislyak.<sup>39</sup> Thereafter, Comey expressed concern to Attorney General Sessions about the President’s communication with Comey about a specific investigation.<sup>40</sup>

In another instance, President Trump’s first Chief of Staff, Reince Priebus, reportedly requested that the FBI publicly contradict a newspaper report about Trump associates’ contacts with Russian intelligence services.<sup>41</sup> In so doing, he likely violated the White House contacts policy in place.<sup>42</sup> These

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<sup>37</sup> *Open Hearing with Former FBI Director James Comey, Hearing Before the S. Select. Comm. on Intelligence*, 115th Cong. (June 8, 2017) [hereinafter *Hearing*] (statement of James Comey, former Director, Federal Bureau of Investigation).

<sup>38</sup> *Id.*

<sup>39</sup> As Acting Attorney General, Sally Yates had informed White House Counsel Don McGahn about Flynn’s dishonesty over two weeks earlier. See Riley Beggin, *A Timeline of Sally Yates’ Warnings to the White House About Mike Flynn*, ABC NEWS (May 8, 2017), <https://abcnews.go.com/Politics/timeline-sally-yates-warnings-white-house-mike-flynn/story?id=47272979>.

<sup>40</sup> See *Hearing*, *supra* note 37 (“Shortly afterwards, I spoke with Attorney General Sessions . . . I took the opportunity to implore the Attorney General to prevent any future direct communications between the President and me.”). In subsequent Senate testimony, Attorney General Sessions largely confirmed Comey’s account:

Following a routine morning threat briefing, Mr. Comey spoke to me and my Chief of Staff. While he did not provide me with any of the substance of his conversation with the President, Mr. Comey expressed concern about the proper communications protocol with the White House and the President. I responded to his comment by agreeing that the FBI and Department of Justice needed to be careful to follow Department policies regarding appropriate contacts with the White House. Mr. Comey had served in the Department of Justice for the better part of two decades, and I was confident that Mr. Comey understood and would abide by the Department’s well-established rules governing any communications with the White House about ongoing investigations . . . . Our Department of Justice rules on proper communications between the Department and the White House have been in place for years.

*Testimony*, *supra* note 34.

<sup>41</sup> Isaac Arnsdorf, *Priebus Talk with FBI Appears to Break White House Rules*, POLITICO (Mar. 17, 2017), <https://www.politico.com/story/2017/03/reince-priebus-fbi-discussion-white-house-rules-236192>.

<sup>42</sup> That policy limits discussion about particular investigations with specified senior Department leaders to the President, Vice President, and White House Counsel (and his designees). See Memorandum from Donald F. McGahn, II, Counsel to the President, on Communications Restrictions with Personnel at the Dep’t of Justice to All White House Staff, 1 (Jan. 27, 2017) [hereinafter *McGahn Memorandum*]. For analysis of White House contacts policies across administrations, see *infra* Part IV. Priebus evidently had not been designated to engage in such discussion and had not sought clearance from White House lawyers. Arnsdorf, *supra* note 41.

reports prompted former Attorney General Alberto Gonzales to observe: “As the attorney general, I would’ve felt it more appropriate for the chief of staff to contact me and then I would have a conversation with the director of the FBI.”<sup>43</sup>

A third, troubling episode involved the White House Counsel. In March 2017, he accused former President Obama of ordering illegal wiretaps of Trump Tower.<sup>44</sup> It did not have underlying evidentiary support.<sup>45</sup> After President Trump’s unsupported wiretapping allegation, the *New York Times* reported, per White House sources, that “Donald F. McGahn II, the president’s chief counsel, was working on Saturday to secure access to what Mr. McGahn believed was an order issued by the Foreign Intelligence Surveillance Court authorizing some form of surveillance related to Mr. Trump and his associates.”<sup>46</sup>

Putting aside the unfounded accusation, there are at least two problems presented for proper White House-Department relations by this sequence of events. First, as head of the executive branch, the President sent a signal to his subordinates in law enforcement that he wants their powers turned toward his predecessor. Second, it prompted his White House Counsel to pursue contacts and information from the Department about an open investigation in order to

<sup>43</sup> Laura Jarrett, *Can the White House Discuss Open Investigations with the FBI?*, CNN (Feb. 24, 2017), <http://www.cnn.com/2017/02/24/politics/fbi-white-house-communications-ongoing-investigation/>.

<sup>44</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017), <https://twitter.com/realDonaldTrump/status/837989835818287106> (“Terrible! Just found out that Obama had my ‘wires tapped’ in Trump Tower just before the victory. Nothing Found. This is McCarthyism!”); Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017), <https://twitter.com/realDonaldTrump/status/837993273679560704> (“Is it legal for a sitting President to be ‘wire tapping’ a race for president prior to an election? Turned down by court earlier. A NEW LOW!”); Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017), <https://twitter.com/realDonaldTrump/status/837994257566863360> (“I’d bet a good lawyer could make a great case out of the fact that President Obama was tapping my phones in October, just prior to Election!”); Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017), <https://twitter.com/realDonaldTrump/status/837996746236182529> (“How low has President Obama gone to tapp [sic] my phones during the very sacred election process. This is Nixon/Watergate. Bad (or sick) guy!”).

<sup>45</sup> See, e.g., Lauren Carroll, *Did Donald Trump Invent Claim that Barack Obama Tapped His Phone?*, POLITIFACT (Mar. 6, 2017), <http://www.politifact.com/truth-o-meter/article/2017/mar/06/did-donald-trump-invent-claim-barack-obama-tapped-/>; Jana Heigl, *A Timeline of Donald Trump’s False Wiretapping Charge*, POLITIFACT (Mar. 21, 2017), <http://www.politifact.com/truth-o-meter/article/2017/mar/21/timeline-donald-trumps-false-wiretapping-charge/>; Glenn Kessler, *Trump’s “Evidence” for Obama Wiretap Claims Relies on Sketchy, Anonymously Sourced Reports*, WASH. POST (Mar. 5, 2017), [https://www.washingtonpost.com/news/fact-checker/wp/2017/03/05/trumps-evidence-for-obama-wiretap-claims-relies-on-sketchy-anonymously-sourced-reports/?tid=a\\_inl&utm\\_term=.fddbf6e33ddc](https://www.washingtonpost.com/news/fact-checker/wp/2017/03/05/trumps-evidence-for-obama-wiretap-claims-relies-on-sketchy-anonymously-sourced-reports/?tid=a_inl&utm_term=.fddbf6e33ddc); Michael D. Shear & Michael S. Schmidt, *Trump, Offering No Evidence, Says Obama Tapped His Phones*, N.Y. TIMES (Mar. 4, 2017), <https://www.nytimes.com/2017/03/04/us/politics/trump-obama-tap-phones.html>.

<sup>46</sup> Shear & Schmidt, *supra* note 45.

provide the President with cover for his claim.<sup>47</sup> The President has an interest in the fruits of intelligence collection in order to defend the United States from Russian active measures. However, it would not be appropriate to access counterintelligence investigation evidence in order to substantiate an accusation against a political opponent.<sup>48</sup>

### 3. White House Control Over Department Personnel

The President has the power to appoint Officers of the United States and other positions so designated, some of which Congress or the Constitution require to be confirmed by the Senate. The President also has the power to remove those appointees. The Department of Justice has several hundred presidential appointees. However, this well-established presidential authority can become suspect when it is wielded in order to improperly influence investigative functions.

The most notorious example was President Nixon's effort to fire Watergate Special Prosecutor Archibald Cox, which triggered the Saturday Night Massacre.<sup>49</sup> Previously, President George W. Bush's White House staff had come under significant scrutiny for the allegedly politically motivated removal of a number of U.S. attorneys.<sup>50</sup>

President Trump appears to have fired James Comey as FBI Director, in part, in order to short-circuit the Russia investigation.<sup>51</sup> At the time, Comey had

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<sup>47</sup> McGahn is one of the White House officials designated for contacts with the Department, but that is only where such contact would assist the President in carrying out his constitutional or statutory duties and would be appropriate from a law enforcement perspective. *See* McGahn Memorandum, *supra* note 42.

<sup>48</sup> Such concerns prompted a letter from the Democratic members of the House Judiciary Committee. *See* Letter from Dem. Members of the H. Comm. on Judiciary to Hon. Dana J. Boente, Acting Deputy Att'y Gen. (Mar. 6, 2017) (on file with author) ("In our experience, it is highly unusual for the White House to seek access to a government application to the Foreign Intelligence Surveillance Court. In almost any circumstance, it would be inappropriate to ask for that information if the President and his associates are related to the underlying investigation.").

<sup>49</sup> In the Saturday Night Massacre, President Nixon ordered his subordinates to fire the special prosecutor. The Attorney General quit and his Deputy Attorney General was fired rather than carrying out this improper order. Eventually, Solicitor General and then-Acting Attorney General Robert Bork carried out President Nixon's order to fire Cox. *See* LEON JAWORSKI, *THE RIGHT AND THE POWER: THE PROSECUTION OF WATERGATE* (1976).

<sup>50</sup> For background on that controversy, see U.S. DEP'T OF JUSTICE, *AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006* (2008), <https://oig.justice.gov/special/s0809a/final.pdf>.

<sup>51</sup> Letter from President Donald J. Trump to James Comey, FBI Dir. (May 9, 2017) (on file with author) (informing Comey "you are hereby terminated and removed from office, effective immediately"); *see also* Michael D. Shear & Matt Apuzzo, *F.B.I. Director James Comey Is Fired by Trump*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html>. The Trump administration initially justified Comey's removal on the basis



six years remaining in his ten-year term.<sup>52</sup> Comey testified that President Trump had sought an assurance of Comey's "loyalty" in a prior conversation about Comey's continued service as director.<sup>53</sup> President Trump characterized his decision to fire Comey as acceptance of Department leadership recommendations, but later it became clear that he initiated Comey's removal.<sup>54</sup> The day after Comey's removal, President Trump reportedly told Russian officials visiting the Oval Office that firing Comey relieved "great pressure"

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of his handling of the investigation into former Secretary of State and Democratic presidential nominee Hillary Clinton's email practices. See Rod J. Rosenstein, Memorandum for the Att'y Gen., Restoring Confidence in the FBI (May 9, 2017) (on file with the author) (outlining criticism of Comey's handling of the email affair and concluding that "[a]lthough the President has the power to remove an FBI director, the decision should not be taken lightly").

<sup>52</sup> Congress established the ten-year term for the FBI Director as a signal to the Executive that it is a nonpartisan position. See S. REP. NO. 93-1213 (1974) (Ten Year Term for FBI Director), <https://assets.documentcloud.org/documents/3726103/Senate-Judiciary-Report-1974.pdf>.

<sup>53</sup> *Hearing, supra* note 37. In his prepared testimony, Comey recounts the dinner conversation that followed President Trump's question as to whether Comey liked his job and wanted to remain in office:

A few moments later, the President said, "I need loyalty, I expect loyalty." I didn't move, speak, or change my facial expression in any way during the awkward silence that followed. We simply looked at each other in silence. The conversation then moved on, but he returned to the subject near the end of our dinner. At one point, I explained why it was so important that the FBI and the Department of Justice be independent of the White House. I said it was a paradox: Throughout history, some Presidents have decided that because "problems" come from Justice, they should try to hold the Department close. But blurring those boundaries ultimately makes the problems worse by undermining public trust in the institutions and their work.

Near the end of our dinner, the President returned to the subject of my job, saying he was very glad I wanted to stay, adding that he had heard great things about me from Jim Mattis, Jeff Sessions, and many others. He then said, "I need loyalty." I replied, "You will always get honesty from me." He paused and then said, "That's what I want, honest loyalty." I paused, and then said, "You will get that from me."

*Id.*; see also Michael S. Schmidt, *In a Private Dinner, Trump Demanded Loyalty. Comey Demurred.*, N.Y. TIMES (May 11, 2017), [https://www.nytimes.com/2017/05/11/us/politics/trump-comey-firing.html?\\_r=0](https://www.nytimes.com/2017/05/11/us/politics/trump-comey-firing.html?_r=0).

<sup>54</sup> See Letter from Donald J. Trump to James Comey, *supra* note 51 ("I have received the attached letters from the Attorney General and Deputy Attorney General of the United States recommending your dismissal as the Director of the Federal Bureau of Investigation. I have accepted their recommendation. False"); see also Letter from Att'y Gen. Jeff Sessions to President Donald J. Trump (May 9, 2017) (on file with author) (recommending Comey's removal); Press Release, Statement from the White House Press Sec'y (May 9, 2017) (on file with author) ("President Trump acted based on the clear recommendations of both the Deputy Attorney General Rod Rosenstein and Attorney General Jeff Sessions.").

from the Russia investigation.<sup>55</sup> Later, President Trump acknowledged that the Russia investigation factored into his decision to dismiss Comey.<sup>56</sup>

#### 4. White House Public Criticism of the Department

The President can also use the bully pulpit to influence particular investigative matters. No element of a democratic government is beyond critique, and there is an appropriate role for the President and White House staff to assess the performance of the Department and its senior leaders. At the same time, the White House should refrain from public assessments that are designed to impede ongoing investigations, especially in order to protect the political fortunes or personal legal exposure of the President.

President Trump has repeatedly called the Russia election interference investigation a politically motivated “witch hunt.”<sup>57</sup> He has dismissed various factual reports or allegations about the Russia investigation categorically as “fake

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<sup>55</sup> See Matt Apuzzo, Maggie Haberman & Matthew Rosenberg, *Trump Told Russians that Firing “Nut Job” Comey Eased Pressure from Investigation*, N.Y. TIMES (May 19, 2017), <https://www.nytimes.com/2017/05/19/us/politics/trump-russia-comey.html>.

<sup>56</sup> Interview by Lester Holt, NBC News, with President Donald J. Trump (Mar. 11, 2017), <https://www.nbcnews.com/nightly-news/video/pres-trump-s-extended-exclusive-interview-with-lester-holt-at-the-white-house-941854787582> (when asked about his decision, President Trump says that he was going to fire Comey regardless of Rosenstein’s recommendation because “when I decided to just do it I said to myself, I said, ‘You know, this Russia thing with Trump and Russia is a made-up story, it’s an excuse by the Democrats for having lost an election’”); see also Tara Golshan, *Trump Admits He Fired Comey Over Russia. Republican Voters Don’t Believe Him.*, VOX (May 15, 2017), <https://www.vox.com/policy-and-politics/2017/5/15/15640570/trump-comey-russia-republican-voters> (“President Donald Trump has said the real reason he fired James Comey from the FBI was because of the bureau’s investigation into links between Trump’s 2016 campaign associates and Russia.”); James Griffiths, *Trump Says He Considered “This Russia Thing” Before Firing FBI Director Comey*, CNN (May 12, 2017), <http://www.cnn.com/2017/05/12/politics/trump-comey-russia-thing/index.html>.

<sup>57</sup> See, e.g., Noah Berman & Brian Bennett, *Trump Lashes Out, Calls Russia Investigation a “Witch Hunt,”* L.A. TIMES (May 18, 2017) (responding to Mueller’s appointment as Special Counsel by calling the Russia investigation “the single greatest witch hunt of a politician in American history!”); Dan Merica, *Trump Defends Embattled Son, Calls Russia Controversy a “Witch Hunt,”* CNN (July 12, 2017), <http://www.cnn.com/2017/07/12/politics/donald-trump-russia-son-fox-news/index.html> (quoting President Trump calling the Russia probe “the greatest witch hunt in political history” during a Fox News interview); Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 29, 2017), <https://twitter.com/realDonaldTrump/status/924639422066384896> (“The Dems are using this terrible (and bad for our country) Witch Hunt for evil politics . . .”). Incidentally, President Trump’s pick to replace Comey as FBI Director, Christopher Wray, told Congress that the Russia investigation is not a witch hunt. See Dartunorro Clark, *Wray Says Russia Probe Not a “Witch Hunt,” Pledges “Independent” FBI*, ABC NEWS (Jul. 13, 2017), <https://www.nbcnews.com/politics/congress/christopher-wray-pledges-independent-fbi-if-confirmed-director-n782131>.

news”<sup>58</sup> and a “hoax.”<sup>59</sup> In addition to his withering criticism of the Attorney General, President Trump has publicly criticized the Deputy Attorney General<sup>60</sup> and the Acting FBI Director<sup>61</sup> during periods they have had authority over the Russia investigation.

## 5. White House Investigation Targeting

Another area of concern is when the White House seeks to propose particular targets of investigation. This raises the specter of the President using the powers of the office to silence political rivals, which would be antithetical to the rule of law and democratic values. As such, the American federal law enforcement system relies primarily on the judgments of career prosecutors to evaluate the law and facts related to potential crimes worthy of investigation or prosecution. To be sure, there are times in which the President may have an appropriate role in calling for an investigation in the national interest—for example in his role as commander-in-chief of the military with a duty to defend the nation. However, those cases are rare.

Breaking from this tradition, President Trump has called for various investigations of political rivals or those involved in the Russia and Hush Money investigations.<sup>62</sup> He renewed his campaign calls for reopening the criminal

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<sup>58</sup> See, e.g., Laura King, *White House Again Bats Away Call for Special Prosecutor on Russia*, L.A. TIMES (Feb. 26, 2017), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-white-house-again-bats-away-call-for-1488128811-htmlstory.html> (reporting “President Trump again inveighed against Russia-related queries as “FAKE NEWS”).

<sup>59</sup> See Brian Stelter, *Trump Says This is All a Hoax. Mueller, Congress and Facebook Disagree.*, CNN (Sept. 22, 2017), <http://money.cnn.com/2017/09/22/media/trump-facebook-russia/index.html> (noting President Trump “has used the ‘Russia hoax’ label at least once a month since March”).

<sup>60</sup> See *Excerpts from The Times Interview with Trump*, N.Y. TIMES (Jul. 19, 2017), [https://www.nytimes.com/2017/07/19/us/politics/trump-interview-transcript.html?\\_r=1](https://www.nytimes.com/2017/07/19/us/politics/trump-interview-transcript.html?_r=1) (including President Trump publicly questioning Deputy Attorney General Rod Rosenstein’s political loyalty because there are “few Republicans” where Rosenstein is from); see also Allan Smith, *Trump Lashes Out at His Deputy Attorney General for Being from Baltimore—and He’s Not from Baltimore*, BUS. INSIDER (July 20, 2017), <http://www.businessinsider.com/trump-rod-rostenstein-baltimore-2017-7> (focusing on President Trump’s criticisms of Rosenstein).

<sup>61</sup> See Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017), <https://twitter.com/realDonaldTrump/status/890207082926022656> (“Why didn’t A.G. Sessions replace Acting FBI Director Andrew McCabe, a Comey friend who was in charge of Clinton investigation but got . . . .”); Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017), <https://twitter.com/realDonaldTrump/status/890208319566229504> (“ . . . big dollars (\$700,000) for his wife’s political run from Hillary Clinton and her representatives. Drain the Swamp!”).

<sup>62</sup> See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (May 18, 2017), <https://twitter.com/realdonaldtrump/status/865207118785372160?lang=en> (“With all of the illegal acts that took place in the Clinton campaign & Obama Administration, there was never a special counsel appointed!”); Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 2, 2017),

investigation of Hillary Clinton's email use.<sup>63</sup> He has also called for investigations of Democrats' alleged ties to a controversial uranium deal and Democratic funding for the so-called "Steele dossier" outlining reports of Russian collusion with the Trump campaign and other salacious allegations about President Trump.<sup>64</sup>

He plaintively asked the Department when it would "act" to prosecute former Hillary Clinton aide Huma Abedin.<sup>65</sup> In calling for criminal investigations of political opponents, President Trump has used Twitter to explicitly pressure the Attorney General.<sup>66</sup>

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<https://twitter.com/realdonaldtrump/status/937141061343956992?lang=en> ("So General Flynn lies to the FBI and his life is destroyed, while Crooked Hillary Clinton, on that now famous FBI holiday 'interrogation' with no swearing in and no recording, lies many times. . . and nothing happens to her? Rigged system, or just a double standard?").

<sup>63</sup> See, e.g., Louis Nelson, *Trump Ratchets Up Call for DOJ to Investigate Hillary Clinton*, POLITICO (Nov. 3, 2017), <https://www.politico.com/story/2017/11/03/trump-doj-investigate-hillary-clinton-244505> (quoting President Trump tweeting: "What about the deleted E-mails, Uranium, Podesta, the Server, plus, plus. . . At some point the Justice Department, and the FBI, must do what is right and proper"); Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 2, 2017), <https://twitter.com/realdonaldtrump/status/937142713211813889?lang=en> ("Many people in our Country are asking what the 'Justice' Department is going to do about the fact that totally Crooked Hillary, AFTER receiving a subpoena from the United States Congress, deleted and 'acid washed' 33,000 Emails? No justice!").

<sup>64</sup> In one tweetstorm, President Trump stated:

Never seen such Republican ANGER & UNITY as I have concerning the lack of investigation on Clinton made Fake Dossier (now \$12,000,000) . . . the Uranium to Russia deal, the 33,000 plus deleted Emails, the Comey fix and so much more. Instead they look at phony Trump/Russia . . . "collusion," which doesn't exist. The Dems are using this terrible (and bad for our country) Witch Hunt for evil politics, but the R's . . . are now fighting back like never before. There is so much GUILT by Democrats/Clinton, and now the facts are pouring out. DO SOMETHING!

This tweetstorm is comprised of four successive tweets: Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 29, 2017), <https://twitter.com/realdonaldtrump/status/924635359480303616>; Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 29, 2017), <https://twitter.com/realdonaldtrump/status/924637600094326784>; Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 29, 2017), <https://twitter.com/realdonaldtrump/status/924639422066384896>; Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 29, 2017), <https://twitter.com/realdonaldtrump/status/924641278947622913>.

<sup>65</sup> See David Nakamura & Matt Zapotosky, *Trump Urges Justice Department to "Act" on Comey, Suggests Huma Abedin Should Face Jail Time*, WASH. POST. (Jan. 2, 2018), [https://www.washingtonpost.com/news/post-politics/wp/2018/01/02/trump-urges-justice-department-to-act-on-comey-suggests-huma-abedin-should-face-jail-time/?utm\\_term=.130f2dfbc4bf](https://www.washingtonpost.com/news/post-politics/wp/2018/01/02/trump-urges-justice-department-to-act-on-comey-suggests-huma-abedin-should-face-jail-time/?utm_term=.130f2dfbc4bf); see also Chris Cillizza, *The Stunning Abnormality of Donald Trump's War on Justice (And Justice)*, CNN (Jan. 2, 2018).

<sup>66</sup> See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (July 24, 2017), <https://twitter.com/realdonaldtrump/status/889467610332528641> ("So why aren't the Committees and investigators, and of course our beleaguered A.G., looking into Crooked Hillarys

## 6. White House Assessments of Guilt or Innocence

Public statements by prosecutors and other law enforcement personnel can have significant consequences for those under investigation and the broader justice system. Prosecutors and other government officials carefully craft their statements about ongoing or pending investigations and criminal cases—they do not want to be accused of tainting or biasing the jury pool or create the perception that the outcome of a trial is a foregone conclusion. Such concerns are only magnified when the White House megaphone is involved.

Even the most horrendous criminal acts call for circumspect public statements. In fact, law enforcement officials are particularly careful when commenting on egregious cases because criminal procedures are under close examination and the public has intense interest in the outcome. In support of these principles, prosecutors are bound by mandatory rules of professional conduct that require them to “refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.”<sup>67</sup>

There are times when it is entirely appropriate for law enforcement officials to make public statements about pending or ongoing criminal enforcement matters. For example, agency heads may inform the public about important developments in an investigation or explain their prioritizing a certain matter or efforts to deter repeat criminal acts. But even in these cases, an official’s message is typically carefully crafted and has undergone a thorough review by various officials within their agency and throughout the executive branch.<sup>68</sup>

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[sic] crimes & Russia relations?”); Donald J. Trump (@realDonaldTrump), TWITTER (July 25, 2017), <https://twitter.com/realdonaldtrump/status/889788202172780544?lang=en> (“Ukrainian efforts to sabotage Trump campaign – ‘quietly working to boost Clinton.’ So where is the investigation A.G. [sic]”); Donald J. Trump (@realDonaldTrump), TWITTER (July 25, 2017), <https://twitter.com/realdonaldtrump/status/889790429398528000> (“Attorney General Jeff Sessions has taken a VERY weak position on Hillary Clinton crimes (where are E-mails & DNC server [sic]) & Intel leakers!”).

<sup>67</sup> See MODEL RULES OF PROF’L CONDUCT r. 3.6 (AM. BAR. ASS’N 2018).

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

*Id.*

<sup>68</sup> For instance, when announcing a new batch of indictments in the Mueller investigation on July 13, 2018, Deputy Attorney General Rod Rosenstein stated: “The special counsel’s investigation is ongoing, and there will be no comments on the special counsel at this time. . . . I want to caution you, the people who speculate about federal investigations usually do not know all of the relevant facts. We do not try cases on television or in congressional hearings. . . . We follow

When the President is commenting on a criminal matter, as the chief executive officer of the United States with an unrivaled bully pulpit, those public comments carry even more weight. In addition to influencing potential jurors and the public at large, such statements could affect federal law enforcement officials' conduct. The President and other senior government officials may of course make public statements that set national policy priorities, even when the policy may apply to only a small group of constituents.<sup>69</sup>

But it does significant damage to the administration of justice when Presidents or White House officials publicly pass judgment on individual criminal defendants. For example, President Nixon declared that Charles Manson "was guilty, directly or indirectly, of eight murders without reason" before the conclusion of Manson's criminal trial.<sup>70</sup> Amid an investigation into Hillary Clinton's email practices during her tenure as Secretary of State, President Obama told a Fox News host her email use had been careless but that "I continue to believe that she has not jeopardized national security."<sup>71</sup> Whether or not that comment was accurate, or accurately reflected President Obama's perspective, it could have downstream effects that could interfere with the investigation.

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the rule of law, which means that we follow procedures, and we reserve judgment. We complete our investigations, and we evaluate all of the relevant evidence before we reach any conclusion." Jen Kirby, *Rod Rosenstein Announces Russia Indictments*, VOX (Aug. 13, 2017), <https://www.vox.com/2018/7/13/17568838/mueller-rosenstein-russian-hacking-election-dnc-transcript-indictment-announcement>.

<sup>69</sup> The Reagan and Obama Administrations provide useful examples. President Reagan once stated, "The American people want the mob and its associates brought to justice and their power broken," when he announced a comprehensive law enforcement initiative to combat organized crime and its consequences, in particular drug-related crime. See President Ronald Reagan, Remarks Announcing Federal Initiatives Against Drug Trafficking and Organized Crime, THE AM. PRESIDENCY PROJECT (Oct. 14, 1982), <http://www.presidency.ucsb.edu/ws/index.php?pid=43127>. Similarly, President Obama proposed a task force to investigate lenders and other business entities involved in the financial crisis during a State of the Union speech. Barack Obama, President of the United States, State of the Union Address (Jan. 24, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/01/24/remarks-president-state-union-address> ("And tonight, I'm asking my Attorney General to create a special unit of federal prosecutors and leading state attorneys general to expand our investigations into the abusive lending and packaging of risky mortgages that led to the housing crisis.").

<sup>70</sup> Robert B. Semple, *Nixon Calls Manson Guilty, Later Withdraws Remark*, N.Y. TIMES (Aug. 4, 1970), <https://www.nytimes.com/1970/08/04/archives/nixon-calls-manson-guilty-later-withdraws-remark-refers-to-coast.html>. Faced with criticism that he had prejudged Manson's guilt, President Nixon issued a statement that "the last thing I would do is prejudice the legal rights of any person, in any circumstances." *Id.*

<sup>71</sup> See David S. Cloud, *Obama Says Hillary Clinton Was Careless with Emails but Didn't Jeopardize National Security*, L.A. TIMES (Apr. 10, 2016), <http://www.latimes.com/politics/la-na-obama-clinton-20160410-story.html>.

Since assuming office, President Trump has continued his practice of engaging in running commentary on the guilt or innocence of those under scrutiny in high profile cases.<sup>72</sup> On October 31, 2017, a terrorist truck attack in a busy Manhattan pedestrian zone killed eight people and injured a dozen more.<sup>73</sup> After a confrontation, police arrested an injured Sayfullo Saipov at the scene.<sup>74</sup> He was a lawful U.S. resident from Uzbekistan.<sup>75</sup> Two days later, as federal, state, and local authorities continued to investigate, President Trump tweeted: “He killed 8 people, badly injured 12. SHOULD GET DEATH PENALTY.”<sup>76</sup> Commentators expressed concern that the President’s call for the death penalty could potentially have the opposite effect by undermining the prosecution.<sup>77</sup>

### 7. Misuse of Presidential Pardons and Classification Authority

The President could also potentially interfere with the integrity of law enforcement by use of other authorities. Two deserve brief mention: pardons and classification authority.

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<sup>72</sup> As a candidate, the President referred to Sergeant Bowe Bergdahl as a “dirty rotten traitor” and called for him to be executed by firing squad or thrown from a plane without a parachute. During Bergdahl’s sentencing before a military tribunal in November 2017, President Trump refrained from making comments about the case but stated, “I think people have heard my comments in the past.” Meghan Keneally, *President Trump Slams Bowe Bergdahl’s Sentence: “Complete Disgrace,”* ABC NEWS (Nov. 3, 2017), <http://abcnews.go.com/Politics/president-trump-bowe-bergdahl/story?id=50912155>.

<sup>73</sup> Benjamin Mueller et al., *Terror Attack Kills 8 and Injures 11 in Manhattan*, N.Y. TIMES (Oct. 31, 2017), <https://www.nytimes.com/2017/10/31/nyregion/police-shooting-lower-manhattan.html>.

<sup>74</sup> *Id.*

<sup>75</sup> Corey Kilgannon & Joseph Goldstein, *Sayfullo Saipov, the Suspect in the New York Terror Attack, and His Past*, N.Y. TIMES (Oct. 31, 2017), <https://www.nytimes.com/2017/10/31/nyregion/sayfullo-saipov-manhattan-truck-attack.html>.

<sup>76</sup> Peter Baker, *Trump Declares Suspect “Should Get Death Penalty,”* N.Y. TIMES (Nov. 1, 2017), [https://www.nytimes.com/2017/11/01/us/politics/trump-new-york-attack-schumer-visa.html?\\_r=0](https://www.nytimes.com/2017/11/01/us/politics/trump-new-york-attack-schumer-visa.html?_r=0).

<sup>77</sup> *See id.* (“Presidents are typically advised never to weigh in on pending criminal charges because such comments can be used by defense lawyers to argue their clients cannot get a fair trial – especially when the head of the executive branch that will prosecute the charges advocates the ultimate punishment before a judge has heard a single shred of evidence at trial.”). The undermining effect of overheated presidential rhetoric concern was realized in the no-jail-time court martial sentence of Bowe Bergdahl for having been absent without leave before becoming a Taliban prisoner. That situation is not legally identical, however, because unlawful command influence doctrine is driven by the chain of command, and the President is the Commander in Chief. *See* U.S. CONST., art. II, § 2, cl. 1. *See also* Monu Bedi, *Unraveling Unlawful Command Influence*, 93 WASH. U. L. REV. 1401, 1421 (2016).

The pardon power, of course, is a broad, unilateral power granted to the President by the Constitution.<sup>78</sup> In one sense, pardons are designed to interfere in law enforcement. They provide the President an opportunity to correct injustices, dispense mercy, or further other national goals by means of clemency. However, that power can take on a sinister cast if it is deployed in a self-protective interest, either by means of an attempt to self-pardon or use of pardon power to impede law enforcement officials from obtaining evidence in which the White House has equities.

In the context of the Russia investigation, President Trump asserted he has the right to pardon himself,<sup>79</sup> contrary to over 40 years of executive branch doctrine indicating a self-pardon is unconstitutional.<sup>80</sup> The pardon power casts a shadow over cooperation agreements and plea bargaining in the criminal cases against former Trump advisers Cohen and Manafort, although no pardons have been issued.<sup>81</sup>

National security classification authority can also have substantial effects on ongoing criminal matters: either by classifying material that prosecutors need for public use, or by declassifying materials that law enforcement needs kept secret. There are instances in which it is within the President's discretion to determine that the national security interests outweigh criminal prosecution. Likewise, there may be situations in which the President could determine, in good faith, that law enforcement interests should yield to public transparency. However, classification authority could also be used to impede investigative activity the White House deems politically threatening. President Trump's declassification of records related to the Russia investigation, over Department objection, became a significant controversy.<sup>82</sup>

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<sup>78</sup> See U.S. CONST., art. II, § 2 (noting the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment").

<sup>79</sup> See John Wagner, *Trump Says He Has 'Absolute Right' to Pardon Himself of Federal Crimes but Denies Any Wrongdoing*, WASH. POST (June 4, 2018), [https://www.washingtonpost.com/politics/trump-says-he-has-absolute-right-to-pardon-himself-of-federal-crimes-but-denies-any-wrongdoing/2018/06/04/3d78348c-67dd-11e8-bea7-c8eb28bc52b1\\_story.html?utm\\_term=.e0e42a2e16e2](https://www.washingtonpost.com/politics/trump-says-he-has-absolute-right-to-pardon-himself-of-federal-crimes-but-denies-any-wrongdoing/2018/06/04/3d78348c-67dd-11e8-bea7-c8eb28bc52b1_story.html?utm_term=.e0e42a2e16e2).

<sup>80</sup> Mary C Lawton, *Presidential or Legislative Pardon of the President*, in 1 SUPPLEMENTAL OPINIONS OF THE OFFICE OF LEGAL COUNSEL 370 (Nathan A. Forrester ed., 2013).

<sup>81</sup> See, e.g., Byron Tau, *Cohen Plea and Manafort Conviction Raise Questions About Possible Trump Pardon*, WALL ST. J. (Aug. 21, 2018 8:26 PM), <https://www.wsj.com/articles/cohen-plea-and-manafort-conviction-raise-questions-about-trump-pardon-1534896170>.

<sup>82</sup> See, e.g., Jenny Herb, *Disputed GOP-Nunes Memo Released with Trump's Approval*, CNN (Feb. 2, 2018 6:52 PM), <https://www.cnn.com/2018/02/02/politics/republican-intelligence-memo/index.html>; Chris Megerian, *Trump Orders Justice Department to Declassify Some Records Related to Adversaries in Russia Investigation*, L.A. TIMES (Sept. 17, 2018 5:05 PM), <http://www.latimes.com/politics/la-na-pol-trump-russia-declassify-20180911-story.html>.



### 8. Taking Stock of Problem Areas in Trump Administration Year Two

In any administration, a White House will have some difficulty navigating its relationship with Main Justice because the Department has policy, intelligence, legal advisory, and enforcement roles. The first year of the Trump administration has been marked by a pattern of unorthodox White House relations with the Department that, taken together, undermine the confidence that Department officials can discharge their investigative duties free of political pressure. Worse, White House-Department relations have been marred by presidential outbursts and running commentary on Department matters beyond the President's brief. The next section places White House-Department relations in the overall framework of statutory and constitutional law.

## III. THE CHIEF EXECUTIVE, TAKE CARE CLAUSE & FEDERAL CRIMINAL INVESTIGATIONS

The President serves as the chief executive of the administration. The President's legitimacy is grounded in the constitutional method of our selection process, especially its democratic elements. There is a constitutional premium on preservation of the President's ability to shape the policy agenda of the executive branch<sup>83</sup> as well as the President's ability to act as the primary voice of the United States in foreign relations.<sup>84</sup> By constitutional design, presidential elections matter. The President needs to have the opportunity to deliver on those campaign promises that can be kept or promoted within the authorities of the office. The President also needs some baseline leverage over subordinate officials in order to meet obligations under the Take Care Clause.<sup>85</sup> But the President's management authority over the executive branch is not a pure command-and-control model. The President's executive power is subject to those powers allocated to other branches of the federal government and, in some instances, it is shared with those branches in areas of concurrent authority.<sup>86</sup> There are powers

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<sup>83</sup> See *infra* Part III.A.6 for a discussion of unitary executive theory.

<sup>84</sup> See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (describing the President as the "sole organ of the federal government in the field of international relations").

<sup>85</sup> See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010) ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them.").

<sup>86</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President acts in absence of either a congressional grant or denial of

that reside in the spheres of sovereignty retained by the states. And there are constitutional limitations on the office itself. This section discusses how the Take Care Clause imposes constitutional obligations that presumptively prevent the President from engaging in political interference or controlling prosecutorial law enforcement decisions in particular cases.

A. *The Take Care Clause*

Article II, Section 3 of the United States Constitution requires that the President “take Care that the Laws be faithfully executed.”<sup>87</sup> Together, the Executive Power Clause<sup>88</sup> and the Take Care Clause reflect “the President’s preeminent role in the execution of federal law.”<sup>89</sup> The Take Care Clause charge starts with a foundational obligation to uphold the Constitution itself as the supreme law of the land.<sup>90</sup> As such, the Clause is integral to the rule of law. The rule of law lies at the heart of the American concept of ordered liberty. It requires that legal rules, rather than individual officials, guide coercive government action.<sup>91</sup> In *Marbury v. Madison*,<sup>92</sup> Chief Justice John Marshall reminds us that the “government of the United States has been emphatically termed a government of laws, and not of men.”<sup>93</sup> An essential feature of the rule of law is that law constrains, and applies to, government actors. In his seminal *Youngstown Sheet & Tube Co. v. Sawyer* (“*Steel Seizure Case*”)<sup>94</sup> concurrence, Justice Jackson conceptualizes the Take Care Clause and Due Process Clause as two sides of the rule-of-law coin. While the Take Care Clause “gives a governmental authority that reaches so far as there is law, the [Due Process

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authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”).

<sup>87</sup> U.S. CONST., art. II, § 3.

<sup>88</sup> See U.S. CONST., art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”).

<sup>89</sup> Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 603 (1994).

<sup>90</sup> See also U.S. CONST., art. II, § 1 (requiring the President to swear an oath to “preserve, protect, and defend the Constitution of the United States”).

<sup>91</sup> The Rule of Law is foundational to the American legal system. As defined by Bouvier:

The Rule of Law has many controversial aspects, but is core requires fair laws that apply to all persons in a state, that are enacted for the benefit of the citizens, and that are fairly and impartially applied without regard to the status of the persons to whom they are applied, by officials who are themselves bound by the laws in every aspect of their duties.

“Rule of Law,” BOUVIER LAW DICTIONARY 1564 (2012).

<sup>92</sup> 5 U.S. 137 (1803).

<sup>93</sup> *Id.* at 163.

<sup>94</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, concurring).

Clause] gives a private right that authority shall go no farther.”<sup>95</sup> He concludes that the clauses, taken together, “signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.”<sup>96</sup> As discussed below, the Clause includes the President’s mandatory obligation (“shall”) to undertake a stewardship (“take care”) of the good faith enforcement (“faithful execution”) of the governing legal provisions (the “laws”).<sup>97</sup> Based on its treatment by courts and the political branches, the Clause contains multitudes.<sup>98</sup>

### 1. The Take Care Clause as Obligation

The Take Care Clause is framed by the language of obligation rather than power.<sup>99</sup> That includes the mandatory language—“shall”—imposed on the President rather than a grant of discretion to the President.<sup>100</sup> Cass Sunstein and Lawrence Lessig note the placement of the Clause within section 3 of Article II provides further evidence of its primary role as a duty rather than a grant of power.<sup>101</sup> The Clause’s primary role as a duty does not foreclose its implication as a recognition of presidential power, however. Indeed, the Supreme Court has

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Josh Blackman argues that the Clause imposes a constitutional duty on the President consisting of “four distinct but interconnected components.” Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 215, 219 (2015). I agree with this characterization of the structural duties of the Take Care Clause. Their application does not take me to the same conclusion as to the subject of Professor Blackman’s article, President Barack Obama’s executive actions on immigration.

<sup>98</sup> See Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1838, 1867 (2016) (describing the Supreme Court’s various treatments of the Take Care Clause as both “particular and delphic” and arguing the Court treats the Clause “as a placeholder for more abstract and generalized reasoning about the appropriate role of the President in a system of separation of powers”).

<sup>99</sup> See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 62 (1994) (“Unlike the other power clauses of Article II, the Take Care Clause is expressed as a duty rather than a power.”).

<sup>100</sup> See *id.* (noting that the Take Care Clause, as well as the other clauses located in section 3, are largely “expressed not as something the President may choose to do (as is the case where he has the ‘power’ to undertake actions), but as something he ‘shall’ do”).

<sup>101</sup> *Id.* (“Indeed, rather than appearing in section 2 of the Article II, where the balance of the President’s basic powers are articulated, the Take Care Clause appears in section 3 of Article II, in the context of a laundry list of other discretionary presidential duties and (arguably) powers.”) (footnotes omitted).

construed the Take Care Clause as both a limitation on presidential power and a recognition of it.<sup>102</sup>

## 2. The Take Care Clause and Stewardship

The Take Care Clause imposes a duty of care on the President, requiring stewardship of executive branch discretion and resources. The President acts as a steward in the sense of “[o]ne who manages another’s property, finances, or other affairs.”<sup>103</sup> The President, of course, acts on behalf of “We the People,” pursuant to the Constitution. The text of the Clause also presumes a role for subordinate officials in carrying out law enforcement. The passive construction of the Clause contemplates that other people will carry out the administration of the laws.<sup>104</sup> Thus, the President’s duty of care extends to the execution of the laws by means of the President’s relation to those officials tasked with laws’ administration. As discussed below, while an obligation of stewardship contemplates some presidential power to influence subordinate administrators, stewardship calls for different presidential orientation based on the laws at issue and the context at hand. Sometimes care in the execution of the laws requires heavy presidential direction, and other times it requires noninterference.

## 3. The Take Care Clause and Good Faith

The Take Care Clause places a duty of good faith on those bringing the laws into execution, including the President.<sup>105</sup> The Clause thereby informs the attitude with which the President must consider discretion in the implementation of laws as well as the deployment of resources designated for their execution. It also suggests that the President’s obligation of care includes an assessment of the faithfulness of those inferior executive branch officials charged with administration.

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<sup>102</sup> See Goldsmith & Manning, *supra* note 98, at 1836 (“Through a long and varied course of interpretation . . . the Court has read that vague but modest language, in the alternative, either as a source of vast presidential power or as a sharp limitation on the powers of both the President and the other branches of government.”).

<sup>103</sup> *Steward*, WEBSTER’S NEW COLLEGE DICTIONARY (1999).

<sup>104</sup> See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1875–78 (2015) (focusing on the implications of the passive voice as executive branch subordinates). In *Myers v. United States*, Chief Justice Taft, drawing from his experience as a former President, recognizes the reality that subordinates “aid [the President] in the performance of the great duties of his office and represent him in a thousand acts to which it could hardly be supposed is personal attention is called.” 272 U.S. 52, 133 (1926). The contours of the President’s management and supervisory authority as it relates to the Take Care Clause is discussed in Part III.A., *infra*.

<sup>105</sup> See David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 886, 907 (2016) (“It is straightforward to construe this language as imposing a duty of good faith on the President in her capacity as law implementer.”).

Zach Price argues the requirement of faithfulness in law execution “invites inquiry into the proper scope and rigor of law enforcement that a ‘faithful’ executive agent should perform.”<sup>106</sup> Faithfulness also invites inquiry into which executive actors should properly participate, and what motivations are permissible, in the exercise of levers of control. That dynamic comes into stark relief with respect to the prosecution function. While the President often has discretion in the means, timing, and resources devoted to execution of the laws, that discretion is largely defined by the terms of the law as drafted by Congress.<sup>107</sup>

#### 4. The Take Care Clause and Legislative Supremacy

The President’s Take Care Clause obligation largely turns on the nature of the “law” at issue. In other words, the President’s duties under the Take Care Clause are defined by the valid statutes, regulations, and judicial orders about which he must oversee execution. In this sense, the text affirms Congress’s legislative supremacy.<sup>108</sup>

A corollary observation is that varied laws require varied execution obligations. For example, consider a law delegating authority to the President to declare a weapons embargo if certain statutorily defined conditions are met. Faithful execution of that law presumes executive discretion and presidential involvement. With respect to criminal prosecutions, the calculus changes dramatically. There is a reasonable policy role for presidential involvement in prioritizing categories of criminal law enforcement as a matter of public policy.<sup>109</sup> In contrast, a particular criminal prosecution calls for evenhanded

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<sup>106</sup> Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 675 (2014).

<sup>107</sup> Of course, the Constitution provides the President with a significant role in the legislative process, both as a matter of the formal power to veto bills and, more importantly, the leverage the veto power provides the President to shape legislative choices during the legislative process.

<sup>108</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”); *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting) (“The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.”); see also Goldsmith & Manning, *supra* note 98, at 1839 (observing the Supreme Court “has treated the Take Care Clause as the direct constitutional source of the President’s obligation to respect legislative supremacy”); Price, *supra* note 106, at 698 (construing the original-era meaning of “faithfully” as a method of reinforcing congressional primacy in establishing law). As discussed in Part III.A.6, *infra*, Lessig and Sunstein argue that the Framers—evidenced by the Take Care Clause drafting process as well as the Necessary and Proper Clause—contemplated an even more significant role for Congress in administrative management of the Executive Branch.

<sup>109</sup> See ELLIOT RICHARDSON, *THE CREATIVE BALANCE: GOVERNMENT, POLITICS, AND THE INDIVIDUAL IN AMERICA’S THIRD CENTURY* 27 (1976) (noting the distinction between the “proper

assessments of facts and law by prosecutors and law enforcement rather than presidential factual and policy determinations.

### 5. The Take Care Clause as Presidential Power Preservative

Notwithstanding its language of duty, the Take Care Clause is also preservative of presidential power. It describes a role expressly granted to the President. In that sense, the canon of construction *expressio unius est exclusio alterius*<sup>110</sup> operates to protect the Executive from undue external meddling. Thus, in its standing doctrine jurisprudence, the Supreme Court has relied on the Take Care Clause to limit judicial encroachment on the President's law execution function.<sup>111</sup>

### 6. The Take Care Clause and Executive Branch Management

Notwithstanding the Take Care Clause's role in protecting the Executive Branch from interference in core executive functions, Congress can largely define the scope of the President's executive branch management authority by the terms of its legislation. A robust congressional role in defining the actors and

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role of the political process in the shaping of legal *policies* and the perversion of the legal *process* by political pressure"). For example, President Barack Obama called for the Department of Justice to create a special unit to investigate potential violations of criminal law after mortgage practices created the conditions leading to the Great Recession. *See also* President Barack Obama, State of the Union Address (Jan. 24, 2012) ("And tonight, I'm asking my Attorney General to create a special unit of federal prosecutors and leading state attorneys general to expand our investigations into the abusive lending and packaging of risky mortgages that led to the housing crisis."). At the time, I served as Associate Counsel to the President at the White House and witnessed that speech from the floor of the House of Representatives.

<sup>110</sup> *Expressio Unius est Exclusio Alterius*, MERRIAM WEBSTER DICTIONARY (defining as the explicit mention of one [thing] is the exclusion of another).

<sup>111</sup> *See* Goldsmith & Manning, *supra* note 98, at 1837 (observing that the Court "has used the Take Care Clause to define the limits of Article III standing" in a manner designed to "help ensure that the President rather than the federal judiciary retains primary responsibility for the legality of executive decisions"). *See, e.g.,* Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (holding that Congress may not create a private right of action for undifferentiated public interest in executive compliance because it would "allow Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed'"); Allen v. Wright, 468 U.S. 737, 761 (1984) (rejecting the standing of a parental lawsuit against the Internal Revenue Service for failure to enforce federal law prohibiting nonprofit, tax exempt private schools from discriminating on the bases of race in part because the "Constitution, after all, assigns to the Executive Branch, and not the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed'").

methods by which the executive branch carries a law into execution is anathema to proponents of unitary executive theory.<sup>112</sup>

Unitary executive theorists believe the Constitution places the President in direct, hierarchical control over a unified executive branch. They generally subscribe to one or more of the following three presidential levers of power as constitutionally required: substitution, nullification, and removal.<sup>113</sup> The first, and most aggressive, view is that the President may just *substitute* his judgment and action for any inferior executive branch official notwithstanding a statutory designation of that official as the sole decisionmaker.<sup>114</sup> A second unitarian model envisions a presidential power to nullify a subordinate's act even though the President lacks direct authority to act.<sup>115</sup> Others subscribe to a third perspective focused on *removal* power as a lever of control, contending "the President has unlimited power to remove at will any principal officers (and perhaps certain inferior officers) who exercise executive power."<sup>116</sup>

I generally subscribe to the third view as to presidential removal power, with the substantial caveat that the Take Care Clause operates as an independent variable on removal power. The President may have the raw power to fire an official, but that removal could nevertheless violate the Take Care Clause.<sup>117</sup> The Take Care Clause analysis would turn on the removed official's role as Congress

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<sup>112</sup> For a fulsome explanation of the theory, see generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008). Some Supreme Court opinions incorporate unitary executive theory. For example, in *Printz v. United States*, 521 U.S. 898 (1997), the Court struck down Brady Act provisions requiring state and local law enforcement officers to perform federal background checks. Justice Scalia wrote: "The insistence of the Framers upon unity in the Federal Executive—to insure both vigor and accountability—is well known." *Id.* at 922. The Court was concerned that executive "unity would be shattered" if Congress could bypass the President through commands to state officials. *Id.* at 923.

<sup>113</sup> See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1166 (1992) (addressing these "three mechanisms, none mentioned in Article II, by which the President might exercise his constitutional control of the executive department").

<sup>114</sup> See *id.* (citing Lee S. Liberman, *Morrison v. Olson: A Formalist Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 316, 347, 353 (1989)).

<sup>115</sup> See *id.*

<sup>116</sup> *Id.*

<sup>117</sup> The law of jury nullification provides a suitable analogy. Under prevailing law, a jury has the raw power, but not the legal right, to acquit a criminal defendant for reasons beyond the constraints of the trial judge's charge to jurors regarding applicable law. See, e.g., *State v. Ragland*, 519 A.2d 1361, 1369, 1371 (1986) (recognizing the jury "has the power to nullify the law by acquitting those believed by the jury to be guilty[,] but characterizing it as "absolutely inconsistent with the most fundamental value of Western democracy, that we should live under a government of laws and not of men"). While the President enjoys power to remove senior officials, the constitutionality of the act of removal must further be evaluated against Take Care obligations.

assigned, the nature of the government functions at issue, and the President's reasons for efforts to exert control by means of removal power.

Consider four hypothetical scenarios in which the President removes the Director of the U.S. Secret Service:

Scenario 1: The President removes the Director in the wake of a security incident involving a threat to the First Family. The President makes his decision in light of his personal experience with the incident and an after-action investigation by the relevant inspector general<sup>118</sup> finds a series of protective detail security lapses attributable to leadership inattention.

Scenario 2: The President removes the Director after the Director demonstrates sustained resistance to a congressional proposal, backed by the White House, to increase the Secret Service's role in cybersecurity of U.S. financial institutions. The Director does not want to distract the Service from its traditional twin core investigation functions: threats to protectees and paper money counterfeiting operations. The President wants a Director who will fully embrace the contemplated cyber mission.

Scenario 3: The President commands the Director's resignation because violent demonstrators breach a foreign embassy compound in Washington, D.C. By treaty and domestic law, the Uniformed Division of the Secret Service had responsibility for foreign embassy security. A subsequent inspector general investigation does not find fault with the Secret Service because the demonstration was spontaneous and beyond the ability of its senior leaders to foresee. Nevertheless, the President demands the resignation of the Director in order to help quell the foreign government's outrage and repair diplomatic relations.

Scenario 4: The President fires the Director because a counterfeiting investigation has started to focus on major donors to the President's campaign and political party. Allegations have surfaced that some of the contributions made to those political committees, as well as some of the cash expenditures listed on Federal Election Committee filings, reflect counterfeit currency.

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<sup>118</sup> The Office of Inspector General of the U.S. Department of Homeland Security has audit and accountability jurisdiction over the Secret Service. See *About Us*, OFF. INSPECTOR GEN., <https://www.oig.dhs.gov/about> (last visited Oct. 5, 2018).



In all four scenarios, the President has the clear power to remove the Director at will. A unitary executive purist would end the analysis at that point, suggesting that any other limitation on the President's removal power would unconstitutionally circumvent the Vesting Clause and sap the President's ability to meet his Take Care Clause obligations. The better reading of the Take Care Clause, however, untethers the President's right to remove from the power to do so.

In Scenario 1, the President's removal of the Director promotes his duty to take care that the laws be faithfully executed. Under the relevant law, presidential protection is a core Secret Service mission. If the President has lost confidence in its leadership to carry out that mission, removal of the Director furthers the execution of that mission. Nothing on these facts suggests that a successor would undermine the faithful execution of the Secret Service mission.

Scenario 2 represents a good faith policy disagreement between the Director and the President as to the scope of the Secret Service mission. Unlike the Director, the President's perspective has constitutional significance. He not only has a Take Care Clause obligation, but also has a significant constitutional role in the federal legislative process.<sup>119</sup> In addition, unlike the Director, the President occupies an office with a scope that looks across executive branch agencies. Interagency coordination is one of the primary functions of the White House policy and national security processes. Congress and the President decide how to structure the executive branch departments. Thus, the President's removal of a law enforcement official over a policy disagreement in which the President's role is supreme does not offend the Take Care Clause. Furthermore, like Scenario 1, there is nothing to suggest that the President will choose a subsequent appointee who would undermine faithful law enforcement.

Scenario 3 complicates the picture because of the blamelessness of the Service. It presents the Director's continued government service in tension with the President's constitutional role as the "sole organ" of U.S. diplomacy.<sup>120</sup> Again, like Scenario 2, the President's portfolio of constitutional roles requires that he have discretion, in the first instance, to deploy removal power in order to deconflict them when they are in tension with one another. And, again, there is

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<sup>119</sup> The President's veto power and the Recommendations Clause recognize the President's agency in the legislative process notwithstanding the legislative power granted to Congress. *See* U.S. CONST., art. I, §1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."); *Id.* art. I § 7 (providing for the President's power to return bills, i.e., the veto power); and *Id.* art. II, § 3 ("[The President] shall from time to time . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient . . .").

<sup>120</sup> *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (describing the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"); *see also* *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2079 (2015) (describing the President's capacity to engage in "delicate and often secret diplomatic contacts").

nothing to suggest the next Director will do anything but advance the agency's law enforcement mission in good faith.

However, the President's conduct in Scenario 4 violates his obligations under the Take Care Clause. Now, the President is using the power of removal to thwart a law enforcement investigation in bad faith. Further, unlike the first three scenarios, one would expect that the next Director will have received the message from the Oval Office loud and clear: do not pursue investigations if they lead to the President's political allies.

My departure from unitarian orthodoxy as to removal power turns on a different understanding of the Take Care Clause in the constitutional scheme, especially as it relates to the Vesting Clause. From the unitary executive perspective, a congressional enactment limiting the President's management control of the prosecution function could frustrate Take Care Clause obligations. The President would be restricted in an ability to ensure that the law is being faithfully executed by subordinates beyond his functional control. This is the position Scalia took in his *Morrison v. Olson*<sup>121</sup> dissent. From the other perspective, however, the Take Care obligations are defined by the particular congressional enactments at issue. Some laws require a pure line of presidential authority to provide for their faithful execution. Others, including the prosecutorial function, in contrast, call for faithfulness of a different variety: circumscribed presidential involvement or political interference. Thus, the majority in *Morrison* holds that good cause restrictions on removal of an independent counsel do not "impermissibly burden" the President's constitutional authority.<sup>122</sup>

One of Sunstein and Lessig's keen insights is the Framers' enhancement of the congressional role in shaping the President's Take Care obligations. At the Constitutional Convention, the Framers removed language granting power to the President to "carry into execution" the laws and replaced it with the duty to take care that those laws be faithfully executed.<sup>123</sup> At the same time, Article I granted Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."<sup>124</sup> By means of the Necessary and Proper Clause, Congress is charged with a significant role in defining the terms of laws being carried into execution. Congress has a prime seat at the table in defining the President's Take Care obligations as hands on or hands off.

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<sup>121</sup> 487 U.S. 654, 726 (1988) (Scalia, J., dissenting) ("If the removal of a prosecutor, the virtual embodiment of the power to 'take care that the laws be faithfully executed,' can be restricted, what officer's removal cannot?").

<sup>122</sup> *Id.* at 692.

<sup>123</sup> Lessig & Sunstein, *supra* note 99, at 66.

<sup>124</sup> U.S. CONST. art. I, § 8, cl. 18 (the Necessary and Proper Clause).

### B. *The Take Care Clause and the Prosecutorial Function*

In the context of the Department's criminal enforcement functions, then, we must look to the legislation authorizing federal criminal proceedings in order to understand the President's Take Care obligations.<sup>125</sup> This Section assesses the foundational laws of the Department's enforcement functions that define the President's corresponding Take Care Clause obligations. This analysis addresses the text, operation, and legislative intent of these legal authorities.

#### 1. Federal Prosecutors

Congress assigned the prosecution function to the Attorney General and United States Attorneys by means of statute.<sup>126</sup> The Judiciary Act of 1789 established the office of the Attorney General, charging the President to appoint "a meet person, learned in the law to act as attorney general for the United States."<sup>127</sup> The Supreme Court later described the Attorney General as "the hand of the President in taking care that the laws of the United States . . . in the prosecution of offences, be faithfully executed."<sup>128</sup> The office went through a gradual, and uneven, path to its current status as chief law enforcement officer.<sup>129</sup> However, Congress subsequently specified that "the conduct of litigation in which the United States . . . is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."<sup>130</sup> The first Congress also created the position of United States attorney in each judicial district with authority to prosecute federal crimes.<sup>131</sup>

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<sup>125</sup> Here, I do not mean the substantive criminal statutes, but rather the function of criminal prosecution and the legal authorities establishing the Department and the FBI that empower federal employees to investigate and prosecute crimes on behalf of the United States.

<sup>126</sup> See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (characterizing the Attorney General and United States Attorneys as "*designated by statute* as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed'" (quoting U.S. CONST. Art. II, § 3) (emphasis added)).

<sup>127</sup> Judiciary Act of 1789, ch. 20 § 35, 1 Stat. 92 (codified as amended at 28 U.S.C. § 503 (2018) ("The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States.")).

<sup>128</sup> *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922).

<sup>129</sup> For a fulsome account of the history of the Attorney General's role, see Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 *FORDHAM L. REV.* 1049, 1050–57 (1978).

<sup>130</sup> 28 U.S.C. § 516 (2018); see also White House Communications with the DOJ and FBI, United to Protect Democracy (Mar. 8, 2017), <https://protectdemocracy.org/agencycontacts> (asserting a White House effort to "direct the use of law enforcement to investigate or prosecute an individual matter" might violate Section 516).

<sup>131</sup> § 35, 1. Stat. at 93.

In 1870, Congress created the Department of Justice,<sup>132</sup> to be led by the Attorney General. The modern statute declares: “The Department of Justice is an executive department of the United States at the seat of Government.”<sup>133</sup> The 1870 Act set out the duties of the Attorney General and subordinate attorneys and investigators:

[T]he officers of the law department, under the direction of the Attorney-General, shall give all opinions and render all services requiring the skills of persons learned in the law, necessary to enable the President and heads of the executive Departments . . . to discharge their respective duties; and shall, for and on behalf of the United States, procure the proper evidence for, and conduct, prosecute, or defend all suits and proceedings in the Supreme Court of the United States and in the court of claims . . . .<sup>134</sup>

It also shifted supervisory power from the Secretary of the Interior over district attorneys and others to the Attorney General, and established that “the Attorney-General shall have supervision of the conduct and proceedings of the various attorneys for the United States in the respective judicial districts.”<sup>135</sup> Today, the “[p]rosecution of all criminal violations is controlled by the Department of Justice.”<sup>136</sup>

## 2. The Federal Bureau of Investigation (FBI)

Attorney General Charles J. Bonaparte issued a memorandum in 1908 describing a “force of special agents” from which the modern FBI traces its origins.<sup>137</sup> In 1976, Congress limited the FBI Director to one 10-year term.<sup>138</sup> The

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<sup>132</sup> Act of June 22, 1870, ch. 150 § 14, 16 Stat. 162.

<sup>133</sup> 28 U.S.C. § 501 (2018).

<sup>134</sup> § 14, 16 Stat. at 164.

<sup>135</sup> *Id.* at § 16, 16 Stat. 162, 164.

<sup>136</sup> Bell, *supra* note 129, at 1057.

<sup>137</sup> OFF. ATT’Y GEN., ORDER ESTABLISHING FBI (July 26, 1908). Bonaparte undertook this effort in response to a congressional provision that foreclosed the Department’s prior practice of barrowing the services of Secret Service agents who were employees of the Department of Treasury. A year later, Bonaparte’s successor George W. Wickersham named this force the “Bureau of Investigation.” During World War I, Congress started assigning counter-espionage assignments to the Bureau of Investigation.

<sup>138</sup> See Crime Control Act of 1976, Pub. L. No. 94-503, §203; 90 Stat. 2407, 2427 (1976) (amending 28 U.S.C. § 532 to establish a single, ten-year term for the FBI Director). In 1968, Congress elevated the FBI Director role from a Department bureau chief hired by the Attorney General to a presidential appointee subject to Senate confirmation. See also Omnibus Crime Control & Safe Streets Act of 1968, Pub. L. No. 90-351, Title VI, § 1101, 82 Stat. 192, 236 (1968).

Senate Judiciary Committee report on the proposal announced twin “complementary objectives” to the legislation: “The first is to insulate the Director of the Federal Bureau of Investigation from undue pressure being exerted upon him from superiors in the Executive Branch. The second is to protect against an FBI Director becoming too independent and unresponsive.”<sup>139</sup> Of particular note, the Committee observes: “The position is not an ordinary Cabinet appointment which is usually considered a politically oriented member of the President’s ‘team.’”<sup>140</sup> Thus, Congress signals to the President its expectations with respect to limitations on the President’s supervision of the FBI Director as a function of removal power.

### 3. The Prosecutorial Function

The FBI serves as the chief federal investigative agency and the U.S. Attorneys and other designated Department lawyers serve as the exclusive prosecutors of federal criminal law. There is a longstanding debate as to whether federal criminal prosecutions constitute a core executive function. That dispute, in turn, often serves as proxy for unitary versus regulable executive. This struggle has particular sensitivity in the context of criminal investigations. In *Morrison*, the Supreme Court characterized prosecution as an executive function, albeit one that left room for congressional regulation of the degree of the Executive’s control. Six years later, however, in *United States v. Armstrong*,<sup>141</sup> the Court described criminal prosecution as a core executive function.<sup>142</sup> From a pure unitary executive perspective, the “President can be considered, in a sense, the chief prosecutor of the United States in that he has access to or influence over all federal investigations unless he decrees otherwise . . . .”<sup>143</sup> Others argue prosecution is not a core executive function beyond Congress’s power to limit the President’s supervisory role.<sup>144</sup> But the Take Care Clause operates on

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In so doing, “Congress asserted its obligation to evaluate the qualifications” of the FBI Director given the “vital importance of the office . . . for the administration of . . . justice.” S. REP. NO. 93-1213, at 2 (1974).

<sup>139</sup> S. JUD. COMM. NO. 92-1213, at 1 (1974).

<sup>140</sup> *Id.* at 3.

<sup>141</sup> 517 U.S. 456 (1996).

<sup>142</sup> See *id.* (describing criminal prosecutions as “a core executive constitutional function”). In *Armstrong*, the Court relied on its core executive function determination in overturning a discovery order that sought prosecutorial files related to charging discretion. *Id.*

<sup>143</sup> Luke M. Milligan, *The “Ongoing Criminal Investigation” Constraint: Getting Away with Silence*, 16 WM. & MARY BILL RTS. J. 747, 756 n.43 (2008). See also Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005).

<sup>144</sup> See, e.g., Harold J. Krent, *A Symposium on Morrison v. Olson: Addressing the Constitutionality of the Independent Counsel Statute: Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275, 278 (1989) (arguing that, “from

presidential conduct with respect to the prosecutorial function whether or not it is core or ancillary to the Executive, and regardless of whether the President has the raw power to remove subordinate officials.

#### 4. Prosecutorial Integrity and Non-Interference

The Department's Great Hall features the statue *The Spirit of Justice*, which is a rendering of Lady Justice, the symbolic personification of a legal system grounded in the rule of law. Lady Justice is often depicted with a blindfold, a balance, and a sword<sup>145</sup> that together symbolize the evenhanded administration and moral force of law. Fidelity to the rule of law requires that prosecutors evaluate facts and evidence without interference by political figures. Elena Kagan argues for the President's robust executive management role over the administrative apparatus in her seminal article *Presidential Administration*.<sup>146</sup> However, she draws the line of Presidential authority to direct subordinate executive branch officials when it comes to criminal prosecutions.<sup>147</sup> She reasons:

Resolution of prosecutorial questions usually is conceived as lying at the heart of the executive power vested in the President. But it is in this area, because so focused on particular individuals and firms, that the crassest forms of politics (involving, at the extreme, personal favors and vendettas) pose the greatest danger of displacing professionalism and thereby undermining confidence in legal decisionmaking.<sup>148</sup>

Kagan's view is emblematic of the widespread understanding of the need for insulation from political or personal interests in criminal prosecutions. Prosecutorial independence from political interference is even a criterion used by the State Department to evaluate other countries' human rights practices.<sup>149</sup>

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a historical perspective, criminal law enforcement cannot be considered a core or exclusive power of the executive branch").

<sup>145</sup> *The Spirit of Justice* at the Department does not present Lady Justice with those accoutrements.

<sup>146</sup> See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

<sup>147</sup> *Id.* at 2357 (describing "appropriate boundaries on presidential direction" as a prohibition on presidential involvement "when, but only when, the government exercises prosecutorial authority").

<sup>148</sup> *Id.* at 2357–58.

<sup>149</sup> See U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2017, available at <https://www.state.gov/j/drl/rls/hrrpt/2017/>.

### 5. The Dual Function Paradox: Advisor & Independent Actor

The varied roles and missions of the Department create a paradox for its senior leadership. The paradox is woven into these incompatible statutory functions: numerous Department officers must serve as legal or intelligence advisors to the President in the fulfillment of his duties but they must also investigate and prosecute crimes. The Attorney General serves as both a legal advisor to the President and chief law enforcement officer with supervisory responsibility for criminal investigations and prosecutions.<sup>150</sup> As Attorney General Bell noted: “From the inception of the office of the Attorney General in the Judiciary Act of 1789, there has been ambiguity about the role, and disagreement about the independence, of the Attorney General.”<sup>151</sup> A proper understanding of the President’s Take Care Clause obligations is necessary for the Attorney General to be able to navigate a role requiring “varying degrees of contact and coordination with the executive branch on one hand, and independence from the executive branch on the other.”<sup>152</sup>

#### C. *A Take Care Clause Hardship: Criminal Investigations of White House Actors*

These awkward White House-Department dynamics, and the stakes, only intensify when the President, his staff, or his associates are the subject of a criminal investigation.<sup>153</sup> The President’s Take Care Clause noninterference obligations, too, become particularly acute when a federal criminal investigation involves White House actors. In the wake of Watergate, one commentator noted, the “partisan instincts of the executive collide most noticeably with the supposedly nonpartisan nature of law enforcement when the executive branch investigates itself and prosecutes crimes of government officials.”<sup>154</sup> Whether a President may be indicted remains an unresolved and contested constitutional

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<sup>150</sup> See NANCY V. BAKER, *CONFLICTING LOYALTIES* 2–4 (1992) (surveying various ways Attorneys General have managed their conflicting roles); see also Bell, *supra* note 129, at 1064 (discussing the “struggle for political independence” in the rendering of legal advice to the President); *id.* at 1067 (noting the “difficulty regarding independence is due in part to the multifaceted nature of the Attorney General’s job”).

<sup>151</sup> Bell, *supra* note 129, at 1065 (footnotes omitted).

<sup>152</sup> *Id.* at 1067.

<sup>153</sup> While this article focuses on limitations on White House contacts with the Department, conflict-of-interest rules are strongly implicated when White House equities are at issue in a Department investigation. The Ford White House defined conflicts: “A conflict of interest may exist whenever a member of the staff has a personal or private interest in a matter which is related to his official duties and responsibilities or the activities of the staff.” See Standards of Conduct for the White House Staff, ¶2 (Oct. 28, 1974) [hereinafter Ford White House Standards].

<sup>154</sup> Frank M. Tuerkheimer, *The Executive Investigates Itself*, 65 CALIF. L. REV. 597, 597 (1977).

question.<sup>155</sup> However, the Office of Legal Counsel has determined that “all federal civil officers except the President are subject to indictment and criminal prosecution while still in office.”<sup>156</sup> Therefore, the Vice President and all White House staff are amenable to criminal prosecution.<sup>157</sup> Further, the Constitution explicitly contemplates the possibility of criminal prosecution of a President removed following impeachment.<sup>158</sup>

Enforcing criminal law where there are White House equities presents vexing problems for the Executive. The President is not a king and is subject to law like everyone else. However, the law must also take into account the President’s singular role and critical constitutional duties. Moreover, there are legitimate concerns about the democratic accountability of the law enforcement. Post-Watergate, Congress and the Executive Branch have struggled to establish structures and processes adequate to balance these competing values.

As a result of President Nixon’s firing of Special Prosecutor Archibald Cox during the Saturday Night Massacre and other Watergate abuses, Congress enacted reforms including the establishment of the independent counsel.<sup>159</sup> As discussed earlier, its constitutionality was upheld in *Morrison* over Justice Antonin Scalia’s vigorous dissent.<sup>160</sup> That statute was used in a number of high-profile investigations of senior political figures such as the Iran-Contra scandal<sup>161</sup>

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<sup>155</sup> Compare Memorandum from Randolph D. Moss, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Janet Reno, Attorney Gen. (Oct. 16, 2000) (concluding that criminal indictment while in office would impermissibly hobble the President’s “ability to carry out his constitutionally assigned functions” which “would be inconsistent with the constitutional structure”), with *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (containing indications from four dissenting justices and one concurring opinion that a sitting President is subject to criminal indictment). See also Ryan Goodman, *When Five Supreme Court Justices Said a President Can Be Indicted*, JUST SECURITY (Aug. 17, 2017), <https://www.justsecurity.org/44264/supreme-court-justices-president-indicted/>.

<sup>156</sup> Memorandum from Randolph D. Moss, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Janet Reno, Attorney Gen. (Oct. 16, 2000) (characterizing, with approval, the determination by OLC in Memorandum from Robert G. Dixon, Jr., Assistant Attorney Gen., Office of Legal Counsel, Amenability of the President, Vice President, and Other Civil Officers to Federal Criminal Prosecution While in Office (Sept. 24, 1973)).

<sup>157</sup> See Memorandum from Robert G. Dixon, Jr., Assistant Attorney Gen., Office of Legal Counsel, Amenability of the President, Vice President, and Other Civil Officers to Federal Criminal Prosecution While in Office (Sept. 24, 1973).

<sup>158</sup> See U.S. CONST., art. I, § 3, cl. 7 (providing that government officials, including the President, convicted in impeachment proceedings “shall nevertheless be liable . . . to Indictment, Trial, Judgment and Punishment, according to Law”).

<sup>159</sup> See Ethics in Government Act, Title VI, Pub. L. No. 951-521, 92 Stat. 1824, 1867 (1978) (establishing the authorities for the independent counsel).

<sup>160</sup> See *supra* Section III.A.6.

<sup>161</sup> See Kenneth W. Starr, *Ronald Reagan*, in KEN GORMLEY ED., THE PRESIDENTS AND THE CONSTITUTION: A LIVING HISTORY 547 (2016).



and, most famously, the Whitewater investigation that eventually led to President Bill Clinton's impeachment.<sup>162</sup> It expired in 1999.<sup>163</sup> In its place, the Department of Justice established regulations providing for the appointment of a special counsel.<sup>164</sup> Deputy Attorney General Rod Rosenstein appointed Robert Mueller Special Counsel in the Russia investigation pursuant to these regulations.

The White House, therefore, will have occasion to respond to requests for cooperation in criminal investigations.<sup>165</sup> One of the main roles of the Office of White House Counsel is managing responses to document requests and subpoenas.<sup>166</sup> Congressional investigating committees and civil litigants fairly regularly seek records and testimony from the White House. Subpoenas and civil discovery requests from non-executive branch actors may raise issues of separation of powers, federalism, and immunity. However, federal criminal

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<sup>162</sup> That investigation had morphed from investigation of the Clintons' role in a failed land deal in Arkansas to lying in a civil deposition related to Paula Jones's sexual harassment lawsuit. While the goal of independence had been achieved, insulation from politics had failed. After the political convulsions caused by the Whitewater investigation, Congress had little appetite to renew the independent counsel statute.

<sup>163</sup> Ken Gormley, *William Jefferson Clinton*, in KEN GORMLEY ED., *THE PRESIDENTS AND THE CONSTITUTION: A LIVING HISTORY* 580 (2016).

<sup>164</sup> See 28 C.F.R. §§ 600.1–600.6 (2018) (setting out the Special Counsel authorities); see also Neal Katyal, *Trump or Congress Can Still Block Robert Mueller. I know. I Wrote the Rules.*, WASH. POST (May 19, 2017), [https://www.washingtonpost.com/posteverything/wp/2017/05/19/politics-could-still-block-muellers-investigation-i-know-i-wrote-the-rules/?utm\\_term=.7dcaebdccc25](https://www.washingtonpost.com/posteverything/wp/2017/05/19/politics-could-still-block-muellers-investigation-i-know-i-wrote-the-rules/?utm_term=.7dcaebdccc25).

<sup>165</sup> See Letter from Keith B. Nelson, Principal Deputy Assistant Attorney Gen., Office of Legislative Affairs, to Henry A. Waxman, Chairman, H.R. Comm. on Oversight & Gov't Reform at 2 (June 24, 2008) (noting that there "is an admirable tradition, extending back through Administrations of both political parties, of full cooperation by the White House with criminal investigations"). That letter relates to the criminal investigation conducted by the Office of Special Counsel Patrick Fitzgerald into the disclosure of Valerie Plame Wilson's identity as a Central Intelligence Agency officer, which focused attention on a variety of people in the George W. Bush White House. Later, President Bush asserted executive privilege over records of interviews by the President and Vice President conducted by Special Counsel Fitzgerald. See also Michael Isikoff, *Plame Probe Stymied by Bush Privilege Claim*, NEWSWEEK (July 15, 2008). Attorney General Mukasey recommended that President Bush assert executive privilege in part because compliance with the subpoena might "discourage voluntary cooperation with future Department criminal investigations involving official White House actions." Memorandum from Michael Mukasey, Attorney Gen., to President George W. Bush, *Assertion of Executive Privilege Concerning the Special Counsel's Interviews of the Vice President and Senior White House Staff* at 11 (July 15, 2008). Mukasey warned that future White House actors "might insist . . . on disclosing information only pursuant to a grand jury subpoena in order to ensure the secrecy protections of Rule 6(e) of the Federal Rules of Criminal Procedure." *Id.*

<sup>166</sup> See MaryAnne Borrelli et al., *The White House Counsel's Office*, 31 *PRESIDENTIAL STUD.* Q. 561, 570 (2001) (noting White House counsel's "role in responding to document requests and subpoenas directed to members of the White House staff and other executive branch officials"). Subpoena and document request response has been my primary official responsibility as a White House lawyer for Vice President Al Gore and President Barack Obama.

investigations of White House conduct create intra-executive dynamics that further complicate White House-Department relations.<sup>167</sup>

With respect to the Take Care Clause, however, the President's obligations are fairly clear. The President and his staff should treat any criminal investigation touching on White House equities at arms' length. First and foremost, White House lawyers should keep fidelity to their public service obligations<sup>168</sup> and continue to facilitate the President's performance of his duties. They should otherwise manage interactions with the criminal investigators and prosecutors in generally the same way a general counsel of a corporation might: responding to document requests and subpoenas, coordinating logistics with counsel for privately represented parties, addressing practical concerns, and raising good faith legal objections. Even in this context, the President is entitled to some leeway in how to navigate his Take Care Clause obligations. However, presidential obstruction of a federal criminal investigation of White House actors is antithetical to the Take Care Clause.

#### IV. TAKE CARE CLAUSE ENFORCEMENT OF NON-INTERFERENCE IN CRIMINAL PROSECUTIONS

All three branches have roles in the enforcement of the President's Take Care Clause obligations not to interfere improperly in federal criminal prosecutions. The Take Care Clause is enforced by a complex set of formal and informal methods: executive self-regulation, inter-branch signaling, legislative leverage, statutory restrictions, grand jury investigations, and the ever-present, though remote, twin threats of impeachment and judicial enforcement.

A number of presidential administrations brought significant improper political pressure to bear on criminal prosecutions. President Thomas Jefferson orchestrated Aaron Burr's trial for treason.<sup>169</sup> In the Watergate cover-up,

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<sup>167</sup> See *United States v. Nixon*, 418 U.S. 683 (1974), *superseded by statute*, Fed. R. Evid. 104(a), *as recognized in* *Bourjaily v. United States*, 483 U.S. 171, 177 (1987) (rejecting President Nixon's challenge to the justiciability of enforcement of the Special Prosecutor's grand jury subpoena in an "intra-branch" dispute).

<sup>168</sup> See *In re Lindsey*, 158 F.3d 1263, 1266 (D.C. Cir. 1998).

The public interest in honest government and in exposing wrongdoing by government officials, as well as the tradition and practice, acknowledged by the Office of the President and by former White House Counsel, of government lawyers reporting evidence of federal criminal offenses whenever such evidence comes to them, lead to the conclusion that a government attorney may not invoke the attorney-client privilege in response to grand jury questions seeking information relating to the possible commission of a federal crime. *Id.*

<sup>169</sup> President Jefferson's orchestration of Burr's treason trial represents an ugly episode of presidential political manipulation of the federal criminal prosecution. Senator Mike Lee (R-Utah) describes President Jefferson's "long-standing personal and political vendetta against his rival, Aaron Burr—a man who served as Jefferson's vice president and whom Jefferson single-handedly tried to convict of treason, a capital offense." MIKE LEE, WRITTEN OUT OF HISTORY: THE

President Richard Nixon sought to thwart the Special Prosecutor's office by means of personnel decisions, appeals to intelligence agency officials to intervene, and surveillance of the Department's investigative activity.<sup>170</sup> With the benefit of that hindsight, it is difficult to imagine President John F. Kennedy appointing his brother, Robert F. Kennedy as Attorney General, much less the Senate confirming him.<sup>171</sup>

Watergate, and the Nixon administration's broader misuse of law enforcement and intelligence agencies,<sup>172</sup> prompted a severe political and

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FORGOTTEN FOUNDERS WHO FOUGHT BIG GOVERNMENT 2–3 (2017). General James Wilkinson, commander of the Army of the United States, provided Jefferson with decoded translation of an encrypted letter with the claim it had been written by Burr. *See id.* at 13–14. While Burr's authorship is questionable, to Jefferson it confirmed his worst suspicions that Burr was preparing to stage a coup. *See id.* at 14.

Before America's first trial of the century, Jefferson campaigned to convince the public that Burr was a traitor. *Id.* at 3 ("Even before the trial began, Jefferson would expend relentless efforts to convict Burr in the court of public opinion . . ."). He transmitted a message to Congress accusing Burr of conspiracy to consisting of "an illegal combination of private individuals against the peace and safety of the Union, and a military expedition planned by them against the territories of a power in amity with the United States." Thomas Jefferson, *Message to Congress on the Burr Conspiracy*, THE AMERICAN PRESIDENCY PROJECT (Jan. 22, 1807) <http://www.presidency.ucsb.edu/ws/?pid=65721> [hereinafter *Burr Conspiracy Message*]. Jefferson framed his presentation as the president's response to a grave national security threat, which is within the expected role of the commander-in-chief. While Jefferson acknowledged doubt in the quality of the incriminating evidence, he asserted Burr's "guilt is placed beyond question." *See Burr Conspiracy Message* ("It is chiefly in the form of letters, often containing such a mixture of rumors, conjectures, and suspicions as renders it difficult to sift out the real facts and unadvisable to hazard more than general outlines, strengthened by concurrent information or the particular credibility of the relator."). *See also* LEE, *supra*, at 14 (describing these qualifications as a "note of judiciousness" on Jefferson's part). Chief Justice John Marshall gavelled the trial to order in Richmond, Virginia on May 22, 1807 and Burr was ultimately acquitted in September of that year. *See* JOSEPH WHEELEN, *JEFFERSON'S VENDETTA: THE PURSUIT OF AARON BURR AND THE JUDICIARY* (2004).

<sup>170</sup> For example, acting FBI Director L. Patrick Gray sent surreptitious periodic reports on the Watergate investigation to President Nixon's top White House aides, White House Chief of Staff John Ehrlichman and White House Counsel John Dean. *See* JAWORSKI, *supra* note 48, at 115.

<sup>171</sup> *But see* WHITNEY N. SEYMOUR, *UNITED STATES ATTORNEY* 39 (1975) ("When 'Bobby' Kennedy was appointed Attorney General by his brother, President John F. Kennedy, there was a brief public outcry against nepotism. But Robert F. Kennedy quickly demonstrated his talents and tackled the assignment with remarkable energy and dedication.").

<sup>172</sup> Of course, it was President Nixon's participation in the Watergate cover-up that sealed the demise of his presidency, but Nixon Administration politicization of the Justice Department was far broader. President Nixon's Deputy Attorney General Richard Kleindienst told a gathering of United States attorneys "it is of the utmost importance to keep this Administration in power . . . and you men must do everything you can to insure that result." *Id.* Attendees characterized Nixon's reelection as an imperative repeated by Kleindienst to United States attorneys over a period of months. *See id.* He reportedly instructed them to "avoid controversies that might lose votes." *Id.* at 226–27. Seymour ultimately concludes that the Nixon Administration abuses of power "have

regulatory backlash. Attorney General Bell lamented that the “partisan activities of some Attorneys General in this century, combined with the unfortunate legacy of Watergate, have given rise to an understandable public concern that some decisions at Justice may be the products of favor, or pressure, or politics.”<sup>173</sup> This section addresses these various enforcement mechanisms of the post-Watergate era. The common thread, however, is not that these enforcement mechanisms are mere norms, but rather prophylaxes to prevent the President from abusing power in a manner that violates the Take Care Clause.

#### A. *The Executive Branch*

The first line of defense against presidential overreach is executive self-regulation. The President must submit to the obligations of the Take Care Clause and the Oath of Office. There are external checks, to be sure, including interbranch competition, checks and balances, and the limits of popular opinion. But a healthy system of self-government relies on the President governing himself. Given the singularity of the office, an ungoverned executive threatens to undermine external limits. As Justice Jackson, himself a former Attorney General, forcefully observed: “By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.”<sup>174</sup>

Like the President, inferior executive branch officials, too, operate under an obligation of faithful execution of the laws. They, too, have legal obligations to insulate some particular functions from undue interference from senior political leadership, including the President. Thus, intra-executive regulations are the starting point of this enforcement analysis.<sup>175</sup>

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plainly shown that strong measures are needed to insulate the enforcement of the law from political partisanship and lawless official conduct.” *Id.* at 227.

In another incident, John Ehrlichman told then-Assistant Attorney General Kleindienst that President Nixon ordered the Department not appeal an antitrust case against International Telephone and Telegraph Company (ITT). *See JAWORSKI, supra* note 48, at 149–57. When Kleindienst refused, Nixon called to give the order directly. An “angry” Nixon was “abusive” on the call, threatening senior officials’ jobs and concluding “This is an order!” *Id.* at 150. Subsequent published reports alleged Nixon wanted the case settled because ITT promised to provide \$400,000 to the 1972 Republican National Convention. *See id.* at 50. Sometime after his resignation due to Watergate scandal proximity, Kleindienst was convicted of lying to Congress during his Senate confirmation hearings when he denied having ever discussed the ITT case with the President or White House staff. *See id.* at 149–57.

<sup>173</sup> Bell Address, *supra* note 1, at 3.

<sup>174</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653–54 (1952) (Jackson, J., concurring).

<sup>175</sup> *See* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006) (arguing for robust inter-executive regulations and checks on political leadership).

### 1. White House-Department Contacts Policies

Since President Richard Nixon resigned, White House staff has generally been prohibited from contacting executive branch agencies about investigations, enforcement actions, or adjudications.<sup>176</sup> After assuming office, President Gerald Ford approved “Standards of Conduct for the White House Staff” that barred all *ex parte* contacts with regulatory agencies and procurement officers unless there was prior clearance by the White House Counsel’s Office.<sup>177</sup> Every administration since President Gerald Ford has undertaken formal efforts to restrict White House contacts with agencies undertaking enforcement functions.<sup>178</sup> Over that period, the White House Counsel’s Office has taken the lead role in managing the sensitive relationship between the White House and the Department.<sup>179</sup> This includes an essential gatekeeping role for White House contacts with the Department. Attorneys General have also undertaken the duty to manage relations with the White House.<sup>180</sup>

White House agency contacts limitations are part of the broader set of rules and norms designed to safeguard the rule of law in the American constitutional system. It is important, therefore, to view these policies in context rather than in isolation. Political noninterference, independent legal judgment, and legal process observance animate these policies. Strong White House agency contacts policies are a necessary, but not sufficient, safeguard for the rule of law.<sup>181</sup>

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<sup>176</sup> See Memorandum from Jack Quinn, Counsel to the President, on Contacts with Agencies for White House Staff 2 (January 16, 1996) [hereinafter Quinn Memorandum], <https://clinton.presidentiallibraries.us/items/show/27001>.

<sup>177</sup> Ford White House Standards, *supra* note 153, at ¶ 11.

<sup>178</sup> See generally *id.*; Memorandum from Donald Rumsfeld, White House Chief of Staff, on Standards of Conduct: Contacts with Regulatory Agencies and Procurement Officers to All Employees of the White House Office and the Domestic Council (Oct. 10, 1975), [hereinafter Rumsfeld Memorandum] (on file with author), <https://www.fordlibrarymuseum.gov/library/document/0204/1511945.pdf>.

<sup>179</sup> See generally MARYANNE BORRELLI ET AL., THE WHITE HOUSE TRANSITION PROJECT, THE WHITE HOUSE COUNSEL’S OFFICE (2008), <http://www.whitehousetransitionproject.org/wp-content/uploads/2016/03/WHTP-2009-29-Counsel.pdf>. The report identifies management of White House and agency contacts with the Department as one of five primary functions of the White House Counsel’s Office. See *id.* at 6.

<sup>180</sup> See, e.g., Bell, *supra* note 129, at 1069 (noting he “played an important role as a buffer between our truly independent litigating attorneys in the Department of Justice, including the Solicitor General and his staff, and other government officials outside the Department of Justice”).

<sup>181</sup> See Memorandum from Eric Holder, Att’y Gen., on Communications with the White House and Congress for Heads of Department Components and All United States Attorneys 1 (May 11, 2009) [hereinafter Holder Memorandum], [https://www.justice.gov/oip/foia-library/communications\\_with\\_the\\_white\\_house\\_and\\_congress\\_2009.pdf/download](https://www.justice.gov/oip/foia-library/communications_with_the_white_house_and_congress_2009.pdf/download) (indicating the contacts policy restrictions are designed to “promote the rule of law”).

This section of the Article surveys the post-Watergate administrations' White House contacts policies. It concludes with a holistic analysis of the policies. While the policies vary in their scope and coverage across administrations, there are some common features that suggest they are critical to enforcement of the President's Take Care Clause obligations with respect to prosecutorial integrity.

*i. The Ford Administration*

Gerald Ford ascended to the Presidency from his leadership position in the House of Representatives after the successive scandal-driven resignations of Vice President Spiro Agnew and President Richard M. Nixon. He took as central to his mandate the restoration of faith in the Office of the President and the broader U.S. government. The integrity of the Department was central to his mission. Edward H. Levi served as Attorney General in the Ford administration. At his swearing-in ceremony, President Ford described Levi's mandate as restoration of faith in the Department of Justice after Watergate.<sup>182</sup> For his part, Levi pledged to convince a rattled citizenry, "by word and deed, that our law is not an instrument of partisan purpose and it is not an instrument to be used in ways which are careless of the higher values which are within all of us."<sup>183</sup> As later recounted by Levi's special assistant, it was not clear that the crisis of legitimacy at the Department "could be restored at all so long as the Department remained an integral part of the executive branch."<sup>184</sup>

The Ford White House Standards declared there is "no justification for [White House staff] involvement in adjudicative proceedings." Subsequent guidance from Ford's White House Chief of Staff, Donald Rumsfeld, characterized the Standards as prohibiting "all *ex parte* contacts with regulatory agencies unless there is prior clearance with the Counsel's Office."<sup>185</sup> It noted that "the ban on contacts extends to the litigating and adjudicatory divisions of the Department of Justice and the IRS."<sup>186</sup> These rules were designed to further the overall Standards goals of maintaining public confidence in the integrity of government operations, the assurance that government decisions would not be

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<sup>182</sup> See President Gerald Ford, *Remarks at the Swearing in of Edward H. Levi as Att'y Gen. of the U.S.*, 1975 PUB. PAPERS 203, 204-05 (Feb. 7, 1975) <http://www.presidency.ucsb.edu/ws/index.php?pid=5467> (describing Levi's responsibility during this "troubled time" to make "the Department the great Department it has been and must be if all our citizens are to have faith in the laws of our land").

<sup>183</sup> Edward H. Levi, *Remarks at His Swearing in as Att'y Gen. of the U.S.*, 11 WEEKLY COMP. PRES. DOC. 164 (Feb. 7, 1975).

<sup>184</sup> Ronald G. Carr, *Mr. Levi at Justice*, 52 U. CHI. L. REV. 300, 301-02 (1985).

<sup>185</sup> Rumsfeld Memorandum, *supra* note 178, at 1.

<sup>186</sup> Rumsfeld Memorandum, *supra* note 178, at 3.

influenced by officials' private interests, and the impartial treatment of those dealing with the government.<sup>187</sup>

ii. *The Carter Administration*

President Jimmy Carter continued President Ford's rehabilitation project. His first Attorney General, Griffin Bell, described a critical part of his mandate as "trying to articulate a position for the Justice Department that will constitute the Department into a neutral zone in the Government, because the law has to be neutral."<sup>188</sup> He acknowledged that "the partisan activities of some Attorneys General in this century, combined with the unfortunate legacy of Watergate, have given rise to an understandable public concern that some decisions at Justice may be the products of favor, or pressure, or politics." According to White House Counsel Robert Lipshutz, President Carter "insisted" on a clear line of independent Department authority as to criminal cases without White House interference.<sup>189</sup> Under President Carter, communications with the intelligence community or Department prosecutors had to be channeled through the National Security Advisor, in consultation with the Counsel to the President if an individual's privacy interests were involved.<sup>190</sup>

Under Lipshutz, White House Counsel's staff of five attorneys "relied very heavily on, for our background legal work, the Department of Justice."<sup>191</sup> However, Lipshutz described the limits on his coordination with Attorney General Bell: "I clearly respected his absolute authority without any interference from the White House, including the President, on criminal matters."<sup>192</sup> As White House Counsel, he saw policing strict noninterference by White House staff as an essential element of his job.<sup>193</sup> The Carter administration's strict delineation of roles traced directly back to the damaging Nixon era. Per Lipshutz, "one of the most undermining things we've had in recent years is the involvement of the White House in matters involving criminal justice which should be exclusively the purview of the Department of Justice."<sup>194</sup>

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<sup>187</sup> See Ford White House Standards, *supra* note 153, at ¶ 1.

<sup>188</sup> Bell Address, *supra* note 1, at 3.

<sup>189</sup> Exit interview by Marie Allen with Robert J. Lipshutz, Counsel to the President, Presidential Papers Staff, in Washington, D.C., 15 (Sept. 29, 1979), [https://www.jimmycarterlibrary.gov/assets/documents/oral\\_histories/exit\\_interviews/Lipshutz.pdf](https://www.jimmycarterlibrary.gov/assets/documents/oral_histories/exit_interviews/Lipshutz.pdf).

<sup>190</sup> See *id.* at 25.

<sup>191</sup> *Id.* at 14.

<sup>192</sup> *Id.* at 15.

<sup>193</sup> See *id.* ("I monitored the White House to make sure it was kept that way.").

<sup>194</sup> *Id.*

*iii. The Reagan Administration*

President Reagan's first Counsel, Fred Fielding, established White House contacts policies in a series of memoranda. Twenty days after the inauguration, Fielding issued a one-page placeholder guidance restricting White House staff from communicating with the Department.<sup>195</sup> It admonished staff of the "imperative that there be public confidence in the effective and impartial administration of the laws."<sup>196</sup> It required that all inquiries by the White House staff about pending criminal matters be directed to the Counsel to the President.<sup>197</sup> Five months later, Fielding issued a comprehensive set of agency contacts policies.<sup>198</sup> As to criminal investigations, the new standards of conduct clarified that the prior memorandum's "ban on contacts extends to the litigating; investigative and adjudicatory divisions of the department of justice."<sup>199</sup> The standards required that, while the White House Office is not covered by the Privacy Act of 1974, staff must "confer with the Counsel's Office before making inquiries of agencies with respect to particular individuals."<sup>200</sup>

*iv. The George H.W. Bush Administration*

C. Boyden Gray, President George H.W. Bush's White House Counsel, issued broad restrictions on White House contacts with agencies.<sup>201</sup> The directive covered both independent and traditional executive agencies.<sup>202</sup> The policy applied with particular emphasis to a variety of specified functions,<sup>203</sup> including

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<sup>195</sup> Memorandum from Fred F. Fielding, Counsel to the President, on Communications with the Department of Justice for the White House Staff 1 (Feb. 10, 1981), [hereinafter February 1981 Fielding Memorandum], <https://www.reaganlibrary.gov/sites/default/files/digitalibrary/smf/counsel/roberts/box-035/40-485-6908381-035-003-2017.pdf>.

<sup>196</sup> *Id.*

<sup>197</sup> *See id.*

<sup>198</sup> *See* Memorandum from Fred F. Fielding, Counsel to the President, on Standards of Conduct: Contact with Independent Regulatory Agencies, Investigative and Intelligence Departments and Agencies, and Procurement Agencies for the White House Staff (July 13, 1981) [hereinafter July 1981 Fielding Memorandum], <https://www.reaganlibrary.gov/sites/default/files/digitalibrary/smf/cos/cicconi/box-11/40-94-6914308-011-006-2016.pdf>.

<sup>199</sup> *Id.* at 3.

<sup>200</sup> *Id.*

<sup>201</sup> Memorandum from C. Boyden Gray, Counsel to the President, on Prohibited Contacts with Agencies for White House Staff (1989) [hereinafter Gray Memorandum].

<sup>202</sup> *Id.* at 1.

<sup>203</sup> The Gray Memorandum identifies investigative, adjudicatory, intelligence, procurement, and independent regulatory functions.



criminal investigations. Gray notes that the “ban on contacts extends to the litigating, investigative and adjudicatory divisions of the Department of Justice.”<sup>204</sup> Public confidence in the evenhanded administration of law calls for contacts restrictions with the Department.<sup>205</sup> The first Bush White House policies required that any inquiries touching on “particular pending investigations or cases” handled by the Department must be made by the Counsel to the President.<sup>206</sup>

v. *The Clinton Administration*

The Clinton administration likewise restricted contacts between the White House and the Department. Attorney General Janet Reno articulated the governing principles in a letter to the White House.<sup>207</sup> She informed the White House that the Department would only advise the White House about pending civil or criminal matters “where important for the performance of the President’s duties and where appropriate from a law enforcement perspective.”<sup>208</sup>

As White House Counsel, Jack Quinn issued White House contacts policies governing the staff of the Executive Office of the President (EOP).<sup>209</sup> The Quinn Memorandum defined “investigations” as “matters related to investigating or reviewing potential or actual administrative, criminal or civil charges for alleged violations of law or regulations by specific individuals or entities.”<sup>210</sup> It noted there may be “rare, special circumstances when it is appropriate for the White House to communicate with an agency about a pending investigation, enforcement action, or adjudication,” but it required any such communication to be “initiated by either the White House Counsel or the Deputy Counsel.”<sup>211</sup>

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<sup>204</sup> *Id.* at 3.

<sup>205</sup> *See id.* at 4 (“As we are all keenly aware, it is imperative that there be public confidence in the effective and impartial administration of the laws.”).

<sup>206</sup> *Id.* at 4–5.

<sup>207</sup> *See* Letter from Janet Reno, Att’y Gen., to Lloyd N. Cutler, Special Counsel to the President (Sept. 29, 1994).

<sup>208</sup> *Id.*

<sup>209</sup> *See* Quinn Memorandum, *supra* note 176, at 1. While it evolves over time, the EOP contains a number of components in addition to the White House Office staff, which typically include the Office of the Vice President, National Security Council staff, Office of Management & Budget, Office of the United States Trade Representative, and Office of National Drug Control Policy. *See generally* HAROLD C. RELYEA, CONG. RESEARCH SERV., 98-606 GOV, THE EXECUTIVE OFFICE OF THE PRESIDENT: AN HISTORICAL OVERVIEW (Nov. 26, 2008).

<sup>210</sup> Quinn Memorandum, *supra* note 176, at 2.

<sup>211</sup> *Id.* at 3.

*vi. The George W. Bush Administration*

Attorney General John Ashcroft issued a memorandum outlining Bush administration contacts policy on April 15, 2002.<sup>212</sup> Like previous administrations, Ashcroft stressed the importance of the Department's legitimacy. He noted the "imperative that there be public confidence that the laws of the United States are administered and enforced in an impartial manner."<sup>213</sup> He, too, limited communication with the White House about pending criminal matters "only when doing so is important for the performance of the President's duties and appropriate from a law enforcement . . . perspective."<sup>214</sup> It carved out an exception for direct communication between the National Security Council and Office of Homeland Security on pending investigations and cases involving national security matters.<sup>215</sup> However, the Ashcroft policy had the effect of permitting at least 417 White House staff members to communicate with at least 42 Justice Department employees on matters not involving national security.<sup>216</sup>

During President Bush's second term, Attorney General Alberto Gonzales issued revised guidance,<sup>217</sup> which had the effect of increasing the number of people within the EOP authorized to communicate with the Department of Justice.<sup>218</sup> According to the Senate Judiciary Committee, the Gonzales policy permitted at least 895 executive branch personnel to speak to at least 42 people in the Department about non-national security matters.<sup>219</sup> In contrast, under the Reno policy only seven people total were designated for initial communication between the White House and Department regarding pending investigations and cases.<sup>220</sup>

The Bush administration caused a firestorm when the White House removed a number of U.S. attorneys following the 2004 presidential election.<sup>221</sup>

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<sup>212</sup> Memorandum from John Ashcroft, Att'y Gen., on Department of Justice Communications with the White House, for Heads of Dep't Components and U. S. Att'ys (Apr. 15, 2002) [hereinafter Ashcroft Memorandum], <https://www.congress.gov/congressional-report/110th-congress/senate-report/203/1>.

<sup>213</sup> *Id.* at 1.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 2.

<sup>216</sup> See S. REP. NO. 110-203, at 3 (2007).

<sup>217</sup> See Memorandum from Alberto Gonzales, Att'y Gen., on Communications with the Executive Office of the President for Heads of Dep't Components and U. S. Att'ys (May 4, 2006) [hereinafter Gonzales Memorandum].

<sup>218</sup> See *id.*

<sup>219</sup> See S. REP. NO. 110-203.

<sup>220</sup> See *id.* at 2.

<sup>221</sup> See Bruce A. Green & Fred C. Zacharias, "The U.S. Attorneys Scandal" and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187, 187 (2008) (explaining the controversy).

Attorney General Michael Mukasey tightened the Bush Administration restrictions on Department communications with the White House in the wake of the controversy.<sup>222</sup> Mukasey later circulated revised guidance.<sup>223</sup> After listing numerous legitimate areas in which the White House and the Department “must be able to communicate freely,”<sup>224</sup> he notes that “[c]ommunications with respect to pending criminal or civil-enforcement matters . . . must be limited.”<sup>225</sup> Numerous internal and congressional reports found that political considerations improperly influenced a number of personnel decisions. Thereafter, Attorney General Michael Mukasey reaffirmed that the “mission of the Justice Department is the evenhanded application of the Constitution and the laws enacted under it.”<sup>226</sup> He undertook a number of reforms, including strengthening of the Department’s White House contacts policy.<sup>227</sup>

vii. *The Obama Administration*

In the Obama administration, Attorney General Eric Holder opened the Department’s White House contacts policy with a declaration: “The legal judgments of the Department of Justice must be impartial and insulated from political influence. It is imperative that the Department’s investigatory and prosecutorial powers be exercised free from partisan considerations.”<sup>228</sup> He also noted that the policy was “developed in consultation with, and have the full support of, the Counsel to the President.”<sup>229</sup> The Obama White House also

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<sup>222</sup> See Memorandum from Michael Mukasey, Att’y Gen., on Communications with the White House, for Heads of Dep’t Components and U.S. Att’ys (Dec. 19, 2007) [hereinafter 2007 Mukasey Memorandum].

<sup>223</sup> See Memorandum from Michael Mukasey, Att’y Gen., on Communications with the White House for Heads of Dep’t Components and U.S. Att’ys (Dec. 19, 2009) [hereinafter 2009 Mukasey Memorandum] (noting he is updating the 2008 “memorandum outlining procedures that govern communications between the Department of Justice and the White House” in order “to ensure that everyone is aware of the rules and of their importance”).

<sup>224</sup> *Id.* at 1.

<sup>225</sup> *Id.*

<sup>226</sup> See Michael B. Mukasey, Att’y Gen., Prepared Remarks of Attorney General Michael B. Mukasey Before the American Bar Association (Aug. 12, 2008) [hereinafter Mukasey Remarks] <https://www.justice.gov/archive/ag/speeches/2008/ag-speech-0808121.html>.

<sup>227</sup> See *id.* (“In December, shortly after becoming Attorney General, I revised the Department’s White House contacts policy and significantly narrowed the list of those who may communicate with the White House about ongoing criminal and civil enforcement matters.”).

<sup>228</sup> Holder Memorandum, *supra* note 181, at 1.

<sup>229</sup> *Id.* Gregory Craig was White House Counsel at the time. See Anne E. Kornblut & Ellen Nakashima, *White House Counsel Poised to Give Up Post*, WASH. POST (Nov. 13, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/13/AR2009111300071.html?noredirect=on>.

implemented mirror-image policies restricting staff contact with the Department.<sup>230</sup>

The Holder Memorandum outlines the central curiosity of the Take Care Clause as it relates to criminal prosecutions. In order for the President to meet his Take Care Clause obligations, the Department of Justice must regularly withhold information about particular criminal and civil investigations from the President and his White House advisers. Holder notes:

In order to ensure the President's ability to perform his constitutional obligation to "take care that the laws be faithfully executed," the Justice Department will advise the White House concerning pending or contemplated criminal or civil investigations or cases when—but only when—it is important for the performance of the President's duties and appropriate from a law enforcement perspective.<sup>231</sup>

This language makes it clear that communication with the White House about active matters is the rare exception rather than the rule. In those rare instances calling for contacts, the Obama administration policy restricted "initial communications" to the Attorney General and Deputy Attorney General on the Department side, and the Counsel to the President, Principal Deputy Counsel to the President, President, and Vice President. This very small cadre of designated individuals ensures that all contact can be closely monitored and managed in order to protect the enforcement function.

*viii. The Trump Administration*

During President Trump's first week in office, Counsel to the President, Donald F. McGahn, II, issued a memorandum to the White House staff outlining communications restrictions with personnel at the Department of Justice.<sup>232</sup> The Trump White House contacts policy articulates the purpose "*to ensure that DOJ exercises its investigatory and prosecutorial functions free from the fact or appearance of improper political influence.*"<sup>233</sup> It acknowledges that the Department "advises the White House about contemplated or pending investigations or enforcement actions under specific guidelines issued by the

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<sup>230</sup> See Memorandum from Kathryn Ruemmler, Att'y Gen., on Prohibited Contacts with Agencies and Departments for All White House Office Staff, (Mar. 23, 2012) [hereinafter the Ruemmler Memorandum].

<sup>231</sup> Holder Memorandum, *supra* note 181, at 1.

<sup>232</sup> See McGahn Memorandum, *supra* note 42.

<sup>233</sup> *Id.* at 1 (emphasis in original).

Attorney General.”<sup>234</sup> Like prior administrations, it appoints the White House Counsel’s office as the gatekeeper of communications with the Department.<sup>235</sup> Scrutiny of White House pressure on the Department has generated criticism of the Trump administration’s adherence to its contacts policy, as well as its substance.<sup>236</sup> From the Department side, it appears the Holder Memorandum remained in effect during the first year of the Trump administration.

## 2. Core Features of White House-Department Contacts Policies

The post-Watergate contacts policies share a number of features that have shaped the primary modality of Executive Branch enforcement of the principle of noninterference in criminal prosecutions. These features act as prophylaxis against violations of the Take Care Clause.

### i. *Front Office Gatekeeper Roles*

The White House Counsel’s Office and the Office of the Attorney General serve as the primary gatekeepers of White House-Department contacts. From the White House side, the Counsel’s Office takes the primary role in drafting the contacts policy that will govern the President’s most immediate staff. Counsel’s Office traditionally approves or disapproves contacts sought by any White House actor, including the President. Furthermore, White House lawyers typically monitor and attend any such contacts when approved to ensure that the integrity of law enforcement is scrupulously honored. The Attorney General, or her designee, fulfills a similar function for the Department. These constrictions on the channels of contact ensure that such contacts will be considered in advance and policed accordingly.

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<sup>234</sup> *Id.* At the time the McGahn Memorandum was issued, President Trump had nominated then-Sen. Jeff Sessions (R-Ala.) to be Attorney General, but he had not yet been confirmed. Obama Administration holdover Sally Yates was Acting Attorney General. *See* Matt Zapposky, *Trump Has Fired the Acting Attorney General Who Ordered Justice Dept. Not to Defend President’s Travel Ban*, WASH. POST (Jan. 30, 2017), [https://www.washingtonpost.com/world/national-security/acting-attorney-general-an-obama-administration-holdover-wont-defend-trump-immigration-order/2017/01/30/a9846f02-e727-11e6-b82f-687d6e6a3e7c\\_story.html?utm\\_term=.3b58a8bab198](https://www.washingtonpost.com/world/national-security/acting-attorney-general-an-obama-administration-holdover-wont-defend-trump-immigration-order/2017/01/30/a9846f02-e727-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.3b58a8bab198). Former Attorney General Eric Holder’s guidelines on Department contacts with the White House were in force. *See* Holder Memorandum, *supra* note 181.

<sup>235</sup> *See* McGahn Memorandum, *supra* note 42.

<sup>236</sup> *See, e.g.,* Letter from Allison F. Murphy, Counsel, United to Protect Democracy, to Donald McGahn, II, White House Counsel (Apr. 18, 2017), <https://protectdemocracy.org/wp-content/uploads/2017/08/20170418-Letter-to-Donald-McGahn-re-Agency-Contacts-Policy.pdf> (criticizing the scope and enforcement of the White House contacts policy).

ii. *Restrictions and Exemptions Follow Function*

White House contacts policies reflect the practical governing realities of the dual function paradox discussed in Section III.B.5 above. Aside from the front office gatekeeping process, the restrictions and exemptions of White House contacts policies follow functions rather than personnel. Prohibited contacts protect criminal investigations and prosecutions, civil enforcement actions, executive branch adjudications, formulation of objective legal analysis, and formulation of intelligence analysis. In contrast, it is generally permissible for White House staff to communicate with executive branch agencies regarding policy, legislative, and administrative issues.<sup>237</sup> The policies allow contacts for the President to obtain national security threat information and legal advice, to consult on judicial nominations, to guide broad policy objectives and resource allocation, and to manage the Department's role in the interagency process.<sup>238</sup>

iii. *The Standard for Exceptions as to Specific Matters*

On a case-by-case basis, White House staff has been allowed to contact the Department on matters that are not exempted. Several of the contacts policies establish a standard for exceptions to the contact prohibitions: where such information is "important for the performance of the President's duties and appropriate from a law enforcement perspective."<sup>239</sup> Of note, the Department language is "and" not "or," indicating that the policy requires both conditions to be satisfied before the contemplated White House contact with the Department is permissible. I address each in turn.

a. Contacts "Important for the Performance of the President's Duties"

This prong of the exceptions standards evaluates the President's need for Department information. One could see legitimate instances in which the President and his aides need to be apprised of information about a specific pending criminal matter. For example, the President's national security team would need to be apprised of a terrorism-related criminal investigation because it requires the President to coordinate an interagency threat response. The Department might need to inform the White House about an imminent indictment of a foreign national so the White House can address diplomatic fallout. Matters

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<sup>237</sup> See, e.g., Quinn Memorandum, *supra* note 176, at 2.

<sup>238</sup> Moreover, the President's removal power, among other sources of leverage, maintains a degree of residual supervisory control over the Department in order to take corrective action if warranted and not inconsistent with Take Care Clause obligations.

<sup>239</sup> See Holder Memorandum, *supra* note 181.

of great public interest might call for routine briefings that do not jeopardize law enforcement integrity.

The Department's mid-investigation disclosure to the White House regarding the potential compromised status of then-National Security Advisor Michael Flynn is a good example. Acting Attorney General Yates and a senior member of the Department's National Security Division informed the White House about a pending criminal investigation. However, the President could be disabled in his role as Commander-in-Chief and the nation's chief diplomat if his National Security Advisor is vulnerable to Russian intelligence leverage. The White House needed an opportunity to safeguard itself from a national security vulnerability. These disclosures were important for the performance of the President's duties.

b. Contacts "Appropriate from a Law Enforcement Perspective"

The second prong of the exceptions standard looks to whether the proposed contact is appropriate from a law enforcement perspective. Here, the focus is on the integrity of the investigation or prosecution, including the civil liberties of the relevant witnesses and targets. Returning to the case of Flynn, the Department disclosures appear to have met the standard of law enforcement appropriateness, although it is a closer question. At that time, the Department had intelligence-based information about the substance of Flynn's conversations with the Russian Ambassador that flatly contradicted Flynn's representations to the FBI. He was guilty of false statements,<sup>240</sup> to which he subsequently pled guilty.<sup>241</sup> As such, a White House disclosure was not going to compromise an investigation of that charge: it was a completed crime and the Department had all the relevant evidence for the charge. However, I would provide a note or two of caution. While Flynn's vulnerability to Russian compromise had been established, an investigation into whether any Russian operatives made any attempt to leverage Flynn likely would have required further investigation. Disclosure to the White House, with a risk of disclosure to Flynn, could have undermined an espionage investigation. Further, Flynn had significant professional and reputational interests adversely affected by the Department's disclosure. Those interests must factor into the White House contacts calculation even if disclosure was ultimately warranted.

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<sup>240</sup> See 18 U.S.C. § 1001 (2018).

<sup>241</sup> Statement of the Offense, *United States v. Flynn*, 2017 WL 5948711 (D.D.C. Dec. 1, 2017) (No. 1:17-cr-00232-RC).

### 3. Executive Branch Accountability Community

While the White House contacts policies are the starting point, other Take Care Clause enforcement mechanisms emanate from the Executive Branch. The executive branch accountability community<sup>242</sup> also protects the criminal prosecution function from undue influence. At the Department, the Office of Professional Responsibility (OPR) and Office of the Inspector General (OIG) have jurisdiction to investigate and enforce Department employee violations of White House contacts policies.<sup>243</sup> As an example, Attorney General Mukasey credited OPR and OIG findings of improper political influence in hiring decision as motivation for his revisions to the White House contacts policy.<sup>244</sup>

### 4. White House Aversion to Comment on Pending Cases

Presidential rhetoric and White House communications have also been generally managed to avoid bringing political pressure to bear in criminal cases. Presidential speech can have dramatic consequences in pending litigation.<sup>245</sup> And, as Justice Jackson noted in the *Steel Seizure Case*, “[n]o other personality in public life can begin to compete with [the president] in access to the public mind through modern methods of communications.”<sup>246</sup> The power of the bully pulpit is significant, especially to the ear of a subordinate executive branch official. The White House has traditionally avoided comment on pending criminal investigations because of the perception of presidential control.<sup>247</sup> The concerns about presidential rhetoric mirror concerns about management control: civil liberties and due process interests of individuals caught up in government investigation, the consequences of a judicial finding that those interests were

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<sup>242</sup> These are largely comprised of congressionally created offices of inspectors general established by the Inspectors General Act of 1978. There are also internal accountability entities created by executive branch agencies themselves. See Inspector General for Agency, 50 U.S.C. § 3517 (2018).

<sup>243</sup> OPR and OIG do not, however, have jurisdiction over White House staff violations of the White House contacts policy.

<sup>244</sup> See Mukasey Remarks, *supra* note 226.

<sup>245</sup> See Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 71 (2017) (noting that, at times, “presidential statements play a significant role in judicial assessments of the meaning, lawfulness, or constitutionality of either legislation or executive action”).

<sup>246</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

<sup>247</sup> See Luke M. Milligan, *The “Ongoing Criminal Investigation” Constraint: Getting Away with Silence*, 16 WM. & MARY BILL RTS. J. 747, 756 (2008) (“The White House has historically behaved as though it were constrained from commenting on the merits, progress, or information gathered during ongoing federal criminal investigations or prosecutions of which the President is perceived to be at least nominally in control.”).



violated by presidential action, and the apolitical and evenhanded administration of criminal laws. For example, President Ronald Reagan assiduously avoided comment on the case of John Hinckley, who gravely wounded and nearly assassinated Reagan.<sup>248</sup> To be sure, a White House may act in political self-interest by refusing to answer media questions scrutinizing the President's administration on "ongoing criminal investigation" grounds.<sup>249</sup>

##### 5. Executive Objections to Congressional Interference in Criminal Matters

The Executive Branch expresses this longstanding view on the central importance of prosecutorial noninterference in other contexts. The Executive Branch has advanced a parallel argument many times in an effort to resist congressional oversight. The Holder Memorandum, for example, covers Department contacts with the White House *and* Congress.<sup>250</sup> The Executive Branch has repeatedly resisted production to Congress of material related to open criminal matters.<sup>251</sup> It has argued that congressional requests threaten to

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<sup>248</sup> See Stuart Taylor, Jr., *Hinckley Is Cleared but Is Held Insane in Reagan Attack*, N.Y. TIMES (June 22, 1982), <https://www.nytimes.com/1982/06/22/us/hinkley-is-cleared-but-is-held-insane-in-reagan-attack.html> ("No comment all the way. We haven't commented on any aspect of this, and we won't comment now."). The President had a political incentive not to undermine the legitimacy of legal proceedings against Hinckley by opening himself to the charge he was being personally vindictive. But he also had a Take Care Clause obligation not to adversely affect the administration of enforcement proceedings against Hinckley.

<sup>249</sup> See Milligan, *supra* note 247, at 747 ("In many minds, the invocation of this constraint—no matter the circumstances—reflexively transforms a White House stonewall into an instance of 'responsible' and 'principled' presidential restraint.").

<sup>250</sup> See Holder Memorandum, *supra* note 181, at 2.

In order to ensure that Congress may carry out its legitimate investigatory and oversight functions, the Department will respond as appropriate inquiries from Congressional Committees consistent with the policies, laws, regulations, or professional ethical obligations that may require confidentiality and consistent with the need to avoid publicity that may undermine a particular investigation or litigation.

*Id.*

<sup>251</sup> See, e.g., Assertion of Executive Privilege with Respect to Prosecutorial Documents, 25 Op. O.L.C. 1, 2 (2001) (opinion of Attorney General John D. Ashcroft); Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 75–78 (1986) (explaining the Executive Branch's authority to withhold open and closed law enforcement files from Congress); Position of the Executive Department Regarding Investigative Reports, 40 Op. Att'y Gen. 45, 49 (1941) (same concerning investigative files of the Federal Bureau of Investigation); Letter from Eric Holder, Jr., Att'y Gen., on Assertion of Executive Privilege over Documents Generated in Response to Congressional Investigation into Operation Fast and Furious to President Barack Obama (June 9, 2012), <https://www.justice.gov/file/20591/download> (grounding the assertion of privilege, in part,

politicize the criminal prosecution function.<sup>252</sup> While the Executive Branch has yielded on numerous occasions,<sup>253</sup> those capitulations are a function of the leverage-based accommodation process that defines oversight disputes between Congress and the Executive.<sup>254</sup> Pennsylvania Avenue separates the branches as a matter of constitutional role demarcation, but the principle of noninterference extends to both political branches as the Executive understands its Take Care Clause obligations.

### B. *The Legislative Branch*

Congress expresses its expectation of noninterference in particular law enforcement matters by executive branch political appointees in numerous ways. A 2007 Senate Judiciary Committee legislative report declared “Congress has a compelling interest in protecting the Department of Justice from undue political interference.”<sup>255</sup> It largely shapes the President’s Take Care Clause obligations by means of defining the “laws.” Congress also uses other signals and sources of

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because Congress “sought information about ongoing criminal investigations and prosecutions”); Letter from Michael B. Mukasey, Att’y Gen., on Assertion of Executive Privilege Concerning the Special Counsel’s Interviews of the Vice President and Senior White House Staff to President George W. Bush (July 15, 2008), <https://www.justice.gov/file/482156/download>; Memorandum Opinion from Robert B. Shanks, Deputy Assistant Att’y Gen., on Congressional Subpoenas of Department of Justice Investigative Files for the Deputy Att’y Gen. (Oct. 17, 1984), <https://www.justice.gov/file/23686/download>; Letter from William French Smith, Att’y Gen., to John D. Dingell, Chairman, House Subcomm. on Oversight and Investigation, Comm. On Energy and Commerce 1 (Nov. 30, 1982) [hereinafter Smith Letter] (“It is the policy of the Executive Branch to decline to provide committees of Congress with access to or copies of law enforcement files, or materials in investigative files whose disclosure might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals.”).

<sup>252</sup> See Smith Letter, *supra* note 251, at 1 (“Congressional assurance of confidentiality cannot overcome concern over the integrity of law enforcement files . . . because of the importance of preventing direct congressional influence on investigations in progress.”). See also Todd D. Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 NOTRE DAME L. REV. 1373, 1388 (2002) (arguing for a per se executive privilege assertion as to open criminal files because congressional access creates an unacceptable “risk of politically influenced prosecutorial action.”).

<sup>253</sup> See MORTON ROSENBERG, CONG. RES. SERV., LEGAL AND HISTORICAL SUBSTANTIALITY OF FORMER ATTORNEY GENERAL CIVILETTI’S VIEWS AS TO THE SCOPE AND REACH OF CONGRESS’S AUTHORITY TO CONDUCT OVERSIGHT IN THE DEPARTMENT OF JUSTICE, *reprinted in EPA’s Criminal Enforcement Program: Hearing before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 103d Cong. 12–41 (1993) (outlining historical examples of congressional inquiry into open federal criminal investigative matters).

<sup>254</sup> See Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881 (2014) (exploring leverage and accommodation in separation-of-powers oversight disputes).

<sup>255</sup> See S. REP. NO. 110-203, at 2.

leverage to reinforce the rhetoric, if not always the substance, of prosecutorial integrity.<sup>256</sup>

### 1. Defining “Law”

As discussed in Section III.A.4 above, Congress has the primary constitutional role in writing the “laws” that define the President’s Take Care Clause obligations. First and foremost, Congress has established and provided for substantive federal criminal law and the apparatus to enforce it. It has protected line prosecutors and law enforcement officials from political considerations in hiring and termination. Congress also passed a whole set of criminal statutes designed to protect the integrity of criminal investigations and related judicial proceedings.<sup>257</sup> Embedded in those laws and functions is an unmistakable expectation that the law will be enforced in particular matters without regard to base political motives or personal interests by presidential appointees, or the President himself.

### 2. Senate Advice and Consent in Executive Nominations

The Senate often uses its confirmation power to establish expectations, communicate norms, and extract commitments from presidential nominees.<sup>258</sup> One of the Senate’s chief lines of inquiry for presidential appointees to the Department of Justice is its commitment to prosecutorial integrity and resistance

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<sup>256</sup> At times, Congress’s calls for “independence” look a lot more like pressure for executive officer fealty or a desired outcome than a true effort to insulate the Department from improper pressure. The consistent deployment of a non-politicization argument, even when done cynically, is a testament to the strength of the concept. Even now, in the most contested of issues related to the Russia investigation, members of both parties claim the mantle of protecting the Department from politicization. *See* Letter from GOP Members of the House Judiciary Comm. to Att’y Gen. Jeff Sessions and Deputy Att’y Gen. Rod Rosenstein (July 27, 2017), [https://judiciary.house.gov/wp-content/uploads/2017/07/072717\\_HJC-Letter-to-AG-DAG.pdf](https://judiciary.house.gov/wp-content/uploads/2017/07/072717_HJC-Letter-to-AG-DAG.pdf) (calling for the appointment of a second special counsel “to investigate a plethora of matters” related to Democratic party officials, law enforcement, and intelligence professionals in order to allow intelligence and investigation functions to be “fully unhindered by politics”).

<sup>257</sup> *See, e.g.*, 18 U.S.C. § 1503 (2018) (influencing or injuring officer or juror generally); 18 U.S.C. § 1505 (2018) (obstruction of proceedings before departments, agencies, and committees); 18 U.S.C. § 1510 (2018) (obstruction of criminal investigation).

<sup>258</sup> *See* ALLISSA M. DOLAN ET. AL., CONG. RESEARCH SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 20 (2014), <http://fas.org/sqp/crs/misc/RL30240.pdf> (“By establishing the policy views of nominees, congressional hearings allow lawmakers to call appointed officials to account at a later time.”). *See id.* at 20 (noting that since the post-Watergate reforms of the Ethics in Government Act of 1978, “Senate committees are setting aside more time to probe the qualifications, *independence*, and policy predilections of presidential nominees”) (emphasis added).

to undue political interference.<sup>259</sup> The Senate Judiciary Committee regularly communicates its expectations of law enforcement integrity and political noninterference, starting with nominees for Attorney General<sup>260</sup> and extending

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<sup>259</sup> For a chart of the nominees and confirmation processes for Attorney General from Reagan to Obama, see MAEVE P. CAREY & MICHAEL GREENE, CRS INSIGHTS, IN10192, ATTORNEY GENERAL NOMINATIONS SINCE THE REAGAN ADMINISTRATION (2014), [http://whitehousetransitionproject.org/wp-content/uploads/2016/04/AG-Noms-Since-Reagan\\_120414-1.pdf](http://whitehousetransitionproject.org/wp-content/uploads/2016/04/AG-Noms-Since-Reagan_120414-1.pdf).

<sup>260</sup> See, e.g., *Confirmation Hearing on the Nomination of Michael B. Mukasey to be Attorney General of the United States Before the S. Comm. on the Judiciary*, 110th Cong. 478 (2007). Statement of Senator Patrick Leahy:

There is good reason why the rule of law requires that we have an Attorney General and not merely a Secretary of the Department of Justice. This is a different kind of Cabinet position. It is distinct from all others. It requires greater independence. The departing Attorney General never understood this. Instead, he saw his role as a facilitator for the White House's overreaching partisan policies and politics.

*Id.*

*Nomination of Eric H. Holder, Jr., Nominee to be Attorney General of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 403 (2009), <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg56197/html/CHRG-111shrg56197.htm> (statement by Sen. Mark Warner that the Attorney General "will be the principal adviser to the president, and much has been said in the opening statements by both of my distinguished colleagues, chairman and ranking member, about the importance of the rule of law and independence") (statement by Sen. Schumer that "four years ago, moreover, the question of independence was my central consideration when Alberto Gonzales sat in the witness chair, that he was too close to the President, didn't understand the nature of the job of Attorney General").

Senator Specter stated that

[n]ext to the President of the United States, there is no Federal officer more important than the Attorney General. The Attorney General is different from any other Cabinet officer because Cabinet officers ordinarily carry out the policies of the President. But the Attorney General has an independent duty to the people and to uphold the rule of law.

*Id.*

*Confirmation Hearing on the Nomination of Hon. Jeff Sessions to be Attorney General of The United States: Hearing Before The S. Comm. of the Judiciary*, 115th Cong. 207 (2017), <https://www.congress.gov/115.chrg/shrg28637/CHRG-115shrg28637.pdf>, (statement by Sen. Charles Grassley that "[w]hen he has questioned other candidates for the Office of Attorney General, he has made plain the priorities of an attorney general's independence").

to other senior Department of Justice appointees.<sup>261</sup> In turn, Department nominees offer assurances of Department independence.<sup>262</sup>

Given controversies over the Russia investigation, one particular colloquy stands out in Robert Mueller's confirmation hearing to become FBI Director. Then a Senator, Sessions asked Mueller about whether he would approach Congress if he felt undue political pressure were being brought to bear by the President:

I do not exclude the possibility that the circumstances would be such that I would feel it necessary to circumvent the ordinary course of proceedings by—which would be to go to the Attorney General first before I made perhaps a disclosure to Congress. But I am not precluding the possibility that given the necessary independence of the Bureau in investigation, that there might not come a time where one seeks an alternative where one believes that political pressure is being brought to bear on the investigative process. That may be somewhere else in the Executive, beyond the Attorney General. It may be Congress, but I would look and explore every option if I believed that the FBI was being pressured for political reasons. And if that were the situation as described here, I would explore other

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<sup>261</sup> For example, David Ogden, nominee to be Deputy Attorney General, assured Sen. Ted Kaufman that his top priority, after national security, was “issues related to the rule of law: restoring nonpartisanship, ensuring the protection of investigations from inappropriate influence, protecting career hiring from inappropriate influence, dealing with transparency issues like some of those that have been discussed, all of which I group as any rule of law bucket.” Patrick Leahy, *Hearing of the Senate Judiciary Committee—Nomination of David Ogden for Deputy Attorney General*, VOTE SMART (Feb. 5, 2009), <https://votesmart.org/public-statement/406489/hearing-of-the-senate-judiciary-committee-nomination-of-david-ogden-for-deputy-attorney-general#.W6msOXtKhph>.

<sup>262</sup> See, e.g., S. DOC. NO. 111-403, *supra* note 260. Eric Holder stated during his confirmation hearing:

If confirmed by the Senate, I pledge to you and to my fellow citizens that I will faithfully execute my duties as Attorney General of the United States of America. I will do so by adhering to the precepts and the principles of the Constitution, and I will do so in a fair, just, and independent manner.

*Id.*

*Nominee for FBI Director Testifies Before Senate*, CNN (July 12, 2017), <http://transcripts.cnn.com/TRANSCRIPTS/170712/cnr.04.html> (Wray stating “in conclusion, I pledge to be the leader that the FBI deserves—and to lead an independent Bureau that will make every American proud”).

alternatives or a variety of alternatives in order to make certain that justice was done.<sup>263</sup>

In tension with the independence concern, Senators also expressed concerns about democratic accountability in light of historical law enforcement abuses.<sup>264</sup> In this give and take, confirmation hearings have become an important forum for expectation setting and extracted commitments, with a substantial focus on insulation from political interference.<sup>265</sup>

### 3. Congressional Oversight

Congress can use its oversight power to send the President signals about investigative noninterference. And it has done so. In recent years, congressional oversight inquiries into the George W. Bush Administration's removal of U.S. attorneys, problematic Bush and Obama era gun trafficking investigations called Operation Fast and Furious, and Obama Administration Secretary of State Hillary Clinton's email use all have had investigative threads that questioned whether the White House had inappropriately contacted or pressured the Department. Congressional committee members have also used hearings to press witnesses on the Department's White House contacts policies.<sup>266</sup>

### 4. Legislative Responses to Presidential Overreach

Aside from defining "law" for purposes of the Take Care Clause, Congress may also use its legislative power to insulate the criminal prosecution function from undue White House political interference. Congress could use Department authorities' reauthorization or appropriation cycles as leverage to correct what it perceives to be abuses of the Take Care Clause. If the President seeks funding for prioritized operations (say, immigration enforcement) or

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<sup>263</sup> *Confirmation Hearing on the Nomination of Robert S. Mueller, III to be Director of the Federal Bureau of Investigation: Before the S. Comm. on the Judiciary*, 107th Cong. 514 (2001) (statement of Robert S. Mueller, III).

<sup>264</sup> *See, e.g., id.* (Sen. Patrick Leahy: "We received testimony in our oversight hearings that too often the independence that is part of the FBI's culture, and a respected part, has instead, though, crossed over into the line of not being independence but arrogance.").

<sup>265</sup> The words "independent" and "independence" were used 76 times during Holder's confirmation hearings, and 56 times during Michael Mukasey's. *See* S. DOC. NO. 111-403, *supra* note 260; S. DOC. NO. 110-478, *supra* note 260.

<sup>266</sup> *See, e.g.,* S. REP. NO. 110-203 (2007) (recounting Sen. Sheldon Whitehouse's (D-R.I.) request for a justification from Attorney General Alberto Gonzales for "[kicking] the portal so wide open that this many people [in the EOP] can now engage directly about criminal cases and matters, compared to before" detailing Sen. Whitehouse's enhanced concerns, during June 29, 2007, about White House-Justice Department contacts following his discovery of the Gonzales Memorandum).

important surveillance authorities, Congress has an opportunity to influence presidential behavior.

In addition, as previously noted, Congress passed a series of post-Watergate laws designed to strengthen government ethics and protect the integrity of criminal prosecutions and other enforcement functions. After the Bush administration U.S. attorney controversy, the Senate Judiciary Committee considered legislation “to provide for limitations between the Department of Justice and the White House Office relating to civil and criminal investigations.”<sup>267</sup> The Committee observed: “The effectiveness and integrity of the administration of justice depends on the Department of Justice (the Department) operating free of political interference. The most dangerous potential source of such interference is the White House.”<sup>268</sup> At that time, Democrats held the majority and directed their critiques at the George W. Bush Administration. When the roles are reversed, Republicans, too, make similar arguments. In light of President Trump’s provocations, the Senate is considering two bipartisan legislative proposals that would codify legal protections for the Office of the Special Counsel from interference by the White House.<sup>269</sup> Thus, subject to constitutional limitations, Congress can police the President’s Take Care Clause obligations by means of substantive legal constraints on his authority vis-à-vis the Department’s prosecution function.

## 5. Censure

Congress may use an expression of censure as a sanction against perceived abuse of the President’s Take Care Clause obligations.<sup>270</sup> There is no express censure power specified in the Constitution, but it has long been used as a sanction by Congress.<sup>271</sup> It does not have legal effect aside from the reputational stain it bears. While it is primarily used to police its own members, Congress has

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<sup>267</sup> See *id.* at 1.

<sup>268</sup> *Id.* at 2.

<sup>269</sup> See *Special Counsels and the Separation of Powers*, COMMITTEE ON THE JUDICIARY (Sept. 26, 2017), <https://www.judiciary.senate.gov/meetings/special-counsels-and-the-separation-of-powers> (taking testimony on the constitutionality and advisability of S. 1735, the “Special Counsel Independence Protection Act” (the Graham-Booker bill) and S. 1741, the “Special Counsel Integrity Act” (the Tillis-Coons bill)).

<sup>270</sup> “Censure” is the “formal resolution of a legislative, administrative, or other body reprimanding a person, normally one of its own members, for specified conduct.” Censure, BLACK’S LAW DICTIONARY (6th ed. 1990).

<sup>271</sup> See JACK MASKELL, CRS REPORT FOR CONG., CENSURE OF THE PRESIDENT BY THE CONGRESS (1998), <https://fas.org/sfp/crs/misc/98-843.pdf>.

censured Presidents on several occasions.<sup>272</sup> Congress could clearly use that platform to voice condemnation of presidential interference in Department enforcement functions.

## 6. Impeachment

The Constitution grants Congress power to remove the President and certain other executive branch officials by means of impeachment.<sup>273</sup> The House of Representatives has the “sole Power of Impeachment.”<sup>274</sup> The Senate has the “sole Power to try all Impeachments” and may convict upon a two-thirds vote.<sup>275</sup> There is a longstanding debate about whether the phrase “high Crimes and Misdemeanors” has substantive content or is merely a reflection of the political determination of Congress.<sup>276</sup> The Articles of Impeachment against President Nixon that passed out of the House Judiciary Committee were largely grounded in obstruction of a criminal investigation as a violation of the President’s Take Care Clause obligations.

The first Article of Impeachment of President Nixon alleged:

In his conduct of the office of President of the United States, Richard M. Nixon, in violation of . . . his constitutional duty to take care that the laws be faithfully executed, has prevented, obstructed, and impeded the administration of justice . . . . Subsequent [to the Watergate break-in], Richard M. Nixon, using the powers of his high office, engaged personally and

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<sup>272</sup> The Senate censured President Andrew Jackson in 1834. *Id.* at 5. The House has censured Presidents John Tyler, James Buchanan, and James K. Polk. *Id.* at 5–6. During his 1998 Senate impeachment trial, an attempt to have Bill Clinton censured instead of removed from office failed.

<sup>273</sup> U.S. CONST. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).

<sup>274</sup> U.S. CONST. art. I, § 2, cl. 5.

<sup>275</sup> U.S. CONST. art. I, § 3, cls. 6–7.

<sup>276</sup> See ELIZABETH B. BAZAN, CONG. RES. SERV., 98-186 IMPEACHMENT: AN OVERVIEW OF CONSTITUTIONAL PROVISIONS, PROCEDURE, AND PRACTICE 22 (2010), <https://fas.org/sgp/crs/misc/98-186.pdf> (“Thus treason and bribery may be fairly clear as to their meanings, but the remainder of the language has been the subject of considerable debate.”). See also Neal Kumar Katyal, *Impeachment as Congressional Constitutional Interpretation*, 63 J. L. & CONTEMP. PROBS. 169 (2000) (discussing Congress as the venue for constitutional interpretation of the phrase “high Crimes and Misdemeanors”); Alex Simpson, Jr., *Federal Impeachments*, 64 U. PA. L. REV. 651, 676–95 (1916) (arguing there was confusion as to the meaning of the phrase “high Crimes and Misdemeanors” at the Constitutional Convention). For more on impeachment, see generally BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS (2012); WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992); Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631 (1999).



through his close subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of such illegal entry; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities.<sup>277</sup>

The remainder of that Article lays out specific means Nixon used in that effort, including making false statements, withholding material evidence, and suborning perjury.<sup>278</sup> It also charged President Nixon with “interfering or endeavoring to interfere with the conduct of investigations by the Department of Justice of the United States, the Federal Bureau of Investigation, the office of Watergate Special Prosecution Force, and Congressional Committees.”<sup>279</sup> The second Article of Impeachment likewise focused on President Nixon’s violation of the Take Care Clause by “impairing the due and proper administration of Justice.”<sup>280</sup> Because President Nixon resigned from office, the House did not vote on the resolution.<sup>281</sup>

Impeachment is an extraordinary remedy. When an executive official is convicted, the impeachment process supplants the President’s removal power. When invoked against a President or Vice President, it overturns an election. Impeachment exacts tremendous political costs on Congress and the political system overall. It remains, however, at Congress’s disposal to regulate a Take Care Clause violation of sufficient gravity to revisit the President’s fitness for office.

### C. *The Judicial Branch*

A Take Care Clause violation by the President is enforced largely as a constitutional question to be decided by Congress rather than the courts. Federal courts have addressed the Take Care Clause in a number of contexts. Goldsmith and Manning effectively demonstrate the “protean” uses to which the Supreme Court puts the Clause.<sup>282</sup> It has been willing, on occasion, to use the Take Care Clause’s expression of legislative supremacy to constrain presidential conduct.<sup>283</sup>

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<sup>277</sup> *Articles of Impeachment*, WATERGATE.INFO <http://watergate.info/impeachment/articles-of-impeachment> (last visited Nov. 1, 2018).

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> See H. R. Res 803, 93d Cong. (1974); H. R. Rep. No. 93-1305 (1974) (This is the House Judiciary Committee report recommending President Nixon’s impeachment).

<sup>282</sup> Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 837 (2016) (offering examples of the Supreme Court’s different interpretations of the Take Care Clause).

<sup>283</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952).

The Supreme Court has also construed the Clause to be a source of presidential duty. However, judicial opinions enforcing a presidential Take Care obligation have been conspicuously rare.<sup>284</sup>

The binary logic of legal enforcement of a statute or constitutional provision is violation or compliance. To be sure, there is room in judicial methodology for tests that balance factors and assess the totality of circumstances, but there is still an underlying expectation that judges will draw defensible and replicable lines. The Take Care Clause duty of good faith stewardship calls for presidential flexibility and discernment. Its enforcement must match that spectral quality. In this sense, the Take Care Clause tends to lack “judicially discoverable and manageable standards” as described in political question doctrine.<sup>285</sup>

Thus, coercive enforcement of the President’s Take Care obligations not to interfere with the prosecution function is better committed to the people’s representatives in Congress through the impeachment process. Every controversial and aggressive decision a president makes in tension with good faith or care in the execution of laws saps popular support and breeds popular assessments of Take Care violations. Eventually, the president’s bad faith can reach a tipping point in which the president’s maladministration transcends partisan affiliation to a degree that sanction for a Take Care violation takes on its own democratic legitimacy.

## V. CONCLUSION

The Take Care Clause governs—and limits—presidential authority over the Department of Justice. White House relations with the Department require sensitive navigation. It requires scrupulous compartmentalization between those Department functions and activities about which communication and contact with the White House is essential, permissible, or prohibited. In those rare instances in which presidential duties require an otherwise prohibited contact about an enforcement function, precautions must be undertaken to ensure that the contact does not compromise the civil liberties of suspects and the evenhanded administration of justice.

Further, all White House actors, including the President, may be subjects of criminal investigation during and after their official tenure. The bedrock American conception of the rule of law presupposes that the President and close advisors are not above the law, but subjects to it. Federal law enforcement may

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<sup>284</sup> See *Texas v. United States*, No. 15-40238 slip op. at 2 n.3 (5th Cir. Nov. 9, 2015), <http://www.scotusblog.com/wp-content/uploads/2015/11/15-40238-CV0.pdf> (“We find it unnecessary, at this early stage of the proceeding, to address the challenge based on the Take Care Clause.”).

<sup>285</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

investigate White House actors for potential criminal violations related to their official duties or wholly unrelated to them. Then, the President's Take Care Clause obligation not to interfere with criminal investigations and prosecutions takes on greater urgency. Material violations of Take Care Clause noninterference obligations by a President whose White House is under criminal investigation would convulse the American body politic and threaten constitutional crisis.

The United States stands on the precipice of that level of politico-legal trauma at the conclusion of the Trump administration's first year. President Trump has mismanaged the Department relationship by approaching it as a subordinate entity subject to command and control. Rather, the Department has varied functions, some of which the Take Care Clause would caution against direct White House involvement. Worse, President Trump's most aggressive acts with respect to the Department have been designed to thwart an investigation bearing on his personal and political interests.

Absent overriding considerations, the President and his White House staff must stand at arms' length from specific law enforcement and prosecution matters. This concept is not merely a political version of polite etiquette or "mere" norms. Rather it is part-in-parcel of the President's obligation to take care that the laws be faithfully executed. Or, put another way, we must understand it as a constitutional injunction. Only then can the Executive ensure it lives up to Attorney General Bell's admonition that "the Department must be recognized by all citizens as a neutral zone, in which neither favor nor pressure nor politics is permitted to influence the administration of the law."<sup>286</sup>

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<sup>286</sup> Bell Address, *supra* note 1, at 13.