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# The Chief Prosecutor

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# The Chief Prosecutor

By Saikrishna Prakash\*

Since Watergate, legal scholars have participated in a larger debate about the President's constitutional relationship to prosecutions. In particular, many legal scholars sought to debunk the received wisdom that prosecution was an executive function subject to presidential control. Revisionist scholars cited early statutes and practices meant to demonstrate that early presidents lacked control over prosecution. Among other things, scholars asserted that early presidents could not control either the federal district attorneys or the popular prosecutors who brought *qui tam* suits to enforce federal law. In fact, many of the revisionist claims are wrong and others are beside the point. Despite the lack of statutory authority over the district attorneys, early presidents directed the district attorneys in all sorts of prosecutorial matters. As authority for their superintendence, presidents cited their constitutional power over law execution. Moreover, there is no evidence that the statutes authorizing *qui tams* were meant to preclude presidential control over the *qui tam* suits. If English practice is any indication, the chief executive was understood to enjoy a great deal of control over popular prosecutors. Though there are many reasons to divorce the president from prosecution, this scheme does not have the imprimatur of early constitutional history. As a matter of the Constitution's original understanding, constitutional text, structure, and history establish that the President is the constitutional prosecutor of all federal offenses whether prosecuted by official or popular prosecutors.

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### *Introduction*

On the evening of Saturday, October 20, 1973, Attorney General Elliot Richardson and then Acting Attorney General William French Smith resigned rather than obey President Richard Nixon's order to fire Archibald Cox, the special prosecutor charged by Richardson to investigate the Watergate break-in.<sup>1</sup> Acting on the advice of his predecessors, Acting Attorney General Robert F. Kennedy complied with Nixon's order and fired Cox.<sup>2</sup> That night Nixon abolished the office of the special prosecutor and turned Cox's investigation over to Justice Department personnel.<sup>3</sup> These events came to be known collectively as the Saturday Night Massacre.<sup>4</sup>

Since the Massacre, politicians and scholars have disputed how much

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<sup>1</sup> Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST, Oct. 21, 1973, at A1.

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

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

<sup>4</sup> The Massacre was not without precedent. President Andrew Jackson removed two Secretaries of Treasury when each refused his demand to remove deposits from the Bank of the United States. See ROBERT V. REMINI, *ANDREW JACKSON AND THE BANK WAR: A STUDY IN THE GROWTH OF PRESIDENTIAL POWER* 115, 124 (1967).

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control the president must or ought to have over prosecution of federal offenses. Senator Sam Ervin, Chairman of the famous Senate Select Committee to Investigate Campaign Practices, championed an independent Department of Justice, claiming that “[t]here is not one syllable in the Constitution that says that Congress cannot make the Justice Department independent of the President.”<sup>5</sup> On NBC’s *Meet the Press*, presidential candidate Jimmy Carter actually pledged to establish an independent Department of Justice, complete with an attorney general with a term longer than the president’s.<sup>6</sup>

In a statement submitted to Chairman Ervin’s Senate Judiciary Committee, former special prosecutor Archibald Cox opposed Ervin’s legislation as unconstitutional because it deprived the president of removal authority over executive officers. He also doubted the constitutionality of vesting in officials independent of the president “a very large part of the duty . . . ‘to take care that the laws be faithfully executed’ . . . . Civil suits and criminal prosecutions are major weapons in the execution of the laws.”<sup>7</sup> Columbia Law Professor Herbert Wechsler agreed, noting that he did not see how the president could be held accountable for faithful law execution if the function of law execution would be vested in officers independent of the president.<sup>8</sup>

Although such drastic measures went nowhere, in 1978 Congress enacted the historic, though more modest, Ethics in Government Act.<sup>9</sup> The Act required the attorney general to seek the appointment of an independent counsel whenever there was specific and credible evidence that high-level executive branch officials may have violated the law.<sup>10</sup> While the attorney general could remove the independent counsel, the Act limited the grounds of removal.<sup>11</sup> Under the Act, almost two dozen

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<sup>5</sup> *Removing Politics from the Administration of Justice: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary on S. 2803 and S. 2978*, 93rd Cong. 3 (1974).

<sup>6</sup> GRIFFIN B. BELL & RONALD J. OSTROW, *TAKING CARE OF THE LAW* 28 (1982) (describing events surrounding the broadcast in 1976). Once Carter took office, his Department of Justice told him that an independent Department of Justice would be unconstitutional. *Id.*

<sup>7</sup> *Supra* note 5, at 208.

<sup>8</sup> *Id.* at 336. As the hearing report reveals, scholars and politicians were on both sides of this issue.

<sup>9</sup> Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

<sup>10</sup> 28 U.S.C. §§ 591(d), 592(c) (2000).

<sup>11</sup> 28 U.S.C. § 596(a) (2000) (providing that attorney general may remove independent counsel only for good cause, physical or mental disability). The original version of the Act provided that the counsel could be removed for “extraordinary impropriety.” Pub. L. No. 95-521, § 601, 92 Stat. at 1872. Some members of Congress felt that this change would enhance the constitutionality of the statute. *See* S. REP. NO. 97-496, at 17 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3537, 3553. John Manning has suggested that the independent counsel statute’s “for cause” removal restrictions were best read to permit

independent counsels have investigated dozens of senior executive branch officials.<sup>12</sup>

Perhaps the most famous critic of the independent counsel framework was Theodore Olson, now the Bush administration's solicitor general.<sup>13</sup> When independent counsel Alexia Morrison served him with a subpoena, Olson challenged the constitutionality of the independent counsel.<sup>14</sup> Although successful before the D.C. Circuit, the Supreme Court rebuffed Olson's claims that the Act violated the Appointments Clause, the limitations of Article III, and the constitutional principle of separation of powers.<sup>15</sup> In a lone dissent, Justice Antonin Scalia denounced the majority. Seizing on the Court's concession that prosecution was an executive function, Scalia asked: "In what *other* sense can one identify 'the executive Power' that is supposed to be vested in the President . . . *except* by reference to what has always and everywhere—if conducted by government at all—been conducted never by the legislature, never by the courts, and always by the executive."<sup>16</sup> Because criminal investigation and prosecution were "quintessentially" executive functions and because the counsel was independent of the president, Scalia reasoned that the Act unconstitutionally transferred a portion of the president's executive power to the independent counsel.<sup>17</sup>

In the wake of *Morrison*, respected scholars such as William Gwyn,

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the president to remove when the counsel defied presidential orders. John F. Manning, *The Independent Counsel Statute: Reading "Good Cause" in Light of Article II*, 83 MINN. L. REV. 1285, 1288 (1999). If Manning is correct, the independent counsel was not so independent after all.

<sup>12</sup> MILLER CENTER OF PUBLIC AFFAIRS, THE SEPARATION OF POWERS: THE ROLES OF INDEPENDENT COUNSELS, INSPECTORS GENERAL, EXECUTIVE PRIVILEGE AND EXECUTIVE ORDERS 2-3 (1998) (noting that at least twenty-one independent counsels were named between 1979 and 1998), [http://millercenter.virginia.edu/programs/natl\\_commissions/past\\_commissions/comm\\_1998.pdf](http://millercenter.virginia.edu/programs/natl_commissions/past_commissions/comm_1998.pdf).

<sup>13</sup> See *Morrison v. Olson*, 487 U.S. 654 (1988). Olson was hardly alone in criticizing the Act. It is probably fair to say that some critic somewhere has charged each of the independent counsels with squandering public funds, moving at a subglacial pace, or grinding partisan axes. Samuel Dash, *Independent Counsel: No More, No Less a Federal Prosecutor*, 86 GEO. L.J. 2077, 2083 (1998) (describing inevitable scrutiny of independent counsels by the media). Furthering the circus like atmosphere, the critics of independent counsels have themselves been condemned as attempting to impede counsel investigations by bringing counsels into disrepute. See AllPolitics, *Carville To Wait, Watch Starr*, at <http://www.cnn.com/ALLPOLITICS/1997/9612/06/carville/index.shtml> (Dec. 6, 1996) (quoting Senator Trent Lott as calling James Carville's attacks on independent counsel Kenneth Starr as "out of order"). Hence executive branch scandals often beget scandals related to the conduct of the independent counsels.

<sup>14</sup> *Morrison*, 487 U.S. at 668.

<sup>15</sup> *Id.* at 660.

<sup>16</sup> *Id.* at 706.

<sup>17</sup> *Id.*

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Harold Krent, Lawrence Lessig, Cass Sunstein, and many others cast doubt on the notion that prosecution was an executive function.<sup>18</sup> Rather than merely defending the notion that the Ethics in Government Act's particular restrictions on executive control did not impermissibly infringe upon the president's executive power, such scholars went further, suggesting that as a historical matter, prosecution was not an executive function at all. First, scholars asserted that federal district attorneys were not subject to centralized, executive control until the late 19th century.<sup>19</sup> Second, some asserted that 19th century state attorneys prosecuted federal offenses, independent of the president.<sup>20</sup> Third, scholars observed that early Congresses, through the creation of "popular-actions,"<sup>21</sup> had repeatedly granted the public the right to prosecute alleged violators on behalf of the federal government.<sup>22</sup> Finally, at least one scholar suggested that

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<sup>18</sup> Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 563 (1989); William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 476 (1989); Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 286 (1989); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 15-16 (1994); Daniel N. Reisman, *Deconstructing Justice Scalia's Separation of Powers Jurisprudence: The Preeminent Executive*, 53 ALB. L. REV. 49, 56-60 (1988); Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069, 1070 (1990). Of course, there have been many who have been critical of the decision in *Morrison v. Olson* and have argued in favor of presidential control of prosecution. See generally Steven G. Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313 (1989); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225; Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701 (2003). None of these prior treatments thoroughly examined the original understanding of prosecutorial control.

<sup>19</sup> See, e.g., Lessig & Sunstein, *supra* note 18, at 16; Dangel, *supra* note 18, at 1085.

<sup>20</sup> Krent, *supra* note 18, at 304-08; Lessig & Sunstein, *supra* note 18, at 19-20.

<sup>21</sup> The article uses the phrases "popular actions" and "popular prosecutions" to refer to suits that may be brought by anyone on behalf of the government to recover fines and forfeitures. Popular actions can be divided into two subcategories: *qui tam* actions and informations. *Qui tams* were pursued by a civil action for debt while informations involved a criminal proceeding. See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*160 (discussing *qui tam* actions); 4 *id.* at \*303-04 (discussing informations). Typically, the popular prosecutor would receive a portion of any recovery with the remainder going to the state. *Id.*

<sup>22</sup> See Evan Caminker, Comment, *The Constitutionality of Qui tam Actions*, 99 YALE L.J. 341, 341 (1989); Krent, *supra* note 18, at 296-303. Many have defended the constitutionality of popular actions. See generally Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381 (2001); Pamela H. Bucy, *Private Justice and the Constitution*, 69 TENN. L. REV. 939 (2002); Robin Kundis Craig, *Will Separation of*

prosecution was at least as much a judicial function as it was an executive one, evidenced by the close relationship of prosecutors and courts and the judicial appointment of prosecutors in early state constitutions.<sup>23</sup> These early practices and understandings led some scholars to conclude that nothing in the Constitution requires that the president control prosecution.<sup>24</sup>

Notwithstanding the vigorous scholarly defense of the constitutionality of prosecutorial independence, Congress failed to reauthorize the independent counsel provisions, thereby interring the independent counsel.<sup>25</sup> In the wake of Kenneth Starr's investigation of several Clinton-era scandals, a bipartisan consensus emerged against the use of independent counsels. For years, many Republicans had decried the law as unconstitutional, and the Clinton experience had left many of the independent counsel's Democratic supporters queasy (especially President Clinton).

But like a ghoul, the idea of divorcing prosecution from the president will not rest in peace. Late in 2003, in the aftermath of allegations that senior White House staff had illegally exposed the cover of a CIA agent, Senators Joseph Lieberman and Carl Levin introduced a "new and improved" independent counsel statute.<sup>26</sup> Given that the executive and legislative branches were controlled by the same party, the proposal had little chance of success.<sup>27</sup> Nonetheless, because members of Congress

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*Powers Challenges "Take Care" of Environmental Citizen Suits? Article II, Injury-in-Fact, Private "Enforcers," and Lessons from Qui Tam Litigation*, 72 U. COLO. L. REV. 93 (2001); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 (2000); Sean Hamer, *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*, 6 KAN. J. L. & PUB. POL'Y 89 (1997); Steven L. Winter, *What If Justice Scalia Took History and the Rule of Law Seriously?*, 12 DUKE ENVTL. L. & POL'Y F. 155 (2001). As one might expect, many others have argued against the constitutionality of popular actions. See generally Eric S. Askanase, *Qui Tam and the False Claims Act: Criminal Punishment in Civil Disguise*, 70 DEF. COUNS. J. 472 (2003); James T. Blanch, Note, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 HARV. J.L. & PUB. POL'Y 701 (1993); Frank A. Edgar, Jr., Comment, *"Missing the Analytical Boat": The Unconstitutionality of the Qui Tam Provisions of the False Claims Act*, 27 IDAHO L. REV. 319 (1990); Kathryn Feola, Comment, *Bad Habits: The Qui tam Provisions of the False Claims Act Are Unconstitutional Under Article II*, 19 J. CONTEMP. HEALTH L & POL'Y 151 (2002); Ara Lovitt, Note, *Fight for Your Right to Litigate: Qui Tam, Article II, and the President*, 49 STAN. L. REV. 853 (1997).

<sup>23</sup> Gwyn, *supra* note 18, at 502.

<sup>24</sup> Lessig & Sunstein, *supra* note 18, at 70; Krent, *supra* note 18, at 281.

<sup>25</sup> By not renewing the independent counsel provisions, Congress allowed the independent counsel provisions to expire in 1999. See 28 U.S.C. § 599 (2000) (providing that independent counsel provisions would cease to be effective five years after the date of the enactment of the Independent Counsel Reauthorization Act of 1994).

<sup>26</sup> See Independent Counsel Reform Act of 2003, S. 1712, 108th Cong.

<sup>27</sup> At the time of publication of this article, the Committee on Governmental Affairs was reviewing Senator Lieberman's bill.

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often grasp for solutions in the wake of scandals, Senator Lieberman's proposal might be a major scandal or two away from enactment.

When the political tides turn, there seems little that will bar the resuscitation of the independent counsel concept. Opportunistic members of Congress might even dust off Senator Ervin's idea of an independent Department of Justice.<sup>28</sup> Though the Supreme Court might now quibble with the appointment of independent counsels, its doctrine suggests that Congress can do much to isolate prosecution from presidential control.<sup>29</sup> Moreover, most of the existing scholarship examining original practices contends that early presidents quite clearly lacked constitutional authority to direct prosecution of offenses against the United States. Instead, early presidents only had as much authority over prosecution as Congress bestowed upon them. So long as reasonable people see the wisdom in divorcing politics from prosecution, the idea of divorcing the president from prosecutions will continue to haunt us.

It is time to drive a stake in the heart of the idea that independent prosecutors (of whatever sort) have the imprimatur of history. Historical claims advanced by academics about the insulation of federal prosecution from presidential control are largely wrong, in some cases profoundly so. There is ample proof that in 1789 the executive power encompassed the authority to prosecute those who (allegedly) violated the law.<sup>30</sup> For instance, William Blackstone repeatedly described the King as the proper prosecutor of all public offenses because the public had charged the King with executing the law.<sup>31</sup> Hence, it is not surprising that the English Crown could control prosecutors as could its royal governors in America. Though they were quite feeble in several respects, the early state executives likewise directed state attorneys. This was the lay of the land when the founders created the presidency.

Under the new Constitution, Presidents Washington, Adams, and Jefferson routinely and publicly directed district attorneys and the attorneys general to start and stop prosecutions.<sup>32</sup> Because no federal statute ever authorized presidential superintendence, the Constitution itself must have been read to authorize presidential direction. Indeed, presidents cited the Constitution as authorizing their control. Speaking of the district attorneys,

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<sup>28</sup> See *supra* note 5 and accompanying text.

<sup>29</sup> *Edmond v. United States*, a 1997 Appointments Clause decision, departed from *Morrison's* balancing approach and articulated a bright-line test for determining whether an officer is inferior. See 520 U.S. 651, 662-63 (1997). This led some to contend that *Morrison's* conclusion that the independent counsel was an inferior officer is no longer good law. See Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1106 (1998).

<sup>30</sup> See *infra* Part II.C.

<sup>31</sup> See *infra* note 155 and accompanying text.

<sup>32</sup> See *infra* Part II.C.4.



Jefferson said that because the president was to have the laws executed, he could “order an offence then to be prosecuted. If he sees a prosecution put into a train which is not lawful, he may order it to be discontinued and put into a legal train . . . . There appears to be no weak part in any of these positions or inferences.”<sup>33</sup> Jefferson was hardly alone in his conclusions. In the republic’s early years there appears to have been something of a bipartisan, tribranch consensus that the chief executive could control official prosecutors and their prosecutions.

Though the arguments are not as conclusive, the Constitution is likewise best read as permitting the president to control popular actions brought by private citizens. Whatever a statute might provide, the Constitution’s grant of the executive power<sup>34</sup> makes the president the “Constitutional Executor”<sup>35</sup> of federal laws. Because popular actions enforce the law, the president must be able to exercise some control over them. Otherwise, contrary to the Article II Vesting Clause, each popular prosecutor would enjoy a portion of the executive power and the result would be an unruly executive horde, with each member of the public empowered to pursue his or her own law enforcement policies and strategies. Independent popular actions, where individuals may prosecute violations of federal law without any executive control, make everyone a chief executive, something the Constitution does not permit.

The point is not that the president’s executive power forbids the harnessing of private greed to enforce the law. To the contrary, if the president exercises ultimate control over popular actions—by retaining authority to discontinue them—the grant of executive power poses no constitutional difficulty to the creation of popular actions. In other words, while independent popular actions are likely unconstitutional, terminable popular prosecutions (popular actions that the president may halt) may not be constitutionally problematic at all.

History points in the same direction. The English chief executive had broad (but not unbounded) power to terminate popular actions. Nothing in early American history suggests that the United States chief executive had less control over popular prosecutors. Although scholars have asserted that early presidents could not intervene in popular actions, no federal statute authorizing popular prosecutions ever barred executive control. In fact, later Supreme Court cases suggested that the president could pardon those popularly prosecuted, thereby precluding the popular prosecutor’s receipt of any share of the fine or forfeiture. Far from demonstrating that

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<sup>33</sup> See Letter from Thomas Jefferson to Edward Livingston (Nov. 1, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON 57 (Paul Leicester Ford, ed., G.P. Putnam’s Sons, 1897).

<sup>34</sup> U.S. CONST. art. II, § 1, cl. 1 (“Executive Power shall be vested in a President of the United States.”).

<sup>35</sup> 4 WORKS OF ALEXANDER HAMILTON 444 (Henry Cabot Lodge ed., 1904).

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independent popular actions are constitutional, history actually suggests that the president's grant of executive power enables him to terminate popular prosecutions.<sup>36</sup>

Part I observes that Congress has created numerous pockets of prosecutorial independence and also recounts how scholars have challenged the judiciary's longstanding view that prosecution is an executive function. Part II claims that, as a matter of the Constitution's original understanding, the president may direct "official prosecutions," i.e., federal prosecutions brought by officers or employees of the federal or state governments. Finally, Part III contends that, while independent popular actions are unconstitutional, terminable popular prosecutions do not violate the president's executive power. Taken together, Parts II and III advance the claim that the president is the chief prosecutor, i.e., the constitutional prosecutor of all offenses against the United States.<sup>37</sup>

Because there are many sound reasons to favor prosecutorial independence, there will undoubtedly be those who continue to see the wisdom in insulating prosecutions from the president. To the extent that some scholars and judges believe that history supports the constitutionality of prosecutorial independence, however, this Article supplies a needed corrective. If people persist in advocating independent prosecutors, an autonomous attorney general, or an independent Department of Justice,

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<sup>36</sup> The constitutionality of popular actions remains an open question. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the Supreme Court pointedly noted that its conclusion that *qui tam* relators had standing left open the question of whether *qui tams* actions might nonetheless violate the Appointments and Faithful Execution Clauses. See 529 U.S. 765, 778 n.8 (2000). Curiously, the Court did not mention the possibility that *qui tam* provisions might violate the president's executive power.

<sup>37</sup> The Article does not address suits brought by private parties to vindicate their own private rights. More importantly, the Article does not discuss when Congress must provide for government enforcement of the law. The Article only asserts that when Congress decides that the United States has an interest in enforcing a particular law, as evidenced by Congress's decision to require governmental execution of that law, the president may control all suits brought on behalf of the United States to enforce that law. Whenever a government official or a private party sues on behalf of the United States, the Constitution grants the president control of that suit. Accordingly, the Article does not consider the constitutionality of statutes that try to supplement governmental enforcement of laws with private enforcement, through the creation of new private rights and causes of action. While the grant of the executive power may limit or bar congressional attempts to create private rights when the actual congressional goal is to bypass sluggish executive branch law enforcement, this Article takes no position on this matter. Likewise, the article does not address the constitutionality of criminal appeals of felony whereby private parties criminally prosecuted those who had injured them. Blackstone regarded this mode of prosecution as largely outdated. See 4 WILLIAM BLACKSTONE, COMMENTARIES \*312-13. Moreover, the criminal appeal apparently never found its way into the United States Code. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 817 n.2 (1987) (Scalia, J., concurring) (observing that he was unaware of any law authorizing criminal appeals).

they must do so without the imprimatur of early constitutional history.<sup>38</sup>

### *I. The Enduring Dispute About Presidential Power Over Prosecution*

Federal judges consistently have viewed prosecution as an executive function. In *Morrison* itself, Justice Scalia and Judge Laurence Silberman claimed that the president must be able to control prosecutions.<sup>39</sup> In the same case, Chief Justice William Rehnquist and then Judge Ruth Bader Ginsburg seemed to admit the executive nature of prosecutions.<sup>40</sup> Prior case law amply reflects this consensus about the executive nature of prosecution.

Citing historical practices, academics have disparaged the assertion that the Constitution authorizes presidential control of prosecution.<sup>41</sup> Some have argued that even if prosecution is an executive function, Congress may insulate prosecution from presidential control.<sup>42</sup> Others have maintained that prosecution is as much a judicial function as it is an executive function.<sup>43</sup>

Well before this debate intensified, Congress made select areas of civil prosecution largely independent of the president. Congress may have begun this trend as early as 1887, when it passed the Interstate Commerce Act.<sup>44</sup> The Act seemingly created an independent Interstate Commerce

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<sup>38</sup> The Article's principle claim is that the Constitution's grant of executive power enables the president to control prosecutions. Though the Article also contends that the Congress cannot curb the president's constitutional control over prosecution (or law execution generally), early constitutional history sheds little light on this matter. Early federal statutes never purported to constrain presidential control. Instead, they were read against the background presumption that the Constitution authorized presidential direction of official prosecutors. Because the issue of congressional constraints on presidential control never apparently arose, it was never considered, much less resolved. Given that this question never arose, no one can cite early constitutional history to either support or refute the notion that Congress can abridge the chief prosecutor's constitutionally-authorized control of prosecutions. Nonetheless, since Congress does not have the generic authority (under the Necessary and Proper Clause or any other clause) to treat the Constitution's allocation of powers as default rules, this Article contends that Congress cannot limit the president's powers over prosecutions. The president's constitutionally granted powers are not mere default rules that Congress may modify as it wishes.

<sup>39</sup> *Morrison v. Olson*, 487 U.S. 654, 706 (Scalia, J., dissenting); *In Re Sealed Case*, 838 F.2d 476, 511 (D.C. Cir. 1988) (Silberman, J.).

<sup>40</sup> *Morrison*, 487 U.S. at 696 (Rehnquist, J.); *In Re Sealed Case*, 838 F.2d at 519 (Ginsburg, R. B., J., dissenting).

<sup>41</sup> See *supra* note 18.

<sup>42</sup> Krent, *supra* note 18, at 279-81; Dangel, *supra* note 18, at 1070-71.

<sup>43</sup> Gwyn, *supra* note 18, at 492-93.

<sup>44</sup> Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (current version in scattered sections of 49 U.S.C.). Chris Yoo, Steve Calabresi, and Laurance Nee have argued that given the rule of construction announced in *Shurtleff v. United States*, 189 U.S. 311 (1903), statutes like the Interstate Commerce Act would not have been understood to limit the president's constitutional removal authority in the early twentieth century. See Christopher

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Commission and commanded district attorneys to prosecute whenever the Commission filed an enforcement petition.<sup>45</sup> Today, while independent litigating authority is the exception rather than the rule, a number of independent agencies litigate free of executive branch control.<sup>46</sup> Moreover, a few federal statutes create popular actions that arguably grant members of the public a measure of autonomy in bringing suits.<sup>47</sup> The Article briefly considers this status quo before recounting the claims made by courts and scholars

#### A. *The Prosecutorial Status Quo*

The default rule is that the Department of Justice, under the attorney general's direction, represents the United States in court.<sup>48</sup> With respect to criminal prosecutions, the Department of Justice has exercised such control since 1870.<sup>49</sup> While many government agencies may investigate crimes, if an agency desires a criminal prosecution, it must refer the case to the Justice Department.<sup>50</sup> While the Justice Department typically criminally prosecutes only if there is an agency referral, the Department need not secure a referral prior to commencing a criminal prosecution.<sup>51</sup> In effect,

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S. Yoo et al., *The Unitary Executive During the Third Half-Century, 1889-1945*, 80 NOTRE DAME L. REV. 1, 25-27 (2004). In *Shurtleff*, the Court said that even if Congress could limit the president's removal authority, it would have to do so by "very clear and explicit language." *Shurtleff*, 189 U.S. at 315. If these scholars are right and the president (and his lawyers) were cognizant of *Shurtleff's* proexecutive rule of construction, then Interstate Commerce Commissioners might not have been as independent as many have supposed.

<sup>45</sup> Interstate Commerce Act § 16.

<sup>46</sup> Neal Devins, *Unitariness and Independence: Solicitor General Control Over Independent Agency Litigation*, 82 CAL. L. REV. 255, 263-64 (1994).

<sup>47</sup> In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Court claimed that there were but four extant popular action statutes, each of which was over a century old. *Id.* at 768 n.1. The most important is the False Claims Act, 31 U.S.C. §§ 3729-3733 (2000). *See also* 25 U.S.C. § 201 (2000) (providing cause of action and share of recovery against a person violating Indian protection laws); 35 U.S.C. § 292 (2000) (providing cause of action and share of recovery against a person falsely marking patented articles). Congress, however, has subsequently repealed the popular action provision of one statute cited by the Court. *See* Indian Tribal Economic Development and Contracts Encouragement Act of 2000, Pub. L. No. 106-179 § 2 (repealing popular action provisions of 25 U.S.C. § 81). The Court also cited other provisions that do not clearly grant informers a right to bring suit. *See* 18 U.S.C. § 962 (2000) (providing for forfeiture to informer of share of vessels privately armed against friendly nations, but not expressly authorizing suit by informer); 46 U.S.C. § 723 (2000) (providing for forfeiture to informer of share of vessels removing undersea treasure from the Florida coast to foreign nations, but not expressly authorizing suit by informer).

<sup>48</sup> 28 U.S.C. § 516 (2000).

<sup>49</sup> An Act to Establish the Department of Justice, ch. 150, §§ 5, 16, 16 Stat. 162, 162-64 (1870).

<sup>50</sup> Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 561 (2003).

<sup>51</sup> *Id.*

the Justice Department has had a century plus monopoly on criminal prosecutions. Other agencies may assist in various ways, but they cannot direct or preclude criminal prosecutions.

As noted, there were notable exceptions to this monopoly. Under the now-defunct independent counsel provisions of the Ethics in Government Act, independent counsels could prosecute alleged criminal violations committed by senior executive branch officials without the leave or control of the Department of Justice.<sup>52</sup> Indeed, the Act barred the Department (and the executive branch more generally) from pursuing matters within the independent counsel's jurisdiction.<sup>53</sup> In effect, each independent counsel had her own narrow monopoly.

With respect to civil law enforcement, Congress has created numerous pockets of prosecutorial independence. Some independent agencies, such as the Federal Election Commission ("FEC"), can litigate all agency related civil matters in all federal courts;<sup>54</sup> the Department of Justice plays no formal role in FEC litigation. Others, like the Securities and Exchange Commission ("SEC"), can prosecute all agency matters in all courts, save the Supreme Court.<sup>55</sup> And still others, like the Federal Communication Commission, can prosecute some agency matters in some federal courts.<sup>56</sup>

While presidents appoint the commissioners of the independent agencies, the underlying statutes are typically read to preclude presidential control of the agencies' actions, including their prosecutorial decisions. Though some presidents have taken fitful steps to curb the decentralization of civil prosecutorial authority (by threatening vetoes of new decentralizing statutes),<sup>57</sup> none have asserted the right to control all official prosecutions.

Besides creating pockets of independent official prosecutions, Congress also has authorized "popular actions" that grant members of the public the right to prosecute on behalf of the government. While these actions have an ancient pedigree, there are currently only three remaining in the United States Code, and Congress has not created any new popular actions in over 130 years.<sup>58</sup> The most well known of the popular actions are the civil *qui tam* provisions of the False Claims Act.<sup>59</sup> Congress authorized any person to prosecute a civil fraud—in the name of the United States—against any person who allegedly makes a false claim to the United States government.<sup>60</sup> If the prosecution is successful, the so called *qui tam*

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<sup>52</sup> 28 U.S.C. § 594(a), (i) (2000).

<sup>53</sup> 28 U.S.C. § 597(a) (2000).

<sup>54</sup> 2 U.S.C. §§ 437c, d (2000); Devins, *supra* note 46, at 275 n.101.

<sup>55</sup> 15 U.S.C. § 77t (2000); Devins, *supra* note 46, at 278-79 n.125.

<sup>56</sup> Devins, *supra* note 46, at 264.

<sup>57</sup> *Id.* at 267-68.

<sup>58</sup> *See supra* note 47.

<sup>59</sup> False Claims Act, 31 U.S.C. § 3730 (2000).

<sup>60</sup> *Id.* § 3730(b).

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relator receives up to thirty percent of any damages and penalties recovered, with the United States Treasury receiving the remainder.<sup>61</sup>

In sum, though the executive branch currently enjoys a monopoly on federal criminal prosecutions, it lacks similar control over civil prosecutions. With respect to civil prosecutions, Congress has created two types of exceptions to the general rule of executive branch control. First, in some areas of civil law enforcement, the executive branch either has no civil prosecutorial jurisdiction at all (such as under the federal election laws) or has sharply curtailed jurisdiction because independent agencies have virtually all prosecutorial authority (such as civil prosecutions under the federal securities laws). Second, in a handful of civil law enforcement matters (such as enforcement of the False Claims Act), the executive branch and the general public have concurrent authority.

*B. A Longstanding Judicial Consensus About the Executive Nature of Prosecution*

In *Morrison v. Olson*, all Justices agreed that prosecution was an executive function.<sup>62</sup> Chief Justice Rehnquist, writing for the majority, noted that “[t]here is no real dispute that functions performed by the independent counsel are ‘executive’ in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.”<sup>63</sup> The majority also agreed that the independent counsel was an executive officer.<sup>64</sup> Justice Scalia concurred: “Governmental investigation and prosecution of crimes is a quintessentially executive function” and the virtual embodiment of the power to take care that the laws be faithfully executed.<sup>65</sup>

In the D.C. Circuit, there was a surprising consensus as well. Writing for the majority, Judge Laurence Silberman claimed that “the Constitution vests the power to initiate a criminal prosecution exclusively in the Executive Branch; this power is encompassed within the Executive’s power to ‘take Care that the Laws be faithfully executed.’”<sup>66</sup> Largely agreeing, then Judge Ruth Bader Ginsburg noted that although prosecution was not a “core” executive function, it nonetheless was “indisputably an executive task.”<sup>67</sup>

In reaching these conclusions, the Justices and judges were merely reiterating what their predecessors had been saying for well over two

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<sup>61</sup> *Id.* § 3730(d)(2).

<sup>62</sup> *Morrison v. Olson*, 487 U.S. 654, 705-06 (1988) (Scalia, J., dissenting).

<sup>63</sup> *Id.* at 691.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 706.

<sup>66</sup> *In Re Sealed Case*, 838 F.2d 476, 488 (D.C. Cir. 1988).

<sup>67</sup> *Id.* at 526 (Ginsburg, R.B., J., dissenting).

centuries. In *United States v. Nixon*,<sup>68</sup> the Court noted that “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.”<sup>69</sup> Over a century earlier, in *United States v. Phillips*,<sup>70</sup> the Court dismissed a case after being informed by the attorney general that the district attorney had entered a *nolle prosequi*<sup>71</sup> at the direction of the president.<sup>72</sup> Almost two centuries ago, in the famous case of *United States v. Burr*,<sup>73</sup> Chief Justice John Marshall criticized the Jefferson administration’s slow handling of the Burr trial and noted that “[t]o the executive government is intrusted the important power of prosecuting those whose crimes may disturb the public repose or endanger its safety.”<sup>74</sup> More examples are not wanting.<sup>75</sup>

To be sure, in *Morrison* there was a profound difference of opinion about what the executive nature of prosecutions meant for the constitutionality of independent prosecutors. Constrained by Supreme Court precedent, Judge Silberman could not merely conclude that, because prosecution was an executive function, any attempts to insulate prosecution from presidential direction were unconstitutional.<sup>76</sup> By virtue of his position as a Supreme Court justice, Justice Scalia was permitted to go further, arguing that once one determined that prosecution was an executive function, any attempt to render it independent of the president was unconstitutional as an abridgement of the president’s executive power.<sup>77</sup>

Clearly, the *Morrison* majority and Judge Ginsburg did not find the executive nature of prosecutions dispositive as to the constitutionality of the independent counsel position. Instead, they asked whether the statute

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<sup>68</sup> *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>69</sup> *Id.* at 693.

<sup>70</sup> *United States v. Phillips*, 31 U.S. 776 (1832).

<sup>71</sup> A *nolle prosequi*, also known as a *nol-pros*, is an entry made on the record whereby a prosecutor declines to continue with the case. BLACK’S LAW DICTIONARY 1070 (7th ed. 1999).

<sup>72</sup> *Phillips*, 31 U.S. at 776; *see also* Heckler v. Chaney, 470 U.S. 821, 832 (1985) (stating that a decision not to indict “has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed’”).

<sup>73</sup> *United States v. Burr*, 25 F. Cas. 2 (C.C.D. Va. 1806) (No. 14,692).

<sup>74</sup> *Id.* at 15.

<sup>75</sup> *United States v. Lara*, 124 S. Ct. 1628, 1642 (2004) (Thomas, J., concurring) (describing prosecution as a quintessential executive task); *INS v. Chadha*, 462 U.S. 919, 1002 (1983) (White, J., dissenting) (referring to prosecutions as an “inherently executive function”); *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922) (describing the attorney general as “the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed”).

<sup>76</sup> *In re Sealed Case*, 838 F.2d 476, 526 (1988).

<sup>77</sup> *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting).

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excessively constrained or interfered with the executive power.<sup>78</sup> Given the political circumstances—widespread concerns about presidential self-dealing going back for more than a decade and a seemingly narrow diminution of executive control of prosecutions—there was little truly surprising in the Court’s decision to uphold the Act’s constraints on executive power.<sup>79</sup>

### C. *The Scholarly Revisionists*

In the wake of *Morrison*’s unanimity that prosecution was an executive function, scholars assumed their traditional (and constructive) role of judicial gadflies. Respected scholars such as William Gwyn, Harold Krent, Cass Sunstein, Larry Lessig, and many others recounted history in an attempt to show that at the founding, presidents had little or no control over federal prosecutions.<sup>80</sup> In fact, early Congresses supposedly ensured that no one enjoyed centralized prosecutorial control.

First, there was no Department of Justice (or Department of Prosecutions) because early Congresses never created a hierarchical, executive department in charge of prosecutions. Instead, the structure of the Judiciary Act of 1789<sup>81</sup> supposedly ensured that no one entity could control official prosecution. The Act charged individual district attorneys with prosecuting in their districts “all delinquents for crimes and offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned.”<sup>82</sup> The Act also required the attorney general to provide advice to the president and heads of departments and to represent the United States in the Supreme Court.<sup>83</sup>

In contrast with language found in the organic acts establishing the Departments of Foreign Affairs and War, neither the attorney general nor the district attorneys were labeled executive.<sup>84</sup> Likewise, in contrast to his power over the Secretaries of War and Foreign Affairs, the president lacked statutory authority to direct or remove either the attorney general or the district attorneys.<sup>85</sup> Early attorneys general similarly lacked statutory

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<sup>78</sup> *Morrison*, 487 U.S. at 690-91; *In Re Sealed Case*, 838 F.2d at 530 (Ginsburg, R.B., J., dissenting).

<sup>79</sup> *Morrison*, 487 U.S. at 693; *In Re Sealed Case*, 838 F.2d at 530 (Ginsburg, R.B., J., dissenting).

<sup>80</sup> See *supra* note 18.

<sup>81</sup> Judiciary Act of 1789, ch. 20, 1 Stat. 73.

<sup>82</sup> Judiciary Act of 1789, ch. 20, § 35, 1 Stat. at 92.

<sup>83</sup> *Id.*

<sup>84</sup> Bloch, *supra* note 18, at 569-70.

<sup>85</sup> *Id.* at 579-81. Susan Low Bloch argues that Congress regarded the attorney general as the Congress’s lawyer as much as the president’s. *Id.* at 581-82. For instance, the Congress sometimes directed the attorney general to make reports to Congress. *Id.* On one occasion, Congress even directed him to prosecute a suit. *Id.* at 581-82.



authority to direct the district attorneys.<sup>86</sup> Indeed, although Attorney General Edmund Randolph sought such power in 1791,<sup>87</sup> Congress waited until 1861 to confer such control.<sup>88</sup> Because apparently no one could direct the district attorneys, the district attorneys were free agents.<sup>89</sup>

Said to be equally damaging to the view that the president could control prosecution is the fact that state prosecutors also prosecuted federal crimes.<sup>90</sup> Though Congress never specified that state prosecutors could prosecute violations of federal law, Congress permitted the state courts to hear cases involving federal criminal law.<sup>91</sup> State prosecutors apparently took this to mean that they could prosecute violations of federal law.<sup>92</sup> Such prosecutors “were far removed from control of the [federal] executive branch”<sup>93</sup> for the simple reason that the president could not remove them from office. The president lacked authority to dismiss any state officials, including state prosecutors.

Another supposed difficulty with the chief prosecutor theory is that early Congresses established numerous popular actions.<sup>94</sup> These Congresses enacted popular actions that granted a portion of a fine or forfeiture to a successful popular prosecutor who sued on behalf of the United States (and on behalf of themselves) to recover fines and forfeitures due the United States. The president surely could not control these private citizens because they were not part of the executive branch at all. Moreover, because the underlying statutes established criminal offenses, a popular prosecution was generally understood to preclude a subsequent official prosecution.<sup>95</sup> In other words, by beating the government prosecutor to the courthouse, the informer or *qui tam* relator could preclude subsequent government prosecution of any criminal offense.<sup>96</sup>

William Gwyn supplied what seemed the coup de grace for the Chief Prosecutor theory, claiming “that there are no good reasons for considering criminal prosecutions as purely ‘executive’ in character.”<sup>97</sup> First, Gwyn claimed that the Constitution nowhere specified that prosecution was an executive task and claimed that no constitutional history supported that

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<sup>86</sup> *Id.* at 567-68.

<sup>87</sup> *Id.* at 585-87.

<sup>88</sup> Act of Aug. 2, 1861, ch. 37, § 1, 12 Stat. 285, 285.

<sup>89</sup> Krent, *supra* note 18, at 286-90; Lessig & Sunstein, *supra* note 18, at 16-18; Dangel, *supra* note 18, at 1086.

<sup>90</sup> Krent, *supra* note 18, at 309.

<sup>91</sup> *Id.* at 307.

<sup>92</sup> *Id.* at 306, nn.152-53.

<sup>93</sup> *Id.* at 303.

<sup>94</sup> *Id.* at 302-03.

<sup>95</sup> Krent, *supra* note 18, at 300.

<sup>96</sup> *Id.* at 301.

<sup>97</sup> Gwyn, *supra* note 18, at 491.

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view.<sup>98</sup> Second, Gwyn cited history that purportedly suggested that early Congresses regarded prosecution as a judicial function.<sup>99</sup> In particular, Congress created the district attorneys and the attorney general in the Judiciary Act of 1789—an Act to establish the *judicial courts* of the United States.<sup>100</sup> Gwyn believed that this suggested that prosecution was closely associated with judicial power in the minds of congressmen.<sup>101</sup> Seeming to confirm his intuition, an early draft of the Judiciary Act would have vested appointment of the attorney general and the district attorneys with the federal courts rather than with the president.<sup>102</sup> If prosecution was truly an executive activity, this proposed appointment mechanism would have made no sense, argued Gwyn. Third, Gwyn noted that modern state constitutions often established attorneys general and prosecutors in (or immediately after) the article establishing a judiciary.<sup>103</sup> Finally, Gwyn noted that, to this day, governors typically lack control of prosecution and that many individuals continue to regard prosecutors as judicial (rather than executive) officers.<sup>104</sup> In the end, however, Gwyn did not wish to pigeonhole prosecution as either judicial or executive. He thought it “[m]ore sensible” to regard prosecution as both executive *and* judicial.<sup>105</sup>

According to the revisionist scholars, their historical scholarship devastated the traditional view of prosecution as an executive function. Congress’s control over prosecutions seemed far-reaching, with the powers to create independent federal prosecutors, to vest prosecutorial authority with state prosecutors independent of the president, and to empower millions of independent, popular prosecutors. On top of all this, Professor Gwyn claimed that prosecution was just as much a judicial function as it was an executive one. To the revisionist scholars, it seemed well nigh conclusive that the conventional view about prosecution was mistaken.

In fact, the revisionist scholars’ claims are often wrong or beside the point. Revisionist scholars have erroneously assumed that early federal statutes implicitly barred presidential control of prosecutions. As we shall see, early presidents (and many others) in the early years came to the exact opposite conclusion. Since the statutes said nothing about presidential control of prosecution and because prosecutions concerned law execution—something constitutionally committed to the president—the president had constitutional authority to control prosecutions.

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 492-93.

<sup>100</sup> *Id.* at 493.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 494-95.

<sup>104</sup> *Id.* at 495-97.

<sup>105</sup> *Id.* at 502.

## II. *Presidential Control of Official Prosecutions*

Revisionists typically say little about constitutional text and structure, preferring to make historical cases for denying that the president may control prosecution. Some assert that the Constitution apparently does not discuss prosecution.<sup>106</sup> Others claim that because provisions like the Executive Power Clause have no obvious meaning, we have no way of knowing what the Constitution might say about prosecution.<sup>107</sup>

If revisionists make further textual claims, they sometimes cite three clauses said to cast doubt on the chief prosecutor thesis: the Faithful Execution Clause,<sup>108</sup> the pardon power,<sup>109</sup> and the Necessary and Proper Clause.<sup>110</sup> The Faithful Execution Clause supposedly requires the president to abide by whatever prosecutorial system Congress enacts, including a system of independent prosecutors. The pardon power purportedly exists precisely because the president does not control prosecutions. The pardon power gives him a measure of control over prosecutions that he would otherwise lack. The Necessary and Proper Clause permits Congress to enact laws to carry into execution its legislative powers, including the ability to create independent prosecutors, or so it is said.

Revisionist scholars have been too hasty in concluding that text and structure have little to say about prosecution. Properly understood, text and structure indicate that the president may control official prosecutions. The Constitution's grant of executive power means that the president may control law execution, including prosecutions of alleged law breakers. The Faithful Execution Clause, by imposing a duty about how the president must use his executive power, helps confirm that the president can prosecute alleged offenders and thereby set the wheels of justice in motion. Neither the pardon power nor the Necessary and Proper Clause casts doubt on presidential control of prosecutions.

In a more general sense, constitutional structure also supports the chief prosecutor thesis. Under the Constitution, Congress makes laws and the judiciary hears cases and controversies about the application of law to facts. The executive is charged with executing judgments but it is also more broadly charged with executing the law—bringing cases or controversies before the courts in order to secure a definitive resolution of the dispute. This is precisely the general system that underlay

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<sup>106</sup> See, e.g., Gwyn, *supra* note 18, at 476; Lessig & Sunstein, *supra* note 18, at 15, n.56.

<sup>107</sup> Caminker, *supra* note 22, at 355-56.

<sup>108</sup> U.S. CONST. art. II, § 3, cl. 4 (“he shall take Care that the Laws be faithfully executed”).

<sup>109</sup> U.S. CONST. art. II, § 2 (the president “shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment”).

<sup>110</sup> U.S. CONST. art. I, § 8, cl. 18 (Congress may make “all Laws which shall be necessary and proper for carrying into Execution” any power of the federal government).

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Montesquieu's famous separation of powers maxim, in which no two powers of government ought to be vested in one entity's hands. Montesquieu's maxim presupposed that the executive was in charge of law execution and, more particularly, prosecution. Keeping prosecution separate from legislating is necessary to avoid the specter of tyrannical prosecution of tyrannical laws. Keeping the judicial power separate from the executive helps ensure the possibility of a judicial check on tyrannical executive prosecutions.

As noted, those who deny the Chief Prosecutor theory generally have eschewed text and structure and have instead relied upon history to make their case. Ironically, constitutional history actually refutes their argument. History reveals that the wielder of the executive power could control official prosecutors. Presidents Washington, Adams, and Jefferson—following a long line of chief executives in England, in the colonies, and in the states—directed official prosecutors to start and stop prosecutions.<sup>111</sup> Contrary to the claims of many revisionist scholars, there appears to have been a bipartisan, tri-branch consensus that the Constitution empowered the president to direct official prosecutors.

#### A. Text

The traditional view that prosecution is an executive function has solid textual support. As discussed below, the executive power establishes presidential control of law execution. Because prosecution is an important subset of the broader category of law execution, the grant of the executive power authorizes presidential control of prosecution. Moreover, the Faithful Execution Clause, by requiring faithful presidential law execution, confirms that the president's executive power includes law execution authority, including the right to control prosecutions.

Although some have argued that the "executive power" granted by the Article II Vesting Clause merely refers to the list of specific powers vested with the president elsewhere in Article II,<sup>112</sup> the better view is that the clause grants those powers traditionally understood to be vested with an executive, subject to the exceptions and limitations laid out in the Constitution. Michael Ramsey and I have posited that one such traditional executive power is the power over foreign affairs.<sup>113</sup> Subject to the Constitution's numerous carve outs (such as Congress's power to declare war and regulate commerce) and to the Constitution's various checks on executive power (such as the requirement of a super-majority approval of

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<sup>111</sup> See *infra* Part II.C.4.

<sup>112</sup> Lessig & Sunstein, *supra* note 18, at 47-50.

<sup>113</sup> See generally Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231 (2001).

treaties by the Senate), the president may direct foreign affairs.<sup>114</sup>

Though the president's executive power encompasses a residual control of foreign affairs,<sup>115</sup> the principle meaning of executive power is the authority to execute the laws. When one examines the dictionary meaning of executive, its meaning comes into sharper focus. "Executive" comes from the verb "to execute," which means to perform, or to carry into effect.<sup>116</sup> Samuel Johnson's Dictionary, a dictionary from the founding era, defined "executive" as "[a]ctive; not deliberative; not legislative; having the power to put in act the laws."<sup>117</sup> Writing of that era, M.J.C. Vile notes that the executive branch got its name from its fundamental function, law execution.<sup>118</sup> The Oxford English Dictionary confirms that this definition remains a standard one; it defines "executive" as a "distinctive epithet of that branch of the government which is concerned or charged with carrying out the laws, decrees, and judicial sentences."<sup>119</sup>

The Founders had the exact same understanding of the executive power. Before, during, and after the Constitution's ratification, the Founders most often used "executive power" as a synonym for the power to execute the laws.<sup>120</sup> Not surprisingly, numerous statements from the founding era observe that the executive power was the power to execute the law and that the Constitution authorized the president to superintend those who execute the law.<sup>121</sup> A unitary executive was seen as critical to ensuring prompt, uniform, energetic, and responsible law execution.<sup>122</sup>

<sup>114</sup> *Id.* at 234-35.

<sup>115</sup> *In re Sealed Case*, 838 F.2d 476, 501 (D.C. Cir. 1988) (concluding that "the Constitution envisioned two domains of presidential responsibility—foreign affairs and law enforcement"); Prakash & Ramsey, *supra* note 113, at 234.

<sup>116</sup> See SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (Cambridge Univ. Press 1996) (Anne McDermott ed. 4th ed. 1773); see also 5 OXFORD ENGLISH DICTIONARY 520 (2d ed. 1989) (denoting that "execute" comes from Latin "ex(s)ecut," past participle stem of "ex(s)equi," meaning "to follow out").

<sup>117</sup> JOHNSON, *supra* note 116.

<sup>118</sup> M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 67 (2d ed., Liberty Fund, Inc. 1998) (1967).

<sup>119</sup> 5 OXFORD ENGLISH DICTIONARY, *supra* note 116, at 522.

<sup>120</sup> See generally Prakash, *The Essential Meaning of Executive Power*, *supra* note 18.

<sup>121</sup> See generally *id.*

<sup>122</sup> See, e.g., 5 THE COMPLETE ANTI-FEDERALIST 42 (Herbert J. Storing ed. 1981) ("A Farmer" suggesting that when "the executive is changeable, he can never oppose large decided majorities of influential individuals—or enforce on those powerful men . . . the rigor of equal law, which is the grand and only object of human society") (emphasis omitted); 2 *id.* at 310 ("The Federal Farmer" claiming that the president was "well circumstanced to superintend the execution of laws with discernment and decision, with promptitude and uniformity"); 3 THE DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 201 (Jonathan Elliot ed., Ayer Co. Publishers, Inc. 1987) (1888) (Edmund Randolph asserting that "[a]ll the enlightened part of mankind agree that the superior despatch, secrecy, and energy, with which one man can act, render it more politic to vest the power of executing the laws in one man"); 1 THE RECORDS OF THE FEDERAL CONVENTION

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No doubt, preventing violations of the law forms an important part of the executive's law execution function. But since the chief executive and his subordinate executives cannot possibly avert every breach of the law, one of the principal means of executing the law consists of sanctioning those who have already violated the law. When an officer prosecutes someone to determine if the alleged offender ought to be sanctioned, the officer performs the quintessential executive function of law enforcement.<sup>123</sup> Indeed, prosecution is an absolutely necessary part of law execution. Under our system of separated powers, the executive cannot unilaterally enforce the law's penalties. Instead it must first, through prosecution, seek the judiciary's sanction for the imposition of penalties.

Though Congress creates the prosecutorial offices employing the Necessary and Proper Clause, the prosecutors that fill those offices should be regarded as the president's instruments of law enforcement. After all, the Constitution grants the president (and not Congress or statutorily-created prosecutors) the power to execute the laws. If government prosecutors help carry into execution the president's powers over law execution, those prosecutors must be subject to presidential control. In extreme cases, the president must be able to remove a prosecutor who acts contrary to the president's law execution agenda.<sup>124</sup>

The Faithful Execution Clause confirms that the president is empowered to control law execution, including prosecution. In imposing a duty of faithful law execution, the Clause presupposes a law execution power in the first instance, for it would be somewhat odd to oblige the president to faithfully execute the law when he has absolutely no constitutional authority to fulfill the duty.

Taken together, the Executive Power and Faithful Execution Clauses suggest that the president may direct official prosecutors and, in some cases, has a duty to do so. Because official prosecutors help exercise the president's executive power over law execution, the president can order official prosecutors in all their prosecutorial actions. He can order them to commence or cease a prosecution, and he can instruct them in their conduct of prosecutions. The president's faithful execution duty may require him to use his executive power to direct the official prosecutors. For instance, if

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65-66 (Max Farrand ed. 1966) (James Wilson observing that a "single magistrate" would supply the "most energy dispatch and responsibility" to those "powers he conceived strictly Executive [such as] those of executing the laws, and appointing officers, not [connected to and] appointed by the Legislature").

<sup>123</sup> Cf. Letter from David Howell to William Greene (July 30, 1782), in 18 LETTERS OF DELEGATES TO CONGRESS 681 (Paul H. Smith ed. 1976) (noting that it was not clear whether prosecutions would be used by Congress to "enforce" a proposed law).

<sup>124</sup> Of course, the claim made here is generalizable: in granting the president the power to execute the law, the Constitution establishes that the president may control all those who execute the law, not just official prosecutors.

the president believes that a prosecuted party is innocent, the president ought to instruct the official prosecutor to cease the prosecution. Likewise, if the president concludes that some prosecutor has bungled the initial stages of a prosecution, the president should put the prosecution on a proper legal train, perhaps by directing the prosecutor to adopt better tactics and techniques or by instructing him on the proper meaning of the law.<sup>125</sup>

One sometimes hears the suggestion that prosecution of criminal offenses is more of an executive function than prosecution of civil offenses. Though there may be sound policy reasons for drawing this distinction (say the greater perceived need for responsible, uniform, and energetic execution of criminal laws), nothing in the Constitution supports the notion that the president has firmer constitutional control over criminal prosecutions than he does over civil prosecutions. Neither the president's executive power of law execution nor the Faithful Execution Clause distinguishes criminal from civil laws. Hence, the case for presidential control is equally strong (or weak) as to both. If criminal prosecution is at the core of executive power as one prominent federal judge has suggested,<sup>126</sup> so is civil prosecution. No matter how one divides the universe of prosecutions, the president has constitutional authority over all prosecutions because all prosecutions involve law enforcement.

As noted, some scholars have cited various presidential duties and powers as reasons to doubt the chief prosecutor thesis. For instance, some have claimed that the Faithful Execution Clause obliges the president to abide by whatever laws Congress enacts.<sup>127</sup> Hence, the president must take care to adhere to whatever prosecutorial structure that Congress devises. If Congress decrees that presidents should not influence official prosecutors, the president must faithfully accept Congress's choice.

This absolutist view of the Faithful Execution Clause is too extreme, for it contemplates that the president must engage in constitutional self-abnegation when a law so provides. For instance, if the absolutist view is

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<sup>125</sup> The Faithful Execution Clause, considered in isolation, probably does not require presidential control of official prosecutors. The Clause imposes a duty and does not convey a power. Instead, the Executive Power Clause actually grants the president control of law execution and the instruments of law execution such as prosecutors. Nonetheless, the Faithful Execution Clause is relevant because it imposes a duty on how the president ought to wield his executive power. It acts as a salutary constraint on a broad grant of law execution power. Moreover, as discussed later, neither the Faithful Execution Clause nor anything else in the Constitution requires Congress to provide the president prosecutorial support. Though the Constitution presupposes that Congress will give the president the means of fulfilling his faithful execution duties, Congress need not create any prosecutors. Nonetheless, once Congress creates official prosecutors, they are under the president's direction because they help carry into execution the president's powers.

<sup>126</sup> See *In re Sealed Case*, 838 F.2d 476, 501 (D.C. Cir. 1988) (Silberman, J.).

<sup>127</sup> Lessig & Sunstein, *supra* note 18, at 69; Caminker, *supra* note 22, at 357; see also Krent, *supra* note 18, at 281-85.

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correct, then if Congress enacted a statute prohibiting presidential vetoes, the president would have to take care to respect Congress's statute and refrain from vetoing any legislation. Likewise, the president would have to be faithful to a statute that stripped him of his commander-in-chief authority. There is no reason to suppose that the clause requires the president enforce unconstitutional laws that infringe upon his powers. Such a view would regard the Faithful Execution Clause as a means by which Congress could treat the Constitution's grants of presidential power as mere default rules that Congress could alter by ordinary legislation. The more sensible reading is that the Faithful Execution Clause constrains the president's executive power by requiring faithful law execution (including faithful prosecution).

The pardon power also confirms that the president lacks constitutional control of prosecutions, or so some revisionists claim.<sup>128</sup> It would make little sense for the Constitution to grant the president the power to pardon offenders prosecuted under his direction. Instead, the president has a pardon power precisely so he can undo the efforts of prosecutors who are independent of him.<sup>129</sup> Just as the veto power nullifies the legislation of an independent Congress, the pardon power similarly voids the prosecutions of independent prosecutors.

This inference is unpersuasive. To begin with, there is nothing incoherent about a president revisiting his administration's prosecutorial decisions. In hindsight, a president might conclude that someone his administration helped convict was actually innocent—as is well established, presidents and their subordinates are fallible. Alternatively, a convicted felon might belatedly turn "state's evidence" in return for a pardon. Finally, a forgiving president might conclude that, upon reflection, a particular sentence was too harsh either because Congress specified too high a minimum penalty or because the individual has repented and shown remorse. Hence, even within the confines of the revisionist argument, the pardon power is not rendered redundant when vested with the person who also controls prosecution.

Of course, a major difficulty with the revisionist argument is that it fails to recognize that a president may pardon offenders prosecuted by earlier administrations. Consequently, the pardon power is not just about undoing the effects of one's own prosecutions. Instead, the pardon power also enables presidents to assume intertemporal control over prior successful prosecutions. Perhaps the most famous early example of this was Thomas Jefferson's pardon of those convicted of violating the Sedition

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<sup>128</sup> See Krent, *supra* note 18, at 282.

<sup>129</sup> *Id.* at 282 n.32 (observing that concerns about presidential power to pardon treasonous associates suggest lack of presidential control of prosecution).



Act.<sup>130</sup> Jefferson used his pardon power to control the continuing effects of prosecutions undertaken by John Adams and his administration.<sup>131</sup>

Equally damaging to the revisionist claim is its failure to appreciate that pardons also enable presidents to bar future prosecutions. By itself, a decision not to prosecute someone has no *res judicata* like effects. Provided that the applicable statutes of limitations have not run, future administrations are free to reverse this decision. In contrast, when a president issues a full pardon, he bars all future prosecution of the pardoned offenses. Hence, the pardon power enables the president to gain a measure of control over at least some future prosecutorial activities in a way he could not if he merely controlled prosecutions while he was in office. When George Washington pardoned the Whiskey Rebels, for example, he not only precluded his administration from revisiting his decision, he also precluded subsequent presidents from prosecuting.<sup>132</sup>

In short, there are no sound reasons to believe that the Constitution's grant of pardon power indicates that the president lacks control of prosecution. In fact, as we shall see later, the pardon power was justified in the 18th century as a natural complement to the chief executive's prosecutorial power. Since the president was the one "harmed" by the violation of the law (he was constitutionally injured by the breach of laws that he was empowered to execute), the president ought to have the ability to forgive ("pardon") the violation.<sup>133</sup>

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<sup>130</sup> See *infra* Part II.C.4.c. (discussing Jefferson's pardoning of those convicted under the Sedition Act).

<sup>131</sup> *Id.*

<sup>132</sup> This feature of the pardon power—the ability to preclude future prosecutions—may explain why some members of the founding generation were concerned that a president might pardon his treasonous associates. See 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 122, at 639 (George Mason warning that a president might pardon his treasonous co-conspirators). While the president's administration probably could be counted on not to prosecute a president's co-conspirators, these associates would have to fear that future administrations would prosecute them. A pardon would preclude that possibility. Hence, a president who wanted to safeguard his associates would pardon them rather than merely instructing his official prosecutors not to prosecute them.

<sup>133</sup> The pardon power assists the president in curbing faithless prosecutions because the pardon power enables the president to stop an unfaithful prosecution dead in its tracks. But the pardon power is a relatively blunt instrument of prosecutorial control because a full pardon bars subsequent prosecution. On the other hand, when a president discontinues a prosecution by directing a *nolle prosequi*, a new prosecution can be commenced should circumstances warrant. If it becomes clear that someone was guilty after all, the *nolle prosequi* may not bar a subsequent prosecution. Notwithstanding the Constitution's Double Jeopardy Clause, the government may bring a new prosecution even after it has discontinued a previous one grounded on the same offense. Until the jury is empanelled and sworn or, in a nonjury trial, until the court has begun hearing evidence, the government may discontinue the suit and subsequently reinstate it without violating the Double Jeopardy Clause. See *Serfass v. United States*, 420 U.S. 377, 388, 394 (1975). Up until the end of the 18th century, England had a much more pro-prosecution rule, where discontinuing a

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The remaining power thought to be fatal to the Chief Prosecutor thesis is the Necessary and Proper Clause. Some scholars claim that the Necessary and Proper Clause allows Congress to determine how to “carry into execution” Congress’ legislative powers over tax, commerce, copyright, etc. Congress thus may determine by law who may prosecute violations of federal law, for in so doing, Congress carries into execution its legislative powers.<sup>134</sup> The Necessary and Proper Clause, it is said, authorizes any prosecutorial structure that Congress might see fit to enact, including independent prosecutors.<sup>135</sup>

This argument is infirm. To begin with, the revisionist reading fails to pay sufficient attention to the actual language of the Necessary and Proper Clause. Under the Clause, Congress does not have power to pass whatever laws it deems relevant for carrying into execution the powers of the federal government. To be justified under the Clause, Congress may only pass laws that are necessary and proper. It hardly seems “necessary,” even under the least restrictive meaning of that word, for Congress to grant independent government prosecutors a measure of the executive power when the Constitution already grants the president the executive power in toto.

Similarly, if the Constitution explicitly grants the president the power to execute the laws, it hardly seems “proper” for Congress to pass laws altering this allocation of power. The only way such laws could be viewed as proper is if the president’s law execution power is a default rule. Yet there is absolutely nothing in the Vesting Clause that suggests that the grant of executive power is qualified. The Vesting Clause does not read like the Appointments Clause, which makes clear that presidential nomination of inferior officers is but a default rule that Congress may change by statute.<sup>136</sup>

Nonetheless, if we chose to read the Executive Power Clause as a default grant of power subject to congressional modification, we should likewise read every other structural grant in the same way. Nothing in the Constitution’s text suggests that powers like the veto power or the treaty power are any more absolute than the executive power. If the latter power is subject to congressional modification, the same should be true of all

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prosecution never barred subsequent prosecutions. See *Nolle Prosequi*, 1958 CRIM. L. REV. 573, 574 (1958); *Criminal Law—Nolle Prosequi—Trial Court Has Power to Dismiss for Want of Prosecution*, 41 N.Y.U. L. REV. 996, 997 (1966).

<sup>134</sup> Lessig & Sunstein, *supra* note 18, at 68-70.

<sup>135</sup> *Id.*

<sup>136</sup> See U.S. CONST. art. II, § 2, cl. 2 (“[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

constitutional grants of power. Needless to say, this seems rather unlikely. Few people regard the entire structural Constitution as merely creating default rules subject to congressional alteration.

Revisionist scholars are right to believe that Congress has tremendous discretion under the Necessary and Proper Clause. They are wrong to suppose that the Clause grants Congress *carte blanche* to rearrange or redistribute the Constitution's grants of powers, including the president's power over prosecution.

### B. *Structure*

The Constitution vests each of the three branches of government with a different type of power. The legislative powers vested in Congress—the powers to enact enumerated types of laws<sup>137</sup>—do not encompass the authority to prosecute. Congress may lay out rules that form the bases of violations and subsequent prosecutions, but it may not prosecute on its own, for such actions would not be the making of laws but the execution of them.<sup>138</sup> The only time Congress may prosecute is when the House sends agents to the Senate to help secure an impeachment conviction. Though the House has broad jurisdiction—it can prosecute high crimes and misdemeanors<sup>139</sup>—its prosecutorial authority is severely limited because no real punishment results from a successful prosecution and because it may only prosecute officers of the United States.<sup>140</sup> Impeachment convictions are not an aspect of law enforcement and merely serve as a means of regulating who can serve as an officer of the United States.

Like their executive counterparts, judges execute the law as well. Both prosecutors and courts must determine if someone has violated the law. In deciding whether to prosecute, the prosecutor makes a determination about whether the evidence suggests that someone has violated the law. Once the

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<sup>137</sup> For a defense of the proposition that the “legislative power” refers to the power to make rules for society, see Larry Alexander and Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1305, 1310-13, 1316-17 (2003).

<sup>138</sup> Dangel cites contempt prosecutions conducted by early chambers of Congress as evidence that prosecution is not an executive function. Dangel, *supra* note 18, at 1086. But this confuses the action with the actor. Not everything that Congress does is legislative in nature. For instance, Congress's impeachment function is an exercise of judicial power, and the Senate's role in appointments and treaties are exercises of executive power. If Congress may prosecute people for contempt of Congress, Congress has a portion of the executive power.

<sup>139</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.”); U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”).

<sup>140</sup> See *supra* note 139; U.S. CONST. art. I, § 3, cl. 7 (“Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States.”).

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prosecution commences, the judiciary (judge or jury) must make an independent determination of guilt or innocence. This superficial similarity in decision making has led some to regard prosecutors as making quasi-judicial decisions.<sup>141</sup> For perhaps the same reasons, others have asserted that prosecution is as much a judicial task as it is an executive one.<sup>142</sup>

We ought not conflate two related, but distinct, activities. The prosecutorial function consists of the exercise of tremendous discretion in deciding when and how to bring prosecutions. Courts lack such discretion. For good structural reasons, federal courts do not possess a roving commission to execute the law. Though judges decide cases and controversies brought to them, they cannot generate the cases and controversies themselves. That is to say, their judicial power does not empower them to decide which questions ought to be brought before them.<sup>143</sup> Indeed, once a case is properly brought before them, they typically must decide the case. Since judges cannot decide which cases will be brought before them and typically cannot decline to decide cases brought before them, judicial officers lack the discretion inherent in the prosecutorial function. In short, the judiciary's narrow yet crucial type of law execution—typically called judging—cannot encompass prosecution.

Likewise, grand juries cannot prosecute or compel others to prosecute. Under the Fifth Amendment, grand jury presentments or indictments are necessary for the prosecutions of infamous crimes.<sup>144</sup> Nonetheless, while grand juries can indict individuals even against the wishes of the district

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<sup>141</sup> See Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1312 n.9 (2002) (citing scholars who claim prosecution is quasi-judicial).

<sup>142</sup> See, e.g., Gwyn, *supra* note 18, at 502.

<sup>143</sup> *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 801-02 (1987), contends that courts may initiate prosecutions for contempts of court when the ordinary prosecutor refuses the courts request to begin a contempt prosecution. The Court reached this conclusion by asserting that if the judiciary lacked the power to bring contempt prosecutions, it would be completely dependent upon the executive to vindicate the judiciary's rights. *Id.* The Court's decision is wrong—courts do not have the authority to initiate prosecutions merely to avoid dependence on the executive. See *Young*, 481 U.S. at 817-18 (Scalia J., concurring) (noting that courts decide cases and cannot seek out violators in order to punish them). There is absolutely nothing unusual about one branch being dependent upon another. The executive and the judiciary must rely on Congress for funds and officers. If Congress does not adequately fund the executive or the judicial branch, neither has the right to raid the Treasury themselves. Likewise, should the executive decline to enforce the judiciary's judgments, the judiciary cannot create its own enforcement mechanism. Even if one thought *Young* correct, however, it would be the exception that proved the general rule. The case implicitly acknowledges that the executive branch controls prosecutions, save for the unique situation where judicial initiation of prosecutions is necessary to prosecute contempts of court. See *id.* at 818 (Scalia, J., concurring) (declaring that general principle that judiciary cannot initiate prosecutions is "uncontested").

<sup>144</sup> U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.").

attorneys, grand juries cannot force prosecutors to act on their indictments. Grand juries are limited to a checking role.

If we regard prosecution as a critical governmental function—an indispensable means of ensuring that the laws are not but a dead corpse<sup>145</sup>—the only constitutional entity left, after we eliminate the Congress and the judiciary as possibilities, is the executive. In other words our knowledge of the principal functions of the legislature and judiciary suggests that the president may control law execution, and prosecutions in particular, for no other branch has the generic power to execute the laws.

Consistent with this deduction, Montesquieu's famous separation maxim presupposed that the executive was in charge of prosecutions. Montesquieu warned that tyranny would result should any one entity exercise two or more of the three fundamental powers of government. "Were [the judicial power] joined to the executive power, the judge might behave with violence and oppression," Montesquieu famously claimed.<sup>146</sup> Why could the judge behave in this way? Because if the same person both executed and judged, there could be no check on this executive/judge. A person possessed of both prosecutorial and judicial functions is unlikely to engage in an odd self-checking exercise.<sup>147</sup> As an example of this problem of combined executive and judicial functions, Montesquieu cited the Italian republics, where informers could make wild accusations before state inquisitors who would then execute the law without the benefit of a judicial check.<sup>148</sup>

Montesquieu likewise advised that, should the legislative and the executive powers be united, the executive could not mitigate the effects of tyrannical laws. Instead, tyrannical laws would be tyrannically executed.<sup>149</sup> Once again, the only grounds for dreading the combination of executive and legislative powers is that, when those powers are combined, the

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<sup>145</sup> CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY 1775-1789* 48 (Da Capo Press ed. 1969) (1923) (comments accompanying revised New Hampshire Constitution of 1784) ("This [executive] power is the active principle of all governments: it is the soul, and without it the body politic is but a dead corpse."); *see also* 1 JOHN ADAMS, *A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA* 372 (Da Capo Press ed. 1971) (1787) (comments of John Adams) ("The executive power is properly the government; the laws are a dead letter until an administration begins to carry them into execution.").

<sup>146</sup> BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 70 (Frank Neuman ed., Encyclopedia Britannica 1952) (1748).

<sup>147</sup> Someone vested with both executive and judicial powers will undoubtedly decide whether someone has violated the laws. But she will make this decision only once and not twice. When it comes to law execution, the genius of the separation of powers is that, typically, two branches must independently conclude that some party has violated the law before anyone is punished. That benefit is clearly absent when the executive and judiciary are one and the same.

<sup>148</sup> MONTESQUIEU, *supra* note 146, at 70.

<sup>149</sup> *Id.*

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executive/legislative entity will compound tyrannical laws with tyrannical prosecutions.<sup>150</sup>

Constitutional text and structure can tell us quite a bit about control of prosecution if we know what to make of the executive power, the Faithful Execution Clause, and the juxtaposition of the three powers of government. Because the executive power is the power to execute the law and because prosecution is a vital means of executing the law, the executive power encompasses the right to control prosecutions. Likewise, the Faithful Execution Clause requires that the president exercise his executive power to ensure faithful law execution. Sometimes the president's faithful execution duty requires him to use his executive power to order prosecutions to ensure faithful execution of penal statutes. Other times that duty will require him to use his executive power to stop, restrain, or redirect prosecutions in order to preclude or avoid an unfaithful execution. Finally, the Constitution's structure suggests that the Constitution vests power over law execution, including prosecution, with the president.

Of course, there are many who do not find arguments from text and structure all that persuasive. For many, something more will be necessary—historical support for presidential control of official prosecutions. Consistent with the textual and structural arguments, the next subpart confirms that in the eighteenth century, chief executives could control official prosecutors.

### *C. The Historical Relationship Between Chief Executives and Official Prosecutors*

History supplies the best evidence for the proposition that the Constitution authorizes the president to control official prosecutors. Due to its executive power, the English crown was deemed the prosecutor of all offenses against the laws and oversaw the prosecutions of the attorney general and other official attorneys. In the colonies and the states, state governors directed official prosecutors. Continuing the trend, Presidents Washington, Adams, and Jefferson repeatedly directed official prosecutors, instructing them to prosecute some individuals and to cease prosecuting others.

Early presidential direction of prosecutors was based on an understanding of the executive's constitutional authority, for no statute ever authorized presidential control. In presidential proclamations, in addresses to Congress, and in correspondence, presidents often noted that they had given instructions to official prosecutors, sometimes articulating the

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<sup>150</sup> Because the Founders clearly embraced Montesquieu's separation maxim, it does not matter whether Montesquieu's maxim is objectively true. Having enshrined it in the Constitution, the Founders ensured that neither the legislature nor the judiciary has a constitutional ability to exercise the executive power to execute the laws.

constitutional bases of their actions. Attorneys general likewise acknowledged that they were executive officers under presidential control and regularly conveyed presidential instructions to the district attorneys. Finally, the district attorneys never complained that, by directing them, the president had improperly usurped discretion granted to them by statute. Indeed, recognizing that they were not free agents, they sometimes sought direction from the president and his immediate subordinates.

The other branches apparently never protested against presidential control of the district attorneys. To the contrary, there appears to have been a bipartisan, tri-branch consensus that the president could control official prosecutors. Many members of Congress agreed that the president could direct prosecutors in the execution of the law. For instance, the Senate requested President John Adams to direct a district attorney to commence a prosecution. Likewise, members of the judiciary occasionally mentioned the president's role in bringing cases before them, even holding the executive accountable for some perceived flaw in the prosecution. Since the president was empowered to execute the laws and charged with faithful execution, it was natural for the president to bear responsibility for any prosecutions commenced by his officers.

### *1. The Crown's Official Prosecutors*

In England, the king was regarded as the constitutional prosecutor of all offenses. Following the Lockean tradition, William Blackstone claimed that, in the state of nature, everyone enjoyed the executive power to punish those who transgressed the laws of nature.<sup>151</sup> Blackstone argued that when individuals formed a civil society, they transferred the power of execution or punishment to the chief magistrate.<sup>152</sup> As part of that transfer, individuals agreed that the chief magistrate would bring prosecutions of those who violated the law.<sup>153</sup> Though violations of the law "seem . . . to be rather offences against the kingdom than the king; yet as the public . . . has delegated all it's [sic] power and rights, with regard to the execution of the laws, to one visible magistrate," such infractions should be considered affronts to the chief magistrate to whom the public has delegated its right to execute.<sup>154</sup> In other words, given the Crown's control of the executive power, the chief magistrate is "the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of

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<sup>151</sup> 4 BLACKSTONE, *supra* note 37, at \*7-8.

<sup>152</sup> *See* 4 *id.*

<sup>153</sup> 4 *id.* at \*8 ("Whatever power therefore individuals had of punishing offences against the law of nature, that is now vested in the magistrate alone; who bears the sword of justice by the consent of the whole community.")

<sup>154</sup> 4 *id.* at \*268.

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the law.”<sup>155</sup> Moreover, because a violation of the laws injures the chief executive, he is a fitting receptacle of society’s willingness to show mercy on those who have violated the law.<sup>156</sup> As Blackstone remarked, “it is reasonable that he only who is injured should have the power of forgiving.”<sup>157</sup> Thus, the English thought it quite sensible to vest the pardon power with the chief prosecutor.

The English monarch did not actually go to court and argue cases; rather, the crown prosecuted offenses in one of two ways. Most offenses were prosecuted by the public on behalf of the crown.<sup>158</sup> Typically, the popular prosecutor kept a portion of any fine or forfeiture recovered and the rest went to the crown.<sup>159</sup> Part III discusses this category of prosecutions. The second method of prosecution involved prosecutions brought by the crown’s attorneys. His two principal attorneys were the attorney general and the solicitor general. The attorney general prosecuted serious offenses where the crown had a particular interest and did so by simple information in the case of misdemeanors and by indictment in capital offenses.<sup>160</sup> The attorney general could also sue for debts owed the crown.<sup>161</sup> The solicitor general was deemed the attorney general’s deputy and had the same powers as the attorney general.<sup>162</sup> The crown had other attorneys but could also hire special attorneys if it saw fit.<sup>163</sup> In this system, these attorneys worked under the direction of the crown.<sup>164</sup>

In the celebrated case of *Wilkes v. The King*,<sup>165</sup> decided in 1768, Chief Justice Wilmot discussed the king’s role in prosecution:

By our constitution, the King is entrusted with the prosecution of all crimes which disturb the peace and order of society . . . . [F]or

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<sup>155</sup> 1 *id.* at \*269; see also 4 *id.* at \*2 (noting that the king “is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore in all cases the proper prosecutor for every public offence”); 4 *id.* at \*176-77 (asserting that by virtue of his “executory power of the law” the king may prosecute those public wrongs that violate the laws of nature, that result in a breach of peace, and that threaten to subvert civil society).

<sup>156</sup> As might be expected, there are all sorts of limitations on the English king’s power of pardon. See 4 *id.* at \*398 (nothing the king cannot pardon private appeals or pardon an impeachment). Some of these limitations clearly extend to the United States Constitution. See U.S. CONST. art II, § 2, cl. 1 (barring pardons in cases of impeachment).

<sup>157</sup> 1 BLACKSTONE, *supra* note 37, at \*269.

<sup>158</sup> See *infra* Part III (discussing popular prosecutions).

<sup>159</sup> See *infra* Part III.

<sup>160</sup> Rita W. Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEGAL HIST. 304, 309 (1958).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 305.

<sup>163</sup> *Id.* at 308.

<sup>164</sup> For a general history of the attorneys of the crown, see J.L.J. EDWARDS, *THE LAW OFFICERS OF THE CROWN* (1964).

<sup>165</sup> *Wilkes v. The King*, 97 Eng. Rep. 123 (K.B. 1768).



that reason, all proceedings, “ad vindictam et poenam” are called in the law, the pleas or suits of the Crown . . . . All indictments and informations, granted by the King’s Bench, are the King’s suits, and under his controul; informations filed by his Attorney General, are most emphatically his suits, because they are the immediate emanations of his will and pleasure.<sup>166</sup>

Wilmot’s explanation echoed Blackstone’s conclusions. In England, the crown was charged with executing the law and prosecuted offenses with the help of its attorneys.

## 2. *Official Prosecution in the Colonies and States*

Prior to the creation of the state constitutions, most of the American colonies had established systems of official prosecution that were more comprehensive and advanced than the then existing English system. Rather than having a handful of official prosecutors concerned only with great matters of state, official prosecutors were typically scattered across the colonies and were charged with prosecuting all manner of offenses. As part of their general law enforcement powers, colonial governors could direct these official prosecutors.<sup>167</sup> Evarts Boutell Greene, a noted authority on the colonial and Revolutionary periods of American history, claimed that, because it was the colonial governor’s duty to execute the laws, “with him also rested in part the duty of prosecution.”<sup>168</sup> To this end, the colonial governor could direct the attorney general, whether or not the governor actually had appointed him.<sup>169</sup> Discussing specific colonies, Oliver Hammonds confirmed that chief executives (or executive councils) could direct and end official prosecutions.<sup>170</sup> Finally, Julius Goebel and Raymond Naughton, in their exhaustive study of law enforcement in colonial New York, likewise noted that the colonial governor could order prosecutions commenced and could require the official prosecutors to enter a *nolle prosequi*.<sup>171</sup>

The early state constitutions favored legislatures at the expense of the

<sup>166</sup> *Id.* at 125.

<sup>167</sup> EVARTS BOUTELL GREENE, *THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA* 139 (1898).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Oliver W. Hammonds, *The Attorney General in the American Colonies*, in 2 *ANGLO-AMERICAN LEGAL HISTORY SERIES*, SERIES 1, 5, 7, 9, 11, 16, 20 (1939) (describing how prosecutors were directed by governors and executive councils in various colonies).

<sup>171</sup> See JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE* 154, 200, 367, 369, 374, 378 (1944). Goebel and Naughton also noted that judges occasionally ordered prosecutions and *nolle prosequi*’s, as well. See *id.* at 367.

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executives.<sup>172</sup> This bias reflected a lingering ill will toward the king and his executive agents in the colonies.<sup>173</sup> Since the state executives were in many respects the successors to the English crown, the architects of the state constitutions apparently felt that the executives ought to be under the legislature's thumb.<sup>174</sup> Accordingly, executives faced numerous structural disabilities: short terms, term limits, legislative selection, and limited appointment powers.<sup>175</sup> In the extreme, some constitutions granted executive powers to a council, thereby ensuring that the exercise of such powers would not be efficient or vigorous.<sup>176</sup>

Despite all these structural handicaps, the chief executives of the states—like their colonial predecessors—retained the power to control official prosecutions. The nation's first Congress repeatedly requested that the state executive powers direct the initiation of prosecutions for the benefit of the nation.<sup>177</sup> Sometimes Congress passed general resolutions beseeching all states executives to commence prosecutions when appropriate.<sup>178</sup> Other times, Congress made specific requests, such as those addressed to the Delaware president, the Rhode Island and Virginia governors, and the Pennsylvania and Massachusetts supreme executive councils.<sup>179</sup> These requests were variously phrased: sometimes the requests specifically mentioned that the executive power ought to direct the state attorney general to begin the prosecution,<sup>180</sup> and other times the chief executives were merely beseeched to order the prosecution.<sup>181</sup> One can

<sup>172</sup> Prakash, *The Essential Meaning of Executive Power*, *supra* note 18, at 757-58.

<sup>173</sup> *Id.* at 759.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 760-61.

<sup>176</sup> *Id.* at 757-58.

<sup>177</sup> See, e.g., *infra* notes 231-231 and accompanying text.

<sup>178</sup> 14 JOURNALS OF THE CONTINENTAL CONGRESS 812 (1779) (Congress requesting that governors prosecute individuals in the quartermasters department whenever they believed such individuals had misbehaved).

<sup>179</sup> 6 *id.* at 950 (including resolution directing "Secret Committee" to write letter to Rhode Island Governor to prosecute a captain if necessary); 14 *id.* at 754 (including resolution requesting the Delaware president to prosecute Henry O'Hara, a deputy quartermaster general); 14 *id.* at 857 (including resolution requesting the governor of Virginia, the president of Pennsylvania, and the Massachusetts executive council to punish certain individuals); Samuel Holten's Diary, in 13 LETTERS OF DELEGATES TO CONGRESS, *supra* note 123, at 276 (Holten confirming that Congress had requested these governors to prosecute).

<sup>180</sup> 19 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 178, at 40 (including resolution requesting Pennsylvania executive council to "direct" the Pennsylvania attorney general to prosecute in the name of the United States).

<sup>181</sup> 3 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 273 (1889) (including resolution requesting Pennsylvania executive to "direct" a prosecution) ("[T]he president and executive council of Pennsylvania be informed that any prosecution which it may be expedient to direct for such matters . . . shall be carried on at the expense of the United States.").

fairly infer that these requests were predicated on the general understanding that each of the state chief executives could direct prosecutions. Otherwise, Congress directed its appeals to the wrong state institutions and ought to have directly sought the assistance of the attorneys general or individual state prosecutors. Congress apparently recognized that prosecutorial control was a feature of the executive power granted to state chief executives by the state constitutions and hence acted on the belief that governors and executive councils could direct prosecutions.<sup>182</sup>

State chief executives understood that they could direct prosecutions and the actions of the official prosecutors. On a number of occasions, the Pennsylvania supreme executive council directed its attorney general.<sup>183</sup> Likewise, George Clinton, governor of New York, directed his Attorney General, Egbert Benson.<sup>184</sup> And presumably, the governors from other states, when requested by Congress to prosecute certain offenders, directed the commencement of prosecutions. Nothing suggests that congressional appeals for the commencement of prosecutions went unheeded on the grounds that the other chief executives could not order prosecutions.<sup>185</sup>

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<sup>182</sup> Congress never declared why it addressed its requests to the chief executives of the states. It is possible that each state had a statute in place that granted the chief executive the power to control official prosecutions and that Congress made its request with this information in mind. If that were the case, the chief executives' authority would arise from statutes rather than the state constitution. All this seems unlikely, however. To begin with, English practice suggested that the chief executive controlled official prosecutors. See *supra* Part II.C.1. Moreover, it seems unlikely that every state had in place statutes authorizing chief executive control of official prosecutors. The most likely reason why Congress believed that state chief executives could direct official prosecutions was that Congress regarded prosecutorial control as an authority granted to the wielder of the executive power.

<sup>183</sup> See *Respublica v. Gordon*, 1 U.S. 233, 233 (1788) (stating that defendant applied to state executive to direct the attorney general to bring his matter before the court, and the executive complied); Letter from John Dickinson to Attorney General Longchamps (May 25, 1784), in 11 PENNSYLVANIA ARCHIVES 467 (1855) (Pennsylvania president directing attorney general to prosecute); Letter from John Dickinson to the Minister of France (June 4, 1784), in 11 PENNSYLVANIA ARCHIVES, *supra*, at 482 (notifying French minister that the council would give instructions to prosecute to the attorney general); Letter from William Bradford, Attorney General, to President Franklin (Feb. 27, 1788), in 11 PENNSYLVANIA ARCHIVES, *supra*, at 250 (attorney general asking for direction from council regarding executing judgments).

<sup>184</sup> See Letter from New York Delegates to George Clinton (Apr. 23, 1783), in 20 LETTERS OF DELEGATES TO CONGRESS, *supra* note 123, at 210, 211 n.3 (New York delegates noting that New York attorney general had briefed New York congressional delegates per the governor's instructions); Letter from Nathan Dane to Caleb Davis (June 12, 1787), in 24 LETTERS OF DELEGATES TO CONGRESS, *supra*, at 325-26 (noting that governor had directed attorney general to bring prosecution). (New York delegates noting that New York attorney general had briefed New York congressional delegates per the governor's instructions).

<sup>185</sup> Given the long tradition of chief executive control of official prosecutors, that the state chief executives' were empowered to superintend law execution, and that Congress clearly assumed that state chief executives could control prosecutions, it seems likely that all the state chief executives could control official prosecutors.

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Some lessons emerge from these practices. Colonial chief executives were thought to enjoy the power to direct official prosecutors. Though no state constitution vested the state executive(s) with the “prosecution power,” the state chief executives likewise enjoyed the power to direct prosecutions. Consistent with that conclusion, chief executive control of prosecution spanned different types of states—some with constitutions passed in the wake of independence, e.g., Pennsylvania, New York, Massachusetts, and others that were still governed by royal charters, e.g., Rhode Island.

Of perhaps greater relevance, we have direct evidence that both New York’s and Pennsylvania’s chief executives could direct official prosecutions.<sup>186</sup> Because both state constitutions granted executive power and contained a precursor of the Faithful Execution Clause, the power exercised by these state chief executives provides a glimpse of the original understanding of the federal Constitution. Given the federal Constitution’s parallel provisions, the practices in New York and Pennsylvania offer a good reason to read the federal Constitution as likewise authorizing the federal chief executive to control official prosecutions.

### 3. *Official Prosecution and the Founding*

While there was a great deal of disagreement about the structure and the peripheral powers of the proposed federal executive, there was unanimity on one point: the chief executive would be empowered to execute federal law.<sup>187</sup> As James Wilson put it at the Philadelphia Convention, this power was “strictly executive.”<sup>188</sup> Indeed, the ability to execute the law and to control the law execution of officers was regarded as the defining trait of a chief executive. Hence it is hardly surprising that both Federalists and Anti-federalists understood that a president granted the executive power would be empowered to superintend law execution.<sup>189</sup>

Was prosecution intended to be encompassed in the president’s law execution function? It is difficult to conclude otherwise. As a matter of context, we have seen that prosecution was regarded as an executive function by the Continental Congress, by the state governors, and by Blackstone and Montesquieu. This historical practice underlay founding era discussions of the president’s fundamental role in law enforcement. Participants in the great debate regarded a unitary executive as necessary for egalitarian execution of the laws, where even the privileged would be subject to the law.<sup>190</sup> Likewise, as James Wilson observed, a unitary

<sup>186</sup> See *supra* notes 183-184 and accompanying text.

<sup>187</sup> Prakash, *The Essential Meaning of Executive Power*, *supra* note 18, at 777.

<sup>188</sup> 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 122, at 66.

<sup>189</sup> Prakash, *The Essential Meaning of Executive Power*, *supra* note 18, at 788.

<sup>190</sup> 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 122, at 21-22 (comments of a

executive was regarded as vital to ensure vigorous, prompt, and responsible execution of the laws.<sup>191</sup> Finally, a unitary executive was regarded as essential to achieving uniformity in law execution.<sup>192</sup> While there certainly are aspects of law execution that do not involve prosecution, such as the expenditure of appropriated funds, it is hard to believe that participants in these debates were referring to these secondary aspects of law execution. The better reading is that when participants in the framing and ratifying debates referred to the law execution powers of the president, they were referring principally to the power to investigate and prosecute alleged offenders. As an Anti-federalist put it, the president was to be “a vindex injuriarum—an avenger of public wrongs” and was “to enforce the rigor of equal law.”<sup>193</sup> The president would avenge public wrongs and ensure the rigor of equal law by prosecuting those who violated federal law.<sup>194</sup>

#### 4. *Prosecutions in the New Republic*

The Judiciary Act of 1789 created an attorney general and numerous district attorneys.<sup>195</sup> The attorney general was more of a general attorney rather than an officer statutorily empowered to command other governmental attorneys.<sup>196</sup> The attorney general was to advise the president and represent the United States before the Supreme Court.<sup>197</sup> His duties were thought to be so light that he was expected to carry on a private practice on the side to supplement his government pay. Seeking to make the office of the attorney general more like its state counterparts (where the state attorneys general could direct local state attorneys), Edmund Randolph, the first attorney general, sought statutory authority to direct the

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“Farmer”).

<sup>191</sup> See 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 122, at 65.

<sup>192</sup> 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 122, at 310; 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 122, at 128.

<sup>193</sup> 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 122, at 21 (comments of a “Farmer”).

<sup>194</sup> 5 *id.* at 21-22. One might question why there were not more specific discussions of prosecution. As suggested in the text, the most likely answer is that prosecution was addressed as part of the broader category of law execution. To make a claim about the Constitution’s original meaning, there need not be plentiful discussions of the particular power in the drafting and ratifying debates. For instance, one could claim that as a matter of original understanding, Congress may impose tariffs as part of its foreign commerce power, even if there were no discussions about tariff imposition. Given the history of foreign commerce, it was clear that the foreign commerce power included the power to set unilateral tariffs. Likewise, given that prosecution was understood to be an executive power and part of the law execution function in particular, when the Constitution granted the executive power, it granted the president control of prosecutions.

<sup>195</sup> Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92-93 (1789).

<sup>196</sup> *Id.* at 93.

<sup>197</sup> *Id.*

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federal district attorneys.<sup>198</sup> Congress acquiesced only long after Randolph's demise.<sup>199</sup>

In fact, neither the Judiciary Act nor any other federal act granted anyone authority to superintend the district attorneys. Given that no official had statutory authority to direct these district attorneys, many scholars have supposed that the Constitution, as originally understood, never authorized centralized presidential control over federal prosecutors. According to these scholars, where official prosecutions were concerned, there was nothing remotely resembling a unitary executive.

On many levels, this revisionist account is mistaken. Presidents Washington, Adams, and Jefferson believed that they had constitutional authority to direct federal district attorneys. In fact, each directed district attorneys to begin and cease prosecutions in a number of contexts: cases suffused with foreign affairs implications; cases involving the domestic political opposition; and even cases concerning the nation's territorial integrity.

Significantly, presidential control of official prosecutions was not something controversial (or worse yet, contrary to law), such that the presidents felt the need to keep their involvement under wraps. Rather, presidents were quite open about their direction, discussing their control in published speeches and proclamations. The presidents understood that they were constitutionally empowered to direct official prosecutions.

The other branches agreed that the Constitution empowered the president to represent the United States in the courts. For instance, the Senate requested President Adams to instruct a district attorney to bring a prosecution. Likewise, the Supreme Court refused to hear a case when it was unsure whether the president had authorized the attorney general to appear before the Supreme Court. Once again, because no statute authorized presidential control, both episodes reflect the understanding that the president was constitutionally empowered to control the representation of the United States.

*a. George Washington*

On numerous occasions, President Washington directed his district attorneys. Typically, he relayed his directions through his subordinates: the secretaries of state and treasury and the attorney general. Occasionally, he would instruct a district attorney directly. Washington would sometimes accompany his instructions (or his public explanation of them) with a citation to the Faithful Execution Clause or his general power to execute the laws, indicating that Washington regarded his prosecutorial authority as

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<sup>198</sup> Letter from Edmund Randolph to George Washington (Dec. 26, 1791), in 1 AMERICAN STATE PAPERS 46 (Walter Lowrie & Matthew St. Clair Clarke eds. 1833).

<sup>199</sup> See Act of Aug. 2, 1861, ch. 37, § 1, 12 Stat. 285, 285.

arising out of the Constitution itself.

In response to the Whiskey Rebellion brewing in western Pennsylvania, Washington directed prosecutions over the course of two years. Continuing an American tradition of tax rebellion, western Pennsylvanians violently opposed a federal tax on spirits. In September of 1792, Washington issued a proclamation in which he maintained that his faithful execution duty required “that every legal and necessary step should be pursued . . . to bring to justice the infractors of the laws.”<sup>200</sup> To that end, he charged all officers (both judicial and executive) to enforce the laws and warned that “all lawful ways and means will be strictly put in execution for bringing to justice the infractors.”<sup>201</sup> The next month, Washington set the wheels of justice in motion by “direct[ing]” Attorney General Edmund Randolph to attend the circuit court in York Town, Pennsylvania in order to supervise the indictment of those who had opposed the execution of the excise law.<sup>202</sup> In a November 1792 speech to Congress, Washington noted that his administration had begun prosecuting offenders. He also assured Congress “that nothing within Constitutional and legal limits, which may depend on me, shall be wanting to assert and maintain the just authority of the laws.”<sup>203</sup>

In 1793, Washington concluded that two “respectable persons” had not rioted and “instruct[ed]” William Rawle, the Pennsylvania district attorney, to enter a *nolle prosequi* on their indictments<sup>204</sup>—apparently the very

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<sup>200</sup> Proclamation of Sept. 15, 1792, in 32 THE WRITINGS OF GEORGE WASHINGTON 150-51 (John C. Fitzpatrick ed., United States Government Printing Press 1931).

<sup>201</sup> *Id.*

<sup>202</sup> Letter from George Washington to the Secretary of the Treasury (Oct. 1, 1792), in 32 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 200, at 173-74; *see also* Letter from George Washington to the Attorney General (Oct. 1, 1792), in 32 THE WRITINGS OF GEORGE WASHINGTON, *supra*, at 171-72 (expressing his “desire” that Randolph attend the proceedings at York Town to ensure that the prosecutions proceeded “properly” and “in a manner to which no exception can be taken with propriety”). Earlier, Washington had noted that he would lend all his “sanction and authority” to commence the prosecutions at York Town if Attorney General Randolph thought that there were indictable offenses. Letter from George Washington to the Secretary of the Treasury (Sept. 7, 1792), in 32 THE WRITINGS OF GEORGE WASHINGTON, *supra*, at 143-45.

<sup>203</sup> President George Washington, Fourth Annual Address to Congress (Nov. 6, 1792), in 32 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 200, at 205.

<sup>204</sup> Letter from George Washington to William Rawle (March 13, 1793), in 32 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 200, at 386. This was not the only occasion that Washington ended a prosecution. After giving instructions to Christopher Gore, the Massachusetts district attorney, to prosecute the French consul for obstructing law enforcement officers, *see* Letter of Thomas Jefferson to Christopher Gore (Sept. 2, 1793), [http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field\(DOCID+@lit\(tj080013\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field(DOCID+@lit(tj080013))), Washington decided not to prosecute the consul and revoked his exequatur instead, *see* Letter of Thomas Jefferson to Christopher Gore (Nov. 22, 1793), <http://memory.loc.gov/master/mss/mtj/mtj1/019/0900/0978.jpg> (Jefferson describing how French had protested revocation of exequatur).

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indictments that had been secured in conformance with Washington's earlier instructions to Attorney General Randolph.<sup>205</sup> Later, when it became apparent that ordinary law enforcement measures would be insufficient to suppress the tax rebellion, Washington called out the state militias to restore law and order. He ordered Rawle to accompany the marching militia in order to prosecute offenders the militia apprehended. Knowing that Washington was particularly interested in the prosecutions, Rawle apprised Washington of his progress.<sup>206</sup> Despite his earlier orders, Washington eventually decided that very few of the rebels deserved punishment.

In mid 1793, while the European powers were waging war, the American president determined that the United States ought to remain strictly neutral. Washington's Proclamation of Neutrality warned that his administration would punish Americans who committed, aided, or abetted hostilities against any of the warring powers.<sup>207</sup> He also announced that he had "given instructions to those officers to whom it belongs, to cause prosecutions to be instituted against all persons, who shall . . . violate the law of nations."<sup>208</sup> Both the English and the French sought the prosecution of those who violated Washington's proclamation.<sup>209</sup> To mollify the English, Secretary of State Thomas Jefferson told the English representative, George Hammond, that individuals assisting France were being prosecuted at the direction of the president.<sup>210</sup> Likewise, when the French representative, Edmond Genet, complained that French consuls were being harassed, Jefferson instructed the district attorneys to "take any

<sup>205</sup> See *supra* note 202.

<sup>206</sup> See Letter of William Rawle to Timothy Pickering (Oct. 25, 1795), <http://memory.loc.gov/mss/mgw/mgw4/108/0300/0397.jpg> (describing progress of prosecutions).

<sup>207</sup> Proclamation of Neutrality (Apr. 22, 1793), in 32 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 200, at 430.

<sup>208</sup> 32 *id.* at 430-31; see also Letter from Thomas Jefferson to William Rawle (May 15, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON 40-41 (Julian Boyd ed., 1950) (expressing the "desire" of the government to have Rawle prosecute citizens of the United States who have committed "depredations on the property and commerce" of other nations); Opinion on the Restoration of Prizes (May 16, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* at 50-51 (opining, at the request of the president, that Britain should be satisfied by the executive's promise to prosecute Americans who had joined a French privateer); Letter from George Washington to The Secretary of the Treasury (May 7, 1793), in 32 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 200, at 430 (Washington wondering whether someone ought to write to the district attorneys "requiring their attention to the observance of the Injunctions of the Proclamation").

<sup>209</sup> See Opinion on the Restoration of Prizes (May 16, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 208; *infra* note 210.

<sup>210</sup> Letter from Thomas Jefferson to George Hammond (June 13, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 208, at 270-71 (noting that the district attorney had been instructed to prosecute those who had captured an English vessel within the waters of the United States).



measures which [the laws] authorize to prevent or to punish breaches of the peace.”<sup>211</sup>

Throughout his terms, Washington sought to prosecute those who violated the rights of Indians. In March of 1791, after denouncing James O’Fallon for violating Indian treaties and the Indian Intercourse Act, Washington promised rigorous prosecutions of those who violated the law.<sup>212</sup> Hoping that making an example of O’Fallon would deter his followers, Jefferson wrote to the Kentucky district attorney, instructing him to prosecute only O’Fallon.<sup>213</sup> Similarly, in December of 1792, Washington proclaimed that he would punish those who had murdered Cherokee Indians and had burned down a Cherokee town.<sup>214</sup> His 1793 State of the Union address noted with satisfaction that his administration had prosecuted the Cherokee’s attackers.<sup>215</sup>

The president’s instructions were not limited to the criminal arena. When it appeared that a suit against William Bingham was properly regarded as a civil suit against the United States, Washington—on the advice of the secretaries of state and treasury and the attorney general—directed the district attorney for the Massachusetts district to appear on Mr. Bingham’s behalf.<sup>216</sup> Evidently, all three of these powerful officers thought that the president could direct the district attorney to defend Mr. Bingham and, thereby, defend the United States.

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<sup>211</sup> See Letter from Thomas Jefferson to District Attorneys in Massachusetts, New York, Pennsylvania, Maryland, and South Carolina (Nov. 29, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 208, at 456; see also Letter to Thomas Jefferson from Edmond Charles Genet (Nov. 30, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 460. Jefferson had made similar promises to the previous French minister who had sought the assistance of the executive in another law enforcement context. See Letter from Thomas Jefferson to Jean Baptiste Ternant (Nov. 9, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 603 (noting that the Georgia district attorney would help prosecute an American accused of stealing slaves from the Island of Santa Domingo); see also Letter to Matthew McAllister, District Attorney of Georgia (Nov. 9, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 599 (same).

<sup>212</sup> Proclamation of March 19, 1791, in 31 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 200, at 250.

<sup>213</sup> Letter from Thomas Jefferson to William Murray, Kentucky District Attorney (Mar. 22, 1791), in 19 THE PAPERS OF THOMAS JEFFERSON, *supra* note 208, at 598.

<sup>214</sup> Proclamation of December 12, 1792, in 32 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 200, at 260-61.

<sup>215</sup> Fifth Annual Address to Congress (Dec. 3, 1793), in 33 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 200, at 163, 167.

<sup>216</sup> See Letter of George Washington to Edmund Randolph (Mar. 27, 1793), [http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field\(DOCID+@lit\(gw320311\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/mgw:@field(DOCID+@lit(gw320311))) (Washington acquiescing to the recommendation of secretaries of treasury and state and the attorney general that district attorney of Massachusetts should be ordered to represent Bingham). Bingham was being sued for his actions as representative of the United States in Martinique in 1779. *Bingham v. Cabot*, 3 U.S. 19, 20 (1795). For an explanation of why Bingham was sued by a private party, see *Bingham*, 3 U.S. at 21.

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Apart from directing the district attorneys in their representation of the United States, Washington also had government attorneys assume other executive tasks. For instance, Washington “directed” the attorney general to “instruct” the district attorneys to “require from” the port collectors information about neutrality infractions, presumably with a view to prosecuting such infractions.<sup>217</sup> When there were allegations that a French consul had rendered judgments on the legality of captures, Secretary of State Jefferson ordered the Maryland district attorney to ascertain the truth and report back to him.<sup>218</sup> Similarly, at Washington’s behest, Jefferson supplied “instructions” to all the district attorneys on how to handle capture disputes.<sup>219</sup> Upon hearing of an arrest of a ship by the local governor, the district attorneys were to notify the parties of the arrest and ask that they appoint arbiters to determine whether the capture occurred within the territory of the United States.<sup>220</sup> If the parties could not agree to appoint “referees,” the district attorney was to take depositions and transmit them to the president for final decision.<sup>221</sup>

Washington not only directed the district attorneys, he also directed his attorneys general. In particular, Washington asked the attorneys general on several occasions to help the district attorneys in their representation of the United States.<sup>222</sup> The events leading up to *Hayburn’s* case also confirm presidential control of the attorney general. The Supreme Court refused to hear a case brought by the attorney general in his official capacity because they were unsure whether the president had authorized the attorney general’s actions.<sup>223</sup> While the Court was wrong to suggest that the attorney general needed the president’s explicit approval for each of his acts, it is quite significant that the Court would not let him proceed without first inquiring as to whether Attorney General Randolph’s actions were

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<sup>217</sup> Letter from Tobias Lear to Thomas Lowrey (May 9, 1793), in 32 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 200, at 455 n.35.

<sup>218</sup> See Letter from Thomas Jefferson to Zebulon Hollingsworth (Nov. 14, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 208, at 374.

<sup>219</sup> See Letter of Thomas Jefferson to the District Attorneys (Nov. 10, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra* note 208, at 338-40 (with instructions); see also Letters from Thomas Jefferson to Foreign Ministers in the United States (Nov. 10, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 340-42 (noting that district attorneys had instructions to notify agents of France and England and to take depositions when the parties chose not to use arbiters); Letter to George Hammond (Nov. 10, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 342-43 (same).

<sup>220</sup> See *supra* note 219.

<sup>221</sup> See *id.*

<sup>222</sup> See, e.g., *United States v. Lawrence*, 3 U.S. 42, 48-49 (1795) (Attorney General William Bradford noting in litigation the president’s motives for intervening); Letter from Washington to the Attorney General (Oct. 1, 1792), in 32 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 200, at 171-72.

<sup>223</sup> Bloch, *supra* note 18, at 602; Maeva Marcus & Robert Teir, *Hayburn’s Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 534-41.

consistent with presidential wishes. Despite the president's lack of statutory authority to direct the attorney general's work before the Supreme Court, the Court evidently thought it obvious that the president could direct the attorney general.

Washington's direction of the federal attorneys is interesting for many reasons. First, Washington's control was wide ranging and complete. He directed their actions when it came to criminal and civil matters, cases with foreign and domestic implications, and controversies relating to tax and treaties. In directing prosecutions and in discontinuing them, there apparently was no law enforcement area that Washington regarded as off limits.

Second, as noted earlier, no statute authorized his administration's control of district attorneys. Washington did not have the statutory authority to direct Attorney General Randolph, Secretary of State Jefferson, or Secretary of the Treasury Hamilton regarding prosecution. Moreover, none of these officers enjoyed statutory power to supervise or control the district attorneys. And, of course, Washington lacked statutory authorization to direct the district attorneys himself.

Third, the lack of controversy is noteworthy. While the administration's underlying policies were often attacked, and while some people certainly disagreed with his prosecutorial choices,<sup>224</sup> apparently no one regarded Washington's direction of the district attorneys as problematic. Obviously, Randolph, Jefferson, and Hamilton regarded Washington's direction as appropriate, else they would not have facilitated his control by conveying his instructions. Moreover, in his proclamations and in his addresses to Congress, Washington conspicuously notified the nation that he had ordered prosecutions, thereby suggesting that Washington did not regard his control as open to debate in the least.

Washington's control triggered no firestorm because the country understood that Washington's control was authorized. The Constitution granted Washington all the authority he needed. Indeed, he cited his constitutional power to execute the law or his duty to execute the law in

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<sup>224</sup> For instance, James Monroe wrote to Jefferson criticizing the prosecution of American citizens who accepted commissions in the French military by the Washington administration. Letter of James Monroe to Thomas Jefferson (June 27, 1793), in 29 THE PAPERS OF THOMAS JEFFERSON, *supra* note 208, at 383-84. Yet Monroe never questioned that Washington could direct prosecutions. *See id.* Instead, his claim was that the American citizens had violated no law. *See id.* While acknowledging that there was some doubt about the propriety of prosecution, Jefferson nonetheless defended the prosecution as necessary to enforce the peace treaty with England. *See* Letter from Thomas Jefferson to James Monroe (July 14, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 501-02. Indeed, he pointedly noted that even if the prosecution was unsuccessful, "the Executive will have acquitted itself" towards England. *Id.* at 502. This comment suggests that Jefferson regarded the prosecution decision as the executive's and not the individual decision of some statutorily independent prosecutor.

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several of his public pronouncements as justification for his law enforcement measures.

*b. John Adams*

President John Adams' direction of the district attorneys had a decidedly partisan tinge. Adams, with the assistance of his Secretary of State, Timothy Pickering, used the Sedition Act of 1798 to punish critics of his administration. Apparently, Pickering personally reviewed Republican newspapers<sup>225</sup> and ordered district attorneys to investigate or prosecute the publishers.<sup>226</sup> For instance, Pickering reported to Adams that William Duane, the publisher of the Republican newspaper *Aurora*, had published an "uninterrupted stream of slander on the American government" by insinuating that the English had bribed members of the Adams administration.<sup>227</sup> Adams wrote back "[i]f Mr. Rawle [the district attorney in Pennsylvania] does not think this paper libelous, he is not fit for his office; and if he does not prosecute it, he will not do his duty."<sup>228</sup> Subsequently, Pickering notified Adams that a prosecution was under way and that Rawle was to examine the *Aurora* and "institute new prosecutions as often as [Duane] offends."<sup>229</sup>

Perhaps the most revealing prosecution stems out of the alleged defamation of the Senate by the same William Duane of the *Aurora* discussed above. On May 14, 1800, the Senate resolved that President Adams "be requested to instruct the proper law officer to commence and carry on a prosecution against William Duane, editor of the newspaper called the *Aurora*, for certain false, defamatory, scandalous, and malicious publications, in the said newspaper . . . tending to defame the Senate of the United States, and to bring them into contempt and disrepute, and to excite

<sup>225</sup> JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* 88 (1951).

<sup>226</sup> LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 407-08 (1948) (noting two requests by Pickering to district attorneys to initiate prosecutions of four people); *see also* MILLER, *supra* note 225 ("Of all United States District Attorneys, Pickering demanded close scrutiny of Republican newspapers published in their districts and prompt prosecution of offenses, even of seditious matter copied from another newspaper. In such cases, he asked that immediate notice be given the Department of State in order that prosecution might also be commenced against the original publisher."). *But see* WHITE, *supra*, at 408 (claiming that, while "Pickering was more ready than [his predecessor] to urge on the district attorneys in particular cases, . . . his letters were not put in terms of orders").

<sup>227</sup> Letter from Timothy Pickering to John Adams (July 24, 1799), *in* 9 *THE WORKS OF JOHN ADAMS* 3-4 (Charles Francis Adams ed. 1854).

<sup>228</sup> Letter from John Adams to Timothy Pickering (Aug. 1, 1799), *in* 9 *THE WORKS OF JOHN ADAMS*, *supra* note 227, at 5.

<sup>229</sup> Letter from Timothy Pickering to John Adams (Aug. 1, 1799), *in* 9 *THE WORKS OF JOHN ADAMS*, *supra* note 227, at 7.

against them the hatred of the good people of the United States.”<sup>230</sup> Not surprisingly, Adams obliged his Senate allies, writing to the Pennsylvania district attorney and the attorney general as follows: “In compliance with this request [by the Senate], I now instruct you, gentlemen, to commence and carry on the prosecution accordingly.”<sup>231</sup> The Senate and Adams clearly believed that the president could direct the district attorneys in their prosecutions.<sup>232</sup>

Like Washington, Adams also ordered prosecutions discontinued. Before a Sedition Act trial of newspaper editor Ann Greenleaf, Adams ordered the prosecution discontinued.<sup>233</sup> Pickering had previously directed the local district attorney to prosecute the paper’s editors if any libel appeared in its pages.<sup>234</sup> The district attorney soon garnered enough material to indict Ms. Greenleaf.<sup>235</sup> But the offending paper subsequently ceased publication, and the Federalists were worried that Ms. Greenleaf made a sympathetic victim.<sup>236</sup> Accordingly, the district attorney suggested to Pickering that the prosecution be dropped.<sup>237</sup> Pickering referred this recommendation to Adams, who “agreed that the reasons urged were ‘quite sufficient for me to consent and indeed to direct a *Nolle prosequi*.’”<sup>238</sup> This direction was relayed to the district attorney and the prosecution was dropped.<sup>239</sup> Likewise, when John Daly Burk, a newspaper editor, agreed to leave the country if his prosecution was discontinued, the district attorney relayed the offer to Pickering, who relayed it to Adams.<sup>240</sup> Adams accepted the offer and ordered Burk’s prosecution discontinued.<sup>241</sup>

Adams’ control of prosecutions was not confined to Sedition Act prosecutions. Like Washington, Adams understood that prosecutions often had foreign policy implications. When a British minister complained that

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<sup>230</sup> 10 ANNALS OF CONGRESS 184 (1800).

<sup>231</sup> Letter from John Adams to the Attorney General and the District Attorney of Pennsylvania (May 16, 1800), in 9 THE WORKS OF JOHN ADAMS, *supra* note 227, at 56.

<sup>232</sup> At least some members of the House also thought the president had the authority to direct prosecutions. See 9 JOURNAL OF THE HOUSE OF REPRESENTATIVES 202 (1814) (containing motion to request president to instruct the Attorney General to prosecute Vermont governor Chittenden tabled); see also 5 JOURNAL OF THE HOUSE OF REPRESENTATIVES at 414 (1806) (passing resolution that condemned Samuel Ogden and William Smith for complaining that executive officials had encouraged their illegal activities and then prosecuted them).

<sup>233</sup> 9 WORKS OF JOHN ADAMS, *supra* note 227, at 415.

<sup>234</sup> *Id.* at 399-400.

<sup>235</sup> *Id.* at 400.

<sup>236</sup> *Id.* at 415.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 217.

<sup>241</sup> *Id.* at 217-18.

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two American privateers had boarded his ship and had opened his private letters, Adams wrote directly to John Davis, the Massachusetts district attorney, and ordered him to “make inquiry into this transaction and . . . make report to me . . . .”<sup>242</sup> Adams further noted that because he intended to demand satisfaction for all injuries done to Americans, sound policy demanded that he “do all in [his] power to give satisfaction when insults and injuries are committed by American citizens on British subjects, by punishing the authors of them.”<sup>243</sup> Shortly thereafter, Adams (somewhat redundantly) ordered Pickering “to refer this business to the attorney of the district . . . with instructions to make a diligent inquiry, and strictly to prosecute the persons he may find guilty of any breach of the law of nations.”<sup>244</sup> Though the prosecutions proved unsuccessful, the incident once again revealed Adams’ control of the district attorneys.

While Adams’ ingloriously exercised his control of the district attorneys to harass those who hounded him, his actions confirm that the president was understood to have constitutional authority to control the district attorneys. As before, no statute authorized presidential direction of the district attorneys. Moreover, though Democrats inveighed against the constitutionality of the Alien and Sedition Acts, apparently no one complained that Adams’ frequent instructions to the district attorneys were similarly unconstitutional or illegal. Indeed, the Senate itself had assumed the constitutional propriety of presidential direction of the district attorneys when it made its prosecution request to John Adams rather than to the district attorney directly.

*c. Thomas Jefferson*

As author of the Kentucky Resolves, resolutions critical of the Alien and Sedition Acts, Thomas Jefferson famously regarded these Acts as unconstitutional. Upon assuming office, President Jefferson was determined to treat the Sedition Act as a nullity.<sup>245</sup> To that end, he pardoned those convicted of violating the Sedition Act. But extending pardons to only those actually convicted of violating the Act would not end

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<sup>242</sup> Letter from John Adams to John Davis, District Attorney of Massachusetts (June 19, 1799), *in* 8 THE WORKS OF JOHN ADAMS, *supra* note 227, at 659; Letter from John Adams to Timothy Pickering, Secretary of State (June 19, 1799), *in* 8 THE WORKS OF JOHN ADAMS, *supra*, at 658 n.1.

<sup>243</sup> Letter from John Adams to John Davis, District Attorney of Massachusetts (June 19, 1799), *in* 8 THE WORKS OF JOHN ADAMS, *supra* note 227, at 659.

<sup>244</sup> Letter from John Adams to Timothy Pickering, Secretary of State (July 20, 1799), *in* 8 THE WORKS OF JOHN ADAMS, *supra* note 227, at 668.

<sup>245</sup> *See* Letter from Thomas Jefferson to Albert Gallatin (Nov. 12, 1801), *in* 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 33, at 57-58; Letter from Thomas Jefferson to Edward Livingston (Nov. 1, 1801), *in* 8 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 57 (“I affirm that act to be no law, because in opposition to the constitution; and I shall treat it as a nullity, wherever it comes in the way of my functions.”).

its lingering effects. While the Sedition Act had expired the day before Jefferson took his oath of office, the Act provided that its expiration would not terminate ongoing prosecutions of alleged offenses that occurred prior to its expiration.<sup>246</sup>

Rather than granting pardons to the accused, Jefferson ordered the district attorneys to halt ongoing prosecutions. Specifically, when Jefferson entered office, a prosecution of William Duane of the *Aurora* was pending. Consistent with his resolve to treat the Sedition Act as a nullity, Jefferson ordered the district attorney to cease any Sedition Act prosecutions of Duane.<sup>247</sup> Nonetheless, out of a regard for the Senate, Jefferson simultaneously ordered the district attorney to institute a *new* prosecution of Duane on whatever grounds might be available.<sup>248</sup> Since the Senate had earlier requested a prosecution of Duane by the Adams administration (while Jefferson was the president of the Senate),<sup>249</sup> Jefferson wanted to oblige the Senate's request as much as possible. The new prosecution stalled after the grand jury refused to indict, presumably because there was no other federal law that Duane might have violated.<sup>250</sup>

Two friendly printers wrote to Jefferson asking him to provide the grounds for his actions in Duane's case, so that they might better defend him against attacks. Jefferson wrote to Edward Livingston and asked him to reply to the printers. Jefferson provided the substance of the justification himself, which is worth quoting in full:

The President is to have the laws executed. He may order an offence then to be prosecuted. If he sees a prosecution put into a train which is not lawful, he may order it to be discontinued and put into a legal train . . . . There appears to be no weak part in any of these positions or inferences.<sup>251</sup>

Whether Jefferson was relying upon his grant of executive power or upon his faithful execution duty is unclear. What is certain is that his defense is the most clear presidential exposition of the executive's authority to control prosecutions. Consistent with the doctrine of presidential control of law execution, Jefferson apparently admitted of no exceptions to his view that the president could both order the commencement and the cessation of prosecutions.

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<sup>246</sup> Section 4 of the Act provided that "the expiration of the act shall not prevent or defeat a prosecution and punishment of any offence against the law, during the time it shall be in force." Act of July 14, 1798, ch. 76, § 4, 1 Stat. 596, 597.

<sup>247</sup> See *supra* note 245.

<sup>248</sup> See *id.*

<sup>249</sup> See *supra* notes 230-231 and accompanying text.

<sup>250</sup> See *supra* note 245.

<sup>251</sup> See Letter from Thomas Jefferson to Edward Livingston (Nov. 1, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 33.

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Throughout his two terms, Jefferson acted on his understanding of presidential control over prosecutions. Shortly after writing to Livingston, Jefferson wrote to Albert Gallatin, the Treasury Secretary, to “approve” of a prosecution in a case involving a schooner called *Sally*.<sup>252</sup> Later, when Jefferson became aware of federal common law prosecutions for libel, he immediately ordered that the prosecutions be stopped, for he believed that federal libel prosecutions were unconstitutional.<sup>253</sup> Fortunately, the district attorney had already decided to stop prosecuting and for the same reasons given by the president: the president’s “obligation to execute what was law, involved that of not suffering rights secured by valid laws, to be prostrated by what was no law.”<sup>254</sup> Presumably Jefferson meant that his obligation to execute the law did not encompass the execution of some federal common law of libel, which stood in opposition to the Constitution’s First Amendment.

Like his predecessors, Jefferson typically did not dictate how the prosecution ought to be carried out.<sup>255</sup> When he became involved in a proceeding, he was usually content to give general directions to prosecute or not, wisely leaving the details to the district attorneys. But on one famous occasion, Jefferson did much more. In the infamous trial of his first vice president, Aaron Burr, Jefferson “proceeded relentlessly to mobilize executive resources to prove the preconceived guilt [of Burr]. Jefferson . . . acted himself as prosecutor, superintending the gathering of evidence, locating witnesses, taking depositions, directing trial tactics, and shaping public opinion as if judge and juror for the nation.”<sup>256</sup> Jefferson’s directions are amply revealed in the numerous letters he wrote over the course of the proceedings.<sup>257</sup> Jefferson even told District Attorney George

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<sup>252</sup> See Letter from Thomas Jefferson to Albert Gallatin (Nov. 28, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 245, at 106.

<sup>253</sup> See Letter of Thomas Jefferson to Wilson Cary Nicholas (June 13, 1809), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 245, at 253-54.

<sup>254</sup> *Id.* at 254.

<sup>255</sup> See Letter from Thomas Jefferson to Albert Gallatin (Nov. 12, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 245, at 106 (describing that the strategy for the case was “not given by way of instruction to the Attorney, because it was presumed [it] would occur to him, and we did not choose, by prescribing his line of procedure exactly, to take on ourselves an unnecessary responsibility”).

<sup>256</sup> LEONARD W. LEVY, JEFFERSON & CIVIL LIBERTIES: THE DARKER SIDE 71 (1963).

<sup>257</sup> See generally Letter of Thomas Jefferson to George W. Hay (May 20, 1807), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 245, at 52; Letter of Thomas Jefferson to George W. Hay (May 26, 1807), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 52; Letter of Thomas Jefferson to George W. Hay (May 28, 1807), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 52; Letter of Thomas Jefferson to George W. Hay (June 2, 1807), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 53; Letter of Thomas Jefferson to George W. Hay (June 12, 1807), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 55; Letter of Thomas Jefferson to George W. Hay (June 19, 1807), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 58; Letter of Thomas Jefferson to George W. Hay (Sept. 7,



Hay to proceed against Burr's co-conspirator's should trial events warrant further prosecutions.<sup>258</sup> Tellingly, Chief Justice Marshall criticized the executive for its tardiness in adducing evidence of Burr's guilt,<sup>259</sup> thereby tacitly noting that Jefferson was responsible for Burr's prosecution.

Finally, recognizing the importance of the district attorneys, Jefferson removed several district attorneys who had been too zealous in prosecuting alleged violations of the Sedition Act.<sup>260</sup> Jefferson viewed these removals as absolutely crucial to his goal of putting law execution back on the proper track.<sup>261</sup> Significantly, there was no statutory authority for these removals. Hence, Jefferson must have understood his authority as emanating from the Constitution itself. Just as the Constitution authorized Jefferson to direct official prosecutors, it also empowered him to remove them when their prosecutions were likely to be contrary to Jefferson's law enforcement policies.

#### *D. The Presidents and Their Official Prosecutors*

The evidence from the first three presidential administrations bespeaks of a bipartisan, tri-branch consensus that the president could direct governmental lawyers in their representation of the United States. Despite the lack of statutory authority, presidents directed the district attorneys and the attorney general in all matters, large and small. Presidents ordered prosecutions commenced and halted, sometimes doing both in the same case! Presidents also ordered official prosecutors to represent the civil interests of the United States. The presidents believed that, since they were in charge of law enforcement and because law enforcement encompassed prosecution, they were empowered to control official prosecutors.

The district attorneys and the attorneys general apparently agreed because they never contested the legality of presidential instructions. Indeed, at least some acknowledged that they were under the president's control. For instance, Richard Harrison, the New York District Attorney, acknowledged that he labored under Washington's control.<sup>262</sup> Harrison

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1807), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 63.

<sup>258</sup> See Letter from Thomas Jefferson to George W. Hay, District Attorney for Virginia (June 19, 1807) in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 245, at 58 (advising Hay to charge with "treason or misdemeanor, as you think they evidence will support").

<sup>259</sup> *United States v. Burr*, 25 F. Cas. 2, 14-15 (C.C.D. Va. 1806) (No. 14,692).

<sup>260</sup> See Carl Russell Fish, *Removal of Officials by the President of the United States*, in 1 Annual Report of the American Historical Association 65, 70 (1899) (listing three clear removals by Jefferson of district attorneys and suggesting a fourth as well); see also Letter from Thomas Jefferson to Benjamin Rush (Mar. 24, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 245, at 32 (discussing removal of some district attorneys for "prosecuting their fellow citizens with the bitterness of party hatred").

<sup>261</sup> See Letter from Thomas Jefferson to Benjamin Rush (Mar. 24, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 245, at 30-32.

<sup>262</sup> Extract of a letter from Richard Harrison to Timothy Pickering (Oct. 3, 1795), in 1

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mentioned but one exception to the general rule that he acted on his own accord in prosecuting: when he was “honored with the directions of the Chief Executive Magistrate.”<sup>263</sup> Similarly, Attorney General Edmund Randolph, in contending that he could represent the United States before the Supreme Court without the express consent of the president, nonetheless acknowledged that he worked for the president.<sup>264</sup> Though the Constitution vested the executive power with the president, it did not require presidential approval for every instance of law execution.<sup>265</sup> Still, the constitutional power gave the president “general superintendence over all, which he unquestionably has.”<sup>266</sup> Clearly, both Harrison and Randolph regarded themselves as subject to presidential direction. To my knowledge, no district attorney or attorney general ever defied a president’s prosecutorial directions.<sup>267</sup>

The district attorneys and the attorneys general consistently followed a pattern of obedience rather than defiance. But were they truly executive officers? Some have suggested that the contrast between the war and foreign affairs departments, which Congress designated as executive departments, and the lack of such a designation for the government attorneys indicated that the latter group of officers were not executive officers.<sup>268</sup> Professor Bloch has suggested that the creation of the attorney general reveals a pragmatic streak on the part of Congress, for she believes that Congress did not regard the attorney general (and presumably the district attorneys) as executive officers that required “comprehensive presidential control.”<sup>269</sup> Rather, according to Bloch, “Congress appeared to believe that the Attorney General would take orders from Congress, as well as the President . . . .”<sup>270</sup>

Too much has been made of the presence or absence of the “executive” label in early organic statutes. Despite the lack of the executive tag, the treasury department was clearly regarded as an executive department.<sup>271</sup>

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AMERICAN STATE PAPERS 626-27 (1833).

<sup>263</sup> *Id.* at 627.

<sup>264</sup> Marcus & Teir, *supra* note 223, at 537.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* (quoting Justice James Iredell’s notes of the argument by Randolph).

<sup>267</sup> It is possible that some attorneys conceived themselves as free agents but followed the president’s instructions because they chose to exercise their supposed statutory freedom to conform to the president’s agenda. This possibility seems unlikely for several reasons. First, there is no evidence of government attorneys claiming statutory independence but nonetheless adhering to presidential direction. Second, though the presidents were quite open in their direction of the district attorneys, it appears as if no attorney, member of Congress, or judge ever regarded the president’s control as *ultra vires*.

<sup>268</sup> Lessig & Sunstein, *supra* note 18, at 30-31.

<sup>269</sup> Bloch, *supra* note 18, at 582.

<sup>270</sup> *Id.* at 581.

<sup>271</sup> Prakash, *The Essential Meaning of Executive Power*, *supra* note 18, at 804 (listing

The same is true for the official attorneys and the attorney general. The most powerful piece of evidence is the fact that the president routinely directed these officers in their official duties.<sup>272</sup> Additionally, the president and his immediate subordinates regarded these government attorneys as executive officers.

Far from doubting the president's power, the other two branches understood that the president had constitutional power to direct prosecutions. Hence, the Senate notoriously requested President Adams to direct a district attorney to prosecute William Duane.<sup>273</sup> Likewise, Justices of the Supreme Court sought evidence from the attorney general that his work before them had been authorized by the president, thereby indicating their understanding that, as a matter of constitutional law, the attorney general labored under the president's directions.<sup>274</sup>

To be sure, the presidents did not routinely direct the official prosecutors. They apparently did not approve of every prosecution; nor did they even monitor every official prosecution. But their restraint was likely not based on a reading of the Constitution or some statute. Rather there were prudent reasons to avoid such micromanagement. In an era of difficult communications, it would have been extremely challenging to communicate detailed instructions in a timely manner. Trials would have been delayed, with sometimes harmful consequences. Moreover, it would have been positively counterproductive for presidents to micromanage their official prosecutors. To begin with, the presidents appointed these attorneys (or let them remain in office), and hence, they were the president's men. To constantly second guess the attorneys' decisions would have shown too little faith in the initial appointment. Finally, such oversight might have led the most qualified attorneys to resign, for few men of wisdom and competence would gladly remain in a post where they exercised no real discretion. The strategy followed was the best: appoint good officers and leave most matters to their wisdom and judgment. Intervene only when weighty matters of state were involved or where constitutional duty (faithful execution of the laws) required.

Could presidents abuse this supervisory power? Of course. In directing the district attorneys to prosecute his critics, President Adams arguably did just that.<sup>275</sup> But no one argued that the presidents lacked the power to direct official prosecutors. Instead, opponents of the president directed their criticisms to the substantive policies themselves: enforcement

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reasons why the treasury department was an executive department).

<sup>272</sup> See *supra* Part II.C.4.

<sup>273</sup> See *supra* notes 230-231 and accompanying text.

<sup>274</sup> See Marcus & Teir, *supra* note 223, at 535 (discussing *Hayburn's Case* and stating that "the crucial question for the Supreme Court was . . . whether [the attorney general] could proceed without specific authorization from the President").

<sup>275</sup> See *supra* Part II.C.4.b.

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of neutrality in the absence of a federal statute making violations of neutrality illegal, enforcement of the Sedition Act to suppress speech, etc. Hence, even though there was no shortage of criticism of these administrations, critics apparently never charged these presidents with usurping discretionary authority granted to the district attorneys or the attorneys general.

Before concluding the discussion of official prosecutions, two more challenges to the chief prosecutor theory must be addressed: the use of state prosecutors to prosecute violations of federal law and the assertion that prosecution was regarded as both a judicial and executive function. Upon closer examination, neither has much substance.

### *1. State Prosecution of Federal Offenses*

As noted earlier, Professor Krent has suggested that early presidents did not have effective control over prosecutions because they could not control state prosecutors who prosecuted federal offenses before state courts.<sup>276</sup> In highlighting the potential consequences of state execution of federal law for the theory of the unitary executive, Professor Krent has good company. In *Printz v. United States*,<sup>277</sup> Justice Scalia cited the independence of state executives from the president as an ancillary reason why Congress could not commandeer state executives into enforcing federal law.<sup>278</sup>

There are several problems with Professor Krent's argument. To begin with, the laws providing for state court jurisdiction of federal offenses did not expressly empower state prosecutors to charge federal offenses.<sup>279</sup> They merely permitted state courts to hear these cases. These statutes hardly sound like either an invitation or a command to the state prosecutors to prosecute federal offenses. In contrast, when Congress clearly wanted state and federal officers to have concurrent jurisdiction, Congress was explicit. For instance, the Judiciary Act expressly authorized state court jurisdiction over certain classes of cases.<sup>280</sup> For all these reasons, it seems

<sup>276</sup> Krent, *supra* note 18, at 309.

<sup>277</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>278</sup> *Id.* at 905-07.

<sup>279</sup> See Krent, *supra* note 18, at 306 ("Although Congress was silent as to whether criminal cases were to be tried by a federal or state prosecutor, at least some prosecutions were initiated and carried out by state officials.").

<sup>280</sup> See The Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (explicitly providing for concurrent jurisdiction of state courts over some cases). Although one could embrace the theory that state officers have the ability to enforce federal law except where Congress clearly precludes them from doing so, I do not believe that this theory predominated in 1789. Even though statutes of the era said nothing about concurrent state enforcement of federal law, I do not believe people of the era concluded that state officers had general authority to enforce federal law given the lack of an express prohibition. Still, more research about state enforcement of federal law would be necessary to draw definitive

likely that Congress did not mean to and, in fact, did not authorize state prosecution of federal offenses.

The Judiciary Act of 1789 strengthens this conclusion. Having created district attorneys for the entire United States, Congress may have thought that the district attorneys were the only officers (federal or otherwise) who could prosecute on behalf of the United States. Indeed, because district attorneys had geographical jurisdiction to prosecute offenders (they were not tied to the federal courts),<sup>281</sup> one might conclude that when Congress permitted federal cases to be heard in state courts, the district attorneys were the only officials meant to try federal offenses in state courts. The district attorneys had jurisdiction in “all” civil and criminal cases where the United States was a party,<sup>282</sup> at least suggesting that state officials lacked the same authority.

In any event, even if state prosecutors were authorized to enforce federal laws, it is not at all obvious that the president would lack constitutional authority to direct state prosecutors, as Krent assumes.<sup>283</sup> While the president may not remove state prosecutors from their state offices or employment, his lack of such authority does not prove that he lacks the authority to direct state prosecutors in their execution of federal law. Nor does it prove that he cannot “remove” or withdraw their power to enforce federal law. If the president has the power to direct federal prosecution and the state prosecutors engage in federal prosecution when they prosecute offenses against the United States in state courts, then the president may control their prosecutorial activities that are, in reality, conducted on his behalf. If they refuse to follow his directions, the president must be able to “remove” the power to enforce federal law from these state prosecutors. In other words, he must be able to forbid them from continuing to enforce federal law in opposition to his instructions, or else these state employees have a share of the executive power.

Presidential control of state officers was hardly unprecedented in this era. Glenn Phelps argues that when state governors helped enforce the Neutrality Proclamation or other presidential proclamations, they did so in subordination to the chief federal executive. He concludes that “[w]here enforcement of the laws of the federal government was concerned,

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conclusions.

<sup>281</sup> District attorneys were not attached to particular courts; instead they had power to bring cases in their respective districts. See Judiciary Act of 1789, § 35, 1 Stat. at 92 (providing that “there shall be appointed in each district [a district attorney] . . . to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district *all* delinquents for crimes and offences, cognizable under the authority of the United States, and *all* civil actions in which the United States shall be concerned”) (emphasis added).

<sup>282</sup> *Id.*

<sup>283</sup> See Krent, *supra* note 18, at 303-10.

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Washington firmly believed that governors were constitutionally subordinate to the president.<sup>284</sup> Whether the state governors were required to assist the executive is a difficult question. But having chosen to do so, they could not act as if each of them was the federal government's chief executive and direct enforcement of federal law (using state resources) in whatever manner they saw fit. They had to conform to the president's views about the execution of federal law, or they had to desist in their federal law enforcement efforts. What is true for the governors should be true for any state prosecutor as well.

The Constitution itself suggests that state executive officers must act in subordination to the president when called into federal service. As a matter of constitutional law, when called into national service, officers of the state militias undoubtedly must follow the directions of the national commander-in-chief.<sup>285</sup> If the president may direct the state militias when called into national service, it seems natural that he should be able to direct state prosecutors in their prosecution of federal offenses.<sup>286</sup> Thus, when Congress either permits or requires state executives to enforce federal law, these state executives become the auxiliaries of the president and are subject to his control.

In short, there is no evidence that early Congresses actually authorized state prosecutors to prosecute federal offenses; that if Congress did so, that Congress meant these prosecutors to prosecute independent of the chief executive's control; or that the Constitution would have permitted Congress to grant autonomy to state executives in their execution of federal law. To the contrary, what we know from Presidents Washington and Jefferson suggests conclusions opposite to the ones drawn by Professor Krent. Recall that Jefferson maintained that the president must be able to stop unlawful prosecutions and set them on a "legal train."<sup>287</sup> Although uttered in the context of controlling district attorneys, Jefferson's logic applies equally to prosecutions commenced by state attorneys.

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<sup>284</sup> GLENN A. PHELPS, *GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM* 132 (1993).

<sup>285</sup> U.S. CONST. art. I, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United States . . .").

<sup>286</sup> To be fair to Professor Krent, I know of no instance where a president directed a state prosecutor. But by the same token, Professor Krent cites no instance where such power was denied by a state prosecutor, a president, or anybody else. Moreover, since we do not know what share of prosecutions of federal law were brought by state officials, we cannot say whether this category was so minor that there was little occasion or need for presidential control.

<sup>287</sup> *See supra* note 251 and accompanying text.

## 2. *Judicial Prosecutions*

Recall Professor Gwyn's suggestion that prosecution was as much a judicial function as it was an executive one.<sup>288</sup> He based his conclusion on a number of claims, including that in some state constitutions, the sections dealing with judiciaries authorized the creation of an attorney general, that the creation of federal attorneys occurred in the Judiciary Act of 1789, and that early versions of the Judiciary Act provided for judicial appointment of federal prosecutors.<sup>289</sup>

There is little doubt that prosecution and judging are intertwined. Without someone to bring a case before the courts, there can be no judging. Likewise, without a judge, executives cannot enforce most penalties. But this close relationship does not mean that prosecution is somehow a judicial task. As Professor Gwyn recognizes, at one time the broad category of law execution generally encompassed both prosecution and judging.<sup>290</sup> But by 1789, even though judging was still part of the overall task of law execution, Americans viewed judging, in part, as a check on the executive's law enforcement.<sup>291</sup> This was a legacy of English law, and it was reinforced by Montesquieu's maxim. So while judges executed the law when they exercised the judicial power, their judicial function occupied only a narrow part of the much larger category of law execution.<sup>292</sup> Judges decided cases brought to them; they did not generally decide which cases ought to be brought before them.

Professor Gwyn also overstates evidence of the "judicial" nature of prosecutions. Although judges may have appointed prosecutors under some early state constitutions,<sup>293</sup> this appointment structure does not make prosecution itself a judicial task anymore than presidential appointment makes judging an executive task.<sup>294</sup> If the Judiciary Act had permitted judicial appointment of district attorneys and the attorney general, it would

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<sup>288</sup> Gwyn, *supra* note 18, at 493-94.

<sup>289</sup> *Id.* at 493-95

<sup>290</sup> *Id.* at 477.

<sup>291</sup> See 1 CHARLES S. HYNEMAN & DONALD S. LUTZ, *The Essex Result, in AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 495-96* (1983) ("That the legislative, judicial, and executive powers, are to be lodged in different hands, that each branch is to be independent, and further, to be so ballanced, and be able to exert such checks upon the others, as will preserve it from a dependence on, or an union with them.").

<sup>292</sup> Steve Calabresi and Joan Larsen have argued that the division between executive and judicial power was rather uncertain at the time of the founding. Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1162-77 (1994). There were many who regarded the judiciary as part of the executive; this could be confusing given that the judiciary also was regarded as a check on the executive.

<sup>293</sup> See Gwyn, *supra* note 18, at 495-96 (discussing the judiciary's appointment of prosecutors in the Tennessee and Connecticut constitutions).

<sup>294</sup> See U.S. CONST. art I, § 2, cl. 2 (Appointments Clause).

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not follow that these officers would be exercising judicial power in their representation of the United States before courts. They would still be helping the president exercise his executive power of prosecution and would still be under his control and subject to his removal.<sup>295</sup> The same observation applies to reading too much into the juxtaposition of judicial power and attorneys general in state constitutions and in the Judiciary Act. Grouping the government attorneys and the judges in state constitutions and the Judiciary Act<sup>296</sup> does not make prosecution a feature of the judicial power. More likely, the two positions were grouped together precisely because consideration of one naturally leads to a discussion of the other.

There were, of course, some notorious instances where judges seemingly “prosecuted” individuals. Some federalist judges zealously enforced the Alien and Sedition Acts to the point of encouraging grand jurors to indict opposition publishers. The articles of impeachment against Justice Samuel Chase are replete with unflattering comparisons to public prosecutors and common informers,<sup>297</sup> suggesting that, in the views of the drafters of the articles, Justice Chase had stepped over the line and had become Prosecutor Chase.<sup>298</sup> Indeed, the articles of impeachment accused Chase of “authoritatively enjoin[ing]” the district attorney to find some means of prosecuting a publisher.<sup>299</sup> Apparently, many members of the House viewed judicial prosecutions as so improper and outside the scope of the judicial power that its practitioners should be impeached.

To regard prosecution as part of the judicial power in any way, shape, or form, is to nullify one of the Constitution’s central features—its judicial safeguard against prosecutorial overreach. To regard prosecution as at least as much judicial as it is executive is to overlook one of the central features of Anglo-American separation of powers, namely the separation of the executive and the judicial powers.

#### *E. The Constitutional Structure of Official Prosecution*

Here we consider the latitude that Congress and president have with respect to structuring federal prosecution. Congress has tremendous

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<sup>295</sup> Even if cross-branch appointments are constitutional (a thorny question to be sure), it does not follow that the president lacks authority over those officers charged with executing the law, however they might be appointed. Greene, in his discussion of the colonial prosecutors, noted that colonial chief executives could direct the prosecutors even when others had appointed the prosecutors. *See supra* note 167 and accompanying text.

<sup>296</sup> *See Gwyn, supra* note 18, at 494-95.

<sup>297</sup> 8 ANNALS OF CONGRESS 668-69 (1805) (accusing Chase of trying to coerce the grand jury to indict and accusing him of directing the district attorney to supply evidence of alleged Sedition Act violations).

<sup>298</sup> *See id.* at 668 (stating that Chase’s actions were “degrading his high judicial functions, and tending to impair the public confidence in, and respect for, the tribunals of justice”).

<sup>299</sup> *Id.*



freedom in creating a prosecutorial substructure. As discussed below, Congress need not create a hierarchical, all-encompassing department of justice headed by an attorney general. Instead, consistent with overall presidential control, Congress may carve up federal prosecution in any number of ways. What Congress cannot do is forbid presidential control of any prosecutorial discretion.

While the president must work with the prosecutorial substructure that Congress erects, the president likewise has great freedom. Though the president may intervene in prosecutions conducted on his behalf, the Constitution does not compel him to supervise every official prosecution. So long as he remains true to his faithful execution duties, the president can grant official prosecutors a measure of autonomy.

### *1. Must Congress Create Official Prosecutors?*

Before addressing contemporary issues, it is appropriate to consider a largely theoretical question about Congress's power over structuring prosecution. Thus far, this Article only contends that the Constitution grants the president the power to control official prosecutions. But in light of this constitutional understanding, may Congress elect *not* to create official prosecutors?

Nothing in the Constitution requires that Congress create official prosecutors. Just as Congress can render the commander-in-chief authority temporarily meaningless—by eliminating the Army and Navy and by never permitting the president to call forth the militia—so too can Congress make aspects of the chief executive power temporarily futile. The president probably can prosecute offenders himself; as the constitutional executor of the laws, the president may always don the prosecutorial mantle. But for all intents and purposes, Congress may effectively emasculate the executive power by deciding not to support the executive power's law execution. Without subordinate prosecutors and funds, the chief prosecutor will be impotent, for though armed with a constitutional power to prosecute, he will have no effective means for carrying this power into execution.

Good reasons exist why Congress has always supplied official prosecutors to the president. The foremost is that, in frustrating the president's executive power, Congress simultaneously hobbles itself. While sometimes members of Congress pass laws for no other reason than to boast that Congress has tackled some issue, other times members of Congress hope and expect that their laws actually will be executed. If Congress does not create official prosecutors dedicated to exacting penalties for violations of the law, Congress can expect that execution of its laws will suffer. For reasons mentioned above, Congress cannot expect much law execution from a solitary chief prosecutor.

For different reasons, popular prosecutors can never be a perfect, or

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even an adequate substitute for official prosecutors. First, private rather than public interests motivate popular prosecutors. Driven by a desire to feather their nests, popular prosecutors will rarely (if ever) take the more diffuse and often complicated public interest into account. Nor will they be moved by mercy or the interests of justice to refrain from prosecution. Instead, popular prosecution will usually be a function of a private cost-benefit calculus. Second, because Congress has more leverage over official prosecutors than private popular prosecutors, it reduces its own influence if it effectively grants members of the public an exclusive right to prosecute. While official prosecutors are the president's mouthpieces, Congress pays their salaries, funds their prosecutions, conducts hearings on their conduct, and, in extreme cases, may impeach and convict them. With popular prosecutors, Congress perhaps lacks a similar array of carrots and sticks.

2. *Centralization of Prosecutorial Authority: The Possibility of Attorney(s) General*

Notwithstanding the president's constitutional power to control prosecutions, Congress has a free hand in designing the prosecution substructure under the president. Nothing in the Constitution requires appointment of an executive officer entitled "attorney general" or an executive officer who superintends most, if not all, official prosecutors.<sup>300</sup> Instead, Congress may choose to leave prosecutorial control solely in the hands of the president and leave it to the president (and perhaps White House staff) to monitor prosecutors and their decisions. Because for almost a century Congress did not grant any statutorily created officer general authority over the prosecutors, Congress apparently made this very choice.<sup>301</sup>

It follows that the recurring protests of attorneys general over the past two centuries that they lack complete control of the representation of the United States are not of constitutional dimension.<sup>302</sup> There undoubtedly are compelling policy reasons for statutory centralization in the hands of one person who is in turn subordinate to the president. But no constitutional rule requires that these sound reasons be heeded. Contrary to the perennial wishes of attorneys general, Congress might choose to structure prosecution in any number of ways: two attorneys general, one civil and one criminal; three attorneys general, one civil, one criminal, and one in

<sup>300</sup> The office of "attorney general" is provided for not in the Constitution, but in the Judiciary Act of 1789. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 ("And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States . . .").

<sup>301</sup> Congress did not empower any statutory officer to superintend the actions of all district attorneys until 1861. See Act of Aug. 2, 1861, ch. 37, § 1, 12 Stat. 285, 285.

<sup>302</sup> See, e.g., Bloch, *supra* note 18, at 585-87.

charge of “official” misconduct; regional attorneys general, etc.<sup>303</sup> And of course, Congress can continue its policy of centralizing criminal prosecutions in one institution (the department of justice) and fragmenting civil prosecutions across many institutions. The one constitutional minimum is that, however the Congress decides to structure prosecution, the president must be able to control all prosecutorial discretion.

All this means that attempts to explore early understandings of *presidential* power over federal prosecutions by examining the *attorney general’s* statutory authority (or lack thereof) over the district attorneys are besides the point. One cannot hope to find the limits of the president’s constitutional power by examining the Judiciary Act’s limited grant of authority to the attorney general. While Attorney General Randolph’s authority over the district attorneys was limited, President Washington’s authority apparently was not.

### 3. *Independent Prosecutors*

Constitutional history reveals that the president has constitutional authority to control official prosecutors by virtue of his executive power. Contrary to the claims of revisionist scholars, early federal statutes are most certainly not evidence for the proposition that the Congress can make prosecution independent of the president because those statutes never were so understood. At the same time, these early federal statutes, and the subsequent practices, cannot be read as somehow establishing that Congress is *incapable* of limiting presidential control over prosecution. Because the issue of limiting presidential control of prosecution apparently never came up, these statutes do not rule out the possibility that the president’s control of prosecution is a default power granted by the Constitution but modifiable by Congress.

Nonetheless, as discussed earlier, constitutional text and structure reveal that the idea of a default prosecutorial power has little to commend it. Nothing in the Article II Vesting Clause suggests that it grants power subject to congressional modification. The Vesting Clause does not read like the Appointments Clause or like the Article III grant of authority to Congress to make exceptions to the Supreme Court’s appellate jurisdiction, both of which explicitly make powers or rights subject to congressional alteration. Moreover, if the Necessary and Proper Clause is a license to treat the Executive Power Clause as a default grant, there is no reason to treat the president’s other constitutional powers as any more sacrosanct. Under the guise of enacting necessary and proper laws, the Congress could modify or abridge all of the president’s powers—the veto power, the treaty power, the pardon power, etc. Though it grants broad authority to

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<sup>303</sup> Here I am using “attorney general” in the sense of an officer who superintends other attorneys.

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Congress, the Necessary and Proper Clause does not permit the Congress to extinguish the executive power under the guise of “carrying [it] into Execution.”<sup>304</sup> There are little grounds to suppose that this is the best (or even a plausible) reading of the Constitution.

Hence, though Congress may refrain from creating official prosecutors and though it may create any number of prosecutorial substructures, the better view is that Congress may not create independent officers designed to carry into execution presidential powers. Prosecution is a presidential power, no less so than the powers to veto legislation or to pardon federal offenders. It follows that official prosecutors cannot be made independent of the president, the chief prosecutor.

By this standard, the independent counsel statute was unconstitutional. Even though the Ethics in Government Act never expressly bars presidential direction of the independent counsel, Congress clearly sought to insulate prosecution from presidential control through the Act’s bar on department of justice control over the independent counsel.<sup>305</sup> Notwithstanding the sincere motives that led Congress to enact the Ethics in Government Act, Congress can no more create an independent counsel than it could create an independent general or an independent ambassador.<sup>306</sup>

Though the independent counsel provisions have expired, there is a more common, yet seemingly less troubling, phenomena of independent official prosecutions of civil law violations. Congress has been able to shield these officers from executive control by exploiting the Supreme Court’s holding in *Humphrey’s Executor*.<sup>307</sup> In *Humphrey’s Executor*, the Court upheld Congress’s limitation on the president’s removal powers over commissioners of the Federal Trade Commission.<sup>308</sup> The case more generally concluded that Congress can constrain presidential removal and control where the offices Congress creates require the exercise of quasi-legislative and quasi-judicial powers.<sup>309</sup>

Admittedly, there is a certain logic to this. Perhaps the Constitution is best read as not permitting the president to exercise complete dominion

<sup>304</sup> See U.S. CONST. art. I, § 9, cl. 18 (Necessary and Proper Clause).

<sup>305</sup> See 28 U.S.C. 594(i), 597(a) (2000) (discussing independent counsel’s independence from Department of Justice). *But see supra* note 11 (discussing John Manning’s interesting claim that the independent counsel could be removed for defying presidential instructions).

<sup>306</sup> Admittedly, there is a textual difference with respect to generals. The president has explicit commander-in-chief authority, whereas he apparently lacks explicit chief executive authority. Yet this misreads the Constitution. There is ample evidence that the president was regarded as the chief executive (sometimes he was called the Supreme Executive Magistrate instead) and that the president was to superintend federal executive officers.

<sup>307</sup> *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

<sup>308</sup> *Id.* at 631-32.

<sup>309</sup> *Id.* at 629.

over officers who actually exercise legislative or judicial power (assuming, for a moment, that this accurately describes the Federal Trade Commissioners at issue in *Humphrey's Executor*). But the Constitution clearly establishes that the president controls the executive power and, therefore, prosecution. Just because Congress may be able to shield quasi-legislative and quasi-judicial tasks from executive control does not mean that Congress also can shield officers who help exercise the executive power. And Congress should not be able to shield officers from presidential control merely because Congress decides to create hybrid officers who exercise multiple powers of government. After all, when Congress creates hybridized officers, it affirmatively chooses to commingle the three authorities of government in the hands of commissioners rather than separately vesting each authority in a distinct officer or set of officers. Congress should not be able to strip away the president's power over law execution merely because it would like to create an officer charged with exercising all three powers of government.

There is a solution that satisfies Congress's desire for creating offices that exercise the three powers of government without unconstitutionally stripping the president's law execution power. Assuming that Congress constitutionally can create officers who exercise more than one of the three powers of government,<sup>310</sup> the president must be able to control such officers in their exercise of executive power. If the president wishes the SEC to alter its enforcement priorities, its commissioners and prosecutors must heed his desires because their authority to execute the laws ultimately derives from the executive and not Congress. In demarcating their offices, Congress merely permits these officers to execute the laws. The president is the only entity who can actually authorize their law execution. In executing the law, these commissioners and prosecutors must be the president's eyes and ears.

If the SEC commissioners and prosecutors defy the president's law enforcement priorities or instructions, the president must be able to retract their prosecutorial authority. It is the president's power of law execution that the commissioners and prosecutors are helping to carry into execution. If they are not carrying into execution the president's executive power, then the president may bar them from executing the law. This constitutional power of selective removal (removal of executive authority and not actual removal from office)<sup>311</sup> ensures that the president retains the power to

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<sup>310</sup> The Constitution implicitly might forbid having more than one power exercised by the same institution by vesting the three powers of government in different institutions. In other words, if the Constitution mandates separated powers, Congress cannot combine them. Under this view of the Constitution, Congress cannot create officers exercising more than one power of government.

<sup>311</sup> Admittedly, the selective removal power appears unprecedented. Historically, the executive power could eject the person from the office and not strip away, in a piecemeal

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control federal law execution.<sup>312</sup>

None of this counters the weighty policy arguments against presidential involvement in the prosecution of presidential allies and political enemies. But we should not be surprised that the Constitution resolves some difficulties (the need for vigorous, efficient, uniform, and responsible law execution) only by creating others. There should be no doubt that the chief prosecutor will face conflicts of interest in prosecutorial decisions and that he can abuse his power. President Adams faced conflicts of interest in prosecuting his opposition, and there were likely many who view him as having abused his authority.

But these difficulties are not unique to the prosecutorial power. The Constitution is replete with such conflicts of interest. Congress decides its own budget<sup>313</sup> and which laws will apply to its members.<sup>314</sup> The judiciary frequently decides cases that determine the powers, rights, and jurisdiction of the courts.<sup>315</sup> And the president can pardon his associates and friends.<sup>316</sup> Nothing about the potential for prosecutorial abuse requires us to be especially fearful of the prosecutorial power.

Moreover, there are constitutionally authorized means of checking prosecutorial abuses: vigorous congressional oversight coupled with a willingness to impeach and convict errant executive officials, including the president. Instead of looking for a means to evade or subvert the grant of executive power to the president, the House should make more frequent use of its limited (yet significant) executive power of prosecution and try impeachment cases before the Senate. As my colleague Michael Rappaport has argued, impeachment investigations are the means by which Congress (and the nation) should expect to uncover and sanction executive

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fashion, the powers employed by an officer. Yet, the selective removal power is itself a response to an unprecedented innovation—the creation in the late 19th century of officers exercising more than one power of government. Assuming that Congress can create such officers, Congress ought not be able to strip away portions of the executive power in the process. Selective removal allows Congress to enjoy one innovation (vesting multiple powers of government in one institution) without permitting its unconstitutional innovation of carving up the executive power.

<sup>312</sup> While the president may not have the constitutional power to direct these independent agency officers in their nonexecutive tasks, nothing said here precludes Congress from granting such power to the president. The point is that the president must have power to control exercises of executive power, not that he must (or must not) have power to control exercises of legislative or judicial power.

<sup>313</sup> See U.S. CONST. art. I, § 7, cl.1 (appropriations power).

<sup>314</sup> See U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings.”). See generally U.S. CONST. art I (granting Congress the power to create and pass laws).

<sup>315</sup> See U.S. CONST. art. III, § 2, cl.1 (“The judicial Power shall extend to all Cases, in Law in Equity . . .”).

<sup>316</sup> See U.S. CONST. art. II, § 2, cl. 1 (the president “shall have Power to grant Reprieves and Pardons for Offenses against the United States . . .”).

wrongdoing, including prosecutorial misconduct.<sup>317</sup>

#### 4. *The Constitutionality of Prosecutorial Autonomy*

The president has the constitutional authority to control prosecutors by virtue of the executive power, and he has a constitutional duty to ensure the faithful prosecution of alleged law breakers. Consistent with these provisions, what, if anything, may the president do to alleviate legitimate concerns about the politicization of prosecutions and prosecutorial self-dealing?

Even if he were inclined, a president cannot grant official prosecutors complete independence. If the president did not have a faithful execution duty, perhaps the president could permit the complete independence of official prosecutors. Standing alone, the grant of executive power arguably does not compel the president to enforce any law, and, hence, he might choose not to exercise his power to control the enforcement of a law, just as the president may choose not to veto bills or not to pardon. But the faithful execution duty constrains his ability to grant freedom to prosecutors. Though the Faithful Execution Clause does not require the president to review each and every prosecutorial decision,<sup>318</sup> it does require the president to take appropriate measures when he discovers unfaithful law execution.

Even though the Faithful Executive Clause arguably requires a minimum level of presidential superintendence, the Clause likely permits the president to grant prosecutors broad autonomy in their decision making. An earnest and honest president would stay within the bounds of the Constitution if he told his prosecutors, “until I learn of the possibility of unfaithful prosecutions on your part, you can prosecute my friends, allies, and officers with impunity. Moreover, until I learn of possible prosecutorial shirking, I will not review your decisions not to prosecute my opponents.”

While some superintendence measures are appropriate, presidents have good reason not to micromanage their officers’ execution of the law. By

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<sup>317</sup> See generally Michael B. Rappaport, Essay, *Replacing Independent Counsels with Congressional Investigations*, 148 U. PA. L. REV. 1595 (2000) (advocating the replacement of the independent counsel statute with congressional oversight and investigation of executive officials).

<sup>318</sup> Though the Faithful Execution Clause requires the president to try to ensure faithful execution, it does not require him to superintend every act of law execution, which would be impossible. The Clause should not be read to require the impossible. More generally, deciding whether the president has satisfied his faithful execution duty seems to require a circumstantial inquiry. For instance, Washington was much more watchful than a contemporary president ever could be. There were far fewer officers to supervise. In an era of millions of federal employees, modern presidents cannot be held to Washington’s supervision standard.

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avoiding presidential micromanagement, the president is able to focus on other matters and also to retain the interest of highly qualified and skilled prosecutors. Paradoxically, though the president has the power to control official prosecutors, few things might make the chief executive weaker than using that power to the fullest extent and becoming an overbearing, meddling president.

The revisionist account of the president's relationship to prosecution has little to commend it. As even some of the revisionists have admitted, text and structure have always pointed towards presidential control. And history, it turns out, provides no safe haven for the revisionist account either. History actually reveals a consistent practice of chief executive control of official prosecutors extending from England, to the colonies, and to the states. The Continental Congress presumed the legitimacy of chief executive control when it repeatedly requested state chief executives to instruct state attorneys to prosecute those hostile to federal interests.

Rather than creating a nationwide system of independent district attorneys, as revisionists have suggested, the Judiciary Act of 1789 established a system of prosecutors who labored under presidential control. The first three presidents directed the district attorneys on numerous occasions, commanding the attorneys to commence and halt prosecutions. And this control was understood to flow from the Constitution itself, for the Judiciary Act never authorized presidential control and the presidents themselves justified their direction by reference to the Constitution. Significantly, though presidential control was quite public and often controversial, few claimed that the control was unlawful or unauthorized. In fact, the other branches seemed to understand that the Constitution granted the president the authority to control representation of the United States in court. In short, the district attorneys were not precursors of the independent counsel, each able to prosecute as he saw fit and free of the chief prosecutor's control. Rather each was the chief prosecutor's instrument in implementing his executive power of prosecution and in satisfying his faithful law execution duties.

### *III. Presidential Control of Popular Prosecutions*

Some scholars might conclude that the textual, structural, and historical arguments discussed in Part II not only establish presidential control of official prosecutions, but that they also bear out chief executive control of *all* prosecutions of federal offenses, whether brought by official or private parties. Of course, others will regard these arguments as perhaps showing (or tending to suggest) that the Constitution authorizes presidential control over official prosecutors only. Because popular prosecutors represented the United States in court, however, perhaps early presidents



really could not control all prosecutions of federal offenses. As noted earlier, early Congresses authorized numerous popular actions,<sup>319</sup> whereby private parties could bring suits on behalf of the United States. Successful private parties garnered a portion of any court ordered fine or forfeiture, with the remainder going to the treasury.<sup>320</sup> If private parties independent of the executive could prosecute suits on behalf of the United States, it simply cannot be the case that early presidents could control all prosecutions. Instead, as many have argued, when Congress authorized popular actions, complete executive control of prosecution became impossible.<sup>321</sup>

Supporters of the chief prosecutor thesis lend credence to the claim that early Congresses authorized independent popular actions. Believing that popular actions pose a challenge to the theory of the unitary executive, such scholars tend to argue that popular actions must be unconstitutional.<sup>322</sup> The Executive Power Clause wholly precludes the creation of popular actions because all of the executive power belongs to the president alone, they argue.<sup>323</sup> Moreover, the Faithful Execution Clause implies that popular actions must be unconstitutional because it would be impossible for the president to ensure faithful execution if individuals could bring suits independent of presidential control.<sup>324</sup> Finally, popular actions violate the Appointments Clause because only officers of the United States may prosecute on behalf of the United States, and citizens who bring popular actions are not officers.<sup>325</sup> Hence, despite their existence since the Constitution's earliest days, popular actions are unconstitutional.<sup>326</sup>

This assertion is a little hard to stomach. Popular actions were not an innovation of 1789; rather, they are part of our English patrimony.<sup>327</sup> For centuries, popular actions, warts and all, were the principle means of enforcing English penal laws. The government harnessed the ample

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<sup>319</sup> As noted earlier, the phrase "popular actions" refers to those actions, criminal and civil, that citizens could bring on behalf of the crown. In return for bringing the suit, the popular prosecutor would receive a statutorily set portion of the fine.

<sup>320</sup> See *supra* notes 21-22.

<sup>321</sup> See Krent, *supra* note 18, at 300 (noting that popular prosecutor "unquestionably participated in setting federal criminal law policy"); Lessig & Sunstein, *supra* note 18, at 21.

<sup>322</sup> See, e.g., Blanch, *supra* note 22, at 767-68; Lovitt, *supra* note 22 at 855-56.

<sup>323</sup> Lovitt, *supra* note 22, at 876-79.

<sup>324</sup> *Id.*

<sup>325</sup> Blanch, *supra* note 22, at 736-47.

<sup>326</sup> Under this view, early popular actions are the structural Constitution's counterpart to the Alien and Sedition Acts. Just as many recognize that the Alien and Sedition Acts were unconstitutional, so too must we concede the unconstitutionality of the early popular action provisions.

<sup>327</sup> See generally JOHN L. J. EDWARDS, *THE LAW OFFICES OF THE CROWN* (1964); PENDLETON HOWARD, *CRIMINAL JUSTICE IN ENGLAND: A STUDY IN LAW ADMINISTRATION* (1981).

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avarice of informers to enforce the law. Indeed, professional informers sprang up to prosecute their fellow citizens in return for portions of fines.<sup>328</sup> Moreover, the system gave criminal associates an incentive to turn on each other in the hopes of securing a pardon and a portion of a fine.<sup>329</sup> Popular actions made it more difficult for criminals to stay true to the idea of honor amongst thieves.<sup>330</sup>

The crown might have used its absolute veto to thwart legislation creating popular actions. Yet the crown apparently did not do this. To the contrary, the crown likely valued popular actions. Popular actions helped enforce the laws by inflicting penalties on wrongdoers and also by serving to deter potential wrongdoers.<sup>331</sup> Moreover, the system surely saved on crown outlays because there was a diminished need to pay governmental lawyers to enforce English laws. Instead, the public helped the crown enforce the laws.<sup>332</sup> Perhaps most important, popular actions helped the crown collect fines and forfeitures.<sup>333</sup> To be sure, the crown only received a portion of the funds collected rather than the whole sum. Yet, the crown very well might have believed that net revenues were higher under a system of popular actions as compared to a costly, nationwide system of governmental investigators and prosecutors. For all these reasons, the crown likely viewed popular actions as a help rather than a hindrance.

Does English and early American history oblige us to accept the constitutionality of independent popular actions brought by citizens, each able to bring suits on behalf of the United States and answerable to no one? Not at all. Contrary to the views of some, English and early American popular actions do not prove that Congress can authorize citizens to bring popular actions independent of presidential control. Although the case for executive control of popular actions is not as compelling as the case for executive control of official prosecutions, considerations of text, structure, and history strongly favor presidential control.

As noted, constitutional text and structure support the notion that the president must be able to exercise ultimate control over all popular actions. As we saw earlier, the Article II Vesting Clause grants the president the right to control law execution, including prosecutions. If independent popular actions were constitutional, each independent popular prosecutor would have a share of the executive power. Structurally, the Founders established a unitary executive to ensure uniform and responsible law

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<sup>328</sup> J.J. TOBIAS, *CRIME AND POLICE IN ENGLAND* 120 (1979).

<sup>329</sup> 2 LEON RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750* 40-42, 138 (1957).

<sup>330</sup> *Id.* at 53.

<sup>331</sup> *Id.* at 142-47.

<sup>332</sup> *See id.*

<sup>333</sup> *Id.*

execution.<sup>334</sup> Independent popular actions imperil these values because each popular prosecutor will establish her own enforcement policies and will be accountable to no one for their law execution choices.

What type of control over popular actions must the president retain? Consistent with the grant of executive power, the president must be able to terminate popular actions using either a pardon or a *nolle prosequi*. When the president can terminate popular prosecutions, he remains in possession of the executive power because he can ensure that prosecutions reflect his law enforcement priorities and principles. He also can prevent popular prosecutors from bringing unfaithful prosecutions.

Obviously, a president might pardon the subject of a popular prosecution when the president believes the prosecution is unwarranted or unnecessary. For instance, a pardon would be appropriate when the president strongly believes that the target of the popular prosecution is innocent of the charged offenses. Alternatively, the executive might pardon a target of a popular prosecution because she has cooperated in an ongoing law enforcement investigation. Finally, the executive might pardon the target of the popular action for nothing more than a promise to refrain from further violations of the law.

A *nolle prosequi* is the executive's determination that the United States does not wish to continue prosecuting someone. Entering a *nolle prosequi* before a court permits the executive more flexibility than a pardon, because a *nolle* does not bar future prosecutions for the same offense.<sup>335</sup> A *nolle* is valuable in situations where the president does not believe a prosecution is currently warranted but wishes to leave open the possibility of a future prosecution. For instance, the president might believe that there currently is insufficient evidence to warrant a popular prosecution of someone. But the president might want to revisit the question at some later date, when the evidence of wrongdoing might be more substantial. In this scenario, the president would *nolle* the popular prosecution, leaving open the option of a new official prosecution. Alternatively, the president might prefer the *nolle* option when the president believes that a prosecution is warranted but concludes that the popular prosecutor will do a poor job of prosecuting. After entering the *nolle*, the president immediately can institute a new suit using official prosecutors and thereby ensure faithful law execution.

The idea of a terminable popular prosecution has English roots. The crown could enter a *nolle prosequi* on criminal informations brought by private citizens.<sup>336</sup> The *nolle prosequi* completely halted the information

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<sup>334</sup> See *supra* Part II.A-B.

<sup>335</sup> See *Serfass v. United States*, 420 U.S. 377, 388, 394 (1975) (discussing when Double Jeopardy Clause attaches).

<sup>336</sup> See *infra* Part III.B.2.a.

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and left open the possibility of subsequent official prosecution.<sup>337</sup> The rule with respect to *qui tams* was less proexecutive, however. The English judiciary concluded that once a *qui tam* relator had commenced his suit, the crown could only *nolle prosequi* or pardon its share of the fine and could not excuse or release the portion sought by the prosecuting relator.<sup>338</sup> Nonetheless, because the crown could exercise partial control over *qui tam* actions and absolute control over informations, the crown clearly enjoyed a good deal of authority over popular actions.<sup>339</sup>

Nothing in early federal statutes undermines the case for terminable popular prosecutions. To date, scholars have concluded that these statutes somehow forbade executive control. Yet these statutes were completely silent on the issue of executive control of popular actions. The strong founding consensus that the president controlled law execution strongly suggests that this statutory silence is better understood as permitting executive termination of popular actions.<sup>340</sup>

Construing silence as forbidding presidential control is particularly problematic in this context. Neither the Judiciary Act nor any other act of Congress granted the president the power to direct or remove district attorneys.<sup>341</sup> Nonetheless, as we have seen, early presidents exercised these powers.<sup>342</sup> No federal statute conferring these powers was necessary because the president had such authority by virtue of the Constitution. The same could be said about the statutes creating popular actions. These statutes did not need to authorize presidential termination of popular actions because the Constitution already established the baseline of presidential control of prosecution.

#### A. *Text and Structure*

Arguments here largely mirror the earlier ones in favor of presidential control of official prosecutions. The Article II Vesting Clause not only grants the President the power to execute the law, it also authorizes the President to control the execution of federal law. As Madison argued during the removal debate, those officers who help execute the law must exercise their authority in submission to the wielder of executive power.<sup>343</sup> Likewise, if Congress decides that members of the public may enforce the law on behalf of the United States, their law enforcement must occur under

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<sup>337</sup> See *infra* Part III.B.2.a.

<sup>338</sup> See *id.*

<sup>339</sup> See *id.*

<sup>340</sup> See *infra* Part III.B.1.

<sup>341</sup> See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92-93.

<sup>342</sup> See *supra* Part II.C.4.

<sup>343</sup> 1 ANNALS OF CONGRESS 394, 500 (1789) (arguing that the president must have the power to remove executive officers).

the control of the constitutional executor of the federal law, the president of the United States.

Likewise, because the Faithful Execution Clause obliges the president to ensure faithful execution of federal law,<sup>344</sup> the president should use his executive power to superintend popular actions. Although Jefferson argued that the president ought to stop unlawful prosecutions in the context of discussing official prosecution, the logic of his argument applies regardless of the traits of the prosecutor.<sup>345</sup> Suppose a *qui tam* informant sues a contractor on behalf of the United States, but there is no credible evidence that the contractor actually violated the law. This suit arguably constitutes faithless law execution, and the president should use his executive power to stop the prosecution from going forward. Or suppose the executive believes that the *qui tam* informant has conspired with the contractor and brought such a weak case that the contractor will be acquitted. Using his executive power, the executive should take over the suit and put it “into a legal train,”<sup>346</sup> lest the two colluding parties successfully thwart future government prosecution of the contractor’s illegal actions.

The pardon power grants the president a blunt instrument of control over popular actions. Though a relator or informer sues for herself as well as the United States, the private party has not suffered an injury or offense when she comes before the court,<sup>347</sup> rather, in order to make her way into court, she must allege that the defendant has offended the United States.<sup>348</sup> Because the United States has suffered an offense when its laws are violated, the president, by virtue of the pardon power, has the ability to pardon the entire offense.<sup>349</sup> A presidential pardon precludes an enforceable final judgment and, therefore, prevents the popular prosecutor’s receipt of any portion of the fine or forfeiture.

Defenders of the constitutionality of independent popular actions might respond with a number of arguments. First, these defenders might claim that, when members of the public bring popular actions, they do not “execute” the law at all. As a matter of constitutional law, perhaps popular prosecutors “administer” the law when they seek to have the court impose a

<sup>344</sup> See U.S. CONST. art. II, § 3, cl. 4 (“[H]e shall take Care that the Laws are faithfully executed . . .”).

<sup>345</sup> See Letter from Thomas Jefferson to Edward Livingston (Nov. 1, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 33; see also *supra* note 251 and accompanying text.

<sup>346</sup> See Letter from Thomas Jefferson to Edward Livingston (Nov. 1, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 33.

<sup>347</sup> See *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772-73 (2000).

<sup>348</sup> *Id.* at 773.

<sup>349</sup> U.S. CONST. art. II, § 2 (the president “shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment”).

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fine or forfeiture.<sup>350</sup> If popular prosecutors do not execute the law when they prosecute, popular actions never implicate the executive power or the Faithful Execution Clauses. Such arguments seem rather feeble. If official prosecutors help exercise the executive power and help execute the laws, then citizens do the same when they prosecute. There is no evidence that the constitutional character of prosecution changes based on the prosecutor's traits. Because popular prosecutors execute the law when they prosecute on behalf of the United States, popular prosecutions necessarily implicate the Executive Power and Faithful Execution Clauses.

Second, some skeptics of presidential control of popular actions might claim that, for a number of reasons, popular actions are only minor incursions into the executive's power—a kind of constitutional *damnum absque injuria*.<sup>351</sup> To begin with, a *qui tam* relator usually only prosecutes a particular offender under a particular statute. Unlike an official prosecutor, the popular prosecutor does not have a roving commission to execute any one of thousands of federal laws. Additionally, popular prosecutors may not have the financial wherewithal to serve as general prosecutors or to overwhelm defendants with lawyers and resources. Because popular prosecutors may be jurisdiction and resource constrained, it may seem that popular prosecutors cannot possibly weaken, in any meaningful way, the chief prosecutor's general grip on prosecutions.

Such arguments understate the constitutional stakes. If a particular independent popular action is constitutional, everyone in the United States may prosecute as many people as violate the relevant statute and the ability to do so free of executive control. Moreover, once one accepts the constitutionality of popular actions, nothing prevents Congress from creating popular actions across hundreds or thousands of federal statutes. Finally, while no private party can match the federal government's resources, there are quite a few private parties who can risk a great deal in return for an even bigger payoff. Indeed, when England had numerous popularly actionable laws, England developed a system of professional informers who were in the business of suing on behalf of the Crown. In short, one ought not believe that independent popular actions are but a minor invasion of the executive power because if independent popular actions are constitutional, Congress can subject the president's executive power to death by a thousand cuts.

Third, defenders of independent popular actions might claim that the pardon power extends only to criminal offenses.<sup>352</sup> If that is true, the

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<sup>350</sup> See Lessig & Sunstein, *supra* note 18, at 13 (raising doubts about whether the Founders meant to give the president control over the "administration" of the law).

<sup>351</sup> BLACK'S LAW DICTIONARY 398 (7th ed. 1999) (defining *damnum absque injuria* as "[l]oss or harm for which there is no legal remedy").

<sup>352</sup> Caminker, *supra* note 22, at 371 (noting that the pardon power only extends to

pardon power does not permit the president to pardon offenses prosecutable by a civil *qui tam* action. Yet the Supreme Court has held the pardon power extends to fines, penalties, and forfeitures.<sup>353</sup> The Supreme Court's conclusion seems correct, for whenever someone violates the law and the law provides for a fine, penalty, or forfeiture to be paid to the United States, the violator has committed an offense against the United States.<sup>354</sup> Whether an offense is designated criminal or civil is immaterial, for in either case, someone has committed an offense against the laws of the United States.<sup>355</sup> Because popular actions seek penalties and forfeitures owed to the United States in consequence of offenses committed against the United States, the president may pardon any offense that might be pursued by popular action.

The same considerations of constitutional structure that point to the unconstitutionality of independent official prosecutors also weigh against the constitutionality of independent popular actions. As discussed earlier, the Constitution established a unitary executive to ensure uniformity and responsibility in law execution.<sup>356</sup> These structural interests are undermined if Congress can create independent popular actions. If independent popular prosecutors may prosecute offenses against the United States without regard to the president's law enforcement policies, there likely will be no uniformity in national law execution. For example, the president may instruct his subordinate prosecutors to take a soft line in enforcing a particularly harsh law. Yet if independent *qui tam* relators can prosecute the same statute vigorously, the president cannot establish a

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criminal offenses and citing *Ex Parte Grossman*, 267 U.S. 87, 120 (1925), for that proposition).

<sup>353</sup> *Osborn v. United States*, 91 U.S. 474, 478 (1875) ("The pardon, in releasing the offence, obliterating it in legal contemplation . . . , removes the ground of the forfeiture upon which the decree rests, and the source of title is then gone.") (involving a petitioner brought suit for restitution of his property confiscated as a result of a lower court decree after petitioner was subsequently pardoned from the offense giving rise to the decree).

<sup>354</sup> See, e.g., EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984* 189 (5th ed. 1984); W.H. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* 51-53 (1941).

<sup>355</sup> The Constitution uses "offence" in only two places: in Article I (Congress can define and punish "Offences against the Law of Nations"), U.S. CONST. art. I, § 8, cl. 10, and the Fifth Amendment ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"), U.S. CONST. amend V. "Offences," as used in Article I, would seem to cover both civil and criminal penalties, for it would be odd to think that Congress's power with respect to violations of the law of nations was limited to imposing criminal sanctions. Offences as used in the Fifth Amendment would seem to refer to criminal offenses only, for only criminal offenses would encompass punishments that put life and limb in jeopardy. Nonetheless, the usage in the Fifth Amendment does not mean that offenses can only encompass crimes. Instead, the Amendment is best read as providing that, of the category of possible offenses, the double jeopardy prohibition only applies to those offenses that jeopardize life or limb.

<sup>356</sup> See *supra* notes 190-192 and accompanying text.

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uniform law enforcement policy for the nation. Because the popular prosecutor will prosecute whenever the expected private value of the suit exceeds the private costs, the popular prosecutor likely will ignore the president's directions and the public policy considerations that underlay his directions.

Responsibility also becomes diffused when every citizen has the power to execute the law. One reason the founders opted for a unitary executive was to ensure that one executive would be accountable for law enforcement choices. Indeed, as noted earlier, the founders rejected an executive council and multiple chief executives because these structures supposedly led to irresponsible law execution.<sup>357</sup> As compared to an executive triumvirate or council, independent popular actions make the assignment of responsibility more difficult by several orders of magnitude. Rather than crediting or blaming a single chief executive, the public must labor to identify individual popular prosecutors in order to apportion credit or blame. Even if the public could identify individual popular prosecutors, these prosecutors, motivated purely by their own private interests, likely will be unconcerned about the public's reaction. Lacking leverage, the public can do little to sanction irresponsible and unfaithful popular prosecutors.<sup>358</sup>

None of these arguments proves that popular actions are *per se* unconstitutional. The problem with independent popular prosecutions lies not in their *popular* nature but in the *independence* they convey. In contrast with independent popular actions, terminable popular actions (popular actions that the president may terminate) pose no executive power problems. When the president can terminate popular prosecutions, Congress has not unconstitutionally subdivided the president's executive power. Instead, Congress has empowered private parties to help the president exercise his executive power. If the president objects to a popular prosecution, he can seize control of the suit and either terminate it once and for all, or direct his official prosecutors to bring it under a proper legal train.<sup>359</sup>

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<sup>357</sup> See *supra* note 122 and accompanying text.

<sup>358</sup> Perhaps Congress might structure popular actions in order to replicate the benefits of a unitary executive. If Congress can deputize the entire populace to enforce the law independent of the president, it presumably could authorize a smaller subset of the public to prosecute on behalf of the United States. Putting aside Appointments Clause issues, Congress might authorize just one person, such as the loser of a presidential race, to bring popular actions. Centralizing control of popular actions in the hands of someone other than the president highlights the constitutional difficulties of popular actions, for it would be clear that Congress had replaced the Constitution's chief executive with a statutory chief executive, a kind of ersatz chief prosecutor.

<sup>359</sup> At this point, it is necessary to say a few words about Appointments Clause objections to popular actions. The Appointments Clause grants the president the power to appoint all officers of the United States, with the advice and consent of the Senate. U.S.



There remains the important question of Congress's constitutional authority to create popular actions. As the discussion up until this point has hinted at, Congress cannot create independent popular prosecutors because it lacks constitutional authority to strip away the executive's power of controlling law execution. None of Congress's powers over commerce, taxes, bankruptcy, etc., permit Congress to vest the executive power where it sees fit. Likewise, the Necessary and Proper Clause would be of little avail because any such statute would not carry into execution any power of government, for no other constitutional provision sanctions the creation of independent popular prosecutors who wield portions of the executive power. Finally, any such statute would be improper, as it would mete out the president's executive power.

Yet the Constitution arguably raises no bar to Congress's creation of terminable popular prosecutions. A sound case can be made that statutes authorizing terminable popular prosecutions (and citizen law enforcement, more generally) are just one of many permissible necessary and proper means for carrying into execution the president's executive power. Just as Congress can use its necessary and proper authority to create executive officers and departments, so too can Congress deploy its authority to authorize popular prosecutions terminable by the president. Hence, while the Constitution does not authorize Congress to redistribute the executive power among an executive horde of millions, it arguably does permit Congress to authorize the use of the general public to help the president execute the law.<sup>360</sup>

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CONST. art. II, § 2, cl. 2. Congress, however, may vest the appointment of inferior officers with the president, the department heads, or the courts. *Id.* In *Buckley v. Valeo*, 474 U.S. 1 (1976), the Supreme Court declared that commissioners of the Federal Election Commission had to be appointed by the president because they controlled the prosecution of federal offenses. *Id.* at 140. Many critics of popular actions have cited this case and argued that relators and informers must be appointed under the rubric of the Appointments Clause. *See, e.g.,* Blanch, *supra* note 22, at 736-47. Since they are not, popular actions must be unconstitutional, or so the argument goes. This Article takes no position on whether the Appointments Clause bars the current structure of popular actions. If the Appointments Clause, however, does pose a fatal problem for existing popular actions, it might be possible to restructure them to satisfy these objections. Perhaps the president could be given the authority to appoint popular prosecutors as inferior officers of the United States. If the president had such authority, there would be no Appointment Clause objections to popular prosecutors.

<sup>360</sup> For the most part, modern defenders of independent popular actions have focused on *qui tams*, which as noted earlier, are civil actions to recover debts owed the government. Yet, there is no reason to believe that Congress has the power to create civil popular actions (*qui tams*) and no power to create criminal popular actions (informations). If Congress can parcel out civil law enforcement, nothing would bar Congress from likewise dividing up criminal law enforcement. As noted earlier, the Constitution does not indicate that the president has a stronger grip on criminal law enforcement than on civil law enforcement. Rather, both areas are under his sway by virtue of his grant of executive power. If Congress may nonetheless strip him of his control of civil law enforcement, there is no textual or

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*B. History of the Popular Action*

Critics of the chief prosecutor thesis have eschewed textual and structural arguments, preferring to make historical claims about popular actions. As these critics are quick to point out, popular actions are part of our English heritage. Even though American colonies and states utilized official prosecutors, they authorized popular actions. Continuing the tradition, early Congresses enacted from five to fourteen popular actions statutes.<sup>361</sup> Critics argue that if individuals independent of the federal executive could sue on behalf of the government, then the president's control of prosecution was not complete. The very prevalence of early popular actions supposedly proves that the founding generation did not read the Constitution as granting the president complete control of prosecution.<sup>362</sup>

But the history of public prosecutions is hardly so one sided. This subpart examines the popular actions themselves before turning to English and American judicial opinions. Far from proving that the president lacked

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structural reason (arising out of Article II at least) why the Congress could not likewise grant every citizen the ability to help impose criminal fines and prison terms.

<sup>361</sup> The different figures arise out of a dispute on how to characterize certain statutes. Five statutes contained express causes of action. *See* Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 102 (allowing informer to sue and receive half of fine for failure to file census return); Act of July 5, 1790, ch. 25, § 1, 1 Stat. 129 (extending same to Rhode Island); Act of July 20, 1790, ch. 29, §§ 1, 4, 1 Stat. 131, 133 (allowing private individual to sue and receive half of fine for illegally employing seamen without contracts or illegally harboring runaway seamen); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137-38 (allowing private individual to sue and receive half of goods forfeited for unlicensed trading with Indian tribes); Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 209 (allowing person who discovers violation of spirits duties, or officer who seizes contraband spirits, to sue and receive half of penalty and forfeiture, along with costs, in action of debt); *cf.* Act of Apr. 30, 1790, ch. 9, §§ 16, 17, 1 Stat. 116 (allowing informer to bring criminal prosecution and receive half of fine for criminal larceny or receipt of stolen goods). Another nine statutes provided a bounty to informers, but do not make clear whether the bounty was for a successful popular action (in which case the statute authorized a popular action) or was instead for informing authorities of a violation ultimately prosecuted by the government. *See* Act of July 31, 1789, ch. 5, § 38, 1 Stat. 48 (giving informer a quarter of penalties, fines, and forfeitures authorized under a customs law); Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 60 (same under a maritime law); Act of July 31, 1789, ch. 5, § 29, 1 Stat. 44, 44-45 (giving informer full penalty paid by customs official for failing to post a fee schedule); Act of Aug. 4, 1790, ch. 35, § 55, 1 Stat. 173 (same); Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 60 (same under a maritime law); Act of Aug. 4, 1790, ch. 35, § 69, 1 Stat. 177 (same under another customs law); Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67 (providing informer half of penalty upon conviction for violation of conflict-of-interest and bribery provisions in Act establishing treasury department); Act of Mar. 3, 1791, ch. 8, § 1, 1 Stat. 215 (extending same to additional treasury employees); Act of Feb. 25, 1791, ch. 10, §§ 8, 9, 1 Stat. 195, 195-96 (providing informer a portion of fines resulting from improper trading or lending by agents of Bank of United States); *cf.* Act of Aug. 4, 1790, ch. 35, § 4, 1 Stat. 153 (apportioning half of penalty for failing to deposit ship manifest to official who should have received manifest and half to collector in port of destination).

<sup>362</sup> *See* Krent, *supra* note 18, at 300-03; Lessig & Sunstein, *supra* note 18, at 20-21.

authority to supervise popular prosecutors, these sources suggest that the chief executive had substantial authority to terminate popular actions.

### *I. The Early Federal Popular Actions*

Both sides of the scholarly debate on popular actions have read too much into the early federal popular actions. Scholars have assumed that the failure to mention presidential control in the early popular actions indicates that Congress deliberately chose not to grant the president control over these prosecutions. Scholars who oppose the chief prosecutor thesis have gone on to contend that these congressional choices indicate that the Constitution did not grant the president any control over popular actions.

Yet there is no evidence to support either conclusion. Although it is true that the popular actions never authorized presidential termination, neither did they bar such termination. In fact, they said absolutely nothing about executive control or intervention.<sup>363</sup> Statutory silence is a notoriously unreliable indicator of congressional intent. As the Supreme Court recently observed, silence “normally creates ambiguity. It does not resolve it.”<sup>364</sup> Based on silence alone, one should not read these statutes as somehow denying the president the power to terminate popular actions.

Moreover, advocates of presidential control believe that the president has control over law execution by virtue of the Constitution, regardless of whether statutes grant or confirm this authority. Obviously, statutory silence is a poor indicator of what the *Constitution* grants the president, for Congress is not obliged to affirm the Constitution’s grants of powers to the other branches. Indeed, one suspects that federal statutes rarely contain an affirmation of the president’s constitutional authority.

It is particularly perilous to make assumptions about the meaning of statutes in the context of executive power. We have seen that the Judiciary Act nowhere hinted that the president could control district attorneys. Similarly, the Judiciary Act nowhere provided that the president could remove district attorneys. Nonetheless, the Act was certainly not regarded as somehow precluding presidential control and removal. Instead, by virtue of their executive power, presidents could control representation of the United States and remove district attorneys.<sup>365</sup>

Likewise, though the popular action provisions said nothing about presidential control, the background understanding of the executive nature of prosecutions suggests that the president could terminate popular prosecutions. Arguably, the statutes said nothing about presidential control because nothing needed to be said. Notwithstanding their silence, the president could halt popular prosecutions. Because the president had a

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<sup>363</sup> See *supra* note 361 (describing statutes).

<sup>364</sup> *Barnhart v. Walton*, 535 U.S. 212, 218 (2002).

<sup>365</sup> See *supra* Part II.C.4.

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constitutional right to execute the law and was supposed to ensure uniform, prompt, and responsible law execution, the president had constitutional authority over all prosecutions, whether undertaken by government prosecutors or members of the public.

More generally, we should construe the public prosecution provisions against the backdrop of common understandings about constitutional powers and constraints. For instance, did the federal courts lack authority to dismiss collusive popular actions because the statutes said nothing on the matter? If popular prosecutors could collude with the accused, they might agree that, in return for money, they would lose the case and thereby both cheat the Treasury and prevent official prosecutors from bringing a subsequent suit. Given that collusive prosecutions were a notorious problem in England,<sup>366</sup> it would be unwise to conclude that since the statutes never expressly conveyed this authority to the courts, the courts could not dismiss collusive popular actions. Because, as a matter of constitutional law, the courts must always decide if they have a real case or controversy,<sup>367</sup> the courts likely had this power regardless of whether the popular actions explicitly allowed courts to review prosecutions for potential collusion. The point is that we ought not regard the popular action provisions as vitiating constitutional constraints or as undermining constitutional powers (such as the executive power) merely because these statutes said nothing about these constraints and powers.

All in all, no one has adduced evidence that early Congresses meant to prohibit presidential termination of popular actions. Statutory text provides no support, and no scholar has yet found any support from any congressional debates. On the other hand, there is a tremendous amount of evidence that the president was empowered to control law execution, with no one suggesting that the president's control did not extend to popular actions. Given the background constitutional understanding, it would be a mistake to conclude that the early popular actions count as evidence of the constitutionality of independent popular actions.

## *2. Executive Supervision of Popular Actions*

So much for the text of the early statutes. What of actual practices under them? The definitive survey of early federal popular actions has yet to be written. We do not know how many federal prosecutions were brought in the early years. Nor do we know what portion of these were popular actions. Hence, we do not know how significant popular actions

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<sup>366</sup> Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 89 (1972).

<sup>367</sup> *Lord v. Veazie*, 49 U.S. 251, 254-55 (1850) (holding that attempt to bring case when interests of plaintiff and defendant are not adverse is punishable by contempt of court).

were in the overall scheme of law enforcement in the early years after the Constitution. The Office of Legal Counsel has claimed that of thirty-five prosecutions brought under one colonial statute that permitted *qui tams*, only one was a *qui tam* action.<sup>368</sup> But, of course, we have no way of knowing whether this pattern holds true across the many federal popular action provisions.

Moreover, we do not know whether early presidents ever terminated (or unsuccessfully sought to terminate) popular prosecutions. What accounts for the lack of evidence of attempted presidential termination of popular actions? Obviously, one answer might be that presidents thought that they could not terminate popular prosecutions. But other answers are possible, answers consistent with the view that independent popular actions are unconstitutional. Perhaps there were so few popular actions that there were few opportunities for presidential termination.<sup>369</sup> Or maybe the president might have had little or no policy difficulties with the majority of popular prosecutions (as was likely true with the vast majority of official prosecutions), and, hence, there was no need for termination of popular prosecutions. Finally, there remains the possibility that certain popular prosecutions were not brought precisely because potential popular prosecutors understood that the president might terminate the popular prosecution.

Lacking direct evidence about presidential termination practices (or the lack thereof), we must cast our net wider and examine British and American cases. These authorities may help us flesh out the chief prosecutor's relationship to popular prosecutions.

*a. English Practice*

English case law favored executive termination up to a point. The crown could halt popular informations by entering a *nolle prosequi* when it believed the popular prosecutions were vexatious, or contrary to the crown's law enforcement policy.<sup>370</sup> In *King v. Guerchy*,<sup>371</sup> the crown halted a popular prosecution of the French ambassador to England.<sup>372</sup> In *Rex v. Fielding*,<sup>373</sup> the crown prevented a popular prosecution of a justice of

<sup>368</sup> See Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. Off. Legal Counsel 207, 249 (1989).

<sup>369</sup> See *id.* at 235-36.

<sup>370</sup> *Criminal Law – Nolle prosequi – Trial Court Has Power to Dismiss for Want of Prosecution*, 41 N.Y.U. L. REV. 996, 997 (1966); see also PENDLETON HOWARD, CRIMINAL JUSTICE IN ENGLAND 35 (1981) (describing how attorney general might *nol-pros* popular prosecution); ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 107 (1980) (same).

<sup>371</sup> *The King v. Guerchy*, 96 Eng. Rep. 315 (K.B. 1765).

<sup>372</sup> *Id.* at 316.

<sup>373</sup> *Rex v. Fielding*, 97 Eng. Rep. 531 (K.B. 1759).

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the peace.<sup>374</sup> Such control made sense. Because the crown was constitutionally responsible for law enforcement and because informers helped enforce the law, the crown could halt the informers' suits.<sup>375</sup> Significantly, by entering a *nolle prosequi*, the crown preserved its right to commence a future prosecution of the defendant for the same offense.<sup>376</sup> Though the informer statutes did not explicitly authorize such crown control, the courts read these statutes against the background of executive control of prosecution.

With respect to civil *qui tam* actions, the executive also had a substantial measure of control. The crown could pardon any offense, even those enforceable by a *qui tam* action.<sup>377</sup> The only limitation on the pardon power applied after commencement of the *qui tam* relator's suit. After the commencement of a *qui tam* suit, the crown could only affect its portion of the fine, by either pardoning the offense or entering a *nolle prosequi* with respect to its portion.<sup>378</sup> Even though the *qui tam* relator might have a terribly weak case, the executive apparently could not terminate the *qui tam* relator's inchoate interest in the fine or forfeiture.<sup>379</sup> Under the *qui tam* line of cases, the relator's interest in the case ripens upon commencement of the suit, such that the crown cannot obliterate it thereafter.

The rationale for the divergent treatment is unclear. While the executive apparently could halt a popular information in its tracks, with respect to *qui tams*, it could only prevent the popular prosecutor from pursuing the government's portion of a fine or forfeiture. One could imagine possible reasons for the disparate treatment. Perhaps the courts distinguished criminal informations from civil *qui tams*, envisioning more control over the former. Maybe *qui tam* relators were somehow regarded as having a more concrete, permanent interest in their portion of the fine or forfeiture. Or perhaps courts concluded in the *qui tam* cases that the *qui tam* statutes implicitly meant to preclude executive termination (either by *nolle* or by pardon) once the relator began her suit. Finally, one cannot rule out the possibility that the English courts were simply unaware of their two competing lines of cases.

The question remaining is this: Which of these frameworks, English treatment of criminal informations or civil *qui tams*, ought to guide our analysis of the president's executive power? For several reasons, the information line of cases seems more fitting for the American Constitution.

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<sup>374</sup> *Id.* at 531-32.

<sup>375</sup> PATRICK DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 21 (1958).

<sup>376</sup> *See* HOWARD, *supra* note 370, at 35; *Nolle Prosequi*, *supra* note 133, at 574.

<sup>377</sup> *See supra* note 375.

<sup>378</sup> *Dr. Foster's Case*, 77 Eng. Rep. 1222, 1228-29, (K.B. 1715); *Stretton v. Tayler*, 78 Eng. Rep. 395, 395 (K.B. 1589).

<sup>379</sup> *See supra* note 378.

We know that the federal chief executive was supposed to control law execution. We also know that executive control was supposed to ensure uniformity and responsibility. The English information cases granted the executive the assistance of the public in law execution while still maintaining executive control. Through *nolle prosequis* and pardons, the executive could decide how the laws could be best executed.

In contrast, the *qui tam* cases do not fit with the Constitution's vision of executive control of law execution. To be sure, the executive retains a great deal of authority over *qui tams* in that the executive can stop the *qui tam* relator from suing for the fine/forfeiture to be paid to the United States. Yet the executive cannot completely control federal law execution because once the *qui tam* relator commences her suit, she has a right to continue to enforce the law, whatever the executive's views. This creates the potential for problems, where law enforcement objectives might be frustrated by the split in law enforcement authority. The president will not be able to guarantee immunity from prosecution in return for cooperation if independent popular prosecutors can continue prosecuting. Popular prosecutors also could prosecute the innocent, and the executive would be unable to halt the unfaithful prosecutions.

More generally, we ought to be cautious about importing English constraints or exceptions to the executive power, when those limitations might be based on the principle of parliamentary supremacy. Whether the crown was the proper prosecutor for all offenses depended not only upon tradition but also on the statutes that Parliament enacted. If the English cases are best understood as cases interpreting the English *qui tam* statutes, so that the courts concluded that Parliament meant to constrain or abridge the crown's executive powers, the limitations on executive control might not apply here. Under our system of separated and shared powers, the legislative branch is not supreme. Instead its powers are enumerated<sup>380</sup> and, in various ways, constrained.<sup>381</sup> Hence, for Congress to carve up the executive power and, thereby, vitiate presidential control over prosecution, it must point to some constitutional authority. As noted earlier, the better view is that presidential powers are not subject to legislative abridgement, for nothing in the Constitution authorizes generic reallocation of federal power. Hence, while Congress has tremendous latitude in establishing a prosecutorial substructure, Congress lacks the power to create independent popular actions.<sup>382</sup>

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<sup>380</sup> U.S. CONST. art. I, § 8.

<sup>381</sup> U.S. CONST. art. I, § 9; U.S. CONST. amends. I-X.

<sup>382</sup> The chief prosecutor thesis contends that the president may control prosecutorial discretion. The chief prosecutor thesis does not deny that Congress may shape and constrain prosecutorial discretion through its appropriations power and its powers to create the officers and departments that will prosecute under the president's control, however.

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In any event, the English cases show that the crown could exercise considerable control over popular prosecutions. The popular prosecutor had no absolute right to sue to recover fines or forfeitures owed the government. Before suit commenced, the crown could pardon an offense pursuable by popular action. Once a popular prosecutor commenced her suit, the crown's authority apparently varied depending upon the type of suit. If an information, the crown could pardon or *nol-pros* and, thereby, preclude the entire popular action from going forward. If a *qui tam* action, the crown could pardon or *nol-pros* the government's portion of the fine but could not remit the *qui tam* relator's portion of the suit.

*b. American Cases*

The Supreme Court has never decided the question of whether a pardon or a *nolle prosequi* can extinguish a *qui tam* relator's portion of a fine or forfeiture once the relator has commenced suit. The Court has held, however, that a nonprosecuting informer's interest may be extinguished prior to the execution of a judgment and, thereby, suggested that the president may terminate a popular prosecutor's interest even after the prosecutor commences its suit.<sup>383</sup>

In a series of cases decided in the wake of the Civil War, the Court adopted reasoning that suggests that *qui tam* relators might not have an unqualified right to their portion of the fine until the court orders distribution of the fine. In the *Confiscation Cases*,<sup>384</sup> the Court held that an informer who had provided information leading to a successful official prosecution had no absolute right to the fine until he actually received a portion of the fine.<sup>385</sup> Among many reasons for its conclusion, the Court emphasized that the informer was not a party to the suit and was not entitled to be heard.<sup>386</sup> While this case must be distinguished from a popular action, the Court offered a number of rationales why the president must be able to prevent informers from receiving their portion of the fines, rationales that apply equally to popular prosecutors.

The Court likewise adopted broad reasoning in the case of *Osborn v. United States*.<sup>387</sup> Osborn received a pardon after the district court issued a judgment that he would have to forfeit his property due to his support of the rebellion.<sup>388</sup> Officers of the court collected the funds and kept the share of funds they were entitled to under the statute.<sup>389</sup> Nonetheless, the Court

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<sup>383</sup> See *infra* notes 387-393.

<sup>384</sup> *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868).

<sup>385</sup> *Id.* at 462.

<sup>386</sup> *Id.*

<sup>387</sup> *Osborn v. United States*, 91 U.S. 474 (1875).

<sup>388</sup> *Id.* at 475-76.

<sup>389</sup> *Id.*



held that the pardon entitled Osborn to receive all the funds garnered from the officers' collection efforts.<sup>390</sup> Because the Court had not entered a final decree distributing the funds resulting from the enforcement of the judgment, the officers had no right to the funds and had to return the money to the court registry.<sup>391</sup> Unless "rights of others in the property condemned have accrued," the pardon operated to nullify the forfeiture.<sup>392</sup> Evidently, the district court's judgment and the execution of the judgment were not sufficient for the officers' rights to "accrue." A subsequent judicial order to distribute the proceeds was necessary for the officers' accrual of rights.<sup>393</sup>

Much more so than the *Confiscation Cases*, *Osborn* has parallels to the popular action context. Because both officers and popular prosecutors must make concrete efforts to recover fines and forfeitures, the Court's rationale for why the officers could not keep fines might apply to popular prosecutors as well. Once again, the Court's rationale suggests that, until the popular prosecutors actually receive their portion of a fine or forfeiture, their rights to the funds are not absolute.

Finally, in *Knote v. United States*,<sup>394</sup> the Supreme Court concluded (albeit in dicta) that "[t]he property and the proceeds [of a judgment] are not considered as so absolutely vesting in third parties or in the United States as to be unaffected by the pardon until they have passed out of the jurisdiction of the [judicial] officer or tribunal."<sup>395</sup> This expansive language, though once again uttered outside the context of a popular prosecution, bespeaks of a broad presidential power of termination of private interests. The underlying rationale is that the president may exercise the pardon power to pardon an offense against the United States so long as he does not affect the property of third parties, such as those informers who had already received their portion of the fines and forfeitures.

Taken together, the logic of these cases suggests that the *qui tam* relator has no right to fines until she actually receives them pursuant to a final judicial decree distributing the funds. Commencement of the suit is a necessary but not sufficient condition for the relator to be entitled to a portion of the fine. Hence, even after the relator commences the suit, the president may pardon or perhaps take the lesser step of entering a *nolle prosequi* before the court. Similarly, judgment might be a necessary but

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<sup>390</sup> *Id.* at 477.

<sup>391</sup> *Id.* at 479.

<sup>392</sup> *Id.* at 477.

<sup>393</sup> *See id.* at 479 ("[U]ntil a decree of distribution is made and enforced, the summary power of the court to compel restitution remains intact.").

<sup>394</sup> *Knote v. United States*, 95 U.S. 149 (1877).

<sup>395</sup> *Id.* at 154.

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not sufficient condition for the relator's unconditional right to a share of the fine. Only actual receipt of her share, pursuant to a post-judgment judicial decree, would preclude a presidential pardon from obliterating the entire fine or forfeiture.<sup>396</sup>

English and American case law suggests a broad power of executive control over popular actions. English case law indicates that the president may pardon the government's portion of the fine at any time. English cases involving informants in particular go further and permit the executive to preclude recovery of even the prosecutor's share of the fine or forfeiture. Finally, Supreme Court cases suggest that the president may remit an informer's interest in a fine or forfeiture at any time prior to receipt of the funds pursuant to postjudgment judicial decree distributing the funds collected. Though these cases involved nonprosecuting informers, the *ratio decendi* of those cases suggest that the popular prosecutor's interest can be extinguished by the president until the popular prosecutor receives her portion of the fine or forfeiture.<sup>397</sup>

### *C. The Proper Relationship Between Popular Prosecutors and the Chief Prosecutor*

Because acceptance of a presidential termination power over popular actions may change the legal status quo (or at least people's perception of

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<sup>396</sup> Following the *qui tam* line of British cases, a few lower courts had earlier concluded that a president could not affect the relator's portion of a fine once the relator commenced the suit. In *United States v. Morris*, 26 F. Cas. 1336 (C. C. D. N. Y. 1822) (No. 15,816), Justice Henry Livingston, while riding on circuit, observed in dicta that "[i]t may also be the case in a *qui tam* action, that a pardon does not discharge that portion of the penalty which goes to the plaintiff." *Id.* at 1344. And in *United States v. Griswold*, 24 F. 361 (D. Or. 1885), the district court in Oregon refused to allow the United States to settle a claim when the suit had been originated by a *qui tam* relator. Evidently the relator had spent a good deal of money and time prosecuting the case and the government's proposed settlement was for pennies on the dollar. *Id.* at 363, 366. Citing Blackstone, the district court claimed that, once the relator had commenced his suit, neither the secretary of treasury nor the president could interfere with the relator's portion of the fine. *Id.* at 364. An Opinion of Attorneys General of the United States concluded that the president could pardon away fines to be paid to third parties where the third parties are not parties to the suit. 5 Op. Att'y Gen. 579, 586-87 (1852). Attorney General Crittenden distinguished seemingly contrary British practice as based on a system where the Parliament could alter the crown's rights. *Id.* at 587. In the United States, by contrast, the president's powers were fixed by the Constitution. *Id.* In the course of his opinion, however, Crittenden asserted that a *qui tam* relator's suit stood on different grounds because, he claimed, such suits were the prosecutions of private parties and not suits of the United States. *Id.* at 586.

<sup>397</sup> Of course, one might fairly charge that opinions written in the wake of the Civil War, almost a century after the Constitution's ratification, hardly illuminate the Constitution's original meaning. These opinions are interesting, nonetheless, for they cast doubt on the claim that independent popular actions have been regarded as constitutional for at least two hundred years. The rationale of these cases suggest that the antebellum Supreme Court might well have regarded independent popular actions as an unconstitutional infringement of presidential power.

it), it seems useful to discuss the effect a termination power would have on various institutions and actors. It also seems worthwhile to discuss limits on presidential control of popular prosecutors.

### 1. *The Effect of Presidential Control*

Some might suppose that a presidential power of termination will sound the death knell of popular prosecutions. Who will put the effort into investigating and prosecuting some alleged lawbreakers if the president has the ability to render these efforts useless by ending the prosecution? If no popular actor would ever bring suit in a world where the president may terminate the prosecution, then a presidential termination power means that Congress has no meaningful power to create popular actions.

This view of the effects of a presidential termination power is too apocalyptic. It is true that if one actually moved from a regime of absolutely no executive intervention in popular prosecutions to a regime of presidential control of popular actions, the total number of popular actions likely would decline because the expected value of acting as a popular prosecutor would decrease. But the current popular prosecutorial regime already permits a level of presidential intervention. In fact, the executive branch (through the attorney general) has a good deal of control over *qui tam* actions brought under the False Claims Act.

Clearly, popular prosecutors prefer a regime that preclude the president (or anyone else) from rendering their efforts a waste of time; they would prefer a regime where they win and collect every time. Nonetheless, popular prosecutors will continue to bring suits when the expected value of their prosecution exceeds the costs of their investigation and prosecution. Under the right circumstances, popular prosecutors can still expect net positive benefits, even if the president has the right to terminate their action. As noted earlier, popular prosecutors will have to factor their expected costs of investigating and prosecuting and the chance of recovering a fine or forfeiture. Factoring into the last calculation will be the chance of succeeding in court and the chance that the executive will terminate the suit. So long as popular prosecutors are aware of the possibility of presidential intervention, they will consider that risk in deciding whether to pursue a case.

If it becomes obvious that popular prosecutors lack sufficient incentives to prosecute (a possibility even in a world without presidential control), Congress can take any number of measures to increase the expected value of popular prosecutions. Because the president has no constitutional authority over the allocation of funds (other than having to expend appropriations), nothing prevents Congress from further incentivizing the class of potential popular prosecutors. For instance, Congress might grant a greater portion of a fine to a successful popular prosecutor. Alternatively, Congress could keep the popular prosecutor's

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share fixed while increasing the total fines payable, thereby increasing the expected private value of a suit. Congress could agree to share the costs of a successful popular action. Or Congress might agree to pay a bounty to popular prosecutors for bringing a suit, whether or not the prosecution is ultimately successful. As should be obvious, a presidential termination power need not necessarily render popular actions impracticable.

*a. Effect on Those Popularly Prosecuted*

The effect on the class of potential prosecution targets (which includes the entire population of the United States) is ambiguous. In some ways the popularly prosecuted are better off. Defendants may convince the president to terminate a costly and improper prosecution. In response to a claim of innocence, the president may pardon the target of the prosecution, thereby terminating the prosecution's deleterious effects on the defendant. At the very least, the president might *nol-pros* the popular prosecution; though not as advantageous, it does at least delay any prosecution.

In another way, potential defendants might be worse off. Some popular prosecutors will be resource poor or perhaps represented by incompetent lawyers. Defendants might welcome the prospect of battling such prosecutors, knowing that if they are acquitted, the executive branch cannot prosecute them once again because of the rule against double jeopardy. A faithful chief executive ought to terminate such weak suits and order his official prosecutors to bring a new suit to vindicate the law. The official prosecutors are likely to be resource rich and may be superior to the average lawyer that might prosecute on behalf of a popular prosecutor. Given that one cannot say which effect will dominate, a presidential termination power has ambiguous effects on the popular prosecutor.<sup>398</sup>

*b. Effect on Congress*

When Congresses created or modified popular actions, some members might have favored popular actions precisely because they hoped that there would be no presidential control. If, over time, the executive branch had proven a poor executor of a particular law, "privatizing" federal law execution might have seemed a useful means of bypassing a sluggish executive. Obviously, if the Constitution permits the president to terminate popular prosecutions of federal law, then such expectations might be dashed.

Yet, frustrated expectations do not increase the powers of Congress. Although we might speculate about what statutes Congress would have

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<sup>398</sup> Because potential defendants do not have a right to incompetent prosecutors, however, they have no cause for constitutional complaint. So, whether defendants are better or worse off in a regime that recognizes presidential termination raises no legitimate constitutional issue.

enacted had it understood that the Constitution grants the president the power to terminate popular prosecutions and although we will have to judge whether existing popular actions actually were meant to permit presidential termination, such speculation is irrelevant with respect to the constitutionality of independent popular actions.<sup>399</sup>

In any event, once Congress understands that the president may terminate popular actions, it will make new decisions about popular actions that reflect the Constitution's allocation of power. Going forward, there should not be any dashed expectations.

*c. Effect on the President*

As noted earlier, while the executive power grants the president power to execute the law, the Faithful Execution Clause imposes a duty of faithful law execution. Hence, the president must meet the soft requirement of faithful execution, even when it comes to popular actions. To ensure knowledge of possible unfaithful law execution or to help ensure adherence to executive branch law enforcement policy, perhaps the executive could institute a more detailed version of the notice *qui tam* relators are required to provide to the government under the False Claim Act.<sup>400</sup> While such notice might initially uncover many problematic suits (as a percentage of the total number of popular actions), the number of problematic suits would likely decline over time as popular prosecutors adjusted to the changed environment. As the executive became more involved in controlling popular actions, we would expect that popular prosecutors would stop bringing suits that are likely to be halted by the executive, for few popular prosecutors knowingly would incur expenses with no expectation of profit. Indeed, with the passage of time, we might see very few exercises of executive control because popular prosecutors will adapt to the executive's preferences and only bring cases that prosecutors believe will not invite executive termination.

Does the Faithful Execution Clause require the president to micromanage every aspect of every popular prosecution? As with official prosecutions, the answer is no. Neither the president nor his assistants

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<sup>399</sup> Even if it could be said that Congress would not have passed popular actions had it known that independent popular actions were unconstitutional, severing the popular actions out of their statutes would not decrease executive control. No existing federal law can be enforced by a popular action only. In other words, executive officials may enforce every statute enforceable by private parties. Given that the executive can already enforce every statute enforceable by popular prosecutors, it is not clear why Congress would have decided against the creation of popular actions in a world where only terminable popular actions are constitutional.

<sup>400</sup> See, e.g., False Claims Act, 31 U.S.C. § 3730(b)(2) (2000) (requiring a copy of the complaint and disclosure of all relevant evidence to be supplied to the government by the relator before commencing the suit).

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must monitor every pleading or argument made by a popular prosecutor. After setting some ground rules which might serve to notify popular prosecutors of his enforcement policies, the president is free to assume that most popular prosecutions will be trouble free. Until he has some reason to believe otherwise (either from the information he receives from the popular prosecutor or from a complaint lodged by the prosecuted), he could grant popular prosecutors a measure of autonomy.

If it became clear that particular popular prosecutors had repeatedly violated executive branch policy or had engaged in unfaithful law execution (say by prosecuting people who were innocent), the president conceivably could bar these popular prosecutors. Though statutes creating popular actions sometimes read as if any and all may prosecute, the Constitution establishes that the president controls prosecution. If a president is convinced that a particular popular prosecutor is unreliable, say because the popular prosecutor repeatedly harasses the innocent, perhaps the president can bar the popular prosecutor from representing the United States. Just as the president can “remove” troublesome official prosecutors, perhaps he can remove or withdraw the prosecutorial authority of popular prosecutors. To tolerate a popular prosecutor who has proven herself an unfaithful executor would be an affront to the president’s faithful execution duties.

Could the president bar *all* popular prosecutions on the grounds that most popular prosecutions are unlikely to faithfully carry into execution either his policies or the law? The better view is that the president cannot cast aside a whole species of law enforcement assistance on the grounds that he prefers a different resource structure. Because the president must take care that the laws be faithfully executed, the president probably cannot shun congressionally sanctioned resources that would help him carry into execution that duty. Given that there will always be some private citizens who will bring prosecutions consistent with executive policy and that will help ensure faithful law execution, a one size fits all rule would not only be counterproductive, it might be unconstitutional. Just as the president cannot dispense with the department of justice merely because he prefers a multimember commission of justice, so too, the president must refrain from spurning popular prosecutions as a whole, merely because he fears that some popular prosecutors will mount unfaithful prosecutions. Instead, the president should target the unfaithful prosecutors, permitting the rest of the public to bring prosecutions.

Presidents may not wholly welcome the ability to terminate popular prosecutions. Currently, the public likely does not hold presidents responsible for popular actions because presidential control is regarded as limited (as in the case of the False Claims Act) or nonexistent. A termination power, however, predictably will provoke termination applications. A president will be held responsible for permitting suits to

continue and for ordering suits halted, decisions that will inevitably leave one party to the popular prosecution disappointed and perhaps angry. Whatever mixed feelings presidents may have about this additional responsibility, however, the Constitution is best read to empower the president to terminate popular prosecutions. Given his duty to ensure a faithful law execution, the president should consider termination applications alleging unfaithful popular prosecutions.

## *2. Constraints on Presidential Control of Popular Prosecution*

While the president has the constitutional power to terminate popular prosecutions, he does not have the constitutional right to prosecutorial resources. Hence it seems clear that presidents lack the constitutional authority to direct private citizens to bring popular prosecutions. Nothing in Article II conveys the power to compel private citizens to enforce the law, let alone prosecute federal offenses at their own expense. For similar reasons, the president likely lacks constitutional power to direct a popular prosecution once commenced. If the president believes that a popular prosecutor will be an unfaithful or inadequate prosecutor, the president may halt the prosecution and fulfill his faithful execution duties by directing an official prosecutor to file a new suit.

But this just marks the limits of the president's constitutional power; by statute, Congress may grant the president additional control. For instance, Congress surely can provide that, as a condition of being able to sue for a portion of a fine or forfeiture, the popular prosecutor must follow the president's prosecutorial instructions. In other words, Congress can provide that the popular prosecutor take the good (the ability to collect fines when the prosecutor suffers no harm) with the bad (the potential for meddling executive control).

Apart from possible statutory authorization for truly intrusive presidential control, presidents can always jawbone private citizens to follow executive prosecutorial wishes. As a matter of what the Constitution authorizes, however, the chief executive's options after the commencement of the popular action are to let it continue under the popular prosecutor's control or to halt the popular prosecution.

## *Conclusion*

The Constitution, as originally understood, made the president the constitutional prosecutor of all offenses against the United States. Consistent with English, colonial, and state practices, and in the absence of congressional authorization, early presidents assumed complete control over official prosecutors. As Thomas Jefferson noted, presidents may order official prosecutors to commence or cease a prosecution because the president has the power to execute the law. While a president's control over popular prosecutions is not nearly as complete—he cannot order a

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private party to bring a prosecution or direct its conduct once begun—Jefferson’s logic suggests that a president may terminate popular prosecutions. Indeed, constitutional text and structure, along with English and American case law, suggest that the chief executive has the ability to terminate popular prosecutions.

In imposing a duty of faithful execution, the Constitution obliges the president to use his executive power to ensure that the laws are not mere pageantry. Using the assistance that Congress supplies (the department of justice, popular prosecutors, White House staff, funds, etc.), the president should superintend official and popular prosecutors to ensure a faithful law execution. While the president need not micromanage these prosecutors and review their every decision, he should stand ready to set things in a proper “legal train.”

Although early history sheds little light on whether Congress can abridge the president’s control over prosecution, the better view is that the Constitution does not authorize the Congress to create independent prosecutors, of whatever sort. Independent official prosecutors and independent popular prosecutors strike at the core of Article II’s grant of law execution authority and fly in the face of the founders’ choice of a unitary executive.

Some two centuries after the Constitution’s creation, we continue debating the founders’ law enforcement choices. Reasonable fears of presidential abuse have led many people to reject a system of presidential control. Concentrating prosecutorial power in the president’s hands allows him to target his enemies and to shield himself and his disreputable friends. But, of course, wherever the power to prosecute rests, it may be abused. The institutional design question is: What prosecutorial scheme gives us the best mix of vigorous, uniform, responsible, and faithful law enforcement? The choice is between a powerful president ultimately responsible to the country and to Congress or a reading of the Constitution in which Congress can grant prosecutorial independence to any government official and every Tom, Dick, and Mary.