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**Firing U.S. Attorneys: An Essay**

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## Firing U.S. Attorneys: An Essay

Article II of the Constitution grants the President “the Executive Power” and admonishes him to “take Care that the Laws be faithfully executed.”<sup>1</sup> Does Article II create a presidential duty, or a broad presidential right to fully control all executive branch officials? This essay explores this issue and explains why the controversial firing of several U.S. Attorneys that came to light in 2007 should prompt a fresh critical look at the unitary executive theory, which treats the President’s executive power as a right to complete control over all executive branch officials.<sup>2</sup>

The decision to fire these prosecutors strikes many legal professionals, including many legal scholars, as wrong—an unfortunate break from a proud tradition of prosecutorial independence.<sup>3</sup> The decision’s many critics, however, have not explained why the firings are wrong on constitutional grounds. The firings seem consistent with the unitary executive theory, which some of the firings’ critics have promoted. This theory

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<sup>1</sup> U.S. CONST. art. II, §§ 1, 3.

<sup>2</sup> See Steven G. Calabresi, *Essay, The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinion: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1022 (2007) (stating that the President can supervise and control principal officers and veto any decision by an inferior officer); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 593–99 (1994) (describing the unitary executive theory as requiring complete presidential control over all executive branch officials and discussing required control mechanisms); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992) (arguing that many arguments made about Article III support the unitary executive theory of Article II); A Michael Froomkin, *The Imperial President’s New Vestments*, 88 NW U. L. REV. 1346, 1348 (1994) (stating that “unitarians” believe that the Constitution requires that the President have the power to countermand and fire all executive branch officials); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 73 (1990) (stating that the Supreme Court has recognized presidential removal authority in order to “preserve a unitary executive”); cf. Robert V. Percival, *Essay: Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L. J. 963 (2001) (arguing against application of the unitary executive theory to officials that have received delegated authority from Congress).

<sup>3</sup> See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 16 (1994) (explaining that district attorneys reported to no one between 1789 to 1820 and did not report the Attorney General until after 1861); Stephen Carter, Comment, *The Independent Counsell Mess*, 102 HARV. L. REV. 105, 126 (1988) (discussing the traditional independence of U.S. Attorneys); cf. Calabresi & Prakash, *supra* note 2, at 659 (discussing early instances of the President issuing directives to United States attorneys).

maintains that the President's Article II power to execute the law gives him the right to control all other officers who have law enforcement responsibilities.<sup>4</sup> The administration's defense of the firings relied upon this theory. For many officials, in addressing complaints of political interference with the United States Attorneys' work,<sup>5</sup> explained the dismissals as an effort to conform the attorneys' work to the President's priorities.<sup>6</sup> This suggests that the administration viewed the President's power to execute the laws as implying a right to choose law enforcement priorities and to fire officials who do not implement the President's priorities.<sup>7</sup>

But little difference exists between a Department of Justice (DOJ or Department) reflecting an elected President's priorities and a politicized department.<sup>8</sup> A President's politics consist, in large part, of a set of priorities he has chosen. The ideal of Justice Department independence only makes sense if we accept Article II as embodying a duty,

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<sup>4</sup> See Calabresi & Prakash, *supra* note 2, at 593–99 (justifying this control and discussing required control mechanisms).

<sup>5</sup> See David Johnston & Eric Lipton, *Doubt is Raised About Honesty and Judgment*, N.Y. TIMES, April 20, 2007, at A19 (noting that “Democrats continued to question whether the dismissals were politically motivated and therefore improper.”)

<sup>6</sup> See David Johnston & Eric Lipton, *Ex-Aide Disputes Gonzalez Stand Over Dismissals*, N.Y. TIMES, March 30, 2007, at A1 (reporting that D. Kyle Sampson, Gonzales' former chief of staff, claims that dismissals were motivated by a desire to assure that U.S. Attorneys were loyal to the President's and the Attorney General's priorities); David Johnston & Neil A. Lewis, *U.S. Prosecutors Assail Gonzales in Closed Session*, N.Y. TIMES, March 29, 2007, at A1 (according to the prepared testimony of D. Kyle Sampson, Gonzales' former chief of staff); Carl Hulse, *Prosecutors in a Past Life, Sleuths in the Senate Now*, N.Y. TIMES, March 23, 2007, at A19 (referring to the administration's position that the Justice Department and the White House “wanted prosecutors who were more committed to the administration's priorities than those being forced out”); David Johnston, *Dismissed U.S. Attorneys Received Strong Evaluations*, N.Y. TIMES, February 25, 2007, at 19 (reporting that a Senior Justice Department Attorney suggested that the dismissals reflected an effort to have U.S. Attorneys conform to administration priorities).

<sup>7</sup> See Sheryl Gay Stolberg, *Bush Criticizes How Dismissal of U.S. Attorneys Were Handled*, N.Y. TIMES, March 15, 2007, at A1 (quoting President Bush's statement that “[p]ast administrations have removed U.S. attorneys [and] they're right to do so.”); accord Calabresi & Prakash, *supra* note 2, at 597 (arguing that the Constitution allows the President to “remove federal officials who are not executing federal law in a manner consistent with his administrative agenda”).

<sup>8</sup> Cf. Johnston & Lipton, *supra* note 6 (discussing Republican Senators' revolt against the placement of “loyalists” in the DOJ).

not an unlimited right to control all officials executing the law. In short, the ideal of DOJ independence does not easily coexist with the unitary executive theory.

This tension does not prove that a duty-based theory is correct or that the unitary executive theory is necessarily wrong. Scholars have devoted numerous articles to the unitary executive theory, and a short essay cannot thoroughly assess the theory's merits.<sup>9</sup> The conflict between the widely held belief that the Justice Department should be both apolitical and substantially independent and the unitary executive theory does suggest, however, that the question of whether Article II primarily creates a right or imposes a duty merits a fresh look. This essay suggests a basis for a duty-based theory and explains how such a theory might justify Justice Department independence.

I can only outline such a duty-based theory here. I will not seek to prove that this conception is the correct theory of Article II, nor thoroughly explore its precise contours. I only wish to show that such a theory is plausible as a literal construction of the Constitution's language and that it would justify DOJ independence. The duty-based theory's reliance upon the Constitution's text is important, because the competing unitary executive theory's influence stems mostly from its claim that the text's plain meaning requires that theory's adoption.<sup>10</sup>

## I. The Firings

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<sup>9</sup> See Calabresi & Prakash, *supra* note 2, at 579 (quoting with approval Justice Scalia's statement that a thorough scholarly treatment of unitary executive theory would require 7000 pages); see, e.g., Calabresi & Rhodes, *supra* note 2 (claiming that many arguments made about Article III support the unitary executive theory of Article II); see also Lessig & Sunstein, *supra* note 3, at 2 (characterizing the claim that the Constitution requires that the "President must have the authority to control all government officials who implement the laws" as "just plain myth").

<sup>10</sup> See Calabresi & Prakash, *supra* note 2, at 550–556 (claiming that constitutional text shows the correctness of the unitary executive theory and emphasizing the primacy of constitutional text).

A DOJ request that several U.S. Attorneys resign created a public furor in 2007, ultimately leading Attorney General Alberto Gonzalez to resign under pressure.<sup>11</sup> U.S. Attorneys are the top regional officials for the Justice Department. They have traditionally been selected through presidential nomination and Senate confirmation to four year terms, coinciding with a President's term in office.<sup>12</sup> Thus, they are political appointees.

A President may remove a U.S. Attorney, but in the past Presidents have rarely used this power to replace attorneys retained or appointed during their administration.<sup>13</sup> In the event of a vacancy (whether through removal or resignation), the Attorney General can appoint a replacement until the President nominates and the Senate confirms a successor to the vacated office.<sup>14</sup> Prior to 2005, these unilateral executive branch appointments were temporary, because they expired after 120 days.<sup>15</sup> If the President failed to nominate and obtain Senate confirmation of a permanent successor within 120 days, the relevant statute provided for judicial appointment of a second temporary

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<sup>11</sup> It is not entirely clear from news reports precisely how many resignations reflect dismissals. See David Johnston, *Justice Department Names New Prosecutors, Forcing Some Out*, N.Y. TIMES, Jan. 17, 2007, at A17 (explaining that the Justice Department would not provide a specific number of prosecutors fired, but reporting Senator Dianne Feinstein's estimate of five to ten firings); see, e.g., Steven Lee Meyers & Philip Shenon, *Embattled Attorney General Resigns*, N.Y. TIMES, August 27, 2007, at A1, available at <http://www.nytimes.com/2007/08/27/washington/27cnd-gonzales.html> (reporting nine dismissed prosecutors); David Johnston et al., *'Loyalty' to Bush and Gonzales was Factor in Prosecutors' Firing, E-Mail Shows*, N.Y. TIMES, Mar. 14, 2007, at A18 [hereinafter *Loyalty*] (reporting seven prosecutors fired and an eighth forced out of office); David Johnston et al., *New E-Mail Gives Dismissal Detail*, N.Y. TIMES, Mar. 20, 2007, at A1 (reporting eight dismissals); David Johnston & Eric Lipton, *White House Said to Prompt Firings of Prosecutors*, N.Y. TIMES, Mar. 13, 2007, at A1 (reporting seven prosecutors fired).

<sup>12</sup> 28 U.S.C. § 541(a) (2000)

<sup>13</sup> See *Parsons v. United States*, 167 U.S. 324, 343 (1897) (finding a presidential power to remove a U.S. attorney without explicit statutory authority); 28 U.S.C. § 541(c) (2000); see Stolberg, *supra* note 7, at A1 (pointing out that dismissals after the onset of a new administration are unusual and stating that neither Clinton nor Reagan replaced U.S. Attorneys in their second terms).

<sup>14</sup> 28 U.S.C. § 546(a) (2000).

<sup>15</sup> 28 U.S.C. § 546(c) (2000). If a temporary appointment expired the District Court could appoint a new U.S. Attorney for the District with a vacant seat until the vacancy is filled.

successor.<sup>16</sup> This arrangement assured that the executive branch could only appoint a permanent U.S. Attorney with Senate consent.

Section 502 of the PATRIOT Improvement and Reauthorization Act of 2005 (hereinafter Patriot Act Amendments)<sup>17</sup>, however, made firing U.S. Attorneys a viable means of shaping prosecutorial activity by allowing the President's Administration to unilaterally choose successors. It repealed the provision limiting the terms of unilaterally appointed replacement U.S. Attorneys.<sup>18</sup> Under section 502, a replacement U.S. Attorney could serve until the President nominated a successor.<sup>19</sup> Of course, this means that a President can make a replacement appointee (chosen solely by the executive branch) permanent during his time in office by simply declining to nominate a new U.S. Attorney for Senate approval.

Limitations on unilateral executive branch control over prosecution through appointments and removal, like those prevailing in the legal practice prior to the Patriot Act Amendments, can limit political interference with prosecution. A custom of not removing U.S. Attorneys during a President's term makes it harder to fire a U.S. Attorney because of political disagreement with decisions to prosecute the President's enemies or not to prosecute his friends. The limitations on unilateral replacement of removed U.S. Attorneys found in the law prior to the 2005 Patriot Act Amendments create a further hindrance to political interference with prosecution decisions. They prevent a President from securing his politically preferred outcome to a particular criminal case by simply

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<sup>16</sup> 28 U.S.C. § 546(d) (2000).

<sup>17</sup> USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §502, 120 Stat. 192, 246 (2006) (to be codified at 28 U.S.C. §546 (c)) (allowing an interim US attorney to serve until another is appointed by the President and confirmed by the Senate).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

firing the attorney making a prosecution decision he disagrees with, because his unilaterally chosen replacement will not remain in office long enough to protect the President's friends or see through a prosecution of his enemies.

Political influence upon prosecution raises serious individual liberty concerns, which can justify structural constraints discouraging political interference with prosecutorial discretion. The power to prosecute constitutes an enormous threat to personal liberty.<sup>20</sup> An official accusation of a crime, even if ill-founded, can ruin a person's reputation. The need to defend oneself against criminal charges can bankrupt and exhaust defendants. And prosecutors sometimes succeed in convicting the wrong person, thereby sending an innocent person to jail. On the other hand, failure to prosecute serious wrongdoing when the evidence is strong also raises serious concerns. Such a failure may allow perpetrators of serious crimes remaining at large to prey upon society. Both of these concerns justify restraints on political influence.

Prosecutors should make judgments about who to prosecute based on evidence. If a higher ranking official could remove prosecutors from office for failing to prosecute some enemy of a powerful politician, like a President or a Congressmen, they might persecute the innocent in order to hold on to office.<sup>21</sup> Conversely, if they could be removed from office for prosecuting powerful politicians' friends or benefactors,

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<sup>20</sup> See *Morrison v. Olson*, 487 U.S. 654, 728 (1987) (Scalia, J., dissenting) (characterizing the prosecutor's power to choose cases as "dangerous" (quoting R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940)).

<sup>21</sup> Cf. *id.* at 728–29 (Scalia, J. dissenting) (describing the danger of prosecuting someone because he is "unpopular with the predominant or governing group") (quoting R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940).

government corruption might remain unchecked.<sup>22</sup> Hence, the tradition of prosecutorial independence has some logic to it.

When the story of the request for resignations first surfaced, the White House asserted that the decisions were made on the merits, not on political grounds.<sup>23</sup> Any suggestion that this merits judgment involved a decision that these prosecutors' were incompetent conflicted with evidence that they had strong records, so the Administration did not squarely and consistently allege incompetence.<sup>24</sup> The Administration cited varying reasons for these dismissals. At one point, the Administration suggested that these prosecutors had been insufficiently vigorous in challenging voter fraud and in prosecuting immigration violations.<sup>25</sup> Reports surfaced of pressure from Senator Domenici to prosecute voting fraud in a case where David C. Iglesias, the U.S. Attorney for New Mexico, had found insufficient evidence of serious wrongdoing to justify

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<sup>22</sup> Cf. Neil A. Lewis & Eric Lipton, *Flexing Majority Muscles, Democrats Issue 3 Subpoenas*, N.Y. TIMES, April 26, 2007, at A18 (discussing a possible link between the firings and pressure to dismiss corruption investigations that could damage Republicans).

<sup>23</sup> See Stolberg, *supra* note 7, at A1 (citing President Bush's denial of accusations that the firings reflected "political decision making"); Jess Bravin, *Still Vague: Why Were Prosecutors Fired*, WALL ST. J., Mar. 15, 2007, at A5 ("The administration has said its initial explanation -- that the prosecutors were fired for poor performance -- wasn't fully accurate."); David Johnston, *A U.S. Attorney Was Removed Without Cause, Official Says*, N.Y. TIMES, Feb. 7, 2007, at A14 (reporting that Deputy Attorney General, Paul J. McNulty, had testified to the Senate Judiciary Committee that most of the prosecutors were dismissed because of "poor performance"); Dan Eggen, *Prosecutor Firings Not Political, Gonzales Says; Attorney General Acknowledges, Defends Actions*, WASH. POST, Jan. 19, 2007, at A2 (reporting that Attorney General Gonzales attributed firings to "performance issues"); Johnston, *supra* note 11, at A1 (reporting that Justice Department officials fired prosecutors "based on a review of their performance in carrying out Mr. Gonzales's violent crime priorities").

<sup>24</sup> See Dan Egger, *6 of 7 Dismissed U.S. Attorneys Had Positive Job Evaluations*, WASH. POST, Feb. 18, 2007, at A11 (reporting that six out of seven prosecutors had positive evaluations before they were fired); Johnston, *supra* note 6 (stating that six of eight fired U.S. Attorneys were routinely praised in their Justice Department evaluations).

<sup>25</sup> See Johnston & Lipton, *supra* note 11, at A1 (stating that both Karl Rove and President Bush relayed the concern that prosecutors failed to aggressively move on voter fraud cases); Richard A. Serrano, *Border Policing Was a Trial for 3 U.S. Attorneys*, L.A. TIMES, Apr. 15, 2007, at A29 (reporting that three of the eight prosecutors were singled out for failure to aggressively prosecute immigration cases).

prosecution.<sup>26</sup> Attorney General Gonzalez, in statements to the Senate Judiciary Committee, cited insufficient gun crime prosecution, resistance to taking up a death penalty case, and “management problems” as justifications for the firings.<sup>27</sup>

The White House’s statement that the Department fired prosecutors who did not implement the President’s priorities implicitly distinguishes conforming prosecutorial priorities to White House policy from political interference with the Justice Department.<sup>28</sup> This emphasis on priority setting suggested some disagreement about what sorts of violations were sufficiently important to merit prosecution, rather than an attempt to force prosecution where no evidence of any crime existed.<sup>29</sup> This invocation of the unitary executive theory suggests that the theory may have played a role in securing support for these firings within the Administration.<sup>30</sup> Conversely, acceptance of a more modest background conception of executive power would make it harder to carry out this sort of action, making it unlikely that a United States Attorney General or other relevant actors in the DOJ would accept such an action absent strong evidence of malfeasance.<sup>31</sup>

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<sup>26</sup> See Johnston & Lipton, *supra* note 5, at A19 (discussing Attorney General’s Gonzalez’s claim that he fired Mr. Iglesias because he had lost Senator Domenici’s confidence).

<sup>27</sup> *Id.*

<sup>28</sup> See Stolberg, *supra* note 7, at A1 (quoting President Bush as denying that the firings were politically motivated but asserting a right to fire prosecutors at will).

<sup>29</sup> See *id.* (reporting President Bush’s statement that he did relay complaints about federal prosecutors to Gonzalez, but did not give him “specific instructions”).

<sup>30</sup> See *id.* (paraphrasing President Bush as stating that the U.S. Attorneys serve at the pleasure of the President).

<sup>31</sup> The Justice Department played a large role in the dismissals, so the beliefs of DOJ officials about the legitimacy of White House actions controlling prosecutors matters. See Loyalty, *supra* note 11, at A18 (characterizing D. Kyle Sampson, Mr. Gonzales’ former top aide, as “the Justice Department’s point man” for the firing plan and characterizing his e-mail communications with the White House as “extensive consultation”); Johnston & Lipton, *supra* note 11, at A1 (explaining that Harriet Miers, then White House legal counsel, asked Mr. Sampson whether all the U.S. attorneys could be replaced at one time, in response to which he advised firing only a few).

Much of the media and congressional attention has focused on questions about Attorney General Gonzalez's conduct.<sup>32</sup> At first, he denied playing an active role in seeking the resignations of prosecutors, but evidence soon emerged suggesting that he had played a substantial role.<sup>33</sup> Ultimately, this evidence and his failure to adequately explain the firings so undermined his credibility that he resigned. The focus on who is to blame for the departure of the U.S. Attorneys and the Attorney General's honesty and management capabilities has diverted attention from the background constitutional issue: Is the tradition of Justice Department independence consistent with the Constitution?

## II. Article II: Duty or Right?

Article II, Section 1 of the Constitution provides that “[t]he executive Power shall be vested in the President of the United States . . . .”<sup>34</sup> This Vesting Clause seems to suggest that the President has the right to control all law enforcement officials. Yet, some intertextual and historical considerations cut the other way. Article I grants “all” legislative power to Congress,<sup>35</sup> but the Article II grant of executive authority to the President does not contain the word “all.”<sup>36</sup> This juxtaposition might suggest that Congress may lodge some executive power outside the President's control, even if the phrase “the executive power” might be read in isolation to encompass all executive power. Historically, the first Congress relied heavily upon state officials to execute

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<sup>32</sup> See, e.g. Johnston & Lipton, *supra* note 11 (discussing Senators' doubts about Attorney General Gonzalez's honesty and judgment and calls for his resignation). David Johnston, *Ex-Aide Says Gonzales Discussed Firings*, N.Y. TIMES, April 17, 2007, at A17.

<sup>33</sup> See *id.* (reporting that a top aide had characterized Gonzalez's assertion that he had no role in deliberations about firing the U.S. Attorneys as “inaccurate.”).

<sup>34</sup> U.S. CONST. art. II, § 1.

<sup>35</sup> U.S. CONST. art. I, § 1.

<sup>36</sup> U.S. CONST. art. II, § 1.

federal law.<sup>37</sup> This suggests that “the executive power” granted in Article II does not necessarily mean the power to completely control the execution of each and every aspect of federal law, at least not directly.<sup>38</sup>

Yet, several prominent scholars have vigorously argued that this clause makes complete control over every official executing federal law a presidential right.<sup>39</sup> Justice Scalia’s dissent from the Court’s decision upholding the independent counsel provisions of the Ethics in Government Act of 1978 in *Morrison v. Olson*<sup>40</sup> gave forceful support to this rights-based view.

On the other hand, Article II, Section 3 states that the President “shall take Care that the Laws be faithfully executed.”<sup>41</sup> The word “shall” suggests that the President has a duty to faithfully execute law,<sup>42</sup> not necessarily a right to control each discretionary decision an official might make.<sup>43</sup> Proponents of a unitary executive theory seek to harmonize the duty and rights-based vision of Article II by arguing that the President

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<sup>37</sup> See Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L. J. 1636, 1666 (2007) (discussing President Jefferson’s effort to enlist governors in the enforcement of a federal embargo); Lessig & Sunstein, *supra* note 3, at 18 (at the founding state officials conducted federal prosecutions); Saikrishna B. Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993) (explaining that the United States relied heavily on state officials to execute federal law); Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM U. L. REV. 275, 303–310 (1989) (discussing the extent of state authority to conduct federal prosecutions).

<sup>38</sup> See Lessig & Sunstein, *supra* note 3, at 31 (noting that the President has no power to remove state officials enforcing federal law); Krent, *supra* note 2, at 67 (claiming that state officials cannot be controlled by the President because he can neither appoint nor remove them); see, e.g., Mashaw, *supra* note 37, at 1636 (discussing the Connecticut Governor’s refusal to enforce a federal embargo law). Cf. Calabresi & Prakash, *supra* note 2 at 639 (claiming that the President may deprive state officials of their authority to carry out federal law).

<sup>39</sup> See, e.g., Calabresi & Prakash, *supra* note 2, at 593.

<sup>40</sup> See *Morrison v. Olson*, 487 U.S. 654, 728–34 (1988).

<sup>41</sup> U.S. CONST. art. II, § 3.

<sup>42</sup> See Lessig & Sunstein, *supra* note 3, at 10 (finding that the Take Care clause establishes a duty); Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L. J. 1725, 1793 (1996) (stating that a number of contemporaries understood the Take Care clause as imposing “some duty or limit” on the President).

<sup>43</sup> See A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L. J. 787, 801 (1987) (denying that the Take Care clause entitles the President to set administrative agencies’ political agenda).

cannot assure the law's faithful execution unless he controls all aspects of the law's execution.<sup>44</sup> This argument construes the Take Care Clause as more than a requirement to *seek* the law's faithful execution. It construes Article II as creating power adequate to enable the President by himself to *assure* the proper execution of every law.<sup>45</sup>

The Constitution contains some other clauses germane to the status of U.S. Attorneys that address the idea that the President alone is responsible for faithful law execution. The Constitution bolsters unitary executive theory by giving the President the authority to nominate "Officers of the United States."<sup>46</sup> Yet, the same clause gives the Senate the power to deny the President complete control over these officials' appointments by preventing his chosen nominees from assuming office absent Senate consent.<sup>47</sup> Since the Senate can be expected to have an interest in seeing laws it has helped enact properly carried out, this provision relies on the Senate power to withhold consent as a check on appointment of officers disinclined to faithfully execute laws.<sup>48</sup> This construction would suggest that the President's executive authority is to be subordinate to his duty to execute the laws and can be negated when his nomination power is used for inappropriate ends.<sup>49</sup>

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<sup>44</sup> See Calabresi & Rhodes, *supra* note 2, at 1198 n. 221 (claiming that the president cannot faithfully execute the law unless the Vesting Clause grants him all executive power); Calabresi & Prakash, *supra* note 2, at 583 (suggesting that the President could not carry out his duty under the Take Care Clause unless the Vesting Clause grants him total executive power); see also Steven Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 36–37 (1995) (postulating that the growth in the federal "pie" combined with the lack of change in methods of election creates a need for a strong unitary President).

<sup>45</sup> See Calabresi & Rhodes, *supra* note 2, at 1165 (stating that the "President *alone* possesses all of the executive power" and . . . therefore can . . . control . . . inferior officers . . .").

<sup>46</sup> U.S. CONST. art. II, § 2, cl.2.

<sup>47</sup> *Id.*

<sup>48</sup> See Percival, *supra* note 2, at 968 (arguing that the Senate's role in appointments suggests an intention to give cabinet officers "some degree of independence").

<sup>49</sup> *Cf. id.* (arguing that the President may not displace the decisions of agency heads with delegated authority).

The Appointments Clause also allows the Congress to take the appointment of “inferior Officers” away from the President entirely by expressly authorizing Congress to vest the appointments power in Article III judges,<sup>50</sup> who have life tenure and may have been appointed by a political opponent of a sitting President. This congressional authority to vest judges with an appointment power figured prominently in *Morrison*, which adjudicated, among other things, the constitutionality of an Ethics in Government Act provision that lodged the power to appoint an independent counsel in a panel of Article III judges.<sup>51</sup> The Court upheld this provision, relying on the language authorizing Congress to delegate appointment authority to judges.<sup>52</sup> The Appointments Clause also authorizes the vesting of the authority to appoint inferior officers in the President or heads of departments, but it leaves Congress with the choice of whether to allow for direct presidential control, the possibility of presidential influence (heads of departments), or no presidential control at all (the judiciary).<sup>53</sup> The provision authorizing Congress to control who gets to appoint inferior officers allows Congress to lodge the appointment power in the person most likely to hire inferior officers who will faithfully execute law.<sup>54</sup> This clause shows that the Constitution does not give the President

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<sup>50</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>51</sup> See *Morrison v. Olson*, 487 U.S. 654, 671–76 (1988) (explaining why 28 U.S.C. § 594(a) does not violate the Appointments Clause when it provides for judicial appointment of an independent counsel).

<sup>52</sup> See *id.* at 673–77 (rejecting an argument against interbranch appointments, primarily because the appointments clause expressly authorizing vesting the appointment of “inferior officers” in the courts).

<sup>53</sup> See *id.* at 673 (stating that the Appointments Clause gives Congress “significant discretion” in choosing where it wants to vest the authority to appoint inferior officers); see also U.S. CONST. art. II, § 2, cl. 2.

<sup>54</sup> Cf. *Ex parte Siebold*, 100 U.S. 371, 398 (1879) (affirming Congress’ discretionary authority to choose the locus of the appointment power, but suggesting that Congress should favor the department of government in which the official is to be located).

complete control over the Executive Branch of government, thereby undermining the duty-based theory.<sup>55</sup>

Not only does the Constitution deny the President sole control over appointments, it grants him no express authority to remove officers, under any circumstances. The Constitution provides only one means of removing “civil Officers of the United States” from office, impeachment.<sup>56</sup> <sup>57</sup> Accordingly, the impeachment provision suggests that the Constitution, far from envisioning complete presidential control of officers, envisions a system of checks and balances where Congress exercises significant control over civil officers.<sup>58</sup> Indeed, this clause, the only clause in the Constitution that addresses removal of officers, provides for congressional, rather than presidential removal.<sup>59</sup> This impeachment provision seems at odds with the notion that the Constitution demands a presidential removal power to secure faithful execution of the law. A literal construction of the Constitution might treat this impeachment provision as an exclusive “finely

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<sup>55</sup> *Cf. Morrison*, 487 U.S. at 674–75 (noting that the framers rejected attempts to transfer the authority to appoint inferior officers to the President).

<sup>56</sup> U.S. CONST. art. II, § 4.

<sup>57</sup> *Steele v. United States*, 267 U.S. 505, 507 (1925), *Motion Systems Corp. v. Bush*, 437 F.3d 1356 (D.C. Cir. 2000) (The phrase “the United States ... or its officers” naturally calls to mind the constitutional class of “officers of the United States,” as that term is used in the Appointments Clause, U.S. Const. art. II, § 2, cl. 2.), *Synar v. United States*, 626 F.Supp. 1374 (D.D.C.1986) (Discussing Congress’ removal power of officers to include ‘inferior Officers’ as found within the appointments clause)

<sup>58</sup> *Accord Froomkin*, *supra* note 2, at 1372 (claiming that the Impeachment Clause shows that Congress has “some say in the conditions of” an executive officer’s “tenure”). *See also* Akhil Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 303 (1999) (suggesting that the text authorizes impeachment of both inferior officers and officers of the United States); Joseph Story, 1 Commentaries on the Constitution of the United States § 792, at 550 (C.C. Little and J. Brown, 2d ed. 1851); Michael J. Broyd and Robert A. Shapiro, *Impeachment and Accountability: The Case of the First Lady*, 15 CONST. COMMENT. 479, 491 n. 61 (1988) (discussing arguments as to whether inferior officers are subject to impeachment); Raoul Berger, *Impeachment of Judges and Good Behavior Tenure*, 79 YALE L. J. 1475, 1510-11 (1970) (reviewing evidence that the Constitution’s adopters did not mean to authorize impeachment of inferior officers).

<sup>59</sup> *Id.*

wrought” procedure for removing civil officers of the United States, which would imply no presidential authority to remove these officers.<sup>60</sup>

The Supreme Court, however, has never treated this impeachment power as exclusive.<sup>61</sup> It has allowed varying degrees of presidential control of removal, often depending upon the type of office involved.<sup>62</sup> This tradition, however, is in some tension with the constitutional text.

Treating impeachment as the exclusive means of removing officers would imply a substantial reliance on the independence and integrity of officers as a means of securing the rule of law. Because the impeachment clause only authorizes removal of civil officers for “high crimes and misdemeanors,” it provides a very limited mechanism for controlling official misconduct.<sup>63</sup> Whether or not the Constitution makes impeachment the exclusive means of removing officers, the Constitution clearly does rely on the individual integrity of executive branch officials as a means of securing faithful execution of the law. The constitutional requirement that all executive officers swear an oath of

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<sup>60</sup> See Calabresi & Prakash, *supra* note 2, at 642–43 (noting that some in the First Congress supported the idea that impeachment was the sole constitutionally permissible method of removing an officer). *Cf.* *INS v. Chadha*, 462 U.S. 919, 951 (1983) (treating the “finely wrought” procedure of bicameralism and presentment explicitly set out in the Constitution as the exclusive means of passing legislation).

<sup>61</sup> See, e.g., *Morrison*, 487 U.S. at 685, 691 (upholding a provision authorizing the Attorney General to remove an independent counsel for “good cause”); *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) (upholding a provision allowing the President to remove a member of the Federal Trade Commission for cause); *Myers v. United States*, 272 U.S. 52 (1926).

<sup>62</sup> See *Morrison*, 487 U.S. at 691–93 (finding the independent counsel’s function insufficiently important to require that the President have authority to remove him at will); *Wiener v. United States*, 357 U.S. 349, 356 (1958) (forbidding the President from removing a War Claims Commissioner in order to name his own appointee when Congress had not authorized removal); *Humphrey’s Executor*, 295 U.S. at 629 (finding that Congress can forbid removal of “quasi-legislative” and “quasi-judicial” officials except for cause); *cf.* *Myers*, 272 U.S. at 117 (finding an implied presidential power to remove officers “in the absence of any express limitation”).

<sup>63</sup> See Amar, *supra* note \_\_, at 301–302 (rejecting the idea that impeachment would be appropriate for non-criminal “maladministration”); *cf.* Michal J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 ST. LOUIS U. L. J. 905, 914–919 (1999) (arguing that impeachment would be appropriate for some types of non-criminal official misconduct).

allegiance to the Constitution and laws of the United States shows this.<sup>64</sup> Furthermore, the Federalist Papers suggest that the Constitution relies on an officials' individual sense of duty, not complete presidential control, as a means of assuring a rule of law. In explaining why the Constitution requires Senate approval of presidential nominees, Federalist No. 76 states that this provision discourages the nomination of pliant officials "personally allied" to the President.<sup>65</sup> The Federalist Papers together with the appointments clause suggest that the framers may have expected appointees to stand up to the President upon occasion.<sup>66</sup> The Constitution, of course, erects a system of checks and balances in order to, among other things, create a rule of law. The lack of express authority for presidential removal of officers, the Oath Clause, and the congressional appointments role all suggest that the framers relied on executive branch officials having a degree of independence as one of the means of securing that goal.

Thus, the Constitution's literal language provides some support for advocates of Justice Department independence. Part IV will show that constitutional reliance on the integrity of individual employees is an important means of securing faithful execution of the law and comports with a duty-based reading of the Constitution.

### III. Duty and Right Collide at the DOJ

The Justice Department's tradition of independence stands in some tension with the view of executive power as an exclusive presidential right. A view of executive power as a presidential right implies a presidential power to control prosecution. If this implication is granted, then the President is within his rights to tell U.S. Attorneys to

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<sup>64</sup> U.S. CONST. art. VI. cl. 3.

<sup>65</sup> THE FEDERALIST No. 76, at 458 (Alexander Hamilton) (Clinton Rositer ed., 1961).

<sup>66</sup> See *id.* (stating that the Senate's advise and consent function would discourage nomination of pliant "obsequious instruments" of presidential "pleasure.").

prosecute cases he would like to see pursued or decline to prosecute cases he does not want pursued and to fire those who do not conform to his directions. The President could then remove prosecutors who fail to conform to his decisions. The theory of presidential right suggests the legitimacy of a presidential decision to remove prosecutors who do not implement the President's enforcement priorities.

The White House's defense of the firings echoes Justice Scalia's articulation of a unitary executive theory based on presidential right. In *Morrison*, Justice Scalia, writing in dissent, characterizes prosecution as a "quintessentially executive activity."<sup>67</sup> He describes Article II as commanding "complete" presidential "control" over prosecution.<sup>68</sup> He then endorses a presidential power to fire prosecutors as the "primary check against prosecutorial abuse."<sup>69</sup> Yet, Justice Scalia's conception of the President's rights under Article II, like that of the White House, goes beyond the checking of outright abuse.<sup>70</sup> In cases adjudicating the standing of private citizens to bring suit, Justice Scalia has suggested that the duty to "take Care that the Laws be faithfully executed" includes a right to determine prosecutorial priorities, including the right to refrain from prosecuting violations enjoying sufficient evidentiary support.<sup>71</sup> Hence, Justice Scalia seems to

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<sup>67</sup> *Morrison*, 487 U.S. at 706.

<sup>68</sup> *Id.* at 710.

<sup>69</sup> *Id.* at 728 (describing "the primary check against prosecutorial abuse" as "political" and then describing this political check as the President's power to remove and appoint prosecutors).

<sup>70</sup> *See id.* at 728–29 (pointing out that prosecutors may misuse their discretion and not prosecute and thereby cause the President political harm); *see also* Carter, *supra* note 3, at 115 (describing a system that limits the President's discretion to refrain from enforcing the law as wreaking "havoc upon the system of checks and balances inherent in the separation of powers.").

<sup>71</sup> In *Friends of the Earth v. Laidlaw Env'tl. Serv.*, 528 U.S. 167 (2000), Justice Scalia criticized the majority's grant of standing to enforce the Clean Water Act, because it deprived "elected officials" of the right to decide that a "given violation should not be the object of suit at all. . ." *Id.* at 210 (Scalia J., dissenting). He finds this loss of discretion "constitutionally bizarre." *Id.* Justice Scalia begins the section containing this statement by quoting Article II's creation of a duty to faithfully execute law, thereby suggesting that the bizarreness involves a conflict with Article II. *Id.* at 209. I have stated only that Scalia "suggests" that Article II embodies a presidential right to refrain from prosecuting violations with sufficient

endorse the idea that the President has a right to direct prosecution according to his priorities, not just a duty to check prosecutorial abuse to assure faithful execution of the law.

On the other hand, the view of executive power as primarily a duty underlies the criticism of the firings. On this view, a prosecutor who honestly chooses cases based on evidence has faithfully executed the law, whether or not the cases he prosecutes reflect presidential priorities. This view of law as a duty influenced the media coverage of this flap, as evidenced by reports of high conviction rates by discharged prosecutors.<sup>72</sup> High conviction rates suggest that the prosecutors have chosen cases where the underlying evidence supports conviction and eschewed the pursuit of cases where the prosecutor cannot prove a criminal violation beyond a reasonable doubt. If a duty to faithfully execute the law defines the Presidency, there is no constitutionally valid justification for firing prosecutors who are already faithfully executing the law. Rather, the President's energy should be devoted to remedying failures to execute the law properly, which are, of course, fairly common in an enterprise as vast as the federal government. If the President fires prosecutors when they are already faithfully executing law, the President is merely engaged in "politics." On this view, the President should only interfere with prosecutors

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evidentiary support, because Scalia claims not to reach the question of whether Article II limits standing in this same passage. *Id.*

<sup>72</sup> See David C. Iglesias, Op-Ed, *Why I Was Fired*, N.Y. TIMES, Mar. 21, 2007, at A21 (reporting his own conviction rate as ninety-five percent); Eric Lipton, *U.S. Attorney in Michigan Disputes Reason for Removal*, N.Y. TIMES, Mar. 23, 2007, at A19 (stating that former U.S. Attorney, Margaret Chiara, increased felony convictions by fifteen percent in her Michigan office); Kevin McCoy & Kevin Johnson, *3 Fired Prosecutors Were in Top 10 for Convictions, Federal Data Show; Justice Department Spokesman Says Rankings Skewed*, USA TODAY, Mar. 22, 2007, at 1A (listing the conviction rate rankings of the eight fired prosecutors); Paul Shukovsky, *Ex-U.S. Attorney McKay Was Forced to Resign: Critics Question Political Motivations*, SEATTLE POST-INTELLIGENCER, Feb. 7, 2007, at B1 (reporting that John McKay had increased the Seattle office's conviction rate from eighty-one percent to eighty-seven percent in five years).

if his duty to faithfully execute law requires such interference, as in a case of prosecutorial abuse.

I do not mean to suggest Article II of the Constitution prohibits the President from interfering with prosecutorial discretion for political reasons. I do mean to suggest that a duty-based theory only makes proper execution of the law a constitutional concern. In other words, the Constitution does not give him a right to interfere with prosecutorial decisions for political purposes and Congress was within its rights to interfere with the firings, even if the President turned out to have directed them. Any invocation of the Constitution's symbolic authority to justify the firings would be inconsistent with a duty-based theory, unless the President could show prosecutorial malfeasance.

The juxtaposition of "politics" and priority setting in the debate over the firings suggests that these are two separate things. But politics consist, in part, of priority setting. If the President has decided that voting fraud cases merit more prosecutorial attention than, say, securities law violations, that represents a political decision that voting rights cases are more important. Perhaps the Bush Administration's critics' framing of the firings as "political" suggests low political motives instead of high ones. A President might prioritize voting rights decisions in order to attack political opponents, a low political motive.<sup>73</sup> Conversely, the Administration's characterization of the firings as reflecting priority setting might suggest what we might call a high political motive, such as a decision that voting rights cases are especially important because voting fraud can prevent elections from reflecting the true will of the people.<sup>74</sup> But in both cases, a

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<sup>73</sup> See Editorial, *Gonzales v. Gonzales*, N.Y. TIMES, Apr. 20, 2007, at A22 (claiming that it's "obvious" that the firing was a "partisan purge.").

<sup>74</sup> Cf. Lewis & Lipton, *supra* note 22 (quoting a DOJ spokesman as denying that Attorney General Gonzalez ever interfered with a prosecution for "partisan political reasons.").

unitary executive theory would support politicization of the Justice Department, allowing an elected President's political choices to determine who gets prosecuted for what.

This politicization seems troubling. For one thing, once politicization is accepted, Presidents can control prosecution for both high and low political reasons. Use of prosecution to defeat political opponents can constitute a serious threat to democracy. And the public will have difficulty discovering whether high or low politics motivated particular decisions.<sup>75</sup>

Even presidential reliance upon high political motives as the basis for removal may have troubling implications. It means that general policy priorities, rather than the merits of individual cases, determine prosecution decisions. This sort of approach seems at odds with the ideal of legal neutrality that, in spite of its problematic nature, lies at the heart of a concept of a rule of law and legitimate government. Prosecutors might refrain from prosecuting cases thought worthy of prosecution by the White House for two related reasons. First, prosecutors might find the evidence of a crime too weak to justify prosecution. Second, they might find violations that have sufficient evidentiary support insufficiently egregious to merit prosecution in light of other criminal activity vying for their offices' prosecutorial resources. Thus, a prosecutor may suspect that a voter deliberately lied in order to cast an illegal vote, but the evidence may only prove beyond a shadow of a doubt that the voter made a false statement, which could be a result of error. The decision to prosecute or not to prosecute such a case may involve a mixture of

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<sup>75</sup> See Eric Lipton, *Some Ask if U.S. Attorney Dismissals Point to Pattern of Investigating Democrats*, N.Y. TIMES, May 1, 2007, at A20 (discussing the lack of data available to check suspicions that Justice Department prosecutions of corruption reflect partisan political motivations).

evidentiary and priority setting judgments.<sup>76</sup> If presidential politics control voting rights cases, then the President (or the Attorney General, or a White House employee) might issue directives to prosecute such cases. But a prosecutor committed to weighing of evidence, rather than execution of individual policy preferences (even if the individual is the President) might eschew such a prosecution. If general policy preferences wholly control prosecution decisions, individualized justice may suffer.

A desire to have individualized justice trump politics constitutes a perfectly good policy reason to like prosecutorial independence, but it does not provide a constitutional theory adequate to show that Article II supports such independence for U.S. Attorneys in the face of a fairly powerful unitary executive theory suggesting that it does not. If the President has the right to control prosecution, then prosecutorial independence constitutes a constitutionally suspect contemporary policy preference.<sup>77</sup> A duty-based conception of the executive power, however, may constitutionally justify prosecutorial independence. In Section IV, I proceed to outline the basis for such a conception.

#### IV. Duty and DOJ Independence

The purpose of Article II is to assure faithful execution of the law. The arrangement of power within Article II should be seen as a means toward this end. And

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<sup>76</sup> See generally, Interview by PBS with David Iglesias, U.S. Attorney of New Mexico, (June 27, 2007), available at <http://www.pbs.org/shows/330/david-iglesias.html> [hereinafter Iglesias Interview] (explaining that David Iglesias' voter fraud taskforce reviewed the evidence in over 100 files and found no prosecutable cases). Cf. *Kondracke Assumed Voter Fraud as Fact in Claiming Prosecutor Firings Were About "The Failure to Prosecute" It*, MEDIA MATTERS AM., July, 12, 2007, <http://mediamatters.org/items/200707120008> [hereinafter McKay] (reporting that former prosecutor, John McKay, who was accused of failure to pursue voter fraud, did not convene a grand jury on the issue because he thought "there was no evidence of voter fraud.").

<sup>77</sup> See Carter, *supra* note 3, at 109–10 (noting that the modern Court generally finds claims of efficiency, good policy, and necessity insufficient as justifications in separation of powers cases). Cf. Calabresi & Prakash, *supra* note 2, at 664 (stating that a preference for "depoliticized" administration has no "grounding in the Constitution.").

the Constitution does not rely on presidential power as the sole means of achieving the desired fidelity to the law.

Even at the time of the founding, and certainly today, the President cannot possibly exercise all executive power.<sup>78</sup> The omission of the word “all” from Article II must be deliberate. The corpus of law, even in George Washington’s time, was too vast for one person to execute all of it.<sup>79</sup> That is why the Constitution contemplates civil officers in the government.<sup>80</sup>

The impossibility of a presidential monopoly on executive action also explains why the Constitution commands that the President “take Care that the Laws be faithfully executed,”<sup>81</sup> instead of simply telling him to execute the law faithfully. He cannot possibly execute all of the laws faithfully himself, because he cannot execute most of the laws at all. Somebody else, such as U.S. Attorneys, must execute an awful lot of the law.<sup>82</sup> This reliance on non-presidential executive action explains the use of the passive voice in the constitutional text—a call that the law “be faithfully executed.”<sup>83</sup>

Because the President cannot control all decisions executing the law, the Constitution places a great deal of reliance on the integrity of individual officers. That is why Article VI requires “all executive and judicial Officers” to swear an oath to “support

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<sup>78</sup> See Calabresi & Prakash, *supra* note 2, at 595 n.205 (acknowledging that the President requires the assistance of “other officers” to execute the law).

<sup>79</sup> See Lessig & Sunstein, *supra* note 3, at 23–30 (discussing departments established by the first Congress); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1980); cf. Mashaw, *supra* note 37, at 1667 (explaining that even though the statutes enforcing the embargo acts under Jefferson gave him the power to enforce these laws, “much of the content of the enforcement policies came from the Treasury Department . . .”).

<sup>80</sup> See Calabresi & Prakash, *supra* note 2, at 593–94 (affirming that the Constitution contemplates executive officers other than the President).

<sup>81</sup> U.S. CONST. art. II, § 3.

<sup>82</sup> See *Myers v. United States*, 272 U.S. 52, 117 (1926) (noting that the President cannot execute the laws unaided).

<sup>83</sup> U.S. CONST. art. II, § 3.

this Constitution.”<sup>84</sup> The “take Care” clause directs the President to influence other officials, so that they might faithfully execute law.<sup>85</sup>

But a duty-based theory denies that the Constitution grants the President complete control over executive officers, and therefore reads the Constitution as not relying on complete presidential control of officers as the only means of obtaining faithful execution of the law.<sup>86</sup> It recognizes that the President has limited control over appointments, since the Constitution only guarantees the President the right to nominate “Officers of the United States.” Congress may give him more power by approving his appointees or vesting the authority to appoint inferior officers in the President, but it need not do so.

Nor does the Constitution expressly confer any removal authority upon the President. Since the only removal mechanism specified in the Constitution is impeachment, a duty-based theory might maintain that the Constitution forbids presidential removal of officers.<sup>87</sup> Or it might maintain that Congress may specify whatever removal provisions it thinks appropriate to ensure faithful execution of the law, subject of course to a presidential veto that would generally create pressure to negotiate the locus of removal power. A third approach, the one the Court has adopted, allows for congressional control over removal provisions subject to ad hoc judicial intervention.<sup>88</sup>

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<sup>84</sup> U.S. CONST. art. VI, § 3.

<sup>85</sup> U.S. CONST. art. II, § 3.

<sup>86</sup> *Accord* Kendall v. United States *ex rel.* Stokes, 37 U.S. 524, 610 (1838) (denying that “every” executive “officer” is “under the exclusive direction of the President.”).

<sup>87</sup> *See* Calabresi & Prakash, *supra* note 2, at 596–97 (acknowledging that at first glance “the Constitution would seem to provide only one means of removing inferior executive officers: impeachment,” but rejecting this “cramped” reading based on prior practice and functional considerations).

<sup>88</sup> *See* Fromkin, *supra* note 2, at 1366–67 (citing “general agreement that the Supreme Court’s separation of powers decisions are hopelessly contradictory.”); *see also* Morrison v. Olson, 487 U.S. 654, 688–91 (acknowledging that the Court had disapproved of “good cause” removal provisions in statutes governing removal of “purely executive” officials, but adopting a “present considered view” that this approach is too rigid); Lessig & Sunstein, *supra* note 3, at 5–6 (discussing the wavering lines in the Court’s jurisprudence on presidential control of officials).

Any of these approaches would raise an issue of how the President would exercise executive power when he does not possess unlimited authority to remove an officer.

The firing cases suggest an answer. Because the Constitution lodges executive power in the President, executive officers, who swear an oath to uphold the Constitution, will normally pay attention to presidential requests. Since they owe their office to the President who nominated them (at least in part), some notion of loyalty will usually augment their sense of duty to make them responsive to presidential requests. This sense of duty to the President explains why the fired U.S. Attorneys did review the cases the White House thought should receive priority.<sup>89</sup> In other words, it is not clear that proper exercise of executive power requires an executive removal authority, especially when an effort to direct prosecution is exercised to assure faithful execution of law, a motive that will enhance the legitimacy of presidential requests and will usually suffice to assure secure adoption of presidential instructions.<sup>90</sup>

On the other hand, a duty-based theory of executive power does not demand that DOJ officials grant all White House requests for prosecutions. As long as prosecutors are faithfully executing the law, a duty-based theory is satisfied whether or not they obey presidential requests to prosecute a particular case or a class of cases.<sup>91</sup>

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<sup>89</sup> See Iglesias Interview, *supra* note 74 (explaining that David Iglesias' voter fraud taskforce, including members from the Washington D.C. Department of Justice and the local FBI, reviewed 100 files and found no prosecutable cases); McKay, *supra* note 74 (reporting that former prosecutor, John McKay found "no evidence of voter fraud," which suggests that he did review cases); see also Lara Jakes Hordan, *Fired U.S. Attorneys Ranked Above Peers in Prosecution Rates*, STARNEWSONLINE.COM, MARCH 21, 2007, [http://www.wilmingtonstar.com/apps/pbcs.dll/article?AID=/20070321/NEWS/703210457/-1/State & template=printart](http://www.wilmingtonstar.com/apps/pbcs.dll/article?AID=/20070321/NEWS/703210457/-1/State&template=printart) (suggesting that three fired prosecutors had pursued administration priorities, because their offices were among the top five rated offices for the number of immigration cases prosecuted).

<sup>90</sup> See Note, *supra* note 43, at 801 (describing the President's role as "one of general leadership and persuasion").

<sup>91</sup> See Percival, *supra* note 2, at 966 (claiming presidential removal authority may influence an official's decisions, but that the President may not simply countermand an official's decision on matters entrusted to her by Congress).

One can, however, reconcile a weak duty-based theory with a weak version of the unitary executive theory. A weak unitary executive theory would insist that the President have nearly complete control over the Executive Branch, but demand that this power be used only to assure faithful execution of the law, not to substitute presidential priorities for those of officials who are faithfully executing the law.

The strong unitary executive theory, however, accepts politicization of the civil service. Its emphasis on presidential control over appointments and removal might be called the theory of the patronage state, because the theory embraces presidential control over hiring and firing as a right, which would inevitably be used for political purposes.

Analysis of the statutory regime governing the appointment and removal of U.S. Attorneys shows why the strong unitary executive theory may be inconsistent with express clauses in the Constitution giving Congress substantial control over appointments. Complete presidential power over removal has the potential to nullify the effect of the congressional participation in appointments that the Constitution explicitly commands. The regime that the Patriot Act Amendments establish illustrates the problem. Under 28 U.S.C. § 546 as revised by the Patriot Act Amendments, the President may remove U.S. Attorneys and replace them with appointees that the Attorney General chooses.<sup>92</sup> The President can keep hand-picked replacement U.S. Attorneys in office by simply declining to nominate a “permanent” U.S. Attorney for Senate approval. In principle, he could do this the day after the Senate confirms his nominee, making the Senate’s advice and consent function a complete charade. Recognizing this, Congress

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<sup>92</sup> See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-77, § 502, 120 Stat. 192, 246 (2006) (to be codified at 28 U.S.C. § 546) (allowing an interim US attorney to serve until another is appointed by the President and confirmed by the Senate).

promptly passed the Preserving United States Attorney Independence Act of 2007<sup>93</sup> amending 28 U.S.C. § 546 to nullify the Patriot Act Amendment's effect once the firings' story came to light.<sup>94</sup>

This inconsistency of presidential removal with effective congressional participation in appointments, which the Constitution specifically requires in various ways, may appear to depend upon the nature of the regime governing replacements for removed officials. After all, the Congress fought perceived politicization of the Justice Department not by targeting the presidential removal authority, but rather by repealing the Patriot Act Amendment section 502's grant of authority to name permanent, rather than just temporary, replacements.<sup>95</sup>

The inconsistency between presidential removal authority and the Senate's appointments power, however, only depends upon the nature of the replacement regime to a limited degree. If the President can immediately fire the person the Senate approves for any reason or no reason at all, he frustrates giving effect to the Senate judgment that the approved nominee is the right person for the job, no matter what happens with replacements. Furthermore, even in the absence of a regime giving the President formal authority to name permanent replacements, the President can exercise substantial control over replacements, thus thwarting the objective of having only "officers of the United States" who command sufficient respect across the political spectrum to gain Senate confirmation. To see this, imagine that the statute simply prohibited the President from naming replacements. Even if the President names no replacement, somebody would

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<sup>93</sup> Pub. L. No. 110-34, § 2, 121 Stat. 224 (2007) (to be codified at 28 U.S.C. § 546) (restricting the time Attorney General appointed U.S. attorneys can stay in office).

<sup>94</sup> *Id.*

<sup>95</sup> *See id.*

have to do an ousted U.S. Attorney's work. And absent an express provision to the contrary, a rights-based theory would assume that the President can assign this work to officers he selects from those already employed in the department. That is why 28 U.S.C. § 546 provided for *judicial* appointment of a successor U.S. Attorney once the term of a temporary replacement lapsed without Senate approval of a permanent successor.<sup>96</sup> Absent some explicit check on abuse of the removal authority through congressional or judicial control of replacements even absent presidential action, presidential removal authority thwarts meaningful congressional participation in appointments decisions, allowing the President to nullify an appointment's effects by removing the appointee and declining to nominate a successor for Senate approval.

The Constitution's reliance on individual integrity, on impeachment as the only explicitly sanctioned removal mechanism, and on a very substantial congressional role in appointments suggest that the Constitution does not require that the President have the freedom to fire prosecutors who fail to implement a President's priorities. In other words, the Constitution may not grant the President the complete control over execution of the law that the rights-based theory envisions. A duty-based theory—that the President enjoys limited power over the executive branch as part of a system of checks and balances to assure faithful execution of the law—fits many constitutional provision better than a rights-based theory.<sup>97</sup> From this perspective, the firing of prosecutors only enjoys a constitutional justification if it corrects a failure to faithfully implement law. If the administration used the removal power just to implement presidential priorities—rather

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<sup>96</sup> See 28 U.S.C. § 546 (d) (2000) (stating that the district court will appoint a U.S. attorney if a temporary appointment expires without Senate approval).

<sup>97</sup> See Note, *supra* note 43, at 804 (describing the separation of powers in the Constitution as seeking to avoid concentrating power in the President or any other person or body).

than to correct prosecutorial abuse—Article II does not require any particular respect for his decision.

The duty-based theory takes into account clauses of the Constitution and some evidence of original intent that unitary executive scholars often gloss over.<sup>98</sup> And it shows that a proper duty-based theory of the Constitution would support DOJ independence. Without such a theory, that independence must remain threatened.

### **Conclusion**

I have sketched here a basic argument for a duty-based conception of executive power. A rights-based conception, however, can support the politicization of the Justice Department. That troubling feature of a rights-based theory should invite a more vigorous debate about the relative merits of a rights-based unitary executive theory and a duty-based theory. A duty-based theory maintains that the Constitution sets up Congress and, to some degree, executive branch officials and the judiciary, as checks on presidential control over the executive branch to assure that the “Laws be faithfully executed.” Such a theory would provide constitutional grounding for a measure of DOJ independence.

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<sup>98</sup> See, e.g., Calabresi & Rhodes, *supra* note 2, at 1168 (stating that unitary executive theorists treat the congressional power to vest the appointment of inferior officers in department heads as an “insignificant housekeeping provision added at the last minute.”).