



The U.S. Justice Department Is *Not* Independent

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[T]here would always be great probability of having the place [of President] supplied by a man of abilities, at least respectable. Premising this, I proceed to lay it down as a rule, that one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment.

Federalist Number 76 (Apr. 1, 1788) (Hamilton)

Introduction

This Federalist 76 excerpt succinctly captures the core political theory that serves as a font for several provisions and doctrines of the Constitution establishing that Article II’s Executive Branch of the federal government was designed to be unitary. In other words, the President is the sole head of the Executive Branch. All Executive Branch officials ultimately report to him and thus can and should be removable by him. The only check or balance on this system is that the Senate must confirm a category of so-called principal officers after the President nominates them. These principal officers are the heads of the respective departments—together with those supplemental officers later added by Congress: namely, the upper-management tiers such as the Subcabinet, Assistant Secretaries, and Assistant Attorneys General.

The analysis of this paper is divided into five parts:

Part I further expands on Federalist 76’s theory of the need for a Unitary Appointer in the Executive Branch by rejecting the alternative of using a “body of men” for all appointments.

Part II provides a set of examples of the incorrect and contrary view of a diluted Constitution held by A) the current U.S. Justice Department;¹ B) so-called “elite” print

¹ Hereafter the U.S. Department of Justice is referred to interchangeably as “DOJ,” “USDOJ,” “Justice Department,” or “Department of Justice.”

media; C) new online media; D) academia; and E) leftist pressure groups. Specifically, these sectors of society, which can collectively be called a body of “influencers,” advance the false paradigm that the Justice Department should be independent of the President. Parts III through V serve to refute this benighted view.

Part III explains the textual provisions of the Constitution that cabin the Executive Branch, thereby fixing its unitary nature and establishing that the Justice Department can be no more independent of the President than the Department of Commerce or the Department of Health and Human Services.

Part IV shows that what really animates the view of modern influencers that the Justice Department is or should be independent is a project that dawned in America’s Progressive Era aiming to get around the Constitution altogether and, in essence, put a new Constitution in its place.

Finally, Part V explains that the main reason the concept of Department of Justice independence has taken firm hold in the lay American mind (even beyond the fact that the proponents of ignoring the Constitution or rewriting it have long captured the educational system in this country) is that the people have become accustomed to conflating the independence of the Justice Department with the separate ideas of equal justice under the law and related norms of the legal profession aimed at avoiding bias. The structure of the federal government is distinct from the conduct of federal officials in particular circumstances occurring within the parameters of that structure.

For instance, federal officials, particularly at the Justice Department, must align their conduct to the Bill of Rights. They cannot act in ways that deny due process of law; they cannot take steps to strip defendants of property except in accord with the law, etc. These external legal constraints on their conduct do not mean that these officials, of necessity, must be freed of the meta-constraint of heeding the leadership of the President on pain of facing removal from office and replacement by an official who will obey the President. Put differently, these external legal constraints as applied to the Attorney General do not mean that the Attorney General must be independent of the President. For the President is also bound by the Bill of Rights.

Similarly, federal laws may require one of the many lawyer-leaders at the Justice Department to recuse themselves from a given case because they have a conflict of interest—for instance, a DOJ official’s spouse owns stock in the specific company being targeted for prosecution. The need to adhere to restrictions on conflicts of interest never free the official to act independently of the President, however. Instead, a subordinate (or a superior or laterally equivalent) official, not subject to the same conflict will step in as the decisionmaker. Nevertheless, at all times the substituted official remains bound

to the President's will directly or to the delegations of the President to higher-ranking officials supervising the activities of the relevant official capable of serving as a decisionmaker because he is untainted by a conflict of interest.

Moreover, conflict-of-interest logic does not go so far as to say that if a President's actions are called into question under the law, the equivalent of a fourth branch of government must be created—whether as a general or specific matter—to solve the theoretical problem of a President's conflict of interest from being imputed downwards to all of his subordinates in the Executive Branch and thus requiring an “independent” official to wield corrective power.

The President's role in the constitutional structure is unique, and the remedies for presidential violations of law of sufficient moment are to be found in impeachment or at the ballot box. No part of the Constitution allows the creation of one or more officials who stand above and outside the President's unitary authority over the Executive Branch.

PART I: THE FOUNDATIONAL NEED FOR A “UNITARY APPOINTER”

The Founders established a system wherein the heads of the various Executive Departments were to be nominated by the President in the first instance, yet confirmed “by and with the Advice and Consent of the Senate.” U.S. Const., art. II, sec. 2, cl. 2. Federalist 76 defends that system, in essence arguing that it creates a best-of-both-worlds approach: one where a single “man of abilities” or “one man of discernment” serves as the best selector, whereas the Senate supplies a backup check on the selections. This secondary check, however, does not go so far as to allocate the initial choice to the Senate, where it could become infected with party or geographic bias, with a “spirit of cabal and intrigue,” or with logrolling (*i.e.*, one Senator saying to another—you give me this appointed head of an Executive Department and I will give you this other one, etc.). And even where the Senate refuses to consent, the singular President retains the first-mover, indeed exclusive-mover, discretion to appoint successive candidates. However, this inherently means the President's primary choice for the job is not always the one who takes office at the end of the process if the Senate refuses to concur.

Another important corollary of this approach is that the office of the presidency, as discharged by the President alone, was designed to maintain control over the heads of the several Executive Departments to be created by Congress—whether by nominating them, by commissioning them, or by dismissing them at his sole discretion. Federalist 76 posits that the proper choice in designing an energetic presidency is one between the binary of the President either possessing exclusive control over

appointments, on the one hand, or a system of presidential nomination coupled with the check of Senate confirmation, on the other. Indeed, we know that the Framers settled on using a hybrid combining both systems—principal officers were to be appointed with Senate confirmation, but the Constitution otherwise empowered the President to exert unilateral appointment authority as to inferior officers. *See* U.S. Const., art. II., sec. 2, cl. 2.

The key point is that the Framers did not think beyond this binary choice to imagine a Cabinet officer invariably holding office (in the absence of impeachment) for the span of a President’s entire term or some other fixed period of time. Cabinet officers were never intended to be semi-permanent satraps invested with an independent sphere of authority placing them beyond the reach of the President’s control. Cabinet officers neither exercise presumptive power that the President can displace only by great effort nor, certainly, is it the case that Cabinet officers exercise power entirely outside of the presidential sphere. Instead, Cabinet officers are subordinate to and answerable to the President at all times for every single one of their decisions.

Despite the rather obvious textual features of Article II (treated in more detail in Part III below), which unmistakably create a unitary Executive—made even plainer in the Federalist Papers—it has nevertheless become a curious commonplace in modern America for the United States Justice Department itself, as well as politicians, the media, academics, and leftist pressure groups to talk about the supposed “independence” of the Attorney General and of the Justice Department from the President.

Worse yet, they speak as if such independence were an established fact, a desirable goal, or both. Indeed, the appreciation for our constitutional system has frittered away to such a sorry state that we now commonly see various Executive Branch officials (even ones who have served in the Justice Department) asserting that *even mere components of DOJ are independent not just of the President but of the Attorney General as well*. Balkanization of the part of the Executive Branch tasked with general law enforcement is a result the Framers would have considered a most bizarre anathema to the structure of the Constitution and in particular to the Unitary Executive.

PART II: EXAMPLES FROM MULTIPLE SPHERES OF INFLUENCE SHOWING MANY HAVE WRONGLY DEPARTED FROM THE CONSTITUTION AND BELIEVE DOJ MUST BE INDEPENDENT OF THE PRESIDENT

As noted above, there is a prevalent attitude these days, which pretends to a certain sophistication, that, *of course*, the Justice Department must be independent of the President.

Just take this sampling:

DOJ Itself

- “Our Values: *Independence* and Impartiality. We work each day to earn the public’s trust by following the facts and the law wherever they may lead, without prejudice *or improper influence*.” U.S. DOJ, *About DOJ*, <https://www.justice.gov/about#:~:text=Our%20Values,without%20prejudice%20or%20improper%20influence> (last visited May 17, 2023) (emphasis added). Those familiar with the political landscape in 2023 will quickly recognize that the “improper influence” referred to above is influence by the President.
- President Trump’s second Attorney General Bill Barr, in response to an audience question about DOJ independence, went even farther and claimed he was personally “vested” with such powers: “Q: [D]o you believe your actions were consistent with the [D]epartment of [J]ustice’s long-standing policy of independence from political influence, which [I] believe you addressed? [A.G.] [B]arr: [T]o me ... the [A]ttorney [G]eneral is the figure that has the authority. the [A]ttorney [G]eneral is not a clerk that just administers a department, the legal authority and discretion is vested in the [A]ttorney [G]eneral and people in the [D]epartment carried out on behalf of the [A]ttorney [G]eneral.” Transcript of Appearance Before the City Club of Cleveland (May 5, 2023), *available at* https://archive.org/details/CSPAN_20230506_014000_Fmr._Attorney_General_Bill_Barr_Speaks_in_Cleveland/start/1680/end/1740 (last visited May 17, 2023).²

“Elite” Media

- Katie Benner, *On First Day, Garland Vows to Restore Justice Dept. Independence: Attorney General Merrick Garland was sworn in and briefed on the department’s investigation into the Capitol riot*, NEW YORK TIMES (Mar. 11 (updated Apr. 19), 2021), <https://www.nytimes.com/2021/03/11/us/politics/merrick-garland-attorney-general.html> (last visited May 17, 2023) (emphasis added).

² See also William P. Barr, ONE DAMN THING AFTER ANOTHER: MEMOIRS OF AN ATTORNEY GENERAL 244 (2022) (“I wanted to minimize contact with the White House at this stage. We intended to make decisions based solely on *our independent judgment* applying the department’s normal standards, and we did not want communications that could be misconstrued as involving *White House input into our deliberations*.”) (emphasis added) (discussing contemplated next steps after he received a copy of Robert Mueller’s Special Counsel report concerning the Russia investigation into President Trump).

- “[B]y unabashedly ordering the department to open a particular investigation, *Mr. Trump has ratcheted up his willingness to impose direct political control over the work of law enforcement officials* ‘Yesterday made explicit what before was implicit, which is that Trump is crossing *every line that protects the independence of the Justice Department*,’ said Neal Katyal, who drafted the department’s special counsel regulation in 1999 for the Clinton administration and served as acting solicitor general in the first term of the Obama administration.” See also Charlie Savage, *By Demanding an Investigation, Trump Challenged a Constraint on His Power*, NEW YORK TIMES (May 21, 2018), <https://www.nytimes.com/2018/05/21/us/politics/trump-justice-department-independence.html> (last visited May 17, 2023) (emphasis added). One would think the *New York Times* would at least cite a constitutional provision establishing such a purported “constraint” on the President, but alas.
- “*The Justice Department has long enjoyed a measure of independence in the executive branch*, even though its boss is appointed by, and answers to, the president.” Matt Zapotofsky & Ellen Nakashima, *Trump’s Comments on Clinton Raise Questions About Justice Department Independence*, WASH. POST (Nov. 22, 2016), https://www.washingtonpost.com/world/national-security/trumps-comments-on-clinton-raises-questions-about-justice-department-independence/2016/11/22/7de6eaaa-b0cc-11e6-840f-e3ebab6bccdd3_story.html (last visited May 17, 2023) (emphasis added). At least this piece by Zapotofsky and Nakashima pays some lip service, however slight, to the constitutionally ordained system of government, recognizing the source of authority for the Attorney General’s appointment and referring only to “a measure of independence,” not to complete independence.
- “To protect *the independence of the 94 U.S. attorney’s offices*, [Geoffrey Berman, former U.S. Attorney for the Southern District of New York] offers some suggestions for reform. For example ... [he] also proposes to eliminate prior-approval requirements that U.S. attorneys’ offices must obtain from the DOJ for sensitive investigative steps.” Barbara McQuade, *Former U.S. Attorney Dishes on How He Held Line Against Trump White House: In detailing ouster from the Southern District of New York, Berman says Barr ‘was desperate,’ cites attorney general’s interference in other investigations*,” WASH. POST (Sept. 9, 2022), <https://www.washingtonpost.com/outlook/2022/09/09/former-us-attorney-dishes-how-he-held-line-against-trump-white-house/> (last visited May 17, 2023) (emphasis added). This review by one former Justice Department official of a

book penned by another former Justice Department official serves as an example of a full-on balkanization where each purported potentate inside the Department of Justice is deemed to exercise his or her own sacrosanct province of authority that neither the President nor the Attorney General can invade.

New Media

- “[Sean] Davis and [Kurt] Schlichter are wrong about *DOJ and FBI independence. For better or worse, these institutions are in important respects independent of the President.*” Jack Goldsmith, *Independence and Accountability at the Department of Justice*, LAWFAREBLOG, <https://www.lawfareblog.com/independence-and-accountability-department-justice> (Jan. 30, 2018) (last visited May 17, 2023) (emphasis added) (hereafter “Goldsmith Article”). And Jack Goldsmith is an ostensibly conservative law professor who headed DOJ’s Office of Legal Counsel in the Bush 43 Administration, making his claim particularly notable. Goldsmith’s article will be discussed extensively below and indeed is a key foil for this paper.
- Tweet by Harry Litman, former Deputy Assistant Attorney General at Main Justice and former U.S. Attorney for the Western District of Pennsylvania (Nov. 20, 2022),



<https://twitter.com/harrylitman/status/1594493153142530049> (last visited May 17, 2023) (arguing that violating DOJ “independence” would “burn down the Justice Department”).

Academia

- “*To illustrate, consider the norm of investigatory independence from the President. Although many understand law enforcement to be a paradigmatic executive function, there is today a set of structural norms that insulate some types of prosecutorial and investigatory decisionmaking from the President.*”

These rules constrain the President's choice of FBI Director and limit the authority of the President to fire the FBI Director without cause." Daphna Renan, *Presidential Norms and Article II*, 131 HARVARD L. REV. 2187 (2018) (footnote omitted), [2187-2282 Online.pdf \(harvardlawreview.org\)](https://www.harvardlawreview.org/2018-2019/2018-2282-online.pdf) (last visited May 17, 2023) (emphasis added). Many have the understanding that law enforcement is "a paradigmatic executive function" because *it is* a paradigmatic executive function, which should cause academics to reconsider the constitutionality of their insistence on "structural norms" of prosecutorial and investigative independence.

- In this short piece from a political scientist, the title says it all: Joshua Holzer, *The President's Authority Over DOJ Jeopardizes Independence: How much influence should a president have over the Justice Department? The answer is critical to the success of America's democratic experiment*, GOVERNMENT EXECUTIVE (July 2, 2021), <https://www.govexec.com/oversight/2021/07/presidents-authority-over-doj-jeopardizes-independence/183051/> (last visited May 17, 2023) (emphasis added) (hereafter "Holzer Article").

Leftist Pressure Groups

- "Restoring and strengthening *the norms of DOJ independence* will require much of many: leaders who *honor DOJ independence*; a public that understands the *importance of DOJ independence*; and an attorney general who takes action to promote such honor and understanding." Center for American Progress, *Restoring Integrity and Independence at the U.S. Justice Department*, <https://www.americanprogress.org/article/restoring-integrity-independence-u-s-justice-department/> (last visited May 17, 2023) (emphasis added). Here, the technique seems to be that if the word "independence" is repeated enough in the same sentence, any ability to debate the constitutionality or wisdom of such independence is defeated.
- "[W]e will continue to advocate to *make sure that American law enforcement agencies maintain their independence from the president* and remain accountable to the Constitution Protect Democracy uses integrated advocacy to *protect and promote DOJ independence*, including legal and policy research and analysis, litigation, legislative and related advocacy, and communications strategies." Protect Democracy, *Department of Justice Independence* (Oct. 28, 2022) (amusingly filed under "Authoritarian Threat Index," as if the original Constitution as written—a revolution in world

republican government—could properly be cast as an “authoritarian threat”), <https://protectdemocracy.org/work/department-of-justice-independence/> (last visited May 17, 2023) (emphasis added) (hereafter “Protect Democracy Article”).

Put the [nattering nabobs](#) aside for now. If the Constitution is clear about the *non*-independence of the Justice Department (as well as of all other Executive departments), where is this profound misunderstanding of the Constitution coming from? The most important source of the problem is the ahistorical, non-constitutional, and extralegal Progressive Era/New Deal policy thinking about how the federal government *should have been* structured, and the pitiful state of American education, which fails to teach the Constitution as it is written and thus even more clearly fails to instruct students in contemporaneous texts explicating the Constitution, such as the Federalist Papers or James Madison’s notes on the Constitutional Convention or the 18th century documents historian Max Farrand collected about that convention.

Media reporters grow up steeped in this non-constitutional world and thus come to think of it as quite natural. Indeed, to the extent reporters at most “mainstream” outlets even acknowledge there is another perspective on how the Justice Department should operate, they see the proponents of such views as the intellectual equivalent of allonge-wig wearers from the 18th century—quaint and ridiculous. Particularly for reporters, the mythology created around the *Washington Post*’s handling of the Watergate scandal is magnetic in elevating and reifying the extra-legal paradigm of an independent Justice Department. *See, e.g.,* W. Joseph Campbell, *Five Media Myths of Watergate*, BBC.COM (June 17, 2012) (“Interestingly, principals at the Washington Post have periodically scoffed at the dominant narrative of Watergate. [Bob] Woodward, for example, once said, ‘the mythologising of our role in Watergate has gone to the point of absurdity, where journalists write... that I, single-handedly, brought down Richard Nixon. Totally absurd.’”).

All of these deleterious tendencies must be resisted with maximum force. The full, 200-proof Constitution must be maintained against all of its attackers—undiluted, unadulterated. So let us begin to delve more deeply into the relevant textual instructions embedded in the Constitution.

PART III: THE PROVISIONS OF ARTICLE II BARRING DOJ INDEPENDENCE

Opinion Clause. The establishment of the Cabinet traces to the Constitution’s provision that the President “may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices.” U.S. Const., art. II, sec. 1, cl. 1 (“Opinion Clause”). In that way,

the Constitution establishes that there will be “executive Departments” and “principal Officer[s]” thereof. Of course, this text also clearly establishes the completely subordinate status of those principal officers to the President.

The Cabinet as a Corollary of the Opinion Clause. Most American students used to learn—by high school at the very least—that there were four and only four departments or Cabinet officials included in President George Washington’s Cabinet as it was established in the immediate wake of Washington’s first inauguration: (1) Department of State, (2) Department of Treasury, (3) Department of War (now Defense)—all of those three headed by a Secretary, and (4) the Attorney General (originally established without a Department, with DOJ not coming into existence until July 1, 1870). See George Washington’s Mount Vernon, *Cabinet Members*, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/cabinet-members/> (last visited May 17, 2023); U.S. Justice Department, *Creation of the U.S. Department of Justice and Civil Rights Enforcement, 1870-1872*, <https://www.justice.gov/history/timeline/150-years-department-justice#event-1195101> (last visited May 17, 2023).

Most fundamentally, since nothing in the Constitution mandates what the particular departments of the federal government reporting to the President are to be, it is clear from the Opinion Clause in Article II that principal Officers are made to report to the President and operate under his supervision and direction. Nothing in the Constitution provides that the Attorney General is some kind of special Cabinet member who is more equal than others and who thus must be left independent.

Appointments Clause. The next constitutional provision to understand is the Appointments Clause:

THE President is “to NOMINATE, and, by and with the advice and consent of the Senate, to appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not otherwise provided for in the Constitution. But the Congress may by law vest the appointment of such inferior officers as they think proper, in the President alone, or in the courts of law, or in the heads of departments. The President shall have power to fill up ALL VACANCIES which may happen DURING THE RECESS OF THE SENATE, by granting commissions which shall EXPIRE at the end of their next session.”

Federalist 76, quoting U.S. Const., art. II, sec. 2, cl. 2.

This brings us to where we began. The term “independent” appears nowhere in Article II of the Constitution establishing the presidency. The President is the prime mover. He selects his Cabinet members because he selects “all other officers of the United States whose appointments are not provided for in the Constitution.” This leadership category of officers are deemed principal officers. *See Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam) (“Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary.”), *superseded by statute in irrelevant part*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81. Principal officers and inferior officers in the Executive Branch are undoubtedly subordinated to the President. There is no other way to read the Appointments Clause.

Vesting Clause. The Opinion Clause and the Appointments Clause help neophytes to the Constitution to understand the point of Article II’s Vesting Clause, even though that last clause is very compact and the Framers no doubt would have thought the Vesting Clause standing alone good enough to make the President the indisputable master of all Executive Branch officials: “The executive Power shall be vested in a President of the United States of America.” U.S. Const., art. II, sec. 1, cl. 1. This means *all* of the executive power of the United States federal government is granted to and conferred upon the President. Not part of it. And not all of it except for an unmentioned donut hole that the Justice Department occupies. No, all of the executive power of the federal government is conferred on the President—including power over the Justice Department. Officials subordinate to the President are vested with executive power only insofar as the President delegates such power to them to wield for a time and according to his supervision.

Take Care Clause. The most important trump card that the President holds over all federal Executive Branch officials, and especially over the Justice Department, is the Take Care Clause: “[The President] shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.” U.S. Const., art. II, sec. 3. Note well: The President is the one to take care that the laws be executed faithfully, not principally the Attorney General, the President’s subordinate. Not any or all U.S. Attorneys. Not the Federal Bureau of Investigation.

Indeed, law enforcement is the President’s signature duty. Law enforcement is not some kind of separate task that can only be entrusted to either an Attorney General (a role not explicitly mentioned in the Constitution) or to the Attorney General presiding as a kind of figurehead atop a vast bureaucracy of DOJ and FBI career people. Relatedly, all commissions are properly granted by presidential authority. *See, e.g.,*

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (adjudicating a dispute over Marbury's presidential commission). Without presidential authority, there are no commissions, so in the absence of a commission, there would be no authority for the Attorney General to act.

Cornell Law School breaks the Take Care Clause powers of the presidency into "at least" these five categories:

(1) powers the Constitution confers directly upon the President by the opening and succeeding clauses of Article II; (2) powers that congressional acts directly confer upon the President; (3) *powers that congressional acts confer upon heads of departments and other executive agencies of the federal government* [since Presidents are the vested font of all executive power]; (4) *power that stems implicitly from the duty to enforce the criminal statutes of the United States*; and (5) power to carry out the so-called "ministerial duties," regarding which an executive officer can exercise limited discretion as to the occasion or manner of their discharge.

Cornell Law School, *Art II.S3.3.1 Overview of the Take Care Clause*, <https://www.law.cornell.edu/constitution-conan/article-2/section-3/overview-of-the-take-care-clause> (last visited May 17, 2023) (emphasis added).

The powers Congress delegates to the heads of departments and agencies are thus, as a constitutional matter, the powers and duties of the President as well, granted to him (vested in him) in paramount measure. This means that while Congress often delegates powers to the Attorney General, that does not take those powers out of the hands of the President, who is always understood to be standing in back of and acting as the headwater for executive authority for any particular exercise of such power. *See, e.g.*, 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."). And, of course, the powers to enforce the criminal statutes (and indeed all federal civil statutes as well) are reposed in the President.

PART IV: THE AIM OF CHANGING THE 1789 STRUCTURAL FORM OF THE REPUBLIC AS THE FOUNTAINHEAD OF CONSTITUTIONAL ERROR

Given the straightforward Take Care Clause, it is remarkable, first and foremost, that anyone at the Justice Department or even in academia, the media, or pressure groups can even try to speak with a straight face about the supposed independence of

the Justice Department. That is, unless they are speaking about *changing the constitutional* order as it was originally designed and doing so outside of the express constitutional amendment process set out in Article V of the Constitution.

Woodrow Wilson's Pernicious Influence. Make no mistake, several of these fourth and fifth, etc. "estates" (the media and academia, respectively) have long been advocating for changing our constitutional order. Consider Professor Woodrow Wilson's erroneous philosophy of "administration" as distinct from constitutional executive power as one of the sources of the most common errors we see so often today in print:

A clear view of the difference between the province of constitutional law and the province of administrative function ought to leave no room for misconception; and it is possible to name some roughly definite criteria upon which such a view can be built. Public administration is detailed and systematic execution of public law. *Every particular application of general law is an act of administration.* The assessment and raising of taxes, for instance, the hanging of a criminal, the transportation and delivery of the mails, the equipment and recruiting of the army and navy, etc., are all obviously acts of administration; but the general laws which direct these things to be done are as obviously outside of and above administration.

The broad plans of governmental action are not administrative; the detailed execution of such plans is administrative. *Constitutions, therefore, properly concern themselves only with those instrumentalities of government which are to control general law. Our federal constitution observes this principle in saying nothing of even the greatest of the purely executive offices, and speaking only of that President of the Union who was to share the legislative and policy-making functions of government,* only of those judges of highest jurisdiction who were to interpret and guard its principles, and not of those who were merely to give utterance to them.

Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 212 (1887) (emphasis and paragraph break added).

Wilson makes his assertion that "administration" must take place apart from constitutional constraints even more explicit here:

Judging by the constitutional histories of the chief nations of the modern world, there may be said to be three periods of growth through which government has passed in all the most highly developed of existing systems, and through which it promises to pass in all the rest. The first of these periods is that of absolute rulers, and of an administrative system adapted to absolute rule; *the second is that in which constitutions are framed to do away with absolute rulers and substitute popular control, and in which administration is neglected for these higher concerns*; and the third is that in which the sovereign people undertake to develop administration under this new constitution which has brought them into power.

* * *

There seems to be no end to the tinkering of constitutions. *Your ordinary constitution will last you hardly ten years without repairs or additions*; and the time for administrative detail comes late. ...

Consequently, we have reached a time when administrative study and creation are imperatively necessary to the well-being of our governments saddled with the habits of a long period of constitution-making. That period has practically closed, so far as the establishment of essential principles is concerned, but we cannot shake off its atmosphere. *We go on criticizing when we ought to be creating.*

Id. at 204, 205-06 (emphasis added). Wilson's contempt for the Constitution practically drips from the page. Indeed, the Constitution was already a century old by the time he was writing, meaning Wilson thought our organic law was in urgent need of about ten massive makeovers by the time we had reached 1887, when he was writing. Take a step back and realize how remarkable it is that such a man could become President of the United States.

No doubt few in the media probably recognize how extra-legal and unconstitutional Wilson's thinking was and yet, in their articles about the Justice Department, they are the ones ruled by the dead hand of his ideas and the evolution of those ideas as worked out by his successors in political science.

The New Deal Era as the Apotheosis of the Progressive Era and the New Deal's Apostle James Landis. It was not until the New Deal that the central idea of Wilson that we need "administration" by experts who should be getting busy "creating" (read: devising unconstitutional forms of government, supposedly out of necessity) reached

its zenith. Here, the principal example would be James Landis, once Dean of the Harvard Law School and Chairman of the Securities and Exchange Commission under FDR:

The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and the legislative processes. It represents our effort to find an answer to those inadequacies by some other method than merely increasing executive power. If the doctrine of the separation of powers implies division, it also implies balance, and balance calls for equality. The creation of administrative power may be the means for the preservation of that balance, so that paradoxically enough, though it may seem in theoretic violation of the doctrine of the separation of power, it may in matter of fact be the means for the preservation of the content of that doctrine.

James M. Landis, *THE ADMINISTRATIVE PROCESS* 46, 154 (1938).

It is difficult to read Landis to be saying anything other than that we need a Fourth Branch of government. The tripartite division the Framers and Montesquieu envisioned between legislative, executive, and judicial is not enough in his view. Just as it is difficult to imagine a Woodrow Wilson, who thought constitutional government a bygone notion slowing down new actions of administrative "creation," it is difficult to imagine someone like Landis becoming Dean of the preeminent institution, the Harvard Law School, advocating for a radical rewriting of the Constitution without ever wanting to submit proposed amendments to the people for their approval.

Genesis of the Administrative State and Humphrey's Executor. In this way, we see the framing generation's vision for an Attorney General as an office created by the Judiciary Act of 1789 converted into the progressive and New Deal era generations' vision of a fourth branch of government—the Administrative State—with an Attorney General presiding over the expert field of law enforcement as a professional administrator of the highest order. And from that vision, it is a few short steps to imagining the Attorney General as a meta-official—a kind of arcane high priest of the Administrative State.

Much as Wilson revealed his disdain for any constitution (not just the United States' Constitution), Landis revealed his disdain for our Constitution's separation of powers. In this way, the Progressive and New Deal eras and their addle-headed, anti-constitutional thinking also bequeathed to us so-called "independent agencies." These are federal government entities like the Federal Trade Commission ("FTC"), the

Federal Communications Commission (“FCC”), and the National Labor Relations Board (“NLRB”), *inter alia*—on and on, practically *ad infinitum*.

One of the most famous cases in the annals of administrative law (and the separation of powers) involves the Federal Trade Commission’s establishment by Congress being allowed to slip loose the ordinary bonds of the Appointments Clause. See *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). By law, Congress established that FTC Commissioners could only be fired by the President for “inefficiency, neglect of duty, or malfeasance in office.” This altered the constitutional system, which permits the President to remove principal officers for any reason at all or for no reason. This is, of course, what it means that principal officers serve “at the pleasure of the President.”

A full explication of all of the constitutional problems with *Humphrey’s Executor* is beyond the scope of this paper. But suffice to say, result-orientation never leads to good outcomes. Justice Sutherland (one of the “Four Horseman” who originally opposed much of the New Deal), wrote for a unanimous court in this case to block President Roosevelt’s attempt to fire FTC Commissioner Humphrey. Humphrey held conservative economic views at odds with the New Deal, so Sutherland and his three other fellow apocalyptic horsemen perhaps thought they were slowing down the New Deal by ruling in favor of Humphrey’s estate. They were wrong because the decision delivered a body blow to the Constitution, holding in essence that the FTC was not engaged in executive activity but instead in legislative and judicial activity—a logic-challenged rationale that *compounds* rather than alleviates the constitutional problems. But from *Humphrey’s Executor*, the reader can easily see how we now have grown the grotesque constitutional mutation of a fourth branch of administrative government essentially wielding the fused powers of the Executive, Legislative, and Judicial Branches all together—a constitutional chimera, a constitutional Frankenstein.

The Present Day. With this background, now you understand why modern American progressives (direct-line inheritors of the Progressive Era to be sure, but of a far more radical cast than that) can make arguments like this one: “Despite insistence by Attorney General Merrick Garland that ‘political or other improper considerations must play no role in any investigative or prosecutorial decisions,’ the Justice Department can never be fully insulated from political influence as long as the president—an inherently political figure—is empowered to hire and fire Justice Department appointees.” Holzer Article. In other words, Professor Holzer believes that the Attorney General and presumably every DOJ official south of the Attorney General must be protected against removal by the President. This kind of idea is dangerous and would entirely subvert

our system of constitutional government, all in the name of and under the rallying cry of “Democracy!” Accountability to the electorate would then go into the waste bin.

Indeed, after Watergate, there was a serious effort in Congress to convert the Justice Department into an independent agency. See Cornell W. Clayton, *What Bill Barr Doesn't Understand About the Office of Attorney General: The U.S. attorney general's office started in the judicial branch, not the executive — and has never been entirely under presidential control*, WASH. POST (Dec. 18, 2019), <https://www.washingtonpost.com/politics/2019/12/18/what-bill-barr-doesnt-understand-about-office-attorney-general/> (last visited May 17, 2023). One would think that the failure of this legislation would be a warning to the press and others that their understanding of a purportedly independent Justice Department is far off-kilter. But apparently not. Clayton does not even seem to appreciate that whatever the first Congress *might have proposed*, which is what he meant by how the office of the Attorney General “started out,” the Attorney General has *always* been firmly seated in the Executive Branch, in the Cabinet. Failed proposals do not carry much, if any, weight. There was no such “start” down a path of independence for the Attorney General from the President, only an abortive attempt at one.

The post-Watergate era did temporarily give us the creature of an Independent Counsel—an office established by the Ethics in Government Act of 1978. By 1999, however, this statute needed to be renewed. With the Monica Lewinsky scandal having skewered President Clinton and the Iran-Contra scandal having bedeviled the Reagan and Bush 41 Administrations, this (unconstitutional) experiment in partial independence afforded to one actor within the Justice Department was allowed to expire. There would be no more Ken Starrs or Lawrence Walshes.³

As one might expect from a former Assistant Attorney General heading the Office of Legal Counsel (sometimes thought of as the President’s constitutional lawyer and chief defender of presidential prerogatives), Professor Goldsmith at Harvard presents a more sophisticated argument for why the Department of Justice is independent in some respects than Holzer, a political science professor. In terms of restrictions on presidential power formally embedded in law, Goldsmith concedes they are “very few, and they are not the most important.” Goldsmith Article (*see supra* at 5).

³ Tracing back to the time when Janet Reno was the Attorney General under President Clinton, the Justice Department promulgated regulations authorizing the appointment of “special counsels.” These special counsels remain subordinated to the Attorney General and thus are arguably consistent with the Constitution’s separation of powers, the Appointments Clause, etc. However, the regulations attempt to hive the special counsels off from Attorney General review to some extent. Analysis of whether the degree of independence afforded to special counsels accords with the Constitution are beyond the scope of this paper.

Present Day Continued: Goldsmith's Initial Examples

Goldsmith's examples of non-independence are thus the Supreme Court upholding the constitutionality of the restrictions on the removal power of the President concerning independent counsels in *Morrison v. Olson*, 487 U.S. 654 (1988), and the FBI Director's ten-year term. *Id.* Neither of these examples is impressive. As noted, the independent counsel statute has lapsed, and so has much-diminished continuing significance. Justice Scalia's dissent in *Morrison*, generally thought of as a *tour de force* in defense of the separation of powers, called *Humphrey's Executor* on the carpet for its shoddy reasoning. It seems unlikely that, if a new independent counsel statute identical to the one in 1978 were passed today, it would survive review by the current Supreme Court, which is far more focused on the separation of powers as the Framers envisioned it. Lastly, the 10-year term for the FBI Director turned out to be nothing more than a parchment barrier that President Trump easily tore through when dismissing James Comey from that Office. The media cried. Some in Congress cried. But there was no lawsuit leading to a judgment ordering Comey to be restored to office.

The Present Day Continued: White House Contacts Memos and Detailed Analysis of the McGahn White House Contacts Memo of 2017

Perhaps recognizing that the Supreme Court's purported enforcement of DOJ independence under provisions of statutory law is a weak argument, Goldsmith transitions to arguing that the more important source of constraints on the President in governing DOJ using his Take Care Clause powers are so-called *informal norms*. *See id.* Here, he begins by noting that there are internal memoranda (issued by the Attorney General and the White House Counsel, respectively) concerning contacts between DOJ and the White House. *See id.* These memos run from the Carter to Trump Administrations (and now to Biden as well). The informal-norms, White House contact policy memos argument is not very persuasive either, for six reasons:

- (1) Out of the gate, it is odd to make a claim that an "informal norm" can supersede the text, structure, and definitive interpretive lattice for the Constitution offered by key Framers in the Federalist Papers. That is not how the process of constitutional amendment works. And either the Constitution has been amended to alter how the Take Care Clause was intended to function or it has not (and it, most definitely, has not). No statute or regulation, let alone a mere White House Counsel or Attorney General guidance document can alter the constitutional *status quo*.
- (2) A practice running from Carter to Biden is not a very long provenance at all—all of those years occur within the span of a single lifetime (including of

this author's lifetime). To test the historicity of claims about the nature of the Constitution, one needs to look much farther back. Goldsmith does not do so.

- (3) The memos do not even take much account of our constitutional system or provisions. They are mere policy guidance. They are not holy writ. The President could dispense with them at any time. And they likely persisted into the Trump Administration only on some kind of autopilot theory of government that was not a subject of serious scrutiny in the first nine days of the Trump Administration.
- (4) The memoranda do not take proper account of the fact that there are more principal officers with their own Senate-confirmed spheres of authority (though at all times subordinate to the President) inside the Justice Department than the narrow choke points of the Attorney General, Deputy Attorney General, Associate Attorney General, or Solicitor General—the key DOJ gatekeepers set up in the relevant memoranda.
- (5) Oftentimes, these memos are observed in the breach. To see this, consider that if every communication from White House staff to an Assistant Attorney General or Deputy Assistant Attorney General had to go through the Attorney General, Deputy Attorney General, Associate Attorney General, or Solicitor General (the top four officials in the Department), the idea of an energetic Executive Branch would be dashed on the rocks. Instead, as part of the exigency of doing the work, Senate-confirmed officials south of the top-tier of the Department regularly brief the officials in that top tier (or at least the Deputy Attorney General or Associate Attorney General) of their recent interactions with White House components, leaders, and staff. This results in instructions tailored to particular litigation activities, rulemakings, and the like about *what degree* of prior authorization to seek or whether, *as to some of those matters*, those leading officials will wish to become personally involved. Everyone on DOJ's fourth and fifth floors of Main Justice (where the four pinnacle offices of leadership are located) knows that rote adherence to the policy is a paper formalism.
- (6) The real purpose of the memos that Goldsmith refers to is to try to wall the President off from the activities of the Justice Department. Additionally, it walls off the President's closest non-lawyer advisors and delegates in the Executive Office of the President from the Justice Department. Again, this is extra-constitutional. It treats the Chief Executive as if he is someone to be managed and who cannot get his hands wet dealing with the actual details of governing. Wilson and Landis would approve (recall Wilson explaining that the form of governance he favored was "administration" giving short shrift to

high-level generalities, *i.e.*, the text and structure of the Constitution). But anyone properly steeped in the separation of powers and the Constitution would fiercely disapprove. If the President wants to consult with his DOJ subordinates, especially those with Senate confirmation, he should be able to do so and do so without rigmarole. Political prudence might in some circumstances counsel that communications between White House officials acting as intermediaries should carry messages to the Justice Department. But exercises of prudence are not matters of constitutional dignity. Nor is such a norm of prudence something that requires DOJ independence.

Let us use the January 27, 2017 White House contacts memo written by former White House Counsel Donald F. McGahn II, a [memo](#) sent to all White House staff, as an example of what Goldsmith is invoking. McGahn's 2017 memo begins by stating as follows:

This Memorandum outlines important rules and procedures regarding communications between the White House (including all components of the Executive Office of the President) and the Department of Justice. These rules exist to ensure both efficient execution of the Administration's policies and the highest level of integrity with respect to civil or criminal enforcement proceedings handled by DOJ. *In order to ensure that DOJ exercises its investigatory and prosecutorial functions free from the fact or appearance of improper political influence, these rules must be strictly followed.*

2017 McGahn Memo (emphasis in original).

With one exception to be covered below, the Memo does not mention the Constitution. Specifically, it does not mention the Vesting Clause, the Appointments Clause, or the Attorney General's role as just one member of the Cabinet. Its principal concern is with avoiding "the fact or appearance of improper political influence."

There are four problems with this approach:

First, it is problematic that the Memo expresses a mere policy concern about political influence or perceptions; it is not about a matter that rises to constitutional dignity or even one animated by constitutional principles. As such, it represents a lesser-order set of concerns that are not even mentioned in the Constitution.

Second, what this first paragraph's italicized language seems to be getting at is that some White House contacts will be proper attempts by the President and his delegates to control subordinates at the Justice Department, directing their activities, but others will instead constitute "the fact or appearance of political influence." The Memo nowhere attempts to establish where this line falls—what kinds of matters

involve proper supervision of the Executive Branch and its personnel versus what kind involve “political influence.” At best, the Memo can be interpreted to answer that question only procedurally—*i.e.*, the line will fall wherever it is set *on a case-by-case basis* by the President, Vice President, White House Counsel, and designees of the White House Counsel. Beware rules that are lacking in specific content and turn every conceivable application of the Memo into an individualized scrum inside the White House apparatus.

Third, any such procedural line lacking an advance set of parameters to guide where the line is set devolves, as a practical matter, an *enormous* span of power on the White House Counsel. For this reason alone, even if one has caught the post-Watergate, extraconstitutional fever of DOJ “independence,” it would be better if some, more-determinate line were set by the President in an executive order, even one making a specific delegation to the White House Counsel, rather than in a Memo written by the White House Counsel himself. In that sense, the Memo is like the self-crowning of Napoleon. The Office of the White House Counsel is not even one the Framers imagined.

Fourth, what the Memo contemplates the President and Vice President doing in their interactions with the Justice Department is ensuring adherence to the “Administration’s *policies*.”⁴ What this does is subtly establish that POTUS and the VP are to be heard on policy direction but not on the resolution of legal questions qua legal questions, suggesting such questions are beyond their ken. No, even beyond the fact that many Presidents and Vice Presidents are lawyers in their own right, the Constitution made the President the place where the buck of ensuring the laws are faithfully executed stops. The President cannot be removed from that equation and demoted to a mere policy setter. This move is similar to Wilson’s, when he was a political science professor, of suggesting that the President and the Constitution focus on high-level issues only. Legal questions, similarly, are technocratic issues placed by the McGahn Memo in the hands of the day-to-day administrators who deal with the details of government.

The second paragraph is also very interesting and should assist the reader in understanding that the Memo smuggles a lot of substance into an ostensible set of purely procedural instructions:

⁴ See also McGahn Memo at 2, Section B (“The White House may communicate with DOJ about matters of policy, legislation, budgeting, political appointments, public affairs, intergovernmental relations, administrative matters, or other matters that do not relate to a particular contemplated or pending investigation or case.” This reinforces that the McGahn Memo exerts a kind of White House Counsel and Attorney General primacy over legal questions, distinguishing them from mere policy questions. Though even in this section of the Memo concerning “Limitations on discussing other matters,” the Memo requires routing through the top three officials at the Justice Department.

DOJ currently advises the White House about contemplated or pending investigations or enforcement actions under specific guidelines issued by the Attorney General. As a general matter, only the President, Vice President, Counsel to the President, and designees of the Counsel to the President may be involved in such communications. These individuals may designate subordinates to engage in ongoing contacts about a particular matter with counterparts at DOJ similarly designated by DOJ. Any ongoing contacts pursuant to such a designation should be handled in conjunction with a representative of the Counsel's office.

This paragraph is also constitutionally problematic in several respects:

First, note that subtly, it incorporates by reference guidelines issued by the Department of Justice to constrain White House contacts from the other direction. This is another delegation, in essence, to a subordinate of key powers to structure how the President and his most proximate agents inside the West Wing and the Eisenhower Executive Office Building ("EEOB") conduct themselves—all without any express indication that this is what the President wants in an executive order. With this paragraph, we now have two presidential subordinates (the White House Counsel and the Attorney General) crowning themselves.

Second, as a practical matter, this set of procedural rules highly restricts the ability of the President to act with energy and dispatch through his White House subordinates. Yes, the Memo permits the President (as well as the Vice President or White House Counsel) to designate subordinates to carry on contacts with DOJ as to "particular matters." But this begs the question of how a President *first learns* about a "particular matter" so that he can designate some particular subordinate to talk to the DOJ about it. This also means general matters that have not coalesced into a "particular matter" may escape presidential attention and thus slam down application of the default rule that a White House official, even one enjoying the President's complete confidence and working on a priority matter, may not engage in DOJ contacts.⁵

Third, notice at this point that the Memo treats a troika of officials empowered under the Memo—the President, Vice President, and White House Counsel—as falling into a special category. One of those officials—the last one—is *not* in the same class as the President and Vice President.

⁵ The only way in which the McGahn Memo acknowledges the important constitutional policy of energy in the Executive (*see* Federalist #70 ("A feeble executive implies a feeble execution of the government.")) is in its Section D discussion of "National Security Exceptions." In that part of the Memo, national security officials at the White House can receive communications on "serious threat[s] to national security" from DOJ and the White House Counsel can be apprised of those contacts *post hoc*.

Next, the Memo restricts which lofty officials at DOJ can have White House contacts, meaning that the aperture for contacts is narrowed at both ends—the White House end and the Department of Justice end. This overly restricts the ability of principal officers at the Justice Department who are Senate-confirmed to interact with the President or his key advisors. Only the top four officials at the Justice Department proper are afforded special freedoms to interact with the White House.

Now, to be clear, there has to be some gatekeeping done so that there is not a profusion of messages coming into the Justice Department or, alternatively, a profusion of potentially conflicting legal advice flowing into the White House and the EEOB. Some examples should serve to make that point, referring to real White House and DOJ officials. Example 1: A White House “research assistant” working on a False Claims Act policy memo should not be able to call up a line lawyer serving in the Fraud Section of the Civil Division to discuss the assistant’s views on a new piece of *qui tam* litigation he has read about. Example 2: Even a White House policy advisor for education should not be able to call up the Deputy Assistant Attorney General at the Civil Rights Division supervising the Educational Opportunities Section out of the blue to discuss an enforcement matter the advisor thinks should be filed.

The purpose of this paper is not to suggest that there should be a free-for-all of communication. Some control for efficiency’s sake (which seems to be one of the motivating elements for the McGahn memo) is necessary. For instance, it seems entirely rational and not inconsistent with the Constitution for the McGahn Memo to control who can request formal legal opinions from the Office of Legal Counsel. *See* McGahn Memo at 2, Section C. Finally, just as noted above, oftentimes these kinds of memos are observed in the breach. The White House Counsel’s Office simply lacks the bandwidth to police every interaction initiated by a White House official to the Justice Department.

The one exception to the general point that the McGahn Memo does not mention the Constitution appears on page two of that Memo: “These rules recognize the President’s constitutional obligation to take care that the laws of the United States are faithfully executed, while ensuring maximum public confidence that those laws are administered and applied impartially in individual investigations or cases.” It is commendable that the critical Take Care Clause is referenced in the McGahn Memo, but the Memo again misconstrues the Constitution by suggesting that the Take Care Clause power and duty of the President needs to be tempered by “ensuring maximum public confidence that those laws are administered and applied impartially in individual investigations or cases.” The Constitution does not guarantee “impartiality.” It guarantees equal protection—no one should be singled out for enforcement (or non-enforcement) of the laws in a way that violates the Fifth Amendment. And, as noted above, conflicts of interest are to be avoided as these were traditional constraints

that form part of Fifth Amendment due process. These constitutionally informed principles do not seem to be what the McGahn Memo is getting at. A descent into an approach where impartiality is judged in the eye of the beholder should not be permitted in a properly run Executive Office of the President.

The Present Day Continued: Goldsmith's Remaining Examples

Goldsmith next invokes the regulations concerning special counsels, arguing that President Trump was hemmed in by these regulations when he wanted to see Robert Mueller fired. *See id.* But Goldsmith knows that those regulations can quickly be repealed. Plus, they are crafted on the theory that the Attorney General retains control over any special counsel, precisely so that, if possible, the regulations can avoid raising separation-of-powers concerns. And the Attorney General still reports to and is subordinate to the President. Hence, by basic operation of a logical transitive property, the President possesses the power to cashier any special counsel.

From here, Goldsmith's argument really grows thin. Citing the "precedent" of the so-called Saturday Night Massacre (where Special Prosecutor Archibald Cox, investigating Watergate, was fired), Goldsmith argues that politics operate as a constraint on the firing of DOJ officials, or at least some of them. But Robert Bork is the DOJ official who wound up firing Cox. No court intervened to stop this, and Bork would go on, willing as he was to faithfully carry out the constitutional chain of command, to be seated on the D.C. Circuit as a famous and highly skilled Judge. Indeed, he would have served on the Supreme Court if not for an unprecedented overt and covert effort to paint him as an extremist. The important point, though, is that Bork was not kept off the Supreme Court for having fired Cox during the Nixon Administration.

Of course, arguing that politics is a constraint is not a legal argument of any kind, let alone an argument from constitutional law. Yes, politicians will argue, *when it suits them*, that DOJ should be independent. And the media has been trained (or trained itself) to think in similar terms. But what this means is that the argument has turned into a set of bootstraps: DOJ should be regarded as independent because certain influential voices in the public conversation *believe it is*, or at least that it *should be* independent. Not very impressive; not very persuasive.⁶

⁶ Goldsmith argues that the press empowers DOJ independence through leaks. *See* Goldsmith Article. But such leaks are rank insubordination. They are not how government should be conducted. Moreover, they are the ultimate bootstrap in that they boil down to this argument: we the press believe DOJ should be independent, and therefore, we can and will make that a self-fulfilling prophecy by trying to hamstring Presidents we do not like wielding power over DOJ in ways we do not like by allowing DOJ officials, often anonymously, to vent to us, complaining that the President (or some other member of the Cabinet

Oddly, Goldsmith's next set of arguments for independence shift out of politics and change gears to talk about institutional culture:

A related check on the President that has been developed and nurtured as a result of these post-Watergate regulations and practices are *the cultural self-understandings of DOJ and FBI officials, including (many) political appointees*. These men and women share a professional and departmental commitment to the rule of law, one component of which is resistance to politicized influence by the President on their operations.

That seems squishy and possibly even dangerous. [This is an important concession by Professor Goldsmith that cannot be understated.] When the President and DOJ are in conflict, it is not always easy to tell whether DOJ is acting on the basis of the rule of law or some self-serving bureaucratic imperative, or whether the President's influence is an appropriate exercise of Executive discretion or a "politicized" action that should be resisted.

Any bureaucracy, including in DOJ and FBI, can use independence as a shield to frustrate presidential (and thus democratic) control over policies that fit within the President's legitimate priorities. This is an old and inevitable problem of administrative governance. [Once again, recall Wilson on "administration" after reading the prior sentence.] Some presidents manage it better than others, especially through the wise selection of political appointees to run the bureaucracy. The important point for now is that these *institutional self-understandings* [read: Deep State bootstraps] are a real force for independence, even on political appointees, as the various threatened resignations by Trump's political appointees in the DOJ and FBI in response to Trump's attacks show.

Goldsmith Article (paragraph breaks added).

With all respect, this is not a statement of a real constitutional constraint; it is instead a statement of the problem. Constitutionally based understandings have fallen so far into the ditch, DOJ career officials and many presidential appointees who owe being at the Department of Justice to the President who put them there regard themselves as independent of the President. That is a basic subversion of the very theory of setting up a bureaucracy subordinate to political leadership tracing to the President—establishing a force for continuity but one that is supposed to be responsive to changes at the top. And it is thus also a subversion of constitutional governance,

setting policy or the White House staff) are impinging on the supposed independence of mere subordinates. And around and around it goes.

whether this recalcitrant attitude is displayed by a career lawyer or by a presidentially appointed lawyer. Political appointees certainly, but even career bureaucrats, have no constitutional legitimacy if they are not subject to the directives and goals of the President in office at the time.

Goldsmith's last point is that the DOJ has an Inspector General who possesses independence. *See id.* This is true but whether the independence of the DOJ IG (or any IG) wields is consistent with the Constitution has not been fully tested. To his credit, Goldsmith notes that in 1998 the National Commission on the Separation of Powers concluded that Inspectors General raise constitutional concerns that have not been litigated. *See* Miller Center of Public Affairs, University of Virginia, *The Separation of Powers: The Roles of Independent Counsels, Inspectors General, Executive Privilege and Executive Orders Final Report of the National Commission on the Separation of Powers* (Dec. 7, 1998), http://web1.millercenter.org/commissions/comm_1998.pdf (last visited May 17, 2023). *See also id.* ("A President may remove an IG, but only after reporting his reasons to Congress, which raises separation of powers concerns."). The members of this National Commission were impressive and thus their view that IGs are "Congressional ferrets of dubious constitutionality" should not be dismissed out of hand, especially as the National Commission's membership was bipartisan and not comprised only of ardent conservative defenders of the classic constitutional order.⁷

Additionally, President Trump removed five IGs without serious legal incident. (There was political blowback but, as noted, that is another matter.) *See* Jen Kirby, *Trump's Purge of Inspectors General, explained: In an unprecedented move, Trump has fired or sidelined at least five watchdogs in recent weeks*, Vox (May 28, 2020), <https://www.vox.com/2020/5/28/21265799/inspectors-general-trump-linick-atkinson> (last visited May 17, 2023). Indeed, President Reagan had acted even more boldly by firing all 16 inspectors general when he took office, and after political pushback, agreeing to reinstate only 5. President Trump's inspector general firings did not result in his decisions being reversed by a court. The DOJ IG is thus fair game for counterpoints (at least there is an IG statute and we have upgraded from talking about mere "informal norms") but the IG's creation cannot carry the heavy weight Goldsmith

⁷ The members of the National Commission were former Senator Howard Baker, former Attorney General Griffin Bell, R.W. Apple, Jr. of the *New York Times*, former White House Counsel Lloyd Cutler, former Attorney General William Barr, former White House Chief of Staff Andrew Card, former Secretary of State Lawrence Eagleburger, former Congressman William Frenzel, Yale Professor Paul Gewirtz, former Secretary of Commerce Juanita Kreps, former Assistant Attorney General Daniel Meador, former Chair of the U.S. Commission on Minority Business Development Joshua I. Smith, TV commentator Sander Vanocur, former Director of the FBI and Judge William Webster. They were assisted by UVA Professor Kenneth Thompson.

attempts to place on it—*i.e.*, that it shows the Department to be independent of the President. The Constitution trumps statutes. That is why it is known as our ultimate organic law. At most, what the institution of the IG shows is that there is a watchdog embedded in DOJ that can call questions made by the AG or his subordinates into question. The IG has no power to actually alter the relevant decisions, however.

PART V: CONFUSING DOJ’S SUPPOSED INDEPENDENCE WITH VARIOUS OTHER CONSTITUTIONAL IMPERATIVES AND ETHICAL NORMS ESTABLISHED BY LAW

Because the case for DOJ independence is so weak in all of its dimensions and so deficient in the constitutional dimension especially, proponents of the independence theory resort to a tactic of conflation. They argue that independence is required because otherwise, the President will prosecute his political enemies and the only way to avoid that outcome is to let DOJ run its own show. *See, e.g.*, Protect Democracy Article (“Independent law enforcement is a hallmark of a democracy rooted in the rule of law. This principle recognizes that the government’s law enforcement powers can be a grave threat to democracy if they are abused by authoritarian-minded presidents to punish enemies, shield themselves from accountability for wrongdoing, or interfere in the conduct of free and fair elections.”).⁸

No Attorney General should allow himself to be used as a tool to persecute the President’s political enemies. And no President should order his Attorney General to do so. That kind of activity is inconsistent with the Oath Clause of the Constitution, *see* U.S. Const., art. VI, cl. 3, because, at the very least, it is inconsistent with the equal protection component of the Due Process Clause, U.S. Const., amend. V; *United States v. Vaello Madero*, 142 S. Ct. 1539 (2022) (exemplar case involving the equal protection component of due process).

Also, no President is above the law and should not interfere with legitimate investigations concerning his own wrongdoing even if (as many constitutional scholars believe) he cannot be indicted while in office. Presidents can, however, decide that their political opponents are the genesis of an illegitimate investigation and order their Attorneys General to proceed accordingly. There are checks on abuse of this power

⁸ This is quite an ironic claim as we are now facing unprecedented investigations into one President (Trump) by his successor (President Biden), when the current President engaging in such conduct purports to be a believer in the theory of DOJ independence. *See, e.g.*, Claire Rafford, ‘*The Way I Said It Was Not Appropriate*’: Biden backs DOJ independence in Jan. 6 investigation, POLITICO (Oct. 21, 2021) (Biden “reaffirm[ing]” his commitment to DOJ independence after what the press reported as his gaffe of saying he hoped DOJ would “go[] after them and hold them accountable criminally,” referring to those resisting the House Select Committee on January 6’s investigative efforts). But examining those particularized disputes of the moment is also beyond the scope of this paper.

consistent with the subordination of the Attorney General to the President. One of them is that the Attorney General can resign if he is ordered to do something illegal or improper. For instance, a resignation might occur because a President is calling for action in violation of longstanding ethical duties since lawyers when serving in an Administration, remain officers of the courts they appear before and need to avoid conflicts of interest barred by federal statute. The Attorney General is at all times subordinate under our Constitution to the President, but he is also bound by his oath, under the Oath Clause, to support our Constitution and system of laws.

Whether as a matter of high theory or as a matter of practical constitutional application, the U.S. Department of Justice *is not independent*. Were it to become an “independent agency,” as progressives and the radical Left argued for in the wake of Watergate, the Republic may become so severely damaged, it may not survive even a few presidential cycles past the point where the DOJ was converted into such a formalized unconstitutional entity.

CONCLUSION

Most of this piece has been focused on explaining the constitutional reasons why the DOJ cannot be independent of the President, rebutting counterarguments, and explaining the historical origins of those counterarguments. There are also policy reasons not to want the Department of Justice to be independent as well. One of them fortuitously presented itself as this paper was being written: namely that the quest for DOJ independence is, in practical reality, an illusion.

There is no avoiding that the President is the Attorney General’s superior officer. The President, at any given time, well knows this. And his Attorney General also knows it well. This means that Presidents will make their views known to the Attorney General, publicly or privately. And it means there are vast incentives for the inferior officer to take his cues from his superior officer. The only way to break that chain is to enact legislation making the Attorney General and his Justice Department formally independent of the President. Beyond the problem that this would be unconstitutional, no such legislation has ever been passed. Thus, the incentives of the President to exercise control and the incentives of the Attorney General to try to please his boss and respond to presidential control remain and cannot be overridden.

These incentives can, however, be hidden. Recently, Freedom of Information Act evidence has come to light indicating that the Biden White House, despite its initial denials, was involved in the investigative process that led to Mar-a-Lago being raided in a search for classified documents. *See, e.g., Michael Lee, Biden Administration Officials Were Reportedly Involved in Mar-A-Lago Raid Despite Claiming Otherwise: The FBI gained*

access to Trump documents through a White House 'special access request', FOX NEWS (Apr. 11, 2023). Until this story broke, the Biden Administration through both Karine Jean-Pierre and the Justice Department had previously been maintaining, first, that the FBI made the decision to seek the search warrant, later admitting that the raid was conducted under the authority of the Attorney General.

In reality, the genesis of the operation traced back to a Special Access request authorized by President Biden, *see* 44 U.S.C. § 2205(2)(B), allowing President Trump documents at the National Archives to be turned over to the Justice Department without a subpoena. *See America First Legal's Investigation Reveals the Biden White House Was Involved With the Mar-a-Lago Raid and that NARA Misled Congress; AFL Launches Additional Investigation, available at <https://aflegal.org/america-first-legals-investigation-reveals-the-biden-white-house-was-involved-with-the-mar-a-lago-raid-and-that-nara-misled-congress-afl-launches-additional-investigation/> (last visited May 17, 2023).*

This blockbuster story, which many in the mainstream media have not even covered, adequately demonstrates that while there is *political utility* in some circles on the American Left in claiming that DOJ is independent, in reality it cannot be independent under the practical realities that the constitutional chain of command creates. Either the Constitution is properly amended to make DOJ independent or it is improperly amended through an attempt at legislation like that proposed in the wake of Watergate and then subsequently blessed by the Supreme Court. Under the constitutional system as it stands, however, DOJ independence does not exist and influencers on the Left of all stripes (as well as those on the Center-Right like Professor Goldsmith) should stop claiming that it does. They are misleading the people.

Finally, future Administrations must end the Carter-through-Biden experiment that White House contacts policies (including the one embodied in the 2017 McGahn Memo) embody. Those contacts policies sweep too far in the name of efficiency. Their revision would go a long way to teaching the Fourth and Fifth Estates in the media and academia to stop thinking DOJ is independent of the President.