

Treat Every Defendant Equally and Fairly: Political Interference and the Challenges Facing the U.S. Attorneys' Offices as the Justice Department Turns 150 Years Old

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ABSTRACT. The US Attorneys' Offices are the flagships of the federal government's law-enforcement work. But as the Department of Justice (DOJ) approaches its 150th anniversary, there are deep concerns for their future. The four years of the Trump Administration have shaken public confidence in DOJ, and during his tenure, Attorney General William Barr all too often took on the role of the President's lawyer rather than upholding the integrity and credibility of line prosecutors to work free from political interference. This Essay, written in the weeks leading up to the 2020 presidential election,¹ argues that, in a new administration, there must be a hardcore realignment of cultural values inside of the Justice Department that supports its independence and permits line prosecutors to effectively resist and reject political interference in criminal matters. The past four years have revealed frailty in the Department that requires more than the new laws and new policies that will be designed to shore up some of the weaknesses that have been revealed. Ultimately, even with those new laws and policies, there must be a culture restoration that guarantees they will be implemented effectively so that the independence of prosecutions from political influence, which is critical to our criminal-justice system, is firmly in place.

INTRODUCTION

The moment when Aaron Zelinsky, an Assistant United States Attorney (AUSA) in the District of Maryland, refused to silently stand by while Attorney

1. This Essay was completed well ahead of the election and before Attorney General William Barr's departure from office. Although no substantive updates have been made since completion, there was minor updating to reflect post-election events like the pardons of Paul Manafort and Roger Stone, which only further strengthen the argument made here.

General William Barr attempted to subvert justice for President Trump’s longtime friend Roger Stone was a moment of pride for federal prosecutors across the country. Zelinsky held the line against political interference in federal prosecutions. He did it possibly at great expense, at least in the short term, to his career. But Zelinsky’s choice was clear. He testified as a whistleblower before Congress and explained, in his view, that the U.S. Attorney for the District of Columbia, where the Stone case was being prosecuted,² succumbed to political pressure. He testified that Stone “was being treated differently from any other defendant because of his relationship to the President.”³

This subversion of the Department of Justice (DOJ) would have been shocking in any other administration, but by February of 2020, it was almost predictable. Roger Stone, longtime friend and political advisor⁴ of President Trump, was indicted in January 2019 by Special Counsel Robert Mueller on one count of obstruction of justice, five counts of false statements, and one count of witness tampering.⁵ Stone denied the charges and pleaded not guilty. On November 15, 2019, a jury in the District of Columbia convicted Stone on all charges.⁶ Stone became the sixth Trump aide or adviser convicted by members of the Mueller team.⁷

Federal prosecutors filed their sentencing recommendation on February 10, 2020. Consistent with federal sentencing guidelines, they suggested a sentence of 87–108 months.⁸ Shortly after they made that recommendation, President Trump tweeted that the recommendation was an impermissible “miscarriage of justice.”⁹ The following day, the Government filed a “supplemental and

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2. Indictment, *United States v. Stone*, 394 F. Supp. 3d 1 (D.D.C. 2019) (No. 1:19-cr-00018).
 3. *Oversight of the Department of Justice: Political Interference and Threats to Prosecutorial Independence: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. 2 (2020) [hereinafter *Zelinsky Hearing*] (statement of Assistant United States Attorney Aaron Zelinsky), https://judiciary.house.gov/uploadedfiles/zelinsky_opening_statement_hjc.pdf [https://perma.cc/ABM9-8DZV].
 4. See Olivia Paschal & Madeleine Carlisle, *A Brief History of Roger Stone*, ATLANTIC (Nov. 15, 2019), <https://www.theatlantic.com/politics/archive/2019/11/roger-stones-long-history-in-trump-world/581293> [https://perma.cc/K38A-UWYY].
 5. Indictment at 21–23, *United States v. Stone*, F. Supp. 3d 1 (D.D.C. 2019) (No. 1:19-cr-00018).
 6. Ashraf Khalil & Michael Balsamo, *Roger Stone Guilty of Witness Tampering, Lying to Congress*, ASSOCIATED PRESS (Nov. 15, 2019), <https://apnews.com/ad355d2c983e4a7c85bc17e86d8c563f> [https://perma.cc/F2BU-DWHU].
 7. *Id.*
 8. Hadley Baker, *Federal Prosecutors Recommend Sentencing Roger Stone to Seven to Nine Years*, LAWFARE (Feb. 11, 2020 12:17 PM), <https://www.lawfareblog.com/federal-prosecutors-recommend-sentencing-roger-stone-seven-nine-years> [https://perma.cc/8YEQ-F8GT].
 9. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 11, 2020, 1:48 AM), <https://twitter.com/realDonaldTrump/status/1227122206783811585> [https://perma.cc/V6BB-96QJ].

amended” sentencing motion, which maintained that the previously recommended sentence, signed off on by the same U.S. Attorney who signed the supplemental pleading, could be considered “excessive and unwarranted.”¹⁰ The prosecution confirmed it was still requesting a custodial sentence but left its length to the discretion of the court.¹¹ Barr denied allegations that the Justice Department’s change of heart was a response to a presidential command,¹² but he seemed to be the only one who believed that. The President himself tweeted his thanks to Barr for the change: “Congratulations to Attorney General Bill Barr for taking charge of a case that was totally out of control and perhaps should not have even been brought.”¹³

This spectacle led four senior prosecutors assigned to the Stone case to withdraw from it, one of whom resigned from the Department entirely.¹⁴

They did what every federal prosecutor knows they must do in the face of political meddling in a case – even if that meddling seemingly comes at the behest of the President. Zelinsky protested when the team’s recommendation was bypassed, withdrew from the case, and finally resigned from his temporary special posting in the District of Columbia.¹⁵ There is no question that he did the right thing.¹⁶

10. Hadley Baker, *Prosecutors Amend Roger Stone Sentencing Recommendation*, LAWFARE (Feb. 11, 2020), <https://www.lawfareblog.com/prosecutors-amend-roger-stone-sentencing-recommendation> [https://perma.cc/MT84-97GE].

11. *Id.*

12. Michael Balsamo, *AG Barr’s Remarks Come After Change over Stone Sentencing*, COLUMBIAN (Feb. 13, 2020, 8:41 PM), <https://www.columbian.com/news/2020/feb/13/ag-barrs-remarks-come-after-change-over-stone-sentencing> [https://perma.cc/Z4YQ-KAU7].

13. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 12, 2020, 6:53 AM), <https://twitter.com/realDonaldTrump/status/1227561237782855680> [https://perma.cc/WV64-634A].

14. Sarah N. Lynch, *Prosecutors Quit as Justice Department Seeks Shorter Sentence for Trump Ally*, REUTERS (Feb. 11, 2020), <https://www.reuters.com/article/us-usa-trump-russia-stone/prosecutors-quit-as-justice-department-seeks-shorter-sentence-for-trump-ally-idUSKBN2052E5> [https://perma.cc/J8P8-782A].

15. See Andrew Prokop, *Prosecutors Resign from Roger Stone’s Case After DOJ Interference in Sentencing*, VOX (Feb. 11, 2020, 6:15 PM EST), <https://www.vox.com/2020/2/11/21133622/roger-stone-prosecutor-aaron-zelinsky-resigns> [https://perma.cc/R5XH-8BLK].

16. If anything, President Trump’s commutation of Stone’s sentence just days before he was required to report to begin service of his prison sentence confirms that Zelinsky and his colleagues properly assessed that there was political influence at work here. For a discussion of President Trump’s commutation, see Peter Baker, Maggie Haberman & Sharon LaFraniere, *Trump Commutes Sentence of Roger Stone in Case He Long Denounced*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html> [https://perma.cc/4ZQ8-QYDA].

These events set off a firestorm and the truth came to light. The Attorney General was forced to defend his conduct and, in the process, exposed more of the truth. Sunlight, as Justice Brandeis opined, is the best disinfectant.¹⁷

The Justice Department is going through a challenging time as it passes its 150-year anniversary.¹⁸ Zelinsky testified that he had never seen political interference brought to bear on a prosecution before the Stone case.¹⁹ In fact, the tradition, policies, and culture of the U.S. Attorneys' Offices are specifically designed to prevent against that. Nonetheless, there was a disturbing tendency in Barr's Justice Department for the appearance of improper political influence, and perhaps the actuality of it, to taint prosecutions, resulting in diminished public confidence in the institution.

It would be nice to write a paean to the Justice Department on the auspicious occasion of its anniversary. It would be comforting to write that U.S. Attorneys' Offices across the country will emerge from the maelstrom of the Trump presidency unscathed. But it is no longer possible to say so with absolute certainty. We are at a critical point where the future hangs in the balance.

Assessing the damage to the institution while in the moment is a difficult task, and this challenge is compounded by the reality that more misconduct seems to take place or come to light with each passing week. From the time I started work on this Essay until the final edits were submitted, Barr seemed to be engaged in a solid effort to undermine the Department's reputation. He gave the order to clear peaceful protestors, who were subsequently tear-gassed and shot at with rubber bullets,²⁰ from Lafayette Park ahead of President Trump's walk from the White House to St. John's Church for a political photo opportunity.²¹ He lied about the firing of the U.S. Attorney for the Southern District

17. See LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1914).

18. See Carrie Johnson, *As Justice Department Turns 150, Some Agency Veterans Say It Needs a Facelift*, NAT'L PUB. RADIO (July 27, 2020, 5:01 AM ET), <https://www.npr.org/2020/07/27/895053457/the-justice-department-is-turning-150-some-agency-veterans-say-it-needs-a-faceli> [<https://perma.cc/ZXJ6-ATCW>].

19. *Zelinsky Hearing*, *supra* note 3, at 1.

20. Carol D. Leonnig, *Park Police Spokesman Acknowledges Chemical Agents Used on Lafayette Square Protestors Are Similar to Tear Gas*, WASH. POST (June 5, 2020, 5:18 PM EDT), https://www.washingtonpost.com/politics/park-police-spokesman-acknowledges-chemical-agents-used-on-lafayette-square-protestors-are-similar-to-tear-gas/2020/06/05/971a8d78-a75a-11ea-b473-04905b1af82b_story.html [<https://perma.cc/93GA-FMFN>] (describing how, after the protests, reporters found evidence of tear gas and rubber bullets, and a police spokesman acknowledged that police used chemical agents "designed to produce tears").

21. Kevin Johnson, *Attorney General Barr Ordered Park Protestors Cleared Before Trump's Visit to St. John's Church*, USA TODAY (June 2, 2020, 3:53 PM ET), <https://www.usatoday.com/story/news/politics/2020/06/02/george-floyd-protests-barr-promises-more-patrols-white-house/3124628001/> [<https://perma.cc/4YKF-H7HQ>].

of New York, whom he invidiously claimed had resigned,²² and tried to laugh off the lie when questioned about it before the House Judiciary Committee.²³ He disingenuously claimed, after Trump encouraged North Carolina voters to vote twice in November, that he did not know whether it was illegal to vote more than once in an election for President.²⁴ And he signed off on a request for the Department to represent the President in a defamation case brought by E. Jean Carroll after the president called her claim that he had raped her more than twenty years ago a lie, despite the ludicrous effort required to characterize the conduct in question as part of his official duties.²⁵ Prosecutor Nora Dannehy's resignation from Connecticut U.S. Attorney John Durham's probe into the origins of the Crossfire Hurricane investigation, which came amid rumors that Barr was pressuring Durham to release interim findings,²⁶ signals that there will be more to

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22. *Oversight of the Department of Justice: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. (2020) (Att'y Gen. William Barr responding to questioning by Rep. Joe Neguse). The exchange between Barr and Neguse is particularly telling:

Neguse: Mr. Attorney General, on June 18th of this year, the Department of Justice issued a statement saying that Mr. Berman, a former US [A]ttorney for the Southern District of New York had "stepped down." You're aware of that statement being released by the [D]epartment, correct?

Barr: Yes.

Neguse: And do you testify today that that statement was true at the time the [D]epartment issued it?

Barr: He may not have known it—

Neguse: —No, it's—

Barr: —But he was stepping down.

Neguse: He may not have known that he was stepping down, that's your testimony today?

Barr: He was being removed.

Id. See also Aaron Blake, *The Plot Thickens on Attorney General William Barr's Removal of a Prosecutor Who Probed Trump*, WASH. POST (July 9, 2020, 4:43 PM EDT), <https://www.washingtonpost.com/politics/2020/07/09/plot-thickens-william-barrs-removal-prosecutor-who-probed-trump> [<https://perma.cc/V96Z-LUEL>] (noting that Barr incorrectly stated that Berman had resigned).

23. Joe Neguse (@RepJoeNeguse), TWITTER (JULY 28, 2020, 4:13 PM), <https://twitter.com/RepJoeNeguse/status/1288206000718327809> [<https://perma.cc/8BC8-MS4Y>] (showing Barr laughing during his remark).
24. Johnathan Chait, *William Barr Not Sure If Trump's Plan for His Supporters to Vote Twice is Legal*, N.Y. MAG. (Sept. 3, 2020), <https://nymag.com/intelligencer/2020/09/barr-cnn-blitzer-vote-twice-logic-fraud-voting-trump.html> [<https://perma.cc/JR88-ZUG9>].
25. Leah Litman, *The Justice Department Says Defaming Women Is Part of Trump's Job. Literally.*, WASH. POST (Sept. 10, 2020, 2:57 PM EDT), <https://www.washingtonpost.com/outlook/2020/09/10/justice-carroll-defamation-trump/> [<https://perma.cc/YJ4H-L7JL>].
26. Edmund H. Mahony, *Nora Dannehy, Connecticut Prosecutor Who Was Top Aide to John Durham's Trump-Russia Investigation, Resigns Amid Concern About Pressure from Attorney General William Barr*, HARTFORD COURANT (Sep. 11, 2020, 2:55 PM), <https://www.courant.com/news>

come about pressure on prosecutors in that matter.²⁷ Subsequently, there was reporting that Barr directed prosecutors to consider charging “violent” protesters under the rarely used Sedition Act,²⁸ which would conflate opposition to the President with plotting to overthrow the United States. Barr also suggested that Seattle’s Mayor Jenny Durkan, a former Obama-era U.S. Attorney whom Trump had threatened on Twitter with a takeover if she didn’t “take back” her city from protestors “NOW,”²⁹ should be criminally prosecuted for allowing city residents to establish a police-free protest zone.³⁰

By the time this Essay is published, there may well be more damage to assess.

History teaches us that this is not the first time the Department has gone through a tumultuous period. However, it is the first time, at least since Watergate, that the interference appears to be desired – if not directed – by the President of the United States. President Trump, however, is distinguished from President Nixon by his direct involvement in the sheer numbers of prosecutions in which he asserted an interest. He tried to exert influence publicly, via his tweets. We do not know, with certainty, what went on behind closed doors, but it seems plain that there will be more rebuilding required than the steps the Department took after Watergate³¹ or the politically motivated firing of nine U.S.

/connecticut/hc-news-john-durham-dannehy-resignation-20200911-20200911-xcsapnq7g5e63kvtw5aqi7cv34-story.html [https://perma.cc/VM6Q-G8HB].

27. Liam Brennan, *Dannehy Resignation Confirms Barr’s Intent to Use Durham Probe for Political Ends*, JUST SEC. (Sep. 12, 2020), <https://www.justsecurity.org/72414/dannehy-resignation-confirms-barrs-intent-to-use-durham-probe-for-political-ends> [https://perma.cc/X2LZ-E6CR].
28. Evan Perez, *Attorney General William Barr Suggests Charging Violent Protestors with Sedition*, CNN (Sep. 16, 2020, 5:08 PM ET), <https://www.cnn.com/2020/09/16/politics/barr-sedition/index.html> [https://perma.cc/ZDP7-6JAJ].
29. “Go Back to Your Bunker”: Seattle Mayor Hits Back at Trump, NDTV (June 12, 2020 AM IST), <https://www.ndtv.com/world-news/seattle-mayor-jenny-durkan-tells-donald-trump-to-go-back-to-your-bunker-after-his-remarks-on-protests-2244968> [https://perma.cc/9L9L-XW3C].
30. Katie Brenner, *Barr Told Prosecutors to Consider Sedition Charges for Protest Violence*, N.Y. TIMES (Sept. 16, 2020), <https://www.nytimes.com/2020/09/16/us/politics/william-barr-sedition.html> [https://perma.cc/H7VP-H25A].
31. Future Attorney General Richard Thornburgh, head of the Justice Department’s Criminal Division in the post-Watergate period, remarked that “[t]he worst thing about Watergate was that there was a perception implanted in the minds of ordinary citizens that was not there before People began thinking that the Justice Department was just like all the rest, and couldn’t be trusted to do what was decent and honorable and right.” Anthony Marro, *Watergate: Justice Dept. Changes*, N.Y. TIMES (June 17, 1977), <https://www.nytimes.com/1977/06/17/archives/watergate-justice-dept-changes-control-at-justice-dept-tighter.html>

Attorneys during the George W. Bush Administration.³² The challenge to the rule of law, and by extension to the U.S. Attorneys is dire, when a President operates under the belief that he can direct investigations into his perceived enemies³³ — or seek special treatment for his friends.³⁴ President Trump has gone so far as to assert a “legal right” to interfere in criminal matters.³⁵

Some have questioned whether the rule of law can hold in the face of such a direct assault.³⁶ Many people, including former Justice Department employees,

[<https://perma.cc/DHA4-EV82>]. Among the changes that resulted from the misconduct of the Watergate era were policies designed to preserve the Justice Department’s independence from the President in law enforcement and intelligence investigations, the codification of independent and special Counsel regulations, 28 C.F.R. § 600 (1999), and the Inspector General process. See Jack Goldsmith, *Independence and Accountability at the Department of Justice*, LAWFARE (Jan. 30, 2018, 2:16 PM), <https://www.lawfareblog.com/independence-and-accountability-department-justice> [<https://perma.cc/BN4U-KKBS>]. The changes were “far-reaching” and designed to repair the damage Thornburgh identified by attempting to “restore faith in the U.S. political system by combating the corrupting influence of money in politics; promoting ethics and transparency in government; protecting people against abuses of government power; and limiting certain extraordinary exercises of presidential authority.” The legislation “transformed, among other things, the federal budget process, government practices for protecting individuals’ personal information, and oversight of the intelligence community.” Sam Berger & Alex Tausanovitch, *Lessons from Watergate*, CTR. FOR AM. PROGRESS (July 30, 2018, 9:00 AM), <https://www.americanprogress.org/issues/democracy/reports/2018/07/30/454058/lessons-from-watergate> [<https://perma.cc/KD73-8BLB>]. See generally CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT’S MEN* (1974).

32. See Carol Cratty, *No Charges in Firing of 9 U.S. Attorneys During Bush Years*, CNN POL. (July 21, 2010, 9:59 PM EDT), <https://www.cnn.com/2010/POLITICS/07/21/us.attorneys/index.html> [<https://perma.cc/49H3-NWDY>]; Adam Zagorin, *Why Were These U.S. Attorneys Fired?*, TIME (Mar. 7, 2007), <http://content.time.com/time/nation/article/0,8599,1597085,00.html> [<https://perma.cc/3CZA-LD6V>].
33. Jonathan Allen, *Trump Turns the Full Force of the Government on Perceived Political Enemies*, NBC NEWS (May 24, 2019, 4:27 PM EDT), <https://www.nbcnews.com/politics/white-house/trump-turns-full-force-government-perceived-political-enemies-n1010096> [<https://perma.cc/DYA7-76M8>].
34. Sarah N. Lynch & Karen Freifeld, *Justice Department Appears to Be Rewarding Trump Allies, Punishing Enemies, Legal Experts Say*, REUTERS (July 21, 2020, 2:41 PM), <https://www.reuters.com/article/us-usa-trump-justice/justice-department-appears-to-be-rewarding-trump-allies-punishing-enemies-legal-experts-say-idUSKCN24M2NT> [<https://perma.cc/ND2K-Y2SY>].
35. Adam Edelman, *Trump Says He Has the ‘Legal Right’ to Involve A.G. Barr in Criminal Cases*, NBC NEWS (Feb. 14, 2020, 9:33 AM EST), <https://www.nbcnews.com/politics/donald-trump/trump-tweets-he-has-legal-right-involve-g-barr-criminal-n1136906> [<https://perma.cc/P4LM-53JH>].
36. More than 1,100 former Department of Justice (DOJ) prosecutors from both parties have called for Barr’s resignation. Katie Benner, *Former Justice Dept. Lawyers Press for Barr to Step Down*, N.Y. TIMES (Feb. 16, 2020), <https://www.nytimes.com/2020/02/16/us/politics/barr-trump-justice-department.html> [<https://perma.cc/8DHK-JDQV>]. And, more than 130 former federal prosecutors in the Southern District of New York expressed outrage over the firing

have opined that the system is already near the point of breaking.³⁷ Critics point to multiple episodes during Barr's time as Attorney General. They include Barr's decision to abandon the prosecution of former national security adviser Michael Flynn, who had twice pleaded guilty under oath;³⁸ the release of former Trump campaign chairman Paul Manafort over four years ahead of schedule despite his failure to meet criteria for early release during the COVID-19 pandemic;³⁹ and his decision to overturn the sentencing recommendation for Roger Stone, who subsequently avoided incarceration entirely when the President commuted his sentence.⁴⁰ These are the publicly known instances of suspected political interference. What remains unclear is whether there are other cases where prosecution has been advanced or withheld due to political pressure.⁴¹

of U.S. Attorney Geoffrey Berman. Connor Perrett, *More Than 130 Former Manhattan Prosecutors Denounce AG Barr and Trump's Firing of Berman as an 'Attack' That Undermines Justice System*, BUS. INSIDER (June 21, 2020, 4:12 PM), <https://www.businessinsider.com/135-former-manchattan-prosecutors-signed-letter-against-trump-and-barr-2020-6> [<https://perma.cc/Y4R9-9R4V>].

37. See sources cited *supra* note 36.
38. See *In re Flynn*, No. 20-5143, 2020 WL 5104220 (D.C. Cir. Aug. 31, 2020) (en banc) (holding that the district court could conduct an inquiry into the reasons behind the government's decision to dismiss the case against Flynn before ruling on the government's motion); Mary B. McCord, *Bill Barr Twisted My Words in Dropping the Flynn Case. Here's the Truth.*, N.Y. TIMES (May 10, 2020), <https://www.nytimes.com/2020/05/10/opinion/bill-barr-michael-flynn.html> [<https://perma.cc/WWE4-A39K>] (calling the government's rationale for dismissing the case against President Trump's first National Security Advisor, former General Mike Flynn, "contorted" and disingenuous).
39. Associated Press, *Paul Manafort Released from Prison Due to Coronavirus Concerns*, L.A. TIMES (May 13, 2020, 10:54 AM), <https://www.latimes.com/politics/story/2020-05-13/paul-manafort-release-coronavirus> [<https://perma.cc/H5SC-EYDU>] (detailing that President Trump's former campaign manager, Paul Manafort, received early release from federal custody under a program meant for those at risk of catching COVID-19 and for which he did not qualify, although others who did qualify remained in custody); Josh Gerstein, *Paul Manafort Released from Prison Because of Virus Concerns*, POLITICO (May 13, 2020, 11:41 AM EDT), <https://www.politico.com/news/2020/05/13/paul-manafort-released-from-prison-due-to-virus-concerns-254532> [<https://perma.cc/6H22-7MCP>].
40. See sources cited *supra* notes 2-16 and accompanying text. Both Manafort and Stone received full pardons after this Essay was finished.
41. For instance, the so-called Durham Investigation into the origins of the Crossfire Hurricane counterintelligence investigation has proceeded in the wake of presidential urging on Twitter and elsewhere, despite a finding by the nonpartisan DOJ Inspector General that nothing criminal occurred. See Julian Sanchez, *The Crossfire Hurricane Report's Inconvenient Findings*, JUST SEC. (Dec. 11, 2019), <https://www.justsecurity.org/67691/the-crossfire-hurricane-reports-inconvenient-findings> [<https://perma.cc/82LR-XEAU>]. Meanwhile, although the Republican-led Senate Select Committee on Intelligence has referred at least five high-ranking Trump campaign officials to the Justice Department for investigation into whether they perjured themselves before Congress, nothing seems to have come from those referrals. See Ken Dilanian, *Senate Committee Made Criminal Referral of Trump Jr., Bannon, Kushner, Two Others*

To make matters worse, it became increasingly difficult to escape the inference that Barr is using the resources of the Justice Department to benefit Trump's re-election effort.⁴² At his confirmation hearing, Texas Senator John Cornyn prompted Barr to explain how problematic it would be for the Department to "get tangled up in election politics" and why DOJ's investigations should be "insulate[d]" from elections.⁴³ Barr responded, "[B]ecause the incumbent party has their hands on the – among other reasons, they have their hands on the levers of the law enforcement apparatus of the country, and you do not want it used against the opposing political party."⁴⁴ As the 2020 election drew near, he seemed to have forgotten that during his confirmation hearing he had earnestly condemned the type of political maneuvering he was now engaging in.⁴⁵

to *Federal Prosecutors*, NBC NEWS (Aug. 18, 2020, 4:10 PM EDT), <https://www.nbcnews.com/politics/justice-department/senate-made-criminal-referral-trump-jr-bannon-kushner-two-others-n1237155> [<https://perma.cc/2AHR-XTYN>] More recently, in early October 2020, as the Attorney General conceded neither a report nor indictments would be forthcoming before the election, the President lambasted him, saying Barr had all he needed to seek indictment and was "going to go down as either the greatest attorney general in the history of the country or he's going to go down as, you now, a very sad situation." Alayna Treene, *Barr Tells Republicans Durham Report Won't Be Ready by Election*, AXIOS (Oct. 9, 2020), <https://www.axios.com/barr-durham-report-election-3co2ec6a-7613-4083-b35c-4844de6da16b.html> [<https://perma.cc/7PW8-G6UV>]. For more information on the Durham Investigation, see generally Katie Benner & Adam Goldman, *Justice Dept. Is Said to Open Criminal Investigation into Its Own Russia Investigation*, N.Y. TIMES (Aug. 14, 2020), <https://www.nytimes.com/2019/10/24/us/politics/john-durham-criminal-investigation.html> [<https://perma.cc/FBC4-GAUQ>].

42. E.g., Joshua A. Geltzer, *Four Ways William Barr Is Already Subverting the 2020 Elections*, WASH. POST (June 26, 2020, 8:46 AM EDT), https://www.washingtonpost.com/outlook/barr-attorney-general-election/2020/06/26/7ad4fc7e-b6fb-11ea-a510-55bf26485c93_story.html [<https://perma.cc/BY6Z-UDDJ>].
43. *Confirmation Hearing on the Nomination of Hon. William Pelham Barr to Be Attorney General of the United States Before the S. Comm. on the Judiciary*, 116th Cong. 65 (2019).
44. *Id.*
45. See, e.g., Kristine Phillips & Kevin Johnson, *1,600 Former Justice Department Lawyers Accuse Barr of Using DOJ to Help Trump in Election*, USA TODAY (Oct. 1, 2020, 5:03 PM ET), <https://www.usatoday.com/story/news/politics/elections/2020/10/01/william-barr-accused-1-600-lawyers-using-doj-help-trump-win/5881731002> [<https://perma.cc/UZ8U-5BQN>]; Jane C. Timm, *Fact Check: Echoing Trump, Barr Misleads on Voter Fraud to Attack Expanded Vote-by-Mail*, NBC NEWS (Sept. 19, 2020, 5:09 AM EDT), <https://www.nbcnews.com/politics/2020-election/fact-check-echoing-trump-barr-misleads-voter-fraud-attack-expanded-n1240144> [<https://perma.cc/9SLF-BELB>]. As the result for Joe Biden became increasing indisputable, even Barr was forced to belatedly concede he had not uncovered any evidence of fraud that led to Trump's loss, as the president and his lawyers continued to assert. See, e.g., Anthony Zurcher, *US Attorney General Finds "No Voter Fraud That Could Overturn Election,"* BBC (Dec. 2, 2020), <https://www.bbc.com/news/world-us-canada-55153366> [<https://perma.cc/DD8B-FZSE>].

What would it mean to the country if our rule-of-law system broke? At bottom, it would mean having a criminal-justice system that was not independent of the presidency but was, rather, a tool in the presidency's arsenal, one that could be wielded for personal or political advantage. A President could benefit friends with declined investigations, dismissed cases, beneficial sentencing recommendations, and lenient treatment. Or, a President could use the criminal-justice system to punish perceived enemies—targeting them for unwarranted prosecution or “lock[ing] them up”⁴⁶ to retaliate for political or personal enmity, at the expense of due process rights,⁴⁷ the kind of conduct we see in countries with broken legal systems. Some of this type of conduct has manifested in the past few years. Preventing it from becoming a feature of our criminal-justice system is critically important for the future of our country. The words on the seal of the Justice Department, “*Qui Pro Domina Justitia Sequitur*,” “Who Prosecutes on Behalf of Lady Justice,”⁴⁸ lose their luster when prosecutions benefit the President, not the people. If the sad legacy of the Trump Administration is a presidency that is above the law, one that can manipulate the criminal-justice system to respond to its whims, then the impartial pursuit of justice would be over and our rule-of-law system at an end.

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46. During the 2016 presidential campaign, “Lock Her Up” became one of then-candidate Trump’s favorite slogans, which he and his supporters directed against Hillary Clinton. Even delegates at the Republican National Convention that July chanted it. See Peter W. Stevenson, *A Brief History of the ‘Lock Her Up!’ Chant by Trump Supporters Against Clinton*, WASH. POST (Nov. 22, 2016, 4:56 PM EST), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/22/a-brief-history-of-the-lock-her-up-chant-as-it-looks-like-trump-might-not-even-try> [<https://perma.cc/W7ZR-MKTC>]. And more than two years later, the chant was still being used by the President and his supporters. In July 2018, then-Attorney General Jeff Sessions repeated “Lock Her Up!” and chuckled as high schoolers chanted it with him during one of his speeches. TIME, *Jeff Sessions Repeats ‘Lock Her Up’ Chant While Speaking at a High School* | TIME, YOUTUBE (July 24, 2018), https://youtu.be/2Cg7Qos_sOo. Trump continued to use the line at his rallies during the 2020 campaign, even though Clinton was not on the ballot. See Chris Cillizza, *How ‘Lock Her Up!’ Just Blew Up*, CNN (Jan. 10, 2020, 10:52 AM), <https://www.cnn.com/2020/01/10/politics/hillary-clinton-donald-trump-justice-department/index.html> [<https://perma.cc/D52X-4QGT>].
47. Protect Democracy, a nonpartisan group that makes policy recommendations and advocates to support democratic institutions, requested that the Department of Justice’s Inspector General determine whether improper criminal matters were being pursued based on Trump’s affinity for this slogan. They noted that if any Department officials took direction from Trump’s demands that his political opponents be prosecuted, it would violate the Constitution, along with Department policy and attorneys’ ethical obligations. Letter from Justin Florence, Legal Dir., Protect Democracy, to Michael E. Horowitz, Inspector Gen., U.S. Dep’t of Justice, and Robin C. Ashton, Counsel, U.S. Dep’t of Justice 4-5 (Jan. 4, 2018), <https://protectdemocracy.org/wp-content/uploads/2018/01/PD-letter-to-DOJ-IG-and-OPR-re-WH-interference-01042018.pdf> [<https://perma.cc/49RW-7VY2>].
48. *DOJ Seal—History and Motto*, U.S. DEP’T JUST., <https://www.justice.gov/about/history/doj-seal-history-and-motto> [<https://perma.cc/Q9ZN-TTFS>].

In order to avoid that outcome, it is essential to preserve the independence of the U.S. Attorneys' Offices' and the independence of their prosecutions from political influence. Ben Franklin, emerging from the Continental Congress, reportedly responded to a question about what form of government they had created by saying, "A republic, if you can keep it."⁴⁹ Those are the stakes. The rule of law is essential to keeping the republic. It has been blemished under Barr's tenure. His time as Attorney General began with misrepresentations to the public about the conclusions of the Mueller Report, while he withheld the Report itself from the public.⁵⁰ Most recently, prosecutors have resigned from cases in three separate matters—something that is virtually unheard of—the common feature being a high level of interest in those prosecutions by the President.⁵¹

49. Gillian Brockell, 'A Republic, If You Can Keep It': Did Ben Franklin Really Say Impeachment Day's Favorite Quote?, WASH. POST (Dec. 18, 2019, 6:36 PM EST), <https://www.washingtonpost.com/history/2019/12/18/republic-if-you-can-keep-it-did-ben-franklin-really-say-impeachment-days-favorite-quote> [<https://perma.cc/C8AY-SEM3>].

50. Even the usually taciturn Robert Mueller wrote to the Attorney General to complain about his public summary of the report. David A. Graham, *Barr Misled the Public—and It Worked*, ATLANTIC (May 1, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/barr-misled-the-public-and-it-worked/588463> [<https://perma.cc/TB23-SYR9>]. It was reported that a federal judge said Barr's words

put forward a "distorted" and "misleading" account of its findings and lacked credibility on the topic. Mr. Barr could not be trusted, Judge Reggie B. Walton said, citing "inconsistencies" between the attorney general's statements about the report when it was secret and its actual contents that turned out to be more damaging to President Trump. Mr. Barr's "lack of candor" called into question his "credibility and, in turn, the department's."

Charlie Savage, *Judge Calls Handling of Mueller Report 'Distorted' and 'Misleading'*, N.Y. TIMES (Mar. 5, 2020), <https://www.nytimes.com/2020/03/05/us/politics/mueller-report-barr-judge-walton.html> [<https://perma.cc/N5DM-W5V6>]. A side-by-side comparison of Barr's summary and Mueller's own testimony about his findings revealed "stark" differences: "Some of the differences involve near complete contradictions—in other words Mueller's statement and Barr's statements cannot both be true." Ryan Goodman, *A Side-by-Side Comparison of Barr's vs. Mueller's Statements About Special Counsel Report*, JUST SECURITY (June 5, 2019), <https://www.justsecurity.org/64441/a-side-by-side-comparison-of-barrs-vs-muellers-statements-about-special-counsel-report> [<https://perma.cc/GK4V-S679>].

51. See Devlin Barrett & Matt Zapposky, *Prosecutor Resigns from U.S. Attorney's Investigation into Origins of Trump-Russia Probe*, WASH. POST (Sept. 11, 2020, 9:47 PM EDT), https://www.washingtonpost.com/national-security/nora-dannehy-john-durham-trump-russia/2020/09/11/8bf49890-f466-11ea-b796-2dd09962649c_story.html [<https://perma.cc/9RDK-C79F>] (Durham Investigation); Jonathan Kravis, *I Left the Justice Department After It Made a Disastrous Mistake. It Just Happened Again.*, WASH. POST. (May 11, 2020, 9:00 AM EDT), <https://www.washingtonpost.com/opinions/2020/05/11/i-left-justice-department-after-it-made-disastrous-mistake-it-just-happened-again> [<https://perma.cc/9D7H-MQ63>] (Stone); Erik Larson, *Flynn Prosecutor Steps Down as Case Is Reportedly Being Dropped*, BLOOMBERG (May 7, 2020, 1:45 PM EDT), <https://www.bloomberg.com/news/articles/2020-05-07>

Despite the institutional fragility that has been exposed during the last few years, the U.S. Attorneys, nationwide, hold two interconnected assets that can be amplified to strengthen the Offices going forward so that it is more difficult for these abuses to be repeated: the history of independence among U.S. Attorneys and the fanatical culture among career prosecutors that dictates avoiding even the appearance of political interference in their cases. These strengths must be marshaled to support the institution and inoculate it against further and future abuses.

Despite the pessimistic voices that suggest the 150th anniversary of the Department arrives at the time of its demise, the Department will recover its reputation with time and dedication. This Essay argues that revitalizing the culture of the U.S. Attorneys' Offices will be paramount for a full recovery. The legislation and policy reform that will come out of this era are essential but, standing alone, not enough. In Part I, I discuss the historical origins of the tradition of independence among U.S. Attorneys and the culture of avoidance of political interference in criminal prosecutions that has developed among the career ranks in their offices. In Part II, I find in those traditions the seeds necessary to address norms that have been violated in the current political environment. Unless those norms can be restored and the Offices can regain the public's confidence, this Essay argues, they will be unable to fulfill their essential mission: keeping communities safe by holding civil and criminal wrongdoers accountable. In Part III, I conclude that essential new laws and policies can only prevent future abuses if a strong culture is in place to ensure their consistent enforcement. Despite the difficulty of assessing history as one lives through it, it is important to reaffirm the need for the U.S. Attorney community to forthrightly address concerns the public may have and protect the integrity of their offices from political interference. The outcome of the fight to restore justice is not certain, but ultimately, success requires a commitment to the career ranks in the U.S. Attorneys' Offices that matches the commitment those prosecutors give to the rule of law and the integrity of their work.

I. THE TRADITION OF INDEPENDENCE AMONG U.S. ATTORNEYS

The office of U.S. Attorney is almost as old as our nation. It was established by the Judiciary Act of 1789:

And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it

/flynn-prosecutor-van-grack-steps-down-from-criminal-case [https://perma.cc/6WFX-ELXQ] (Flynn).

shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the supreme court in the district in which that court shall be holden.⁵²

Although the number of federal districts has grown from the thirteen districts in eleven states of 1789⁵³ to ninety-four⁵⁴ districts today,⁵⁵ the primary duties of a U.S. Attorney remain remarkably unchanged. By statute, U.S. Attorneys must “(1) prosecute for all offenses against the United States;” and “(2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned.”⁵⁶

Originally, the Attorney General – a standalone position that was also created by the Judiciary Act of 1789 – did not supervise or direct U.S. Attorneys.⁵⁷ A change was made in 1861, when Congress directed the Attorney General to assume “general superintendence and direction duties” over criminal and civil proceedings in district courts.⁵⁸ The Justice Department itself did not come into being until 1870,⁵⁹ when Congress passed the Act to Establish the Department of Justice,⁶⁰ and placed the Attorney General at the helm. Today, the Attorney General is authorized by statute to “supervise all litigation to which the United States, an agency, or officer thereof is a party”⁶¹ and to “direct” the U.S. Attorneys and their offices in “the discharge of their respective duties.”⁶²

So, the U.S. Attorneys had over seventy years of near-total independence from Washington. Even with the creation of the Justice Department, most of them were geographically far enough removed from Washington that the formal presence of the Attorney General as supervisor went largely unfelt. They contin-

52. An Act to Establish the Judicial Courts of the United States, ch. 20, § 35, 1 Stat. 73, 92-93 (1789).

53. *Id.* § 2, 1 Stat. at 73.

54. Although there are ninety-four federal districts, there are only ninety-three U.S. Attorneys. Guam and the Northern Mariana Islands share a U.S. Attorney.

55. Offices of the U.S. Att'ys, *Mission*, U.S. DEP'T JUST. (Sept. 22, 2016), <https://www.justice.gov/usao/mission> [<https://perma.cc/Q79T-VW8P>].

56. 28 U.S.C. § 547 (2018).

57. Judiciary Act of 1789, § 35, 1 Stat. 73, 92-93.

58. Act of August 2, 1861, ch. 37, 12 Stat. 285.

59. *About DOJ*, U.S. DEP'T JUST., <https://www.justice.gov/about> [<https://perma.cc/NX9T-48QR>].

60. Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870).

61. 28 U.S.C. § 519 (2018).

62. *Id.*

ued to act independently to the extent that, by 1940, then-Attorney General Robert Jackson, who would later become an Associate Justice of the Supreme Court, became fed up with the “differences in the degree of diligence and zeal in different districts.”⁶³ He summoned all of the U.S. Attorneys to Washington for a meeting, during which he admonished them against the risks of abusing their authority in a speech that has become a seminal work on the power and obligation of prosecutors:

It would probably be within the range of that exaggeration permitted in Washington to say that assembled in this room is one of the most powerful peace-time forces known to our country. The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen’s friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. . . . While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.⁶⁴

Jackson acknowledged that the responsibilities of U.S. Attorneys should not be “wholly surrendered to Washington and ought not to be assumed by a centralized department of justice.”⁶⁵ He conceded that the Attorney General should only take control of a case in “unusual and rare” circumstances, such as one where the U.S. Attorney had a conflict of interest, and only in “unusual” cases should a U.S. Attorney’s judgment be overruled by the Attorney General.⁶⁶ This balance between independence and accountability through centralized oversight has continued to be a point of some contention for the thousands of federal prosecutors across the country. It can be difficult to reconcile the Justice Department’s hierarchical oversight with a legal system and a culture that requires U.S. Attorneys to be blind to anything beyond the law and the facts, when they make decisions about their cases. Even beyond the corridors of the “Sovereign District of

63. Robert H. Jackson, U.S. Attorney Gen., *The Federal Prosecutor* (Apr. 1, 1940), in 24 J. AM. JUDICATURE SOC’Y 18, 18 (1940).

64. *Id.*

65. *Id.*

66. *Id.*

New York,”⁶⁷ prosecutors vigilantly protect their independence and the integrity of their cases from improper influence.

Jackson argued that the constitutional requirement for presidential appointment and senatorial confirmation of prosecutors protected citizens from the “immense power” an irresponsible prosecutor could wield. He told the gathered U.S. Attorneys that they had to “win an expression of confidence in your character by both the legislative and the executive branches of the government before assuming the responsibilities of a federal prosecutor.”⁶⁸

Although Attorney General Jackson was focused on convincing the U.S. Attorneys to accept greater centralized control of the Department to ensure that everyone followed cohesive policy objectives and uniform interpretations of the law, most prosecutors retain and even cherish his message about the importance of integrity and developing an ethic of fairness. But the issue he raises of the balance between central control and local independence has pervaded many debates inside of the Department over the years, although likely never so much and so publicly as in recent months. Questions regarding whether a U.S. Attorney or the Attorney General should control certain investigations and prosecutions, who is investigated and for what, who is charged, and how cases and sentences are handled have even found their way into the media and have sat atop the daily news cycle.⁶⁹

67. See Erin Fuchs, *America’s ‘Killer Elite’ Lawyers Are All in One Prosecutor’s Office in Manhattan*, BUS. INSIDER (Nov. 7, 2013), <https://www.businessinsider.com/why-the-southern-district-of-new-york-is-so-prestigious-2013-11> [<https://perma.cc/7283-TJCV>].

68. Jackson, *supra* note 63, at 18.

69. Recent decisions to replace U.S. Attorneys Jesse Liu in the District of Columbia and Geoffrey Berman in the Southern District of New York with insiders close to Attorney General Barr provoked nonstop news coverage of concerns that those moves were made to weaken independent control of criminal prosecutions in U.S. Attorneys’ Offices. See Keith L. Alexander, Spencer S. Hsu & Matt Zapotosky, *Attorney General William P. Barr Names Timothy Shea, One of His Counselors, as the District’s Interim U.S. Attorney*, WASH. POST (Jan. 30, 2020), https://www.washingtonpost.com/local/public-safety/attorney-general-william-p-barr-names-timothy-shea-one-of-his-counselors-as-the-districts-interim-us-attorney/2020/01/30/446fe6a6-4303-11ea-b503-2b077c436617_story.html [<https://perma.cc/DGY5-6VNV>]; Benjamin Weiser, William K. Rashbaum, Nicole Hong, Maggie Haberman & Katie Benner, *Clash Over U.S. Attorney Who Investigated Trump Associates Sets Off Crisis*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/06/19/nyregion/us-attorney-manhattan-trump.html> [<https://perma.cc/WLB9-MK73>]. No case better demonstrates the public display of scrutiny over charging decisions than the saga of former Acting FBI Director Andy McCabe, including reporting that the grand jury investigating him never returned an indictment against him despite DOJ authorization to seek one, ultimately leading to a decision he would not be charged. See Matt Zapotosky, Devlin Barrett, Karoun Demirjian & Josh Dawsey, *Justice Dept. Won’t Charge Andrew McCabe, the Former FBI Official Who Authorized the Investigation of President Trump*, WASH. POST (Feb. 14, 2020), <https://www.washingtonpost.com/national-security/justice-dept-wont-charge-andrew-mccabe-the-former-fbi-official-who>

U.S. Attorneys do not have the luxury of being mavericks. Wise exercise of their discretion in the evenhanded but independent fashion Jackson called for is the best guarantee that the mission of the Offices will be accomplished. But what is the best way to guard that independence? It is essential that U.S. Attorneys, in conducting criminal prosecutions, remain free from interference in their criminal prosecutions by the White House or any other elected officials. While there have been rules in recent administrations strictly limiting contacts between federal prosecutors and the White House or other politicians,⁷⁰ much of prosecutorial independence is a function of the Justice Department's culture and unspoken norms rather than a written rule.

This notion that political appointees transcend their origin in office and slip the ties of politics to arrive at independence may sound strange to those who have not experienced it. Yet, it is the common expectation and experience inside of the Department. Republican-appointed U.S. Attorney Patrick J. Fitzgerald, acting as an independent counsel in the investigation into the leak of the covert identity of CIA agent Valerie Plame Wilson, returned an indictment against Vice President Dick Cheney's Chief of Staff.⁷¹ Geoffrey Berman, the now-former U.S. Attorney for the Southern District of New York, declined to be bullied into resigning. Rather than going quietly when the Attorney General claimed he had resigned, Berman succeeded in ensuring his deputy—an experienced career prosecutor—would step into his shoes until Senate confirmation of his replacement, thereby retaining local control of the cases his Office was pursuing. There is a gravitational pull towards independence on a U.S. Attorney once they enter office. That pressure is exerted as much by the career ranks of AUSAs who expect and insist that their new boss honor the tradition of independence, as from any place else. Far from the spotlight, career prosecutors carefully weigh this obligation every day, pursuing their cases without fear or favor on the basis of the law and the facts, and permitting nothing else to enter their calculus. They expect the same from their leadership, even if they are political appointees.

Although this is not the first time the Department of Justice has been through a tumultuous era, the past four years have been a time of unusual turmoil. Damage to the Justice Department's credibility with the public has the potential to tarnish prosecutions in U.S. Attorney's offices across the Country. Many established rules of conduct—policies once assumed immutable—have

-authorized-the-investigation-of-president-trump/2020/02/14/8ab3aac0-4f48-11ea-bf44-f5043eb3918a_story.html [https://perma.cc/8P57-AGPC].

70. *White House Communications with the DOJ and FBI*, UNITED PROTECT DEMOCRACY (Mar. 8, 2017), <https://protectdemocracy.org/agencycontacts> [https://perma.cc/2LT2-5LUJ].

71. Andrew Glass, 'Scooter' Libby Sentenced to Federal Prison, June 5, 2007, POLITICO (June 5, 2018), <https://www.politico.com/story/2018/06/05/this-day-in-politics-june-5-2007-617212> [https://perma.cc/2EBP-VZEU].

proven to be no obstacle to an Administration that would use the Department for something other than to “ensure fair and impartial administration of justice for all Americans.”⁷² The Trump Administration’s erosion of democratic norms raises questions about the vitality of these institution. Nowhere are these concerns more present than in the independence of federal prosecutors, who oversee the most sacred of matters: whether a person will be deprived of their life or liberty.

II. REINFORCING A CULTURE THAT REJECTS POLITICAL INTERFERENCE IN PROSECUTIONS

Federal prosecutors can only succeed before judges and juries if their office’s reputation for candor and integrity is unimpeachable. So, offices tend to rigidly self-enforce ethical obligations, knowing that misconduct in a U.S Attorney’s Office can gravely damage credibility in the courtroom, taking with it the office’s ability to carry out its mission of litigation successfully on behalf of the United States and keeping communities safe. While U.S. Attorneys have, on rare occasion, had to reckon with prosecutorial misconduct committed by career attorneys in their offices, today the challenge is handling allegations of serious and repeated misconduct leveled against the leadership of the Justice Department and the executive branch.

The Department’s moral compass has always been its career prosecutors, and they have continued to demonstrate their dedication to the mission of being the people’s lawyers even when led by an Attorney General who has been unable to correspondingly honor their commitment with candor and independence of his own.

Legislation and formal steps to restore the Department’s independence and integrity are essential to the future of both the Justice Department and the U.S. Attorneys’ Offices. The Justice Department has had to renew and rebuild its integrity and values before. The Department and the U.S. Attorneys’ Offices have had to recover from crises ranging from Nixon’s Watergate and the Saturday Night Massacre to the U.S. Attorney firings during the Bush Administration.⁷³ After Watergate, the problems raised by a criminal presidency were addressed directly, with responsive legislation crafted to create new rules where unwritten norms failed to suffice.⁷⁴ Bush-era abuses in the hiring process, where improper

72. *About DOJ*, *supra* note 59.

73. *See supra* note 31-32 and accompanying text.

74. *See Berger & Tausanovitch*, *supra* note 31.

political or social criteria were used to select candidates for career positions, led to new policies and training to prevent reoccurrence.⁷⁵

A transformation of the written rules will need to happen again. Various groups and think tanks have started the work of identifying problem areas and proposing fixes.⁷⁶ This work deserves serious consideration and a legislative package designed to provide the boundaries that protect DOJ's independence to conduct criminal cases, free of interference, should be adopted. Reforms that focus on formally decoupling the Department from political influence, while creating standards designed to restore public confidence in the integrity of the Department's decision-making processes, should be adopted and implemented.

Codifying responses to specific abuses is important. But it must be accompanied by a reinforcement of the U.S. Attorneys' culture of independence that ensures it is strong and widespread. Prosecutors must appreciate that they have the ability and the obligation to push back if actual abuses reoccur. As the saying goes, culture eats policy for breakfast. New laws and policies that address specific points of failure are important, but the culture they exist in must be hardened as well. An ethic of unrelentingly steadfast refusal to permit improper influence will create strong guardians for new measures that are passed.⁷⁷

Ensuring that culture in an entity that consists of ninety-four main offices nationwide is a challenge. Federal prosecutors, like all busy people, resist time away from their offices and their prosecutions. But where the culture of inde-

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75. See Eric Lichtblau, *Report Faults Aides in Hiring at Justice Dept.*, N.Y. TIMES (July 29, 2008), <https://www.nytimes.com/2008/07/29/washington/29justice.html> [https://perma.cc/QPK9-YN44] (describing how senior aides to former Attorney General Alberto Gonzales used a variety of inappropriate political criteria to make hiring and promotion decisions for civil-service positions at DOJ, both slowing the hiring process when there were critical needs, and damaging the Department's credibility, and noting how Gonzalez resigned in the wake of the resulting scandal and his successor, Attorney General Michael Mukasey, vowed, following the release of the Inspector General's report, "to prevent such actions from happening again").
76. E.g., Criminal Justice Team, *Restoring Integrity and Independence at the U.S. Justice Department*, CTR. FOR AM. PROGRESS (Aug. 13, 2020, 9:01 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/08/13/489387/restoring-integrity-independence-u-s-justice-department> [https://perma.cc/3UUS-Y8LH]; *Roadmap for Renewal: Preserving Non-Partisan and Independent Law Enforcement*, PROTECT DEMOCRACY (July 4, 2018), <https://protectdemocracy.org/resource-library/document/doj-independence-roadmap> [https://perma.cc/RCC3-WAEG].
77. As Preet Bharara noted in his book *Doing Justice*, U.S. Attorneys must guard vigorously against any perception among prosecutors in their offices that an investigation must result in a prosecution, rather instilling in them a commitment to finding the truth and making the fairest recommendations possible. PREET BHARARA, *DOING JUSTICE* 146-53 (2019). Bharara quotes one of his predecessors, who said, "You judge an office not just by the cases it brings but also by the cases it doesn't bring." *Id.* at 151 (citation omitted).

pendence has been largely a product of wisdom passed down from one generation of prosecutors to the next, a more comprehensive and universal approach is needed now. Prosecutors must make a study of the wise exercise of prosecutorial discretion, free of political or other undue influence. It must become a core part of every Office's training and an explicit part of its culture, with Offices sharing experiences and best practices with one another. Not all offices are created alike. Some are small and/or rural, while others are large and have more specialized resources as a result. The frequency of turnover among personnel may vary. Offices' dockets consist of different types and mixes of cases. Despite this variation, it is important to instill a uniform tradition of independence that is consistent nationwide. Standard practices that reject inappropriate interference will provide a bulwark against any future incursions into proper conduct of criminal matters.

Public confidence in the Justice Department and the U.S. Attorneys' Offices is essential if they are to succeed in their work. This applies not just to prosecutions, although it is especially critical for them, but to civil-enforcement work and policymaking as well. One example readily demonstrates this: during the Obama Administration, the U.S. Attorneys were charged with playing a leadership role in criminal-justice reform policy in their districts. In addition to prosecutions, they focused on crime prevention and successful community reentry for people returning home after serving prison sentences. As part of this work, they became aware of community concerns about racial injustice in some areas, and worked in a variety of ways to address it. Key among them was working with colleagues in the Civil Rights Division to use the consent-decree process to identify and require departments to address the worst practices.⁷⁸ The role of the U.S. Attorneys in identifying where the community believes problems exist is essential in this regard, yet, if the taint of political influence in their prosecutions shatters public confidence, their ability to attract and work with community partners to help resolve important issues, like those of bias and excessive force in policing, is seriously undercut.

To succeed in its important work, the next generation of U.S. Attorneys must build on the much-needed distillation of norms into law and policy by instilling a deeply rooted culture of independence and wise exercise of prosecuto-

78. This process was discontinued under Attorney General Jeff Sessions. Presumably, it will be one of the first items on the agenda of a new Attorney General. The U.S. Attorneys will be key partners for the Civil Rights Division in the reintroduction of this work for a variety of reasons, including their existing relationships with state and local law enforcement. See Katie Benner, *Sessions, in Last-Minute Act, Sharply Limits Use of Consent Decrees to Curb Police Abuses*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/us/politics/sessions-limits-consent-decrees.html> [<https://perma.cc/U9Y7-8CTJ>].

rial discretion. That work, progress towards it, and the sincerity of the commitment must be shared with the public. Candor can help restore damaged credibility, albeit slowly and only if the Offices acknowledge past deficits and amplify their commitment to rejecting any further attempts at political influence as well as any other efforts at undue influence designed to improperly interfere with prosecutorial decisions. Every Office will benefit from a nationwide commitment from their fellow U.S. Attorneys to reject past abuses and make certain their offices are prepared to repel future ones.

III. RESTORING PUBLIC CONFIDENCE

In his written submission to Congress, Aaron Zelinsky wrote:

The first thing every AUSA learns is that we have an ethical and legal obligation to treat every defendant equally and fairly. No one is entitled to more or less because of who they are, who they know, or what they believe. In the United States of America, we do not prosecute people because of their politics.⁷⁹

A key step the U.S. Attorneys' Offices should take is to reassure the communities they serve that they are deeply committed to this fundamental tenet of prosecutions, which is, in effect, a practical description of how a functioning rule of law system operates. No one could blame Americans for being ill at ease, or at least confused about, the integrity of the criminal-justice system after being exposed to the barrage of criticism the President has leveled against prosecutors and law-enforcement officials. While the U.S. Attorneys' Offices are not responsible for public confusion or worse that may have resulted, they should nonetheless seize the opportunity to help restore public confidence. Perceived impropriety can be as damaging to that confidence as actual misconduct. U.S. Attorneys should take on the mission of educating their communities about their work and their commitment to freedom from political influence.⁸⁰

Neither the Justice Department nor the U.S. Attorneys can deliver justice if there is a public perception that they are political actors. And there is no avoiding the consequences of the damage that the last four years, and especially Attorney General Barr's time in office have done in that regard. New leadership will have

79. *Zelinsky Hearing*, *supra* note 3, at 1.

80. Although it is beyond the scope of this piece, any discussion of the rule of law and our criminal-justice system should acknowledge its imperfections and the fact that our goal of having a fair and just society is still aspirational, as events this summer following George Floyd's death have brought into focus with new clarity. That makes it more, not less, important that prosecutors dedicate themselves to all aspects of the integrity of their offices.

to be direct and honest with the American people, credibly explaining the failures of the past and describing how they intend to conduct their work free of political influence and why the public can rely on objectivity from people who enter public service through a political-appointment process. In the absence of candor, it would be easy for the public to succumb to the narrative that the Justice Department has become just another politicized agency. In a time when even public-health issues are readily politicized, there is little that goes untouched. And there is no reason to believe that the 2020 election will cure that. Magical thinking will not be helpful here.

The oath of office that every U.S. Attorney and every federal prosecutor takes demands that they check their biases and affiliations at the door and pursue their cases based solely on the law and the facts. As Preet Bharara, the former U.S. Attorney for the Southern District of New York says, “Do the right thing, in the right way, for the right reasons.”⁸¹ That is every good prosecutor’s North Star. But no one should blame communities that are unwilling to accept this attestation of good faith without proof. Prosecutors must find ways to peel back the opaque curtain that prevents communities from observing their work – often for good reasons like grand jury secrecy rules, ensuring the integrity of investigations and the safety of witnesses, and protecting the reputations of those who are investigated but never prosecuted – and explain processes and policies, while protecting individual cases from inappropriate disclosures. Prosecutors follow their oath to uphold the law like doctors follow their Hippocratic Oath. That is not to say they are perfect but, if willing to engage, they have a compelling story to share with communities about why they are deserving of confidence. And there are rules and norms, like the currently disregarded Hatch Act,⁸² that prohibit political activity by political appointees and other U.S. Attorneys’ Office employees and can again be a check, as they used to be, to enforce the apolitical standards set for political appointees by Department policy.⁸³

The Offices will have to take on the obligation to promote transparency with the people they serve, not into the conduct of individual criminal cases, but into their people, their policies, their training, and their commitment to the commu-

81. BHARARA, *DOING JUSTICE*, *supra* note 77, at xiv.

82. *The Hatch Act*, CITIZENS FOR RESP. & ETHICS WASH., <https://www.citizensforethics.org/hatch-act-mixing-partisan-goals-official-positions-trump-administration> [<https://perma.cc/ND22-WWUH>].

83. These standards apply and can and have been enforced. For instance, during the Obama Administration, a U.S. Attorney stepped down after possible Hatch Act violations came to light. Office of the Inspector Gen., *Report of Investigation of Former U.S. Attorney James L. Santelle*, U.S. DEP’T OF JUST. (Aug. 2016), <https://www.oversight.gov/sites/default/files/oig-reports/01605.pdf> [<https://perma.cc/S3CJ-3AL2>].

nity. It will not be enough to reference tradition; there will have to be an intentional commitment to the present and the future. All too often, the Offices have held themselves apart from the community. Now is not the time for that. Justice cannot restore itself.

There are benefits to greater transparency, especially where, as now, institutions are emerging from difficult times. This is true because of a basic principle of good government that holds especially true at the Justice Department and in the U.S. Attorneys' Offices – not only must actual impropriety be impermissible, even the appearance of impropriety must be avoided as well. The appearance of impropriety damages the public's trust in prosecutors and in the ability of the system to provide justice. So, it is axiomatic that prosecutors must zealously guard against conduct that suggests undue influence at work in their offices, particularly in this time of rebuilding. That means everything from avoiding routine socializing that could give an appearance of impropriety to providing public access to office policies, like those on contacts with other executive-branch and legislative-branch officials. Engagement with communities can foster trust and understanding and build pathways for understanding where an appearance of impropriety may have developed. Regular engagement permits Offices to understand community points of view and correct any damage so that further drain on reputation can be staunched. This is difficult, and will require intention, time, explanation, and commitment. It's critical that it be done in a manner that empowers communities to demand justice from Justice beyond the period of rebuilding and into future administrations.

The conduct of prosecutors and their offices must be above question if they are going to have the legitimacy to ask juries to convict in their cases, potentially sending people to prison. The entire tradition of the U.S. Attorneys revolves around preserving perceived and actual integrity, so the public has confidence that the machinery of the criminal-justice system is used properly. Line prosecutors in U.S. Attorneys' Offices who run investigations make important decisions about charging and sentencing and take cases to court. Rather than supporting them, President Trump has belittled, mocked, and even criticized prosecutors by name⁸⁴ on his Twitter feed, deliberately damaging the Justice Department by

84. *E.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 11, 2020, 10:58 PM), <https://twitter.com/realDonaldTrump/status/1227441882793480196> [<https://perma.cc/89DT-PWLH>] (Roger Stone and Mike Flynn prosecutors); Donald J. Trump (@realDonaldTrump), TWITTER (May 21, 2019, 8:51 PM), <https://twitter.com/realDonaldTrump/status/1130999648976560128> [<https://perma.cc/FAS3-SUG2>] (Mueller investigation prosecutors); Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 7, 2018, 6:18 AM), <https://twitter.com/realDonaldTrump/status/1071001119697108992> [<https://perma.cc/J89F-XLR8>] (Jerome Corsi prosecutor Jeanne Rhee); Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 29, 2018, 11:12 AM), <https://twitter.com/realDonaldTrump/status/1034821067423014913> [<https://perma.cc/8XKL-AE4U>] (career DOJ employee Bruce Ohr).

falsely disparaging its prosecutors. The President's approach has been transactional — he supports prosecutions when they align with his personal interests and denigrates them when he or someone close to him is in their sights. By characterizing prosecutors as part of a witch hunt or questioning their integrity, he diminishes the ability of all prosecutors to do their jobs properly, namely, to run investigations that seek out the truth and bring wrongdoers to justice in order to protect the public. This unwarranted damage to the reputation of the Justice Department renders us all less safe and weakens institutions that are foundational to our system of government. Here too, the U.S. Attorneys' Offices can take steps to restore normalcy by engaging more transparently with their communities and being willing to explain their work.

At the same time U.S. Attorneys engage in efforts to rebuild trust with the communities they serve, the leadership of the Justice Department must also engage in unambiguous and sustained support of the U.S. Attorney community and particularly the line prosecutors. It's important to recognize that the unwarranted criticism of prosecutors and damage to the Justice Department's apolitical standing has come at a severe cost in morale for the career ranks of the U.S. Attorneys' offices. These are the lawyers who are essential as the lawyers for the people. Yet instead of defending them from Trump's attacks, Attorney General Barr stayed silent, or worse, actively diminished their standing as he did recently, calling them "part of the permanent bureaucracy" and lacking in "the political legitimacy to be the public face of tough decisions," while suggesting that unlike political appointees, career prosecutors who devote lives of service to justice are not capable of making "complex judgment calls concerning how we should wield our prosecutorial power."⁸⁵

These are lawyers who could often make far more money in private practice but who chose to remain in government despite the long hours and lack of perks because they are committed to the one product they produce: justice. As former Assistant Attorney General for the National Security Division Mary McCord put it,

I'm sure that some D.O.J. attorneys feel that judges are not going to look at them in the same way And I'm sure there are judges who are going to wonder, "Can we credit what you say, or is D.O.J. going to come back tomorrow and say something different?"⁸⁶

85. William P. Barr, Att'y Gen., Address at the Hillsdale College Constitution Day Event (Sept. 16, 2020), <https://www.justice.gov/opa/speech/remarks-attorney-general-william-p-barr-hillsdale-college-constitution-day-event> [<https://perma.cc/7DG9-4E75>].

86. Katie Benner, Sharon LaFraniere & Nicole Hong, *Fearful of Trump's Attacks, Justice Dept. Lawyers Worry Barr Will Leave Them Exposed*, N.Y. TIMES (May 18, 2020), <https://www.nytimes>

Over the course of the last four years, prosecutors have endured the President's attacks, as in the Stone case, and his vocal support for defendants, as in the Manafort case. They endured Barr's apparent disdain for them. So Barr's protestation when the Stone prosecutors resigned, "I hope there are no more resignations We, we like our prosecutors and hope they stay," rang hollow to many prosecutors.⁸⁷ Prosecutors who foster a strong, professional culture should in turn receive respect from both their leadership and the White House. Without them, the Justice Department cannot accomplish anything. All they ask is that they be permitted to conduct their cases, free from political pressure.

That's exactly what we want them to be able to do. It is what their communities need to see them doing as we stand at a pivotal point in the history of our nation, where the rule of law has been contorted by a leader who seeks to bend it to his own purposes. The U.S. Attorneys have the ability to stand for the rule of law and to restore public trust with a steadfast commitment to repel any improper efforts at interference in their cases.

Justice is not yet dead, as many have feared. But there is much work to do if we intend to keep it.

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.com/2020/02/15/us/politics/trump-barr-justice-department.html [https://perma.cc/R53L-PJR5].

87. *Id.*