

Line Prosecutors v. Main Justice Independence with the DOJ

A Talk with Professors Bruce Green and Rebecca Roiphe

- Federal prosecutors' role
 - State vs. federal prosecutors
 - Many state prosecutors are elected. Held accountable through the electoral process.
 - Federal prosecutors are appointed. Are under the DOJ under the AG or in US Attorneys' offices throughout the country.
 - Federal jurisdiction has become more extensive over the past century, which has given federal prosecutors enormous power and discretion. Because the DOJ is an executive agency, there is inevitably tension between the policy priorities of the executive and legal and ethical responsibilities of the office.
 - Federal prosecutor independence
 - Contemporary understanding is that federal prosecution should be politically neutral. Ethical rules applicable to all prosecutors, whether state or federal, require politically neutral prosecution.
 - Federal prosecutors should think about president's policies as members of the executive branch, but should not be improperly influenced in individual cases.
 - No constitutional provision or statute establishes prosecutorial independence but it has become a norm over the last century. Prosecutorial independence has become central to ensuring the integrity of the criminal justice system.
 - President using hiring/firing power to influence criminal prosecutions
 - President has power to hire and fire AG, but does that imply power to instruct subordinate officials in specific prosecutions? Does the AG have a responsibility to resist president's attempt to influence or interfere?
 - What should be the President's role in criminal prosecutions?
 - President Obama wrote a commentary in the Harvard Law Review of broad level policy goals to reform the criminal justice system and the role of the President. He wrote, "The President does not and should not decide who or what to investigate or prosecute or when an investigation or prosecution should happen." He noted that that is important to maintaining the independence of the justice system.¹
 - Nixon's use of firing power: the Saturday Night Massacre

¹ Barack Obama, The President's Role in Advancing Criminal Justice Reform, 130 Harv. L. Rev. 811, 823 (2017), <https://archive.org/details/edu.harvard.hlra.130.Harv.L.Rev.811/page/n11/mode/2up>.

- President Nixon ordered his Attorneys General to fire the special prosecutor who was assigned to investigate the Watergate scandal. When they refused, he fired them. Attorney General Robert Bork did relent and fire the special prosecutor but appointed a new special prosecutor to continue the investigation.²
 - The role of the Attorney General
 - Both a legal and political position, the responsibilities of which are often in tension with each other. Sets policy priorities of the DOJ according to the policy priorities of the President.
 - Ethical responsibilities
 - Help president fulfill constitutional obligation to “take Care that the Laws be faithfully executed.”³
 - Seek to preserve legitimacy of the DOJ
 - Contrasting views of line prosecutors’ role within the DOJ
 - Federal prosecutors should be able to make decisions free from political pressure and the exercise of their discretion in individual cases should not be influenced by partisan politics.
 - AG Bill Barr’s view: In public remarks, Barr stated, “The notion that line prosecutors should make the final decisions within the Department of Justice is completely wrong and it is antithetical to the basic values underlying our system.”⁴ The AG and elected officials have the authority to exercise discretion on behalf of the DOJ as the public-facing and publicly accountable figures.
- Examining federal prosecutorial independence and line prosecutor discretion
 - Election fraud investigations – “doing justice” or politically motivated investigations?
 - AG Bill Barr issued a memo to US Attorneys to pursue election fraud investigations days after the 2020 elections. The move was criticized in many circles for the public nature of the announcement, its timing just on the heels of the election, and the seemingly partisan nature of the investigations.⁵
 - Roger Stone case

² See Gormely, K., *The Saturday Night Massacre: How our Constitution trumped a reckless President*, National Constitution Center (Oct 20, 1973), <https://constitutioncenter.org/blog/the-saturday-night-massacre-40-years-later-how-our-constitution-trumped-a-r>

³ U.S. Const., art. II, §3.

⁴ Remarks by Attorney General William P. Barr at Hillsdale College Constitution Day Event, Sep 16, 2020, <https://www.justice.gov/opa/speech/remarks-attorney-general-william-p-barr-hillsdale-college-constitution-day-event>

⁵ See Grisales, C. & Wise, A., *Barr Wades Into Trump's False Voting Claims, Allowing Prosecutors To Investigate*, NPR (Nov. 9, 2020), <https://www.npr.org/sections/live-updates-2020-election-results/2020/11/09/933254127/gop-tip-toes-around-acknowledging-biden-win-timidly-backs-trump-election-conspir>

- Roger Stone was convicted of several felonies, including lying to Congress and witness tampering. The DOJ reversed the trial prosecutors' sentencing recommendation of 7-9 years. One of the prosecutors quit the DOJ and three others withdrew from the case, seemingly in protest of the AG's involvement.⁶
 - Mueller report
 - After the Mueller investigation wrapped, AG Barr issued an initial letter to Congress purporting to summarize the report in which he seemed to state that the report cleared the President of any wrongdoing.⁷ The letter was criticized as a mischaracterization of the report's conclusions.
 - A group of prominent D.C. lawyers filed an ethics complaint with the D.C. bar alleging that Barr violated several sections of the D.C. Rules of Professional Conduct.⁸
 - DCRPC 8.4(c) and 8.4(d) on engaging in conduct that is dishonest, fraudulent or misrepresentation or prejudicial to the administration of justice.⁹
 - DCRPC 1.3 on diligence and zeal in representation¹⁰ and 1.7.(b)(4) on conflict of interest.¹¹
 - Michael Flynn case
 - The DOJ dropped charges against Michael Flynn, former national security adviser, who had already pleaded guilty twice to lying to the FBI about his contacts with Russia. The highly unusual and unprecedented move was criticized.¹²

⁶ See Johnson, K. & Wagner, D., 'Angst, anger and disappointment': Roger Stone intervention stokes uncertainty across federal justice system, USA Today (Feb. 20, 2020), <https://www.usatoday.com/story/news/politics/2020/02/19/dojs-reversal-roger-stone-sentencing-worries-prosecutors-judges/4805363002/>.

⁷ See Greenspan, R., *Read Attorney General William Barr's Letter to Congress on the Mueller Report*, Time (Mar. 24, 2019), <https://time.com/5557808/mueller-report-full-letter/>.

⁸ See Harshbarger, S., *Why 27 Distinguished DC Lawyers Filed a Complaint with Bar Association Against Attorney General Barr*, Just Security (Jul. 22, 2020), <https://www.justsecurity.org/71598/why-we-filed-a-complaint-with-the-dc-bar-against-attorney-general-william-barr/>.

⁹ D.C. Rules of Professional Conduct Rule 8.4: Misconduct, <https://www.dcbarr.org/For-Lawyers/Legal-Ethics/Rules-of-Professional-Conduct/Maintaining-the-Integrity-of-the-Profession/Misconduct>

¹⁰ D.C. Rules of Professional Conduct Rule 1.3: Diligence and Zeal, <https://www.dcbarr.org/For-Lawyers/Legal-Ethics/Rules-of-Professional-Conduct/Client-Lawyer-Relationship/Diligence-and-Zeal>

¹¹ D.C. Rules of Professional Conduct Rule 1.7: Conflict of Interest: General Rule, <https://www.dcbarr.org/For-Lawyers/Legal-Ethics/Rules-of-Professional-Conduct/Client-Lawyer-Relationship/Conflict-of-Interest-General-Rule>

¹² See Benner, K. & Goldman, A., U.S. Drops Michael Flynn Case, in Move Backed by Trump , The N.Y. Times (Jun. 10, 2020), <https://www.nytimes.com/2020/05/07/us/politics/michael-flynn-case-dropped.html>

- Additional Resources
 - Rebecca Roiphe, *A Typology of Justice Department Lawyers' Roles and Responsibilities*, 98 N.C. L. Rev. 1077 (2020).
Available at: <https://scholarship.law.unc.edu/nclr/vol98/iss5/5>.
 - Bruce A. Green and Rebecca Roiphe, *May Federal Prosecutors Take Direction From the President?*, 87 Fordham L. Rev. 1817 (2019).
Available at: <https://ir.lawnet.fordham.edu/flr/vol87/iss5/3>.