EXECUTIVE OVERREACH:
EVALUATING THE UNITARY EXECUTIVE THEORY AND THE DOJ

CARDOZO JOURNAL OF EQUAL RIGHTS AND SOCIAL JUSTICE SYMPOSIUM

March 6, 2026

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I. WELCOME AND OPENING REMARKS

MS. SERENA ROCHE: Good morning, everyone, and welcome. My name is Serena Roche, and I am the editor-in-chief of the Cardozo Journal of Equal Rights and Social Justice. Our journal publishes intersectional scholarship across a broad range of topics, civil rights, immigration, criminal law, administrative law, constitutional law, human rights, environmental justice, and more. We're grateful to have you with us today.

At the forefront of many of today's biggest legal and political controversies is a struggle over what presidential control is supposed to mean in a government built on checks and balances. Today, we'll use the unitary executive theory as a lens to ask what the Constitution permits, what our institutions have come to accept in practice, and what that means for accountability and restraint when presidential power is at its strongest. Across administrations, this pull towards presidential control hasn't been a one-party phenomenon. Presidents of both parties have increasingly centralized policymaking, personnel decisions, and enforcement. The harder question is what has changed about the constraints? Whether the guardrails that once came from Congress, courts, internal executive norms, and professional bureaucracy are doing the same work, or whether they've thinned out in ways that make the same formal powers operate very differently in practice.

Today's symposium consists of two panels. Panel one focuses on presidential control of the administrative state, how to think about Article II, appointments and removal, independent agencies, and the categories courts use when they describe agency power as quasi-legislative or quasi-judicial. Panel two turns to the Department of Justice's use of selective and vindictive prosecution, an area where executive power is most intuitively executive and where the stakes of misuse are especially high.

II. PANEL 1: THE UNITARY EXECUTIVE THEORY & MULTI-MEMBER AGENCIES

Our first panel will be moderated by Wilfred Codrington III. Professor Codrington is the Walter Floersheimer Professor of Constitutional Law and Co-Director of the Floersheimer Center for Constitutional Democracy here at Cardozo. And he is also a non-resident fellow at the Brennan Center for Justice. A public law expert, his research, teaching, and advocacy focus on voting, elections, and the law of democracy, constitutional law, including constitutional theory and reform, and civil rights, anti-discrimination, and the role of race in the law. He is also the co-author of *The People's Constitution, 200 Years, 27 Amendments, and The Promise of a More Perfect Union*, which

offers a narrative history of the amendments to the Constitution and a call for renewed popular commitment to progressive constitutional reform.

We're also honored to be joined by an outstanding group of panelists. Professor Ashraf Ahmed is an Associate Professor of Law at Columbia and a legal theorist whose work draws on political philosophy and intellectual history to examine constitutional and administrative law. His scholarship has appeared in and is forthcoming in leading journals, including his 2024 co-authored Harvard Law Review article, *The Making of Presidential Administration*, which received the ABA's Administrative Law Section's Annual Scholarship Award. He also co-directs Columbia Law School's Law and Philosophy Workshop. His current work includes two major projects, one that explores the character and tensions of practice-based constitutional theory, and another that traces the origins of interpretive constitutional theory.

Professor Haiyun Damon-Feng is an Assistant Professor of Law here at Cardozo, where she teaches and writes in immigration law, administrative law, and constitutional law. Her scholarship focuses on executive power, immigration, procedure, and race, has appeared or is forthcoming in both the Yale and Duke Law Journals, and her work bridges theory and practice in a way that's especially relevant to today's topic. Before academia, she co-founded the Adelante Pro Bono Project, a cross-border immigration rapid response initiative. She also serves as an advisor to Define American and consults on immigration law issues in television and popular media, bringing a uniquely grounded perspective on how presidential power actually operates through agencies and enforcement systems.

Nathaniel Donahue is the Samuel Golieb Fellow in Legal History at NYU, where he works at the intersection of administrative law, legal history, citizenship, and governance. His scholarship is published or forthcoming in the Yale Law Journal and the Cornell Law Review, and he has received multiple prizes for his work on legal history and the Bill of Rights. Notably, for today's discussion, he co-authored an amicus brief in *Trump v. Slaughter* that explores the history behind the Supreme Court's quasi-legislative and quasi-judicial categories in removal doctrine.

And Professor Peter Shane, who is one of the country's most important scholars of the American presidency and the separation of powers. He is the author or editor of nine books and more than seventy-five law review articles and book chapters, including *Madison's Nightmare: How Executive Power Threatens American Democracy*, and *Democracy's Chief Executive: Interpreting the Constitution and Defining Future of the Presidency*. He has also served the executive branch itself as an attorney advisor in the U.S. Department of Justice, Office of Legal Counsel, and as an assistant general

counsel at OMB, giving him a rare view of presidential power from both practice and scholarship. Professor Shane has been a major public-facing voice on how presidential authority expands not only through doctrine, but through institutional incentives and democratic breakdown.

We're truly excited for the extraordinary group of scholars we've assembled today to explore these issues with us, and we're grateful to have you here to learn from their expertise. Thank you again to our moderator and panelists for joining us. Professor Codrington, I'll turn it over to you.

PROF. WILFRED CODRINGTON III: Thank you very much. It is a pleasure to be here this morning to speak to you about a topic of growing significance, one that has reached peak significance today but we've seen emerge over years and decades even. This idea of the unitary executive is something that I am happy to be exploring with this distinguished panel.

So, I'll just open up with a sort of broad definitional question, and hopefully everyone will be okay with me using first names. But maybe this one can start with Peter. Can you just talk to us about the unitary executive theory? What does unitary mean here? I have a sense of what executive means, but maybe there's more there as well. And if we think about it in terms of a minimum and maximum—in terms of a spectrum—how would you describe what people are saying when they use the term unitary executive theory?

PROF. PETER SHANE: Sure, I'd be glad to do that. And let me also start just by thanking Serena and Rob and the staff of the Cardozo Journal of Equal Rights and Social Justice for inviting us to be part of this discussion. It's exciting for me to still be at the cool kids' table.

In describing the idea of unitary executive theory to others—and this will perhaps be better understood in this audience as compared to others—I like to think of it as having reform, conservative, orthodox, and ultra-orthodox versions. What they have in common—the common denominator across all stripes—is some version of the idea that the president, by virtue of the Article II vesting of executive power or maybe the duty to take care that the laws be faithfully executed or some alchemy between them, has some control over all discretionary judgment and action rendered by the executive branch. The least aggressive form of that is the president has comprehensive removal power over the principal officers of any government agency. This is what's at stake in *Humphrey's Executor*, what's at stake in *Trump v. Slaughter*.

A yet more ambitious version would say that the president has to have comprehensive removal authority over anyone in the executive branch, whether a principal or inferior officer, who wields significant executive power. A third version would be that by virtue of those things or in addition

to those things, the president has the ability to directly command how all discretionary functions are exercised. So if the president wants to, under this version of unitary executive theory, he could call EPA and say, "I understand you're debating between a technology-based solution and a performance-based solution to curbing pollution, and I'm telling you which of those solutions to adopt." And if EPA is required to explain its choice, it could say, "The president made us do it and has the authority to do so."

And then there is the most, I suppose, ambitious form of unitary executive theory, and I think Saikrishna Prakash at Virginia has defended it, even though there are a lot of unitarians who would not go as far. He reads Article II as empowering the president to execute the laws personally. If a president wants to, he could say, for example, "Okay, I know that Congress initially delegated this decision to Health and Human Services, but I kind of feel like writing the regulations here myself." And that would be, again, within his power.

The bottom line, whichever of these things you would go with, is that something about the vesting of executive power and the duty of faithful execution entitles the president to some measure of control over all executive branch discretion. This is not just the discretion he's given, or she's given, directly by Article II, but also any discretion that the executive branch has under the statute.

And unfortunately, in the hands of the Roberts Court, and particularly following the careless—one might say reckless—immunity decision, *Trump v. United States*, the president's "conclusive and preclusive" powers, powers that are not to be regulated by Congress or reviewed by the Courts, include a comprehensive power of supervision and control over all prosecutorial and investigative decision-making by the executive branch. My guess is we'll be talking about that more.

PROF. CODRINGTON III: All right, so if we were to use NOAA as an example, the president has anywhere the power range is between firing meteorologists and hiring whoever he wants, to taking a Sharpie pen and changing the actual direction of storms.

PROF. SHANE: Defenders of the most extreme view—I keep mentioning Professor Prakash, because we're friends and he's a significant scholar, notwithstanding our completely different views about this—offer this response to the question: "Isn't this licensing a dictator?" They would say: "No, no, no, the president still has to operate, you know, within the confines of statutes." And so, if the president is doing too much, it's as much Congress's fault in delegating too broadly. Congress could narrow the channels of power and then the president would have unitary control, but over a much smaller swath of decision-making.

As for firing meteorologists, and I defer to Nathaniel on this subject because of his work on inferior officers and the lower levels of the civil service—the Office of Personnel Management has just finalized a rule that would allow the president to move out of the competitive service and into the accepted service any career professional in the federal government whose work affects the making of policy. That person doesn't have to be a policy *maker*, but they could be the climatologist advising on climate change. It could be the economist working on tax policy. It could be the statistician who refuses to cover up when the United States is losing jobs. None of these people are principal officers. They're not political officials. They're people who would ordinarily be in office across administrations. Yet there is now a rule in place that allows agencies to ask OPM to allow them to take a bunch of positions and move them into a very vulnerable status. This all depends on some terminology in the civil service law that is going to yield another fight about the major questions doctrine after the tariffs case, but it would conceivably allow the evisceration of career expertise in the executive branch.

PROF. CODRINGTON III: I want to follow up with Nathaniel since you raised Nathaniel and his work on officers. We're having this conversation because of a number of cases, including *Trump v. Slaughter*. So maybe what would be helpful is if you can explain what's going on in that case, maybe its relationship to *Humphrey's Executor*. And then also, I guess, talk about the distinct functions of administrative agencies, as related to your work.

MR. NATHANIEL DONAHUE: What has happened recently is that there are a number of independent agencies and under this case from the 1930s called *Humphrey's Executor*, the law has been for a long time that Congress is allowed to place removal restrictions. That is to say they are allowed to limit the president's ability to remove the heads of agencies on any commission that is quasi-legislative or quasi-judicial.

Humphrey's Executor was over the Federal Trade Commission, and so *Slaughter*, the most recent case in front of the Supreme Court, is about President Trump trying to remove one of the commissioners of the Federal Trade Commission. For some context, there was this even bigger case before *Humphrey's Executor* called *Myers*. In *Myers*, in the 1920s, Chief Justice Taft articulated a very strong version of the unitary executive theory, giving the president power to remove a number of agency heads. He left open the possibility of these quasi-judicial officers as having some kinds of protection.

You get the sense in the case that they didn't really think that much about it, and then almost ten years later, the Court pulls back *Myers* by creating these restrictions in *Humphrey*, or creating possibilities for Congress

to restrict presidential removal authority in *Humphrey's Executor*. They almost immediately came under fire as categories because quasi-legislative and quasi-judicial sound made up. A number of academics recently, even today, will argue that these were, in fact, made up categories at the time of *Humphrey's Executor* that were designed to push back against the FDR administration.

Some of the research that I've been doing shows that that's not true. In fact, these were categories that were established terms of art dating back at least a century that came out of battles about non-delegation and separation of powers disputes largely emerging in the local government context. Broadly speaking, quasi-legislative we might think of as kind of rulemaking or associated with rulemaking. The idea was there are statutes that a legislature will pass that leave open a lot of details to be filled in by other kinds of officers. Say a state legislature would pass a law allowing a town or a city to prohibit alcohol, and then someone would challenge that law saying this is a delegation of legislative power to a city that doesn't operate through bicameralism and presentment. The courts would say, well, they're exercising not legislative power, but quasi-legislative power, because the legislature has created a statute that is effectual, that is contingent on a certain set of facts, and they can delegate that fact-finding to other kinds of agencies. The city can say we think that this is necessary, we think it's not necessary—that's quasi-legislative power.

Quasi-judicial power has to do with transformations that were happening in the court system. I won't bore you too much with this, but it's just to say that there are a number of specialized bodies that were making determinations that look kind of like a court, right? So they're hearing evidence, they're interpreting law, but they're not Article III courts, right? The Patent Office was a really early example of this, where they're making determinations about the validity of patents, and you have scientists in the Patent Bureau who are making these determinations. There's a line of even federal case law from the 18th century saying that Congress is allowed to move their supervision away from the executive branch and into the judiciary, because they're quasi-judicial, they sort of have a foot in both worlds.

The alternative to these categories is that you have a really strong non-delegation doctrine, right? So anything that looks like a statute or the promulgation of a statute or sort of what we would today call legislative rulemaking is very plausibly an unconstitutional divestiture of Article I power from Congress. Similarly, any kind of adjudication or thing that looks like adjudication is moving judicial power into the executive branch.

In reality, a modern system of government wouldn't work with categories this rigid. And so, there was play in the joints developed through 19th and early 20th century case law to identify these two kinds of ways around it. In *Humphrey's Executor*, the Court pointed out they exist in the space between these branches, and so it makes sense that the president wouldn't have untrammeled control over it. But today, we've kind of lost those meanings, and the recent Supreme Court jurisprudence has just expanded executive power to fill all of those categories.

Now, of course, if you trace it to its logical extension, this might mean a much stronger non-delegation doctrine, which is something that Justice Gorsuch tried to tease out during the *Slaughter* oral arguments. He's been trying to advance that point. I don't think that the Court has the appetite for that, so instead, I think it's just going to lead to some kind of confused case law. I think understanding those categories is helpful in thinking about the settlement that we reached after *Humphrey's Executor* that is now being revisited.

PROF. CODRINGTON III: And so it shows what's at stake, I guess, in *Slaughter*, which is sort of the loss of certain functions.

MR. DONAHUE: Yeah, or like expertise, right?

PROF. CODRINGTON III: Expertise.

MR. DONAHUE: That, you know, there are certain kinds of categories where the reason that lawmakers delegated a lot of these had to do with the specialized expertise, say, of the Patent Bureau. And you may, in fact, want to protect some of that specialized expert decision-making from kind of the machinations of politics.

PROF. CODRINGTON III: And Haiyun, I'm going to ask you to follow up here, because I know you have a paper coming out soon in the Yale Law Journal. And you're talking about, I guess, a function that is overarching or bridges other core agency operations. Maybe you can just elicit what other things are at stake with this case and alongside the devolution of agency independence.

PROF. HAIYUN DAMON-FENG: Like you all have been saying, the concern has been teasing out what is executive power, how should it be wielded, how should it be supervised or controlled, and by whom? The question of the separation of legislative and executive power are all at play.

One thing that the administrative state also does is it has this, what I call, fact-making function. The administrative state doesn't just do regulation, enforcement, or adjudication. It also has a huge role to play in knowledge production and knowledge dissemination, information dissemination. An example of this from the founding is in the Constitution, we have to take a census every ten years. That function is delegated to the

administrative state, and that function has grown. But the impact of the census is a political apportionment, i.e., the formal kind of allocation of political power based on population, and then that raises the question of who counts and how you count and whether the count is accurate. We can talk about the inaccuracies of the census, why the process of conducting the census is so important, and why who controls the process is so important for how we think about whether political power is apportioned appropriately and inclusively.

Other examples that are separate from rulemaking, prosecution, or adjudication but that relate to or affect rulemaking might be, like Peter said, the Bureau of Labor Statistics' compilation of the jobs report, and other economic data. This is data that is gathered from a variety of sources. The federal bureaucracy, the agencies, actually have perhaps the best reach of collecting data. They can both compel data from industry, and can see a wider range of data. It is private and available, but it is often seen as not as comprehensive, therefore there is a question of whether agency-created data can be more accurate and reliable compared to data from private sources.

That data has traditionally been seen as the gold standard by economists in using it, for example, in Fed monetary policy. We saw earlier this past year the president fire the commissioner of the Bureau of Labor Statistics because there was a big correction in the job number that was a downward turn, which suggests a weaker economy than the president would have liked to see. That kind of threat to information control not only could significantly affect policy, but also contributes to the way that we understand the facts on the ground.

Agency-produced facts are significant in that they are relied upon and often intended to be relied upon by a wide array of both public and private interests. Individually, we might rely on agency-produced facts, agency-made data to make choices about whether, for example, to vaccinate our children and how to evaluate the risks and tradeoffs of vaccines. When agency-made facts push back against and are detached from the expertise-based scientific consensus, it poses a real problem and creates a real question around if the premise of the unitary executive theory is to promote political accountability, as is often presented. When agency-made facts are controlled by the political power that exists, how do we then use that to hold the political powers accountable?

That's this puzzle that comes from strong political presidential control over the administrative state and is one that the Court hasn't necessarily wrestled with. I think you all have alluded to the fact that even though the Court has in the past distinguished between quasi-legislative and quasi-judicial executive power, it has in lots of ways pulled everything into the

bucket of executive power. As long as it's being done by the executive, that is executive power regardless of what the actual function of the thing is. And so that is something that we are grappling with now on the ground and that we'll see be affected by the Court's decisions in *Trump v. Slaughter* and *Trump v. United States*.

PROF. CODRINGTON III: Can I ask you to follow up, because something stood out to me, maybe it's selfishly because it goes into my area of study. But you mentioned the census, and you talked about who counts and accountability, these ideas I think about a lot in relation to the political process. And we've had some high-profile instances, political events occur that relate to the census. So, people may not remember in President Obama's first term, he sought to show himself as bipartisan and then initially selected as the head of the Commerce Secretary a Republican. Lo and behold, the census is under the Commerce Department, which we've, you know, really found out in the Trump administration when they were trying to change census processes. Maybe you could just draw on the census a little bit to better illustrate the accountability issues at stake, the "who counts" issues that are all sort of at the crux of what you're talking about in agency knowledge production.

PROF. DAMON-FENG: I think a strong theory of the unitary executive, like Peter talked about, includes some kind of control and command up to the president, but not necessarily just the president, right? Also the Commerce Secretary and other officers that flow up the chain. And that is, I think, an improper vision of what the bureaucracy is, or what agencies do.

So the way that the census has historically been done, as with a lot of agency fact-making, is that it's been rooted in the expertise-wielding community. The census has been constructed in ways that are supposed to, and have for the past several decades, incorporate kind of independent committees of folks that are thinking about and rooted in good statistical practices. This more diffused kind of allocation of responsibility ensures that the census is conducted in ways that are inclusive. If you look at the first Census Act, the U.S. Marshals were told to go knock on doors and count people, and that is no longer how the census is done. And there were inaccuracies then, too, but accuracy was super important. So now we do this big sample, and the question is, how do you ask the question? What kind of questions do you ask? Where do you go? How do you promote responses?

The undercount for Black Americans has always been a problem with the census, and it historically undercounted Black Americans to varying degrees. Recently, with kind increased control by the president, by the Commerce Secretary, in some instances by influence by the DOJ, and

thinking about the census case from a few years ago, the process has become more detached from those more diffuse expertise-based communities. And are now, if you are told by somebody above, by some principal officer, add a question about citizenship. The questions about citizenship have been hotly contested for a long, long time. If the goal of that is to, for example, undercount certain populations or to disincentivize people from responding, that's going to alter the count. It's not necessarily just that anything in an agency should be controlled top-down, or even by the president directly—who is appointed matters.

And then ultimately, the questions of removal. If you can remove the Commerce Secretary, well, that's an incentive for the Commerce Secretary to align themselves with the president's prerogatives. If you can go all the way down and remove anybody who is affecting the making of policy, that goes much deeper. This promotes detachment from an expertised, more diffused community, and puts everything in enhanced control of the political body.

PROF. CODRINGTON III: Luckily, we have Wilbur Ross' expert assessment that this was all to enforce the Voting Rights Act. Ash, I want to bring you into this conversation. I want to talk about originalism. We talked a bit about the history of this idea and associated things that have been going on, whether we're talking about these different sort of functions, the different cases. How does originalism play into this? Originalism is all the rage at the Supreme Court, and seems to dominate its constitutional analysis. The unitary executive and originalism, do they jive?

PROF. ASHRAF AHMED: So, it's an irony of the current moment and of originalism that, as a theory, it was not fully developed, truly in an embryonic stage when many of the developments that have set forth our current era were initially launched. So, you can really trace the current moment back to the late '70s tremors in the Carter administration. And then more fully with the Reagan administration's creativity through executive orders and the assertion of supervisory control over rulemaking and the creation of executive agencies like OIRA. And at that moment in time, you don't have originalist arguments for the unitary executive or for an administrative state under the control of the president.

If those constitutional arguments didn't exist, however, they had to be invented. Therefore, over the next decade, you see graduates of OLC in the conservative Reagan administration and others in the emerging conservative legal movement like Saikrishna Prakash publishing work in the late '80s and especially in the early '90s that take an originalist bent towards these questions and really yoke their arguments to, honestly, just the events of what we call the Decision of 1789, which, again, as most historians like Nathaniel

would tell you, had deep ambiguities. It could not resolve many of the more technical and governance questions that we have today. And as Peter has pointed out, we have a range of options within the unitary executive theory.

And as Haiyun has pointed out, the administrative state of today is just not the administrative state of yesteryear, and that's not simply a question of state capacity. That's also a question of how do we use old categories to make sense of things that might be qualitatively different? The only way to do so is to use categories that are so abstract as to be unhelpful. So questions of: is this executive or not? Ultimately, that rests on functional analysis, the very functional analysis these judges would eschew because they'd say, "Well, we look for historical analogs."

I would just note that originalism plays in this in two different ways. And I'm going to say that there are basically two flavors of historicism at play. The first is originalism, which is the place where unitary executive theory grounds its authority. And the spring or the fountainhead for this is Justice Scalia's dissent in *Morrison v. Olson*, which takes *Myers* and breathes new light into it. It's as if you have an artist gaining posthumous fame.

That's what happens with *Myers*. We lawyers teach and live in an extremely presentist way, and we are very quick to forget enduring bodies of law. So, if one goes and looks at textbooks from basically 1940 till 2000 or so, even later until 2010, you still learn *Humphrey's Executor*. You still learn *Wiener*. You learn a whole host of nitty gritty rules that make for grading issue spotters in a systematic and tractable way.

Discretion has now spread from the executive branch into our exam grading, so all of us have a vested stake in limiting it. But I'd underline that alongside this, however, is a different type of historicist argument. Problems internal to originalism, i.e., the inability of resources to definitively answer more granular questions about the Fed or the like, have now led to using different theories. One might call them historical practice theories like gloss or liquidation, which are theories that say, well, let's look at enduring patterns of behavior over time. I should just note another irony there is that this is just British constitutionalism in disguise. We are not as exceptional as we think we are in our forms of constitutional argument. And so, we have customary constitutionalism where we go and look at the patterns of practice that people like Nathaniel, Andrea Katz down at Washington University, Noah Rosenblum, Jane Manners, and many others, excavate.

These patterns themselves are not self-interpreting because it turns out that doing history is not the same thing as doing fact reporting. In fact, even reporters would tell you they don't just report facts, they tell you stories. And historians have to do so at a scale of sophistication that goes well beyond just going and saying, "Well, we had an agency in the past that did X, Y, and Z."

At every moment, you're making discretionary choices about, well, what's the salient dimension along which this past institution is similar to the institution today—i.e., the very things you guys do in common law reasoning when you're trying to say, well, this precedent bears on this case in X, Y, or Z ways. All of this is to say that originalism is introduced as a device to constrain judicial discretion, and in particular, the excesses of the Warren Court. That is the historical foundation of originalism.

In its lifecycle, originalism and its adjacent historical practice theories have basically reintroduced the same discretionary issues that they had purported to solve in their initial development. We can get more granular, and I'm happy to talk about problems in *Slaughter* and in *Cook* in particular when we think about the Fed. But I'll just say that all of the problems we see in administrative law, which have kind of operatic stakes because you really are talking about the capacity of the United States to function as an advanced economy, really, aside from questions of fundamental rights and political equality, all of them also exhibit and illustrate what we might call the antinomies or tensions of late constitutional theory today.

My card's on the table. I'm a deep skeptic of interpretive theory and how useful it is. I happen to think you just do law, and people have done so for a very long time, and there's a tacit common law-like reasoning to that, but again, happy to expand on that.

PROF. CODRINGTON III: Thank you, and also thank you for dropping Professor Katz's name. She will actually be here on March 26th for a Floersheimer event, so that's a shameless plug for the center that I co-direct. Do come. We'll be talking about amendment. But also in talking about this and other implications. I want to open this up to everyone. We've seen, just at a rapid clip, the termination of the heads of many agencies, Merit Systems, Protection Board, the EEOC, the FTC, the Bureau of Labor Statistics, and the Fed, and one of those seems not like the other for some reason.

I guess I want to know why the Fed is different. These other agencies had these terminations were not enjoined. These people were able to be fired on the Court's shadow docket rulings, and things move along. But that is not the case with the Fed, and I want to know why that is.

PROF. AHMED: Just to pick up on that, because I think you picked up what I had left on the table, and you handed it back to me, I'll just say, under the Fed, one of these is not like the others. The only way it's not like the others is because it's more important than the others. Of course, major questions doctrine is not a doctrinal force in these cases, and it's not doctrinally relevant, but the same animating impulse of the economy—we don't want to go too far—is the functional consideration driving this.

Now, just to get into the brass tacks, and truly, there have been attempts. We saw this on the horizon. Over the last three, four years, you have a spate of articles, including work by Aditya Bamzai and the like, Aaron Nielson, who saw Fed independence as coming under threat very, very soon.

And lo and behold, it's 2026, and it is completely under threat. Obviously, there is a bipartisan consensus among what we might call legal elites or sensible people about the economy that central banking independence is a good thing. Obviously, on both ends of the spectrum, from those who are, call them right-wing populists to those who are adherents to MMT, that actually think we should politicize modern monetary theory, we should politicize central banking independence.

But by and large, there's a consensus among most power holders that central banking independence is a good thing. Well, how do you protect that then? Well, what people do is they go back and read *McCullough*, and then they try to analogize the contemporary Federal Reserve to the First and Second National Bank. There are a whole host of reasons that go from private ownership to their very structure and the nature of their actual powers that make those analogies completely untenable. Because the modern Fed just doesn't go and set an interest rate. That's not how it works.

One of my colleagues who is sort of the authority on this, Lev Menand, a rare creature who can toggle seamlessly from con law to the intricacies of monetary, can tell you that the Fed is composed of many, many different agencies with extremely complex interlocking functions. And it is best understood as the invention of a 20th century regulatory tradition. It's closer to the Interstate Commerce Commission than it is to the First National Bank.

That is a challenge for people who both like a conservative Supreme Court and are also very interested in dollar dominance and their Roth IRAs. And so that contrast is what's driving this. Because as a historical matter, aside from analogizing at a level of generality that is unhelpful, the very critique we get, for instance, in substantive due process critiques where we say, "Oh, levels of generality, we got to define the right in the *Glucksberg* test very narrowly because otherwise we let judges do whatever they want."

To save the Fed, you'd have to do the very thing in separation of powers doctrine that the Court has for now decades abjured in individual rights cases. And so all of this is to say, the Fed is a great example of the internal tensions, the chickens coming home to roost in these interpretive theories.

PROF. CODRINGTON III: So I think in mentioning the ICC, the Interstate Commerce Commission, that is, for everyone, one of the first modern administrative agencies created in the late 1800s. And so, Ash was referring to that, saying that the Fed is more like that than it is akin to the

First or Second Bank of America, which I think is right. I guess I'd like to tease out a little bit more of what's going on there.

So we're talking about the separation of powers a lot. And I guess I'd like to get to the roots of the separation of powers concerns here. What are we actually trying to preserve here? Because we don't think of constitutional law as just a means to reach a specific end. And we realize that we can make choices among a various set of constitutional values. And so I'd like to sort of discuss more of the values that are at stake here in terms of government administration.

PROF. SHANE: So, there's always an embarrassing moment in these conversations for me because I'm not an originalist. I don't think originalist theory, even if it could be done well based on its own premises, which I think it cannot be, makes sense.

Let's imagine we had really strong evidence of a 1789 consensus of what would be George Washington's constitutional relationship to the fledgling bureaucracy. We'd be talking about a federal civilian workforce probably smaller than the smallest cabinet department in 2026. Our workforce today, the civilian workforce—even if we put aside the contractors in the federal government—is about half the size of the total population of the United States in 1789.

In interpreting the Constitution's requirements regarding the president's relationship to administrative agencies, I think it very strange that anyone would want us to find ourselves in a kind of Procrustean bed created based upon a drastically different set of material, political, institutional arrangements from 1789. I don't regard the framing as an irrelevant moment. I do think, going back to this idea of "levels of generality", that the framers were concerned with certain values that we share, one of which was their anxiety about tyranny.

One of the value propositions that underlay the constitutional design was that the allocation of powers among the three branches could be arranged in a certain way to protect liberty. Now, in order to make that work, the way in which they allocated powers was not as a complete separation at all. It's a checks and balances system in which every branch is both dependent on the forbearance of the other two branches and sometimes dependent on the support of the other two branches in order to go forward.

To the extent that each branch exercises some functions they can do autonomously, that's partly a matter of relative capacity. Washington and Jefferson famously complained that, under the Articles of Confederation, the Continental Congress got so involved in the details of everything that they couldn't actually make the fundamental legislative decisions that needed to

be made. And so, you know, separating the executive branch from the legislative branch in part had an efficiency justification.

But this is going to be a system in which, as Madison said, powers would be so distributed as to keep the ambition of the other branches in check. It is a system which only works if each branch understands, as a normative matter: "We are not going to press our exercise of power to the full linguistic limits of what the constitutional text could permit." Now, if there's a silver lining to our originalist moment, it has helped provoke an absolute renaissance in early American legal history. That's the good news, and a lot of it's happening at Columbia and NYU, and that's great.

But the bad news is that this flowering of new scholarship is just demonstrating how historically unserious the Roberts Court is. I mean, they have a mythical narrative of the presidency. One proposition is that the president was intended to be a one-person branch of government, which makes the reference in Article 2 to executive departments hard to understand.

And the second part of the narrative—which I attribute to the Roberts Court, but much of which comes straight from the pen of Chief Justice Roberts personally—is that the thousands of federal officers who wield governmental power do so on behalf of the president. I thought it was on behalf of the law. But according to Chief Justice Roberts, they act on behalf of the president and owe their legitimacy and accountability to a strict hierarchy that runs from the White House all the way down to the appointees, the presidential appointees, to the political layers, to the non-political layers underneath. And again, this is anachronistic. For the Founding generation, what made the action of government officials legitimate was primarily their accountability to law.

Chief Justice Roberts has said that the framers created the president as the most democratically accountable official in the government. That would have come as a surprise to them. They thought the opposite—that unlike the House of Representatives, the president would not be chosen by voters. Unlike the Senate, he wouldn't be chosen by state legislatures. He would be chosen by some people called electors whom the state legislatures would determine a method for choosing, but the president was the most insulated official from direct electoral politics.

You asked me, what is the separation of powers trying to accomplish? The other question, what is unitary executive theory trying to accomplish? Here, I really recommend a book by two political scientists, William Howell, who's now the dean of Public Policy at Johns Hopkins, and Terry Moe, who is the former chair of political science at Stanford, called *Trajectories of Power*, in which they explain that the United States seems to have two kinds of presidencies at the moment.

Howell and Moe start from the proposition that all presidents want to have a big impact. They want their name on things, not just the Kennedy Center. But that desire has different implications for progressive and for right-wing presidents. I'm using the term "progressive" very generously. I'm considering Eisenhower progressive for these purposes, even Nixon. Such presidents have statutes to work with in order to address our collective problems. The social movements of the 20th century produced laws—the labor movement produced statutes, the civil rights movement produced statutes, the women's movement produced statutes, the consumer movement produced statutes, the environmental movement produced statutes. The statutes may not go as far in licensing executive branch initiative as a progressive president wants to go, but they offer tools a progressive administration can use.

In 1980, we have a president elected, maybe for the first time, whose mandate is to shrink the government's capacity to solve problems, really to undermine that capacity. And if that's the mandate, the president is not going to find a statute that authorizes it, certainly not explicitly, so the president needs to find constitutional arguments to enable a unilateral restructuring of administration. And that's why unitary executive theory as we know it comes out of the Reagan White House, the Reagan Justice Department—from people like John Roberts who was in the White House counsel's office, Samuel Alito at OLC, and Ed Meese who is running the show at the same time he's helping to fund the newly born Federalist Society.

My fear is that despite the renaissance in legal history, which is demonstrating week in and week out how this Court has lost the sense of what the words meant or didn't mean in 1789, faith in unitary executive theory is so built into the identity that these folks have of what it means to be faithful to the Constitution, that they're just impervious to evidence-based argument. That's my theory.

PROF. CODRINGTON III: I want to pick up on two things, little historical tidbits since you were talking about history. One is that we have this separation of powers doctrine, largely judicially created, built out of very minimal text out of the Constitution, and we're making a lot out of "the executive power" or what have you. In early constitutions, for example, North Carolina, there was a sort of forever and distinct provision. So it was a very clear textual indication that we wanted our separation of powers very separate, so none of these constitutional branches shall ever exercise the power of others, something to that effect. We didn't choose that. And so I wonder what the implications are for that here. Whether that is relevant historically.

The second sort of thing you mentioned was a sort of Madisonian view and I wonder how far we are away from any sort of discussion of Madison's Constitution, especially in this context. When you say how you think about how every president has a big agenda and wants to accomplish something great. The question is how you go about doing that, I'm thinking that this argument is more in the FDR-Reagan sort of battle. I'd like to tease that out—what those visions look like that create this vacillation. And again, for anyone who can pick up on any of those two strands, if they are intelligible halfway.

MR. DONAHUE: I'll do my best to follow with my own unintelligible whimsy, but I guess also something I want to pick up there. You have this idea that there are some state constitutions where they're very clear that they want to kind of enforce separation of powers doctrine, and I think something that's interesting about the U.S. is that our Constitution is relatively sparse at the federal level, and when it comes to the sort of nitty-gritty details and implementation, that is not spelled out in the Constitution.

When it came time to actually implement and structure the early government, the first Congress reaches to a kind of English common law set of institutions that come out of a very different tradition. This builds on Ash's point too, about originalism and the Constitution itself not solving a lot of the real detail-oriented practical stuff.

In the English context, these distinctions that the Constitution introduced aren't as live. I mean, they don't have a written constitution famously. And the notion that the judicial power was something that was separate from the executive power was a relatively recent innovation. As late as the 1760s, John Adams refers to courts as part of the executive branch and there being only two: executive and legislature.

When it comes time to design the kinds of people who are going to do the detail-oriented work that Haiyun was talking about, those have never been held to the rigorous separation of powers that the Court wants to impose on the government. I think even the Supreme Court, as it's being confronted with more and more of these cases like in the oral arguments in *Slaughter*, is getting uncomfortable about how far they are going to have to go.

When we're talking about a Madisonian view, it's also worth noting that when it came time to design the government, even Madison wasn't persuaded by the sort of rock-solid separation of powers. When he first proposes a comptroller of the United States, he proposes it as something that has kind of judicial powers and that might be insulated from certain kinds of oversight.

And even when you look at the design of early agencies—the Department of War and the Secretary of Foreign Affairs who becomes the

Secretary of State—the statutes are designed totally differently than the Secretary of the Treasury, which is understood to be much more legislative in its nature. So, the Constitution has always admitted a lot of play in the joints, especially when it comes to detail-oriented decision making because the categories are made for man and not man for the categories, and there is not a natural kind that is called judicial power that exists in the world that you can easily distinguish from executive power or legislative power or something like that.

I do think that originalism, but also the writing of the Constitution self-consciously left a lot of this design to lawmaking branches and the lawmaking itself was going to be split between the branches of government. Congress would write laws, the president could veto, and in some ways in trying to impose a very strong separation of powers doctrine, we're undermining the broader lawmaking process that the Constitution was trying to put forward when the drafters created it.

PROF. CODRINGTON III: I'm not really into betting, but let's play the betting market here and get a sense of what people think the outcome of the *Slaughter* case and the *Cook* cases may be. What might be really important is thinking about—what are the paths available and how do we operationalize an eventual decision? So how do we actually implement a *Cook* decision in which Cook stays and/or a *Slaughter* decision in which Slaughter goes or vice versa if it goes the other way, not to show my own cards. I'd love to hear how you think it's all going to play out in doctrine and practice and how that looks like in the future.

MR. DONAHUE: So one thing I'll say quick is we haven't even talked about whether the Trump administration is trying to remove Lisa Cook for cause, right? So that's not even challenging the Federal Reserve Act statute. Lisa Cook is one of the governors on the board of the Federal Reserve, the Trump administration is trying to remove her on the basis of some allegations of past impropriety of hers that are probably specious. The Federal Reserve Act says that governors may be removed for cause, but it doesn't specify what those causes are.

There's a question of can the president just make up any cause that he wants? And also, if he asserts something, say that she reported houses as her primary residence before she started at the Fed, is she entitled to notice and a hearing or some kind of procedures before he can remove her? So that's just some context. I will say in the *Slaughter* case, I think there are three open questions about how far the Court is going to go.

It looks like in *Slaughter*, they're going to overturn *Humphrey's Executor* and say that the president has removal authority. But there are questions, first of all, about inferior officers, right? So maybe there are

policymaking principles at the top, but how far down can that go? I think that you saw in the oral arguments, the justices were really pressing for limits and they weren't sure.

There is another question about adjudication, right? So there's this case, *Weiner*, that Ash mentioned about protecting the independence of adjudicative bodies and it's not clear how far the Court is going to be willing to go on that.

And then the third question is the Federal Reserve specifically. In *Wilcox*, which was another case that came up on the emergency docket, the shadow docket, the equity docket, whatever you want to call it, the Court seems to indicate that they were going to have this quasi-private cut out for the Federal Reserve. And so those are I think three potential places that may well be open questions after the *Slaughter* decision comes down.

PROF. CODRINGTON III: I'm going to go with shadow docket—

MR. DONAHUE: [Interposing] Sure.

PROF. CODRINGTON III: —for what it's worth.

PROF. SHANE: You want more predictions?

PROF. CODRINGTON III: Sure.

PROF. SHANE: I think the bottom line—again, I'm not a betting person, but I think it's virtually certain that Lisa Cook will keep her job and that Commissioner Slaughter—and there's another commissioner who's up there in the FTC? They're actually two, they're probably out of luck and there are two things I sort of want to say about that. I mean, one—you know, Ash laid this out very well—why there's no originalist case to be made using the tools of originalism to distinguish the Board of Governors of the Federal Reserve system from the other agencies that are being undermined here. But there are a couple of things to note.

One, it's hard not to be struck by what I would call the hubris of the Roberts Court. I mean, the *Humphrey's Executive* Court was as ideologically spread out as the Roberts Court. That Court include the most ardent opponents of the New Deal, two of the most iconic progressives of the early 20th century, and the swing justices of their day, along with Chief Justice Charles Evans Hughes, who's not exactly a naive participant in institutional politics. He'd been the Republican candidate against Woodrow Wilson, I think, in 1916. And this philosophically diverse group of Justices coalesced around a single unanimous opinion.

They got Cardozo to go along, they got Brandeis to go along, they got the Four Horsemen to go along. Now, whatever's going to happen to the FTC, it's going to be a 5-4/6-3 vote probably. It will be like *Seila Law*, the 2020 decision that said that the president was constitutionally entitled to fire at will the director of any single-headed executive agency.

I think *Seila Law* was wrong. But you could have a doctrine now that says it's up to Congress. If Congress decides to design a single-headed agency, they have to live with presidents being able to fire the person. If they want to have an independent agency, it has to follow the multi-member model. This, in an interesting way, would sort of follow the structural logic of *Meyers*.

We know from the historical research of Robert Post that, in deciding the *Myers* case, Taft was actually being urged by at least one other Justice to carry his dicta further and say that the entire civil service system was a violation of Article II, but he didn't, he wouldn't. He reaffirmed the idea that it's up to Congress to decide whether somebody is to be appointed by the president, either with Senate advice and consent if they are a principal officer or unilaterally if they are an inferior officer. If Congress chooses a presidential appointment, they would have to live with presidential control over removal.

If we're talking an inferior officer, Congress could exercise their options to put that appointment in the hands of the head of a department or a court of law and then the president would not have control over that appointee and Congress could decide to impose conditions upon removability. The Roberts Court could embrace the same kind of "it's up to Congress" compromise, if they could just get over the idea that they're smarter than every other court in the last 200 years.

And I know that's asking a lot, but with regard to the Lisa Cook situation, let me make a confession. I fault myself and other members of my generation for taking a lot of things for granted. I remember looking at the Fed statute once upon a time and it refers to discharge "for cause." Other statutes say that people can be removed only for "inefficiency, neglect of duty, or malfeasance." I thought this was all the same. Turns out, not so.

A paper by Lev Menand and Jane Manners shows that these were terms of art, which when combined or not combined as Congress chose with fixed terms of office, had specific implications for what removal authority existed and what the Court's role would be in reviewing how removal was conducted. I think one of the most important things that they discovered—completely lost on me until they pointed it out—is that when Congress picked up from the states the idea of making malfeasance and neglect grounds for removal, they were thinking of this in the context of people, like Fed governors, who have a fixed term of office. This wasn't, "Oh, these people would otherwise be removable, but now we're cutting back so they could only be removable for malfeasance or neglect."

No, their legal understanding was if you give somebody a term of office, they could be removed only by impeachment. The "inefficiency, neglect of

office, and malfeasance" formulation was permission to go further in removing than the Constitution would otherwise have.

Last word on this. If you're an originalist, you're sort of stuck with having to explain away a lot of things that don't really make sense in 1789 terms, like what about these states that had strict separation of powers provisions but not unilateral executive power? The usual response is something like, "Well, the states—you know, the states didn't really mean it," because if you look at the Constitution, they often had legislative control over the Attorney General or over the State Treasurer." Well, that's one way to look at it.

Another way to look at it is they didn't think a strict separation of powers actually meant that you couldn't have legislative control over certain functions, including prosecution and running the treasury. John Marshall said in *Marbury v. Madison*, you couldn't fire somebody at will who had a five-year term of office. Now you look at what the originalists are saying, "Oh, he just got it wrong." No, he had it right for 1789.

If we're going to take originalism seriously, at least we would want to have it done with some respectability, and the idea that the framers had in mind these clearly defined categories, of legislative, executive, and judicial power, each categorically invulnerable to intrusion by the other branches is just woefully anachronistic.

PROF. CODRINGTON III: So we've been talking about precedent and it seems to be the case that *Humphrey's* is the relevant precedent and it may well be tossed into the trash bin. We've been talking about history, sort of inflected methods of interpretation, trying to think about how that might constrain courts in deciding this sort of case. Peter, you raised the Court a lot, and clearly we're all talking about the Court, but that's only half of it here, right? The Court has some control over this. But through this clear interaction with—and I'm going to say the president up first and foremost.

I guess I'd love to hear more about what this says about how we actually generate constitutional meaning, particularly where it implicates these exercises of extraordinary administrative power and over areas that touch all of our lives every day. Is it something more than the Court driving what's going on here? And will we see some expressions of remorse owing to the excesses since *Trump v. United States* when the Court now thinks about the questions that I'm asking you?

PROF. AHMED: I just want to note that if you shift the lens from the Court to the internal behavior of the executive branch, all legal systems require an internal point of view from participants. That is some sense that they find a law normatively binding and not merely an imposition, but as

something constitutive of their ethical identity, and that for a legal system to be effective, you do need an internal point of view. What does that mean?

It means that a lot of legality within these departments take the form of conventions or norms, non-legal but still normatively binding and authoritative practices that have some play in the joints over time, they can be contested, but they're seen to be constitutionally salient. One good, and very dead example now is executive non-interference with DOJ. That had long been a tradition, a constitutional convention that the executive—obviously, you have conversations with your AG, you have some influence—when it came to enforcement actions in particular, was hands off. One need only open a newspaper or click on the front page of the newspaper to see that is authoritatively dead at the moment and would need to be resurrected. The other option for constraining behavior is actual statutes and constructing legal materials that we understand as legal—statutes, regulations, ordinances, and the like.

I just want to note that we're in a position where we're in a double bind, which is to say that you have the authoritative breakdown of norms largely because of more ambient pressures in the political culture and the fact that the kind of mid-century consensus that followed World War II has authoritatively broken down.

On the other hand, the tools that we would use to rebuild a culture that is passing statutes that could start to tame the bad men or bad people and then hopefully generate and cultivate good ones has been constrained by a separation of powers jurisprudence that is quite allergic to legislative creativity and production. So if you're thinking about well, how do you get out of this? The only way out is legislative reform that runs headlong into the currents of current separation of powers jurisprudence. So it is a double bind, we can take a view of the executive branch but it ends up taking us straight back to the Court.

PROF. CODRINGTON III: We're teasing out sort of these values: accountability, independence, stability, facts, what of a world where these don't matter to the person controlling the levers of power? Haiyun, maybe you can speak to—because that's what I'm concerned about, where are those critical things we imply when talking in terms of conventions, or even law, right? Statutes, constitutions, sort of take the backseat to moral judgments. What do we have left in a system where the actors don't pay heed to any of those fundamental values?

PROF. DAMON-FENG: I think that's called tyranny. But in all seriousness, as you were saying, the assumption underlying even the strongest Roberts Court opinion if you take it on its face is this idea that the president needs to take care that the law is faithfully executed. And that's

doing a lot of work in the assumptions realm and we're seeing it really break down in the realm of reality.

Part of the question is, is the Court ever going to grapple with this idea. If you look at for example, immigration right now—we have seen the executive agency charged with immigration, arrest, detention, enforcement, deportation knowingly, willingly violate Court orders and on the order of hundreds, right? And we've seen hundreds of victories in the habeas context seeking people released from unlawful detention. That's what a habeas win is. Is the Court saying, "You've been detained against the law," right, "against the Constitution," when an executive agency is willing to do that, right? They have now abdicated, in lots of ways, their own obligations to operate within the confines of the law and the Constitution.

I think it's going to require: (a) the Court hopefully grappling with this in a way that is more rooted in reality and less in the kind of conceptual idealization of what the president does in terms of the Vesting Clause plus the Take Care Clause equals this wonderful executive who is democratically accountable to the people; and (b) Congress intervening in ways that reassert its authority. We've also seen it's not just the Court giving power to the executive, it's Congress giving power to the executive either through refusing to intervene and reassert its power when the president, for example, decides to withhold funding that was appropriated by Congress to the agencies that results in the mass firing of large swaths of the federal bureaucracy and the shutting down of certain agencies against congressional mandates that have been passed and enacted.

Congress could have stepped in and said, "That's not what we are doing here," and reassert its own constitutional authority. We haven't seen that be done, and we haven't talked a lot about political parties and what that is doing now in the context of all of this and the differences between the founding era conception and what we see on the ground today. That's probably motivating some of the abdication from Congress. I don't think it's great if we see all three branches allowing for political interference with fact making, prosecution, and all of the coercive exercises in power.

MR. DONAHUE: Just to tease out one thread there, right? So Haiyun mentions the political parties as something that are not well factored into the Constitution or separation of powers jurisprudence because in theory, if Congress were a unitary actor that would assert its institutional interest, you could have ways that would pierce a sort of epistemic bubble in the executive branch. Congress can hold hearings, it can withhold funding, it has some tools that the Supreme Court will often, in its separation of powers jurisprudence, throw on to Congress.

But of course, one of the big oversights of the Federal Constitution was that it didn't understand that political parties would exist and political parties might align interests between institutions and government that the operative structure of the Constitution assumes they're going to be rival to one another on. And so, in some ways, a separation of powers jurisprudence, even if it could be faithful to the founders intention, would be recapitulating one of their core mistakes of the Constitution and would give rise to some of the dysfunctions that we see.

PROF. CODRINGTON III: We are going to have to close this part of what has been a great conversation. I will just observe that we are living in an era where we see the Court sort of kneecap Congress along the way in various capacities. If it really is going to take a Congress to rebuild this, including according to the Court's own theory of the unitary executive, the Court is going to have to embolden a Congress to do that and not kneecap it. And also, just thinking about our separation of powers doctrine broadly, one thing that is very important is Congress is the first branch. And so all of this, maybe we're making a lot out of nothing textually to fortify the second branch, but our first branch should be determining how lawmaking is done and they should be supported in doing that. If there are questions from the audience, we'd like to have a few minutes to make that available.

PROF. VISHNUBHAKAT: [*Question inaudible*.]

MR. DONAHUE: Yes. I mean, it remains to be seen how far the Court is willing to press *Gundy* or sort of the Article I, Article II non-delegation jurisprudence, especially with the rise of a major questions doctrine that lets them sort of get at a lot of those concerns without having to constitutionally invalidate something. There is, of course, waiting at the wings. You could always expand *Jarkesy*, or there's a whole line of cases about whether Article III power has been removed and put into an article, what we used to call Article I courts or executive agencies.

I don't think that the Court is looking to pick up a massive increase in its social security caseload or immigration detention or immigration kind of administration. I think that is perhaps one reason that they have largely not wanted to pick up those kinds of cases. The public rights doctrine is certainly something that is alive and well among originalist jurisprudence such that they have at least the makings of some category that can let them chart a different path for Article III delegations versus non-delegation issues versus Article I issues. But that's always subject to change, as the equities emerge. But in this Court's recent jurisprudence, I think that there's much more concern about Congress giving up its power to the executive alongside wanting to create a kind of unitary executive.

PROF. DAMON-FENG: I'll just quickly say immigration adjudication is not independent. Immigration adjudication is squarely within the Homeland Security Department for prosecution and the Department of Justice for adjudication. And so that's not an independent function. You could say that's congressional design, or you could say that there was an assumption when Congress designed the system that there would be a degree of independence assigned to the adjudicative function, which is why you separate out the prosecution and the adjudication itself. There's a case that's pending before this that we didn't talk about, Cathy Harris's case, who is the commissioner of the MSPB who was fired. I think that's part of the litigation strategy in that case, right, to kind of distinguish adjudication from FTC and NLRB. So I guess we'll see what happens there.

PROF. SHANE: I think it's going to be interesting to see going forward the degree to which the Court is going to strive towards any kind of coherency here. Nathaniel mentioned the major questions doctrine. One of the most fascinating things about the tariffs case is that most of the 170 pages that will be taken up in U.S. Reports is going to be the fight between Barrett, Roberts, and Gorsuch versus Kavanaugh and maybe Alito and Thomas on when the major questions doctrine should be deployed.

A number of very smart people have written commentaries about how the tariffs case shows that the Court really is following the rule of law. Well, they followed the rule of law in a case in which the president's overreach was inconsistent with the policy priors of the conservative legal establishment. This was a case in which the major questions doctrine was deployed by a subset of three justices who were going along with the liberals where what the impact of their decision was one of deregulation, getting rid of the tariffs. Whether the Court is going to worry about delegation in a principled way, or about major questions in a principled way, when the president is doing things more consistent with the bullet point positions of the conservative legal establishment, I think that remains to be seen.

PROF. CODRINGTON III: I also just want to say it seemed Gorsuch had a little something for everybody in his opinion, it seemed like. I think it's also right to raise the tariff decision because it seems, just on the text of the law itself, the nature of what was done was clearly not in the president's power. And yet, we get a lot of discussion of this other stuff, determining—and not determining—the actual outcome. This kind of goes to Ashraf's point, if we see one of the Fed cases that may come up before the Court, including the one that's before currently there, turning out in just some way that happens to save the Fed, but everything else goes by the wayside. But maybe that tariffs decision and the Fed decision will be more in alignment.

PROF. SHANE: Could I just say one thing about norms because you brought that up before?

PROF. CODRINGTON III: I like them, I'm for them.

PROF. SHANE: We all like some of them. But, so, I was at the Justice Department in the late '70s and it was still part of the post-Watergate moment under the Carter administration. There was a certain set of norms that people were committed to in a kind of bipartisan project of re-professionalizing the department after the Nixon debacle. A special assistant to the Attorney General at that time was a lawyer named Merrick Garland. And undoubtedly, I haven't spoken to him about this, but I think it's a pretty safe bet that when he was designated to be Attorney General, he thought, "Oh, I'm going to rebuild the norms of the late '70s." And I'm sure a question that has been asked of him, I don't know whether he's asked it of himself, is whether that should have been the way to go?

You posed before the juxtaposition of FDR and Reagan. And I've often wondered, because I was in the Carter administration, whether I have would have been more sympathetic to the unitary executive idea if I had been old enough to work for FDR. And if we get President AOC, and she turns to her lawyers and says, "May I impound some of this money that's been given to the Department of Homeland Security and maybe send it over to something else?" what's the appropriate response to be? With regard to civil service, I've used this line before, if Trump sets up a world in which it's possible to get rid of all of the careerists affecting policy who are antagonistic to you, I hope that the next Democratic administration gets rid of that rule, maybe in the third week of the administration.

PROF. CODRINGTON III: Do we have any other questions from the audience?

MALE VOICE 1: [*Question inaudible*.]

MR. DONAHUE: It's interesting, we're talking about the Reagan administration, right, that Chevron deference was sort of initially understood to have a kind of conservative valence in part because if you want to deregulate, you use the same tools that you use to regulate. And in some ways I think what you're getting at is *Loper Bright* represents a sort of inversion of that logic. I guess this gets back a little bit to the point that Saurabh Vishnubhakat was raising earlier too, that the unitary executive jurisprudence is embedded within a broader separation of powers jurisprudence and one where, depending on the line of cases, the Court has a different view about the executive branch in part, I think, because there are concerns. If you think about one of the things that unifies them as skepticism or concern about the administrative state specifically, then you can see in *Loper Bright*, you have an effort to sort of pull the strings tight on the

administrative state from the judicial side by hacking away at these authorizations that really belong to Congress. And then in the unitary executive side, you're hacking away at sort of unaccountable administrators through the use of political control via the kind of executive branch.

And so I think understanding a skepticism about this modality of government that, at least to the Court's mind, emerged in the late 19th century blurs the kind of foundational order of the Constitution. You can see some kind of unity between a set of doctrines that otherwise seem like they might be at cross-purposes with one another because some of them are interested in aggrandizing Congress and some of them are interested in aggrandizing the president.

PROF. AHMED: I'll just say I don't think there's a direct line to be drawn from *Loper Bright* to unitary executive theory, at least as a matter of substance, and I think that sort of flows naturally from the actual questions at stake. But I do think that there is a shared sensibility that animates both of these decisions, or let's say unitary executive, the body of unitary executive theory decisions and *Loper Bright*, which is a high degree of competence—confidence in judicial craft and an emphasis on judicial supremacy.

This needn't be the case. We have varieties of, let's say, if not interpretive theories, but let's call it interpretive sensibilities that are more deferential to the constitutional views of other actors in government. We've cordoned that off. We've deeply limited that space. The *Chevron* world was one where it was seen as a conservative decision, but only in its interaction with a set of contingent political formations.

Loper Bright, to the extent that one would read it in a, let's call it in a very cynical and some might say correct way, would see it as a doctrine that's built by a conservative Supreme Court that sees the future having only a conservative Supreme Court. And so we can see an interesting inversion here. *Chevron* was pegged to the political formations outside the judiciary, and so its valence, its effects would depend on those shifting political currents. *Loper Bright* is pegged to the political composition of that Court. And given, even call it democratic resistance to Supreme Court reform in any serious way, it's a good bet. If there is Supreme Court reform, it might look different.

PROF. DAMON-FENG: I have several disconnected thoughts that I'm going to try to pull together into something that looks coherent. I think it was Kagan's opinion in *Loper Bright* where she asked: why do you think that the Courts are any better than the agency to think about whether one version of western gray squirrel is endangered versus some other version of western gray squirrel? And that points to the question of, is an expertise best

embedded in the agency, and shouldn't the agency be in charge of interpreting its own statutes to figure out how they ought to apply to facts?

And to all your points, the majority in *Loper Bright* envisions one type of agency and one type of Court, right? But I also think that there's another piece of the story where more and more of the agency expertise is being pulled into White House control, and so that starts to look a little bit different. So one example right now in the news is the EPA's endangerment finding with greenhouse gases. And that has this long-tortured history. A couple of weeks ago, the agency reversed this endangerment finding that originally said that greenhouse gases endanger us, public safety, and the air, and there are certain emissions from certain vehicles that contribute to the greenhouse gases. Professor Hertz can correct me on the name. The EPA does this and bases it in kind of expertise and science.

The current EPA released a new rule overturning the endangerment finding, and you might think, well, that was done predicated on kind of existing political views on what should be regulated and should not be regulated. And they predicate that finding based on this uncertainty—we don't really know that greenhouse gases pose all these dangers. And so that might be an opening for a Court to kind of intervene and say we have something to say about this, and you've interpreted this incorrectly. And so I think *Loper Bright* is kind of in an interesting state here. Now, it depends on whether the Court will, in fact, do that kind of intervention, and if they will find that it's appropriate to do so. But I think there are certain elements that might help to pull away from some of the unitary control over fact-finding, but also might not be based on how the Courts choose to deploy that doctrine.

PROF. SHANE: The irony here, and I think all the last three comments point this out, is that the court that invented or concretized the unitary executive theory has effectively reconstituted itself as the Council of Revision. Now, the measure of what the executive branch will be able to get away with is what those justices operating on the shadow docket or on the merits decide is permissible. And again, their self-confidence is something to behold.

PROF. CODRINGTON III: Thank you again for taking the time out of your day to come help these scholars elicit some great information.

III. PANEL 2: AGENCIES WITH EXECUTIVE FUNCTIONS: THE DOJ

MR. ROB LOESER: Hello, everyone. My name is Rob Loeser. I'm the symposium editor of the Journal of Equal Rights and Social Justice. Thank you all again for coming, and we are so honored to have such brilliant

moderators and panelists here with us today. The discussion thus far has been truly enlightening, and I'm so thrilled to present to you our second panel of our symposium. This panel will discuss presidential control over the DOJ, as well as selective and vindictive prosecution.

To begin, I'd like to introduce our moderator, Professor Roth. Professor Roth is a professor of law at Cardozo School of Law, where she is the co-director of the Jacob Burns Center for Ethics in the Practice of Law. She teaches in the areas of criminal law, evidence, and legal ethics. Her scholarship has been published in journals such as the UCLA Law Review, the Northwestern Law Review, and the Washington University Law Review, among others. Previously, she was a federal prosecutor in the United States Attorney's Office for the Southern District of New York for seven years. She has served as a law clerk for the Honorable Denise Cote and then for the Honorable John M. Walker Jr. of the United States Court of Appeals for the Second Circuit. She also worked at the New Jersey law firm now known as the Gibbons Firm, where she was the recipient of the John J. Gibbons Fellowship in Public Interest in Constitutional Law to work exclusively on pro bono litigation.

Evan T. Barr is the first panelist here to talk with us today about the DOJ. Mr. Barr is a New York-based partner in Reed Smith's Regulatory and Investigations Practice Group, primarily representing clients facing sensitive investigations and prosecutions by state and federal law enforcement and regulatory agencies. A previous federal prosecutor, he served as Chief of the Major Crimes Unit in the United States Attorney's Office for the Southern District of New York. Before his tenure at the U.S. Attorney's Office, Mr. Barr served as deputy special counsel to the U.S. Senate Committee on Foreign Relations. His writings and legal commentary have appeared in such publications as the New York Times, the Wall Street Journal, the New York Law Journal, and Law360.

Our next panelist is Professor Roiphe. Professor Roiphe is the Joseph Solomon Distinguished Professor of Law at New York Law School, where she teaches professional responsibility, criminal procedure, ethics in criminal practice, and American legal history. She also runs the Institute for Professional Ethics and is a co-director of the Criminal Justice Institute at New York Law School. She writes on the history of the legal profession and prosecutorial ethics, as well as the politicization of prosecution and the president's ability to control the Department of Justice. Professor Roiphe is a legal news contributor for CBS News and also appears as a legal analyst on MS, formerly MSNBC, now MS NOW, and CNN. Her opinion pieces have appeared in the New York Times, the New York Review of Books, the Washington Post, and other popular press.

Our third panelist is Harry Sandick. Mr. Sandick is a partner in Patterson Belknap Webb & Tyler's litigation department and a member of the firm's white-collar defense and investigations team. He has represented organizations and individuals in investigations and prosecutions in New York and around the world. Previously, Mr. Sandick served as an assistant U.S. attorney in the criminal division of the U.S. Attorney's Office for the Southern District of New York. He is a frequent commentator on high-profile white-collar cases, appearing on CNN, MS NOW, and NPR. Additionally, he has contributed articles to the New York Law Journal, Reuters, Financial Times, and Law 360, among others. He is also the editor-in-chief for the Second Circuit Criminal Law Blog, which provides commentary and analysis of every criminal law decision rendered by the U.S. Court of Appeals for the Second Circuit.

Our last panelist, Professor Simonson, unfortunately could not make it here today, as she is out sick. We wish her well in her recovery. Panelists, we are grateful to have your time today, and we look forward to the discussions surrounding the DOJ. I'll hand it over now to Professor Roth. Thank you.

PROF. JESSICA ROTH: Great. Thank you, Rob. Thank you to the symposium for inviting us all to be here, and thank you to our first panel. It was really terrific, and I hope that we'll be able to draw on some of the themes from the first panel in our discussion now, which is going to focus specifically on the Department of Justice. I'm so grateful to all of you for being here for this discussion.

This administration came into office clearly of the view that it was not bound by the strong norm of noninterference with the independence of the Department of Justice that was alluded to earlier. It was sort of a shock-and-awe campaign from the beginning, starting with the memo issued by Attorney General Pam Bondi that's been known as the zealous advocacy memo, reminding all lawyers working for the Department of Justice of their duty to argue zealously the positions of the Department of Justice, and that referred to the lawyers working at the Department of Justice as the president's lawyers. This was a shock to those of us who had worked at the Department of Justice who did not see ourselves as the president's lawyers, but the lawyers working on behalf of the United States and the Department of Justice.

That was followed soon by a directive from the then-Acting Attorney General to the Southern District of New York prosecutors to drop the charges that had been brought against New York City Mayor Eric Adams. I'm sure you all recall that. The examples of interference in individual prosecution decisions are too many to go through, but also include the September 2025

indictments of Jim Comey, former FBI Director, Letitia James, New York Attorney General. There are many examples that I'm sure we'll be talking about and the various legal doctrines that some of them implicate, but it is, of course, a norm of noninterference in the Department of Justice as opposed to a legal requirement, or at least that's how it's generally been understood.

So what I wanted to do to start our discussion is go to our historian on the panel, Rebecca Roiphe, to talk a bit about the history of the Department of Justice and whether there is actually any argument that there is a legal requirement of independence for the Department of Justice from the White House.

PROF. REBECCA ROIPHE: That's a huge question, Jessica. Thanks again. Thank you all for coming and thanks for inviting me. I also found the first panel extremely interesting, and I learned a huge amount that I plan to draw on, so thank you guys for that. The Department of Justice came into being through an act in 1870. I think it's worth backtracking a little bit before that as to its origin.

The Supreme Court has recently said that criminal law enforcement is a quintessentially executive function. They said that in the *Trump v. United States* case. I don't think as a historical matter that's true. The predecessor to the act that created the Department of Justice was the Federal Judiciary Act of 1789. The earlier drafts of that statute had the Court appointing the Attorney General and what were then called the District Attorneys, which were the equivalent now of the U.S. Attorneys.

They finally came to a compromise where they used what in middle school we're taught not to use, which is the passive tense that somebody ought to be appointed—a person educated in the law should be appointed. The president ultimately took authority for appointing the Attorney General and the District Attorneys and that became the norm. But I think this idea that it was even at all settled that criminal law enforcement was necessarily an executive function is inconsistent with an originalist approach. I think a lot of the originalists that write on presidential control over the Department of Justice cite a few examples of presidents exerting control, and those usually happened in the context of foreign policy.

It's also worth backtracking a little bit historically to point out that federal criminal law was tiny. The Attorney General in his office was underfunded, he had basically no money. The first Attorney General, Edmund Randolph, was just sitting there in his own little dusty office, one desk, and very little to do. And there were these District Attorneys, fifty-six of them, I think. And they also were responsible for a very small amount of what constituted the criminal law, sort of maritime and customs law and things like that, often having a lot of overlap with foreign policy. The vast

majority of criminal law was conducted in the states, and much of the criminal laws were enforced by private prosecutors.

The idea that any government person would have control over criminal law enforcement, was not on anyone's radar. How do you control a private prosecutor? And there was a lot of criminal law enforcement that was conducted that way. I could go on and on about this topic, but when we think historically about presidential control over federal prosecution, we can pretty conclusively say that that was never anticipated at the founding, at least not with the scope of federal criminal prosecution that we have now.

Over time there became different developments, and I'll give just one second to the Department of Justice, which was created in 1870. When it was created, I did not find in my historical analysis that political control was a particular concern. To the extent that anybody did talk about it, they thought of the Department of Justice as being the solution, and I think that's because the fear was mostly that local prosecution was so diffuse at the time, and DOJ was meant to create organization, uniformity, and efficiency. It was designed to professionalize prosecution.

And so it was the antidote to the concern about corruption, because there was this notion that all these district attorneys in these various locations were just doing their own thing, and maybe there was some cronyism going on, but it was not about the presidential control at all. Ironically, the creation of Department of Justice was actually seen as a solution to corruption, particularly political influence.

MR. HARRY SANDICK: The only thing I would add to that is just the sheer change in the volume of the work done by federal prosecutors. I went back and looked at the Federal Judicial Center, and they said that from 1789 to 1801, there were 426 indictments. So you have about 40 per year. Last year, or the year before, in 2024, it was 66,000 indictments. As you're saying, there wasn't this whole thing, that came much later on in Prohibition and then the drug wars.

PROF. ROIPHE: To the extent that there's any textual source to this notion that criminal law enforcement is a quintessentially executive function, it has to come from the Take Care Clause, that the president has this obligation to take care that the laws are faithfully executed.

A lot of scholars have focused on the word faithfully, and that word "faithfully" actually comes from fiduciary law. That would actually support this idea that control is about appointing somebody who would become a fiduciary, and that in some ways, when we think about lawyers, that's what they are, is fiduciaries, and certainly prosecutors are fiduciaries. That would require at least some form of distance, because a beneficiary lacks direct control over what is necessarily being done on the benficiary's behalf.

PROF. ROTH: Becky, I was wondering if you could follow up on that a bit, in terms of, is there an argument that there is a legal constraint on the president in terms of controlling individual prosecution decisions by the Department of Justice?

PROF. ROIPHE: Yes, this is very controversial, and there are a lot of unitary executive theorists, as we were talking about in the first panel, who argue that there is absolutely not. I think Bill Barr certainly had the view that the president can, but the president ought to not exercise control. The first panel made me question some earlier arguments I made with my co-author about how prosecutors are independent. Earlier arguments we made were based in part on *Morrison v. Olson*, and now people write about that case as if Justice Scalia's dissent is the majority opinion.

Bruce Green and I wrote in an article called *Can the President Control the Department of Justice*, that Congress has the power to create independent prosecutors. We also argued that Congress, by not doing anything when this has been the tradition for so long, has essentially done just that. It has agreed to—in a legal way, the separation between the Department of Justice function and the executive.

Maybe given the prominence of the unitary executive theory, that ship has sailed, but I would argue that the norms that were alluded to a little bit earlier, that are established within the Department of Justice are, in fact, law. I have argued this separately, and I think it maybe stands the moment a little bit more, that those norms are not just norms. The tradition of prosecutorial independence and the norm that politics cannot play a role in individual cases are what gives meaning to a prosecutor's fiduciary obligation to the public. It's just that they are not the same as traditional fiduciary law. Courts normally develop the content of what the fiduciary obligation is but not in this context. So in all sorts of traditional fiduciaries, you have courts developing the content of the duties of loyalty and care, but with prosecutors, the courts just don't have, for the most part, the opportunity and the will to develop the content of the fiduciary obligation that prosecutors owe to their client, which is the public.

My co-author, Bruce Green, and I have argued in different pieces that the independence of prosecutors, the obligation to be an impartial prosecutor, is actually a legal fiduciary obligation that is given meaning through norms rather than being given meaning through direct, court-made law. It is therefore a legal obligation. In some ways, whether or not it is law may be irrelevant, because then you have to think about how this law is enforced, and when you think about how it's enforced then the only things that one can think of is either: (a) through impeachment, which is never going to happen for many of the reasons that we've discussed about how that's no longer

much of a check; or (b) we would argue perhaps Congress could give meaning to this by codifying these obligations? Congress does all sorts of things with regard to law enforcement and criminal laws. For instance, they write the criminal laws and they made the position of the Attorney General. There are all sorts of things that they could do with regards to defining what it means to be an impartial prosecutor, but then again that runs right up into the sort of current problem with the unitary executive and separation of powers.

PROF. ROTH: And Rebecca's referring to a series of articles that she co-wrote with Professor Bruce Green at Fordham that are terrific about this question of whether there's any legal constraint on a president directing control of individual prosecution decisions by the Department of Justice.

So Evan, I thought maybe this would be a good segue for talking about vindictive and selective prosecution claims. Because if there actually is something that constrains the president from directing individual prosecution decisions, it may be that it's not directly against the president, but if in fact that directive from the president results in a prosecution of an individual person, they have a claim to at least defeat that prosecution based on selective or vindictive prosecution. This is not exactly the same thing as saying it was directed by the president. So can you talk about what those two concepts are and the doctrines around them?

MR. EVAN T. BARR: Let me add to all the praise that's been already given to the first panel, super fascinating, tough act to follow, but we'll do the best we can. So look, the proliferation of sort of politicized targeting in this administration has led to a lot of the individual defendants or targets to invoke these two doctrines that Jessica just mentioned: selective prosecution and vindictive prosecution. I think they're both widely misunderstood by the media, by lawyers, by non-lawyers. They're actually both fairly narrow and very difficult, I'm sorry to say, difficult to establish. They very rarely succeed, in fact, almost never succeed.

That being said, we may be at an inflection point where they have some renewed life to them. So let's go over them real quick here. Selective prosecutions, sort of the common sense lay person is like you're pulled over on I-95, speeding, and thinking what about all those other people? Why did I get pulled over? Or you're smoking a joint, not me, nobody here, but you're smoking a joint at a baseball game and you get the ticket and what about all the other folks under the cloud? Or you get targeted by the IRS for an audit and you're doing something that's exactly the same as everybody else.

That is not what selective prosecution is all about. The elements are actually pretty rigid. First of all, in order to prevail in federal court on a selective prosecution defense, you have to show that there's other persons

who are similarly situated who are not prosecuted, okay? Second, that has to be an intentional thing, not the product of lax or incomplete enforcement. Let's go back to the highway scenario. The cops obviously can't pull over everybody who's going over the speed limit. They're allowed to pick folks to pull over. Third, it has to be a form of discrimination based on what I would call an invidious or suspect classification. Race, religion, ethnicity, exercise of constitutional rights—that's the one that could be important as we move forward.

It's an issue for the court, not the jury. It's typically raised pre-trial. Defense counsel can seek discovery and that's very important because whatever evidence exists of any of those factors, it's going to be in the files of the government. It's very hard to get that stuff. There's a bit of a conundrum because you can't essentially get the discovery unless you can make a prima facie showing, but you can't make the prima facie showing without the discovery. So that's a real problem.

The paradigmatic cases are actually from the 1970s and these were successful examples. There were cases involving, for instance, draft dodgers—a large group of folks who did not sign up for the Selective Service Program. Some of those were prosecuted, others were not. The government, this is, I guess, during the Nixon administration, had picked on certain draft dodgers that they didn't like. That was an example of a case that succeeded.

There was another Vietnam-era case, Pentagon protesters handing out leaflets. Folks had been in the Pentagon lobby handing out leaflets before. Then when the Vietnam War protesters went into the building and handed out leaflets, they got arrested for trespass. Those also were cases that worked.

But in 1996, the U.S. Supreme Court handed down a case called *Armstrong*, which was essentially a selective prosecution case based on the distinction between powder and crack cocaine, which had widely disparate potential sentences. The defendants argued that it was a racially motivated distinction, and the Supreme Court rejected it, basically saying, "Well, you haven't shown that there's a similarly situated group of white defendants who weren't charged for the same crime." So in that instance, the Court said, "No discovery permitted." That really kind of put the kibosh on selective prosecution ever since 1996. It's almost impossible.

Now, it's coming—so that being said, we're seeing it everywhere now. It actually started under Trump, in Trump I, if you will, you had a lot of Trump-affiliated defendants who were invoking the doctrine. Roger Stone, Paul Manafort, they said, "We're being picked on." I think Trump himself actually made the argument in his state court case. Now, more recently, of course, James Comey, Letitia James, LaMonica McIver, I think John Bolton

has also. These are, in my view, probably all going to fail at the selective prosecution hurdle.

For Comey, for instance, it's very difficult to define the universe of similarly situated witnesses before Congress. That's going to be really tough. McIver has already lost in the district court, actually. She's the congresswoman who appeared at the ICE facility in Newark and got arrested for disruption. She said, "Well, look at all the January 6th defendants who did the same thing I did and got pardons." That did not fly in the district court. They're like, apples and oranges, sorry, you're out of luck.

It will be very hard for any of these defendants to find a comparative set of people who are all facing basically the same charge arising out of the same facts and circumstances. That's what you're going need, like the cases from the 70s, and it's going to be really tough. Let me turn to vindictive.

Vindictive prosecution, again, layperson's view is that person is targeting me because he doesn't like me. That's not quite it. It's not about just being nasty or hateful. Traditionally the key elements—again, there's not a lot of clear-cut case law in this—for this defense to succeed are you need to show that the charging decision, whether it's by initiating or adding charges, was a form of punishment for the defendant doing something that he or she is entitled to do under the law. In that instance, the sort of paradigm case is where the defendant gets convicted, takes an appeal, wins on appeal on some issue, case gets remanded back down to the trial court, and is going to be retried. Then the Assistant U.S. attorney says, "Okay, you think you're so smart? I'm now going to go from a five-count indictment to give you five more counts." Now we have ten counts in the indictment. Or, "We started out with one charge, I'm now going to add a more significant charge that carries a stiffer sentence, just to show you who's boss." You can't do that. You can't punish somebody for filing an appeal or filing a motion to suppress.

Again, this defense has been raised by Comey and Letitia James, I think Bolton, and interestingly, Abrego-Garcia. In that group, I actually think Abrego has the best chance. It's about to be decided any day now, but Abrego has actually a pretty good argument, right? He's the guy who they tried to deport, and then to reward him for fighting the deportation, they hit him with a human trafficking criminal case. I think that's actually a pretty good test case where he might well prevail. So, that's the state of play on those two defenses.

PROF. ROTH: Thank you for giving us the overview of the law on those subjects. I think it's worth noting that the claims that were briefed by Jim Comey and Letitia James, those issues were not decided in their cases because the court dismissed their indictments for other reasons, namely the

unlawful appointment of the U.S. attorney, Lindsey Halligan, who had sought their indictments before the grand jury. That issue is up on appeal.

We're going to talk about appointment of acting and interim U.S. attorneys in a moment, but I do want to open to the panel a little bit more on the unique fact patterns created by these cases under the Trump administration where you have Trump truth socially, calling for the indictment of Jim Comey, for example, and Letitia James. This being so atypical in terms of the context in which these claims of selective or vindictive prosecution are usually made, where usually the claim is that the individual prosecutor was vindictive or selective against me because I exercised my right to go to trial, et cetera, or because this prosecutor has a vendetta against me for some other personal reason.

Here, you have the president of the United States calling for individual prosecutions. It's a real question of can that be attributed to the individual prosecutor, and as I understand what happened in the hearing on Kilmar Abrego Garcia recently is the prosecutor who actually filed the charge was testifying about how he made an individual assessment about whether to bring the case, and it had nothing to do with what the president of the United States or the highest level of people at the Department of Justice were directing that we all saw essentially in plain sight. So, will those calls be attributed to that individual prosecutor is really the question in that particular case. Harry?

MR. SANDICK: I mean, there is some interesting law. There's a Second Circuit case that says it doesn't have to be the prosecutor's own animus, if the prosecutor was prevailed upon to bring the charges by someone else who had the animus that would be enough to satisfy the vindictive prosecution claim. So we do have this unusual situation. I'm sure there will be line assistants who will say, "No, no, no, honestly, this was my own call." But is that really credible if the public statements that are made are so strong from the president? Then you join that with, and also kudos to the initial panel, a unitary executive theory where the president's administration is saying, "These are all my decisions." "Well, if they're all your decisions, then shouldn't you be held responsible for your words?"

The other thing I would say on that front is that like so many other things we've seen in this administration—vindictive prosecution—if you're a defense lawyer making that claim, you're often faced with the challenge of saying, "Well, no, no, no, really, this was vindictive." Yet there isn't any evidence. As you were saying, you don't get the discovery just based on the allegation. Here, the evidence, it's bountiful, it's out there in some of these cases, just over and over again. Going back multiple years, there was the

truth social post that seemed like it was meant maybe to be a direct message to the Attorney General that said, "Hey, indict these people now."

So it's not going to be as hard as it will be in the ordinary case, and I guess when you think about it, a vindictive prosecution claim kind of comes out of the due process clause. Selective prosecution is really an equal protection claim. This makes sense for all the reasons Evan was saying, who's your comparative set? An equal protection claim might be hard to prove, but a due process claim actually seems more logical given the interference in the individual process that we see from the administration.

PROF. ROTH: I think the question is: what is the nature of the due process claim? Is it that the president directed my prosecution, and is that inherently a violation of due process? Or is it he directed it because I'm his political enemy, and that's the nature of the claim?

MR. BARR: Right.

MR. SANDICK: Yeah.

PROF. ROIPHE: So I think that Evan is right about the limitations of the doctrine, and so people are starting to think about whether either those two doctrines will evolve to mean something else, or a different doctrine could come in. Jeffrey Bellin just wrote an article about how the Take Care Clause could create an individual cause of action that could fill this gap. Bruce Green and I have argued that there's an independent due process claim based on the right to an impartial prosecutor, separate from the vindictive prosecution claim.

There's an independent due process right that the Supreme Court has recognized to an impartial prosecutor, and that comes from this case, *Young vs. United States ex rel. Vuitton*, which is essentially a case in which the lower court appointed the private attorney for Louis Vuitton, which had brought this trademark infringement case, as the prosecutor. The defendant claimed this is unfair because we don't have in our country this idea that the victim gets to prosecute a claim, not anymore, even though that was actually the case in the early Republic, and so we have suggested that you could establish a broader due process claim to an impartial prosecutor. That would at least entitle the victim to some of the discovery that may not be available for vindictive prosecution and selective prosecution claims. Specifically, it would permit discovery within the Department of Justice in a more structural way rather than in an individual case. I think that would probably help in an evidentiary way to create a record of what has happened. Which is also, by the way, important from a unitary executive perspective because part of what the unitary executive theory is about is political accountability.

And while everybody's like, "Yeah, yeah, yeah," the administration has fully admitted that they're taking over the Department of Justice, that is not

true. They have not. Look at the Jeffrey Epstein case where all of a sudden the president's like, "I have nothing to do with this—that's my independent Department of Justice." It's funny, but kind of not, right, because the whole idea is if you are going to expect some kind of transparency and political accountability, we need to know what's going on. If the president has taken over the Department of Justice and the public knows that, then we as voters can say, "I don't like that kind of thing in my executive." But if the president is going to pretend that he hasn't when it's beneficial, then that seems really problematic and it calls for some kind of solution, even if you are in favor of the unitary executive.

MR. SANDICK: I went back and read *Vuitton* after we talked a couple days ago in advance of this, and one thing I thought was interesting was that the Court frames it to some extent as an exercise of supervisory authority over the criminal justice system. I wonder if in a way that maybe is kind of an end run around unitary executive type theories for the Courts to say, "Look, you may have your unitary executive authority, but we have our authority here, and we're not going to allow the prosecution system to become biased in the way that we expressed the concern in 1987."

PROF. ROIPHE: Right, and that links back to Jessica's earlier question: is there a legal obligation of independence, and is prosecution a quasi-judicial function? I don't think it's exactly what was anticipated in *Humphrey's Executor*, but it's like prosecutors are called quasi-judicial actors all the time. That is because these norms that we have are actually obligations that we owe to the court, like all lawyers, but heightened obligations that prosecutors owe. And elsewhere in Bruce Green and my scholarship, we've argued that courts should step up, using their supervisory authority to give substance to this fiduciary obligation, because they can, right?

If a prosecutor stands before you, there are all sorts of rules of professional conduct that you have, and that the court has the supervisory authority to enforce. And so if a prosecutor has appeared before the court and is doing something that clearly contradicts the rules of professional conduct, the court can use that rule as a way of: (1) engaging in fact-finding that can help us figure out what's going on; and (2) holding these individual prosecutors where it is appropriate, accountable for their conduct. It can be a very simple rule, like the duty of competence, because who's your client? Your client is not this administration, but rather the public.

PROF. ROTH: It would be very interesting to see if the courts actually embrace supervisory authority as a basis for dismissing some of these cases if the existing doctrine doesn't work. And actually, if you go back and look at the history of the expansion of federal criminal law enforcement, where

there was increased narcotics enforcement and the genesis of the entrapment defense, actually, that was originally located, as you and I have both written about, in the court's supervisory authority, essentially saying, "We will not supervise. We will not give our imprimatur to cases where we find what became, essentially, entrapment." And the doctrine developed from there, but where there was nothing as a hook, legally, for the courts to look to, they initially looked to their supervisory authority.

MR. BARR: How remarkable it is that this Epstein Files Transparency Act could represent a very interesting, I think, assertion of congressional power here, as was discussed during the first panel. You know, it's up to Congress now to step it up, right?

I mean, this is a very interesting development. As far as I'm aware, the only thing even remotely comparable was the JFK Assassination Records Act of 1992, I think it was, and you have FOIA, of course. But for Congress to essentially dictate to DOJ that you need to produce the document—now, there's no enforcement mechanism, it's not exactly working out, and I think there's a lot of chaotic, unintended consequences that are flowing. From a defense lawyer perspective, I'm a little horrified in terms of grand jury secrecy, et cetera. But anyway, I think it's a really interesting development.

PROF. ROTH: So many good things to get into. I want to turn to the president's control of who serves as the U.S. attorney in each district, because of course, that is one way in which the president can control prosecutions a little bit less directly by just making sure that a hand-selected individual occupies the office that actually goes into the grand jury and seeks the indictment. We've seen that, obviously, repeatedly under Trump, with Lindsey Halligan, and various other hand-selected U.S. attorneys. She's the one who I think had the least experience of the people he's appointed.

So, Harry, could you talk a little bit about the concern in putting in somebody who is not a Senate-confirmed U.S. attorney?

MR. SANDICK: As with so many things that we're talking about in this panel and this morning, there was the world before, and then now we're testing the theoretical limits of what the law can actually do. The traditional approach, as most people know, and it's codified in 28 U.S.C. Section 541, is that the president nominates a U.S. attorney with the advice and consent of the Senate. That person is confirmed. They technically have a four-year tenure, but they can stay in office past that date until a successor is appointed, and they're also subject to removal by the president.

As a practical matter, the way it typically works is the home state senators enter into negotiations with the administration and end with a pick that is acceptable to everyone. That's been done even when you have, let's

say a Republican president and two New York senators who are Democrats, but it's sort of negotiated out who is an acceptable person to everyone.

28 U.S.C. Section 546 provides that if there is a vacancy and there is no confirmed replacement, the attorney general can appoint someone to serve for 120 days, after which, if there is still no Senate-confirmed attorney general, then the district court may appoint, does not have to, but may appoint a U.S. attorney to serve until the vacancy is filled. The idea behind this is that no administration should be allowed to appoint a U.S. attorney on an interim basis to serve indefinitely, because if they could, then that would negate the Senate confirmation process, which is in the Constitution and also in Section 541. And courts have held this power when they wish to to appoint a U.S. attorney, almost without interruption from 1863 to the present, the power dropped out sort of mysteriously without legislative history in 2006. In the aftermath of that, a number of U.S. attorneys were pressured to bring voting rights cases that were meritless, some were fired, and then Congress reinstituted this provision in 2007.

We've seen in some of the districts, Northern District of New York comes to mind, where kind of a long-standing former prosecutor and defense lawyer was appointed by the judges of the Northern District to be the U.S. attorney, and within a few hours, Todd Blanche kind of in a bizarrely, I don't know, fired him.

MR. BARR: Trumpy.

MR. SANDICK: Yeah, Trumpy type of email said, "You're fired." I don't think this is actually as clear as the DAG has made it seem. Because if the president can remove a court-appointed U.S. attorney and appoint another interim person, you have just the evil that Section 546 was meant to address, which is to prevent the president from just appointing someone in a temporary position, but in fact, they hold it forever. It would really gut the purpose of the statute. It would undercut the purpose of congressional confirmation.

So some people said, "Well, is it constitutional? It sounds weird that a district court could pick a U.S. attorney. Where does that come from?" The answer is: it comes from the Constitution. Article II, Section 2 says, "Congress may by law vest the appointment of such inferior officers," which the U.S. attorney is, as they think proper "in the president alone, in the courts of law, or in the heads of departments." So Congress does have the authority to give this role to the courts of law, which is just what they have done.

People have questioned whether it gives the district court too much involvement in the conduct of federal prosecutions. People have also questioned, again, going to unitary executive theory, whether it is

constitutional to prevent the president from firing this person. And there is no Supreme Court ruling on this issue.

To some extent, the challenge to what Todd Blanche has done, could come, in theory, from the person who was supposed to be the U.S. attorney, according to the court, and was fired. But it might not be a lot of fun to bring that lawsuit or to serve as U.S. attorney in that very difficult spot. Defendants can make those motions, although so far, it's been with a mixed success.

MR. BARR: But it's before the Fourth Circuit now, right?

MR. SANDICK: Yes, exactly, before the Fourth Circuit now. So we'll see what happens there. Again, even if it's clear the district court can appoint someone, the tougher question is can the president then just fire that person and undercut the entire mechanism. So, look, if we're going to have Senate confirmation of U.S. attorneys, it's going to have to be done something like the old system of negotiation and accommodation. Otherwise, whatever the president's right is to have their person in that role, doesn't seem, to my mind anyway, to be something that can override the ability of the Senate to decide whether or not to confirm someone. So, it's certainly an end run that the administration is exercising that no one has really thought to exercise before.

PROF. ROIPHE: I just wanted to bring up something that I thought was an interesting connection to the first panel, which is a broader question about expertise. Because the entire system here that Harry just so skillfully described is designed to ensure that we have people in these positions who have a level of expertise. And so, and certainly I did think also prosecutors are essentially knowledge producers in a certain way, in the way that we were talking about. And so, it is important that those people have some form of expertise.

The question I would have had for the first panel is what do we do when expertise gets coded liberal progressive? And so, it's not a bug in the system that the unitary executive is about replacing experts with people who have political accountability, but rather the purpose, because the sense is that anybody who has kind of come up in the system and would get this kind of nod from the Senate confirmation or would get the nod from the professional community are going to necessarily be politically to the left. If we have this situation, then what do we do, right? If it's that conservatives think they can gain political power and they can win that way, and that part of what they're doing is saying, "It's this deep administrative state," that is the problem because it's so biased.

And then I would just add something like how did prosecutors get into that? Because traditionally, if Jocelyn had been on this panel, she would have said those are the right—I mean, I don't know, those are right wing, whatever. All the people in law school who want to be prosecutors, those aren't

progressives, but somehow we've gotten lumped in that, especially through, I think, kind of through the Trump investigations, is that he said that those are left wing progressives, even if they were people like Comey or all these people who are, if anything, centrist, but maybe centrist right, but they just got pulled in.

So now we have politics versus experts, experts left, politics right, then I don't know, it seems like a very difficult thing to then say, "Now, we need to try to figure out a way to restore this with, basically, a system in which we recognize the importance of experts." Because why would anybody with political power do that if they think that—and by the way, are they wrong? Because that entire first panel, I didn't hear a particularly conservative view from any single one of you. So they may be right on this, in which case, I don't know.

MR. BARR: On the issue of the appointments of the U.S. attorneys, I actually don't understand why Trump has created this problem for himself. He has a majority in the Senate, so he could ram through whatever nominees he wanted, right? There is the blue slip tradition.

MR. SANDICK: That's right, that's the issue.

MR. BARR: You have to get the home state senator. So I guess that's just completely broken down such that even when you have the majority in the Senate, you can't get your people in.

MR. SANDICK: I think that there has always been talk about ending the blue slip tradition. It's been ended for circuit court appointments, I think, but not for district court or for U.S. attorney. I think the other cell of his own making, so to speak, is that, going to your point, there are conservative lawyers, I'm confident, in every district, who would be delighted to serve as U.S. attorney if they could exercise the authority in a fair and impartial way. But it's sort of like that New Yorker cartoon some of us have seen where there's a person standing in the middle of the airplane aisle, and they say, "Who are these smug elitist pilots telling us what to do? Let me fly the plane."

They don't want an outstanding conservative lawyer in New Jersey to be the U.S. attorney. They want Alina Habba to be the U.S. attorney, who doesn't have the kind of experience that we've customarily seen, the expertise for a U.S. attorney. I think, it is a cell of their own making. They could fix this tomorrow, but not maybe with the people that they want.

PROF. ROTH: I'd like to talk about what comes in the future, assuming we do have a new administration in a few years. And I want to go back, actually, to a comment that Peter Shane made on the earlier panel about if Trump succeeds in modifying the civil service protections such that it's possible to fire a lot of people, who we think of as having civil service

protections today, and if that is a possibility. And we have a lot of people who have been hired into the Department of Justice as line prosecutors under the current administration, recruited perhaps by Chad Mizelle.

MR. SANDICK: Yes, that's right, "DM me if you want a job." That's how you and I got the job, right? [laughter] Basically, we just DM someone.

PROF. ROTH: DM me if you support the president, and you want to be a prosecutor. How does the Department of Justice restore norms that preceded the current administration for decades? And how does one not perpetuate a cycle of what are perceived as political firings? Do you all have any thoughts on the way forward?

MR. SANDICK: Something from history that one of my former partners lived through in the early 50s, was the U.S. Attorney's Office here in New York at the end of the Truman administration. Roy Cohn was a significant figure. There were lots of people who were hired just purely for political considerations. No one could send DMs back then, but the impression that historians and the individuals who participated in that moment had was that it was really a wave of political hiring.

Ed Lumbard, who later became the Chief Judge of the Second Circuit, was appointed by Eisenhower to be the U.S. Attorney for the Southern District of New York. What I'm about to say is not to say we should do exactly the same thing, or that it even could be done given current civil service protections, but he basically came in and asked for everyone to offer their resignations, and he decided who was actually talented and doing the job and who was just here because of who they knew or because of their willingness to bend the rules or break the rules, like Roy Cohn. And he brought in talented young prosecutors, many of whom went on to great careers, Robert Morgenthau, Peter Leisure, Bob Patterson, and many others. And so, I think part of it will take a willingness of a new U.S. attorney. Maybe they can't ask for everyone to resign, but to challenge the people who are there to do the job properly, and if they can't or won't, then you have grounds to remove them, even under the civil service protection. And to bring in young people who want to do that job the way it's supposed to be done. It's not a permanent cure, and it wouldn't cure it past one administration, but I think it might be a good first step, something like that.

PROF. ROIPHE: I mean, I think one thing that's uncontroversial is changing leadership. Whatever one might say about how this is being conducted with U.S. attorneys and loyalists being put into place, it is common and traditional for a new administration to pick their own U.S. attorneys. And so I think it's absolutely fine to start by changing DOJ leadership, and leadership can have a lot to do with changing culture. I think the broader problem is the one that you were talking about before, which is what to do

about the rank and file to the extent that the rank and file has been recruited through this politicized process. And I think one of the first questions is an empirical one, which is how much has that recruiting push worked and where, and to what extent is it a problem, and then one could try to address it.

I do think that there's a concern about cleaning house. This could easily be perceived as putting in place Democrat people who are going to do what the new administration wants them to do. And so Democrats would be accused of political weaponization in response to Republicans' political weaponization. Then the public just throws up their hands. There's a lot of that going into the weaponization: "Oh, yeah, well, that was a weaponized case against Trump, and now Trump is weaponizing it back." I guess that's just what prosecution is, that there needs to be that kind of Merrick Garland where we're doing something different. Otherwise, we'll just descend into this mutually assured destruction. We're just all going down this route. Whoever has power is going to use the criminal law enforcement apparatus to its advantage.

MR. BARR: What I would add on that front is it's always been true that with the new U.S. attorney, you had different priorities, okay, different, each U.S. attorney brought his or her emphasis. Now we're picking U.S. attorneys who are interested in narcotics, guns, immigration. Next set of U.S. attorneys, hopefully for my business model, are going to be interested in white-collar crime enforcement again and focusing on public corruption or things like that. So, hopefully, that'll also be part of it. As we move into 2029, for instance, the people who are the assistant U.S. attorneys in these offices, it's going to be the office-wide priorities. And I hope those will shift.

MR. SANDICK: I have one other thought, which is something I heard recently. I was not old enough to have lived through this, but just the focus on the norms and even having some minimal virtue in terms of the president staying out of the criminal process is a story about when Charles Manson was being tried for several murders. Nixon was giving a speech at some event, and he said, "Here is a man who was guilty, directly or indirectly, of eight murders without reason." He said this during the trial, and Manson's lawyers immediately moved for a mistrial.

And Nixon, who we don't think of as being like the paradigm of virtue and non-intervention in DOJ, almost immediately issued a statement. He said, "The last thing I would do is prejudice the legal rights of any person in any circumstances. To set the record straight, I do not know and did not intend to speculate as to whether the defendants are guilty. All of the facts in the case have not yet been presented. The defendants should be presumed to be innocent at this stage of their trial."

If only we could have a president with the integrity of Richard Nixon to stay out of the criminal process in this way, but there are other examples, too. Reagan and Iran-Contra, Obama talking about a 9-11 plotter, Biden talking about the George Floyd defendants, and they all quickly said, "But I want to make clear, I'm not prejudging this." And so, you know, there's no substitute for virtue. All the parchment barriers, to use Madison's phrase—in the world won't fix the system if the people who are running it are motivated by the wrong things, to do the wrong things for the wrong reasons and doing them the wrong way.

PROF. ROIPHE: On another note, being a former state prosecutor, I will say there's a lot of a room for state prosecutors' offices. For students who are thinking about going into prosecution, there are state prosecutors' offices that emphasize the professional values of prosecution and it could be, conceivably, that these state prosecutors' offices take the place of DOJ as the prime prosecutors' offices. If the states train those prosecutors properly, then in 2029 those people could fill in not just the entry-level jobs at DOJ, but some of the more senior positions that aren't political appointees. It's important to look to some of those offices to fill that gap.

PROF. ROTH: Okay. Well, we reserve a little bit of time for questions. So open up to questions from the audience.

MALE VOICE 2: [*Question inaudible*.]

PROF. ROIPHE: So as sometimes happens, I take a controversial view. I take a longer view and I worry about state regulators being responsible for disciplining federal government employees and how that could go. I think there are federalism concerns about those state regulatory authorities doing that. I know the McDade Amendment did say that any federal lawyer who is subject to the rules of professional conduct in the state in which they practice but there are some court decisions that suggest that these state bar regulators may be limited when they are interpreting rules that affect federal criminal prosecution.

I worry about the flip side when you might think about how this could be used in the hands of a conservative regulator in a state where in the future there's a federal government actor. So, my view is that federal courts ought to step in here. They have the authority to do this. They should be using that authority to investigate federal government lawyer misconduct. They've ceded their authority in part because of the McDade Amendment and in part because of this deference that they generally pay to government lawyers. I think they should get rid of that deference for now.

A lot of them already have and should investigate allegations of federal government lawyer abuses themselves. In a different administration, I would like to see the Office of Professional Responsibility, Inspector General, and

other watchdog offices reinvigorated. Right now, they basically have just become political appointees too.

MR. BARR: There's not even an Inspector General at DOJ right now.

PROF. ROIPHE: No, there isn't. But those are the people that you want to be investigating these sorts of issues. And it runs into the same issue that you brought up in the first panel, which is, "What do we do in this moment?" Do we just say, "Okay, in this moment we have to use every tool that's available to us." Going forward, it just compromises where you are. It would be better if a future Attorney General were to do the Merrick Garland thing to the best of his ability or at least stay as close to that as possible. I don't really like the state's jumping in to regulate federal government lawyers in an aggressive way is the answer.

MALE VOICE 3: [*Question inaudible*.]

MR. SANDICK: A couple of thoughts. One is in the post-Watergate era, there were many changes, such as the Presidential Records Act, that were meant to make sure that you actually could get insight into a lot of things, and those laws have been limited in some cases by court rulings on issues like this. I guess some of this might be dependent on a change in administration, but it's not clear to me how one administration could bind the successor in terms of a willingness to disclose those documents.

There's some interesting analogies, maybe, to attorney-client privilege in the context of a takeover, where one company acquires another and now they own the privilege of the second. And what if they learn some things as a result of that that they'd like to use, can they do that, or can somehow the people associated with the first company prevent that? I do think that the tools right now are probably not strong enough to allow the kind of disclosure of internal deliberation that we would need to get those types of documents, but the hope would be that a successor administration might decide as part of some broader initiative to do it.

The problem, of course, is always the next administration doesn't like to do that, because they also want to have a broad view of executive power, and so you just have generation after generation of broader and broader assertions. No one actually delivers on their campaign promises in this area.

PROF. ROIPHE: I would just add, I have my eye on the Jeffrey Clark case. I don't know if you've been following that, but he was the attorney who was willing to and wanted to step in and send the letter that said that there was massive electoral fraud, and he was disciplined in D.C. First of all, I thought that discipline was better suited in that case, but I would have disciplined him under one point—under the competence rule. I don't know what they were thinking with how they did it as attempted lies.

The argument should have been that he was fully incompetent on behalf of his client. They said attempted lies, I teach this class and I've never told my students, "Don't attempt to lie." A better argument would be: this was a completely incompetent representation of the people of this country. What was he doing?

On his appeal, Jeffrey Clark's main argument is that *Trump v. U.S.* created immunity for subordinates who are carrying out the president's orders. The argument is that if the president has immunity we can't even hold the people who were working for him at that time responsible because otherwise they will not freely and openly consult with the president. If it goes that far, that seems quite extraordinary to me. That's being litigated right now, and that might have at least some answers for the parameters of how far it will go.

PROF. ROTH: I would say one other note about *Trump v. U.S.* is this footnote by Justice Roberts about things being a matter of public record and how that could be used to prove up certain official acts, even if you can't inquire into the conduct of the official act in other ways. It could be that pointing to a truth social post by the president calling for the prosecution or indictment of Jim Comey, you know, that that's a public record that could be used. If that gets litigated, that could provide some further understanding about what can and can't be considered a public record that could be used in this context.

PROF. HERTZ: You had this argument about the Supreme Court being a matter of public record . . . [*Question inaudible*] . . . I'm wondering if anybody wants to comment a little bit on whether the norms in the United States should be or are similar to those other settings, I mean, those other settings in terms of the president, or really, the real concern is just in the United States.

PROF. ROTH: So, I'll ask who wants to address that, but it's rich to raise that point this week with the administration having changed whether it was going to appeal the adverse ruling on the executive orders against the law firms, you know, flipping so fast, one could barely keep track of it.

PROF. ROIPHE: I mean, I'll jump in and just say, I think that it's so complex what government lawyers do that to have some blanket rule about independence for all the different kinds of lawyers in government wouldn't work. It's not even just that they have different roles, they're also governed by different rules. An agency lawyer might answer to his agency head, or he might answer to somebody in the administration, depending on the relevant legislation. Even within a particular role, a lawyer might act like a prosecutor, in some cases, for instance where this lawyer is bringing a civil rights case, and it could be civil but the lawyer is still determining the public

interest in the case. I think the nature of government lawyers' role and the extent of independence very much depend on what it is that the particular lawyer is doing. I think it's smart to separate each of those different things and not to suggest that that means that other government lawyers don't necessarily enjoy some kind of—or shouldn't have some kind of independence, but I think it very much depends.

MR. SANDICK: It's a little like your point about administration priorities, right? You think of what is the role of a lawyer in the federal programs branch in the Department of Justice defending government policy. I'm sure that those lawyers shouldn't go into court and lie and misrepresent things either, right? But they probably are sometimes doing things they might not agree with on certain policy issues. On those issues, it's no different really than—Evan and I, under one U.S. attorney, maybe you could get a phone count in a drug case, and under another U.S. attorney, a phone count is a four-year cap for a case that could otherwise have a ten or twenty-year cap. One U.S. attorney says, "No phone counts." The next U.S. attorney says, "Yes, phone count." And on that, you know, as assistants, we had no choice. It didn't matter that was office policy.

PROF. ROIPHE: As an aside, that's a norm, in addition to the independence, that has completely gone to the wayside. There were prosecutors who were fired, just because Trump did not approve of the cases that they worked on. Normally, we think of lawyers should not be treated as if they believe or embrace their clients' views or causes. Many lawyers simply take the case that was assigned to them, they may agree with it, they may disagree with it, but there is a general principle about lawyers, which is codified in the code at Rule 1.2. When you represent a client, that doesn't mean that you embrace that client's moral or political or ideological cause. Obviously, this is something that the administration doesn't—has not—does not see or accept. It used to be that one would look at any kind of effort to conflate a lawyer with a lawyer's client as very controversial from the position of the rule of law, and that also is something that has gone—I mean, we no longer seem to respect.

PROF. ROTH: Except for the current hiring protocol, which is. . .

MR. SANDICK: Yeah.

FEMALE VOICE 1: So, you kind of went over the discussion a little bit. I was curious how you think about what it feels to be someone who's settled in this, or you feel like you've settled in that. And in how that people in the Republican Party can think of presidential prerogatives or control. So, as an example, when I joined the Biden administration, there was only one way to have clear and transparent supporters and it's a government-to-state. And DOJ was working for settlement and it was almost finalized. And then,

at some conference, President Biden said, "We would never do that." And that corrected the whole thing.

And then, back towards this administration, it's right there where there's an attempt by President Trump to sue various agencies for money damages, and also under Treasury, for purposes of tax returns, for $10 billion in fees and we're directly to settle that case? So, I'm just curious how you think about that. Is settlement different? Or is it something that can go both ways?

PROF. ROIPHE: I do think that prosecutors enjoy a very distinct role, because they are both public officials and lawyers. So just by designation, as a prosecutor, these lawyers are interpreting what the interest of justice requires in a particular case, and the same lawyers are going to have to litigate that case and settle the case. And I think civil lawyers are different. So, sometimes civil litigators look a lot like prosecutors, and then maybe we ought to think about carving out some kind of norm of independence, but I do think it's pretty different, not just a settlement, but. . .

MR. SANDICK: I'm worried about a related issue to what you raised, which is, for instance, to talk about settling the January 6th cases, which are completely meritless as far as I can tell, but could result in the payment of large amounts of money to people who acted to try to obstruct the confirmation of President Biden's election. And we have a tradition where district judges are not really given much of a role in this area. A number of years ago, Judge Rakoff tried to block an SEC settlement, I think with Citibank, and the Second Circuit reversed him very quickly and strongly. But I do sort of wonder, in a case—

MR. BARR: You still have the authority, though, ultimately.

MR. SANDICK: You may remember better, didn't the Circuit kind of confine it in a way that would make it hard to say, that, for instance, the president can't pay himself $10 billion because of whatever? You may remember that Rakoff case better than I do, but I remember coming away thinking it's a pretty narrow authority.

PROF. ROTH: Right, I do think that the civil lawyers do have a client that they're representing in the agency, in a way that's just different from how a prosecutor's role is defined, but you raise a really interesting point.

FEMALE VOICE 2: [*Question inaudible*.]

MR. BARR: I can remember when we got to the office, there were folks who'd been there for twenty, thirty years who you went to to learn the ropes, and there was an institutional memory. That seems to have been completely wiped out at Main Justice and in the field offices, I think. So that's super concerning, right?

On the other hand, when a young associate who's interested in becoming a prosecutor speaks to me and says, "What do you think? Should I apply to the office or whatever, given what's going on?" I always encourage them to do so. Because first of all, I want good, decent people to be in the government, even if you're serving under this government, right? And I also happen to think the reality is a lot of the work of the office goes on on a day-to-day basis.

The controversial stuff that we read about, Eric Adams wrote, that's at this level up here, but the day-to-day bread and butter continues. There are different priorities, so immigration, guns, whatever, yes, but the average job for an AUSA is still, I think, the same job that it was when decades ago I did it, and Harry a little more recently, and you as well. So, I still encourage people to apply, notwithstanding who the boss might be. And I hope that good people still get involved in government, regardless.

PROF. ROIPHE: I think just go back to the fiduciary obligation, if you're being ordered to do something that violates your obligation to your client, and you have no way of staying in your job without doing that thing, then you have one of two choices. You can either just withdraw from the case, if that's possible, which happened in the first Trump administration, or if you can't, you have to withdraw from the office entirely. But I agree that that's not every lawyer in DOJ. If you go take this job, you may find yourself, especially in certain units, in a position where you're never going to have to do something like this. That said, if a prosecutor takes on a controversial high profile case, there's a real risk that the president might intervene. A greater risk is that now, there's been sort of a warning shot across some of the elite of the profession to say that any prosecutor who defied Trump is a little bit of a dangerous hire, because it might invite the president's ire.

There may be a broader cost to doing that. I think it is something, even if you encourage people, you should warn them that "Look, this is a great path to a really successful career. It used to be, and maybe it still is, but there's some dangers along the way that didn't used to exist."

PROF. ROTH: Well, with that, please join me in thanking our panel.

IV. CLOSING REMARKS

MS. PALESE: Good afternoon, everyone,

As we bring today's symposium to a close, I want to take a moment to reflect on what we have heard and what it means.

Today's discussions have taken us deep into some of the most urgent constitutional questions of our time. We examined the theoretical foundations of executive authority, including the continuing debates surrounding the unitary executive theory and the structural role of

independent agencies. We then turned to the practical realities of prosecutorial discretion, selective and vindictive prosecution, and the institutional integrity of the Department of Justice.

These are not abstract academic questions. Moments of constitutional strain are also moments of constitutional clarity. They force us to ask what kind of government we believe in, what kind of legal culture we want to sustain, and what responsibilities we bear as lawyers within it. As members of the legal community—whether as scholars, practitioners, judges, or students—we inherit both the benefits and the burdens of that institutional framework. We are stewards of it.

We would like to extend our deepest gratitude to our moderators and panelists for their intellectual rigor. Your scholarship and public engagement make conversations like this possible, and we are incredibly grateful for your time and insight. We would also like to extend our sincere thanks to Professor Codrington, Professor Roth, and Professor Rudenstine for help organizing this panel and making today's discussion possible.

Additionally, we would like to thank all the other people who made this event possible: our Editor-in-Chief, Serena Roche; our Senior Symposium Editor, Robert Loeser; our Junior Symposium Editors, Darci Siegel, Rachel Landis, and Evelyn Yu; and all the other incredible people who devoted so much time and energy to organizing this Symposium.

As a reminder, if you registered to receive CLE credits, please see Hannah Cohen to obtain your certificate. Thank you all for being part of this conversation. We are deeply grateful for your engagement. Have a wonderful afternoon and a great weekend.