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The President is the Chief Executive, But Does Not Control the Mueller Probe

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The president is the chief executive but does not control the Mueller probe

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In an attempt to discredit the investigation into Russian interference in the 2016 presidential election, President Trump has claimed absolute control over the Department of Justice. His lawyers, no surprise, had echoed his claim, though they had advised him to be cooperative with the special counsel. Less obvious allies also have assumed the president's power over prosecution. Most recently, two former solicitors general, Neal Katyal and Ken Starr, used this premise to argue in a [New York Times editorial](#) that Congress cannot protect Robert Mueller's investigation from presidential interference.

A lot rides on this notion, particularly with fresh news reports that the special counsel has [subpoenaed the Trump Organization](#) to turn over documents related to Russia, bringing the investigation ever closer to the president.

If the notion is true, then the president can ignore internal DOJ regulations and fire Mr. Mueller, and he may be able to avoid a subpoena to testify before a grand jury. It may follow, as well, that the president could never be charged with obstruction of justice because he has the power to interfere with a prosecution for any reason.

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Yes, the president has power to hire and fire the attorney general. And he can pardon anyone charged with a federal offense. But he has no power to control individual prosecutors. He cannot direct or interfere with their decisions.

The support for the president's view that he has complete control over all federal prosecutions is of relatively recent and dubious vintage. It stems from arguments Richard Nixon made to the Supreme Court when he sought to avoid handing over the tapes that ultimately toppled his administration. [The court forced Nixon to comply](#) but did not address this question of presidential power directly.

Shortly after, in 1973, the DOJ's Office of Legal Counsel [issued a memo](#) that relied on Nixon's own briefs to support his position. In concluding that a sitting president cannot be prosecuted, the office argued that an indictment is inconsistent with the president's power as chief law enforcement administrator. It reasoned that a president cannot be a federal defendant because the president oversees federal prosecutions and cannot be expected to oversee a prosecution of himself.

When similar issues arose during Special Prosecutor Ken Starr's investigation of President Clinton, [the OLC reiterated these views](#).

The OLC memos and Nixon's brief are suspect because they were written with partisan purpose to save a besieged president. Perhaps for that reason, DOJ regulations and attorney general nominees since Watergate have emphasized the critical importance of federal prosecutors' independence from the president. Senators have confirmed these nominees based on the assurance that they will answer to the law — not the interests of a president.

The legal arguments for absolute presidential control over the DOJ, and in particular prosecutorial decisions, are weak. The Constitution does not grant the president the power to prosecute; the only explicit role the Constitution carves out for the president in individual criminal cases is [the right to issue pardons](#). Congress added the right to hire and fire the attorney general, but the powers to pardon and to hire and fire do not necessarily imply the power to control decisions in individual criminal cases.

The Constitution does vest executive authority in the president and directs the president to "take care" that the laws are faithfully executed. But the Constitution does not vest all executive authority in the president and the president can fulfill his obligation by firing incompetent prosecutors. The Supreme Court agreed with these limits on presidential power in [Morrison v. Olson](#), when it stated that prosecution is an executive function but insisted that Congress nonetheless had the power to create a special prosecutor, independent of the president.

Congress subsequently has let that law — which created Mr. Starr's post — sunset. As a result, there is no law on the books establishing an independent prosecutor or otherwise protecting federal prosecutors' independence. In cases such as these, when Congress has been silent, courts often look to tradition and practice.

Prosecutorial independence has been a reality of American prosecution and an animating theme since the founding. Although presidents occasionally, and unsurprisingly, try to use their attorneys general to enforce a political agenda, they usually are limited to dictating policy

priorities. Congress created the DOJ in 1870 to ensure that professional values would protect the law department from partisan influence.

Insulating prosecutors from presidential control allows them to pursue criminal justice without partisan pressure. It allows them to use their professional experience and judgment to be fair and even-handed, a value that is critically important when individual liberty is at stake.

Partisan concerns should play no role in the decision to charge or to dismiss a case, or in any other of the myriad choices that prosecutors make in criminal investigations. Many from both political parties were reassured when Mueller was appointed special counsel, not because he was a Republican but because he was known as a talented, principled professional, able to transcend partisan interests for the sake of finding facts and doing justice.

Of course, it is important to ensure that prosecutors who wield so much power are accountable to the public. But this need for accountability must be balanced by independence. The president himself cannot be held accountable if facts are sacrificed to a partisan agenda or self-interest. If President Trump prevents Mr. Mueller from uncovering the truth about Russia and the Trump campaign, the public would be voting without necessary information.

As the Supreme Court recognized in upholding the subpoena for Nixon's tapes, no one is above the law. This would be an empty platitude without maintaining the prosecutorial independence that has become a cornerstone of American democracy.

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