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A History of Prosecutorial Independence in America

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In an **interview** with the *New York Times* on July 19, President Trump criticized Jeff Sessions for recusing himself in the Russia investigation and hinted that he might fire special prosecutor Robert Mueller. The following morning, former acting Attorney General, **Sally Yates tweeted**: "POTUS attack on Russia recusal reveals yet again his violation of the essential independence of DOJ, a bedrock principle of our democracy." Many pundits have echoed Yates' outrage about the assault on prosecutorial independence, but others, like **Newt Gingrich**, have insisted that the President, as chief executive, controls the entire apparatus of criminal prosecution and can do as he pleases.

Who is right? Prosecutorial independence, an inchoate but important concept at the Founding, grew into a cornerstone of American democracy in the late-nineteenth and twentieth centuries. The attorney general occupies an especially odd position in the already complex balance of powers among the three branches of government because he or she is appointed by the President, but, like all lawyers, is regulated by the judiciary.

In England, prosecutorial independence has evolved into a constitutional principle. In the fifteenth century, the King's attorneys appeared before the royal courts to represent the Crown. The office of attorney general and solicitor general grew in importance, and during the sixteenth century, these attorneys, one of whom was typically a member of the House of Commons, were often summoned to attend and give advice to the House of Lords. The attorney general in England dealt with a vast array of legal issues and cases, the shear complexity of which leant him some independence from the King. By the mid-eighteenth century, English law recognized, by custom, that the chief prosecutor would serve the public interest rather than the whim of the ruler.

In 1924, in what came to be known as "**the Campbell affair**," this norm was tested. The newly elected Labour government ordered the attorney general to dismiss the prosecution of a left-wing newspaper editor, a political ally of the Prime Minister. The scandal ultimately led to the downfall of the administration and the recognition of the constitutional principle of "independent aloofness," or prosecutorial independence.

America inherited its criminal law enforcement structure from England and the British Crown attempted to control its colonies by installing attorneys general to enforce its edicts. As America established its independence, the federal office of attorney general evolved from the colonial model. The Constitution was silent on the structure of federal law enforcement, but the **Judiciary Act of 1789** provided for "a meet person, learned in the law" to act as Attorney General for the United States. By simultaneously establishing district attorneys who had responsibility for enforcing federal law on the local level, the act created a diffuse system of prosecutors who enjoyed a great deal of independence from both the attorney general and the president. Federal law enforcement occurred, for the most part, in different local courts, and district attorneys did not report to the attorney general, who had no power over them.

There is evidence that early presidents exerted control over federal prosecutors on occasion, dictating particular actions in individual cases, but the federal criminal law at the time was sparse and each of these incidents involved criminal cases with strong implications for other national interests, like foreign policy. The Judiciary Act itself was silent on who would appoint the attorney general, and earlier drafts of the statute gave that responsibility to the Supreme Court. These same early versions of the law would have had local courts appoint federal district attorneys. While these provisions did not make their way into the final draft and the President quickly assumed responsibility for appointing the attorney general, they illustrate ambivalence about whether federal prosecutors ought to be judicial or executive actors.

Despite the initial, somewhat contradictory evidence about the power of the president over federal prosecution, the early attorneys general inherited the notion of prosecutorial independence from England and emphasized its importance as they found their way in the job. Local prosecutors, who had responsibility for the bulk of federal law enforcement, continued to operate independently from the attorney general, as did lawyers in different federal departments.

By 1870, this diffuse structure of criminal law enforcement grew increasingly inefficient and subject to both waste and corruption. The scope of federal law had grown and the disparity in interpretations of those laws proved unruly, as the country grew more tightly woven together by national economic and social interests. Congress established the Department of Justice to provide order to the system. By consolidating the legal wing of the government, Congress hoped to capitalize on professional norms to improve the quality of criminal law enforcement and ensure that even-handed justice replaced the corrupt partisan concerns of local actors and department heads. So, ironically, the consolidation of federal law enforcement in an executive law department, which created more hierarchical structure and the possibility for greater control, was designed to preserve the value of prosecutorial independence that had emerged from England and developed through American practice.

The notion of prosecutorial independence was not truly tested in America until Watergate and the Saturday Night Massacre. In October 1973, President Nixon famously fired Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus when they refused to dismiss special prosecutor Archibald Cox. In a less well-known incident in 1971, President Nixon ordered his attorney general to drop an **anti-trust appeal** against International Telephone & Telegraph because IT&T had donated a large sum for the 1972 Republican National Convention.

In both incidents, President Nixon sought to control the Department of Justice, imposing his will on prosecutors whose professional judgment dictated a different course. In the wake of these two scandals, Congress considered a bill that would have removed the Department of Justice from the executive branch entirely making it an independent agency like the Federal Reserve. Amidst concerns about the constitutionality of the law as well as the loss of democratic accountability in federal prosecution, the statute never passed. In debating the provision, however, congressmen, statesmen, and scholars repeatedly asserted the fundamental importance of prosecutorial independence to our democratic system, and DOJ implemented rules and regulations to ensure its continued vitality.

The long tradition of prosecutorial independence evolved into a critical component of the democratic system. While DOJ remains a part of the executive branch and the attorney general reports to the president, prosecutorial independence has evolved into an accepted norm, which is reflected in Department of Justice regulations and honored in practice. Any effort by the president to control the judgment of the attorney general or other federal prosecutors ignores this important tradition, and any interpretation of the law or Constitution ought to be informed by it.