RESPONSE

PRESIDENTIAL AUTHORITY & THE FEDERAL DEATH PENALTY: A RESPONSE TO PROFESSOR J. RICHARD BROUGHTON'S *THE FEDERAL DEATH PENALTY, TRUMPISM, AND CIVIL RIGHTS ENFORCEMENT*

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Professor J. Richard Broughton's 2018 American University Law Review *Essay titled* The Federal Death Penalty, Trumpism, and Civil Rights Enforcement, *offers an insightful contribution to the scholarly discourse related to the federal death penalty. In this invited Response to Professor Broughton's Essay, the primary focus for divergence between the two pieces emerges from differing conceptualizations of the role of presidential authority and Department of Justice (DOJ) independence in federal capital litigation. This Response suggests a more robust potential for presidential engagement with deciding to pursue the death penalty and accordingly less independence for the DOJ than is, seemingly, suggested by Professor Broughton's Essay.*

While death penalty law covers complex terrain and decision-making as to federal death penalty prosecutions rests on internal bureaucratic procedures within the DOJ, ultimately, this Response suggests that a President's authority is greater and engagement in decision-making is more appropriate than the portrait rendered by Professor Broughton would seem to envision. The decision to seek the execution of a human being, homicide by governmental action, is a monumental one, and one that the President of the United States is ultimately responsible for through the actions of his or her delegates in seeking the death penalty. Given that, this Response suggests that responsible Presidents can and

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should play a more engaged role in shaping decision-making on whether to pursue the federal death penalty but should do so through exercise of appropriate means.

RESPONSE

The arc traveled by the death penalty across the course of U.S. history is often presumed to be a journey reflecting a linear progression.[1] This telling presents a story of an ever decreasing and narrowing application and increasingly widespread opposition to the death penalty.[2] This narrative, however, does not fully reflect the reality of the trajectory of the death penalty through American history, which has been decidedly more complex.[3] The evolution of the death penalty has been marked by ebbs and flows of application and public sentiment, more than unidirectional linear progression.[4] The death penalty in the United States reflects more of an ongoing and evolving conversation on criminal justice, rather than an inevitable, settled, and clear destination.[5] Accordingly, the death penalty presents, in the American experience, not a definitively resolved understanding with a forever binding sense of right and wrong, but instead a core question of morality and justice that is pressed to be answered through evolution and modification by each generation.[6]

As part of addressing the challenge of the death penalty, the legal academy is fortunate to have a wonderful collection of brilliant and insightful commentators who offer discerning insights and challenges to the death penalty.[7] There are studies, analyses, and argumentation

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1. Jeffrey Omar Usman, *State Legislatures and Solving the Eighth Amendment Ratchet Puzzle*, 20 U. PA. J. CONST. L. 677, 697–700 (2018).

2. *See, e.g.*, Krista L. Patterson, *Acculturation and the Development of Death Penalty Doctrine in the United States*, 55 DUKE L.J. 1217, 1224–30 (2006) (describing the United States' following of the European trend toward the abolition of the death penalty).

3. *See, e.g.*, STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 5–6 (2002); Usman, *supra* note 1, at 697–700.

4. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 854–55 (1988) (O'Connor, J., concurring in judgment); Usman, *supra* note 1, at 697–700.

5. *See* Usman, *supra* note 1, at 700; Gabriel S. Sanchez, Comment, *Towards a Post-Historicist Punishments Clause Jurisprudence*, 56 DEPAUL L. REV. 1321, 1330–31 (2007).

6. *See* Usman, *supra* note 1, at 700; Sanchez, *supra* note 5, at 1330–31.

7. *See, e.g.*, Valena Elizabeth Beety, *The Death Penalty: Ethics and Economics in Mississippi*, 81 Miss. L.J. 1437 (2012); William W. Berry III, *Ending the Death Lottery: A Case Study of Ohio's Broken Proportionality Review*, 76 OHIO ST. L.J. 67 (2015); John D. Bessler, *The Inequality of America's Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments*, 73 WASH. & LEE L. REV. Online 487 (2017); Russell D. Covey, *Death in Prison: The Right Death Penalty Compromise*, 28 GA. ST.

pushing towards narrowing application and eventual or immediate abolition of the death penalty.[8] This work has influenced judicial decisions, and legal scholars have helped to save lives of defendants on death row.[9] What the legal academy has not done as well is to present countervailing voices that reflect the views held by most Americans as to the death penalty.[10] While under no obligation to give a voice to those who would present a more sympathetic defense of capital punishment, failure to do so keeps arguments less honed than they might otherwise be through meaningful engagement with countervailing voices within the legal academy.[11] Discourse within the legal academy is poorer when the conversation is one-sided on issues that sharply divide the broader society.[12]

That is part of the reason that Professor J. Richard Broughton's capital punishment scholarship is so valuable to deepening and refining legal academia's discourse on the death penalty. Through his scholarship, he has provided, what is within the legal academy, a rare sympathetic ear to those supportive of capital punishment and a voice in defense of capital punishment.[13] His recent Essay, *The Federal Death*

U. L. REV. 1085 (2012); Linda A. Malone, *From Breard to Atkins to Malvo: Legal Incompetency and Human Rights Norms on the Fringes of the Death Penalty*, 13 WM. & MARY BILL RTS. J. 363 (2004); Michael J. Zydney Mannheimer, *The Coming Federalism Battle in the War over the Death Penalty*, 70 ARK. L. REV. 309 (2017); Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769 (2006); Kenneth Williams, *The Deregulation of the Death Penalty*, 40 SANTA CLARA L. REV. 677 (2000).

8. *See, e.g.*, THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH 5–6 (Charles S. Lanier et al. eds., 2009).

9. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 439, 443–46 (2008); Furman v. Georgia, 408 U.S. 238, 268, 274 (1972) (Brennan, J., concurring); State v. Santiago, 122 A.3d 1, 65–66, 70–71 (Conn. 2015).

10. *See generally* Baxter Oliphant, *Public Support for the Death Penalty Ticks Up*, PEW RES. CTR. (June 11, 2018), http://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018.

11. Carol Goforth, *Diversity in Law School Faculty Hiring: Why It Is a Mistake to Make It All About Race*, 56 U. LOUISVILLE L. REV. 237, 249 (2018); James C. Phillips, *Why Are There so Few Conservatives and Libertarians in Legal Academia? An Empirical Exploration of Three Hypotheses*, 39 HARV. J.L. & PUB. POL'Y 153, 203–04 (2016).

12. *See* Goforth, *supra* note 11, at 249; John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1190–95 (2005); Phillips, *supra* note 11, at 203–04.

13. *See, e.g.*, J. Richard Broughton, *Hate Crimes, the Death Penalty, and Criminal Justice Reform*, 37 HAMLINE J. PUB. L. & POL'Y 185, 213–14 (2016); J. Richard Broughton, Jones, Lackey, *and* Teague, 48 J. MARSHALL L. REV. 961, 990 (2015); J. Richard Broughton, *Kennedy and the Tail of Minos*, 69 LA. L. REV. 593, 593–94 (2009); J. Richard Broughton,

Penalty, Trumpism, and Civil Rights Enforcement, published in the *American University Law Review*, offers another thoughtful and excellent contribution in this vein.[14] His Essay has already been met with a strong rejoinder in the form of the essay, *The Federal Death Penalty Scheme is Not a Model for State Reform of Capital Punishment Laws*, which presents a more traditional anti-capital punishment vantage point in a well-written piece by Mark J. MacDougall and Karen D. Williams.[15] In accepting the *American University Law Review*'s invitation to write a response to Professor Broughton's Essay, this piece takes a different course than the existing critique offered by MacDougall and Williams.

The area of divergence, or perhaps variance in emphasis, from Professor Broughton's Essay addressed in this Response is a divide over the role of presidential authority and Department of Justice (DOJ) independence in federal capital litigation. This Response suggests a more robust potential for presidential engagement with deciding to pursue the death penalty, or declining to do so, and accordingly less independence for the DOJ than is, seemingly, suggested by Professor Broughton's Essay.

In his Essay, *The Federal Death Penalty, Trumpism, and Civil Rights Enforcement*, Professor Broughton draws a distinction between a President "expressing support for the death penalty generally, on the one hand, and calling for it in specific cases, on the other hand."[16] In this vein, Professor Broughton further contends that presidential engagement presents troubling interference with the prosecutorial independence of the attorneys within the DOJ.[17] He also observes that President Trump's comments on particular capital cases have tended to undermine, rather than strengthen, confidence in the federal death penalty given their reckless, under-informed, and demagogic nature.[18]

With the final point, no quarrel is offered in this Response. With the former, this Response offers a different angle for consideration. Pressed to its full extent, Professor Broughton's argument seems to arrive at a place in which a properly acting President becomes a cheerleader before the public for maintenance of the death penalty in general (or

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"On Horror's Head Horrors Accumulate": A Reflective Comment on Capital Child Rape Legislation, 39 DUQ. L. REV. 1, 1 (2000).

14. J. Richard Broughton, *The Federal Death Penalty, Trumpism, and Civil Rights Enforcement*, 67 AM. U. L. REV. 1611 (2018) [hereinafter Broughton, *The Federal Death Penalty*].

15. Mark J. MacDougall & Karen D. Williams, *The Federal Death Penalty Scheme Is Not a Model for State Reform of Capital Punishment Laws*, 67 AM. U. L. REV. 1647 (2018).

16. Broughton, *The Federal Death Penalty*, *supra* note 14, at 1622.

17. *See id.* at 1618–27.

18. *See id.* at 1621–27.

opponent thereof for an anti-death penalty President) while doing little more and leaving the professionals at the DOJ to handle the decision-making on whether to pursue the death penalty. While death penalty law covers complex terrain[19] and decision-making as to federal penalty prosecutions rests on internal bureaucratic procedures within the DOJ,[20] ultimately, a President's authority is greater and engagement in decision-making is more appropriate than the portrait rendered by Professor Broughton would seem to suggest.

While federal prosecutors enjoy wide latitude in determining whether to prosecute and in selecting charges in federal criminal proceedings, as acknowledged by the DOJ in its *Justice Manual*, "[t]his discretion exists by virtue of the prosecutor's status as a member of the Executive Branch, and the President's responsibility under [Article II, Section 3 of] the Constitution to ensure that the laws of the United States be 'faithfully executed.'"[21] In referencing federal prosecutors' broad discretion, the U.S. Supreme Court has made precisely this point, observing that federal prosecutors "have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'"[22] It is ultimately the obligation of the President, acting personally and through his or her appointees and other executive branch employees, to ensure that the laws are faithfully executed.[23] In accordance therewith, courts have repeatedly noted that the prosecution stands as a core executive function in meeting this aim.[24]

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19. *See, e.g.*, Russell Dean Covey, *Exorcizing Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS CONST. L.Q. 189, 268 (2004); Michael D. Hintze, *Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years After* Furman, 24 COLUM. HUM. RTS. L. REV. 395, 410 (1993); Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1923 (1994).

20. *See generally* U.S. DEP'T OF JUST., JUSTICE MANUAL §§ 9-10.010–9-10.200 (2018) [hereinafter JUSTICE MANUAL].

21. § 9-27.110 CMT. (quoting U.S. CONST. Art. II, § 3).

22. United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting U.S. CONST. Art. II, § 3).

23. Printz v. United States, 521 U.S. 898, 922 (1997).

24. *See, e.g.*, United States v. Brantley, 803 F.3d 1265, 1271 (11th Cir. 2015) ("Decisions regarding which crimes will be prosecuted are entrusted by the United States Constitution to the Executive Branch, which is charged with seeing that our nation's laws are enforced."); United States v. Lopez-Matias, 522 F.3d 150, 156 (1st Cir. 2008) (citation omitted) (observing that "[w]hile some administrative regulations do create rights in third parties . . . those governing prosecutors enjoy greater flexibility because the exercise of prosecutorial discretion is a 'core executive constitutional function'"); Cmty. for Creative Non-Violence v. Pierce, 786 F.2d 1199, 1201 (D.C. Cir. 1986) (indicating that "[t]he power to decide when to investigate, and when to

While federal prosecutors serve as the President's delegates, as stated by Professor Akhil Reed Amar, "[w]hat Article II *did* make emphatically clear from start to finish was that the President would be personally responsible for his branch."[25] James Wilson, who "was probably the single most important author of Article II"[26] at the Philadelphia Convention,[27] distinguished the American President from the British monarch, in part, by explaining that:

> [t]he British throne is surrounded by counsellors. With regard to their authority, a profound and mysterious silence is observed. One effect, we know, they produce; and we conceive it to be very pernicious one. Between power and responsibility, they interpose an impenetrable barrier. Who possesses the executive power? . . . In the United States, our first executive magistrate is not obnubilated behind the mysterious obscurity of counsellors. Power is communicated to him with liberality, though with ascertained limitations. To him the provident or improvident use of it is to be ascribed. For the first, he will have and deserve undivided applause. For the last, he will be subjected to censure; if necessary, to punishment.[28]

Or, as President Harry S. Truman might more concisely observe in accordance with James Wilson's analysis of the role of the President, "[t]he [b]uck [s]tops [h]ere."[29]

Where there is no authority, responsibility cannot follow, which raises the question of how a President may exercise authority in this context. For adherents to a robust unitary executive view, there is little difficulty to be confronted in finding this authority.[30] As described by

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prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws; when reviewing the exercise of that power, the judicial authority is, therefore, at its most limited"); *In re* Jackson, 51 A.3d 529, 538 (D.C. 2012).

25. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 197 (2005); *see also Printz*, 521 U.S. at 922–23 (addressing the constitutional structure having made the President the authority ultimately responsible for enforcement of the laws under the United States Constitution).

26. Daniel J. McCarthy, *James Wilson and the Creation of the Presidency*, 17 PRESIDENTIAL STUD. Q. 689, 689 (1987).

27. *See generally* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 215, 218, 220–22, 226–28 (2016) (addressing Wilson's contributions at the Constitutional Convention in Philadelphia in 1787); JOSEPH TARTAKOVSKY, THE LIVES OF THE CONSTITUTION: TEN EXCEPTIONAL MINDS THAT SHAPED AMERICA'S SUPREME LAW 27–47 (2018) (addressing James Wilson's role in shaping the Constitution).

28. 1 THE WORKS OF JAMES WILSON 399–400 (James DeWitt Andrews ed., 1896).

29. DAVID MCCULLOUGH, TRUMAN 481 (1992).

30. STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3 (2008).

Professors Steven Calabresi and Christopher Yoo, a unitary executive can be understood as follows:

> [T]he Constitution gives and ought to give all executive power to one, and only one, person: the president of the United States. According to this view, the Constitution creates a unitary executive to ensure energetic enforcement of the law and to promote accountability by making it crystal clear who is to blame for maladministration. The Constitution's creation of a unitary executive eliminates conflicts in law enforcement and regulatory policy by ensuring that all cabinet departments and agencies that make up the federal government will execute the law in a consistent manner and in accordance with the President's wishes . . . . The President is thus not only the commander in chief of the military, but also the law enforcement officer in chief of the federal government.[31]

Mincing no words in addressing the impact of the unitary executive on criminal prosecutions, Professor Saikrishna Prakash declared that "[i]t is time to drive a stake in the heart of the idea that independent prosecutors (of whatever sort) have the imprimatur of history. Historical claims advanced by academics about the insulation of federal prosecution from presidential control are largely wrong, in some cases profoundly so."[32]

The early years of the Republic are replete with examples of presidential directives in federal criminal prosecutions.[33] Presidents Washington, Adams, and Jefferson all repeatedly made decisions that were carried out by delineating prosecution policies and directing specific prosecutions, as well as curtailing criminal enforcement actions.[34] Reflecting upon one such example, Professor John Yoo has observed that "Washington's decision to drop . . . two Whiskey Rebellion cases made clear that he possessed the discretion to choose which cases to prosecute and which to let go."[35] Addressing an intervention of Washington in stopping another prosecution, then-House of Representatives member and future Chief Justice, John Marshall, "described the President's prosecutorial discretion power as 'an indubitable and a Constitutional power' which permitted him

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31. *Id.* at 3–4.

32. Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 526 (2005).

33. Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1053 (2013).

34. Prakash, *supra* note 32, at 552–63 (describing the direct engagement of President's Washington, Adams, and Jefferson in making decisions regarding federal prosecutions).

35. John Yoo, *George Washington and the Executive Power*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 1, 16 (2010).

alone to determine the 'will of the nation' in making decisions about when to pursue and when to forego prosecutions."[36]

One need not, however, embrace the unitary executive concept to see a robust role for the President in directing whether federal prosecutors seek the death penalty. In challenging the unitary executive understanding in the context of its intersection with the DOJ, Professor Jack Goldsmith has observed that the DOJ maintains important independence from the President on criminal justice matters.[37] He finds this independence in the evolution of the relationship between the DOJ and the President in the post-Watergate era.[38] The independence of the DOJ emerges from internal operating procedures and the accompanying development of norms that support DOJ autonomy.[39]

Presidential engagement in federal death penalty decision-making can fit, however, within existing strictures and norms so long as a President moves with softer footfalls than President Trump has demonstrated.[40] First, at the level of priority establishment, "[t]he President has a broad law enforcement responsibility that involves setting law enforcement priorities that will affect prosecutorial and investigative decision-making."[41] Invariably lacking resources to adequately prosecute every offense and offender,[42] decisions must be made about what to prioritize in prosecuting criminal offenses.[43] That Presidents bring different enforcement priorities is the norm.

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36. Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 497 (2017).

37. *See* Jack Goldsmith, *Independence and Accountability at the Department of Justice*, LAWFARE (Jan. 30, 2018, 2:16 PM), https://www.lawfareblog.com/independence-and-accountability-department-justice.

38. *See id.*

39. *See id.*

40. *See* Jennifer Hijazi, *Trump Wants to See the Death Penalty Come "Into Vogue" Again. He's Wanted that for Years*, VOX (Oct. 28, 2018, 1:42 PM), https://vox.com/policy-and-politics/2018/10/28/18032438/trump-death-penalty-pittsburgh-shooting (detailing President Trump's interest in the death penalty, including his statement after the Pittsburg synagogue massacre that it was time to "bring the death penalty into vogue").

41. Henry L. Chambers, Jr., *The President, Prosecutorial Discretion, Obstruction of Justice, and Congress*, 52 U. RICH. L. REV. 609, 614 (2018).

42. Markowitz, *supra* note 36, at 496 ("In the modern era, there are never sufficient resources to prosecute all offenses in any enforcement scheme, and thus choices must be made about which prosecutions to pursue and which to forego.").

43. *Id.*; *see also* Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 414 (2009).

Prosecutors are subject to these presidential priorities,[44] and "[p]riority pronouncements are of obvious importance in determining the allocation of federal enforcement resources."[45] For example, President Trump has prioritized the prosecution of immigration offenses, resulting in a significant increase in such prosecutions by federal prosecutors.[46] President Obama, acting through the Cole and Ogden memorandums, de-emphasized prosecution of marijuana possession in jurisdictions where possession did not violate state laws.[47] President Ford, emerging from Watergate, focused the DOJ on prosecuting public corruption, something that continued through the Carter and Reagan administrations, resulting in a four-fold increase in public corruption convictions.[48] Thus, it is not surprising that strategies for increasing public confidence in federal prosecutors tend to focus not on stripping the President of authority in establishing prosecutorial priorities but instead on transparency with regard to clearly communicating those priorities to Congress and the public.[49]

Nor are administration-driven shifts novel in the context of handling capital cases within the DOJ in the post-federal death penalty restoration era. The federal death penalty did not exist between the United States Supreme Court's 1972 decision in *Furman v. Georgia*[50]

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44. Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1072 (2017) ("From the executive branch, police and prosecutors enforce the law with some autonomy but are subject to appointment, sometimes election by the public, and to the limits and priorities of the chief enforcer, the president or state governor.").

45. 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.2(f) (4th ed. 2015).

46. Natasha Arnpriester, *Trumping Asylum: Criminal Prosecutions for "Illegal" Entry and Reentry Violate the Rights of Asylum Seekers*, 45 HASTINGS CONST. L.Q. 3, 13–14 (2017).

47. Douglas A. Berman, *Leveraging Marijuana Reform to Enhance Expungement Practices*, 30 FED. SENT'G REP. 305, 307 (2018).

48. Joshua A. Kobrin, Note, *Betraying Honest Services: Theories of Trust and Betrayal Applied to the Mail Fraud Statute and § 1346*, 61 N.Y.U. ANN. SURV. AM. L. 779, 792 n.61 (2006).

49. James K. Robinson, *Restoring Public Confidence in the Fairness of the Department of Justice's Criminal Justice Function*, 2 HARV. L. & POL'Y REV. 237, 264 (2008) ("Any priorities of the President or Attorney General for criminal enforcement should be announced publicly."); *see also* Leland E. Beck, *The Administrative Law of Criminal Prosecution: The Development of Prosecutorial Policy*, 27 AM. U. L. REV. 310, 375–76 (1978).

50. 408 U.S. 238, 239–40 (1972) (per curiam). The *Furman* decision effectively nullified existent death penalty statutes and sentences around the country, including the federal death penalty. *See* Deborah W. Denno, *The Firing Squad as "A Known and Available Alternative Method of Execution" Post-*Glossip, 49 U. MICH. J.L. REFORM 749, 757 (2016) (noting that *Furman* "ended up having a broad effect, essentially invalidating nearly every death sentencing system of every jurisdiction in the country"); Brent E. Newton, *The Slow Wheels of* Furman*'s Machinery of Death*, 13 J. APP. PRAC. & PROCESS 41, 65 (2012) (observing that "*Furman* had the effect of invalidating every existing death

and its reinstatement in 1988.[51] Between 1988 and 1994, under Presidents Ronald Reagan, George H.W. Bush, and Bill Clinton, a United States Attorney's Office that aimed to seek the death penalty had to obtain permission from the Attorney General to do so.[52] Under this approach, the respective Attorneys General of the United States granted forty-seven of fifty-two such requests.[53] If a frontline Assistant United States Attorney and the United States Attorney under whom he or she worked did not wish to seek the death penalty, that ended the matter.[54]

Following the passage of the 1994 Federal Death Penalty Act,[55] which substantially expanded the reach of the federal death penalty,[56] the

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sentence in America"). As noted by Professor Corinna Barrett Lain, "[b]y *Furman*'s one-year anniversary, twenty states had restored the death penalty—and by 1976, that number had grown to thirty-five." Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 48 (2007).

51. Jennifer J. van Dulmen-Krantz, *The Changing Face of the Death Penalty in America: The Strengths and Weaknesses of* Atkins v. Virginia *and Policy Considerations for States Reacting to the Supreme Court's Eighth Amendment Interpretation*, 24 HAMLINE J. PUB. L. & POL'Y 185, 205 (2002) ("In 1988, Congress reinstated the federal death penalty . . . ."); Rory K. Little, *The Future of the Federal Death Penalty*, 26 OHIO N.U. L. REV. 529, 531 (2000) ("In 1988 . . . Congress had enacted the first set of constitutionally sufficient federal death penalty procedures since *Furman*"). *See generally* Laurie B. Berberich, Note, *Jury Instructions Regarding Deadlock in Capital Sentencing*, 29 HOFSTRA L. REV. 1301 (2001).

> Following *Furman*, Congress failed to enact revised procedural, federal death penalty legislation. The older federal statutes suffered from the same infirmities as the state capital sentencing statutes. In addition to the still-existing pre-*Furman* death penalty provisions, between 1972 and 1988 Congress enacted three new federal death penalty provisions. However, since no federal statutory procedures existed in response to *Furman*, neither the pre-*Furman* nor post-*Furman* death penalty statutes were utilized because of concerns over the constitutionality of the old federal procedures.

Id. at 1307.

52. Kevin McNally, *Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DEPAUL L. REV. 1615, 1618 (2004).

53. *Id.*

54. *Id.*

55. Federal Death Penalty Act of 1994, Pub. L. No. 103-322, 108 Stat. 1959 (codified at 18 U.S.C. §§ 3591–3598).

56. Christopher Q. Cutler, Comment, *Death Resurrected: The Reimplementation of the Federal Death Penalty*, 23 SEATTLE U. L. REV. 1189 (2000).

> In 1994 Congress introduced the largest expansion of the death penalty in our nation's history when, in connection with the Violent Crime and Law Enforcement Act of 1994, it introduced the new federal death penalty, a broad expansion of federal capital crimes. In a move void of substantial expressed intention, Congress greatly augmented the list of death-eligible offenses. Congress enacted this sweepingly broad measure for two purposes: to expand

Clinton administration's DOJ altered the decision-making process for determining whether to seek the death penalty.[57] Under the new protocol embraced by Attorney General Janet Reno, United States Attorneys were required to "submit to the Attorney General for review all cases in which a defendant is charged with a capital-eligible offense, regardless of whether the U.S. Attorney actually desires to seek the death penalty in that case."[58] The process contains multiple moving parts, but there are three core components of the decision-making process. First, if the defendant has been charged with a capital-eligible offense by the local United States Attorney, there is an initial evaluation and accompanying recommendation for or against seeking the death penalty prepared by the United States Attorney and submitted to main Justice.[59] Second, the Attorney General's Review Committee on Capital Cases ("review committee") analyzes the local United States Attorney's submission and conducts further analysis and consideration.[60] Having received the recommendations and evaluations of both, the Attorney General then makes the decision of whether to seek the death penalty.[61] In instituting this approach, "[t]he Protocol made clear that, unlike most prosecutorial decisions, the decision of whether to seek the death penalty was to be centralized in Washington."[62]

The DOJ death penalty protocols were altered under the direction of Attorneys General John Ashcroft and Alberto Gonzales, reflecting the capital punishment policies of the administration of President George W. Bush. Three especially significant changes were made. First, even if the defendant was not charged with a capital eligible offense, if the facts could give rise to such charges, then the United States Attorney was required to submit an evaluation to Main Justice to start the review of whether the case should be pursued as a capital

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> the number of crimes that potentially could be punished by death, and to provide a new federal system for the imposition of the death penalty.

Id. at 1209.

57. McNally, *supra* note 52, at 1618–19.

58. Kenneth Williams, *The Death Penalty: Can It Be Fixed?*, 51 CATH. U. L. REV. 1177, 1188 (2002).

59. Joshua M. Toman, *Time to Kill: Euthanizing the Requirement for Presidential Approval of Military Death Sentences to Restore Finality of Legal Review*, 195 MIL. L. REV. 1, 15–16 (2008).

60. *Id.*

61. *Id.*

62. Eric A. Tirschwell & Theodore Hertzberg, *Politics and Prosecution: A Historical Perspective on Shifting Federal Standards for Pursuing the Death Penalty in Non-Death Penalty States*, 12 U. PA. J. CONST. L. 57, 77 (2009).

case.[63] Second, United States Attorneys could no longer dispose of capital cases through plea bargaining without the prior approval of the Attorney General.[64] Third, whereas the Clinton administration protocol did not consider whether the state wherein the crime occurred provided for the death penalty in deciding whether to seek the death penalty, under the Bush administration protocol, a crime occurring in a non-death penalty state became a quasi-plus factor in favor of seeking the death penalty.[65] Though not part of the death penalty protocol itself, Attorney General Ashcroft also directed all federal prosecutors to "charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case."[66] The combination of these changes led to more overruling of local United States Attorneys in death penalty cases in favor of seeking death sentences, fewer plea bargains to avoid death penalty prosecutions, and more capital case prosecutions in non-death penalty states than under the Clinton administration.[67]

The DOJ under President Obama continued the trend of modification. Attorney General Eric Holder clarified the Ashcroft memorandum directive to federal prosecutors by cautioning that charging decisions "must always be made in the context of 'an individualized assessment of the extent to which particular charges fit the specific circumstances of the case.'"[68] Additionally, the DOJ's death penalty protocols were altered to remove the plus factor of the death penalty being sought in a non-death penalty state and also to provide for considering the "willingness to plead guilty and accept a life or near-life sentence" as part of the decision-making in whether to seek the death penalty.[69]

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63. *Id.* at 81–85.

64. *Id.*

65. *Id.* at 79.

66. U.S. Att'y Gen. John Ashcroft, *Memo Regarding Policy on Charging Of Criminal Defendants*, DEP'T OF JUST. (Sept. 22, 2003), http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm.

67. *See* Tirschwell & Hertzberg, *supra* note 62, at 83–85 (noting a 117% increase in death penalty requests in non-death penalty states during the Bush administration).

68. U.S. Att'y Gen. Eric Holder, Jr., *Memo to All Federal Prosecutors: Department Policy on Charging and Sentencing*, DEP'T OF JUST. (May 19, 2010), http://sentencing.typepad.com/files/holder-charging-memo.pdf.

69. Francesca Procaccini, Note, *Faithfully Executed? The Legal and Rational Imperative of Declining to Seek the Federal Death Penalty in Abolitionist States*, 55 HARV. J. ON LEGIS. ONLINE (2016), http://harvardjol.com/2016/01/06/faithfully-executed-federal-death-penalty-abolitionist-states.

In the immediate wake of the Watergate scandal, Congress directly considered the issue of whether it should seek to increase separation between the President and the DOJ in directing and controlling criminal prosecutions but ultimately decided against doing so.[70] The Supreme Court has observed that the Attorney General is directly responsible to the President and that the President may act through an Attorney General,[71] who is appointed by and who serves at the pleasure of the President.[72] Additionally, Congress has continued to posit decision-making capacity in the Attorney General.[73] In accordance therewith, pursuant to Justice Manual 9-10.050, the death penalty protocols provide that "the Attorney General will make the final decision whether to seek the death penalty."[74]

Enforcement of criminal law, including decisions as to charging, plea bargaining, and sentencing, are not mechanical; to the contrary, broad but not standardless discretion abounds.[75] Within this arena, there is a culture of political control in prosecutorial decision-making in the United States that attaches to the vast majority of criminal prosecutions.[76] Unique among the nations of the world, in the United States the citizens, in general, elect prosecutors,[77] or at least state prosecutors who handle the overwhelming majority of criminal prosecutions in the United States.[78] As explained by Professor William T. Pizzi:

> American prosecutors are almost always elected public officials who have to defend their record and the way that they use their discretion to the electorate . . . . [I]t is typical of the American political tradition—in which state power is not viewed with the same trust that it is in civil law countries—to come down in favor of political control over public officials, rather than preferring internal hierarchical

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70. Beale, *supra* note 43, at 414–15.

71. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 495 (2010) (quoting Morrison v. Olson, 487 U.S. 654, 695–96 (1988)).

72. *See, e.g.*, Fran Quigley, *Torture, Impunity, and the Need for Independent Prosecutorial Oversight of the Executive Branch*, 20 CORNELL J.L. & PUB. POL'Y 271, 271 (2010).

73. *See* 28 U.S.C. § 519 (2012) (providing the Attorney General with the authority to "supervise all litigation" and "direct all United States attorneys").

74. JUSTICE MANUAL, *supra* note 20, § 9-10.050.

75. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 840–42 (2004).

76. *See generally* JEFFREY A. JENKINS, THE AMERICAN COURTS: A PROCEDURAL APPROACH 98 (2011).

77. Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 (2012).

78. Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211, 242–43 (2008).

> controls over public officials . . . . If someone is to decide which laws will be aggressively enforced, which laws will be enforced occasionally, and which laws will never be enforced, it makes sense that the person who has to answer to the voters will make those determinations.[79]

That federal prosecutors stand as an exception, having not been elected,[80] points, in harmonizing with the broader American tradition, more towards an increased role for the President as the politically accountable actor than a divorce between the concept of political judgment and prosecution.[81]

For good or ill, the decision of whether to pursue the death penalty, where the offense is death penalty eligible, is more political than mechanical in nature.[82] Positioning on the death penalty has been a recurring part of presidential campaigns since at least 1988 when then-Vice President George H.W. Bush made the death penalty a central issue in his campaign against Massachusetts Governor Michael Dukakis.[83] At

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79. William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1338–39 (1993) (noting that "[n]inety-seven percent of . . . state prosecutors [are] elected").

80. Hon. J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1135 (2014).

81. *See* Russell M. Gold, *"Clientless" Lawyers*, 92 WASH. L. REV. 87, 117 (2017) ("For federal prosecutors, the primary accountability mechanism ties back somewhat detachedly through the administrative state to the elected President.").

82. *See, e.g.*, State v. Banks, 271 S.W.3d 90, 154–55 (Tenn. 2008); Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 268–70 (2017); Lee Kovarsky, *Muscle Memory and the Local Concentration of Capital Punishment*, 66 DUKE L.J. 259, 291 (2016); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2080 n.139 (2000); Brian Palmer, *Capital Decision*, SLATE (Aug. 2, 2013, 3:17 PM), http://www.slate.com/articles/news_and_politics/explainer/2013/04/james_holmes_faces_execution_how_do_prosecutors_decide_whether_to_seek_death.html.

83. *See* George Kannar, *Federalizing Death*, 44 BUFF. L. REV. 325, 325 (1996) (explaining that the death penalty became federalized as a campaign issue during the 1988 presidential campaign). Vice President George H.W. Bush, a death penalty supporter, used the issue to practically disqualify Governor Dukakis, a death penalty opponent, with a broad section of American voters during the 1988 campaign. *See* BANNER, *supra* note 3, at 276 ("Michael Dukakis was widely believed to have lost any chance of winning after he emphasized his opposition to capital punishment during a debate against George Bush."); Samuel R. Gross, *The Death Penalty, Public Opinion, and Politics in the United States*, 62 ST. LOUIS U. L.J. 763, 770 (2018). Governor Clinton used the death penalty as part of honing his image as a new, more centrist, Democrat rather than a liberal in running for the presidency. *See* Mark White, *Vicissitudes: 1992 and the Road to the White House*, *in* THE PRESIDENCY OF BILL CLINTON: THE LEGACY OF A NEW DOMESTIC AND FOREIGN POLICY 34, 55–56 (Mark White ed., 2012); Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 542–43 (1996). As President, Clinton would use the death penalty as part of his centrist triangulation in winning re-

the intersection of discretion, political judgment, and accountability, Attorney General Reno, who presided over the DOJ's adoption of death penalty protocols, in her testimony before Congress, observed that "[a]ccountability is no small matter. It goes to the very heart of our constitutional scheme. Our Founders believed that the enormity of the prosecutorial power—and all the decisions about who, what, and whether to prosecute—should be vested in one who is responsible to the people."[84] In the context of deciding whether to pursue the death penalty, presidential engagement is, perhaps, even more appropriate given the broad deference given by the judiciary to a decision to proceed and the unreviewable nature of the decision not to do so.[85]

A President seeking to push the determination of whether to pursue the death penalty either towards increased or decreased use overall or as applied in particular types of cases could effectively act through ensuring that there is "no daylight between" the Attorney General and himself or herself on capital case decision-making.[86] Even where

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election. *See* FELICIA KORNBLUH & GWENDOLYN MINK, ENSURING POVERTY: WELFARE REFORM IN FEMINIST PERSPECTIVE 81 (2018). Governor George W. Bush cast himself as more conservative than his more moderate father and his principal primary opponent Senator John McCain. *See* E.J. DIONNE, JR., WHY THE RIGHT WENT WRONG CONSERVATISM—FROM GOLDWATER TO TRUMP AND BEYOND 185–86 (2016) (illustrating the lengths to which the younger Bush distanced himself from his father as he recognized the changing electorate); MICKEY EDWARDS, RECLAIMING CONSERVATISM: HOW A GREAT AMERICAN POLITICAL MOVEMENT GOT LOST—AND HOW IT CAN FIND ITS WAY BACK 49 (2008) (highlighting the younger Bush's embrace of the label "conservative"). Part of that conservative image emerged from his approach to the death penalty. Andrew Phillips, *The Bush Bandwagon*, MACLEAN'S (July 12, 1999), https://archive.macleans.ca/article/1999/7/12/the-bush-bandwagon. President Obama also embraced an aggressive death penalty stance, rendering it harder for Senator McCain to attack him on this front. Usman, *supra* note 1, at 704. Finally, President Trump's death penalty pronouncements have fit with his image making as the law and order and no-nonsense, abrasive, non-politician. *See* Broughton, *The Federal Death Penalty*, *supra* note 14, at 1622–25 (noting examples of President Trump's rhetoric to appeal to his supporters).

84. Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 720 (2005) (quoting *The Future of the Independent Counsel Act: Hearings Before the S. Comm. on Governmental Affairs*, 106th Cong. 250 (1999) (statement of Janet Reno, Att'y Gen. of the United States)).

85. *Cf.* Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 224 (2003) (highlighting the opaque nature of prosecutors' decisions to pursue the death penalty).

86. *Cf.* Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama's Immigration Actions*, 50 U. RICH. L. REV. 665, 707–08 (2016) (noting that even under a more de-centralized understanding of executive power that where authority is placed in the hands of an executive branch cabinet officer, where the

daylight exists, for a President seeking to engage, so long as the President's views are neither illegal nor contrary to seeking justice or pursuing what is right, the Attorneys General can generally be expected to act in a manner consistent with the President's view of sound policy.[87] The decision to seek the execution of a human being, homicide by state action, is a monumental one, and one that the President of the United States is ultimately responsible for through the actions of his or her delegates in seeking the death penalty. Given that, responsible Presidents should play a more engaged role in shaping decision-making on whether to pursue, or not, the federal death penalty but should do so through exercise of appropriate means.

cabinet official and the President are in accordance on a policy, the removal from presidential direct control is immaterial in consequence).

87. William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 874–75 (2001); *cf.* Jack Goldsmith, *Quick Thoughts on Sally Yates' Unpersuasive Statement*, LAWFARE (Jan. 30, 2017, 9:32 PM), https://www.lawfareblog.com/quick-thoughts-sally-yates-unpersuasive-statement (finding the acting Attorney General's reasoning behind her refusal to implement an executive policy wanting).