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Impressed with a conviction that the due administration of justice is the firmest pillar of good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country and to the stability of its' political system—hence the selection of the fittest characters to expound the laws, and dispense justice, has been an invariable object of my anxious concern.
–George Washington to Edmund Randolph, Sept 28, 1789[1]

". . .I have absolute right to do what I want to do with the Justice Department."
–Donald Trump to Michael S. Schmidt, Dec 28, 2017[2]

Introduction

George Washington clearly understood the judiciary's importance. Those whom he selected to fill judicial positions would establish a good government and maintain peace in the nation. As a result, he sought the "fittest characters" to fill them.[3] Today is no different; prosecutors wield tremendous power,[4] as federal prosecutors can charge nearly anyone

* Assistant Professor of Criminal Justice, High Point University. The author wishes to acknowledge the research assistance provided by Brianna Burns and Jessica Wallace.

1. Letter from George Washington, U.S. President, to Edmund Randolph, U.S. Attorney Gen. (Sept. 28, 1789), http://founders.archives.gov/documents/Washington/05-04-02-0073.

2. NEW YORK TIMES, *Excerpts from Trump's Interview with the Times*, N.Y. TIMES (Dec. 28, 2017), https://www.nytimes.com/2017/12/28/us/politics/trump-interview-excerpts.html.

3. Letter from George Washington to Edmund Randolph, *supra* note 1.

4. *See* Angela J. Davis, *The American Prosecutor: Independence, Power,*

courtesy of vague and broad criminal statutes and minimal systemic oversight.[5] They have expanded their domain greatly since the Nation's founding and original practices.[6] This makes the character of federal prosecutors extremely important.[7] Prosecutors motivated by objectives beyond justice administration can use their discretionary power for inappropriate ends.[8]

Current political and prosecutorial norms reflect the belief that the administration of justice must be insulated from partisan politics.[9] Each day, federal prosecutors make decisions regarding people's lives and liberty.[10] The federal prosecutors decide whom to charge, for what and when.[11] They can charge

and the Threat of Tyranny, 86 IOWA L. REV. 393, 408-10 (2001) (describing the importance of prosecutorial charging power); Bennett L. Gershman, *The Most Dangerous Power of the Prosecutor*, 29 PACE L. REV. 1, 19-25 (2008) (identifying the contours of prosecutorial discretion); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 36–37 (2009) (distinguishing between a prosecutor's minister of justice ethic and conviction ethic).

5. *See* Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L. J. 2087, 2089–90 (2009); Michael A, Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 924–36 (2000) (comparing Congress and the Executive branch's responsibility for and ability to control overfederalization of crime); *see also* HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (Encounter Books 2009).

6. *See* William McDonald, *The Prosecutor's Domain, in* 11 THE PROSECUTOR 19–28 (Sage Publications, Inc., William McDonald, ed., 1979) (describing the expansion of prosecutor's domain over time).

7. *See* Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065 (2014) (explaining the difference between individual prosecutors and their role perception).

8. *See* Heather Schoenfeld, *Violated Trust: Conceptualizing Prosecutorial Misconduct*, 21 J. CONTEMP. CRIM. JUST. 250 (2005) (identifying various methods by which prosecutors commit misconduct).

9. *See* Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 370–71 (2009) (describing the relationship between politics and prosecution); Andrew Kent, *Congress and the Independence of Federal Law Enforcement*, 52 U.C. DAVIS L. REV. (forthcoming 2018).

10. *See* Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3 (1940).

11. *See* Peter L. Markowitz, *Prosecutorial Discretion Power at its Zenith: The Power to Protect Liberty*, 97 BOS. U. L. REV. 489, 490 (2017) ("Prosecutorial discretion refers to the power of the Executive to determine how, when, and whether to initiate and pursue enforcement proceedings" (footnote omitted)).

anyone so long as they have probable cause to believe the person committed a federal crime.[12] Probable cause is not a high standard.[13] Consequently, a federal prosecutor with political ambitions is able use prosecutorial power to advance partisan political purposes.[14] Similarly, ambitious Justice Department lawyers can use their policy-making authority to target political opponents or politically-unpopular organizations.[15] To make this less likely, norms developed to insulate federal prosecutors from political forces.[16] The norms have insulate specific cases and some believe they should also include policy decisions.[17]

This Article examines the relationship between the Nation's first President and the selection of United States Attorneys. It argues that politics played an important, if not primary, role in the President's selections. George Washington sought those who would represent the government's interests, adhere to the government's policies, and advance Washington's political

12. FED. R. CRIM. P. 3. ("The complaint is a written statement of the essential facts constituting the offense charged. . . . [I]t must be made under oath before a magistrate judge . . ."); U. S. ATTORNEYS' MANUAL 9-2.030 (U.S.A.M. 2018); MODEL RULES OF PROF'L CONDUCT r. 3.8(a) (AM. BAR ASS'N 2018); STANDARDS FOR CRIMINAL JUSTICE 3-1.4 (AM. BAR ASS'N 2015).

13. *See* Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 981, 995 (2003) (highlighting the differing perspectives on probable cause and its lack of practical use); Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN'S L. REV. 1133, 1136 (1998).

14. H.W. Perry, Jr., *United States Attorneys—Whom Shall They Serve?*, 61 LAW. & CONTEMP. PROBS. 129, 142–45 (1998).

15. *See* Gershman, *supra* note 4, at 11–16 (explaining potential political targeting of prosecutorial power).

16. *See* Kent, *supra* note 9, at 3–5; Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1201–03 (2013); David Kris, *Presidential Norms and the Special Counsel Investigation: Disclosures to Congress*, LAWFARE BLOG (May 3, 2018, 4:50 PM), https://www.lawfareblog.com/presidential-norms-and-special-counsel-investigation-disclosures-congress (stating "[t]here is a real norm of Justice Department independence from the president in the context of individual criminal cases, a real departure from the theory of a unitary executive branch"); *see also* U. S. ATTORNEYS' MANUAL 9-27.260 (U.S.A.M. 2018) (listing political associations, activities or beliefs as impermissible considerations).

17. Matthew Kahn, *The Lawfare Podcast: Preserving Justice Department Independence*, LAWFARE BLOG (Apr. 28, 2018, 1:30 PM), https://www.lawfareblog.com/lawfare-podcast-preserving-justice-department-independence [hereinafter, Georgetown Law Panel Discussion].

goals.[18] His selections also demonstrated Washington's requirement of loyalty to America. In this respect, the politicization of United States Attorneys occurred at the outset. Part I of this Article defines politicization and identifies its four aspects. Part II describes the United States Attorney position as understood through the 1789 Judiciary Act and state experience. Part III examines how Washington's selections and selection process included three of the four politicization categories. The concluding Section briefly explores the ramifications of politicization and its potential benefits in today's prosecutorial environment.

I. Modern Assault on Modern Norms

Recent presidential politics brought this norm into public view. Repeatedly, the President has shown ignorance, if not outright disregard, of these prosecutorial norms.[19] Concerns arose prior to the President's inauguration.[20] One commentator noted, "[t]he soft spot, the least tyrant-proof part of the

18. RON CHERNOW, WASHINGTON: A LIFE 595 (2010) (highlighting commentary from various historians on Washington's appointments generally, with one biographer writing: "Washington believed that forming an honest, efficient civil service was a critical test for the young republic"); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800, at 55 (Oxford Univ. Press 1993) (Washington had two strict rules for his appointments: first, no family members could receive appointment, and second, they had to support the Constitution); FORREST MCDONALD, THE PRESIDENCY OF GEORGE WASHINGTON 38 (Univ. Press of Kan. 1974) (stating that a historian of his presidency wrote: "Washington scrupulously declined to exploit the opportunity to develop a system of patronage"); JOHN C. MILLER, THE FEDERALIST ERA: 1789-1801, at 31–32 (Waveland Press, Inc, 1998) (explaining that another historian, writing about the era, said, "[t]he President decided, by the application of three principal criteria: fitness, 'former merits and sufferings in the service,' and residence").

19. *See* Bob Bauer, *The Survival of Norms: The Department of Justice and the President's 'Absolute Rights,'* LAWFARE BLOG (Jan. 10, 2018, 10:00 AM), https://www.lawfareblog.com/survival-norms-department-justice-and-presidents-absolute-rights; *Protecting Independent Law Enforcement*, PROTECT DEMOCRACY, https://protectdemocracy.org/independent-law-enforcement/tracker/ (last visited Oct. 29, 2018) (providing a timeline of President Trump's Administration's statements that "[attack] the independence of law enforcement").

20. Benjamin Wittes, *Trump and the Powers of the American Presidency (Part I)*, LAWFARE BLOG (May 25, 2016, 3:44 PM), https://www.lawfareblog.com/trump-and-powers-american-presidency-part-i.

government, is the U.S. Department of Justice and the larger law enforcement and regulatory apparatus of the United States government."[21] In a later piece, the commentator explained:

> [Trump's] promise [to appoint a special prosecutor to initiate charges against Presidential opponent Hillary Clinton] tramples on a number of *cherished norms* in the relationship between the Justice Department and the White House and in the conduct of the Justice Department itself. These norms restrict presidential and departmental behavior far more than the bare bones strictures of the Constitution. They are part of our constitutional fabric and rooted in important constitutional values. But our mode of enforcing them is not legal. It is political. It is a matter of our deepest expectations of the presidency and the Justice Department.[22]

Once in office, the President wasted little time confirming fears that he would not adhere to these *cherished norms*. Less than one month into his Presidency, Trump stated to then-FBI Director James Comey, "I hope you can see your way clear to letting this go, to letting Flynn go. He is a good guy. I hope you can let this go."[23] When Comey would not comply, Trump fired

21. *Id.*

22. Benjamin Wittes, *Grab 'Em by the Constitution: Trump and the Justice Department*, LAWFARE BLOG (Oct. 10, 2016, 3:07 PM), https://lawfareblog.com/grab-em-constitution-trump-and-justice-department (emphasis added).

23. Stephen Collinson et al., *James Comey Testimony: Trump Asked Me to Let Flynn Investigation Go*, CNNPOLITICS (June 8, 2017, 1:54 AM), http://www.cnn.com/2017/06/07/politics/james-comey-testimony-released/index.html (stating that the White House, through Trump's personal lawyer, denied that Trump asked Comey to stop the investigation); *see also* Bob Bauer, *When Questions of Norms Become Questions of Law: Trump's Conversations with Comey*, LAWFARE BLOG (May 11, 2017, 8:38 PM), https://lawfareblog.com/when-questions-norms-become-questions-law-trumps-conversations-comey (explaining the norm breaking behavior of this); David Nakamura, *Trump Lawyer: President Never Told Comey 'I Need Loyalty, I Expect Loyalty*,' WASH. POST (June 8, 2017, 2:18 PM), https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/james-comey-testimony-what-we-learn/trump-lawyer-president-never-

Comey. This apparently occurred after receiving confirmation from Comey that Trump, himself, was not under investigation.[24] With Comey no longer running the investigation, the Justice Department selected former FBI Director and federal prosecutor Robert Mueller to act as special counsel.[25] This angered the President; he did not control the investigation.[26] He resorted to undermining the investigation with tweets but did not fire Mueller.[27]

Trump's intervention efforts were not his only norm-breaking behaviors. During his first summer as President, Trump interviewed potential United States Attorney nominees for the Southern District of New York and Washington, D.C.[28] Presidents rarely speak to United States Attorneys, let alone conduct interviews. Former United States Attorney for the Southern District of New York, Preet Bharara, endured Trump's interview process after never speaking with President Barack Obama.[29] At the same time, Administration critics cited a White

told-comey-i-need-loyalty-i-expect-loyalty/?utm_term=.257311a8a7dc.

24. *See* Bauer, *supra* note 19 (discussing the norm-breaking aspect of this behavior); Jack Goldsmith, *The President Can't Kill the Mueller Investigation*, LAWFARE BLOG (Jan. 1, 2018, 10:00 AM), https://www.lawfareblog.com/president-cant-kill-mueller-investigation (explaining the significance of the norm and its observance by Attorney General Sessions and Deputy Attorney General Rosenstein, among others); *Partial Transcript: NBC News Interview with Donald Trump*, CNNPOLITICS (May 11, 2017, 2:29 PM), http://www.cnn.com/2017/05/11/politics/transcript-donald-trump-nbc-news/; *Watch Lester Holt's Extended Interview with President Trump*, NBC NEWS (May 11, 2017, 2:29PM), https://www.nbcnews.com/nightly-news/video/pres-trump-s-extended-exclusive-interview-with-lester-holt-at-the-white-house-941854787582.

25. Rebecca R. Ruiz & Mark Landler, *Robert Mueller, Former F.B.I. Director, Is Named Special Counsel for Russia Investigation*, N.Y. TIMES (May 17, 2017), https://www.nytimes.com/2017/05/17/us/politics/robert-mueller-special-counsel-russia-investigation.html.

26. Michael S. Schmidt & Maggie Haberman, *Trump Humiliated Jeff Sessions After Mueller Appointment*, N.Y. TIMES (Sept. 14, 2017), https://www.nytimes.com/2017/09/14/us/politics/jeff-sessions-trump.html.

27. Jeff Zeleny, *Trump Will Not Call for Firing of Mueller, Officials Say*, CNNPOLITICS (Oct. 30, 2017, 10:43 PM), https://www.cnn.com/2017/10/30/politics/president-donald-trump-robert-mueller/index.html.

28. Chris Smith, *Why Is Trump Personally Interviewing U.S. Attorney Candidates for New York and D.C.?*, VANITY FAIR (Oct. 26, 2017, 6:57 PM), https://www.vanityfair.com/news/2017/10/trump-personally-interviews-us-attorney-candidates-for-new-york-and-dc.

29. Edward-Isaac Dovere, *Preet Bharara Reads Bob Mueller's Tea Leaves*,

House Press Conference featuring Principal Associate Deputy Attorney General Rob Hur.[30] This "renewed warnings of blurred ethical lines between the White House and law enforcement."[31] One former career Justice Department official noted that the Justice Department "generally goes to great lengths to maintain arms length [sic] distance from the White House when it comes to when it comes to [*sic*] specific criminal or investigative matters."[32] Yet, Trump went further; one month into his presidency, Trump announced that he "called the Justice Department to look into the leaks" involving phone calls he made to certain foreign leaders.[33] The President has the absolute power to do these things but norms have developed over time such that the President does not ordinarily do these things.[34]

Over time, Trump learned he could not "control" the Justice Department, or, at least, not as much as he wished.[35] The non-prosecution of 2016 Democratic Presidential candidate, Hilary Clinton, provides the strongest example.[36] His campaign promise to prosecute her for using a private email server to save national security information remains unfulfilled. The President stated:

> The saddest thing is, because I am the President of the United States, I am not supposed to be involved with the Justice Department. I'm not supposed to be involved with the FBI. I'm not

POLITICO MAG. (Oct. 31, 2017), https://www.politico.com/magazine/story/2017/10/31/preet-bharara-reads-bob-muellers-tea-leaves-215767.

30. Josh Gerstein, *Justice Department Briefing at White House Fuels Ethics Worries*, POLITICO (July 27, 2017, 11:55 PM), https://www.politico.com/story/2017/07/27/justice-department-briefing-fuels-ethics-worries-241063.

31. *Id.*

32. *Id.*

33. Charlie Savage & Eric Lichtblau, *Trump Directs Justice Department to Investigate 'Criminal Leaks,'* N.Y. TIMES (Feb. 16, 2017), https://www.nytimes.com/2017/02/16/us/politics/justice-department-leak-investigation-trump.html.

34. Georgetown Law Panel Discussion, *supra* note 17; *see also* Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 532 (2005).

35. *Excerpts from Trump's Interview*, *supra* note 2.

36. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, A REVIEW OF VARIOUS ACTIONS BY THE FEDERAL BUREAU OF INVESTIGATION AND DEPARTMENT OF JUSTICE IN ADVANCE OF THE 2016 ELECTION 37–39 (2018).

> supposed to be doing the kind of things I would love to be doing and I am very frustrated by it.[37]

President Trump seeks to direct the Justice Department on a specific case.[38] Instead, Justice Department employees frustrated Trump's efforts, which, in the words of one commentator, was an unwitting tribute to their work.[39]

President Trump's norm-breaking approach contrasts markedly with his predecessor, Barack Obama. As a constitutional law professor, President Obama diligently observed executive behavior norms.[40] For example, following a press conference on immigration, someone asked President Obama about the investigation of Maricopa County, Arizona sheriff Joe Arpaio.[41] Obama responded, "I have to be careful

37. Radio Interview by Larry O'Connor with Donald J. Trump, U.S. President, in Washington, D.C. (Nov. 3, 2017), http://www.wmal.com/2017/11/03/listen-president-donald-trump-to-larry-oconnor-im-very-unhappy-the-justice-department-isnt-going-after-hillary-clinton/.

38. *See also* Bob Bauer, *The Survival of Norms: The Department of Justice and the President's 'Absolute Rights*,*'* LAWFARE BLOG (Jan. 1, 2018, 10:00 AM), https://www.lawfareblog.com/survival-norms-department-justice-and-presidents-absolute-rights.

39. Benjamin Wittes, *'The Saddest Thing': President Trump Acknowledges Constraint*, LAWFARE BLOG (Nov. 3, 2017, 1:02 PM), https://lawfareblog.com/saddest-thing-president-trump-acknowledges-constraint.

40. *Barack Obama*, WHITEHOUSE.GOV, https://www.whitehouse.gov/1600/presidents/barackobama (last visited Oct. 29, 2018) (looking at how closely President Obama followed this norm can be debated); *see also* CHARLIE SAVAGE, POWER WARS: THE RELENTLESS RISE OF PRESIDENTIAL AUTHORITY AND SECRECY 318 (Back Bay Books rev. ed. 2017) (discussing how the Obama administration could not contact prosecutors to instruct them to offer a plea deal in the Omar Khadr case); Bauer, *supra* note 38 (discussing how Bauer remained out of discussions on the prosecution of John Edwards for campaign finance violations despite Bauer's belief, as White House Counsel, that the legal theory was problematic); Eric Tucker, *Why the Justice Department Operates Free of White House Sway*, L.A. TIMES (Nov. 24, 2016), http://beta.latimes.com/nation/nationnow/la-na-justice-department-white-house-20161123-story.html; *but see* Charlotte Allen, *Politicizing Justice*, WEEKLY STANDARD (Feb. 25, 2013, 12:00 AM), https://www.weeklystandard.com/charlotte-allen/politicizing-justice; Andrew C. McCarthy, *Gee, I'm Starting to Think the Obama DOJ Just Might Be Politicized*, NAT'L REV. (Jan. 14, 2017, 9:00 AM), https://www.nationalreview.com/2017/01/obama-justice-department-political/.

41. Interview by Jose Siade with Barack Obama, U.S. President in Washington, D.C. (Sept. 28, 2011), https://obamawhitehouse.archives.gov/the-

about commenting on individual cases. That's handled typically by the Department of Justice or these other agencies."[42] His response came, in part, from a memo drafted by President George W. Bush's Attorney General Michael Mukasey, outlining relations between the Justice Department and the White House.[43] Mukasey wrote, "[c]ommunications with respect to pending criminal or civil-enforcement matters, however, must be limited. Therefore, the Department will advise the White House about such criminal or civil-enforcement matters only where it is important for the performance of the President's duties and where appropriate from a law enforcement perspective."[44] Later in the memo, Mukasey described how communications would occur:

> With the exception of national security related matters, which are discussed below, all initial communications between the White House staff and the Justice Department regarding any specific pending Department investigation or criminal or civil-enforcement matter should involve only the Counsel to the President or Deputy Counsel to the President and the Attorney General or Deputy Attorney General.[45]

This significantly narrows the communication channels between the White House and the Justice Department.

Attorney General Mukasey's White House communications memo resulted from the last major controversy arising from political interference into Justice Department operations. In late 2004 and into 2005, the George W. Bush Administration discussed firing United States Attorneys who were not "loyal

press-office/2011/09/28/remarks-president-open-questions-roundtable#.

42. *Id.*

43. Memorandum from Michael Mukasey, U.S. Attorney Gen. to Heads of Dep't Components & U.S. Attorneys (Dec. 19, 2007), https://www.justice.gov/sites/default/files/ag/legacy/2008/04/15/ag-121907.pdf.

44. *Id.*

45. *Id.* at 2.

Bushies."[46] As 2006 progressed, seven names emerged.[47] By December, the White House approved firing those seven United States Attorneys.[48] Common traits among those fired were an apparent unwillingness to pursue specific public corruption cases against Democrats, unwillingness to cooperate with Congressional supporters, and not prosecuting a sufficient number of certain types of cases.[49]

Legal scholars identified these rationales as undue political influence on the administration of justice. Professor Laurie Levenson asserted that the firing "jeopardized the credibility of federal prosecutors, disillusioned career prosecutors in those positions, and called into question the separation between professionalism and politics in the enforcement of our federal laws."[50] Professor Ellen Pogdor argued that the firings "provide a sharp contrast to the history and tradition of a nonpolitical DOJ."[51] Professor Sara Sun Beale examined the firings from the context of prosecutorial neutrality.[52] She wrote:

> The position of U.S. Attorney is . . . plainly political . . . . Once selected, however, U.S. Attorneys are expected to leave behind partisan politics, adhering to the norm of prosecutorial neutrality. In this context, prosecutorial neutrality means, at a minimum, that the decision whether and when to bring charges in individual cases should be made without regard to either the political affiliation of the individuals

46. Ari Shapiro, *Timeline: Behind the Firing of Eight U.S. Attorneys*, NAT'L PUB. RADIO (Apr. 15, 2007, 3:07 PM), https://www.npr.org/templates/story/story.php?storyId=8901997.

47. *Id.*

48. *Id.*

49. *See* Beale, *supra* note 9, at 374–80; *see also* Richman, *supra* note 5, at 2100 (describing mechanisms of control over federal criminal enforcement).

50. Laurie L. Levenson, *Live and Learn: Depoliticizing the Interim Appointments of U.S. Attorneys*, 31 SEATTLE U. L. REV. 297, 301–02 (2008).

51. Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569, 1571–72 (2010).

52. *See* Beale, *supra* note 9, at 370–71; *see also* H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695 (2000) (referencing prosecutorial neutrality).

> involved or the resulting benefit (or harm) to either political party.[53]

Professor David Driesen reviewed the firings from a unitary executive theory.[54] This theory places the President over the entire Administration, thus making Justice Department political independence a contradiction.[55] Driesen resolved this, arguing that a president is only justified firing federal prosecutors who do not faithfully execute the law.[56] Finally, Political Science Professor James Eisenstein viewed the firings from an organizational perspective. The firings represented a repeated Justice Department process to gain more control over United States Attorneys.[57] From this perspective, political influence equates with policy enforcement. If the attorneys did not follow policy, they could be removed. One fired United States Attorney, David Iglesias, concurred with Eisenstein that United States Attorney independence motivated the firings, but Iglesias insisted adhering to political wishes was not part of his official oath, instead it was to uphold the Constitution.[58]

The norm against political involvement in prosecutorial decisions originated relatively recently. By the 1970s, the norm's formation was underway, but was accelerated by President Nixon's conduct during the Watergate investigation.[59] When the Attorney General and Deputy Attorney General refused to fire the special prosecutor, Nixon fired them.[60] This

53. Beale, *supra* note 9, at 370–71.

54. David M. Driesen, *Firing U.S. Attorneys: An Essay*, 60 ADMIN. L. REV. 707, 714–15 (2008) (unitary executive theory is the notion that the president has complete control over the executive branch).

55. *Id.* at 709.

56. *Id.* at 727.

57. James Eisenstein, *The U.S. Attorney Firings of 2006: Main Justice's Centralization Efforts in Historical Context*, 31 SEATTLE U. L. REV. 219, 220–21 (2008).

58. David C. Iglesias, *A Prosecutor's Non-Negotiables: Integrity and Independence*, 44 GA. L. REV. 939, 943 (2010).

59. Kent, *supra* note 9, at 3–5; *see also* Constance O'Keefe & Peter Safirstein, Note, *Fallen Angels, Separation of Powers, and the Saturday Night Massacre: An Examination of the Practical, Constitutional, and Political Tensions in the Special Prosecutor Provisions of the Ethics in Government Ac*t, 49 BROOK. L. REV. 113, 117–18 (1982).

60. *See* O'Keefe & Safirstein, *supra* note 59.

led to a movement for career federal prosecutors who remain, regardless of which party controls the Presidency and the Justice Department.[61] Prior to this, most assistants remained only as long as the United States Attorney remained.[62] This dynamic created an overt connection between federal prosecutors and an administration.

The connection between prosecutors and politics vacillated prior to Nixon's Administration.[63] Nixon's Justice Department emphasized that federal prosecutors must adhere to Administration policy and promote it through political activity.[64] This is true even though the Southern District of New York, renowned for its independence, trained political operatives and used its power to undermine Democratic city leadership.[65] Future Republican Presidential Candidate Thomas Dewey established his political credentials as an Assistant United States Attorney during President Hoover's Administration.[66] When Franklin Roosevelt assumed the Presidency, Dewey resigned with his mentor, United States Attorney George

61. Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271, 274, 286–87 (2002). Today, Assistant United States Attorneys work without any connection to the United States Attorney. *Id.* Assistants remain in office despite Administration changes and party changes. *Id.* While this insulates assistants from political preferences, it has some effects on agenda setting. Professor Lochner argues that (1) agenda setting is an inherently political act; (2) institutional structures affect prosecutorial agendas; (3) present institutional structures are ill-equipped to handle the unique difficulties and opportunities that stem from a growing league of career prosecutors. *Id.* Lochner argues that this makes career prosecutors hard to motivate. *Id.* They view United States Attorneys as *political appointees* who have no sense about what makes a good criminal case or what cases should be prosecuted. *Id.*

62. *See* Eisenstein, *supra* note 57, at 227–29.

63. NANCY V. BAKER, CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789-1990, at 32–35 (Univ. Press of Kan. 1992) (arguing that there have been three norms of *attorney general* behavior: (1) independent from executive control; (2) nonpartisanship (usually emerges post scandal); and (3) loyalty to president as part of cabinet, and that attorneys general can fall along a continuum from political to neutral).

64. JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 37–38 (Johns Hopkins Univ. Press 1978).

65. MARY M. STOLBERG, FIGHTING ORGANIZED CRIME: POLITICS, JUSTICE, AND THE LEGACY OF THOMAS E. DEWEY 67–77 (Northeastern Univ. Press 1995).

66. *Id.*

Medalie.[67] Several years before this, Attorney General Harry Daughterty used his position to coerce campaign funds from German interests who hoped to regain assets unlawfully seized during World War I.[68] Daughtery also allegedly sold pardons and refused to investigate the Teapot Dome scandal because of its adverse potential adverse.[69] Prior to this, President Grant's personal secretary, Orville Babcock, faced an indictment for conspiring with St. Louis revenue officials to defraud the government of millions of dollars of whiskey tax money.[70] During one trial, special prosecutor John Henderson, alluded to Grant during closing argument.[71] This infuriated Grant, who then fired Henderson.[72] This impaired the Grant Administration's prosecution of Grant's personal secretary.[73] Finally, when Thomas Jefferson assumed the presidency, becoming the first opposition party President, he refused to re-nominate several United States Attorneys that Adams appointed but Congress did not confirm, citing their Federalist credentials as justification.[74] Jefferson replaced them with Republican supporters.[75] Toward the end of his second term, Jefferson imposed an embargo on British trade that required judicial enforcement.[76] Many United States Attorneys in the northeast offered their resignations because they refused to enforce the embargo.[77] The Massachusetts United States

67. *Id.*

68. LATON MCCARTNEY, THE TEAPOT DOME SCANDAL: HOW BIG OIL BOUGHT THE HARDING WHITE HOUSE AND TRIED TO STEAL THE COUNTRY 71 (Random House Trade Paperback ed. 2009).

69. *Id.* at 72.

70. 2 ALLAN NEVINS, HAMILTON FISH: THE INNER HISTORY OF THE GRANT ADMINISTRATION 786–90 (Frederick Ungar Publ'g Co. rev. ed. 1957).

71. *Id.*

72. *Id.* (explaining that Henderson cast one of the Republican votes against removing President Andrew Johnson from office in the Nation's first presidential impeachment trial); *see also* Ralph J. Roske, *The Seven Martyrs?* 64 AM. HIST. REV. 323, 328 (1959).

73. NEVINS, *supra* note 70, at 786–90.

74. RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 33, 40 (Oxford Univ. Press 1971).

75. *Id.*

76. Douglas Lamar Jones, *"The Caprice of Juries": The Enforcement of the Jeffersonian Embargo in Massachusetts*, 24 AM. J. LEGAL HIST. 307, 311–12 (1980).

77. LEONARD D. WHITE, THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE

Attorney, George Blake, actively undermined enforcement.[78] As these examples demonstrate, United States Attorneys and their assistants have long been politicized.

II. Politicization and Prosecution

Politicization has become a code word for complaints about the government's use of law enforcement power. When the government makes a controversial criminal law enforcement decision, critics assert that the Justice Department has become politicized.[79] These conflicting accusations impede the usefulness of politicization to determine the propriety of Administration and/or Justice Department decisions. This section defines politicization by dividing it into four types, each type connecting the political process to criminal prosecution. This more nuanced definition provides insight into how politics pervades prosecution.[80]

Of the different paths through which politics affects prosecution, policy likely is the most palatable. Politicization through policy uses criminal prosecution choices to advance particular policy goals. These policy goals are identified by a particular political party. Discussion about politics and policy focuses upon who should make the decision rather than whether politics is a permissible basis. Professor Eisenstein observed this during his study of federal prosecutors in the 1960s.[81] He

HISTORY 1801-1829, at 414–15 (MacMillan Co. 1961).

78. *Id.* at 455.

79. *See, e.g.*, Allen, *supra* note 40; McCarthy, *supra* note 40 (the author is a former Assistant United States Attorney for the Southern District of New York and prosecuted high-profile terrorism cases); *but see* Cheryl K. Chumley, *Eric Holder: I Fixed George W. Bush's Partisan Justice Department*, WASH. TIMES (Feb. 4, 2015), https://www.washingtontimes.com/news/2015/feb/4/eric-holder-i-fixed-george-w-bushs-politicized-jus/.

80. *See* Steven I. Friedland, *"Advice and Consent" in the Appointments Clause: From Another Historical Perspective,* 64 DUKE L.J. ONLINE 173 (2015), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1010&context=dlj_online; Russell L. Weaver, *"Advice and Consent" in Historical Perspective*, 64 DUKE L.J. 1717 (2015) (explaining that a similar approach was used by Professors Weaver and Friedland in their debate about the historical role the Senate played in the advice and consent of judicial appointments).

81. *See generally* EISENSTEIN, *supra* note 64.

saw tension between the Justice Department in Washington, D.C., and the United States Attorney's offices, located in each federal district throughout the United States.[82] The Attorney General is the nation's chief law enforcement officer and the United States Attorney is a federal district's chief law enforcement officer.[83] For uniform law enforcement, the Attorney General must establish policy preferences because the government cannot prosecute every federal law violation.[84] Presumably, United States Attorneys will adhere to the Administration's policy preferences.[85] At the same time, each district presents unique problems which the United States Attorney must address, especially those that the state cannot or will not address.[86] Sometimes the United States Attorney must choose between district issues and national priorities.[87] These conflicts must be resolved internally, through bureaucratic politics.[88]

The magnitude and frequency of disputes between the Justice Department and United States Attorneys can be minimized by selecting United States Attorneys based upon political affiliation and ideology. This is another method for politicizing prosecution. Presidential administrations use the United States Attorney position to reward political loyalty, especially at the local level.[89] Politically-motivated selection ensures loyalty. Appointees will adhere to the Administration's policies.[90]Patronage often conflicts with merit-based selection.[91]

82. *Id.* at 4–8, 16.

83. Levenson, *supra* note 50, at 303–05.

84. Richman, *supra* note 5, at 2097–2100.

85. *See* J. Richard Broughton, *Politics, Prosecutors, and the Presidency in the Shadows of Watergate*, 16 CHAP. L. REV. 161, 170–71 (2012); Perry, *supra* note 14, at 142–43.

86. Tom Rickhoff, *The U.S. Attorney: Fateful Powers Limited*, 28 ST. MARY'S L.J. 499, 504–08 (1997) (using the Western District of Texas as an example of the need for local control).

87. *See id.*; Andrew B. Whitford, *Bureaucratic Discretion, Agency Structure, and Democratic Responsiveness: The Case of the United States Attorneys*, 12 J. PUB. ADMIN. RES. & THEORY 3, 6 (2002).

88. Whitford, *supra* note 87, at 12–13.

89. Beale, *supra* note 9, at 372–73.

90. Richman, *supra* note 5, at 2104–05 (outlining the steps taken by Bush Administration to put loyal U.S. Attorneys in place).

91. Griffin B. Bell & Daniel J. Meador, *Appointing United States Attorneys*, 9 J. L. & POL. 247, 249–51 (1993) (describing the effects of merit-

Party loyalists, even those with the proper statutory qualifications, are not always the most able.[92] Assuming some degree of competence is desired, the question becomes the balance between political loyalty and legal ability.

Loyalty causes people to act on behalf of those to whom loyalty is owed. In a prosecutorial context, party loyalists can channel prosecutorial power to serve the interests of the prosecutor's political party, thus creating another politicization method.[93] To exercise prosecutorial power, prosecutors only need probable cause that a person violated a vaguely worded and broadly written criminal statute.[94] In a world where accusations equate to presumptions of guilt, a politically-motivated prosecutor can use criminal charges to damage opposition candidates if not eliminate them.[95] While the charges themselves might cause damage, the prosecutor must still prove the case to a jury beyond a reasonable doubt so federal prosecutors cannot stray too far from what can be proven.[96] Similarly, prosecutors may use their position to advance particular political interests by targeting opposing fundraisers or prominent supporters.[97] By selecting opposition interests for investigation, prosecutors are more likely to find actual crimes

only selection during the Carter Administration).

92. *See* Perry, *supra* note 14, at 142–46 (discussing different characteristics and how their interaction affects decision-making); Rickhoff, *supra* note 86, at 518–20 (identifying ideal characteristics).

93. Levenson, *supra* note 50, at 309–10.

94. *See generally* Lerner, *supra* note 13.

95. *See generally* Richard L. Lippke, *The Prosecutor and the Presumption of Innocence*, 8 CRIM. L. & PHIL. 337 (2014) (explaining the relationship between prosecutors and the presumption of guilt); Anna Roberts, *Arrest as Guilt*, ALA. L. REV. (forthcoming 2018) (describing the court system and how it views arrests as guilt).

96. *See* U.S. ATTORNEYS' MANUAL 9-27.300 (U.S.A.M. 2018) ("Once the decision to prosecute has been made, the attorney for the government should charge and pursue the most serious, readily provable offenses. By definition, the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences."); Larry Laudan, *Is Reasonable Doubt Reasonable?*, *in* PUB. LAW & LEGAL THEORY RESEARCH PAPER, at 295 (Ser. No. 144, 2003) (on the ambiguity of reasonable doubt); Miller W. Shealy, Jr., *A Reasonable Doubt About "Reasonable Doubt,"* 65 OKLA. L. REV. 225 (2013) (discussing the origins of reasonable doubt).

97. *See* Bruce A. Green & Fred V. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 858–59 (2004).

committed by opposition interests.[98]

However, criminal investigations do not always target the opposition. Presidents may find that their Administration or their political allies become the target of a criminal investigation.[99] The President may respond by using prosecutorial powers as a shield, thus the fourth means of politicization. Presidents can remove prosecutors suspected of disloyalty and replace them with more loyal officers.[100] They can also terminate the investigation.[101]

Of these four politicization categories, policy is the most palatable to modern sympathies. Prosecution is an inherently political act.[102] Presumably, these are candidates who win elections because their policy choices are more popular.[103] Thus, an Administration may legitimately use policy preferences when governing, including when making criminal prosecution decisions. Patronage is less palatable than policy, though still accepted at certain levels. Incoming administrations reward top advisors with policy positions; however, the advisors should

98. *See* W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 FORDHAM L. REV. 1333, 1334 (2009) (discussing how all government policies discriminate in some way).

99. *See* Josh Gerstein, *The Fraught Political History of Special Prosecutors*, POLITICO (Mar. 2, 2017, 3:24 PM), https://www.politico.com/story/2017/03/special-prosecutors-political-history-235610); Jim Mokhiber, *A Brief History of the Independent Counsel Law: Secrets of an Independent Counsel*, PBS.ORG (May 1998), https://www.pbs.org/wgbh/pages/frontline/shows/counsel/office/history.html.

100. *See generally* Beale, *supra* note 9; Levenson, *supra* note 50; Podgor, *supra* note 51.

101. *See* Mark Greenberg, *Can Trump Obstruct Justice?*, *in* PUB. LAW & LEGAL THEORY RESEARCH PAPER (Ser. No. 18-24, 2018); Josh Blackman, *What Obstruction Law Applies to the President?*, LAWFARE BLOG (June 6, 2018, 12:00 PM), https://www.lawfareblog.com/what-obstruction-law-applies-president.

102. *See* Broughton, *supra* note 85, at 167-69; Lochner, *supra* note 61, at 273; Perry, *supra* note 14, at 131–32.

103. Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 797–98 (2012) ("Legislators and elected chief prosecutors serve as professional delegates of a given constituency. For representative democracy to work—that is, for the will of the people to be served by its delegates—lawmakers and chief law enforcers must be accessible to the citizenry, responsive to popular demands, and accountable for their decisions." (citation omitted)); *see generally* Lawrence J. Grossback et al., *Electoral Mandates in American Politics*, 37 BRIT. J. POL. SCI. 711 (2007) (discussing electoral mandates finding that electoral mandates exist in the American political process).

have a high-level of legal ability.[104] When prosecutors use their discretionary authority for partisan purposes, they cross a line. Using the legal process to achieve political advantage impugns the legal system's apparent objectivity.[105] Finally, administrations who use political power to shield themselves from criminal liability place themselves above the law.[106]

III. The Political Context of Washington's Selections

Throughout George Washington's eight years as President, policy, patronage and partisanship played a significant role in his United States Attorney appointments. Washington understood these appointments visually represented federal government. If the people respected the appointments then the people would, in turn, respect the fledgling national government. This meant those hired had to endorse Washington's vision for the nation as expressed in policy decisions. The people he selected had to be loyal to the federal government. They had to actively advance its political interests.

To understand Washington's politicized selections, one must understand the political context of the time and how the United States Attorney role fit within that context. Although the issues differed, today's sharp political divisions replicate those, which existed as Washington made his appointments. As the President noted in his letter to Attorney General nominee Randolph, selecting the best people as United States Attorneys was crucial to the new government's success.

A. The Perception and Role of USDAs

While the 1787 Constitutional Convention left several issues unresolved, the most significant was the Judiciary.[107]

104. Beale, *supra* note 9, at 370–71.

105. Levenson, *supra* note 50, at 309–10; Podgor, *supra* note 51, at 1582.

106. *See, e.g.*, Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 398–400 (1993) (using the Iran-Contra investigation as an example of how Presidents can shield themselves and allies from investigation).

107. Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1424–25

Congress first met in 1789 and it addressed the judicial issues.[108] A senate committee consulted with the fledgling Nation's legal leaders and debated the Judiciary Act's details.[109] One issue was the creation of federal courts in each state.[110] With a federal district court in each state, the committee understood that the federal government required an attorney in each state to represent federal interests.[111] The federal government created United States Attorneys.[112] United States Attorneys had to meet two statutory requirements: (1) a meet person and (2) learned in the law.[113] Washington

(1989).

108. WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 4–7 (Wythe Holt & L. H. LaRue eds., Univ. of Okla. Press 1990); David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. CHI. L. SCH. CHI. UNBOUND 161, 208–09 (1995); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 59–63 (1923).

109. Maeva Marcus, *The Judiciary Act of 1789 Political Compromise or Constitutional Interpretation*, *in* ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, at 15–16 (Maeva Marcus ed., 1992); RITZ, *supra* note 108, at 16.

110. Marcus, *supra* note 109, at 17–18; Warren, *supra* note 108, at 66–67.

111. Gerhard Casper, *The Judiciary Act of 1789 and Judicial Independence*, *in* ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, at 286 (Maeva Marcus ed., 1992); Marcus, *supra* note 109, at 20–21; Currie, *supra* note 108, at 209–14; Warren, *supra* note 108, at 108–09.

112. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73 (1789).

113. *Id.* Despite the plethora of research on the Attorney General and United States Attorneys that references the requirement that those who hold the position *meet* people, the term is never defined. Historical research in other areas employs the term when quoting texts from the 17th and early 18th centuries. In a 1661 Boston General Court Decree, the Court had the power to issue arrest warrants for Quakers. Henry Cadbury, *The King's Missive*, *in* 63 QUAKER HIST. 117, 120 (1974). These warrants could be directed to the constable or, in the constable's absence, "to any other meet person . . . ." *Id.* In a 1715 prenuptial document, a woman stipulated that "her self [sic] or with the [a]ssistance of [s]uch meet person or persons whom [s]he shall appoint . . ." may control her wealth. Virginia Bernhard, *Cotton Mather's "Most Unhappy Wife": Reflections on the Uses of Historical Evidence*, 60 NEW ENG. Q. 341, 355 (1987). In 1677, as a pastor left his congregation, the congregation requested the pastor's "help and advise [sic] and direction respecting a meet person for that work . . . ." Walter R. Steiner, *The Reverend Gershom Bulkeley of Connecticut, An Eminent Clerical Physician*, 2 MED. LIBR. & HIST. J. 91, 93 (1904). From these three uses it appears that "meet person" refers to a person who will act in the place of or in coordination with someone else. The term also appears in a 19th century British sermon on the nativity by Reverend Lancelot

prepared his selections, as he was aware of the committee's plans.[114]

Washington considered the United States Attorneys' part of the judiciary. Four key pieces of evidence demonstrate this: first, traditional state practice made district attorneys judicial figures. Second, by including them within the Judiciary Act, Congress indicated its understanding. Washington had no reason to disagree. Third, in Washington's letter informing Randolph of his nomination, Washington discussed the qualities of those for the judiciary. The letter's context indicates Washington believed those representing the government fell into this category. Finally, Washington included the United States District Attorneys in the same appointment message as federal judges.

In the years preceding Washington's first United States Attorney appointments, prosecutors began shifting from purely private attorneys to government-appointed, sometimes by the local judiciary.[115] Criminal prosecution had been largely a

Andrewes. LANCELOT ANDREWES, SERMONS OF THE NATIVITY AND OF REPENTANCE AND FASTING 23 (1878) In reference to Jesus's relationship as a "Child" or "Son," Andrewes uses "meet person" three times. *Id.* "Therefore, though two natures, yet but one Person in both. A meet person to make a Mediator of God and man, as symbolizing with either, God and man. A meet person, if there be division between them, as there was, and 'great thoughts of heart' for it, to make an union ; *ex utroque unum*, seeing He was *unum ex utroque*. Not man only ; there lacked the shoulder of power. Not God only ; there lacked the shoulder of justice ; but both together. And so have ye the two Supporters of all, 1. Justice, and 2. Power. A meet Person to cease hostility, as having taken pledges of both Heaven and earth—the chief nature in Heaven, and the chief on earth." *Id.* In these instances, "meet person" refers to someone who brings two sides together. *Id.* Most likely, the Act's drafters had some combination of meanings in mind. To stand in for someone else requires good character and trustworthiness. Therefore, "meet person," as used in this article, refers to a person of high-character.

114. By late May, 1789, Washington began receiving correspondence soliciting a position under the newly introduced judiciary bill. *See, e.g.*, Letter from Arthur Lee to George Washington, U.S. President (May 21, 1789), https://founders.archives.gov/documents/Washington/05-02-02-0256; Letter from Benjamin Nicholson, Lieutenant Colonel, Balt. Town Battalion, to George Washington, U.S. President, n.1 (May 27, 1789), https://founders.archives.gov/documents/Washington/05-02-02-0288.

115. JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 15–21 (Lexington Books 1980); Yue Ma, *Exploring the Origins of Public Prosecution*, 18 INT'L CRIM. JUST. REV. 190, 198–201 (2008).

private pursuit.[116] Crime victims pursued offenders through the courts, pleading their own cases in minor matters and securing the services of attorneys in serious matters.[117] Not every crime had an identifiable victim;[118] moral offenses often only had society as a victim.[119] In some places this meant those offenses were not prosecuted.[120] To remedy this, some states hired local attorneys to prosecute.[121] In others states, the Attorney General initiated the cases.[122] The new federal courts would not adjudicate victim crimes as most federal crimes were against the federal government.[123] If Washington, himself, did not know

116. *See* John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511 (1994) (pointing out a significant body of literature on the use of private prosecution in the United States); Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth Century United States*, 39 AM. J. LEGAL HIST. 43 (1995); Craig B. Little & Christopher P. Sheffield, *Frontiers and Criminal Justice: English Private Prosecution Societies and American Vigilantism in the Eighteenth and Nineteenth Centuries*, 48 AM. SOC. REV. 796 (1983); Andrew Sidman, *The Outmoded Concept of Private Prosecution*, 25 AM. U. L. REV. 754 (1975); Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney and American Legal History*, 30 CRIME & DELINQ. 568 (1984); John A.J. Ward, *Private Prosecution—the Entrenched Anomaly*, 50 N. C L. REV. 1171 (1972).

117. ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880, at 38 (Univ. of N.C. Press 1989).

118. David H. Flaherty, *Law and the Enforcement of Morals in Early America*, 1 CRIME & JUST. IN AM. HIST. 127, 170–72 (1991); Douglas Greenberg, *Crime, Law Enforcement, and Social Control in Colonial America*, 26 AM. J. LEGAL HIST. 293 (1982).

119. Flaherty, *supra* note 118; Greenberg, *supra* note 118.

120. Greenberg, *supra* note 118.

121. Ma, *supra* note 115, at 199.

122. *Id.* at 199–201.

123. Most early federal crimes consisted of crimes against the government such as theft of mail, counterfeiting currency or evading customs. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 71 (Basic Books, 1993). When the federal government had jurisdiction over federal crimes, these were based on federal jurisdiction over crimes occurring on the high seas. *See* An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 112 (1790); *see also* Robert C. Palmer, *The Federal Common Law of Crime*, 4 LAW. & HIST. REV. 267 (1986) (discussing the scholarly debate regarding the application of common law of crimes in new federal courts); Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 LAW. & HIST. REV. 223 (1986); Gary D. Rowe, *The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendency, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919 (1992).

this, those who made nomination recommendations knew that those nominated would represent the interests of the United States.

While state practice served as the model for the Judiciary Act and Congress identified the new United States Attorneys as judicial officers, Congress debated who would appoint these attorneys.[124] Initial drafts granted the Supreme Court appointment power.[125] Later, Congress changed the provision, giving it to the President with the Senate's advice and consent.[126] While this might indicate a desire to make the District Attorneys executive officials, the judges were subject to the same process.

On September 24, 1789, Washington signed the Judiciary Act and sent most of his nominees to the Senate for its consent.[127] Among these nominees was Virginia's Edmund Randolph as Attorney General.[128] Four days later, Washington wrote Randolph informing Randolph of the appointment and expressing Washington's desire that Randolph accept it.[129] Washington began by defining the characteristics he hoped those in the judiciary would possess, writing, "the selection of the fittest characters to expound the laws, and dispense justice, has been an invariable object of my anxious concern."[130] Removed from its context, this seemingly refers to judges. However, Washington then wrote, "I mean not to flatter when I say that considerations like these have ruled in the nomination of the Attorney-General of the United States &, that my private wishes wd [sic] be highly gratified by yr [sic] accepte [sic] of the

124. Warren, *supra* note 108, at 108–09.

125. *Id.*

126. *Id.*

127. *See Primary Documents in American History: Judiciary Act of 1789*, LIBRARY OF CONGRESS (Apr. 25, 2017), http://www.loc.gov/rr/program/bib/ourdocs/judiciary.html (discussing the date Washington signed the Judiciary Act); *see also* Letter from George Washington, U.S. President, to the U.S. Senate (Sept. 24, 1789), https://founders.archives.gov/documents/Washington/05-04-02-0053) (listing Washington's nominees).

128. Letter from George Washington to the U.S. Senate, *supra* note 127.

129. Letter from George Washington to Edmund Randolph, *supra* note 1 (noting that interestingly, Washington nominated, and the Senate confirmed, many of Washington's nominees prior to informing the nominee of the nomination).

130. *Id.*

Office . . . ."[131] With these words, Washington indicated that the United States' legal representatives were as much judicial figures as judges.

By nominating his attorneys, Wahsington demonstrated that he considered them part of the judiciary. When Washington nominated United States Attorneys, he did so at the same time as judicial appointments.[132] For each judicial district, Washington nominated a judge, an attorney, and a marshal, all of whom served the court.[133] He also nominated the Supreme Court Justices and Attorney General.[134]

Compared to those with whom they were nominated, the United States Attorney position was not prestigious and was considered, at best, a second-rate position. The most reputable attorneys sought and filled Congressional and Supreme Court positions. Of the ninety-five men who served in the first Congress, forty-three had formal legal training and backgrounds,[135] two became presidents,[136] one temporarily became the Supreme Court's third Chief Justice and another would serve on the Court,[137] one was a president of the Continental Congress,[138] and four had signed either the Declaration of Independence or the United States

131. *Id.*

132. Letter from George Washington to the U.S. Senate, *supra* note 127; *see also* Letter from George Washington, U.S. President, to the U.S. Senate (Sept. 25, 1789), https://founders.archives.gov/documents/Washington/05-04-02-0058.

133. Letter from George Washington to the U.S. Senate, *supra* note 127.

134. *Id.*

135. *See generally* BIOGRAPHICAL DIRECTORY U.S. CONG., http://bioguide.congress.gov/biosearch/biosearch.asp (last visited Nov. 2, 2018).

136. *Madison, James, Jr., (1751 - 1836)*, BIOGRAPHICAL DIRECTORY U.S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000043 (last visited Nov. 2, 2018); *Monroe, James, (1758 - 1831)*, BIOGRAPHICAL DIRECTORY U.S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000858 (last visited Nov. 2, 2018).

137. *Ellsworth, Oliver, (1745 - 1807)*, BIOGRAPHICAL DIRECTORY U.S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=E000147 (last visited Nov. 2, 2018) (Oliver Ellsworth served as Chief Justice); *Paterson, William, (1745 - 1806)*, BIOGRAPHICAL DIRECTORY U.S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=P000102 (last visited Nov. 2, 2018) (William Paterson served as an Associate Justice).

138. *Boudinot, Elias, (1740 - 1821)*, BIOGRAPHICAL DIRECTORY U.S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000661 (last visited Nov. 2, 2018).

Constitution.[139] Washington's Supreme Court Justice appointments also included illustrious attorneys.[140] Washington chose John Jay, a leader in the Continental Congress and writer of several Federalist Papers, to be Chief Justice.[141] He also chose John Rutledge, who temporarily became the third Chief Justice.[142] Rutledge had been a state governor and a delegate to the Constitutional Convention.[143] James Wilson, also nominated to the Supreme Court, was a leading American legal scholar and played an important role in the Constitutional Convention.[144]

Well respected attorneys not elected to Congress or appointed to the Supreme Court hoped for federal district court judgeships. During the summer of 1789, once certain there would be lower federal courts, people began sending Washington

139. *Clymer, George, (1739 - 1813)*, BIOGRAPHICAL DIRECTORY U.S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000538 (last visited Nov. 2, 2018); *Morris, Robert, (1734 - 1806)*, BIOGRAPHICAL DIRECTORY U.S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000985 (last visited Nov. 2, 2018); *Read, George, (1733 - 1798)*, BIOGRAPHICAL DIRECTORY U.S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=R000091 (last visited Nov. 2, 2018); *Sherman, Roger, (1721 - 1793)*, BIOGRAPHICAL DIRECTORY U.S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000349 (last visited Nov. 2, 2018).

140. *See generally Justices 1789 to Present*, SUP. CT. U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Nov. 2, 2018) (showing Washington selected John Jay as Chief Justice and John Rutledge, William Cushing, James Wilson, John Blair, and James Iredell as the Associate Justices).

141. WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 54 (Univ. of S.C. Press 1995); *see generally* Sandra Frances VanBurkleo, *"Honor, Justice, and Interest:" John Jay's Republican Politics and Statesmanship on the Federal Bench*, *in* SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 29 (Scott Douglas Gerber ed., N.Y.U. Press 1998).

142. CASTO, *supra* note 141, at 54.

143. James Haw, *John Rutledge: Distinction and Declension*, *in* SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 71 (Scott Douglas Gerber ed., N.Y.U. Press 1998); *see also* ELKINS & MCKITRICK, *supra* note 18, at 526–27. (explaining that Rutledge was nominated, but was not confirmed due to his opposition to the Jay Treaty).

144. CASTO, *supra* note 141, at 54; Mark D. Hall, *James Wilson: Democratic Theorist and Supreme Court Justice*, *in* SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 126–28 (Scott Douglas Gerber ed., N.Y.U. Press 1988).

judicial recommendations.[145] Not knowing the legal community in these states, Washington accepted the recommendations, as most came from the state's congressional delegation.[146] Recommenders usually ranked candidates.[147] The first person listed was the federal judge recommendation and the others became candidates for the United States Attorney position.[148] Thus, the pool of potential district attorneys was limited to those not selected for Congress, the Supreme Court, or the federal bench.

Another limiting factor was the position's financial compensation. The job of a United States attorney was a part-time position, as the United States government was one of many clients.[149] United States Attorneys received a fee for each case they pursued.[150] While this incentivized filing cases, some United States Attorneys were less inclined to act and later submitted bills for services rendered for work unrelated to a court case.[151] Future Supreme Court Chief Justice John Marshall was one of Washington's initial appointments.[152] Marshall declined the appointment, however, citing his significant state-court practice.[153] This shows that Marshall, who would become a staunch Federalist, did not believe the federal courts and the position's compensation were worth his time.

145. *See, e.g.*, Letter from Arthur Lee to George Washington, *supra* note 114; Letter from Benjamin Nicholson to George Washington, *supra* note 114, at n.1.

146. *See infra* IV(A).

147. *Id.*

148. *See, e.g.*, Letter from Jeremiah Wadsworth, Member, U.S. House of Representatives, to Thomas Jefferson, U.S. Sec'y of State (Feb. 22, 1791), https://founders.archives.gov/documents/Jefferson/01-19-02-0103-0003.

149. Symposium, *The Office of U.S. Attorney and Public Safety: A Brief History Prepared for the "Changing Role of U.S. Attorneys' Offices in Public Safety,"* 28 CAP. U. L. REV. 753, 755–56 (2000).

150. EISENSTEIN, *supra* note 64, at 9–10; NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940, at 257 (Yale Univ. Press 2013).

151. *See, e.g.*, Letter from Edmund Randolph, U.S. Sec'y of State, to Alexander Hamilton, U.S. Sec'y of the Treasury Jul. 2, 1794), http://founders.archives.gov/documents/Hamilton/.

152. Letter from George Washington to the U.S. Senate, *supra* note 127.

153. Letter from John Marshall to George Washington, U.S. President (Oct. 14, 1789), https://founders.archives.gov/documents/Washington/.

B. Types of "Politics" When Hiring

President George Washington began to experience partisan turbulence similar to today's political atmosphere. Unlike today's deeply entrenched allegiances, partisan political alliances formed and mutated during Washington's presidency. Hoping to stay above the political fragmentation, Washington navigated these changes to fulfill his particular political objectives.[154] The first divide Washington encountered arose between the Constitution's supporters and detractors.[155] Once the federal government began operating, its detractors turned to constitutional interpretation.[156] Republicans pushed for a strict, narrow interpretation, along with some who favored the Constitution, giving the federal government little authority beyond the Constitution's specific wording.[157] Their opponents favored a more expansive constitutional interpretation that gave the federal government powers implied in the constitution's wording.[158]

Having served as the Constitutional Convention's presiding officer, Washington identified with Constitutional federalists, or those who supported ratifying the new Constitution.[159] He had agreed to serve this function because his experience as the Continental Army's Commander-in-Chief gave him a national perspective.[160] His post-war commercial business interests required interstate commerce and he understood the need for

154. JOHN FERLING, THE ASCENT OF GEORGE WASHINGTON: THE HIDDEN POLITICAL GENIUS OF AN AMERICAN ICON xix–xxi (Bloomsbury Press 2009).

155. MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (1st ed. Oxford Univ. Press 2016); PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788 (1st ed. Simon & Schuster 2010).

156. JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS 8-10 (Yale Univ. Press 1993); *see generally* Lance Banning, *Republican Ideology and the Triumph of the Constitution, 1789 to 1793*, 31 WM. & MARY Q. 167 (Omohundro Inst. of Early Am. Hist. & Culture 1974).

157. CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 155–56 (Maeva Marcus et al. eds, Cambridge Univ. Press 1st ed. 2008).

158. *Id.* at 150–51.

159. FERLING, *supra* note 154, at 267–68.

160. *Id.* at 262–67.

national regulation, a power the Articles of Confederation lacked.[161] However, Washington also knew that the anti-federalists feared a centralized national government and identified themselves more closely with their respective states.[162] His appointments had to balance these interests.[163] He sought people with strong local reputations who also supported the new national government.[164] Therefore, Washington chose constitutional federalists with his initial government personnel selections.

This initial divide did not last long as the Constitution's opponents quickly accepted its legitimacy.[165] Unity did not result, however, as competing constitutional interpretations emerged,[166] most noticeably from within Washington's administration.[167] Treasury Secretary Alexander Hamilton led the Federalists, or those supporting an expansive constitutional interpretation.[168] Meanwhile, Secretary of State Thomas Jefferson led the opposition to Hamilton's centralization of executive branch power.[169] Washington generally sided with Hamiltonian Federalists.[170] Hamilton served Washington during the Revolutionary War and, despite some differences, Washington supported Hamilton's philosophy.[171] Consistent

161. *Id.* at 258–61.

162. *Id.* at 270–73; *see also* GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815, at 75–76 (David M. Kennedy ed., Oxford Univ. Press 2009).

163. DAVID S. HEIDLER & JEANNE T. HEIDLER, WASHINGTON'S CIRCLE: THE CREATION OF THE PRESIDENT loc. 1342–1346 (Random House Publ'g Grp. 2015) (ebook).

164. WOOD, *supra* note 162, at 106–10.

165. Banning, *supra* note 156, at 168–69.

166. FRITZ, *supra* note 157, at 150–55.

167. ELKINS & MCKITRICK, *supra* note 18, at 18–28 (describing the ideological differences between Jefferson and Hamilton); JOHN FERLING, JEFFERSON AND HAMILTON: THE RIVALRY THAT FORGED A NATION 213–15 (Bloomsbury Press 2013) (explaining how Hamilton's idea for a Bank of the United States triggered Jefferson and Hamilton divide).

168. RON CHERNOW, ALEXANDER HAMILTON 388–95 (Penguin Press 2004).

169. *Id.*; LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 45–49 (Oxford Univ. Press 2004); FERLING, *supra* note 167, at 214–18; SHARP, *supra* note 156, at 40–42; WOOD, *supra* note 162, at 144–47.

170. CHERNOW, *supra* note 168, at 395.

171. FERLING, *supra* note 154, at 282–84.

with these preferences, Washington's later United States Attorney appointments aligned with Hamiltonian Federalists to ensure enforcement of Hamilton's legislative agenda.[172]

IV. The Process, the Prosecutors, and Politicization

Against these political backdrops, Washington made his initial attorney selections and, as time passed, selected replacements when necessary. To make each appointment, Washington relied upon others in the government and others he trusted to provide recommendations. Following these recommendations, Washington would select someone and then send the nomination to the Senate. His selections shared certain characteristics, especially in terms of age, experience, and personal connections. These similarities resulted in a group loyal to Washington and his policies.[173]

A. Process

Even before George Washington assumed the Presidency, those hoping to work for the new federal government wrote seeking appointment, mostly for Treasury and public works positions.[174] Nearly all involved Treasury and public works positions.[175] There were more jobs and more applicants than people whom Washington knew.[176] This required Washington to rely upon other's recommendations. Reputation played a particularly important role;[177] it equated to political currency.[178] Knowing that the fittest characters were necessary for the judiciary to earn its desired respect, Washington utilized a

172. *See infra* notes 366–396 and accompanying text.

173. *See* Scott Ingram, *Representing the United States Government: Reconceiving the Federal Prosecutor's Role Through a Historical Lens*, 31 NOTRE DAME J. L. ETHICS & PUB. POL'Y 293 (2017).

174. *See, e.g.*, Letter from Lachlan McIntosh, General, to George Washington, U.S. President (Feb. 14, 1789), https://founders.archives.gov/documents/Washington/05-01-02-0223.

175. WOOD, *supra* note 162, at 108–109.

176. *Id.* at 108–09.

177. JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC xx-xxi (Yale Univ. Press 2001).

178. *Id.*

similar process whereby he sought recommendations from people he knew.[179]

On September 24th and 25th, Washington nominated thirteen United States Attorneys, the Attorney General, and all federal judges.[180] The Senate confirmed each appointment on the 26th.[181] Washington would appoint twenty more people as United States Attorneys during the next eight years.[182] All

179. *See, e.g.*, Letter from George Washington, U.S. President, to James McHenry (Aug. 13, 1792), https://founders.archives.gov/documents/Washington/05-10-02-0436.

180. *See* Letter from George Washington to the U.S. Senate, *supra* note 127; *see also* Letter from George Washington to the U.S. Senate, *supra* note 132. The thirteen U.S. Attorneys were as follows:

Name	State	Age at Appointment	Years of Experience	Years in Office
Christopher Gore	Massachusetts	31	11	7
William Lithgow	Maine	41	17	4
John Samuel Sherburne	New Hampshire	32	13	4
Pierpont Edwards	Connecticut	39	18	17
William Lewis	Pennsylvania	37	16	2
George Read, Jr.	Delaware	24	4	26
Richard Potts	Maryland	36	14	2
John Marshall	Virginia	34	9	0
John Julius Pringle	South Carolina	36	8	3
Matthew McAllister	Georgia	31	6	7
George Nicholas	Kentucky	35	n/a	2
Richard Harison	New York	42	6*	12
Richard Stockton	New Jersey	25	2	2

*Does not count years of experience prior to Declaration of Independence.
BIOGRAPHICAL DIRECTORY U. S. CONG., http://bioguide.congress.gov/biosearch/biosearch.asp (last visited Feb. 12, 2019) [hereinafter Initial United States Attorney Table].

181. 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 29 (Duff Green 1828) (1789), https://memory.loc.gov/cgi-bin/ampage?collId=llej&fileName=001/llej001.db&recNum=35&itemLink=?%230010036&linkText=1 [hereinafter Senate Executive Journal].

182. The table below lists those who Washington nominated for United States Attorney throughout the remainder of his tenure in office:

but three replaced one of Washington's initial appointments. In each instance, like Washington's initial appointments, the Senate confirmed the nominees quickly.[183]

Name	State	Age at Appointment	Years of Experience	Years in Office
John Sitgreaves*	North Carolina	33	12	0
William Channing*	Rhode Island	39	19	3
Stephen Jacobs*	Vermont	36	10	3
John Davis	Massachusetts	35	10	5
Daniel Davis	Maine	34	n/a	5
Edwards St. Loe Livermore	New Hampshire	32	11	3
William Rawle	Pennsylvania	32	8	10
Zebulon Hollingsworth	Maryland	30	n/a	14
William Nelson, Jr.	Virginia	36	n/a	1
Thomas Parker	South Carolina	32	7	28
Charles Jackson	Georgia	29	n/a	1
William Murray	Kentucky	n/a	n/a	1
Abraham Ogden	New Jersey	48	23	7
William Hill	North Carolina	24	n/a	4
Ray Greene	Rhode Island	29	8	3
Amos Marsh	Vermont	30	n/a	2
Alexander Campbell	Virginia	28	n/a	5
George Woodruff	Georgia	33	10	4
Benjamin Woods	North Carolina	n/a	n/a	13
Thomas Nelson	Virginia	32	n/a	7

*Although listed with replacements, these attorneys were the first for their state. Their states did not ratify the Constitution until after Washington made his initial appointments.

BIOGRAPHICAL DIRECTORY U. S. CONG., http://bioguide.congress.gov/biosearch/biosearch.asp (last visited Feb. 12, 2019) [hereinafter Replacement United States Attorney Table]

183. *See* JOURNAL OF THE EXECUTIVE PROCEEDINGS, *supra* note 181 (stating that all of Washington's nominees were confirmed within one week of nomination and most were within one to two days following nomination). While Professor Friedland asserts that this shows the Senate did not provide

One of the first recommendations Washington received came from George Thacher, an attorney and Congressman from Maine.[184] Thatcher sided with the Federalists and remained in Congress until 1801.[185] Thatcher wrote Washington on September 14th, 1789 saying:

> I take the liberty of handing to you the names of two Gentlemen either of whom in my opinion will make a respectable District Judge for the District of Maine—viz. the Honourable David Sewal & William Lithgow Junr. The former was appointed one of the Judges of the Supreme Judicial Court, for the Commonwealth of Massachusetts, about the year 1776—which office he has sustained to the present time—He lives at York in the District of Maine.
>
> The latter is a respectable Attorney at Law of about thirteen years standing he lives at Hollowel on Kennebeck River[.] He served four or five years in the Army—where he lost the use of his right arm by a ball he received [sic] in an engagement with the enemy—He is now Major General of the Militia in the eastern Division of Massachusetts.
>
> Should the former be appointed Judge in Maine District—the latter appears to me the most suitable person in that District for the Attorney to the United States in the said District—But if the latter be appointed Judge, I wish to mention Daniel Davis of Portland as a suitable person for the Attorney in that District.[186]

a significant check on Washington's appointments, this misses the informal role members of Congress played in Washington's appointments. Friedland, *supra* note 80, at 181–82.

184. *Thacher, George, (1754 - 1824)*, BIOGRAPHICAL DIRECTORY U. S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=T000141 (last visited Nov. 2, 2018).

185. *Id.*

186. Letter from George Thacher to George Washington, U.S. President (Sept. 14, 1789), http://founders.archives.gov/documents/Washington/05-04-02-0021 (footnotes omitted) (alterations in original).

Washington followed Thacher's advice and appointed Sewall as judge and Lithgow as attorney.[187] This demonstrates the role *advise* and *consent* played in the selection process. Washington made only one visit to Maine and likely knew little about its legal community.[188] Therefore, Washington relied on those familiar it. No one else in Congress would be familiar with Maine's legal community because, at that time, it was a District within Massachusetts;[189] Maine did not have its own senator. Therefore, no one in Congress could credibly question Thatcher's judgment. There was no need for further inquiry; they trusted their colleague's judgment.

North Carolina provides another example of Washington's consultations prior to making an appointment. When North Carolina ratified the Constitution in the fall of 1789, it meant Washington had more positions to fill.[190] He received recommendations from as many of the North Carolina Congressional delegation as would provide them. Four North Carolina Representatives provided advice,[191] but no Senator did.[192] When the recommendations arrived, Washington tasked

187. Letter from George Washington to the U.S. Senate, *supra* note 127.

188. *See* FERLING, *supra* note 154, at 287 (noting that just before making his nominations, Washington journeyed to the New England states reaching as far north as Kittery, Maine, his journey taking him a month to complete, which did not give him significant time in any one place).

189. MAIER, *supra* note 155, at 161–62 (discussing Maine as part of the Massachusetts constitutional ratification convention).

190. MAIER, *supra* note 155, at 457–58; Albert Ray Newsome, *North Carolina's Ratification of the Federal Constitution*, 17 N. C. HIST. REV. 287, 299 (1940).

191. *See* Letter from Timothy Bloodworth, Member, U.S. House of Representatives, to George Washington, U.S. President (June 5, 1790), https://founders.archives.gov/documents/Washington/05-05-02-0300 (explaining that Representatives Steele, Ashe, Bloodworth, and Williamson submitted recommendations for the judgeship, with only Ashe and Bloodworth including people for United States Attorney); *see also* Letter from John B. Ashe to George Washington, U.S. President (June 5, 1790), https://founders.archives.gov/documents/Washington/05-05-02-0298.

192. North Carolina's Senators were Benjamin Hawkins and Samuel Johnston. *See Hawkins, Benjamin, (1754 - 1816)*, BIOGRAPHICAL DIRECTORY U. S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000368 (last visited Nov. 2, 2018); *Johnston, Samuel, (1733 - 1816)*, BIOGRAPHICAL DIRECTORY U. S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=J000198 (last visited Nov. 2, 2018).

Jefferson with summarizing them.[193] Four United States Attorney candidates emerged.[194] Representative Timothy Bloodworth, an anti-Federalist during ratification but elected to serve in the First Congress, recommended four people, more than any other recommender.[195] His list included the eventual nominee, John Sitgreaves, whom John Ashe also mentioned.[196] Ashe had served as chair of North Carolina's ratification convention, but was opposed to the Administration.[197] When Jefferson collected the names, he consulted one of North Carolina's Senators, Benjamin Hawkins, for his thoughts on the candidates.[198] Hawkins served on Washington's staff during the Revolutionary War and supported the Constitution's ratification.[199] According to Jefferson, Hawkins vouched for all candidates but one, who was under indictment for fraud.[200] The others possessed good character but, of Sitgreaves, Hawkins said, "he is a gentlemanly man, & as good a lawyer as any there."[201] With that, plus Ashe's concurrence and Bloodworth's acquiescence, Sitgreaves received the nomination.[202] This demonstrates that when Washington lacked knowledge about whom to appoint, he relied upon the State's elected officials and deferred to their opinions while seeking consensus. North

193. Memorandum from Thomas Jefferson, U.S. Sec'y of State, to George Washington, U.S. President (June 7, 1790), https://founders.archives.gov/documents/Jefferson/01-16-02-0274 (recommending candidates for federal offices in North Carolina and the Southwestern Government).

194. *Id.*

195. *See* Letter from Timothy Bloodworth to George Washington, *supra* note 191.

196. *See* Letter from John B. Ashe to George Washington, *supra* note 191.

197. *Ashe, John Baptista, (1748 - 1802)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=A000307 (last visited Nov. 2, 2018); *see also* Letter from John B. Ashe to George Washington, *supra* note 191.

198. *See* Memorandum from Thomas Jefferson to George Washington, *supra* note 193.

199. *Hawkins, Benjamin, (1754 - 1816)*, *supra* note 192.

200. *See* Memorandum from Thomas Jefferson, U.S. Sec'y of State, to George Washington, U.S. President (June 7, 1790), http://founders.archives.gov/documents/Washington/05-05-02-0304.

201. *Id.*

202. *See* Letter from George Washington, U.S. President, to the U.S. Senate (June 7, 1790), https://founders.archives.gov/documents/Washington/05-05-02-0306.

Carolina also provides evidence that Washington relied more upon those who shared his views than those who did not. While Bloodworth names Sitgreaves, the nomination was not made until Hawkins lent his support.

B. Salient Nominee Characteristics

At least twenty-six pieces of correspondence remain discussing United States Attorney nominees. While Washington wrote a few, most were sent to the Administration providing attorney recommendations. These letters provide insight into the characteristics Washington and the recommenders considered most salient. Anyone recommended to Washington had to meet the statutory requirements, so it is not surprising that legal and character factors were most common. Legal factors appeared in all twenty-six recommendations and character in twenty.

Three different legal factors emerged: (1) legal knowledge, (2) talent, and (3) experience. Rarely, however, did they provide detail about the factors. For example, in the summer of 1792, Maryland's United States Attorney resigned, forcing the Administration to select a replacement.[203] William Vans Murry, an attorney and Congressman from Maryland aligned with the Hamilton Federalists, recommended the person Washington selected saying, "[a] long acquaintance with him enables to say that he is a man of integrity; & I conceive of parts exceedingly brilliant, with a knowledge of his profession which has raised his consequence at the bar . . . ."[204] In Rhode Island, where appointments were hotly contested, the nominee for District Judge wrote Vice President Adam about the eventual nominee, "I do not know where are [sic] Atty for the District can be found so worthy of Attention as Mr. Wm. Channing:—In extensive Practice and Law Knowledge scarcely equalled, inferior to none—His Name & Family will be well known to the President

203. *See* Letter from Richard Potts, Chief Judge, Fifth Judicial Circuit, to George Washington, U.S. President (June 12, 1792), https://founders.archives.gov/documents/Washington/05-10-02-0299.

204. Letter from George Washington, U.S. President, to James McHenry, *supra* note 179.

upon recollection . . . ."[205] Channing, who had served as Rhode Island Attorney General, exemplifies the importance of experience with knowledge.[206] Finally, Congressman Ashe's recommendation of Sitgreaves as United States Attorney for North Carolina revealed the distinction between legal experience and ability.[207] Ashe said Sitgreaves, "has [practiced] the Law for some years past in No. Carolina, tho' [sic] not so brilliant in abilities, Stands as a favorably as to rectitude of mind, as any of his profession."[208] While Ashe and others distinguished, Washington apparently did not.

Legal experience also played a key role. Washington's selections averaged eleven years of experience prior to selection. Of Washington's initial nominees, only four had less than ten years' experience. Two had eight and nine years respectively. The other two—Delaware's George Read and New Jersey's Richard Stockton—had four and five years.[209] As for the replacements, less is known about their prior experience. Thomas Parker of South Carolina entered office with the least experience (seven years), but he remained for twenty-eight years, the longest tenure of any Washington appointee.[210] At the other end, Abraham Ogden, who quickly replaced Stockton in New Jersey, had twenty-three years of experience when he assumed the role, the most of any Washington nominee.[211] In

205. Letter from Henry Marchant, Dist. Judge, U.S. Dist. Court for the Dist. of R.I., to John Adams, U.S. Vice President (June 7, 1790), http://founders.archives.gov/documents/Adams/99-02-02-0976.

206. *See* Letter from William Channing to George Washington, U.S. President (June 8, 1790), https://founders.archives.gov/documents/Washington/05-05-02-0307.

207. See Letter from John B. Ashe to George Washington, *supra* note 191.

208. *Id.* (footnote omitted).

209. Christian Gullager, Office History: A Rich History of Public Service, U.S. DEP'T OF JUST.: U.S. ATT'YS OFF., DISTRICT OF N.J., https://www.justice.gov/usao-nj/about/office-history (last updated May 8, 2018) [hereinafter Read, Jr.]; Jim Meek, *George Read, Jr. (1765-1836)*, NEW CASTLE, DEL. COMMUNITY HIST. & ARCHAEOLOGY PROGRAM, http://nc-chap.org/portraits/details.php?wname=george_read_jr_wertmuller (last visited Nov. 6, 2018).

210. *See* Letter from Tobias Lear to Thomas Jefferson, U.S. Sec'y of State (Oct. 26 1792), https://founders.archives.gov/documents/Washington/05-11-02-0146.

211. WILLIAM OGDEN WHEELER, THE OGDEN FAMILY IN AMERICA: ELIZABETHTOWN BRANCH AND THEIR ENGLISH ANCESTRY: JOHN OGDEN, THE PILGRIM AND HIS DESCENDANTS 1640-1906, at 103–04 (Lawrence Van Alstyne

total, all of Washington's nominees, with the possible exceptions of Read and Stockton, practiced long enough to establish legal reputations.

Character played a part in twenty of the twenty-six recommendations. Several different traits emerged. Some spoke of character generally. When Congressman Timothy Bloodworth recommended Sitgreaves, he wrote, "[Sitgreaves] is a gentleman of [c]arrecter [sic] & represented the State in Congress in the [y]ear 1785."[212] Others provided more detail. For example, Ashe referred to Sitgreaves as having "rectitude of mind," meaning that he did what was proper.[213] In Georgia, Washington's eventual nominee for District Judge, Nathaniel Pendleton, wrote to Washington recommending Matthew McAllister as the United States Attorney.[214] Pendleton referred to McAllister as "a man of [s]trickt [sic] honor and [i]ntegrity . . . very well qualified to fulfil [sic] the duties of the [o]ffice he solicits if he should be appointed to it."[215] Washington used this information to conclude his appointees were meet people, learned in the law.

C. Politicization

While legal training and character were the statutory requirements, Washington did not select people on this basis alone. Instead, he selected people based on their politics. First and foremost, these were political patronage positions. Nearly every person selected had served Washington or had a close connection to the recommender. Able lawyers were not selected because they lacked the requisite connections. Second, those Washington selected matched Washington's policy goals. If there was no evidence that they supported the Constitution prior to ratification or had not demonstrated loyalty to the Republic

& Charles Burr Ogden eds., J.B. Lippincott Co. Phila. 1907).

212. Letter from Timothy Bloodworth to George Washington, *supra* note 191.

213. Letter from John B. Ashe to George Washington, *supra* note 191.

214. See Letter from Matthew McAllister to George Washington, U.S. President (Aug. 26, 1789), http://founders.archives.gov/documents/Washington/05-03-02-0318.

215. *Id.*

in some other manner, then Washington did not select them. Finally, and while not the case in every instance, many of Washington's nominees supported Washington's partisan interests. They were loyal Federalists.

1. Patronage

Nearly every person Washington appointed as a United States Attorney was a political patronage position.[216] They had a direct connection to Washington or were one step removed from him so that a trusted recommender identified them. Those whom Washington knew either came from prominent families or had served the Revolution. Among the patronage selections, two were most obvious: Delaware's George Read and New Jersey's Richard Stockton. Both were among Washington's first nominees, had less legal experience than any other nominee, and were the youngest of any Washington nominee.[217] They shared one other common trait: their fathers were two of only six people who signed both the United States Declaration of Independence and the United States Constitution.[218] Having nothing else merit their selection, their selection was clearly a reward for their fathers' loyalty and service.[219]

216. *See generally* Domonic A. Bearfield, *What Is Patronage? A Critical Reexamination*, 69 PUB. ADMIN. REV. 64, 68–69 (2009) (Patronage has a variety of meanings. At minimum, it involves a relationship between people with unequal status who participate in an exchange relationship and is anchored only loosely to law or norms. Bearfield identifies four patronage styles. Organizational patronage strengthens or creates political organizations. Democratic patronage uses patronage to achieve democratic goals. Tactical patronage uses public offices to achieve political or policy goals. Finally, reform patronage uses public offices as a means to replace the disfavored previous regime. At the time Washington made his appointments, patronage meant the selection of close family members to important positions in order to maintain power.); ELKINS & MCKITRICK, *supra* note 18, at 52–55. For purposes of this article, patronage refers to the more modern conception.

217. *See* Read, Jr., *supra* note 209; *see also Stockton, Richard, (1764 - 1828)*, BIOGRAPHICAL DIRECTORY U.S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000941 (last visited Nov. 7, 2018).

218. *Read, George, (1733 - 1798)*, *supra* note 139; *see also* Frederick Bernays Wiener, *The Signer Who Recanted*, 26 AM. HERITAGE (1975), http://www.americanheritage.com/content/signer-who-recanted.

219. Despite their similarities, their service as United States District Attorneys differed substantially. Read went on to become one of the longest serving United States Attorneys while Stockton remained only one year *See*

For several other nominees, Washington utilized his professional and personal knowledge. One, John Davis of Massachusetts, served in the Treasury Department during Washington's presidency[220] and another, Daniel Davis of Maine, served as de facto United States Attorney when William Lithgow could not.[221] Two nominees served in the Revolutionary War: Lithgow and North Carolina's John Sitgreaves.[222] While neither fought under Washington's direct command, both demonstrated their loyalty. Lithgow's service cost him the use of one arm.[223] Others did not fight in the war, but provided assistance. New Jersey's Abraham Ogden lent his residence to Washington's army following the Battle of Princeton.[224] William Channing, Rhode Island's first United States Attorney, had assisted Washington in 1781.[225]

Those whom George Washington did not know had well-established political connections that aided their nominations. Several had connections to Administration members. Richard

supra note 181 and accompanying text. Of the two, Stockton would have the more noteworthy legal career. Read became a Chief Justice for Delaware until his death in 1798. *The Founding Fathers: Delaware*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/founding-fathers-delaware (last visited Feb. 12, 2019). Stockton would later serve as a Senator and Congressman from New Jersey. *See The Election Case of John P. Stockton of New Jersey (1866)*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/contested_elections/047John_Stockton.htm (last visited Feb. 12, 2019); *see also Stockton, Richard, (1764 - 1828)*, *supra* note 217.

220. *Davis, John*, FED. JUD. CTR., https://www.fjc.gov/node/1379836 (last visited Nov. 7, 2018).

221. *See* Letter from Meletiah Jordan to Alexander Hamilton, U.S. Sec'y of the Treasury (Oct. 1, 1794), https://founders.archives.gov/documents/Hamilton/01-17-02-0274; Letter from Timothy Pickering, U.S. Sec'y of State to George Washington, U.S. President (Aug, 22, 1796), https://founders.archives.gov/documents/Washington/99-01-02-00875.

222. *See* Letter from William Lithgow, Jr. to George Washington, U.S. President (July 20, 1796), https://founders.archives.gov/documents/Washington/99-01-02-00753; Letter from George Thacher to George Washington, *supra* note 186; Letter from Benjamin Hawkins, U.S. Senator, to George Washington, U.S. President (Nov. 4, 1790, https://founders.archives.gov/documents/Washington/05-06-02-0292.

223. *See* John Francis Sprague (Ed.), *Sprague's Journal of Maine History (Vol. XIV, No. 3)*, ME. COLLECTION 31 (1926).

224. WHEELER, *supra* note 211, at 103–04.

225. *See* Letter from George Washington, Officer, U.S. Army, to William Channing (June 7, 1783), https://founders.archives.gov/documents/Washington/99-01-02-11394.

Harrison, who received the appointment for New York, worked closely with Alexander Hamilton in the matter of Vermont independence and New York's Constitution ratification convention.[226] John Julius Pringle received South Carolina's first United States Attorney nomination.[227] During the Revolution, he studied law in London then left for France, becoming the United States consul for France Ralph Izard's personal secretary.[228] While in France, Pringle volunteered to meet with the British and negotiate the release of captured American seamen.[229] The selection committee, on which future Vice-President John Adams served, chose Pringle.[230] Back in the United States, Pringle studied law under one of Washington's initial United States Supreme Court nominees.[231] Kentucky's first nominee, George Nicholas, knew James Madison well, who, at that time, was one of Washington's closest advisors.[232] Nicholas played a key role in Virginia's ratification debates and

226. *See* Memorandum from N.Y. Assembly on An Act Acknowledging the Independence of Vermont nn. 1–2 (Mar. 28, 1787), https://founders.archives.gov/documents/Hamilton/01-04-02-0067); *see also* Francis Childs, First Speech at the New York Ratifying Convention n. 1 (June 23, 1788), https://founders.archives.gov/documents/Hamilton/01-05-02-0012-0019.

227. *See* Letter from George Washington to the U.S. Senate, *supra* note 127.

228. Letter from John Julius Pringle to Benjamin Franklin, U.S. Comm'r, et al. (Feb. 9, 1779), http://founders.archives.gov/documents/Adams/06-07-02-0257; *see also* Letter from Benjamin Franklin, U.S. Comm'r to John Ross (Apr. 26, 1778), https://founders.archives.gov/documents/Franklin/01-26-02-0295 (describing Pringle's service to Izard); *My Ancestors: Harris, Williams, Betts, Sappington, Mullican, Wiley, Stout & Crocker & Other Families*, Roots Web, https://wc.rootsweb.ancestry.com/cgi-bin/igm.cgi?op=GET&db=catherineburr357&id=I34258 (last visited Nov. 6, 2018) [hereinafter *My Ancestors*] (displaying Pringle's biography).

229. Letter from John Julius Pringle to Benjamin Franklin et al., *supra* note 228.

230. *Id.* at n.1.

231. *My Ancestors*, *supra* note 228.

232. Letter from Robert Carter Nicholas, Member, Va. Gen. Assembly, to George Washington, Officer, U.S. Army n.1 (Feb. 20, 1777), https://founders.archives.gov/documents/Washington/03-08-02-0422; *George Nicholas (ca. 1754–1799)*, EDUC. @ LIBR. OF VA., http://edu.lva.virginia.gov/online_classroom/shaping_the_constitution/people/george_nicholas (last visited Nov. 7, 2018); *see* HEIDLER & HEIDLER, *supra* note 163, at 1239–47 (discussing Madison's relationship as Washington's Prime Minister at this time).

in Kentucky's statehood movement.[233]

Pennsylvania's two United States Attorneys during Washington's Administration demonstrated the importance of political connections. The first nominee was William Lewis, a Quaker who studied law under a prominent Quaker attorney in Philadelphia.[234] When Lewis earned his bar admission, his teacher retired, leaving his practice to Lewis.[235] This gave Lewis the freedom to represent causes that were important to him, including representing Quakers accused of treason in the years immediately following independence.[236] This work connected him with James Wilson, one of six people to sign both the Constitution and the Declaration of Independence.[237] Wilson was a leading legal scholar when Washington nominated him to the Supreme Court.[238] While no record remains, Wilson likely recommended Lewis to Washington. However, Lewis remained less than a year because Washington's Pennsylvania District Court Judge appointee died, allowing Lewis to receive the district judge nomination.[239]

To replace Lewis, Washington nominated William Rawle.[240] Rawle was a Philadelphia native and Quaker who remained loyal to the British during the Revolution.[241] He escaped to New York when the British abandoned Philadelphia.[242] While in New York, Rawle studied law and then went to London for further legal study.[243] In 1782, Rawle returned to Philadelphia and was later admitted to the bar in 1783.[244] Rawle subsequently joined

233. *George Nicholas (ca. 1754–1799)*, *supra* note 232.

234. GEORGE C. MCFARLAND, JR. ET AL., WILLIAM LEWIS, ESQUIRE: ENLIGHTENED STATESMAN, PROFOUND LAWYER, AND USEFUL CITIZEN 3 (Diane Publ'g Co. 2012).

235. *Id.* at 4.

236. *Id.* at 20–21.

237. *Id*. at 9–10; JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 15–16 (Harvard Univ. Press 2007).

238. WITT, *supra* note 237, at 16.

239. Letter from George Washington, U.S. President, to the U.S. Senate (Oct. 31, 1791), https://founders.archives.gov/documents/Washington/05-09-02-0077).

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

the Pennsylvania Abolition Society, which connected Rawle to Lewis.[245] When Rawle received his appointment, he noted he had not solicited it; someone else recommended Rawle to Washington.[246] It is most likely that Lewis recommended Rawle. The two worked together closely prior to and after Rawle's appointment.[247]

Finally, New England politics influenced Washington's selections. Those recommended to Washington had to be on the "right" side of the state's political alliances. New Hampshire and Rhode Island proved the most contentious positions. New Hampshire politics featured a battle between those living along the coast and those living inland.[248] The groups advocated joining the new federal government but divided over who should serve in the government.[249] At first, the coastal faction prevailed so Samuel Sherburne, a political operative for the coastal faction, received the initial appointment.[250] This faction later opposed Administration policies.[251] Sherburne remained in office until 1793 when he became a member of the United States House of Representatives.[252] Edwards St. Loe Livermore, whose

245. *See generally* David C. Claypoole & John Dunlap, PA. PACKET & DAILY ADVERTISER, Jan. 23, 1790, at 2.

246. Journal Entry by William Rawle Sr., *in* RAWLE FAMILY PAPERS (Pennsylvania Historical Society 1791) ("Composed upon receiving the unsolicited Commission of Attorney for the United States").

247. MCFARLAND, ET AL., *supra* note 234, at 36–37.

248. *See* LYNN WARREN TURNER, NINTH STATE: NEW HAMPSHIRE'S FORMATIVE YEARS 120 (Univ. of N.C. Press 1983) (discussing the Exeter Junto); *see also* J.M. Opal, *The Politics of "Industry": Federalism in Concord and Exeter, New Hampshire, 1790-1805*, 20 J. EARLY REPUBLIC 637 (2000).

249. *See* TURNER, *supra* note 248, at 121, 142 (explaining the origins of the divide in New Hampshire, stating "[n]othing except vague and conflicting personal antagonisms divided the leaders of New Hampshire in 1792. Within a few months, however, these men were to find themselves arrayed in hostile ranks under banners inscribed Federalist and Republican, fighting at the side of other men with whom, in many cases, they had exchanged heavy blows during the paper-money struggle or at the ratifying convention.").

250. *Id.* at 103; Letter from George Washington to the U.S. Senate, *supra* note 127.

251. TURNER, *supra* note 248, at 143.

252. Letter from John Samuel Sherburne, Member, U.S. House of Representatives, to George Washington, U.S. President (Aug. 30, 1793), https://founders.archives.gov/documents/Washington/05-13-02-0393; *Sherburne, John Samuel, (1757 - 1830)*, BIOGRAPHICAL DIRECTORY U.S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000339 (last visited Nov. 7, 2018).

father was a prominent New Hampshire judge from the inland faction, replaced Sherburne.[253] This group adhered to the Washington Administration's political positions.[254]

Rhode Island politics revolved around commerce because of its two major ports, Providence and Newport,[255] each of which had its own faction.[256] The two factions sought consensus selections for federal appointments.[257] If one person aligned too closely with one side, then that person was eliminated from consideration.[258] When William Channing, Rhode Island's first

253. TURNER, *supra* note 248, at 160–162; Letter from George Washington, U.S. President, to the U.S. Senate (Feb. 14, 1794), https://founders.archives.gov/documents/Washington/05-15-02-0177; Letter from Samuel Livermore, U.S. Senator, to Thomas Jefferson, U.S. Sec'y of State (Dec. 4, 1793), https://founders.archives.gov/documents/Jefferson/01-27-02-0449.

254. TURNER, *supra* note 248, at 143.

255. JACKSON TURNER MAIN, THE ANTI-FEDERALISTS; CRITICS OF THE CONSTITUTION,1781-1788, at 52–54 (Van Rees Press 1961).

256. *Id.*

257. *Id.*

258. William Ellery, Newport's Customs Collector, responded to Hamilton's request for recommendations on who should replace William Channing. Letter from William Ellery to Alexander Hamilton, U.S. Sec'y of the Treasury (Dec. 16, 1793), https://founders.archives.gov/documents/Hamilton/01-15-02-0385. Ellery excluded David Howell and David Barnes, based on their political biases. Ellery wrote:

> Formerly, by being a Colleague in Congress with Mr. Howell, I became well acquainted with him, but since that time I have not often seen him. He has for some years studied and practiced [sic] Law, and his professional knowledge may be competent to the business of District Attorney; but it is apprehended, if he should be appointed to that Office, and a dispute should arise between the United States and certain mercantile houses in Providence, his connections by marriage, and the patronage and encouragement he has received from them, might give him a biass to their side. In a similar case the Merchants in Newport might not hope to receive any favour from him. . . . With Mr. Barnes I have but a slight acquaintance. He married into a respectable family in Providence where he resides; but it is not probable that he would be biased [sic] by his connections in that town to the disadvantage of the United States. . . . But as this affair having assumed a party complexion, has suggested an inquiry, whether there may not be a third character competent, eligible, and who would not be liable to a similar difficulty, I would mention our Senator Bradford and our Representative Bourn, was I not informed that neither of them would accept the Office. There is a young Gentleman,

United States Attorney, died, a contentious debate arose over his replacement.[259] One candidate, David Howell, promoted himself to Jefferson who, in turn, lobbied Washington to appoint Howell.[260] Howell, a Providence law professor, also had support from some prominent local citizens.[261] Howell's political opponents proffered David Barnes, a Massachusetts attorney who relocated to Rhode Island.[262] Rhode Island's political factions finally settled on Ray Greene.[263] In the 1780s, Greene's father had been Rhode Island's Governor.[264] His mother had been a Correspondent with Ben Franklin.[265] Greene was from Warwick, a neutral site between Providence and Newport.[266] With this background, he appeased everyone.

2. Policy

Washington entered office with particular policy goals. One was to make the new federal government respected

> Mr. Ray Greene, who I think would be agreeable to both parties.

Id. (footnotes omitted).

259. Letter from Theodore Foster, U.S. Senator, to George Washington, U.S. President (Oct. 3, 1793), https://founders.archives.gov/documents/Washington/05-14-02-0112.

260. Letter from David Howell to Thomas Jefferson, U.S. Sec'y of State (Oct. 4, 1793), https://founders.archives.gov/documents/Jefferson/01-27-02-0196) (explaining that Jefferson would eventually appoint Howell as United States Attorney for Rhode Island in 1801); *see also* Letter from Thomas Jefferson, U.S. President to the U.S. Senate (Jan. 6, 1802), https://founders.archives.gov/documents/Jefferson/01-36-02-0183-0007.

261. Letter from Theodore Foster to George Washington, *supra* note 259; Letter from Alexander Hamilton, U.S. Sec'y of the Treasury n.1 (Nov. 20, 1793), https://founders.archives.gov/documents/Hamilton/01-15-02-0325.

262. Letter from Henry Marchant, Dist. Judge, U.S. Dist. Court for the Dist. of R.I., to Alexander Hamilton, U.S. Sec'y of the Treasury (Dec. 9, 1793), https://founders.archives.gov/documents/Hamilton/01-15-02-037.

263. Letter from George Washington, U.S. President, to the U.S. Senate (Jan. 24, 1794), https://founders.archives.gov/documents/Washington/05-15-02-0091.

264. Letter from Edmund Randolph, U.S. Sec'y of State, to George Washington, U.S. President n.4 (Jan. 11, 1794), https://founders.archives.gov/documents/Washington/05-15-02-0047.

265. *Id.*

266. Letter from Henry Marchant to Alexander Hamilton, *supra* note 262.

domestically.[267] This meant establishing the federal government's law enforcement authority.[268] To accomplish this, Washington sought people who would enforce the laws, but also respect local sensibilities.[269] The first nominees had strong connections to the newly ratified Constitution, especially if they lacked a political patron vouching for their loyalty. Two key pieces of evidence demonstrate that Washington only selected those who favored nationhood. First, most whom he initially selected served at their State's ratification convention and supported the Constitution. Second, those whom Washington selected came of age during the independence movement, thus spending little of their life as colonists.

Of Washington's initial thirteen United States Attorney positions, four supported the Constitution at their respective state's ratification convention. Future Supreme Court Chief Justice John Marshall led the Constitution's supporters at the contentious Virginia ratification convention.[270] Likewise, Christopher Gore of Massachusetts was a vocal supporter who led the opposition to antifederalist John Hancock.[271] In Connecticut, Pierrepont Edwards, the son of prominent minister Jonathan Edwards and uncle of Aaron Burr, had served in the Continental Congress and at the ratification convention.[272] Finally, Maryland's Richard Potts supported the Constitution at Maryland's convention.[273]

267. SHARP, *supra* note 156, at 17–27.

268. FRITZ, *supra* note 157, at 72–74, 79 (arguing the Administration's response to the Whiskey Rebellion was based on a desire to assert and demonstrate the federal government's law enforcement power); WOOD, *supra* note 162, at 72–74 (noting that the executive would be the energetic center of the government).

269. GAUTHAM RAO, NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE 1–6 (Univ. of Chi. Press 2016).

270. JOEL RICHARD PAUL, WITHOUT PRECEDENT: CHIEF JUSTICE JOHN MARSHALL AND HIS TIMES 44 (Riverhead Books 2018).

271. HELEN PINKNEY, CHRISTOPHER GORE, FEDERALIST OF MASSACHUSETTS, 1758-1827, at 22–27 (The Anthoensen Press 1969).

272. Charles A. Heckman, *A Jeffersonian Lawyer and Judge in Federalist Connecticut: The Career of Pierpont Edwards*, 28 CONN. L. REV. 669, 670–71 (1996).

273. Edward C. Papenfuse et al., *A Biographical Dictionary of the Maryland Legislature, 1635-1789*, 426 ARCHIVES OF MD., 2002, at 658, https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000426/html/am426—658.html.

At least two of Washington's subsequent appointees also served their state's ratification conventions: John Sitgreaves and John Davis. John Sitgreaves, North Carolina's first nominee in 1790, supported ratification during North Carolina's final convention.[274] John Davis, who succeeded Gore in Massachusetts, also was a delegate to his state's convention.[275]

Support for the Constitution as a prerequisite clearly appears in the debate about Maryland's second United States Attorney. Two of Washington's initial Maryland nominees did not accept their commissions.[276] Potts, the United States Attorney nominee, delayed conveying his acceptance and ultimately resigned in 1792, citing the distance he lived from court.[277] This forced Washington to find a replacement; Washington turned to James McHenry.[278] McHenry responded, "[i]t is to be lamented that the best qualified man in the State is the last person who merits this appointment. I mean Mr. Luther Martin. Very few of his description have so far altered their principles as to be safely trusted with power."[279] Martin had been a delegate to Maryland's ratification convention but left in protest and actively opposed ratification.[280] McHenry clearly equates support for the Constitution with meriting appointment. Those who did not support the Constitution could

274. *Sitgreaves, John*, FED. JUD. CTR., https://www.fjc.gov/history/judges/sitgreaves-john (last visited Nov. 7, 2018).

275. *Davis, John*, *supra* note 220.

276. Letter from George Washington, U.S. President, to James McHenry, U.S. Sec'y of War (Nov. 30, 1789), https://founders.archives.gov/documents/Washington/05-04-02-0244 (explaining that Judge Harrison declined his Supreme Court nomination and Johnston declined his district judge position).

277. *Id.* ("I have no information of Mr [sic] Potts, the Attorney . . . having accepted their Commissions"); Letter from Richard Potts to George Washington, *supra* note 203.

278. Letter from James McHenry to George Washington, U.S. President (Aug. 16, 1792), http://founders.archives.gov/documents/Washington/05-11-02-0002 (explaining that James McHenry served Washington during the Revolutionary War, represented Maryland at the Constitutional Convention, and would become Washington's second Secretary of War); *McHenry, James, (1753 - 1816)*, BIOGRAPHICAL DIRECTORY U. S. CONG., http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000469 (last visited Nov. 7, 2018).

279. Letter from James McHenry to George Washington, *supra* note 278; *see also* MAIER, *supra* note 155, at 90–93 (regarding Luther Martin).

280. Letter from James McHenry to George Washington, *supra* note 278, at n.7.

not be entrusted to represent the federal government's legal interests.

Washington also used age as an indicator of loyalty to the nation, rather than the thirteen individual states. Of Washington's first thirteen United States Attorney nominees, only one was born prior to 1750.[281] His nominees averaged thirty-three years old.[282] This coincides with Washington's cabinet selections. Treasury Secretary Alexander Hamilton, Attorney General Edmund Randolph and Secretary of War Henry Knox were also born in the 1750s.[283] This becomes significant when related to the nation's independence. By the late 1760s and into the early 1770s, the colonists pushed toward independence.[284] At that time, Washington's eventual nominees were studying law and becoming adults. They only knew the wish for independence and did not recall peaceful times as colonists. By war's end, they were solidifying their place in the new Nation's political circles. Therefore, national interests preceded state interests simply because the nominees better accepted the possibilities nationhood offered than the previous generation who lived peacefully as colonists during their formative years. This trend continued with Washington's replacement attorneys. Only three were born outside the 1760s giving them even less colonial experience.[285]

3. Partisanship

While everyone accepted the newly-ratified Constitution, some who served in Congress opposed the Administration.[286]

281. *See* Initial United States Attorney Table, *supra* note 180.

282. *Id.*

283. NORTH CALLAHAN, HENRY KNOX: GENERAL WASHINGTON'S GENERAL 16 (Reinhart 1958) (stating Knox was born in 1750); FERLING, *supra* note 167, at 11 (stating Hamilton was most likely born in 1755); JOHN J. REARDON, EDMUND RANDOLPH: A BIOGRAPHY 5 (Macmillan Publ'g Co. 1974) (stating Randolph was born in 1753).

284. THOMAS P. SLAUGHTER, INDEPENDENCE: THE TANGLED ROOTS OF THE AMERICAN REVOLUTION 157–58 (2014).

285. *See* Replacement United States Attorney Table, *supra* note 182.

286. The Biographical Directory of the United States Congress lists 28 Congressmen as "Anti-administration" among those who served in the First Congress. *See generally* BIOGRAPHICAL DIRECTORY U.S. CONG., *supra* note 135. This is a fluid label, however, as it includes James Madison who did not oppose

Partisan fractures emerged over executive power.[287] Within Washington's Administration Hamilton and Jefferson clashed repeatedly.[288] Washington tended to side with Hamilton, as the latter obtained an excise tax on whiskey and a pro-British version of neutrality.[289] Hamilton needed people to enforce his political objectives: (1) establish the federal government's power and (2) improve the nation's economy.[290] Therefore, supporting these objectives became a key selection criterion for Washington.

Partisan selection also became more prominent because Washington could not devote as much time to filling federal offices as he could at the outset of his presidency.[291] Washington delegated the collection and review of recommendations to the Secretary of State. Washington first utilized this process in June 1790 when he received several different United States Attorney recommendations for North Carolina.[292] The next instance occurred in January 1794 during Rhode Island's contentious process to replace Channing. Randolph, now Secretary of State, summarized the debate and provided a recommendation for Washington which Washington ultimately accepted.[293] By 1796, the practice became much more common. At that time, Timothy Pickering, an ardent Federalist, who zealously investigated Jeffersonian Republicans during the

the administration until late in the First Congress. HEIDLER & HEIDLER, *supra* note 163, at 1239–47, 1823–31, 1985–93. Nonetheless, the Administration faced Congressional challenges. When Washington sought its advice on a treaty, he left irritated because the Senate did not simply consent. *Id.* at 1823–31. When Hamilton introduced his economic program, it was met with strong opposition. *Id.* at 1985–93. These actions illustrate the nation's partisan divide.

287. ELKINS & MCKITRICK, *supra* note 18, at 18–28.

288. FERLING, *supra* note 167, at 213–23.

289. *Id.* at 220–22; WOOD, *supra* note 162, at 90–92.

290. WOOD, *supra* note 162, at 106–11.

291. *See* RICHARD NORTON SMITH, PATRIARCH: GEORGE WASHINGTON AND THE NEW AMERICAN NATION 130 (Houghton Mifflin Co. 1993) (stating the Presidency changed Washington because he increasingly asserted his executive authority).

292. Memorandum from Thomas Jefferson, U.S. Sec'y of State on Recommendations for Federal Offices in North Carolina and the Southwestern Government (June 7, 1790), http://founders.archives.gov/documents/Jefferson/01-16-02-0274.

293. Letter from Edmund Randolph to George Washington, *supra* note 264.

Adams Administration, chose several United States Attorneys.[294] Correspondence remains regarding Pickering's recommendations of John Davis in Massachusetts and Daniel Davis in Maine.[295] Pickering wrote:

> I was hence induced to write to Stephen Higginson, Esqr. of Boston, a private letter, requesting him, by enquiring among gentlemen of law-knowledge, to ascertain Mr Davis's professional talents. Mr Higginson's answer I received yesterday, and have now the honor to inclose [sic]. I also wrote to a nephew of mine in Boston for the same information; and his answer corresponds with Mr Higginson's. Both being so decidedly in favour [sic] of Mr Davis, I have this day transmitted to him his commission; it appearing to the Secretary of the Treasury & to me, upon comparing your letters to us, that you desired no delay in the commissioning of Mr Davis, when we should be satisfied of his professional abilities.[296]

Stephen Higginson was a prominent Federalist merchant in Massachusetts who would not have endorsed someone possessing divergent interests from Higginson.[297] Other appointments that year included Charles Jackson, of Georgia, and Thomas Nelson, of Virginia.[298] In one instance, Washington

294. JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 182–87 (Cornell Univ. Press 1963).

295. Letter from Timothy Pickering to George Washington, *supra* note 221 (stating "[t]he enquiries concerning a successor were made by me before the rising of Congress, in expectation of Mr [sic] Lithgow's resignation"); Letter from Timothy Pickering, U.S. Sec'y of State, to George Washington, U.S. President (July 26, 1796), https://founders.archives.gov/documents/Washington/99-01-02-00783.

296. Letter from Timothy Pickering to George Washington, *supra* note 295.

297. *Higginson, Stephen, (1743 - 1828)*, BIOGRAPHICAL DIRECTORY U. S. CONGR., http://bioguide.congress.gov/scripts/biodisplay.pl?index=H000581 (last visited Nov. 7, 2018).

298. Letter from George Washington, U.S. President, to the U.S. Senate (Mar. 2, 1797), https://founders.archives.gov/documents/Washington/99-01-02-

relied on Tobias Lear, one of his personal secretaries, to make the selection.[299] Washington wrote, "The District [A]ttorney of New Hampshire has sent his resignation—I am entirely unacquainted with the characters in that line, in that State, and would thank you to name the person whom you think best qualified to succeed Mr. Sherburne, & most likely to give general satisfaction."[300] Both incidents show Washington's deference to his advisors and his lack of knowledge about qualified candidates.

Nearly all of Washington's appointments had strong Federalist credentials and the few exceptions demonstrate the rule. Several of Washington's Federalist appointments have been identified previously, falling under multiple politicization categories. Livermore, in New Hampshire, replaced Sherburne who resigned to pursue other *avocations*.[301] Sherburne's political leanings are demonstrated by Jefferson nominating Sherburne to become a United States Attorney in 1801.[302] Pennsylvania's United States Attorneys both had strong Federalist ties as well.[303] Finally, Alexander Campbell, nominated in 1791, worked closely with Virginia's leading Federalist, John Marshall.[304]

In some places, finding Federalists to represent the government proved challenging. In Kentucky, the Administration could not find people willing to serve.[305] When

00384; Letter from George Washington, U.S. President, to U.S. Senate (Apr. 28, 1796), https://founders.archives.gov/documents/Washington/99-01-02-00474.

299. Letter from George Washington, U.S. President, to Tobias Lear (Sept. 25, 1793), http://founders.archives.gov/documents/Washington/05-14-02-0095.

300. *Id.* (footnote omitted).

301. Letter from John Samuel Sherburne to George Washington, *supra* note 252.

302. *Id.* at n.1; Memorandum from Thomas Jefferson, U.S. President, on the Draft of Interim Appointments (Dec. 26, 1801), https://founders.archives.gov/documents/Jefferson/01-36-02-0183-0005.

303. MCFARLAND, ET AL., *supra* note 234, at 27–28; Alicia M. Parks, *William Rawle: Abolitionist, Federalist, Loyalist?* LAUREL HILL MANSION http://laurelhillmansion.org/Pages/William%20Rawle.html (last visited Sept. 12, 2018).

304. PAUL, *supra* note 270, at 63, 67.

305. MARY K. BONSTEEL TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY, 1789-1816 101 (Princeton Univ. Press 1978).

Hamilton obtained his desired whiskey excise tax, much of the western populace protested and refused to enforce it.[306] Kentucky was one of the most vigorous opponents.[307] Washington attempted several nominations, but all refused.[308] Only one Federalist stepped forward, William Murray, but he only served one year and the post remained vacant until after Washington's presidency.[309] In South Carolina, Thomas Parker succeeded Pringle in 1792.[310] Although Parker's credentials are unknown, he provided Charleston's customs officers a narrow statutory construction during the Administration's efforts to enforce neutrality which permitted the French to arm privateers in Charleston.[311] When the Federalist Customs Collector, Isaac Holmes, reported this to Hamilton, Hamilton responded, "[a]s to the construction which the District Attorney has given to the Act, I must acknowledge [sic] that it intirely [sic] confounds me. After what has been said, I need scarcely add that it must not govern your conduct."[312] Despite Parker's interpretation, however, he was not removed but became the longest tenured of all of Washington's appointments.[313] This fact reveals that Parker's political leanings as Republicans held the Presidency

306. Mary K. Bonsteel Tachau, *The Whiskey Rebellion in Kentucky: A Forgotten Episode of Civil Disobedience*, 2 J. OF EARLY REPUBLIC 239, 242–48 (1982).

307. *Id.* at 240.

308. TACHAU, *supra* note 305, at 66.

309. *Id.* at 69–70; Letter from William Murray to Thomas Jefferson, U.S. Sec'y of State (Dec. 7, 1792), https://founders.archives.gov/documents/Jefferson/01-24-02-0695.

310. Letter from George Washington, U.S. President, to the U.S. Senate (Nov. 19, 1792), https://founders.archives.gov/documents/Washington/05-11-02-0233 (last visited Sept. 10, 2018.

311. Letter from Alexander Hamilton, U.S. Sec'y of the Treasury, to Edmund Randolph, U.S. Att'y Gen. (Jan. 2, 1795), https://founders.archives.gov/documents/Hamilton/01-18-02-0006.

312. Letter from Alexander Hamilton, U.S. Sec'y of the Treasury, to Isaac Holmes, Collector of Customs, Port of Charleston, (Sept. 4, 1794), http://founders.archives.gov/documents/Hamilton/01-17-02-0151 (footnote omitted).

313. *See* 3 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 236 (Washington Gov't Printing Office 1821), https://memory.loc.gov/cgi-bin/ampage?collId=llej&fileName=003/llej003.db&recNum=243&itemLink=D?hlaw:1:./temp/~ammem_GV02::%230030244&linkText=1 [hereinafter Thomas Parker].

for most of his tenure.[314]

Parker was not the only United States Attorney with a contrary political view that Washington tolerated once it was revealed. Pierpont Edwards, in Connecticut, also held strong Republican views.[315] Edwards aligned with his nephew, Aaron Burr, who would become Hamilton's nemesis.[316] In 1792, Hamilton expressed skepticism about Edwards' allegiance, informing Washington that Edwards aligned with Burr.[317] Near the 1792 Presidential election, Vice President Adams wrote his wife, "Mr P[ierpont] E[dwards] came off miserably. He gave such offence by mentioning his Nephew [Aaron Burr], that they would not appoint one Man who had any connection with him."[318] Supporting Burr politically isolated Edwards, but it did not cost him his federal post.[319] While this might evidence non-partisanship, it is equally likely that it reflects uncertainty about the President's power to remove people from office.[320] What is certain, however, is that Washington did not remove Parker and Edwards despite their political opposition.

314. Thomas Jefferson became the first Republican president in 1801. *Presidents*, WHITEHOUSE.GOV, https://www.whitehouse.gov/about-the-white-house/presidents/ (last visited Nov. 16, 2018). After an eight-year term, he was replaced by Madison and Monroe, who both served eight years. *Id.* John Quincy Adams was the last Republican president, serving until 1829. *Id.*

315. Heckman, *supra* note 272, at 671.

316. *Id.*; CHERNOW, *supra* note 168, at 421–22, 687–89, 702–04; FERLING, *supra* note 167, at 339–47.

317. Letter from Alexander Hamilton, U.S. Sec'y of the Treasury, to George Washington, U.S. President (Sept. 23, 1792), http://founders.archives.gov/documents/Washington/05-11-02-0074.

318. Letter from John Adams, U.S. Vice President, to Abigail Adams (Nov. 24, 1792), https://founders.archives.gov/documents/Adams/04-09-02-0185.

319. Heckman, *supra* note 272, at 673–74.

320. *See, e.g.*, Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997); Martin S. Flaherty, *Relearning Founding Lessons: The Removal Power and Joint Accountability*, 47 CASE W. RES. L. REV. 1563 (1997) (discussing the scholarly debate); *see also* Currie, *supra* note 108, at 196–201 (discussing the Congressional debate in the First Congress); Letter from James Madison, Member, U.S. House of Representatives, to Edmund Randolph, U.S. Att'y Gen. (June 17, 1789), https://founders.archives.gov/documents/Madison/01-12-02-0141 (displaying that James Madison, writing to future Attorney General Edmund Randolph, considered the question).

V. Effects of Politicization

Undoubtedly politics influenced Washington's United States Attorney selections and he had no evident qualms about using political preferences as a basis for appointments. Washington sought people who shared his vision because those whom he selected would publicly represent the government's positions.[321] Although politicization is used in a critical or derogatory fashion today, Washington's politicized selections had important effects that should inform the modern debate surrounding politicization. First, by hiring people who represented specific political positions, the citizenry could voice their support of or objection to the position. Second, by including Congress in the process and relying on their political connections, Washington's decisions were not unilateral but represented the voice of government as a whole. Finally, by representing the government as a whole, Washington's selections represented the will of the "people," for better or worse.

A. Democratic Check on Federal Government Power

Most view politicizing criminal prosecution as an abuse of power.[322] If political preferences are used in hiring, then politically-motivated prosecutions will result.[323] Politically motivated prosecutions are improper because they are not based on actual law violations.[324] This reasoning reveals a lack of faith in jury trials.[325] If we trust juries to decide cases based on law

321. *See generally* Ingram, *supra* note 173.

322. Jon Entine, *A Parable of Politicized Prosecution*, AM. ENTERPRISE INST. (July 21, 2009, 12:00 AM), http://www.aei.org/publication/a-parable-of-politicized-prosecution/print/; Joshua Philipp, *Former FBI Agent Explains the Problems of Politicized Law Enforcement*, EPOCH TIMES (July 13, 2017), https://www.theepochtimes.com/former-fbi-agent-explains-the-problems-of-politicized-law-enforcement_2267235.html.

323. Levenson, *supra* note 50, at 309–10; Frank M. Tuerkheimer, *The Executive Investigates Itself*, 65 CAL. L. REV. 597, 600–02 (1977).

324. Broughton, *supra* note 85, at 164–79; Bruce Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, ALA. L. REV. (forthcoming).

325. Scholars have neglected juries as a potential check on politicized prosecutions. Beale, *supra* note 9, at 415–16. For example, Professor Beale

and facts, then politically-motivated prosecutions are not as problematic because juries would acquit. If such prosecutions were more than isolated incidents and not based on sufficient evidence, then the people could remove the party from power with the next election. Washington's appointees, in many instances, were overtly political. They pursued prosecutions that furthered their political interests. However, when they did this, juries failed to convict, thus establishing a powerful check on federal prosecutorial power.

As Washington's presidency progressed, he developed specific ideas about how to address national problems.[326] However, not everyone agreed with his policy choices.[327] Those who opposed Washington's policy choices resisted the laws implementing his priorities and prosecutions ensued.[328] Washington trusted his attorneys to present those cases.

Two specific instances arose during Washington's second term. First, in 1791, Hamilton convinced Congress to pass an excise tax on whiskey.[329] Many in the western United States

discusses whether the US Attorney role should be reconceptualized by redefining it as a nonpartisan career appointment. *Id.* She ultimately decides it is not a good idea because the Justice Department leadership will be politically appointed thus allowing the possibility of political influence. *Id.* She argues the Senate confirmation of US Attorneys provides a counterbalance, making United States Attorneys more local and responsive to local political influences. *Id.* Others argue that juries do not provide a sufficient check. *See* Gershman, *supra* note 4, at 9–19 (describing three politically motivated prosecutions that resulted in jury convictions despite questionable evidence).

326. One pressing problem was the nation's debt. Assuming the state's debt and paying it from federal tax revenues was a central feature of Alexander Hamilton's economic policy that Washington adopted. *See* FRITZ, *supra* note 157, at 172–74. One particular aspect of this was the whiskey excise tax that generated significant and occasionally violent protests. *Id.*

327. *See, e.g.*, FRITZ, *supra* note 157, at 175 (discussing the disagreement with the whiskey excise); WOOD, *supra* note 162, at 140–46 (discussing the creation of the Bank of the United States).

328. The most notorious opposition to Washington Administration policies arose during the summer and fall of 1794 when residents of western Pennsylvania violently resisted the whiskey excise tax. *See generally* WILLIAM HOGELAND, THE WHISKEY REBELLION: GEORGE WASHINGTON, ALEXANDER HAMILTON, AND THE FRONTIER REBELS WHO CHALLENGED AMERICA'S NEWFOUND SOVEREIGNTY (Scribner 2010)*;* THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION (Oxford Univ. Press 1986) .

329. SLAUGHTER, *supra* note 328, at 3, 93–97.

violently resisted its collection.[330] In the summer of 1792, Hamilton convinced Washington that criminal prosecutions were necessary to demonstrate federal resolve.[331] Attorney General Edmund Randolph had already opined that the conduct Hamilton identified was protected by the First Amendment.[332] Nonetheless, acting on Washington's instructions, the United States Attorney for Pennsylvania, William Rawle, initiated prosecutions to demonstrate the federal government's power.[333] The Administration's hasty efforts were exposed, however, when it became apparent that those accused were victims of mistaken identity.[334] Second, two years later, in 1794, Hamilton and Washington led a militia group to confront protesters in western Pennsylvania.[335] With the rebellion quashed, Rawle initiated numerous criminal cases, reinforcing the Administration's desires, creating a broad definition of "levying war" in the process.[336] Like the first case, most cases ended with dismissals or acquittals.[337] Only two were convicted and both subsequently received pardons.[338]

330. *Id.*

331. Letter from Alexander Hamilton, U.S. Sec'y of the Treasury, to George Washington, U.S. President (Sept. 1, 1792), https://founders.archives.gov/documents/Hamilton/01-12-02-0239.

332. Letter from Edmund Randolph, U.S. Att'y Gen., to Alexander Hamilton, U.S. Sec'y of the Treasury (Sept. 8, 1792), https://founders.archives.gov/documents/Hamilton/01-12-02-0261.

333. SLAUGHTER, *supra* note 328, at 160–61, 167, 170; Letter from George Washington, U.S. President, to Edmund Randolph, U.S. Att'y Gen. (Oct. 1, 1792), http://founders.archives.gov/documents/Washington/05-11-02-0097.

334. Letter from George Washington, U.S. President, to William Rawle, U.S. Dist. Att'y for Pa. (Mar. 13, 1793), http://founders.archives.gov/documents/Washington/05-12-02-0243; Letter from Tench Coxe to Alexander Hamilton, U.S. Sec'y of the Treasury, n.10 (Oct. 19, 1792), https://founders.archives.gov/documents/Hamilton/01-12-02-0409.

335. Richard H. Kohn, *The Washington Administration's Decision to Crush the Whiskey Rebellion*, 59 J. OF AM. HIST. 567, 567–68 (1972).

336. Whitman H. Ridgway, *Fries in the Federalist Imagination: A Crisis of Republican Society*, 67 PA. HIST.: J. OF MID-ATLANTIC STUD. 141, 147 (2000); *see Minutes of the Circuit Court, United States Circuit Court for the Eastern District of Pennsylvania, 1791-1840*, ANCESTRY.COM, http://search.ancestryinstitution.com/aird/search/db.aspx?dbid=1248 (last visited Nov. 20, 2018) (citing a list of cases prosecuted).

337. Scott Ingram, *Presidents, Politics, and Pardons: Washington's Original (Mis?)Use of the Pardon Power*, 8 WAKE FOREST J. L. & POL'Y 259, 299–309 (2018).

338. *Id.*

While the whiskey rebellion cases only arose in Pennsylvania, prosecutions for violations of Washington's neutrality proclamation occurred throughout the Nation. In February 1793, a war began between France and Great Britain causing considerable policy problems for the United States due to the citizenry divided over whom to support.[339] Knowing that the United States could not fight a war, Washington declared neutrality and warned those who might join a side that they would be prosecuted.[340] During the summer of 1793, cases arose in Pennsylvania,[341] Georgia,[342] and North Carolina.[343] Federalist prosecutors in each state brought cases without any clear legal prohibition regarding the accused's conduct.[344] In at least one instance, the facts were not sufficient for a conviction.[345] While the North Carolina case was dismissed, juries in Georgia and Pennsylvania acquitted the Defendants.[346] In 1794, Congress enacted a neutrality statute and more cases arose.[347] Federalist prosecutors in Massachusetts[348] and Virginia[349] investigated neutrality violation cases. Only in Federalist Massachusetts did a jury convict.[350] Juries across the

339. ELKINS & MCKITRICK, *supra* note 18 at 308–11; FERLING, *supra* note 167, at 244–46.

340. WILLIAM R. CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL 26–34 (Univ. of S.C. Press 2006); ELKINS & MCKITRICK, *supra* note 18, at 336–38.

341. United States v. Henfield, No. 6360, 1793 U.S. App. LEXIS 16, at *1–95 (C.C.D. Pa. May 22, 1793) [hereinafter Henfield's Case].

342. United States v. Rivers, (C.C.D. Ga. 1793).

343. United States v. Olmstead, Minutes of the Circuit Court (C.C.D.N.C. 1793), NARA-Atlanta Branch.

344. Scott Ingram, *Replacing the "Sword of War" with the "Scales of Justice": Henfield's Case and the Origins of Lawfare in the United States*, 9 J. NAT'L SECURITY L. & POL'Y 483, 496–497 (2018) (manuscript at 15–16), http://jnslp.com/wp-content/uploads/2018/05/Replacing_the_Sword_of_War%E2%80%9D.pdf.

345. Henfield's Case, *supra* note 341, at 93.

346. CASTO, *supra* note 340, at 100–02.

347. Neutrality Act of 1794, ch. 50, 1 Stat. 381, 383–84 (1794) (current version at 18 U.S.C. § 958 (1994).

348. United States v. Samuel Rogers, Case File (C.C.D.Mass. 1794), NARA-Boston; United States v. Jonathan Nutting, Case File (C.C.D.Mass 1794), NARA-Boston.

349. United States v. John Sinclair, Minutes of the Circuit Court (C.C.D.Va. 1794).

350. *See supra* notes 348–48.

country refused to enforce the federal government's neutrality efforts because they disagreed with it. Only South Carolina's Parker offered any internal resistance.[351]

These cases demonstrate how a jury can check government power. Prosecutions resulting from policy enforcement largely failed. Washington's hand-picked attorneys presented cases to the people and the people rejected them.

Unlike during Washington's presidency, today's federal cases rarely go to trial.[352] One significant reason is that prosecutors, rather than juries, now have the final say on policy enforcement.[353] By only prosecuting cases with ample evidence, a jury will never have the opportunity to acquit because defendants will plead guilty.[354] Without this important check, politicized prosecutions can cause significant societal harm. A jury may only exercise its power to check the federal government's policy-oriented prosecutions when defendants assert their right to trial.

B. Actual Advise and Consent

While the Judiciary Act gave the President power to appoint United States Attorneys, it required the Senate give its advice

351. *See supra* notes 310–314 and accompanying text.

352. U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2016, at 5–7 (2016), https://www.justice.gov/usao/page/file/988896/download (reporting that, in 2016, the year for which statistics are most recent, the United States Attorney offices prosecuted 50,973 cases and, of those cases, only 2,195, a mere 4%, went to trial); *see generally* Suja A. Thomas, *Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195 (2014).

353. *See generally* Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701 (2013); Markowitz, *supra* note 11; Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999); David Alan Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIM. 451 (2018), https://www.annualreviews.org/doi/full/10.1146/annurev-criminol-032317-092440.

354. *See generally* Celesta Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 L. & SOC'Y REV. 291, 310–11 (1987); Lisa Frohmann, *Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROBS. 213, 224 (1991) (discussing prosecutorial concerns with convictability); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 48–58 (2002).

and consent.[355] When Washington required assistance filling the positions, he wisely looked to representatives from the states to recommend candidates. This became the roots of Senatorial courtesy.[356] While there was no formal hearing about a nominee's suitability, Congress approved Washington's nominations because, in effect, its members selected the nominees. By providing Washington with recommendations, Congress enhanced the politicization effects; however, George Washington consulted those who shared the Administration's perspective making the nominees more likely to support his agenda.[357]

More recently, Congress has abandoned this role.[358] While Congress might subject judicial nominees to more strict scrutiny, rarely is any United States Attorney scrutinized, let alone challenged.[359] Most selections result from discussions between lower-level staff at the Justice Department and Congressional offices.[360] This is why President Trump's discussions with potential United States Attorney nominees raised such concern.[361] There could be no other reason for a President to meet with a potential nominee, other than to exert improper influence over that person or to ensure that person is loyal to the Administration.[362]

However, this is exactly what Washington had in mind when making his United States Attorney selections. He wanted people loyal to the federal government who would represent the federal government's interests in court. Washington consulted

355. Judiciary Act of 1789, § 35, 1 Stat. 73, 92 (1789) (current version at 28 U.S.C. § 1654 (1949).

356. EISENSTEIN, *supra* note 64; *see also* Richman, *supra* note 5, at 289–90; Mitchel A. Sollenberger, *Georgia's Influence on the U.S. Senate: A Reassessment of the Rejection of Benjamin Fishbourn and the Origin of Senatorial Courtesy*, 93 GA. HIST. Q. 182 (2009).

357. Perry, *supra* note 14, at 143–46 (discussing how U.S. Attorney type could affect behavior, responsiveness to Administration agenda).

358. Kent, *supra* note 9, at 28–30; Tuerkheimer, *supra* note 323, at 620–22 (arguing that senatorial courtesy in United States Attorney appointments enhances political influence and minimizes advice and consent).

359. *See* Michael J. Nelson & Ian Ostrander, *Keeping Appointments: The Politics of Confirming United States Attorneys*, 37 JUST. SYS. J. 211 (2016).

360. Eisenstein, *supra* note 57, at 242–48.

361. Smith, *supra* note 28.

362. *Id.*

with those who supported his Administration; they thought like him and knew his desire to make the new government succeed and become respected among the populace.

C. Balancing National versus Local Politics

When people are elected to public office pursuant to our constitutional system, it is presumed that they represent the public's will[363] because they were elected to advance particular political ideas.[364] The Nation's diversity ensures that a significant percentage of the populace may not like those ideas. When those ideas manifest themselves in criminal law, then prosecutions naturally follow those enactments.[365] One benefit of separating politics and prosecution is the independence United States Attorneys gain to address important local matters.[366] However, Washington's politicized selections and his expectations that they advance policy and partisan interests demonstrate that politicization does not mean United States Attorneys cannot still address local problems.

Washington's United States Attorney selections were chosen for their support of Federalists, both Constitutional and Hamiltonian. They were expected to enforce the Administration's policies. However, they also had to be respectable local figures. Washington, consistent with his overall philosophy and practical necessity, deferred to the decisions of his United States Attorneys. This deferment and discretion appeared in several national policy-related matters.

363. *See* NADIA URBINATI, REPRESENTATIVE DEMOCRACY: PRINCIPLES AND GENEALOGY 24–25 (Univ. of Chi. Press 2008) (noting that this is just one theory of representative democracy—two others have no relationship between the people's will and the representative's actions); *see also* Grossback et al., *supra* note 103, at 712–13.

364. *See* URBINATI, *supra* note 363, at 24–25.

365. *See* Broughton, *supra* note 85, at 156; Simons, *supra* note 5, at 895–99; *see also* Karen J. Maschke, *Prosecutors as Crime Creators: The Case of Prenatal Drug Use*, 20 CRIM. JUST. REV. 21 (1995)*; but see* James D. Calder, *RICO's "Troubled. . . Transition": Organized Crime, Strategic Institutional Factors, and Implementation Delay, 1971-1981*, 25 CRIM. JUST. REV. 31 (2000) (arguing that the executive branch requires a period of adaptation before new policy implementation).

366. *See* Lochner, *supra* note 61, at 272; Richman, *supra* note 5, at 2105.

Two arose in the first years of the presidency. In 1790, the new federal government focused on economic interests and ensuring domestic tranquility with Native American tribes.[367] Dealing with the former meant establishing the legitimacy of government securities.[368] Counterfeiting was rampant;[369] the government had to prosecute vigorously. In one interstate investigation and prosecution, Washington deferred to his Attorney's expertise and recommendations. In early April 1790, United States Attorney William Lewis heard from the jailer in Philadelphia that a person in custody wished to speak with him about a federal crime.[370] Lewis went to the jail and learned of a counterfeiting operation in New Jersey and New York.[371] The person confined, Smith, would only provide the information in a sworn format upon receipt of a pardon.[372] Lewis lacked pardon authority and sent the information to Washington and Chief Justice John Jay.[373] At the same time, Richard Harrison, in New York, and Abraham Ogden, in New Jersey, were dealing with others involved in the case and also corresponding with Jay.[374] Without waiting for additional information, Washington trusted Lewis's judgment and granted the first pardon in United States federal history.[375] Washington trusted Lewis not because they worked closely but because Washington knew he and Lewis shared the same priorities.

When dealing with the tribes, Washington proclaimed, "all officers of the United States, as well civil as military, and all

367. FERLING, *supra* note 167, at 203–05 (discussing Washington's selection of Hamilton as Treasury Secretary and the speed at which he initiated his economic program); WOOD, *supra* note 162, at 111–19 (identifying border security as the main problem confronting the new administration).

368. *See* STEPHEN MIHM, A NATION OF COUNTERFEITERS: CAPITALISTS, CON MEN, AND THE MAKING OF THE UNITED STATES 1–19 (Harv. Univ. Press 2007).

369. *Id.* at 6–9.

370. *See* Letter from William Lewis to George Washington, U.S. President (Mar. 7, 1791), http://founders.archives.gov/documents/Washington/05-07-02-0294.

371. *Id.*

372. *Id.*

373. *Id.*

374. *See* Letter from John Jay, U.S. Chief Justice, to George Washington, U.S. President (Mar. 11, 1791), http://founders.archives.gov/documents/Washington/05-07-02-0312.

375. *See* Ingram, *supra* note 337, at 285–88.

other citizens and inhabitants thereof, to govern themselves according to the treaties and act aforesaid; as they will answer the contrary at their peril."[376] He knew many citizens wanted tribal lands and could forcibly take it. However, taking it constituted an act of war and violated treaty terms.[377] Therefore, prosecution was essential for deterrence and retribution. In one instance, James O'Fallon advertised his desire to form an army, invade tribal lands, and establish a new nation in the southwest United States.[378] Word reached the Administration, who determined prosecution was necessary.[379] Jefferson, as Secretary of State, sent Kentucky's United States Attorney, William Murray, instructions to investigate.[380] Over the next six weeks, Murray collected information about O'Fallon's activities.[381] When Murray completed his task, he determined that there was no threat and that O'Fallon was more talk than action.[382] Murray refused to prosecute, even for riot as Attorney General Randolph had suggested.[383] Despite the need to demonstrate executive action to enforce its treaty obligations, Washington deferred to Murray. Similar to Lewis, Washington and Murray did not have any pre-existing relationship. Instead, Murray was a Federalist. Washington understood Murray would prosecute if the case was viable because Murray supported both Washington's desire for the federal government to succeed and Washington's policies.

Two years later, Washington confronted a similar issue with

376. George Washington, U.S. President, Proclamation (Aug. 26, 1790), https://founders.archives.gov/documents/Washington/05-06-02-0159.

377. *Id.*

378. *See* Letter from Henry Knox, U.S. Sec'y of War, to George Washington, U.S. President, n.4 (Jan. 22, 1791), http://founders.archives.gov/documents/Washington/05-07-02-0146.

379. *Id.*

380. *See* Letter from Thomas Jefferson, U.S. Sec'y of State, to William Murray (Mar. 22, 1791), http://founders.archives.gov/documents/Jefferson/01-19-02-0159.

381. *See* Letter from William Murray to Thomas Jefferson, U.S. Sec'y of State (May 12, 1791), http://founders.archives.gov/documents/Jefferson/01-20-02-0139.

382. *Id.*

383. *See Opinion of Attorney General on the Case of James O'Fallon, 14 February 1791*, FOUNDERS ONLINE, http://founders.archives.gov/documents/Jefferson/01-19-02-0049 (last visited Nov. 27, 2018).

neutrality between France and Great Britain.[384] Despite Washington's calls for neutrality, American citizens joined French privateers.[385] To prevent war with Great Britain, the United States had to prosecute these violations.[386] Yet even under these circumstances, Washington deferred to his chosen United States Attorneys when they believed a prosecution was not viable. One of the first reports came in early May, just weeks after Washington issued the Neutrality Proclamation.[387] A French vessel, the *Sans Culotte,* captured a British vessel and sailed it up the Chesapeake Bay into the Choptank river area.[388] Based on the advice of a Congressman, the local customs inspector detained the vessel and learned a Maryland citizen captained it.[389] Around the same time, the United States Attorney, Zebulon Hollingsworth, learned of the activity and did not think prosecution was possible.[390] Jefferson instructed Hollingsworth that prosecuting the captain was essential to United States national security.[391] Despite this, the captain, John Hooper, was never prosecuted.[392] The Administration did

384. *See* CHARLES MARION THOMAS, AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT 21 (Faculty of Political Science of Colum. Univ. eds., AMS Press, Inc. 1931).

385. ELKINS & MCKITRICK, *supra* note 18, at 335.

386. *See* Ingram, *supra* note 344, at 494.

387. *See* Letter from William Vans Murray, Member, U.S. House of Representatives, to Alexander Hamilton, U.S. Sec'y of the Treasury (May 8, 1793), https://founders.archives.gov/documents/Hamilton/01-14-02-0287; Letter from William Vans Murray, Member, U.S. House of Representatives, to Thomas Jefferson, U.S. Sec'y of State (May 9, 1793), http://founders.archives.gov/documents/Jefferson/01-25-02-0639.

388. Letter from William Vans Murray to Alexander Hamilton, *supra* note 387, at n.3; Letter from William Vans Murray to Thomas Jefferson, *supra* note 387.

389. Letter from William Vans Murray to Alexander Hamilton, *supra* note 387, at n.3; Letter from William Vans Murray to Thomas Jefferson, *supra* note 387.

390. Letter from Thomas Jefferson, U.S. Sec'y of State, to Zebulon Hollingsworth (June 25, 1793), https://founders.archives.gov/documents/Jefferson/01-26-02-0335.

391. *Id.*

392. The extant records from the Maryland District and Circuit Courts do not indicate any case against Mr. Hooper in 1793 or 1794. In fact, other than Hollingsworth's first court appearance in the May, 1793 term, there is no record of him appearing in court during the Circuit Court sessions. *See* Mins. of the Circuit Court of Md., Nat'l Archives – Phila.

not protest and continued working with Hollingsworth.[393] Hollingsworth had the Administration's trust because they shared ideological values. The vessel eventually sailed from Choptank back into the Atlantic and arrived near Norfolk where it took on more armaments and crew.[394] This time, the matter was referred to the United States Attorney for Virginia, Alexander Campbell, another trusted attorney, who also declined to prosecute, citing that his interpretation of the neutrality proclamation and subsequent instructions rendered prosecution impossible.[395] Again, Washington relied on Campbell's loyalty. However, in a similar instance, when Thomas Parker refused to prosecute a case in South Carolina, Alexander Hamilton turned to Secretary of State Randolph to send Parker additional instructions about proceeding in the case.[396] Parker's politics were more akin to South Carolina's Governor who allowed the French to outfit the initial privateers in Charleston and subsequently set in motion the need to vigorously enforce neutrality through the courts.[397]

In today's environment, trusted appointees are those lacking political connection.[398] Today's Presidents know even less about their United States Attorney appointees than Washington did.[399] Today's process includes many more

393. Hollingsworth remained in office until 1805 when he resigned. *See Notes on Appointments, 23 December 1805,* FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/99-01-02-2865 (last visited Sept. 7, 2018). Despite the fact Hollingsworth remained in office, Jefferson did not hold a strong opinion of his attorney for Maryland. When Jefferson became President he held a cabinet meeting on appointments and slated Hollingsworth for firing after September. *See* Memorandum from Thomas Jefferson, U.S. President, on a Cabinet Meeting (Dec. 23, 1805), http://founders.archives.gov/documents/Jefferson/01-34-02-0101. Despite this, Hollingsworth remained. *Notes on Appointments*, *supra.*

394. Letter from Henry Lee, Governor of Va., to Thomas Jefferson, U.S. Sec'y of State (Oct. 4, 1793), https://founders.archives.gov/documents/Jefferson/01-27-02-0197.

395. *Id.*

396. Letter from Alexander Hamilton, U.S. Sec'y of the Treasury, to Edmund Randolph, U.S. Sec'y of State (Jan. 2, 1795), http://founders.archives.gov/documents/Hamilton/01-18-02-0006).

397. C.L. BRAGG, CRESCENT MOON OVER CAROLINA: WILLIAM MOULTRIE AND AMERICAN LIBERTY 254–58 (Univ. Of S.C. Press 2013).

398. EISENSTEIN, *supra* note 64, at 41–47; Levenson, *supra* note 50, at 310–11.

399. *See supra* notes 358–362 and accompanying text.

bureaucratic layers that mitigate political influence as much as possible.[400] This makes establishing trust between the President and the appointed prosecutors difficult because the entire relationship is built around the notion that federal prosecutors will prosecute cases in a politically neutral fashion without input from the person who appointed them.[401] Yet this makes federal prosecutors unaccountable. For the systemic checks on prosecutorial power to function properly, prosecutors must be politically accountable.[402] Washington understood this and ensured that those he selected had his trust. While all did not perform as expected, he trusted his people to balance the political interests entrusted to them.

Only three of the four politicization types appear in Washington's United States Attorney appointments. Unsurprisingly, Washington never had occasion to select people to protect him or his Administration from governmental criminal investigation. The opportunity to employ this type of politicization in hiring is exceedingly rare. It requires a vacancy in an office that is investigating the President or a key Administration official. Only a small handful of offices could do this. However, more significant for Washington's time is the manner in which such investigations occurred. Initially, Congress performed these investigations. In late 1792 to early 1793, Hamilton confronted allegations that he personally benefited from his economic program.[403] Eventually, the Congressional investigation cleared Hamilton.[404] Congress remained the primary investigator of executive branch conduct until after the Civil War.[405]

If Washington politicized his appointments, why not remove them when they acted contrary to Washington's political wishes? Washington did not remove them for two reasons. First,

400. *Id.*

401. *Id.*

402. Beale, *supra* note 9, at 413–38 (suggesting reforms to selecting United States Attorneys and analyzing the potential effects of removing political influence).

403. ELKINS & MCKITRICK, *supra* note 18, at 296–301.

404. *Id.*

405. MARK WAHLGREN SUMMERS, THE ERA OF GOOD STEALINGS 20–22 (Oxford Univ. Press 1993); *see also* Bernard Schwartz, *Executive Privilege and Congressional Investigatory Power*, 47 CAL. L. REV. 3, 23–24 (1959).

Washington, and those like him, denied factions existed.[406] They understood the ideological differences, but factions had to be avoided.[407] By removing those who did not act as Washington preferred, factions could result which would undermine the national unity George Washington sought.[408] Second, there was uncertainty about the President's removal power.[409] Did Washington have the authority to remove Senate-confirmed appointees? Having many other political battles to wage, Washington accepted that, once confirmed, he could not remove the office holder.[410]

VI. Conclusion

Politicizing criminal prosecution is not new, as it did not originate with Watergate in the 1970s. Instead, efforts to curb politicization arose then.[411] A clear line emerged between political appointees and career prosecutors. This permitted some political control, but as scholars have noted, career prosecutors can wait for the next Administration to remove political obstacles to the career prosecutor's agenda.[412] Prior to Watergate, the entire federal criminal prosecutorial machinery turned over whenever a new political party assumed the White House.[413] They did this because the new Administration wanted its people with similar political views in these important positions.[414] Selecting people based on their political viewpoints originated with Washington's selections. He chose people loyal to his specific policy and political agendas, ensuring that his

406. ELKINS & MCKITRICK, *supra* note 18, at 263–70.

407. *Id.*

408. FERLING, *supra* note 154, at 273–74; GLENN A. PHELPS, GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM 131 (Univ. Press of Kan. 1993).

409. *See supra* note 319 (removal power uncertainty).

410. MILLER, *supra* note 18, at 30–31.

411. *See* Eisenstein, *supra* note 57, at 235 (identifying five factors promoting the independence of United States Attorneys, which is the converse of politicization and often equates to autonomy from the dictates of the Justice Department); *see also* Kent, *supra* note 9, at 5–12.

412. Lochner, *supra* note 61, at 282–84.

413. Eisenstein, *supra* note 57, at 228–29, 233.

414. *Id.* at 233.

policies were enforced and the government followed the course he devised.

Two key lessons emerge from Washington's practice. First, politicization provides important benefits. The debate about politicized prosecutions cannot be reduced to a simple dichotomy. Politicization takes multiple, interrelated forms. Prosecutorial positions are a reward for loyalty. Prosecutors must enforce specific policy positions that often are ideological and partisan. This is the nature of our system, and we must remember that the elected party has, at minimum, a constitutional mandate to pursue its policy vision. The concern arises when prosecutors target political adversaries or protect political allies.

Addressing the concern about targeting political adversaries is at the heart of the second lesson. We have this concern because we do not trust our political and constitutional processes to deal with the effects of politicization. While we might have good reason to distrust these processes, circumventing the processes in the name of political neutrality further erodes the political and constitutional processes. Washington chose attorneys who perceived national concerns similarly to him. He trusted them to enforce his political objectives. In many instances the popular will held different views. When Washington's attorneys prosecuted cases in accordance with Washington's objectives, the public exercised their constitutional duty and checked prosecutorial power by finding people not guilty. When matters of public corruption emerged, Congress exercised its constitutional role and investigated. Ultimately, the people accepted the outcomes. Power was not abused because the checks worked. This is not to say abuses will not happen; however, if the political and constitutional checks are in place, then the abuses are remedied quickly.

Criminal prosecution is an inherently political act. It is a decision to use the government's power. Preferences are an important basis for political and prosecutorial decision-making. Rather than bar politicized prosecution, we must revitalize the criminal justice system's political and constitutional checks on it.