

COMMENT ON LAURENCE CLAUS, *THE DIVIDED EXECUTIVE*

MARGARET H. LEMOS*

In *The Divided Executive*, Professor Claus offers a provocative proposal to vest Congress—rather than the President—with the power to remove the Attorney General (“AG”), and to further insulate the AG by conditioning removal on a finding of good cause and a two-thirds vote of both houses of Congress.¹ Building on his earlier work, Professor Claus grounds the proposal in a theory of separation of powers that (contra Montesquieu) emphasizes the importance of *intra*-institutional checks and balances.² This brief response largely ignores that rich theoretical backdrop in favor of a more pedestrian approach that focuses on the nature of the AG’s job and on potential downsides of moving control over that particular position outside of the executive branch.

Professor Claus’s proposal is motivated by discomfort with the President’s power to dismiss the AG, or the AG’s subordinates at the Department of Justice, at will—and a desire to create more checks on the President within the executive branch. More specifically, Professor Claus focuses on the need for independence for government actors who may need to prosecute others in government. That is an understandable impulse in the current political moment, and Professor Claus is hardly alone in worrying about a state of affairs in which the President can effectively immunize himself and his allies by firing any AG who dares to shine the prosecutorial light on the executive branch itself.

Copyright © 2018 Margaret H. Lemos.

*Robert G. Seaks LL.B. ‘34 Professor of Law, Duke University. These informal comments were prepared for the Symposium on Amending the Constitution, held at Duke Law School on Feb. 2, 2018. I am grateful to the editors of the Duke Journal of Constitutional Law and Public Policy for inviting me to participate, and to Professor Claus for his thought-provoking contribution.

1. Laurence Claus, *The Divided Executive*, 13 Duke J. Const. L. & Pub. Pol’y 25, 25–26 (2018).

2. See generally Laurence Claus, *Montesquieu’s Mistakes and the True Meaning of Separation*, 25 OXFORD J. LEGAL STUD. 419 (2005).

But the AG does a great deal more than prosecute crimes, generally, and crimes by executive actors, specifically. The AG also stands atop an organizational hierarchy that is responsible for the civil side of federal law enforcement, including control of litigation for much of the vast administrative state.³ Is that a power that we want to vest in an appointed official who's formally independent from the President, removable only by a supermajority vote in Congress? I'm not sure. The primary reason for my hesitation is that, in my view, law-execution is an unavoidably political endeavor given the scope of federal law today. When I say "political," I don't mean partisan. But I do mean that the exercise of enforcement discretion entails contestable policy judgments that, it seems to me, call for some meaningful form of democratic accountability.

To be sure, there are lots of reasons to doubt that there *is* meaningful democratic accountability when it comes to the actions of the federal AG, and in other work I have suggested various mechanisms for improving transparency and accountability.⁴ Professor Claus is working at the other end of the spectrum: he thinks there should be even less in the way of political checks and more independence for the AG—along the lines of *judicial* independence. Indeed, at several points in his argument, Professor Claus suggests a similarity between prosecutors and judges. For example, he quotes Lord Camden, who was England's AG in the mid-1700s, as saying that he "interposed himself as a *judicial* officer between the executive Government and the subject; that he acted as a kind of referee, accountable to both parties, by a tacit compact for sound and virtual exercise of discretion."⁵ Professor Claus also notes that an early draft of the Judiciary Act provided for the

3. For discussions of DOJ control of agency litigation, see, for example, Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 J. CONST. L. 558, 560–61 (2003); Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1368–69 (2000).

4. See Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929 (2017) (suggesting reforms to "sunshine" and recusal rules, restrictions on lobbying, and regulations of state attorney general elections to promote greater transparency around efforts to influence broad enforcement policy, and greater accountability for government enforcement generally). My work has focused primarily on civil law enforcement. For articles exploring similar themes for local prosecutors, see, for example, Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939 (1997); Ronald F. Wright, *Beyond Prosecutor Elections*, 67 S.M.U. L. REV. 593 (2014); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2008).

5. Claus, *supra* note 1, at 27 (quoting 5 JOHN CAMPBELL, LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND 360 (1846)).

United States AG to be appointed by the Supreme Court rather than the President.⁶ And he argues that “[t]aking care that the laws are faithfully executed no more requires an unlimited presidential power to dismiss the Attorney General than it requires an unlimited presidential power to dismiss judges, whose decisions are just as integral to the law’s faithful execution.”⁷

It’s not a wild idea to think of prosecutors as analogous to judges. Other scholars have argued that prosecutors—and government lawyers more generally—have a duty to “seek justice.”⁸ The point is to distinguish the prosecutor’s job from that of a private lawyer, whose obligation is to advocate zealously in favor of her client’s position, whatever that happens to be. Put somewhat differently, we might think of the “client” of the government lawyer as the public itself, and conclude that zealous advocacy on behalf of the public means something like trying to do what’s right and just, all things considered.⁹ That ideal is reflected in an inscription that rings the space outside the AG’s office: “The United States wins its point whenever justice is done its citizens in the courts.”¹⁰

There is a quasi-judicial cast to this conception of the AG’s job, suggesting (as in the quote from Lord Camden) that the prosecutor is serving as something of a referee and not just blindly pursuing a conviction.¹¹ But that’s still quite different from “calling balls and strikes,” as Chief Justice Roberts famously—or maybe infamously—described the job of a judge.¹² It’s also different from less formalistic understandings of judging that allow for legal indeterminacy and the inevitability of difficult judgment calls. Even if we acknowledge that the law does not always supply clear answers to the questions judges must answer, we can nevertheless distinguish between judicial and prosecutorial discretion. Judges must do their best to fairly resolve the

6. *See id.*

7. *Id.* at 8.

8. *E.g.*, Bruce A. Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 269 (2000).

9. *Cf.* William B. Rubenstein, *On What a “Private Attorney General” Is—And Why it Matters*, 57 VAND. L. REV. 2129, 2138 (2004) (“Many public attorneys . . . consider ‘the public’ or ‘the public interest’ as their real client in interest; the agency or government official to whom they report is simply an intermediary form of that principal.”).

10. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (invoking the quote).

11. *See Lemos, supra* note 4, at 956–63 (exploring similarities between public enforcement and judging).

12. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55, 56 (2005) (statement of Judge John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

cases that come to them, but prosecutors do much more than that. Prosecutors also make a slew of discretionary choices about which offenses to prioritize, what kinds of sanctions to seek, and what violations to ignore. And, given the prevalence of settlement and plea bargaining, in many cases prosecutors determine not only which actions to pursue, but also how to resolve them. Those are not just debatable judgments about the best way to understand the laws on the books, akin to the sorts of judgments judges must make. They're policy decisions about what to do with that law.

Importantly for present purposes, such policy decisions may well shift from one presidential administration to the next. Federal policy on marijuana prosecutions is one recent and obvious example, but there are plenty more. Deciding whether or not to devote prosecutorial resources to a particular category of offense is not the kind of thing we'd expect judges to do, or even to weigh in on. Indeed, that's one reason why judges generally refuse to second-guess the exercise of prosecutorial or enforcement authority: because they recognize that it turns on a host of strategic and policy-based considerations that lie outside of the law. As the Court explained in *Heckler v. Chaney*,¹³ enforcement decisions “often involve[] a complicated balancing of a number of factors which are peculiarly within [the relevant agency’s] expertise,” including “whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and . . . whether the agency has enough resources to undertake the action at all.”¹⁴ The Court was talking about civil enforcement—a significant part of the AG’s job, as I’ve noted—but similar points hold on the criminal side as well. All of which is to say that the political independence of federal judges does not translate neatly or easily to the independence of the AG and her subordinates.

Granted—as Professor Claus emphasizes—it is the case that most state AGs are independent from the Governor, so the structure he proposes (or something like it) is by no means unthinkable.¹⁵ But it also

13. 470 U.S. 821 (1985).

14. *See id.* at 831–32 (invoking § 701(a)(2) of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (2012), which withholds judicial review of “agency action [that] is committed to agency discretion by law”).

15. *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2471 (2004) (“The fact that forty-eight states employ such a structure . . . suggests that the idea [of a divided federal executive] is not all that radical . . .”).

bears emphasis that most of those AGs are independently elected.¹⁶ Elections offer a way—an imperfect way, but a *way*—for state AGs, like elected local prosecutors, to articulate their enforcement priorities to the public, and for the public to weigh in on those important policy choices. It’s hard to imagine a federal appointment procedure that served those functions. The theater of judicial confirmation hearings tends to focus on judges’ fidelity to a source of authority separate from the appointing President: the law itself.¹⁷ (That commitment, of course, goes a long way toward explaining the tradition of judicial independence.¹⁸) Nominees for Professor Claus’s independent AG position might make similar promises to “call balls and strikes,” as it were—thereby demanding an even more heroic suspension of disbelief from the rest of us and offering no meaningful information to the public and our representatives about what enforcement policy would actually look like. As unattractive as that vision is, it’s difficult to conjure up an alternative scenario in which AG nominees were candid about the massive discretionary power they would wield, and what they planned to do with it.

But let’s bracket all that and suppose that the selection process works flawlessly on the front end. Questions of accountability at the back end remain. Professor Claus argues that AG independence is necessary given the current lack of checks on the President; he says that the “Presidency as a power center poses a uniquely great danger to liberty in lacking intra-institutional checks, because it comprises only one person.”¹⁹ I’m not sure that’s the right way of looking at it. The President is indeed one person, but the DOJ and the enforcement arms of all the agencies make up a huge bureaucracy that, in my view, create a significant set of informal checks. Other scholars have written about the importance of careerist lawyers and other civil servants, for example.²⁰ There are other protections as well. Any prosecution that

16. *See id.* at 2448 n.3.

17. *Cf.* *Chisom v. Roemer*, 501 U.S. 380, 410–11 (1991) (Scalia, J., dissenting) (“[I]t is the prosecutor who represents ‘‘The People’’; the judge represents the Law . . .”).

18. *See, e.g.*, Stephen B. Burbank, *What Do We Mean by ‘‘Judicial Independence?’’*, 64 OHIO ST. L.J. 323, 330 (2002) (arguing that “the enablement of judicial review” was “the central goal of the architects of federal judicial independence”); *see generally* Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 CAL. L. REV. 315 (1999) (elaborating the argument).

19. Claus, *supra* note 1, at 44.

20. *See, e.g.*, Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 540–47 (2015) (emphasizing the civil service as a critical component of the administrative system of checks and balances); Jon D. Michaels, *Privatizations Pretensions*, 77 U. CHI. L. REV. 717, 745 (2010) (“At times—especially when they must rely on professional civil servants—Presidents, governors, and mayors may find themselves statutorily and constitutionally

does go forward is subject to checks from the judicial branch. Our federalist system creates some protections against under- or non-enforcement, since in many cases states have overlapping jurisdiction.²¹ And for cases involving top-level executive officials, we have independent prosecutors in DOJ’s Office of Special Counsel.²²

As Professor Claus acknowledges, moreover, while there is no formal prohibition on the President firing the AG, there may be non-binding *conventions* that constrain the President’s ability, or willingness, to dismiss the AG in order to stymie an investigation or prosecution.²³ He says that “such a convention does not check as reliably and effectively as it would if it were backed up by constitutional protection for the investigators and prosecutors.”²⁴ That’s surely true: a convention would not prevent the President from dismissing an AG in order to protect his political cronies or himself, or for any other bad reason. But I have less than perfect confidence that a constitutional amendment along the lines Professor Claus proposes would effectively check a President who was bound and determined to put an end to an investigation, no matter what. In both cases, it seems to me that what matters is the response—specifically, the *political* response. Professor Claus is quite right that presidential impeachment is a crude tool and is unlikely to be used to calibrate the exercise of prosecutorial discretion.²⁵ But it’s a different question, I think, whether we might expect impeachment to be a viable response if the President were to breach longstanding norms concerning dismissal of the AG. Here, I’m not quite as pessimistic as Professor Claus—or maybe I’m more so, because if impeachment is so difficult to imagine under our current arrangements, then it seems to me that adding new “parchment barriers” won’t be much help.

limited in their ability to control regulatory policy.”).

21. Cf. Jed Handelsman Shugerman, *No Pardoning This Offense*, SLATE (Sept. 5, 2017) (“If Trump fires Mueller and his team, state attorneys general and state prosecutors can hire them. If Trump succeeds in pardoning the defendants or himself, state prosecutors can step in”), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/09/states_could_bring_these_charges_if_trump_tries_to_pardon_his_way_out_of.html.

22. *Special Counsel’s Office*, THE U.S. DEP’T OF JUSTICE, <https://www.justice.gov/sco> (last visited Mar. 29, 2018).

23. Cf. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1202 (2013) (discussing longstanding norms against politicizing the DOJ, which permitted “en masse replacement of U.S. Attorneys at the time of a partisan change of administration, but barred targeted removal midstream”).

24. Claus, *supra* note 1, at 41.

25. *Id.* at 42.