

PANEL DISCUSSION: THE INDEPENDENCE OF FEDERAL PROSECUTORS A
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Moderator:

Merrick B. Garland, U.S. Court of Appeals, D.C. Circuit

Garland:

My name is Merrick Garland. I am a judge on the D.C. Circuit and I will be your moderator. Today we're going to discuss the independence of federal prosecutors, and we're going to do this in three dimensions: the relationship between the White House and the Department of Justice; the relationship between the Department of Justice and U.S. Attorneys' offices; and the relationship between each of those and Congress. It should be noted that the panelists or myself often refer to the Department of Justice at the exclusion of the U.S. Attorneys' offices because of the independence that is at issue in this discussion, despite the fact that the U.S. Attorneys are part of the Department of Justice. We will begin with a panel discussion and save the last thirty minutes or so for questions from the audience.

We have an extremely knowledgeable and interesting panel for you. Professor John Yoo is a professor of law at the University of California at Berkeley. At the time of the 9/11 attacks, he was the **[*208]** Deputy Assistant Attorney General in the Office of Legal Counsel at the Department of Justice. Professor Yoo previously served as General Counsel for the Senate Judiciary Committee under Chairman Orrin Hatch, and he served as a law clerk for my colleague Judge Laurence Silberman of the D.C. Circuit and Justice Clarence Thomas of the Supreme Court.

Ms. Jamie Gorelick is a partner at the Washington law firm WilmerHale. She was a member of the National Commission on Terrorist Attacks on the United States. From 1997 to 2000, she was Vice Chair of Fannie Mae. Ms. Gorelick was Deputy Attorney General in the Clinton Administration and was also General Counsel of the Department of Defense.

Mr. Andrew McCarthy directs the Center for Law and Counterterrorism at the Foundation for the Defense of Democracies. For eighteen years, Andrew served as an Assistant U.S. Attorney in the Southern District of New York, where he led the prosecution of Sheikh Omar Abdel Rahman and eleven others in connection with the 1993 World Trade Center bombing. Following the 9/11 attacks, Mr. McCarthy supervised the office's command post near Ground Zero in New York City.

Bob Barr is the President and CEO of Liberty Strategies, LLC, a public policy consulting firm. Bob also occupies the 21st Century Liberties Chair for Freedom and Privacy at the American Conservative Union, and he serves on the Libertarian Party's national committee. Bob served as the U.S. Attorney in the Northern District of Georgia from 1986 to 1990. From 1995 to 2003, Bob was a member of the U.S. House of Representatives, where he represented the Seventh District of Georgia. Bob was at that time a senior member of the House Judiciary Committee and Vice Chair of the Government Reform Committee.

This panel on the independence of federal prosecutors is not intended to be a referendum on any particular President, any particular Attorney General, or any particular U.S. Attorney. The issues that we're going to discuss are ones that have been discussed for many years and we expect will be discussed for many more. For that reason, the questions I'm going to ask are either going to be hypothetical or historical, and I'd be grateful if, when taking questions from the audience, the questioners try to put their questions in that form.

So, here is my first hypothetical question, which I hope that most of the members of the panel are hearing for the first time.

Suppose that the President appoints his friend, a former judge and adviser from his home state, as the Attorney General.

[*209] Suppose that a public interest group then criticizes the Department of Justice as being "heavily politicized" and claims that the Attorney General has not "sorted out the distinction between being the President's lawyer and the people's lawyer."

Suppose at some time later, a member of Congress from the President's party calls the White House and the Department of Justice to request that a U.S. Attorney in his hometown be removed.

Suppose that the White House eventually tells the member of Congress that it will "expedite" the dismissal of that U.S. Attorney, tells the Department of Justice to do just that, and the Department of Justice then terminates the U.S. Attorney.

And suppose that the U.S. Attorney then calls a press conference and says, "A call from a Congressman clearly expedited my removal."

From that little bit of laughter before, I get the impression that you realize this is not a hypothetical. You're right. It's a real case. So I'm going to ask my questions using the real players' names. In this real case, which took place in 1977, did President Jimmy Carter do anything wrong when he called Attorney General, and former Judge, Griffin Bell and asked him to expedite the dismissal of Philadelphia U.S. Attorney David Marston at the request of Pennsylvania Representative Joshua Eilberg, who was at the time under investigation by Marston?

McCarthy:

We must first determine what "wrong" means. If the question is, did he do anything legally wrong, I think the answer to that is clearly no. The President can remove U.S. Attorneys or cause U.S. Attorneys to be removed for any reason or no reason. So, legally there shouldn't be an issue. I take the fact that the description did not suggest that there was an obstruction going on in connection with any particular case that was under litigation - that it was simply the removal of a U.S. Attorney.

Now, "wrong" is not just a legal concept. It's got a lot of other elements to it, and part of it is political. And I think the circumstances that Judge Garland described might be an incredibly stupid way to go about replacing U.S.

Attorneys. I would think that an Administration that did that would have to take a political hit for it, which is the way it's supposed to work in our system. The ultimate check is supposed to be the public at the ballot box. So I don't want to be misunderstood **[*210]** as saying that I didn't hear anything that was wrong, but I didn't hear anything that was either a crime or something that I think is legally redressable.

Barr:

I don't think that relying on just the ballot box for the impartial and appropriate administration of justice is the way most of us as Federalist attorneys would like to see the system operate. Some things in our political system, in a very general sense, certainly are appropriately left to the ballot box, but the swift and impartial administration of justice is not one of those factors of our society that ought to be left just to the ballot box.

This is an area that certainly, either hypothetically or in real life, Congress has an appropriate role, a responsibility to inquire as to whether or not there were improper motivations with regard to the request from the White House. Obstruction of justice is a very serious offense. It is one that falls within the appropriate oversight role of Congress, in addition to federal prosecutors. The answer to the question ultimately of whether or not there is something wrong here clearly is yes. As Andy said, whether it is in fact legally wrong, that it is criminal or possibly criminal, ought to be something that all of us, if we were a part of or around at the time that fact pattern occurred, should demand a full and sifting inquiry by Congress and by the Department of Justice.

One would have hoped that the pressure from the White House, as illustrated in the hypothetical, would have been resisted very quickly, very thoroughly, and very consistently by the Attorney General.

Garland:

So, you raise two issues, is there an obstruction problem and is there a political problem. Now, before I get to the other two members of the panel, let me add two other things. There was, in fact, the investigation that Bob's referring to. The Office of Professional Responsibility ("OPR") did investigate and determined that President Carter did not know that Representative Eilberg was under investigation by Marston at the time. Does that make any difference to you?

[*211] Barr:

That would certainly be relevant to the inquiry. One, I think, would want to go a little bit further than simply leaving it up to OPR to investigate its own. We don't know from the hypothetical whether Congress, or the Judiciary Committee in either house, looked into this as part of its oversight responsibility. We don't know whether or not, in fact, there was any other follow-up with regard to what seems to be a cursory conclusion that the President did not know.

Certainly, to me, knowing that particular White House, knowing the attention to detail by that particular President, the OPR's conclusion would strike me as one that certainly would require a little further investigation.

Garland:

Andy, on the political appearances question, does it matter to you that U.S. Attorney Marston was an appointee of President Nixon and that this all took place during the very first year of the new Administration?

McCarthy:

No. I don't think that that matters. In the sense that this is, as far as I'm concerned, principally a political problem, it may make a difference. Every fact that goes to the calculus of whether it was good judgment or bad judgment factors in. But in terms of the strict legal question about whether there's a legal problem here or not, I don't think it does. And I hear what Bob is saying about OPR and the Department investigating its own, but there are competing evils here. This is one of these situations where, no matter which way you come out or which way you structure an investigation, there's going to be something undesirable in the result.

You can have independent prosecutors look at this, but I think our experience now, and this is a decade's worth of experience, is that there's a significant downside to that. In many ways, I think it's better, no matter how much downside there is, to have OPR do investigations like that rather than go to the really awful procedure of having somebody independent of the Department of Justice do it.

Garland:

Jamie, let me ask you to respond to what you've heard, and let me add one more question. Did Attorney General Bell do anything [*212] wrong when he took President Carter's call after he learned what the subject was going to be?

Gorelick:

The knowledge of the President and the knowledge of the Department of Justice - in the person of the Attorney General - about whether there was an investigation pending are critical. The role of the Attorney General should be to buffer from any kind of political pressure the due processes of individual prosecutors and those who are developing cases. So, it really is unacceptable that a President should be making a decision like this in the absence of knowing whether he is actually affecting an investigation that is ongoing.

A second point is that it does matter that Marston was of the opposite party and presumably, at some point, was to be replaced. This explains why Presidents now generally say, when taking office, "This is a new Administration, and I expect to appoint all new U.S. Attorneys or at least take the resignations and decide individually." The result is that you don't have to individually pick out people for replacement at some later time. Every time a U.S. Attorney is removed on an individualized basis, you raise the question of whether they've got something within their domain that could be viewed as an investigation that the President is influencing.

Garland:

On that note, let me ask, does it matter, again regarding the facts already laid out, that Attorney General Bell actually sent a team of career prosecutors to Philadelphia to talk with the other people in the U.S. Attorney's Office to determine whether removing Marston would have any consequences to the Eilberg investigation?

Gorelick:

Yes. The fundamental question is whether this investigation is being handled as it ordinarily would. You want to make sure that your prosecutors are indeed being buffered. That does matter. Then you have to address what sort of message is being sent more broadly. When you fire a U.S. Attorney for failure to bring a case against someone in the opposite party or for bringing a case against someone in your party, you are sending a message. So there are two aspects to consider.

[*213] Absolutely, the Attorney General taking steps to make sure that the investigation proceeded or would proceed as it should was the right thing to do.

Yoo:

First, I was worried you were going to raise this case. In the interest of full disclosure, I grew up in Philadelphia and, in fact, I dated Marston's daughter, so I know the whole story, backwards and forwards. I am biased in favor of Marston, but I have to be, out of long-time attachment.

I would like to comment on Jamie's point about there being a buffer between the sort of political operations of the government and the civil service. I would just point out that it is not really required by the constitutional design. And I think what she's saying makes very good sense as a matter of policy judgment about how you might want to run the Department of Justice. But if you go back and look at the beginning of our country, Presidents would directly intervene in the decisions of prosecutors all the time.

President Washington overruled the U.S. Attorney in Philadelphia when the U.S. Attorney wanted to prosecute people who were involved in the Whiskey Rebellion. Another example is President Jefferson's direction of the prosecution of Aaron Burr. I think Jefferson wanted to out-lawyer Marshall, who was from the other party, and Jefferson gave directions to the U.S. Attorney in the Aaron Burr case about what types of evidence to introduce and documents to withhold or not. Jefferson also told all U.S. Attorneys not to prosecute anyone for Alien and Sedition Act violations because he thought the law was unconstitutional, which I think was correct.

So you had, once upon a time in our system under the Constitution, Presidents very directly intervening with prosecutorial decision-making. And I think that's because they all, at least these Presidents, viewed their authority as Chief Executive to carry out the law, meaning they had to have full control over anybody who carried out the law on the President's behalf. So it seems to me under that type of analysis, I think I come out where Andy does, that you, as a President, can fire U.S. Attorneys for whatever you want, for any reason or no reason.

Garland:

What if, as President, the U.S. Attorney is investigating you or your brother for a high crime or misdemeanor, or anything else?

[*214] Yoo:

I still think that the President has the authority to fire the special prosecutor or U.S. Attorney. And then, I think as Andy said, the President has to pay the political price, which ultimately could be impeachment. And I think that's also the answer to what's motivating Jamie. I think if you do have a President who's dropping cases and bringing cases for partisan reasons, then the Congress could and should impeach him for that, but the President is not constitutionally blocked from firing prosecutors.

Garland:

Does anybody on the panel disagree with that?

Barr:

Well, having some passing familiarity with the impeachment issue, I certainly wouldn't disagree that obstruction is not an appropriate grounds for impeachment. Whether it is, in fact, the ultimate penalty I'm not quite sure. It raises the question of whether or not a President can be prosecuted outside of, or after, the impeachment process for obstruction.

While historical analogies certainly are appropriate to understand the fundamental issues such as those we're talking about here, the actual issue we are talking about is the independence of the Department of Justice - because U.S. Attorneys are part of the Department of Justice - and therefore the independence of our institution of government. Certainly in earlier times the power of the federal government, which is approaching omnipotence now, was much less. It was very different as the country was forming, so I'm not really sure analogies to the first or the third President have a great deal of relevance.

The fact of the matter is that the number of federal grand juries and the variety of offenses that can give rise to federal prosecutions number in the thousands, as opposed probably to the dozens or hundreds in the formative years of our country. It becomes much more important with that size of the federal judiciary and the power of federal prosecutors to pay much closer attention than we might have 200 years ago to what these men and women are doing. In particular to make sure that the White House, which is the political arm of our government, is not able to and does not exert political influence on those prosecutorial decisions of the U.S. Attorneys.

[*215] So, I think it is extremely important that in a scenario such as you've outlined here, Judge, that there be a serious inquiry very deeply and very aggressively, both by Congress and by the Department of Justice and its prosecutors, into whether or not there was in fact obstruction of justice.

McCarthy:

I think the problem with this is that the executive power as it's created in the Constitution is indivisible. It's completely vested in the President. And the problem with the recent debate on this issue is that there's a limit to how much you can take the President out of something that is completely vested in the President. And there's a limit to how much you can take politics out of something that is inherently very much wrapped up in policy.

We've - thanks to Jamie, actually - taken a look at some of the orders implemented by Attorneys General going back to Civiletti. There's a lot of effort, I think admirably, at buffering. There's a lot of effort at trying to make sure that people who were in the field doing cases are not getting political pressure either from the White House or the Hill. But at the end of every one of these orders, you get down to the bottom line, and it says "nothing heretofore said shall impede the ability of the President to communicate directly with the Attorney General."

At the end of the day, I think we could put a lot of safeguards in, but this still remains a political problem. And it's not one that can be overly regulated because you can't do anything about the fact, nor do I think we should want to do anything about the fact, that the executive power is completely vested in the President. And there are good practical and policy limitations to how much you can interfere with that.

Garland:

I'm going to get to these policies in one second and ask Jamie actually to describe them, but I just want to ask John two questions on this point.

So, in the hypothetical that I was giving, which is where the President removes somebody who is actively investigating him, and may be the only person who is actively investigating him, is it your view that the President can't be guilty of obstruction of justice; that the statute doesn't apply to him constitutionally? Or is it that you [*216] think as a matter of statutory construction, obstruction doesn't include removing somebody for any particular reason?

And then the second question is: what if it's the Attorney General rather than the President?

Yoo:

I would say it would have to be a matter of statutory construction, that you would not read the obstruction of justice statute to impinge on the President's constitutional authority. So you could say it's the President's constitutional authority to remove that has been recognized by the Supreme Court, the Framers, and so on from the very beginning. Is that infringed by the obstruction of justice statute? I would personally say it is. But I'm not denying it's a hard question because I would think the remedy then has to be something political, like impeachment, rather than legal. I don't think you can recognize Congress as being able to criminalize the President's exercise of his inherent constitutional authority, and the question is, really, where the outer limits of that are.

Regarding the second question and the Attorney General, it depends on whether he's acting on his own authority or at the order of the President. If he's acting on his own, then he's not exercising the President's removal authority under the Constitution, so then he might be subject to the obstruction statute.

I have to say, I was surprised at what Bob said about the size of the government and all the criminal laws and so on, meaning that we need to have a more independent prosecutorial branch. What if we take that to an extreme? Should we then have an independent branch of government, like an independent agency, that would all be prosecutors? It seems to me, actually, the more complex and the more extensive the power of the federal government, you want to have more directly accountable checks on the power of the executive branch. The traditional answer to this is to try to centralize accountability in the President because we can hold him responsible through elections.

If you have someone exercising his prosecutorial authority completely insulated from presidential control, then you really are at the hands of some unelected and unaccountable people - oh, just like the courts.

[*217] Garland:

I thought that was in the Constitution. Article 3, or something. I don't know.

You've now raised actually two interesting issues. One is this issue about reform proposals about giving some independence, and I want to ask the whole panel about one such proposal, but that's going to come at the end.

The other issue, which I'm going to ask Jamie to talk about in one second, is the rules that the various Departments of Justice and White Houses have established, not from a legal point of view but from an appearance or political perspective. Just let me give a chance for anyone else on the panel to respond to John's point, which he isn't making definitively but does appear to be leaning to, which is that the President can't be guilty constitutionally of a statute barring obstruction of justice. You can't write a statute, I take it, that says the President can't remove somebody if it would interfere with the criminal investigation of the President. Have I got that fair enough?

Yoo:

Yes, and I would admit that's an intention with *Morrison v. Olson* and Supreme Court jurisprudence.

Garland:

Okay. Does anybody want to respond to that, take the other side?

Barr:

Thank you, Judge. I think this sort of gets us into this notion that has some currency recently of something called a unitary President. I think the term has been stretched in use in ways that bear little relationship to whatever meaning it might legitimately have had at one point to simply indicate that within the executive branch there has to be ultimately one decision maker. I don't think that's a term that's in the Constitution.

The way it is used by some is to cloak the President with this omnipotent power to ignore laws, or in the case we're discussing here, to be completely above the law simply because the President has an appointive authority that insulates him necessarily from being held accountable for legal abuse or violation of the federal law. This is not something that I, certainly as an attorney, would adhere to, regardless of whether I step into or out of my former prosecutorial shoes. I operate from the presumption that in our system of [*218] government every official in the government is accountable to the law and ought to be held liable for violations thereof, whether it's the President or not.

But this notion that the unitary executive means that none of the two other branches of government can pierce the sphere of power that surrounds that unitary President, I think is something that is, at best, a slippery slope and at worst a very, very dangerous invitation to tyranny. I don't think that any President ought to be above the law simply because of the administrative power to appoint an official. This should not be seen as a get out of jail free card for a President, and I don't think it was intended that way by our Framers.

Garland:

Andy, you actually mentioned the unitary Chief Executive in passing in one of your answers. Do you have a view on this point?

McCarthy:

Well, what if Congress enacted a statute that said that Congress shall be the Commander-in-Chief?

Garland:

Well, you can't change my hypothetical.

McCarthy:

But I think that is the point. You can't change the Constitution. And when we say that we're under the rule of law, the rule of law includes the Constitution. And the Constitution vests certain areas in the unique and complete control of the President. That is just a fact. So to say that we're all under the rule of law is fine as long as we understand that the rule of law includes the Constitution. It includes the framework that we have, in which certain powers are committed to the President, and they cannot be usurped by acts of Congress.

Regarding the hypothetical removal of a U.S. Attorney in violation of an obstruction statute, impeachment seems to be the solution. If you have a situation where a President is using or abusing his authority to interfere with law enforcement functions, and it's a serious enough situation, then I think the President can be impeached. And it doesn't upset me if he can't be indicted because I think, as far as society is concerned, whether he can be impeached is by dimensions a bigger deal than indictment.

[*219] Gorelick:

I would agree with Andy on that. It doesn't actually matter if the sanction for a President obstructing justice is indictment or impeachment. There is a method of accountability beyond the method of elections. I also think it proves too much to simply say that the executive branch is responsive to a President, and the President is responsive to the electorate, so the President can do what he wants at the Department of Justice without regard to the law. If that were the case, you would have all political appointees in the Department of Justice. And we don't. We have the Civil Service in the Department of Justice and in our law enforcement agencies generally, and we have that for a very good reason. While Presidents can set priorities for the use of prosecutorial resources - for example, to not enforce the sedition laws if the President thinks that is not a good priority for his Department of Justice, or prosecute immigration cases or prosecute gun cases - for both legal and prudential reasons, prosecutors must abide by the law, as Bob says, including abiding by the custom and practice as to what is and is not really a case in which you would indict. They are accountable to abide by the rules. This cabins executive authority, even as to a U.S. Attorney as an appointee of the President he serves.

Yoo:

Under Bob's approach, then Andrew Johnson should have been impeached because Congress passed a law prohibiting the removal of any Cabinet officer without Senate advice and consent. It also passed a law forbidding the President from removing any General in the occupied South, and he went ahead and did it. And he got impeached for it, but he was acquitted. But that's an example; it's not just a hypothetical. It's an example where Congress passed a statute trying to constrain the removal power, and it said it was an obstruction of justice, that the President was obstructing congressional policy in Reconstruction.

And I think the judgment of history, if you read John F. Kennedy's Profiles in Courage, is that it was good that Congress didn't convict Andrew Johnson. It's something we've gone through before. It's not some extraordinarily new claim. You can agree with it even if you don't care about or want to reach the question of subsequent powers but just the question of who manages all the personnel in the executive branch.

[*220] Garland:

Let's stray from the law for a moment and go to the question that Andy was talking about, political, with a small "p," appearance. What's the better approach? I'm going to let Jamie describe some policies in just a moment. Beginning with, probably with the aforementioned Attorney General Griffin Bell, but maybe even with Attorney General Ed Levi before him, all the Attorneys General since then have promoted and promulgated procedures that limit and control communications between the White House and the Department of Justice and the U.S. Attorneys on the other hand.

Gorelick:

Very simply, what's been in place for decades is a process: communication on enforcement matters, not on legislation, grants, etc., have been limited to a small number of very senior officials, for example, the Attorney General and the Deputy on the Department of Justice side, and the White House Counsel and Deputy on the White

House side. In this way, a very considered judgment can be made about whether any further communication is appropriate to have after that, and, if so, who should have that communication and under what circumstances.

That has worked pretty well. From my own experience, having worked with five White House Counsels in the Clinton White House, no matter what his personal style was, there was a sense that it would be a serious matter if you were going to raise an issue of an enforcement decision that the Department was making, and it had to be handled by grown-ups. I think that's a good rule.

For reasons that I am not aware of, at the beginning of the Bush Administration when this same rule was promulgated, instead of saying the Attorney General and the Deputy had to make this decision, the rule said that their "offices" did. The same thing happened on the White House side, so those in various executive offices within the White House could have those conversations. So you ended up with, at least potentially, hundreds of people being able to have those communications. Attorney General Mukasey has said that he would revisit that, and I expect the policy will revert to what it had been. I think it's just a good principle, and it helps a lot.

Andy is absolutely right. In each of these letters it says that the President has the authority to dictate all matters to his Department of Justice, but these letters by each Administration indicate that the President is agreeing to place a restraint on communications with the [*221] Department of Justice. Every letter or policy does say the Department of Justice has an obligation to tell the President when there are matters pending within the Department of Justice that could affect critical responsibilities of the President.

Garland:

How wide should the holes in these screens be? Should they go to whole offices? Should they only go to the principals or the principals and their deputies?

McCarthy:

I think, in field U.S. Attorneys' offices, and that's what I can speak to, you want it to be a very, very narrow pipeline. You don't want U.S. Attorneys or Assistant U.S. Attorneys, who are actually handling cases, fielding phone calls from either people from the Hill or the White House. And in the office where I worked, and I think this is probably normal throughout the country, the line prosecutor's duty when you got a call or a communication like that was to report it to your unit chief, who would report it to the chief of the Criminal Division, and then it would go to an Executive Assistant U.S. Attorney. And the line prosecutor was basically cut out of the process unless there was a reason to involve him later. I think that works well.

I also agree that at the Department of Justice level you want to have as few people involved in those communications as you can. Grown-ups, like Jamie said.

I'd also just note that we're looking at this in the context of potential obstruction of justice. There's also an upside to the way information from actual litigation flows upward to policymakers. I can just speak from my experience. When we prosecuted Sheikh Omar Abdel Rahman, the arsenal that federal prosecutors had to bring terrorism cases was woeful. It was fine if you had a completed bombing, but if you had what we had in the second phase of the plot, which was a conspiracy to kill tens of thousands of people, which turned out not to be successful, you had to basically charge that offense under the federal conspiracy statute, the catchall which is a penalty of zero to five years.

The case was a real eye opener in terms of how inadequate the resources that we had to prosecute these types of violations were, probably because the country was unfamiliar with the phenomenon of international terrorism, at least on the scale that we have now. And [*222] I think largely because of the way that case moved upward, there was ultimately a major overhaul of counterterrorism law, of which the most famous statute is the Patriot Act. But the most important of laws, in terms of how prosecutors handle terrorism cases, is the legislation that was enacted in 1996. And I think that was directly because of information that flowed upward through the pipeline from litigation, where people who were in the field were letting the policy people know what the problems were.

Garland:

First of all, everybody seems to be saying in a general manner, these kind of screens are okay and maybe even a good idea. Are there any topics as a matter of, again, appearance and not law, that the Department of Justice should not share with the White House?

Barr:

Part of the magic of our federal judicial system, particularly as it relates to prosecutors over the course of the last, little more than 200 years, and why, by and large, the system has worked so well, with some exceptions, is this unusual mix between independent and dependent federal prosecutors.

One of the reasons why federal prosecutors are appointed, or should be, is because they know the districts in which they serve. They are, generally speaking, from the districts in which they will serve. They have a feel for the politics, with the small "p," not necessarily partisan, but for the law enforcement priorities, the issues that are important to people in the district. And any Attorney General and any President who has an appropriate feel for the administration of justice would want to encourage the exercise of that judgment on the part of the U.S. Attorneys.

You certainly don't want U.S. Attorneys to be insulated from communications with Washington, but I think it is extremely important for appearances, if nothing else, that gives rise to the credibility of the Department of Justice that there not be undue influence. And it is an important job of the Attorney General, in which the former Attorney General, I think, failed completely, to provide that strong support and strong guidance for the U.S. Attorneys but also to insulate them. Specifically, the Attorney General should proactively and affirmatively insulate them from political pressure such as, for example, David Iglesias was under in New Mexico. And one of the ways you do that is to very, very [*223] carefully circumscribe and delineate the manner of communications from the White House with regard to any pending criminal prosecution or investigation. It might not even be a prosecution yet, but those types of communications, should go through the Attorney General or the Deputy. Not as is current procedure under the most recent memo by former Attorney General Gonzales that opens up the number of people that can communicate back and forth with the White House to approaching 900 people. That is because of the terms used, referring to the office instead of the principal themselves. Because then what starts out as a very good, very sound, very carefully delineated funnel through which communications are conducted with the political side of the government, that is the White House, becomes large enough to drive a Mack truck through.

Garland:

Is there a topic that the Attorney General should not tell the President about with respect to a criminal prosecution?

Gorelick:

Going back to your suggestion, Merrick, that we look at either hypotheticals or actual past cases, we had, during my tenure, any number of instances in which there was a debate about what should be told to the White House about a pending matter. It comes up most acutely where there is an investigation of a foreign leader, of an ambassador or a head of state. This happened under President George H.W. Bush, when the Department of Justice was investigating and was about to indict Manuel Noriega, and no one at a policy level knew about it. Another instance was a drug investigation in Haiti that could have implicated the Jean-Bertrand Aristide Administration just at the moment that the United States was about to invade in order to establish that Administration. This is very difficult. You know that, in general, you shouldn't talk to the White House about enforcement matters, but there are situations in which you must.

Now, how does it come up in a difficult way? You may recall that there was a time in which the FBI was hearing that there were various Chinese-Americans, or perhaps people who were of Chinese descent but not citizens, who were trying to make contributions to members of Congress or in the presidential campaign. The Bureau decided it wanted to go and brief members of Congress to tell them to be careful. And I somewhat naively said, don't you think we ought to tell the White House too? After all, it's the same concern.

[*224] This is one of the very rare times when Director Freeh and I completely disagreed. He said no, because he thought it would be tipping off a potential defendant. I said that Secretary of State Madeleine Albright was on her way to China, and if she doesn't know that the Chinese are trying to destabilize our government, that's a very bad thing for the country. I felt that there was something we could share that wouldn't undermine the investigation. We had a very big argument about that. I lost. The Attorney General sided with the Director. But I think that was the wrong decision and I would take the same position today.

The Department of Justice has very important responsibilities, and sometimes those come into conflict with each other. And the responsibility to the President in carrying out a vast array of his responsibilities is very acute and not something that can be covered elsewhere in the Administration. But these issues have arisen in nearly every Department of Justice over the last two or three decades.

Garland:

John, let me ask you the same point that Jamie is making here with an even sharper historical example. During the Carter Administration, the Libyans were alleged to have approached Billy Carter, the President's brother. The question was if it was acceptable for the Attorney General to tell the President that this had happened. On the one hand, you have the problem that it's the President's brother. On the other hand, you have the problem it's the Libyans. Leaving aside the law question, what do you think is the right thing to do from a policy or political perspective?

Yoo:

I would say, actually for the reasons Jamie gave, that the Department of Justice still had to tell the President because the President has all kinds of responsibilities. If the President is in charge of managing the entire executive branch, and what the Department of Justice does is just a piece of what the executive branch is doing, it's not necessarily the case that what the Department of Justice wants should prevail every time. So, the President needs to know that information so he can or she can make a judgment about whether to pursue the prosecutions or not, consistent with other objectives that the executive branch is carrying out, even if it involves the President's brother. It's still part of national policy. It's still part of enforcing the law.

[*225] So, I would think this is a matter of good management of the government. You still want to require the Department of Justice to keep the President consistently informed of all important cases and not cordon off any categories from the President.

McCarthy:

I agree with that. First of all, I think, odd as this is to say from a prosecutor, there are some things that are more important in life than criminal cases and criminal investigations. There are some things that are more important to the operation of the country and the government than whether an investigation goes along the pattern that a prosecutor or investigator would like.

So, from a policy standpoint, I think that's where you have to come out. I don't mean to beat a dead horse on this, but the Attorney General does not have an independent reservoir of power under the Constitution. The Constitution commits all of the executive power to the President. And while I could see from a policy standpoint that a President would want to set things up in such a way that you would perform the presidential responsibilities efficiently and in a way that was completely above reproach, or as much above reproach as you could make it, I don't know what right the Attorney General has, since he's executing the President's power, to withhold information from the President.

Barr:

The fact of the matter is that the power that the Attorney General possesses and the standard that the Attorney General is to uphold are not derived from the President. The Attorney General does not take an oath of office to the President. The Attorney General takes an oath of office to the Constitution and the laws of this land, and that must be his or her absolute ultimate responsibility.

That does not mean that the Attorney General can never communicate with the White House; that would be absurd. And it may be that there would be cases - for example, the one involving Billy Carter, and one would have to look at the facts and circumstances of each one of these cases - where it may make sense because it is much different from a prosecution. The fact pattern might be truly and simply a policy decision, or a policy imperative, so that it would make sense for the Attorney General to communicate with the White House.

[*226] There may be other instances in which, in order for the Attorney General to carry out his or her responsibility under their oath of office to see that laws are faithfully executed, that they not inform the White House. The Attorney General has a higher authority to which they answer than the President of the United States, and that is the Constitution and the rule of law. And the Attorney General must make the decisions on what to communicate to the White House based on that imperative, not "I work for the President."

McCarthy:

I want to be clear here. While I disagree with what Bob said, I think as a matter of honor, the Attorney General has to be prepared to resign if the Attorney General is directed to do something that's lawless or corrupt. I don't mean to be understood as saying that because the Attorney General draws his power from the President, that anything the President says goes. But as a matter of law and as a matter of the Constitution, I don't think that you can avoid the fact that the Constitution commits all of the executive power to the President and that in the use of that power, the Attorney General is the agent of the President.

Garland:

Let me switch gears for a moment to another topic, and this is the relationship between the Department of Justice and the U.S. Attorneys' offices: How much independence should a U.S. Attorney have from the Department of Justice? What kind of communications should go in both directions, and in particular has 9/11 changed the calculus in that regard?

For this, I'm going to turn Andy, who was an Assistant U.S. Attorney both before and after 9/11 in what I think everybody would regard as the most independent U.S. Attorney's Office, the Southern District of New York. He can give us an idea of what it was like before 9/11, what it was like after, and whether the change is a good or a bad one.

McCarthy:

Well, the change I think we're talking about is whether you can go from a prosecution mode to a prevention mode, and I think we at least nominally and thematically tried to do that. I'm not sure we've run through all the ramifications of what that means. First, I think, clearly, post-9/11, the ambit of what we think of as national security **[*227]** and a potential threat to the country is bigger. And second, if you're going to make a decision that your main priority is prevention rather than prosecution, there is more of an imperative to get information up the chain of command and more of a sense that there are more important things than the bottom-line outcome of the prosecution.

What we're basically saying is that it's more important to stop the bombing from happening than to prosecute it after it's over. That sounds common-sense enough, but there's a lot of fallout from that which I don't know that we've necessarily bought into yet. For example, it necessarily means that the prosecutors today have a much more difficult job than I had in 1993 and 1995 because success now is making sure that things don't happen. In order to make sure that bad things don't happen, you have to interrupt them at a much more premature stage, when your evidence necessarily is going to be much more ambiguous.

The cases we tried in the 1990s had many challenges attendant to them. They were much different than the normal run of criminal cases. But one thing that we didn't have to deal with was the sense that we were possibly overreaching, that we were assuming there were dark, deadly conspiracies where there weren't. We mainly mobilized after bad things happened. Now, using the laws that I mentioned before from 1996, we're trying to interrupt things, especially with the material support prosecutions, at a very, very early stage.

The Department of Justice also now makes an effort to "partner up" on prosecutions with the field offices, which was something that really was not done, certainly not in New York. There was a strong tradition in the office, and I think it's a good tradition, that the Southern District of New York handled its own caseload and that the Department of Justice was not there to come up and try cases with our office. The Department of Justice was there to do the things the Department of Justice does. And I think that that has begun to blur in the post-9/11 period. I frankly think it was better when the Department was not as operational as it is now.

Garland:

Bob, you were concerned about the independence of U.S. Attorneys. As a former U.S. Attorney, what's your view about how independent they should be, not of the President, but of the Department of Justice?

[*228] Barr:

Certainly, U.S. Attorneys have largely enjoyed a fair degree of independence, though not absolute independence from the Department of Justice. However, they are not, were not intended to be, nor do I think we would want them to be, a cadre of U.S. Attorneys that are completely independent of the Department of Justice. That's a non sequitur, I think. And there are categories of cases in which U.S. Attorneys are required to seek permission or approval from the Department of Justice before either initiating an investigation, sometimes initiating certain investigating techniques involving individuals such as public officials, or when seeking indictments. That's important because the U.S. Attorney can be held to reflect the priorities of the Department of Justice, which come down presumably from the President through the Attorney General. If a U.S. Attorney disagrees with those priorities, then the solution is, as Andy mentioned, the same as for the Attorney General. They should resign.

But it is important that the Attorney General and those immediately under him, particularly the Deputy Attorney General, have both the support of the U.S. Attorneys and vice versa that they support their U.S. Attorneys. It makes no sense at all from a policy standpoint to have your U.S. Attorneys out there who feel a breach with the Department of Justice, who do not believe that they are getting the support that they need. They're the Administration's very best public advocates for enforcing the rule of law and the law enforcement priorities of the district, and of the Administration.

With respect to the question, regarding whether 9/11 has changed us, it has, but I disagree that it should. I don't think that the Department of Justice or its prosecutors, as it is configured in our system of government, should be used as a preventative arm of the government. After all, we have any number of agencies and tremendous capabilities with our federal government; far too many in the eyes of many of us. But we have a very powerful federal government, armed with all sorts of agencies, and there are proper agencies whose job it is to prevent acts of terrorism, to prevent breaches of our borders and so forth.

But if we shift the mode after a couple of centuries from viewing the role of the prosecutor and the role of the Department of Justice to see that justice is done and to prosecute those crimes for which prosecution is appropriate within the rule of law, to one of, "Oh, we're going to use these vast resources to go out and prevent crime," **[*229]** you've changed something more than simply the procedures. You've changed the whole role of the judiciary and the role of having a Department of Justice in the first place.

So, I think we travel down that path at great peril, and if we are going to make those decisions, it requires more than simply a decision by a particular Administration to say, "Oh, this is the way it's going to be now." That really requires a fundamental look at what the Department of Justice is, what the role of the prosecutor is, and we haven't really gone through that yet. That's partly the fault of the Congress for failing to do so.

Gorelick:

The events around 9/11 certainly have changed the relationship between the Department of Justice and the local U.S. Attorneys, and quite consciously so on the part of the Department of Justice and its leadership.

U.S. Attorneys are often selected by the political leadership in their jurisdiction, often have the backing of a powerful Senator or Senators, and just as a practical matter, tend to view themselves as quite independent of the Department of Justice. As a consequence, over a period of a couple of decades the role of the litigating divisions, which was always to make sure there was consistent application of the law - and to litigate cases particularly where U.S. Attorneys' offices might not have expertise in a particular area - had been eviscerated. And the same thing was true to a certain extent at the FBI Headquarters.

The tension was greatest vis-a-vis New York because the FBI in New York and the U.S. Attorney's office in New York were very strong, very powerful, very capable, and the key terrorist cases were there. And so, the locus of information and activity was in those New York offices of the FBI and the U.S. Attorney. This left the Criminal Division of the Department of Justice and the FBI Headquarters nearly bare. If you read the 9/11 Commission Report, you see there was very little going on at the FBI Headquarters on counterterrorism. Very little capability could be found there, and thus connections with what was happening in the rest of the country were being lost.

If you talk to FBI Director Robert Mueller or the Deputy Attorney General Larry Thompson, they would say they took the opportunity of 9/11 to readjust. And that, as Andy said, has indeed happened. Now, there had always been some instances in which the Department [*230] of Justice jumped into cases that would normally have been handled locally. It required some political maneuvering.

After the Murrah Building in Oklahoma City was blown up, one Merrick Garland was dispatched by Attorney General Janet Reno to run that investigation because, after all, the U.S. Attorney's office in Oklahoma City wasn't the biggest and it didn't have a U.S. Attorney. We were worried about the biggest case we'd ever had being handled in the right way.

The other comment I would like to make is this. We have a beautiful system: we have an integrated federal prosecutorial and investigative force and we have local offices that can respond to local needs and their local judiciary, so that you can have an amalgam of your federal priorities, local effectiveness and sensibilities.

So, for example, in a jurisdiction in which no jury is going to vote for the death penalty, you can listen to your U.S. Attorney when he says, "I'm going to lose the conviction if you make me seek the death penalty." In the jurisdiction in which the judges don't like thousands of small drug cases being brought, you might listen to your U.S. Attorney who says, "It's going to hurt me in the other priorities if I do this to the extent that you want." And that's healthy. Getting that equilibrium is difficult, but it's important to do.

Yoo:

I think I probably have a different view than Jamie and Bob in this respect. I think there should be more control by the Department of Justice over U.S. Attorneys. And I think it's a strange historical artifact that we have the system that we have. The reason we have it is because there were U.S. Attorneys before there was a real Department of Justice, which didn't really arrive until the Civil War and thereafter.

But ask yourselves this, is there any other federal agency outside the Department of Justice in which you have ninety-two independent presidentially nominated and Senate confirmed officers who are spread all throughout the country? I don't know it's necessarily the most efficient way to run the system. Does the Department of the Interior, or even the Department of Defense, have that kind of independence granted to subordinate field officers? You can certainly have benefits of decentralization by getting to know local conditions, but I don't know that means that you have to have a system where each of the people out there is the "Honorable" and has a certain feeling that they can resist commands from Washington, D.C.

[*231] And that gets to my second point, which is, who wins out? Who wins out if U.S. Attorneys do become more independent and there's less Department of Justice control? It's going to be the Senators from those home states. It's not that nobody gains by growing independence. If you did reduce the contacts between the Department of Justice and U.S. Attorneys and Senators, I think, then local Congressmen are going to have a lot more influence in the way prosecutions can be run. That's our experience certainly with the independent agencies. When agencies and their personnel become protected from removal, they start to be for Congress just as much as for the

President. And we may not like the way the President makes prosecutorial decisions, but do we want to hand that over to Congress? I don't think so.

The last point I'll make about the 9/11 issue is that it seems to me that certainly there are a great number of cases where knowledge of local conditions make sense. But there are also types of cases which have such a national-level importance, you would want them to be handled by some central authority within the Department of Justice. I would think that terrorism after 9/11 would be an example of this. And I wouldn't claim that the Bush Department of Justice did it perfectly.

For example, consider the case of Zacarias Moussaoui. I think that was an example where a U.S. Attorney's office really pushed hard to prosecute that fellow because it wanted to prove that the federal law enforcement system could handle terrorists in a way that Andy doesn't think it can. And I think if it had been a decision purely under the control of the Department of Justice, you might have had a different outcome, or you might have had other considerations taken into account. But I think the local U.S. Attorney's office won that, and the prosecution was a disaster. I think he made a circus out of the trial proceedings and that's an example where too much local control and too much decentralization may actually harm broader national objectives, which would be advanced through central control in the Department of Justice.

Garland:

Now we will take questions from the audience.

Question:

I have a question for Representative Barr. In response to the last question, you disparaged the use of the Department of Justice and the U.S. Attorneys' offices for prophylactic purposes. You would return, I [*232] assume, to a law enforcement model rather than a post-9/11 model - try to stop terrorism by stopping it before it happens. And you said there were other agencies that could lend themselves to that. I don't know what agencies can fulfill this role in light of the Posse Comitatus Act. It seems to me that the Department of Justice has stepped up into a more ex ante position, and I think it's actually right. What other agencies do you think should step into that role?

Barr:

I didn't have in mind that these issues involving terrorism are fought from beginning to end only within the four corners of our country. What I have in mind, for example, is a much better, more effective use of our foreign intelligence capabilities overseas than we've seen in the past, allowing them to do a much better job in a preventive sense. These are agencies that are designed to gather intelligence on not necessarily just what has happened but what is likely to happen, what is going on in the minds of those who would do the United States harm, and to try to identify those who would do us harm and how they would carry out those plans. That would be one. Another would be to utilize much more effectively, again in a preventive sense, our border patrol and those other agencies with responsibility for both the physical and the economic aspects of border security and the sovereignty of our nation.

It is not to say in any way shape or form that because I disagree with the other three panelists here that 9/11 did not change, nor should it not have changed, the prioritization. In fact, in a post-9/11 world, it makes a lot more sense for U.S. Attorneys, at the direction of the Department of Justice, to devote more resources to prosecuting cases involving suspected terrorist activity, and that is entirely appropriate.

I have very high regard for Posse Comitatus and what I'm saying is that if you change the focus of our system of justice as suggested here you are changing the whole paradigm. If U.S. Attorneys are now charged with going out there and preventing crime as opposed to the Anglo-Saxon view of a prosecutor, that is, to prosecute cases within the Fourth Amendment, for example, that is a drastic change. And the last time I looked, the Fourth Amendment does not have an asterisk for suspected terrorism - the Fourth Amendment is the Fourth Amendment. That is an issue I have with that view of the role of prosecutors.

[*233] And if we want to go down that road it requires, particularly as Federalists are concerned, a lot more than simply the unitary Chief Executive saying that prosecutors are no longer going to perform their traditional function within the Constitution, within the law, but they're going to go out there and prevent crime. At least let's have a debate over it and make adjustments to our law. My point is that it's much more than simply a policy decision.

McCarthy:

Well, I just think it's important to highlight here how narrow what we're actually talking about is. I don't think that anyone is saying that we're changing the paradigm to preventing crime. What we're saying is we're changing the paradigm to preventing terrorism, which is obviously of huge importance. But in terms of the amount of crime that we're talking about, it's thankfully a very small slice of the law enforcement that we actually do. It's obviously something that we have to put a very large proportion of our resources into it because the consequences of a successful strike are so huge.

But I don't think we're talking about changing the paradigm to preventing crime. We're talking about terrorism. And I think it doesn't accurately represent the change that we're talking about to suggest that it's something that applies across the board to all law enforcement. What we're talking about very narrowly is the national security paradigm. And even more specifically, we are talking about the threat of foreign international terrorism.

Question:

This is for Representative Barr as well. Representative Barr, how many branches of the federal government would you say there are? Because, the last time I checked my Constitution, there were three branches of the federal government. We already have one unaccountable branch in the judiciary, and you seem to take as a structure of government an independent branch of prosecutors. Everyone is concerned about the political independence of the President and corruption in firing prosecutors, but I think the fetishization of prosecutorial independence has led to cases like Patrick Fitzgerald running around, where nobody can touch him, wasting millions of dollars on a case where he knew ahead of time that no crime was committed. Where is the check on prosecutors? At least the President is accountable via elections or impeachment.

[*234] Barr:

I don't know whether you've been here for the entire session, but I think there have been any number of examples in areas including those that I've indicated, that very clearly illustrate that when we talk about the independence of prosecutors it is a matter of degree. I have stated explicitly here today that I do not believe that prosecutors should ever be considered and were not envisioned by our system of justice to be completely independent. It's simply a matter of what degree of independence or dependence they should have.

I believe federal prosecutors need to, as I already indicated, follow the priorities in their office as laid down by the Attorney General from the President. And if they, in fact, disagree with those, then the proper course would be to resign. They can't just go off on their own, and I don't believe they ought to be allowed to go off on their own, and prosecute whatever types of crimes they want. In a post-9/11 world, those priorities necessarily are very different and that's appropriate.

So, I certainly have not advocated and would not advocate that these prosecutors be completely independent, but there are areas, such as those we've seen with the recent firings of U.S. Attorneys over the last year, in which I think there very well have been an improper exercise of the power to retain or not retain prosecutors that raise legitimate questions about the process.

Question:

I have a question for Professor Yoo, which I want to preface with a little background.

I spent thirty-five years as a career prosecutor before I retired, mostly at the Department of Justice and sometimes in the field. I was in the Organized Crime Section in the Criminal Division for a long time. And I was in the U.S.

Attorney's Office in Hawaii for four or five years and a local prosecutor in New York. Not only is there a big disconnect between the field and the Department of Justice, there's a huge disconnect between political appointees and career people.

What you have is not only a tremendous failure to share information, some of which has been cured by more centralization, but a tremendous resentment about any influence from Washington, D.C., on the field. As attorneys for the Department of Justice from Washington, D.C., we started off with cynicism. For instance, say the Republicans come into office, they think everybody who worked for the Department of Justice is a Democrat. On the other side there is [*235] hostility from career people who think everybody who got politically appointed is a political hack until they prove themselves. I'm not saying that's true in all cases, but it was true in some cases. So, wouldn't it be time to at least take a hard look at improving the quality of the Department of Justice, reducing the likelihood of adverse political influence by taking a hard look at whether or not we should have career prosecutors running the U.S. Attorneys' offices?

I know there are a lot of problems. You want change for the sake of change, you want new blood, but you don't want a system based on someone coming in for two years and then leaving. You have a never-ending rotation and people learning the learning curve. But after 9/11, especially after 9/11, and all of the national problems we have with immigration, terrorism, etc., hasn't the time come to take a real hard look at whether or not we should have career-appointed prosecutors rather than politically appointed prosecutors in U.S. Attorneys' offices?

Yoo:

Yeah, I think your question is actually a broader one about whether the civil service reform that went on at the turn of the last century was a wise decision because the point you make would apply to the rest of the federal bureaucracy as well. And I don't know. It's a fact of life that we have the civil service, and it is permanent and very difficult to remove anybody. But I think as the jury is still out about whether it's effective, whether it led to better administration than the system one had before.

We used to have the spoils system, and you had much more political accountability at the cost of our federal government doing some of the things you mentioned.

Question:

You'd rather go back to Tamany Hall?

Yoo:

Well, yeah. I mean, at least you had political accountability; you just had to bribe the right people, right?

Garland:

Is there a place between these? We said we were going to talk about some independence proposals, so one independence proposal would be U.S. Attorneys have to be career prosecutors, but it's totally [*236] up to the President which career prosecutor to choose as U.S. Attorney. Would that help any from your point of view?

Yoo:

I think it would make things worse if you had to pick a career prosecutor for U.S. Attorney. I think that's the proposal.

Garland:

Andy, as a former career prosecutor, do you have a view on that?

McCarthy:

I actually think the way the system works now is fine, and it's a human system, which means we'll have problems and there will be injustices. But I actually think, as Jamie said before, there needs to be a mix between the independence and the centralization, the priority-making and the people in the field who are politically accountable but know what the conditions are. I think you're playing with fire if you tinker with what we have because I can't think of anything that would be better.

Gorelick:

I would say just two things. One is that the leadership of the Department of Justice and the White House has to push back on Senators who suggest nominees who aren't qualified, because, otherwise, you get just the cynicism that you're talking about, you get dysfunctionality of offices, and then usually something really bad happens because the person is not qualified. And I did that a lot, but it was very hard to do. But if you don't do it, you're going to have problems.

The second point I would make is just an illustration of the challenge. You would think that if there were any agency in which you could depoliticize positions, it would be in the Marshals Service, which performs a core law enforcement function like the FBI. But marshals have been and remain political appointees. If you try to change that, those who currently have the right to select an appointee in their jurisdiction are up in arms. So just imagine trying to do this for U.S. Attorneys. It would be a very heavy lift.

[*237] Barr:

I think the system that we have is tremendous. I think overall, it has worked over the course of our history very, very well. It's not perfect, but there's no such thing as a perfect system.

Going back to the question by the prior gentleman, I think he's also actually correct, and it's very important to keep in mind that, in large measure, those instances in which we have had problems with prosecutors going off on fishing expeditions have not been your U.S. Attorneys; they have been the independent counsels, the special prosecutors. And that is, I think, probably as good a reason not to have completely independent prosecutors as any. This whole series of cases in which special prosecutors, independent counsels, have been appointed and go on for literally, in some instances, years trying to find a case, trying to get a case on somebody with no regard at all for the resources, the cost of these things, or the political implications of them, that's the real problem, where you have that sort of institutionalized independence. Not the system that we have with the U.S. Attorneys.

Garland:

So this actually brings us full circle to something that John mentioned. Arnold Burns, Deputy Attorney General in the Reagan Administration, wrote within the last year an op-ed in which he suggested a politically appointed Attorney General, but a fixed term, either like the ten-year term for the FBI Director or the four-year term for the Chair of the Federal Reserve.

How do you react to that?

Barr:

Very negatively. I do have great faith in the political system. It doesn't always work properly. We've just seen some instances in which it hasn't. But here again, insulating that person that serves as the Attorney General so that they are not accountable to the electorate at large, I think, would be a grave mistake.

McCarthy:

I agree with that. I would leave things the way they are now. I don't know why you would want to have a situation where, if you had an outstanding Attorney General that you would have to remove him over an arbitrary time limit. I wouldn't do that.

[*238] Gorelick:

Any policymaking position in the Administration has to be a political appointee with a term coterminous with the President's. Those positions that are term positions, like the Director of the FBI, are not policymaking. They give their views on the underlying facts, but they are not a participant in the policy debate. Unless you construe the Attorney General as someone who does not have a policy role, you should have an Attorney General who serves at the pleasure of the President.

Yoo:

I agree. I would also take away the term appointment from the FBI Director because I think a lot of their decisions do involve policy. We want to have more responsive governmental elections. I think the only hard case is the Chairman of the Federal Reserve. We might accept taking away the term for the Chairman of the Fed if you take a position I think everybody on the panel has expressed. But I think people recognize, though, that having an independent Chairman of the Federal Reserve is different somehow. Maybe the money supply is more important than prosecutions. It probably is. But still, I find that hard to reconcile. I think my position would have to be that the Chairman of the Fed can't have a fixed limited term with no real strong removal power either.

Garland:

Well, having momentarily achieved complete unanimity on this panel, this seems like a good place to end.

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