ARTICLE

PRESIDENTIAL ADMINISTRATION VIA CRIMINAL ENFORCEMENT

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Abstract

When the president seeks to influence administrative agencies, he can choose from a "toolkit" of different techniques for presidential control. The president might intervene into an agency's funding, for example, by conditioning the release of agency grants. Alternatively, the president might intervene into an agency's rule-making, for example, by directing the agency to rescind a prior rule. Or the president might intervene into an agency's enforcement, for example, by announcing a high-profile enforcement crackdown against certain types of offenses. By utilizing a broad toolkit of techniques, the president can influence agencies in a process known as "presidential administration," a term coined by then-Professor Elena Kagan in 2001. Presidential administration has become the dominant scholarly theory used to describe the president's influence over administrative agencies, and in the decades since Kagan's article, many scholars have expanded upon Kagan's theory by identifying new techniques in the toolkit for presidential control.

Fewer scholars, however, have examined criminal enforcement as a tool for presidential administration. Administrative agencies typically pursue civil enforcement (which involves civil penalties such as fines or injunctions), but agencies may also pursue criminal enforcement (which involves criminal penalties such as imprisonment). The president has the power to direct both civil and criminal enforcement, and many recent presidents have turned to criminal enforcement. President Biden, for example, oversaw crackdowns against environmental and corporate crime. President Trump used criminal enforcement against immigrants to create the Family Separation Policy. President Obama encouraged criminal prosecution of workplace safety violations. And President Bush used civil and criminal enforcement in his attempt to outlaw physician-assisted suicide in Oregon. In these examples, criminal enforcement has functioned as a tool for presidential administration, allowing the president to influence areas like immigration law, environmental law, and workplace safety.

This Article makes two contributions. First, it identifies criminal enforcement as a powerful tool which has received relatively little attention from scholars of presidential administration. Kagan, for example, rarely discussed criminal enforcement, and her article does not include the word "criminal" in the main text. Second, this Article offers an argument for constraining the president's use of criminal enforcement.

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In most instances, the president is too removed from the facts of specific cases to assess the mens rea, or criminal intent, for any given case. Given the president's limited knowledge about mens rea, he may face mens rea-based constraints when he attempts to intervene into criminal enforcement.

I. Introduction

In recent years, the president has intervened in criminal enforcement across a wide range of policy areas. President Trump combined criminal and immigration enforcement to create the Family Separation Policy.[1] President Biden oversaw a crackdown on environmental and corporate crimes.[2] President Obama encouraged criminal prosecution of workplace safety violations[3] and announced new guidelines for mandatory minimum sentences.[4] And President Bush invoked both civil and criminal enforcement in his attempt to outlaw physician-assisted suicide in Oregon.[5] Across both Democratic and Republican administrations, the president has used criminal enforcement for policymaking in immigration law, environmental law, workplace safety, securities regulation, and other regulatory areas that include criminal penalties.[6]

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[1] Ms. L. v. U.S. Immigr. & Customs Enf't., 415 F. Supp. 3d 980, 984 (S.D. Cal. 2020) ("[P]arents who were prosecuted for unlawful entry . . . were not reunified with their children after serving brief criminal sentences because DHS did not have adequate systems in place to keep track of the children . . . . As a result, migrant parents remained separated from their children for months . . . ."); *see also* Jeff Sessions, *Memorandum for Federal Prosecutors Along the Southwest Border* (Apr. 6, 2018) [hereinafter Family Separation Memorandum], https://www.justice.gov/archives/opa/press-release/file/1049751/dl [https://perma.cc/ZJ2N-SEDA] (directing federal prosecutors to accept criminal referrals from immigration agencies).

[2] In 2024, the Biden administration announced a "Strategic Civil-Criminal Enforcement Policy" for environmental crimes. *See* David Uhlmann, Strategic Civil-Criminal Enforcement Policy (Apr. 17, 2024), https://www.epa.gov/system/files/documents/2024-04/strategic-civil-criminal-enforcement-policy-april-2024.pdf [https://perma.cc/CUQ3-9MBG]. The Biden administration also cracked down on corporate crime. *See infra* note 219.

[3] *See* U.S. Dep't of Labor & U.S. Dep't of Just., *Memorandum of Understanding Between the U.S. Departments of Labor and Justice on Criminal Prosecutions of Worker Safety* (Dec. 17, 2015) [hereinafter Workplace Safety Memorandum], https://www.justice.gov/enrd/file/800526/download [https://perma.cc/QYM4-Q55H].

[4] *See infra* notes 198–205 and accompanying discussion.

[5] *See* Part III.B for a discussion of Gonzales v. Oregon, 546 U.S. 243 (2006).

[6] Many regulatory statutes include both civil and criminal penalties. Generally speaking, criminal penalties are more severe than civil penalties and may include imprisonment. Civil penalties are less severe and often involve civil fines, injunctions, or immigration penalties like removal. *See* Part III.A for a longer discussion of civil and criminal penalties.

In many of the above examples, the president enlisted the resources of both traditional administrative agencies, such as the Environmental Protection Agency, and the Justice Department, which is the sole agency authorized to bring federal criminal charges.[7] This approach is common for presidents who use criminal enforcement: many presidential policies will cut across both administrative and criminal law.[8] So in order to fully address the president's use of criminal enforcement, this Article adopts a cross-cutting approach that draws on both administrative and criminal law.

This Article makes two contributions. First, it recognizes that criminal enforcement is a powerful and largely overlooked tool for presidential administration. Coined by then-Professor Elena Kagan, "presidential administration" is the leading theory that scholars have used to describe the president's control over administrative agencies.[9] Yet scholars of presidential administration have devoted relatively little attention to criminal enforcement. In fact, Kagan did not include the word "criminal" in the main text of her seminal article on the theory.[10] Many subsequent articles about presidential administration have followed Kagan's approach and have largely overlooked criminal enforcement.[11] This Article advances the presidential administration literature by identifying criminal enforcement as a powerful tool for the president.[12]

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[7] The Justice Department holds a "monopoly" over federal criminal prosecutions. *See* Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 758 (2003).

[8] *See* Part III.B, which discusses examples from the Trump, Biden, Obama, and Bush administrations.

[9] *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

[10] Kagan's article mentions the word "criminal" once, in a footnote naming the "Assistant Attorney General for the Criminal Division." *See id.* at 2385 n.193. This Article refers to Kagan without using her full title ("Justice Kagan"), because the Article discusses work written when Kagan was a professor and not yet a Justice.

[11] For example, the following articles use the term "criminal" fewer than three times. *See, e.g.*, Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131 (2024); Ashraf Ahmed & Karen M. Tani, *Presidential Primacy Amidst Democratic Decline*, 135 HARV. L. REV. F. 39 (2021); Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. 104 (2021); Daniel A. Farber, *Presidential Administration Under Trump* (Aug. 8, 2017) (unpublished manuscript), https://ssrn.com/abstract=3015591 [https://perma.cc/9KD7-RXT5]; Andrea S. Katz & Noah A. Rosenblum, *Becoming the Administrator-in-Chief:* Myers *and the Progressive Presidency*, 123 COLUM. L. REV. 2153 (2023); Kathryn E. Kovacs, *From Presidential Administration to Bureaucratic Dictatorship*, 135 HARV. L. REV. F. 104 (2021); Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953 (2015); Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1 (2022); Bijal Shah, *Statute-Focused Presidential Administration*, 90 GEO. WASH. L. REV. 1165 (2022); Ian Shapiro & David Froomkin, *The New Authoritarianism in Public Choice*, 71 POL. STUD. 776 (2023); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683 (2016).

[12] While some administrative law scholars have studied the president's *civil* enforcement powers, fewer have studied criminal enforcement. Kate Andrias, for example, has considered the president's civil enforcement powers, yet she deliberately steered clear of criminal enforcement. *See* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1036 (2013)

Second, this Article proposes a mens rea-based constraint on the president. This constraint is based on the president's epistemic disadvantage: the president simply does not know as much as prosecutors and line-level agency officials. If the president seeks directive control over prosecutors, he may pressure prosecutors into bringing charges even if there is weak evidence of mens rea.[13] When this happens, the lower courts can use mens rea to constrain presidentially directed criminal prosecutions. For example, in New Mexico, a magistrate judge dismissed criminal charges in dozens of cases against immigrants in the Trump administration's new militarized border zones.[14] The judge first applied a presumption in favor of scienter, which reads in an implied mens rea requirement even in statutes that do not expressly require mens rea, and then he held that prosecutors had failed to allege sufficient facts about mens rea.[15] This Article urges the lower courts to adopt the New Mexico court's more protective approach to mens rea. In addition, the Article urges the Supreme Court to signal to prosecutors that they should resist presidential pressure to charge cases with weak evidence of mens rea.[16]

This Article proceeds in five parts. Part II situates criminal enforcement within Kagan's theory of presidential administration. Kagan's traditional toolkit described rulemaking, civil enforcement, Office of Information and Regulatory Affairs ("OIRA") review, and other tools for presidential control. Part III describes a relatively new tool for presidential policy control—criminal enforcement—which recent presidents have used across many areas of administrative law. Criminal penalties are embedded within many otherwise civil regulatory regimes,[17] so the president has a strong incentive

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("[A]lthough the role of the President in criminal prosecutions . . . is relevant to this Article, the focus here is on administrative enforcement."). Other scholars have considered the president's criminal enforcement powers, yet this scholarship has usually analyzed the president's enumerated powers rather than the president's broader powers of presidential administration. For example, Rachel Barkow has studied the president's clemency powers, *see generally* Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. Rev. 802 (2015), while Peter Shane has discussed the president's powers over prosecutors, *see generally* Peter M. Shane, *Prosecutors at the Periphery*, 94 Chi.-Kent L. Rev. 241 (2019).

[13] *See infra* Part V for a discussion of mens rea in criminal prosecutions.

[14] In New Mexico, the Trump administration created a new military zone at the border and directed prosecutors to bring more severe "military trespass" charges against immigrants. A federal magistrate judge used mens rea to dismiss the military trespass charges in dozens of cases, holding that prosecutors had failed to allege sufficient facts about mens rea. *See* United States v. Lopez-Gonzalez, 782 F. Supp. 3d 1062, 1071 (D.N.M. 2025); *see also* discussion *infra* Part III.B and Part V.A.

[15] *See Lopez-Gonzalez*, 782 F. Supp. 3d at 1070 ("We start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.' We normally characterize this interpretive maxim as a presumption in favor of 'scienter,' by which we mean a presumption that criminal statutes require the degree of knowledge sufficient to 'make a person legally responsible for the consequences of his or her act or omission.'") (citations omitted).

[16] *See infra* Part V for a discussion of mens rea as a signal to the president.

[17] Many modern regulatory regimes contain criminal penalties embedded inside otherwise civil regulatory statutes. Criminal penalties exist in the Clean Water Act, the Clean Air Act,

to use criminal enforcement. Part IV evaluates Kagan's traditional normative argument in favor of presidential administration. This Part argues that Kagan did not fully address concerns about "presidential lawlessness," which occurs when the president adopts aggressive policies that push agencies beyond their statutory mandates.[18] Kagan believed that presidential lawlessness could be managed through judicial review, yet her reasoning applies most squarely to agency rulemaking (where judicial review is presumptively available) and less squarely to agency enforcement[19] (where judicial review is harder to obtain).[20] If the president opts for criminal enforcement rather than rulemaking, then he can avoid the presumption of reviewability under the Administrative Procedure Act ("APA").

Finally, Part V argues for a mens rea-based constraint on the president. Under a more protective conception of mens rea, the president would be free to set general enforcement priorities, but he would be prevented from issuing binding or quasi-binding directives to lower-level officials, because binding directives squeeze out lower-level officials' ability to consider mens rea.

This more protective conception of mens rea would operate in two places: in the lower courts and the Supreme Court. In the lower courts, judges would apply a more protective conception of mens rea during criminal prosecutions, as illustrated by recent cases in New Mexico.[21] In the Supreme Court, a ruling on mens rea would allow the Court to send a strong signal to prosecutors and to the president, urging the president to exercise restraint in his use of criminal enforcement. Many Justices on the Court are already deeply committed to mens rea,[22] and they might be more willing to use mens rea, as opposed to cabining the Vesting Clause, to rein in the president's use of criminal enforcement.[23]

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food and drug law, securities laws, immigration laws, tax laws, and more. *See* discussion *infra* notes 96–102.

[18] *See* Kagan, *supra* note 9, at 2349 ("[T]he history of presidential administration may suggest that it poses a danger of such lawlessness—that Presidents, more than agency officials acting independently, tend to push the envelope when interpreting statutes.").

[19] This Article adopts Barkow's rough working definition of "enforcement," which includes an agency's decisions on how to "prioritize its cases," and to "pick and choose from among possible targets" to investigate for regulatory violations. Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 Geo. Wash. L. Rev. 1129, 1130 (2016). The APA does not provide a definition for "enforcement." Instead, the APA divides agency action into two broad categories: rulemaking and adjudication. *See* 5 U.S.C. § 551(5) (defining "rulemaking") and 5 U.S.C. § 551(7) (defining "adjudication"). In the APA's scheme, enforcement generally falls under the category of adjudication.

[20] *See, e.g.*, Michael Asimow, *Greenlighting Administrative Prosecution*, 75 Admin. L. Rev. 227, 243 (2023).

[21] *See, e.g.*, *Lopez-Gonzalez*, 782 F. Supp. 3d at 1071.

[22] *See infra* notes 311–14 (discussing Justice Gorsuch's commitment to mens rea, and noting that mens rea has broad support within the Republican Party).

[23] Many Justices have adopted Justice Scalia's interpretation of the Vesting Clause, which holds that "all" executive power is vested in the president. Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting). These Justices are unlikely to adopt a Vesting Clause-based constraint on the president, because it is incompatible with Justice Scalia's version of unitary executive theory. However, a mens rea-based constraint on the president does not interfere with

This Article draws on a wide range of scholarship from both criminal and administrative law. It was enriched by prior work on the growth of the criminal code,[24] the federalization of criminal law,[25] and the empirics of environmental crimes.[26] Other scholarship discussed enforcement crackdowns by agencies,[27] separation of powers in the criminal law,[28] and the moral dimensions of regulatory crimes.[29] Recent scholarship has chronicled the Court's preoccupation with criminal delegations[30] and its adoption of a strong unitary executive theory[31] based on Justice Scalia's interpretation of the Vesting Clause. This Article is deeply indebted to this array of excellent prior scholarship.

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unitary executive theory on the president, because it is largely compatible with Justice Scalia's reading of the Vesting Clause. See Part V for a more detailed discussion.

[24] *See, e.g.*, William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) (arguing that the growth of the criminal code is a "one-way ratchet" driven by prosecutors and legislators). Barkow has proposed reforms to help counter the growth of the criminal code. *See generally* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009).

[25] *See, e.g.*, Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995); Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1 (2012); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995).

[26] *See, e.g.*, David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime Redux: Charging Trends, Aggravating Factors, and Individual Outcome Data for 2005–2014*, 8 MICH. J. ENV'T & ADMIN. L. 297, 305 (2019) (analyzing environmental crime charging patterns).

[27] *See, e.g.*, Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31 (2017). *See generally* Barkow, *supra* note 19; Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227 (2006).

[28] *See, e.g.*, Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 992–94 (2006) (arguing that separation of powers is often more significant in criminal contexts than in civil contexts, because "state power is at its apex in the criminal context").

[29] For excellent recent scholarship on the "moral turn" in public law, see, Blake Emerson, *Public Care in Public Law: Structure, Procedure, and Purpose*, 16 HARV. L. & POL'Y REV. 35 (2021); Jodi L. Short, *The Moral Turn in Administrative Law,* Univ. of Cal. S.F. L. Sch. Rsch. Paper (forthcoming 2026) (draft manuscript) (on file with author); Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924 (2018). For further analysis, see VINCENT CHIAO, CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE (2018); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); Stuart P. Green, *Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997); Sanford Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963); Joshua Kleinfeld, *Why the Mind Matters in Criminal Law*, 53 ARIZ. ST. L.J. 539 (2021).

[30] Justice Gorsuch has repeatedly revisited the question of "criminal delegations." *See, e.g.*, Gundy v. United States, 588 U.S. 128, 179 (2019) (Gorsuch, J., dissenting). Criminal delegations have also inspired a burst of recent scholarship. *See, e.g.*, Brenner M. Fissell, *When Agencies Make Criminal Law*, 10 UC IRVINE L. REV. 855 (2020); Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 298 (2021); Emma Kaufman, *The Past and Persistence of Private Prosecution*, 173 U. PA. L. REV. 89 (2024); Daniel Richman, *Defining Crime, Delegating Authority: How Different Are Administrative Crimes?*, 39 YALE J. ON REG. 304 (2022) [hereinafter Richman, *Defining Crime*]. For some older scholarship on criminal delegations, see Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996).

[31] *See, e.g.*, Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769 (2023); Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756 (2022); Cristina Rodríguez

II. The Traditional Toolkit for Presidential Administration

When Kagan introduced her theory of presidential administration, she described a broad toolkit of techniques for presidential control.[32] President Reagan, for example, used OIRA, which allowed him to delay or return agency rulemakings.[33] President Clinton was fond of press conferences, which he used to announce new rules and to personally claim credit for agency action.[34] President Bush inherited an "arsenal" of techniques from his predecessors, and he continued to expand the toolkit for presidential control.[35] As Kagan noted, each new president had a strong incentive to preserve or expand the powers handed down by his predecessors.[36]

A. Kagan's Original Toolkit

1. Rulemaking

In Kagan's article, rulemaking was the most frequently cited tool for presidential administration.[37] Rulemaking allows an agency to promulgate a new rule which carries the "force and effect of law."[38] Rules are typically formulated via the notice-and-comment process, which requires a notice of proposed rulemaking, a period for members of the public to submit comments, and publication in the Federal Register.[39] Most pre-publication rules are reviewed by OIRA, which has the power to delay or return agency rulemakings.[40] If a rule survives OIRA review, then the newly promulgated rule is considered "binding" upon the agency and the public.[41]

President Clinton often used rulemaking as a substitute for legislation, because his legislation was frequently blocked in Congress. During President Clinton's two terms, Congress was mostly controlled by Republicans who

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& Anya Bernstein, *The Accountable Bureaucrat*, 132 Yale L.J. 1600 (2023); Cristina Rodríguez & Anya Bernstein, *The Diffuse Executive*, 92 Fordham L. Rev. 363 (2023).

[32] *See generally* Kagan, *supra* note 9.

[33] *Id.* at 2277–78.

[34] *Id.* at 2285.

[35] *Id.* at 2319 ("[President] Clinton's methods of control will join Reagan's in Bush's arsenal, thus continuing the expansion of presidential administration this Article has chronicled.").

[36] *Id.* at 2312 ("The more the demands on the President for policy leadership increase . . . the greater his incentive to [utilize] . . . his position as head of the federal bureaucracy.").

[37] *See* Kagan, *supra* note 9 (Kagan's article mentions "rulemaking" 97 times, while "OIRA" is mentioned 19 times, "enforcement" 13 times, and "executive order" 61 times).

[38] *See* 5 U.S.C. § 553 (describing the rulemaking process); *see also* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015) ("Rules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'") (citations omitted).

[39] *See, e.g.*, *Perez*, 575 U.S. at 95–96 (describing the notice-and-comment process).

[40] *See* Kagan, *supra* note 9, at 2277–78 (describing the OIRA review process).

[41] *See, e.g.*, Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014) (describing legislative rules as rules that "impose legally binding obligations or prohibitions on regulated parties").

proved "hostile" to President Clinton's progressive agenda.[42] President Clinton failed when he tried to enact legislation for universal healthcare,[43] failed when he attempted to legislate tobacco restrictions,[44] and failed again when he pursued other legislative goals.[45] Rulemaking allowed President Clinton to accomplish what he had been unable to accomplish through legislation.

As Kagan noted, President Clinton inserted himself at every stage of the rulemaking process. He announced new rules before the agency initiated the rulemaking process, he weighed in on rules as they made their way through OIRA review, and he personally claimed credit for new rules after they were finalized.[46] In some instances, President Clinton even dictated the specific contents of some rules: for example, when President Clinton announced a new anti-tobacco rule, he described six specific proposals (including a ban on "Joe Camel" advertising for children and a prohibition on "cigarette vending machines" in schools).[47] After the agency completed its rulemaking process, President Clinton's six proposals were included in the agency's final rule, essentially unchanged.[48]

2. Civil Enforcement

Civil enforcement was a secondary tool in President Clinton's toolkit, one which he used "less frequently" than rulemaking.[49] Kagan described two significant civil enforcement efforts from President Clinton, against tobacco

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[42] *See* Kagan, *supra* note 9, at 2312–13 (finding that President Clinton's presidential directives "accelerated dramatically when the Democrats lost control of Congress in the third year of Clinton's Presidency").

[43] Adam Clymer, *National Health Program, President's Greatest Goal, Declared Dead in Congress,* N.Y. Times (Sep. 27, 1994), https://www.nytimes.com/1994/09/27/us/health-care-debate-overview-national-health-program-president-s-greatest-goal.html [https://perma.cc/3MQW-XXMW].

[44] John F. Harris & Ceci Connolly, *President Clinton Suffers Major Defeat on Tobacco*, Wash. Post (June 17, 1998), https://www.proquest.com/newspapers/clinton-suffers-major-defeat-on-tobacco/docview/408370246/se-2?accountid=189667 [https://perma.cc/A84D-CE5N] (describing President Clinton's anti-tobacco bill which died in Congress).

[45] *Id.* ("Democrats yesterday acknowledged that most of the items left on President Clinton's plate—such as a minimum wage increase and a 'Health Care Bill of Rights' regulating health maintenance organizations—are far less likely to become law . . . .").

[46] Kagan, *supra* note 9, at 2282–84 (describing President Clinton's interventions into anti-tobacco rulemaking and rulemaking about paid family leave, and noting that President Clinton often "publicly entered a rulemaking" at various rulemaking stages).

[47] *See* The President's News Conference, 31 Weekly Compilation Pres. Docs. Comp. Pres. Doc. 1415 (Aug. 10, 1995) (describing six proposals to limit cigarettes for kids, including I.D. requirements for cigarette sales, a prohibition on "cigarette vending machines," and a ban on "Joe Camel" images targeted towards kids).

[48] *See* Kagan, *supra* note 9, at 2283 (noting that the final rule "incorporated a number of changes" but that "none" of these changes "went to the heart of the regulatory proposal (or to the President's public comments)").

[49] Andrias, *supra* note 12, at 1060 ("While [President] Clinton focused on enforcement, he did so less frequently, and rarely with respect to identifiable parties.").

companies[50] and gun manufacturers.[51] Oftentimes, President Clinton's civil enforcement efforts were accompanied by rulemakings: his tobacco enforcement announcement, for example, followed his push for an anti-tobacco rulemaking.[52]

When Kagan discussed civil enforcement by President Clinton, she sounded a rare note of caution, even disapproval.[53] She argued that specific enforcement actions might tempt the president to engage in "the crassest form of politics," such as the pursuit of "personal favors and vendettas."[54] Presidential interventions should be discouraged in enforcement cases,[55] she said, and she even proposed a "prohibition" on presidential administration in specific enforcement actions.[56]

Kagan's prohibition was inspired by the risks of abuse. Enforcement decisions center on "particular individuals and firms,"[57] Kagan noted, which created a "danger" of politicized and unprofessional decisions.[58] If the president involved himself in selecting specific enforcement targets, he might target his political rivals or pursue "vendettas" or "favors."[59] To avoid these risks, Kagan favored a "prohibition" on presidential administration in specific enforcement cases.[60] Notably, Kagan's prohibition applied only to specific enforcement actions but not to general enforcement policy.[61] As Kagan clarified:

> I do not mean this prohibition to include the articulation of broad enforcement policy or strategy, of the kind President Clinton sometimes made part of his program of administrative

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[50] *See* Kagan, *supra* note 9, at 2306 (noting that President Clinton "involved himself in the development and implementation of enforcement policy, even (albeit rarely) as to decisions to prosecute identifiable parties like manufacturers of handguns or tobacco products").

[51] *See id.* at 2305 (describing President Clinton's firearms policies where President Clinton began "directing and appropriating not only rulemakings but enforcement strategies").

[52] *See id.* at 2302 (noting that President Clinton used his 1999 State of the Union Address to announce that "the Justice Department is preparing a litigation plan to take the tobacco companies to court" (quoting Address Before a Joint Session of Congress on the State of the Union, 1 PUB. PAPERS 62, 66 (Jan. 19, 1999))).

[53] *See id.* at 2357–58 (arguing for a "prohibit[ion]" on presidential direction in *specific* cases of civil enforcement).

[54] *Id.*

[55] *See id.* at 2358 n.423 (discouraging "presidential direction" in civil enforcement cases like "decisions to file suit against discrete entities such as Microsoft or the tobacco industry").

[56] *Id.* at 2357–58 ("These considerations, taken together, make me set the appropriate boundaries on presidential direction . . . in an untraditional place—prohibiting this direction when, but only when, the government exercises prosecutorial authority."); *see also id.* at 2358 n.423 (discussing her "prohibition" on presidential interventions and clarifying that the prohibition extends only to specific enforcement actions but not to "broad enforcement policy or strategy").

[57] *Id.* at 2357–58.

[58] *Id.* (noting that presidential intervention into specific enforcement cases "pose[s] the greatest danger of displacing professionalism and thereby undermining confidence in legal decisionmaking").

[59] *See supra* note 54 and accompanying text.

[60] Kagan, *supra* note 9, at 2358 n.423.

[61] Kagan did not elaborate further on the difference between specific enforcement cases and general enforcement policy, so her distinction remains somewhat amorphous. *See id.* at 2357–58.

> governance . . . . I do mean to raise serious questions about presidential direction of decisions to file suit against discrete entities . . . .[62]

As Kagan herself acknowledged, her "prohibition" cut against the grain of traditional theories, particularly unitary executive theory.[63] Unitary executive theory views enforcement as "the heart" of presidential power.[64] Part V will discuss unitary executive theory in more detail.

3. OIRA Review, Press Conferences, and Other Tools

In addition to discussing rulemaking and civil enforcement, Kagan also mentioned additional tools for presidential administration, including OIRA review, press conferences, and executive orders. According to Kagan, different presidents favored different "methods of control," depending on their personalities and the tools available to them.[65] For example, President Reagan preferred to use the OIRA review process, which gave him greater control over rulemaking.[66] Via OIRA, the White House could delay, dilute, or even defeat agency rulemakings.[67]

President Clinton perfected the art of the press conference, which he used to announce high-profile executive orders. In Kagan's count, President Clinton issued 107 executive orders, compared to only nine by President Reagan.[68] According to President Clinton's chief speechwriter, "The White House settled into a rat-a-tat-tat of announcements and statements. A 'message event' of the day. Each one with an element of news—issuing an executive order, announcing the results of a study, setting a regulation, passing out grants."[69]

Another Clinton aide joked that "we expect that we'll be producing executive orders until the morning he leaves office."[70]

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[62] *Id.* at 2358 n.423.

[63] *Id.* at 2357–58 (acknowledging that her prohibition falls "in an untraditional place").

[64] *Id.* (discussing unitary executive theory as articulated by Justice Scalia); *see also* Morrison v. Olson, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) (arguing that prosecution and enforcement are "quintessentially" executive powers).

[65] *See* Kagan, *supra* note 9, at 2319 (discussing the "methods of control" used by Presidents Reagan, Clinton, and Bush).

[66] *See id.* at 2277–78 (describing Reagan's Executive Order 12,291, which established the OIRA review process).

[67] *See id.* (arguing that OIRA review gave the White House "a form of substantive control over rulemaking" because OIRA could "prevent publication of a proposed or final rule, even indefinitely, until the completion of the review process").

[68] *See id.* at 2294–95.

[69] *Id.* at 2300 (quoting MICHAEL WALDMAN, POTUS SPEAKS: FINDING THE WORDS THAT DEFINED THE CLINTON PRESIDENCY 16 (2000)).

[70] *Id.* at 2296 (quoting Alexis Simendinger, *An Executive Endgame Takes Shape*, 32 NAT'L J. 628, 628 (2000)).

After President Clinton left office, he handed down an expanded toolkit to President Bush, who inherited an "arsenal" from his predecessors.[71] President Bush took office a few months before Kagan published her article,[72] and Kagan (correctly) predicted that President Bush would be an enthusiastic adopter of presidential administration, despite some early predictions to the contrary.[73] According to Kagan, President Bush was "unlikely" to voluntarily "cede" the presidential powers which had been built up by Presidents Reagan and Clinton.[74] Kagan noted that President Bush had taken an "aggressive posture" in the OIRA process,[75] and she predicted that President Bush would use his powers to advance a deregulatory agenda, as President Reagan had.[76]

B. Expanding the Toolkit

In the decades since Kagan's article, scholars have identified numerous additional tools for presidential control. This section briefly summarizes the expanded presidential toolkit, which includes tools like agency funding, agency personnel, and agency nonenforcement.

1. Agency Funding

Agency funding has gained renewed attention since 2025, when President Trump began actively intervening into areas like foreign aid spending and federal research grants.[77] These interventions have been called "appropriations presidentialism," a term coined by Eloise Pasachoff, Zachary Price, and Matthew Lawrence.[78] In their recent article, they argue that President Trump's actions represent a "dramatic, destabilizing expansion of a preexisting trend."[79] They follow the preexisting trend to President Obama, who used his powers to implement the Affordable Care Act's cost-sharing

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[71] *Id.* at 2319.

[72] Kagan's article was published in June 2001. President George W. Bush took office in January 2001.

[73] *See* Kagan, *supra* note 9, at 2317 ("My prediction flies in the face of conventional wisdom regarding Bush's management style . . . .[T]he *New York Times* has reported broad consensus that Bush, as compared with Clinton, will 'delegat[e] more authority' to executive agency heads, '[s]ignaling [a] [r]eduction in [the] [r]ole of [the] White House [s]taff.'") (citation omitted).

[74] *Id.*

[75] *Id.* at 2318 ("Bush's choice for the administrator of OIRA suggests an intent to renew an aggressive posture toward the agencies in the regulatory review process . . . .").

[76] *Id.* (noting that President Bush often cited "the economic costs of regulatory decisions" as a drag on businesses, as had Reagan).

[77] The Trump administration has "paused foreign aid spending; imposed conditions on grants and spending programs related to these issues; [and] threatened to rescind hundreds of millions to billions of dollars in funding for individual universities." *See* Matthew B. Lawrence, Eloise Pasachoff & Zachary S. Price, *Appropriations Presidentialism*, 114 GEO. L. J. ONLINE 1, 4 (2025) (internal citations omitted).

[78] *See id.*

[79] *Id.* at 5.

reductions.[80] However, they argue that President Trump has aggressively expanded the president's powers in ways not undertaken by previous presidents. For example, the Trump White House accessed the Treasury Department's payment system, which historically has not been used for policymaking,[81] cut off funds without following agencies' own internal procedures,[82] and clawed back funds already disbursed.[83] Pasachoff, Price, and Lawrence critique President Trump's "dramatic escalation" of appropriations presidentialism,[84] and they urge Congress to reassert its power over the purse.[85]

2. Agency Personnel & Capacity

Presidents can influence agency capacity by changing an agency's high-level leadership or lower-level personnel. In recent years, Anne Joseph O'Connell has documented the president's use of "actings," or temporary agency leadership.[86] By appointing "actings," the president can bypass the usual Senate confirmation process and exert greater control over agency leadership.[87] More recently, Nicholas Bednar has shed new light on agency "capacity," which includes know-how by lower-level staff.[88] As Bednar writes, "[S]ome agencies are overworked, under-resourced, and poorly managed," and these capacity issues can derail the president's agenda even in agencies that are broadly aligned with the president's policies.[89] Agency capacity has

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[80] *See id.* at 3 (discussing U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165 (D.D.C. 2016) and Nicholas Bagley's analysis of the Affordable Care Act). Bagley wrote, presciently, that President Obama's attempts to shore up the Affordable Care Act had weakened Congress's appropriations power and might "embolden" future presidents to intervene more aggressively into agency funding. *See* Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. Pa. L. Rev. 1715, 1735 (2016) ("It's impossible to anticipate the full consequences of weakening the legislature's power of the purse . . . [b]ut the Administration's efforts to put the ACA on surer financial footing may embolden the next president to further slip the reins of legislative control . . . .").

[81] *See* Lawrence et al., *supra* note 77, at 14.

[82] *See id.* at 12 ("[I]t has threatened to cut off funds immediately based on any alleged noncompliance; in some instances, it has actually followed through on this threat, pausing or terminating existing grants without reference to agencies' prescribed internal processes for such funding changes.").

[83] *See id.*

[84] *See id.* at 14.

[85] For a small sample of recent work discussing Congress's appropriations power, see generally, Bagley, *supra* note 80; Jonathan S. Gould, *A Republic of Spending*, 123 Mich. L. Rev. 209 (2024); Matthew B. Lawrence, *Disappropriation*, 120 Colum. L. Rev. 1 (2020); Gillian E. Metzger, *Taking Appropriations Seriously*, 121 Colum. L. Rev. 1075 (2021); Eloise Pasachoff, *Modernizing the Power of the Purse Statutes*, 92 G.W. L. Rev. 359 (2024); Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 Vand. L. Rev. 357 (2018).

[86] *See generally* Anne Joseph O'Connell, *Actings*, 120 Colum. L. Rev. 613 (2020).

[87] *See id.* at 667.

[88] *See* Nicholas R. Bednar, *Presidential Control and Administrative Capacity*, 77 Stan. L. Rev. 823, 829 (2025) ("I define 'capacity' as the expertise, experience, and team production that allow agencies to choose between policy alternatives and navigate the procedural requirements of the Administrative Procedure Act (APA).").

[89] *Id.* at 830.

also been discussed by Jody Freeman and Sharon Jacobs, who have warned that the president can "hollow out" agencies by deliberately pushing out "key staff."[90]

3. Nonenforcement

Finally, many scholars have written about nonenforcement, which gained national attention during President Obama's policy on Deferred Action for Childhood Arrivals ("DACA"). DACA hinged on nonenforcement: immigration agencies were told to cease enforcement against immigrants who had been brought to the United States as children, who had earned a high school diploma, and who met other requirements.[91] DACA also allowed immigrants to apply for employment authorization documents.[92]

DACA kicked off a flurry of nonenforcement scholarship. Kate Andrias, for example, found that President Obama was not the only president who used nonenforcement: President Bush, for example, had dialed back enforcement of environmental regulations.[93] Nonenforcement also attracted the attention of constitutional scholars, including John Yoo, Robert Delahunty, Zachary Price, Mila Sohoni, and many others.[94] Some scholars argued that the Take Care Clause was flexible enough to accommodate policies like DACA, while others argued against a broad nonenforcement policy like DACA.[95]

* * *

The toolkit for presidential administration was already large when Kagan described it in 2001, and it has grown even larger since. In the interest of space, this Article provides only a brief discussion, since this is already well-trodden ground. Next, this Article turns to a relatively new tool for presidential administration: criminal enforcement.

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[90] Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 597 (2021).

[91] *See* Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children 1 (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [http://perma.cc/DH5S-3NXN].

[92] *See id.*

[93] *See* Andrias, *supra* note 12, at 1062–63 ("[T]here was an overall decline in enforcement at the EPA during the Bush Administration. This included some announced policies of nonenforcement.").

[94] *See*, *e.g.*, Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014).

[95] *See generally, e.g.*, Zachary S. Price, *Faithful Execution in the Fifty States*, 57 GA. L. REV. 651 (2023) (discussing prosecutorial discretion and "faithful execution" at the state level); Sohoni, *supra* note 27, at 89–92 (discussing the Take Care Clause and the president's duty to faithfully execute the laws).

III. Criminal Enforcement as a New Tool for Presidential Control

The president has strong incentives to utilize criminal enforcement for regulatory control, because criminal enforcement is widely available and is more strongly deterrent than civil enforcement. Part III.A describes incentives for the president, who can use criminal enforcement across the many regulatory areas where criminal penalties are embedded alongside civil penalties. Part III.B describes examples from the Bush, Obama, Biden, and Trump administrations.

A. Incentives for the President to Use Criminal Enforcement

For the president, criminal enforcement may present an attractive option. First, criminal enforcement is widely available, because many regulatory regimes contain both civil and criminal penalties. Second, criminal enforcement carries a stronger deterrent effect, because criminal penalties are typically heavier than civil penalties. Third, the president can amplify the uptake of criminal referrals, because he has the power to direct agencies (which investigate regulatory violations) as well as the Justice Department (which receives criminal referrals from agencies).

1. Widely Available Criminal Penalties

Regulatory statutes often include both civil and criminal penalties. For example, criminal penalties exist in environmental regulations,[96] food and drug law,[97] securities law,[98] antitrust law,[99] tax law,[100] immigration law,[101] and

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[96] The Clean Water Act of 1972, codified at 33 U.S.C. §§ 1251–1389, contains criminal penalties for some violations. *See, e.g.*, 33 U.S.C. § 1319(c)(1)(B) ("Any person who negligently introduces into a sewer system . . . any pollutant or hazardous substance . . . shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both."). Similarly, the Clean Air Act of 1963, codified at 42 U.S.C. §§ 7401–7675, contains some criminal penalties. *See, e.g.*, 42 U.S.C. § 7413(c)(2)(C) ("Any person who knowingly . . . falsifies, tampers with, renders inaccurate, or fails to install any monitoring device . . . required to be maintained or followed under this chapter . . . shall, upon conviction, be punished by a fine pursuant to Title 18 or by imprisonment for not more than 2 years, or both.").

[97] The Federal Food, Drug, and Cosmetic Act was first enacted in 1938 and was amended throughout the 1970s and 1980s. *See* 21 U.S.C. §§ 301–399i. The Act contains several criminal provisions. *See, e.g.*, 21 U.S.C. § 333(a) ("Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both."); 21 U.S.C. § 376 ("Any person who forges, counterfeits, simulates, or falsely represents . . . any mark, stamp, tag, label, or other identification devices . . . shall be guilty of a misdemeanor . . . .").

[98] Securities violations may be criminally punishable under 18 U.S.C. § 1348 and other statutes.

[99] *See, e.g.*, 15 U.S.C. § 1 (establishing criminal penalties for antitrust violations, including criminal fines and imprisonment up to 10 years).

[100] The tax code imposes criminal penalties for "willful failure to collect or pay over tax," 26 U.S.C. § 7202, and other tax violations.

[101] *See, e.g.*, 8 U.S.C. § 1325 (establishing criminal penalties for "improper entry by alien").

other areas. According to Lawrence Solan, "[s]tatutes that contain both civil remedies and criminal penalties are typical in the modern regulatory state."[102]

The number of criminal penalties has grown "explosively" since the 1970s.[103] Several authors have attempted to count the number of criminal penalties embedded in the United States Code; while the authors do not agree on an exact number, all agree that the number has grown significantly.[104] In 1998, for example, the American Bar Association found that "over forty percent" of federal crimes "have been created since 1970."[105] In 2004 and 2008, two studies from John Baker found several hundred new federal crimes.[106] A more recent January 2022 study found 1,510 sections of the Code that created at least one federal crime,[107] and a subsequent study found additional sections that had been overlooked by the 2022 study.[108]

It has been difficult to quantify the number of criminal penalties in the Code because criminal penalties are scattered throughout many

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[102] Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 Wm. & Mary L. Rev. 2209, 2211 (2003) (describing criminal penalties in statutes such as "RICO, the antitrust laws, the securities laws, environmental laws such as the Clean Water Act, various tax statutes, the Copyright Act, and the Bankruptcy Code" (footnotes omitted)).

[103] Crim. Just. Section, Am. Bar Ass'n, The Federalization of Criminal Law 7 (1998) [hereinafter ABA Report], https://www.nacdl.org/Document/ABAFederalizationofCriminalLawReport [https://perma.cc/EG4P-CCHC].

[104] In chronological order, the studies are: (1) In 1989, a report from the Justice Department's Office of Legal Policy, *see* Ronald L. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 Crim L.F. 99 (1989); (2) In 1998, the ABA Report, *supra* note 103; (3) In 2004, a study by John Baker, *see* John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, Federalist Soc'y Rev. (2004) [hereinafter Baker Report 2004], https://fedsoc.org/fedsoc-review/measuring-the-explosive-growth-of-federal-crime-legislation [https://perma.cc/T5VY-JLBD]; (4) In 2008, a follow-up study by Baker, *see* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Found. (June 16, 2008) [hereinafter Baker Report 2008], https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes [https://perma.cc/E388-XPHE]; (5) In 2022, the Count the Code Report, *see* GianCarlo Canaparo, Patrick McLaughlin, Jonathan Nelson & Liya Palagashvili, Count the Code: Quantifying Federalization of Criminal Statutes, No. 251, Heritage Found. (2022) [hereinafter Count the Code], https://www.heritage.org/crime-and-justice/report/count-the-code-quantifying-federalization-criminal-statutes [https://perma.cc/6JR9-93ST]; (6) In 2025, a study by Faiz Surani et al., which used large language models to detect criminal penalties in the United States Code, *see* Faiz Surani, Lindsey A. Gailmard, Allison Casasola, Varun Magesh, Emily J. Robitschek & Daniel E. Ho, *What Is the Law? A System for Statutory Research (STARA) with Large Language Models, in* ICAIL '25: Proceedings of the Twentieth International Conference on Artificial Intelligence and Law 394 (Juliano Maranhão ed., 2025); (7) A forthcoming study by Sean Farhang & Andrea Roth, which traces the growth of federal crimes from 1887 onward, *see* Sean Farhang & Andrea Roth, *Congress and Criminalization* (unpublished manuscript) (on file with author).

[105] ABA Report, *supra* note 103, at 2.

[106] Baker Report 2008, *supra* note 104, at 5 ("My 2004 report, however, concluded that a large percentage of the new crimes came in the environmental area. For the years 2000 through 2007, many of the new crimes were in the following areas: [n]ational security . . . [t]errorism and support for terrorists . . . and [c]ontrols on the Internet.").

[107] The 2018 version of the U.S. Code had 48,367 sections total, and of these sections, 1,510 sections created at least one crime. *See* Count the Code, *supra* note 104, at 3.

[108] Surani et al., *supra* note 104, at 397 ("Using STARA, we identify 2,305 criminal provisions with 98% precision—nearly 8,800 more provisions than previously documented.").

different parts of the Code and they are often embedded in otherwise civil regulatory regimes. For example, the National Wildlife Refuge System Administration Act regulates wilderness conservation. The Act is usually civilly administered by the Fish and Wildlife Service,[109] yet it also includes criminal penalties, such as the following:

> Any person who knowingly violates or fails to comply with any of the provisions of this Act or any regulations issued thereunder shall be fined under [T]itle 18 or imprisoned for not more than 1 year, or both.[110]

The statute uses the word "imprisoned," which denotes a criminal, not civil, penalty.[111] Throughout the Code, keywords like "imprisonment," "shall be punished," and "shall be guilty of"[112] are used to create criminal penalties, which are often embedded into otherwise civil regulatory regimes.[113]

In recent years, many scholars have attempted to explain the "explosive growth" of criminal penalties.[114] Some scholars blame overcriminalization and the "tough on crime" movement.[115] Alternatively, William Stuntz has argued that legislative incentives are the primary driver of federal criminal legislation.[116] Whatever the reason, the past fifty years have seen a substantial increase in federal criminal provisions.[117] Criminal penalties exist in many modern regulatory regimes, thus creating more opportunity for criminal enforcement direction by the president.

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[109] 16 U.S.C. § 668dd; *see also* Cam Tredennick, *The National Wildlife System Improvement Act of 1997: Defining the National Wildlife Refuge System for the Twenty-First Century*, 12 Fordham Env't L. Rev. 41, 44–59 (2000) (discussing the National Wildlife Refuge System Administration Act of 1966).

[110] 16 U.S.C. § 668dd(f)(1).

[111] The statute also uses the word "fine," which might imply a civil or criminal penalty depending on the context. *See* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795 (1992). In this context, however, the statute refers to Title 18 of the U.S. Code, which governs federal criminal law, making these fines likely to be criminal in nature.

[112] *See* Count the Code, *supra* note 104, at 8–10 (locating criminal penalties in the U.S. Code by searching for keywords like: "Be fined under this title or imprisoned"; "Imprisonment for not more than"; "Be punished by a fine"; and "Shall be guilty of").

[113] *Id*. at 3 (finding 1,510 statutes "that create at least one crime" in the 2018 version of the U.S. Code).

[114] ABA Report, *supra* note 103, at 7.

[115] *See, e.g.*, Brickey, *supra* note 25, at 1145 ("Congress simply could not resist the citizens' demands to be 'tough on crime' because crime had assumed the spotlight as a national political issue."); Judith Greene, *Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act*, *in* Sentencing and Society: International Perspectives 43 (Cyrus Tata & Neil Hutton eds., 2002).

[116] Stuntz, *Politics of Criminal Law*, *supra* note 24, at 509 (arguing that the "tough on crime" explanation is powerful but "incomplete," and proposing an incentive-based explanation whereby legislators and prosecutors have strong incentives to enact more criminal statutes).

[117] *See supra* note 108.

2. Strong Deterrent Effect

Criminal penalties are often more severe than civil penalties, and many theorists have argued that criminal penalties have a stronger deterrent effect.[118] For example, William Stuntz, who wrote about the civil-criminal distinction, noted that:

> Criminal punishment often means prison, and prison is both different from and worse than money damages. It is also, by definition, worse than nonmonetary civil sanctions: Injunctions take away the freedom to do certain things, while prison takes away the freedom to do just about anything that prison officials don't want you to do.[119]

Stuntz, like many criminal theorists, acknowledged that deterrence is not the *only* goal of criminal punishment. Such punishment may also aim to rehabilitate, to incapacitate the wrongdoer, to restore the social standing of the victim, or to accomplish a wide variety of other goals.[120] As Henry Hart, Jr. put it, deterrence need not be "the overriding and ultimate purpose of the criminal law, important though it is."[121]

Yet despite competing theories, many theorists nevertheless agree that criminal penalties have a stronger deterrent effect than civil penalties. This intuition is borne out in the empirical literature, including a recent article by Nicholas Parrillo, who studied enforcement against large companies and healthcare providers.[122] According to one attorney interviewed by Parrillo, the fear of criminal enforcement "was the main reason people in the industry followed [agency] guidance."[123] Another interviewee noted that announcements about criminal indictments could trigger a "built-in level of hysteria" in the industry.[124]

3. Amplified Uptake of Criminal Referrals

Finally, the president can amplify uptake of criminal referrals, because he can direct the Justice Department to accept criminal referrals from

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[118] *See, e.g.*, Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 404 (1958) (arguing that criminal penalties involve a "judgment of community condemnation"); *see* Mann, *supra* note 111, at 1809 (discussing the "special stigma" associated with criminal penalties as opposed to civil penalties); *see also id.* at 1811 ("[C]riminal penalties are thought to be more severe than civil penalties.").

[119] William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 24 (1996).

[120] *See* Hart, *supra* note 118 (discussing the multiple goals of the criminal law).

[121] *Id.* at 409.

[122] *See* Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165 (2019).

[123] *Id.* at 216.

[124] *Id.*

agencies.[125] When agencies refer their cases for criminal prosecutions, their referrals are sometimes declined by the Justice Department.[126] But the president can increase uptake of criminal referrals by simultaneously directing (a) agency investigations of regulatory violations and (b) Justice Department prosecutions.

a. Agency Investigations of Regulatory Violations

Administrative agencies typically investigate regulatory violations in their areas. According to Daniel Richman, a former federal prosecutor, agencies have "the expertise, the manpower, the technical resources, and, perhaps most importantly, the informational networks that no U.S. Attorney's Office possesses."[127] In many cases, federal prosecutors will "not even know that a crime has been committed" until an agency refers a criminal case to the Justice Department.[128]

Mens rea, also known as *scienter* or "guilty mind," typically divides criminal offenses from civil offenses. Some tax statutes, for example, allow civil penalties for good-faith mistakes, yet tax errors can become criminally punishable if the offender acted willfully or with some other culpable mental state.[129] Similarly, environmental violations are usually sanctioned with civil fines, yet violators may become criminally liable if the agency uncovers evidence of willfulness, intent to deceive, or other aggravating factors.[130]

Agencies that conduct criminal investigations must also "convince a prosecutor to take the case."[131] Per Robert Rabin, agencies that acquire a "reputation for poor quality preparatory work" may find that prosecutors are reluctant to accept their referrals.[132] If the Justice Department *does* accept a

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[125] As Richman has written, the Justice Department holds a "monopoly" over federal criminal prosecutions. *See* Richman, *Prosecutors and Their Agents*, *supra* note 7, at 758. Richman has also noted that the Justice Department frequently declines referrals, and he has written that it is "quite difficult for regulatory agencies to get prosecutors to take their cases." Richman, *Defining Crime*, *supra* note 30, at 366.

[126] *See infra* notes 145–48.

[127] Richman, *supra* note 7, at 767–68.

[128] *Id.* at 768.

[129] *See, e.g.*, Cheek v. United States, 498 U.S. 192, 199–200 (1991) ("The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses.") (citations omitted).

[130] David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENV'T L. REV. 159, 164–66 (2014) [hereinafter Uhlmann, *Environmental Crime*]; *see also id.* at 198 ("I have suggested that lying is the most significant factor in making a criminal case out of what otherwise might be a civil or administrative violation. If this premise is true and a high percentage of criminal cases involve deceptive or misleading conduct, it could address concerns that law-abiding individuals are being unfairly targeted with criminal prosecution.").

[131] Richman, *supra* note 7, at 758.

[132] Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1063 (1972).

referral, agency investigators may assist with the prosecution and "will generally be responsible for the evidentiary aspects" of the case.[133]

When an agency refers a case to the Justice Department, it will sometimes send the criminal referral to "Main Justice" in Washington, D.C. At Main Justice, some units specialize in certain types of regulatory crimes: for example, Main Justice's Tax Division will often handle referrals from the Internal Revenue Service,[134] and Main Justice's Environmental Crimes Section will often work with the Environmental Protection Agency.[135] But agencies need not always work with Main Justice in D.C., because agencies may also refer cases to local U.S. Attorneys' Offices throughout the country. The Securities and Exchange Commission, for example, often works with federal prosecutors in the Southern District of New York.[136] The Environmental Protection Agency, too, can refer cases to local U.S. Attorneys' Offices, and these local U.S. Attorneys' Offices can sometimes file charges without seeking approval from Main Justice.[137]

b. Criminal Prosecutions by the Justice Department

The Justice Department's control over criminal litigation derives from the Judiciary Act of 1789, which authorized federal prosecutors to represent the United States in civil and criminal litigation.[138] Over time, civil litigation authority was split between different agencies: for example, the Securities and Exchange Commission was created in 1934 and was granted its own civil

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[133] *Id.* at 1068 ("The investigator who worked on the case will generally be responsible for the evidentiary aspects of preparation for litigation . . . ."). *See generally* Asimow, *supra* note 20, at 247 (explaining how agency staff prosecutors prepare confidential memoranda analyzing the factual, legal, and policy rationales for charging or settling a case, including evidentiary weaknesses and strategic considerations).

[134] *See, e.g.*, *How Criminal Investigations Are Initiated*, Internal Revenue Serv. (May 17, 2025), https://www.irs.gov/compliance/criminal-investigation/how-criminal-investigations-are-initiated [https://perma.cc/WZ36-KRT2] (noting that the Internal Revenue Service's Criminal Investigation Division "conducts criminal investigations" and then makes a prosecution recommendation to the Tax Division in Main Justice for tax investigations or to a U.S. Attorney's office for all other investigations).

[135] *See Environmental Crimes Section: About the Section*, U.S. Dep't of Just., https://www.justice.gov/enrd/environmental-crimes-section [https://perma.cc/2BB6-LJ8M] (describing the Environmental Crimes Section and its work with the EPA, the Fish and Wildlife Service, and other partner agencies); *see also* U.S. Dep't of Just., Just. Manual § 5-11.104 (2018) [hereinafter JM], https://www.justice.gov/jm/jm-5-11000-environmental-crimes#5-11.104 [https://perma.cc/FM4J-S2Y3] ("United States Attorneys' Offices have responsibility for the investigation and prosecution of environmental crimes within their own districts and the Environmental Crimes Section has responsibility for the investigation and prosecution of environmental crimes on a nationwide basis.").

[136] *See, e.g.*, *Criminal Division*, U.S. Dep't of Just., https://www.justice.gov/usao-sdny/criminal-division [https://perma.cc/XQ67-G6CZ].

[137] *See* Uhlmann, *Environmental Crime*, *supra* note 130, at 172 ("By 1994, United States Attorneys' Offices were no longer required to seek approval from officials in Washington before bringing criminal charges in environmental cases.").

[138] *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73 § 35 (1789).

litigation authority independent of the Justice Department.[139] Yet even though some agencies acquired *civil* litigating authority, *criminal* authority remained firmly ensconced within the Justice Department.[140] According to Kirti Datla and Richard Revesz:

> The default rule is that the Attorney General is to direct all litigation to which the United States is a party '[e]xcept as otherwise authorized by law.' Congress has carved out numerous exceptions to the centralized control of litigation in the DOJ. These exceptions—*all related to civil, not criminal, litigation*—'have been anything but systematic.'[141]

In the centralized system described by Datla and Revesz, some agencies can pursue *civil* litigation in federal court, but all agencies must refer cases to the Justice Department for federal *criminal* prosecution.[142] Agencies are thus "dependent" upon the Justice Department for criminal prosecutions,[143] and Justice Department prosecutors are the "exclusive gatekeepers" for federal criminal enforcement.[144]

The president can amplify uptake of criminal referrals in given policy areas because he can direct the Justice Department to prioritize certain types of referrals. During the Family Separation Policy, for example, the Trump administration directed the Justice Department to accept referrals from immigration agencies.[145] During President Biden's term, prosecutors were instructed to prioritize corporate and white-collar crime.[146]

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[139] The Securities and Exchange Commission was given civil litigating authority by Congress in the Securities Exchange Act of 1934, which created the agency. *See* 15 U.S.C. §§ 78a–78rr; *see also* 15 U.S.C. § 78u(d)(3)(A) ("Whenever it shall appear to the Commission that any person has violated any provision of this chapter . . . the Commission may bring an action in a United States district court to seek . . . a civil penalty . . . .").

[140] In the lead-up to the Administrative Procedure Act in 1946, numerous agencies testified before Congress to describe their enforcement practices, which included criminal referrals to the Justice Department. *See generally* Att'y Gen.'s Comm. on Admin. Proc., Administrative Procedure in Government Agencies, S. Doc. No. 77-8 (1941). Multiple agencies described a system of "criminal referrals," whereby serious regulatory violations were referred to the Justice Department for criminal enforcement. For example, in the Internal Revenue Service, "[i]f criminal prosecution is finally decided upon by the Bureau, the case is transmitted to the Department of Justice." Att'y Gen.'s Comm. on Admin. Proc., Administrative Procedure in Government Agencies Pt. 9, S. Doc. No. 77-10, at 17 (1941). In the Maritime Commission, criminal cases were "referred to the Department of Justice" for criminal prosecutions. S. Doc. No. 77-8, at 294. And in the Securities and Exchange Commission, the agency "does not . . . conduct criminal prosecutions, but is expected to transmit evidence of crime to the Attorney General." *Hearings Before a Subcomm. of the S. Comm. on the Judiciary on S. 674, S. 675, and S. 918*, 77th Cong. 394 n.12 (1941).

[141] Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 800–01 (2013) (alteration in original) (emphasis added) (footnotes omitted).

[142] *Id.* at 801.

[143] Rabin, *supra* note 132, at 1037.

[144] Richman, *supra* note 7, at 758.

[145] *See* Family Separation Memorandum, *supra* note 1 ("Accordingly, I direct each United States Attorney's Office along the Southwest Border . . . to adopt immediately a zero-tolerance policy for all offenses referred for prosecution under section 1325(a) [for illegal entry].").

[146] *See infra* note 219.

B. Criminal Enforcement as Used by Recent Presidents

Many recent presidents have used criminal enforcement, including Presidents Trump, Biden, Obama, and Bush. However, President Trump's policies have been unusually *binding* upon prosecutors, who have traditionally exercised a large degree of independence from the White House. This section provides five in-depth case studies of criminal enforcement as used by recent presidents.

1. New Mexico Military Zone (Trump Administration)

As part of its effort to reduce immigration, the Trump administration created new military zones in border states like New Mexico.[147] The military zones allowed the Army to "take a more direct role in securing our southern border," and they were announced by President Trump, who directed the Department of the Interior to transfer jurisdiction over public lands to the Department of Defense.[148] President Trump noted that the transfer would allow the Army to patrol the newly created military zone and to "exclude persons" from entering the zones.[149] A few weeks later, in May 2025, Defense Secretary Pete Hegseth and the U.S. Attorney for the District of New Mexico announced that they would "work hand in glove" to criminally prosecute immigrants.[150]

The military zones allowed prosecutors to bring more severe national security-related charges against immigrants. In previous administrations, immigrants might have faced deportation (a civil penalty)[151] or charges of entry without inspection (carrying a criminal penalty of up to six months of imprisonment).[152] Under the Trump administration's new policy, immigrants were charged under multiple criminal statutes, including national security-related statutes.[153] These national security-related charges were often more severe, especially if the charges were stacked together: for example, immigrants

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[147] *See* Morgan Lee, *US Expands Militarized Zones to 1/3 of Southern Border, Stirring Controversy*, A.P. News (July 3, 2025), https://apnews.com/article/border-military-trump-national-defense-area-89f046e09809fe5b5071c6b9e1f48da9 [https://perma.cc/HD5J-NCYG].

[148] Memorandum on the Military Mission for Sealing the Southern Border of the United States and Repelling Invasions, 2025 Daily Comp. Pres. Doc. 471 (Apr. 11, 2025) [hereinafter Memorandum for Military Zones].

[149] *Id.*

[150] Press Release, U.S. Att'y's Off., Dist. of N.M., U.S. Attorney Announces Prosecution of Title 50 Charges Following Joint Visit to New Mexico National Defense Area (May 1, 2025), https://www.justice.gov/usao-nm/pr/us-attorney-announces-prosecution-title-50-charges-following-joint-visit-new-mexico [https://perma.cc/YSZ5-ZHR6]; *see also* C. Todd Lopez, *Interagency Land Agreement Strengthens Military Border Mission*, DOD News (Apr. 16, 2025), https://www.war.gov/News/News-Stories/Article/article/4156956/interagency-land-agreement-strengthens-military-border-mission/ [https://perma.cc/4XK9-M5TW].

[151] Deportation, also called removal, is considered a civil, not criminal, penalty. *See* Fong Yue Ting v. United States, 149 U.S. 698, 713–14 (1893).

[152] 8 U.S.C. § 1325.

[153] *See, e.g.*, United States v. Lopez-Gonzalez, 782 F. Supp. 3d 1062, 1066 (D.N.M. 2025).

were charged under 50 U.S.C. § 797 for violating a national security regulation (punishable by imprisonment up to one year), plus 18 U.S.C. § 1382 for entering military property (punishable by imprisonment up to six months), plus 8 U.S.C. § 1325 for entry without inspection (punishable by imprisonment up to six months).[154]

By May 2025, prosecutors were bringing stacked criminal charges against immigrants detained in the New Mexico military zone.[155] Federal prosecutors filed hundreds of nearly identical charges, using a "cut-and-paste approach" that repeated the same generic allegations.[156] Public defenders contested the national security-related charges, arguing that they were unwarranted because immigrants did not even know they were entering a military zone.[157] Indeed, many local residents and local officials seemed confused about the boundaries of the New Mexico military zone, which contained large swaths of private land (such as a church-owned pilgrimage site)[158] and land frequently used by ranchers for livestock grazing.[159] In some instances, the U.S. Attorney's Office erroneously charged immigrants who had not, in fact, been found within the boundaries of the military zone.[160]

In May 2025, Magistrate Judge Gregory Wormuth dismissed the national security-related charges in dozens of cases.[161] He held that prosecutors had failed to allege sufficient facts about mens rea.[162] Prosecutors wrote that "signs" had been posted to alert passersby about the military zone, but the judge held that this generalized allegation was insufficient. Simply stating that "some 'signs' were posted," he argued, "provides no basis on which to conclude that the Defendant could have seen, let alone did see, the signs."[163] In dismissing the criminal charges, Judge Wormuth drew upon a more robust and far-reaching conception of mens rea, which this Article will discuss in detail in Part V.

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[154] *See id.* (discussing the three charges).

[155] *See id.*

[156] *See id.* at 1067 n.2.

[157] *See id.* at 1068.

[158] *See* Patrick Lohmann, *Confusion Reigns in New Mexico's Militarized Border Zone*, Source N.M. (May 30, 2025), https://sourcenm.com/2025/05/30/confusion-reigns-in-new-mexicos-militarized-border-zone/ [https://perma.cc/ZT9M-ERXY].

[159] *See id.* ("In the last two weeks, Army and Border Patrol officials have collected the names, photographs, phone numbers, license plates and other details of ranchers who enter the [National Defense Area] to round up their livestock or check on water tanks, ranchers told Source New Mexico. The collection is an effort, they said, to make sure the Army does not mistake ranchers, who often carry firearms, for those who might be trespassing on a military base.").

[160] *See id.*

[161] Morgan Lee, *Judges Dismiss National Security Charges Against Immigrants Who Enter New Militarized Zone at Border*, A.P. News (May 16, 2025), https://apnews.com/article/military-trespassing-cases-dismissed-6c4a83f4d1fd9674e5b49d4a23dc91be [https://perma.cc/89AC-NXC6].

[162] *See, e.g.*, *Lopez-Gonzalez*, 782 F. Supp. 3d at 1067–68 ("Having concluded its probable cause review in this case, the court finds that the facts alleged in the complaint do not establish probable cause for either the 50 U.S.C. § 797 or 18 U.S.C. § 1382 charge.").

[163] *Id.* at 1071.

2. Family Separation Policy (Trump Administration)

In April 2018, President Trump announced a crackdown against immigrant families at the border.[164] The crackdown began with an executive order from President Trump,[165] which was quickly followed by a memorandum from Attorney General Jeff Sessions, who announced a "zero-tolerance" policy for immigration cases referred to federal prosecutors.[166] Another memorandum, from Secretary of Homeland Security Kirstjen Nielsen, directed immigration officials to criminally refer cases to the Justice Department, even though the criminal referrals would separate parents from children.[167] Both memoranda were published in April 2018, and shortly thereafter, President Trump's cabinet members approved the Family Separation Policy by a show-of-hands vote in the White House.[168]

The Family Separation Policy used criminal referrals to redirect the flow of immigration cases. Prior to the Family Separation Policy, immigrant families typically faced civil immigration proceedings.[169] While more serious cases sometimes had been referred to the Justice Department (for example, immigration cases that involved human trafficking or sex offenders), many routine immigration cases were resolved without a criminal referral, in part due to concerns about family separation.[170]

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[164] *See* Ms. L. v. U.S. Immigr. & Customs Enf't, 415 F. Supp. 3d 980, 984 (S.D. Cal. 2020) ("[T]he Trump Administration embarked on an unprecedented policy of separating migrant families at the border to deter immigration."); *see also* Caitlin Dickerson, *"We Need to Take Away Children": The Secret History of the U.S. Government's Family-Separation Policy*, The Atlantic (Aug. 7, 2022), https://www.theatlantic.com/magazine/archive/2022/09/trump-administration-family-separation-policy-immigration/670604/ [https://perma.cc/PS8L-Z4AA] (documenting the Family Separation Policy and the involvement of high-level White House officials, including cabinet officials).

[165] Exec. Order No. 16,179, 83 Fed. Reg. 16179 (Apr. 6, 2018).

[166] Family Separation Memorandum, *supra* note 1.

[167] Secretary Nielsen's full memorandum has not been released, but a partial memorandum is available. *See* Press Release, Project on Gov't Oversight, New Document Shows Nielsen Signed Off on Family Separation Policy (Sep. 25, 2018), https://www.pogo.org/post/new-documents-show-nielsen-signed-off-on-family-separation-policy [https://perma.cc/Y6N6-T5WQ]; *see also* Memorandum from Kevin McAleenan, Comm'r., U.S. Customs and Border Prot., to Kirstjen Nielsen, Sec'y, U.S. Dep't of Homeland Sec. (Apr. 23, 2018), https://www.documentcloud.org/documents/4936568-FOIA-9-23-Family-Separation-Memo.html [https://perma.cc/9PCS-ZETY].

[168] *See* Julia Ainsley & Jacob Soboroff, *Trump Cabinet Officials Voted in 2018 White House Meeting to Separate Migrant Children, Say Officials*, NBC News (Aug. 20, 2020), https://www.nbcnews.com/politics/immigration/trump-cabinet-officials-voted-2018-white-house-meeting-separate-migrant-n1237416 [https://perma.cc/CKK8-23R2].

[169] *See* Off. of the Inspector Gen., U.S. Dep't of Just., Review of the Department of Justice's Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services 6 (2021) [hereinafter Inspector Gen. Report].

[170] *Id.* at 4.

After the Family Separation Policy, however, immigration cases began flowing toward the Justice Department—specifically, toward U.S. Attorneys' Offices along the Southwest border. Attorney General Jeff Sessions instructed these U.S. Attorneys to exercise "zero-tolerance" in immigration cases, even if the cases involved parents with children.[171] By law, children can be held in immigration detention but not in criminal detention,[172] so children were placed in the custody of the Department of Health and Human Services while their parents served criminal sentences.[173] Immigration officials failed to create a system that would allow them to reunify families after the parents' criminal trials,[174] and in some instances, officials worked to *prevent* family reunifications.[175] One immigration official wrote that reunification "obviously undermines the entire effort" and that "the expectation is that we are NOT to reunite the families."[176] An estimated 3,000 children were separated from their parents.[177]

The Family Separation Policy was unusually binding upon federal prosecutors. Traditionally, U.S. Attorneys' Offices have exercised a large degree of independence from Justice Department officials headquartered in Washington, D.C.[178] Yet Attorney General Sessions overrode the traditional independence of U.S. Attorneys' Offices,[179] and he publicly claimed that his zero-tolerance policy should apply to "100 percent" of referrals.[180] Lower-level officials were allegedly pressured to comply.[181]

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[171] Family Separation Memorandum, *supra* note 1; *see also* Inspector Gen. Report, *supra* note 169, at 1 ("[W]ith the urging of Sessions, DHS changed its policy of not referring family unit adults and began referring them to Southwest border USAOs for criminal prosecution.").

[172] *See* Inspector Gen. Report, *supra* note 169, at 5–6 (describing the *Flores* settlement agreement, which allows the government to hold children in immigration detention "in the least restrictive setting appropriate to their age and needs").

[173] *See id.*

[174] *See* Jacob Soboroff, *Emails Show Trump Admin Had "No Way to Link" Separated Migrant Children to Parents*, NBC News (May 1, 2019, at 19:30 ET), https://www.nbcnews.com/politics/immigration/emails-show-trump-admin-had-no-way-link-separated-migrant-n1000746 [https://perma.cc/SL55-2QUG].

[175] *See* Dickerson, *supra* note 164 (citing emails from immigration official Matt Albence).

[176] *Id*.

[177] Inspector Gen. Report, *supra* note 169, at 2.

[178] *See, e.g.*, Richman, *supra* note 7, at 798–99 (discussing the "independent judgment" of U.S. Attorneys, and noting that "Main Justice" officials in D.C. have tended to "devolve power" to U.S. Attorneys).

[179] *See* Inspector Gen. Report, *supra* note 169, at 39 (describing a May 11, 2018, conference call between Attorney General Sessions and five U.S. Attorneys who raised concerns about the family separations).

[180] *See* Jeff Sessions, Att'y Gen., U.S. Dep't of Just., Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions [https://perma.cc/7KHX-YSMS].

[181] *See* Dickerson, *supra* note 164 ("Internal emails show that some assistant U.S. attorneys who resisted prosecuting parents under Zero Tolerance faced reassignment . . . .").

Was the Family Separation Policy truly binding upon prosecutors? Some prosecutors appear to have treated it as binding. The U.S. Attorney for the Western District of Texas, who was interviewed by the Justice Department's Office of the Inspector General, stated:

> Zero tolerance, per our instructions, it's basically sapping prosecutorial discretion . . . . [I] still can determine whether it's a readily provable offense . . . . But even with respect to age of the child, it was a categorical, 'We're prosecuting all.' . . . [N]o one in this office, including me, had any discretion on whether to accept if we were under the zero tolerance requirement from the Attorney General.[182]

Other AUSAs treated the policy as partially binding, attempting to "refine[]" the policy to find a middle ground.[183] For example, some AUSAs "declined cases with very young children, [one] through six year olds," but applied the Family Separation Policy to children older than six.[184]

Finally, some AUSAs resisted the Family Separation Policy, arguing that it was inhumane or that it diverted resources from more serious crimes. An AUSA in the Southern District of Texas, for example, warned higher-up officials that the family separation cases had "affected [the office's] ability to prosecute other substantive crimes."[185] In some instances, prosecutors were forced to deprioritize cases with sex offenders who were then released without criminal prosecution.[186]

Yet the fact remained that despite pushback from some U.S. Attorneys, the Family Separation Policy was unusually binding upon prosecutors. This binding nature stood in stark contrast to earlier examples of criminal enforcement, discussed below.

3. Workplace Safety Memorandum (Obama Administration)

In other instances, the president has adopted less-binding policies that preserved decision-making power for prosecutors. Consider, for example, President Obama's Workplace Safety Memorandum from 2015.[187] The Workplace Safety Memorandum was part of President Obama's larger workers' rights agenda,[188] and it encouraged criminal prosecutions for serious

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[182] Inspector Gen. Report, *supra* note 169, at 41.
[183] *Id.* at 16.
[184] *Id.*
[185] *Id.* at 67.
[186] *Id.*
[187] Workplace Safety Memorandum, *supra* note 3.
[188] For example, President Obama also sought to increase overtime pay for workers. *See* Memorandum on Updating and Modernizing Overtime Regulations, 2014 Daily Comp. Pres. Doc. 138 (Mar. 13, 2014).

workplace violations—for example, an employer might face criminal charges if his "willful" violation caused an employee's death.[189] President Obama's efforts were prompted, in part, by several high-profile workplace disasters, including a deadly mining explosion and an oil spill.[190]

The Workplace Safety Memorandum encouraged criminal referrals from the Department of Labor to the Justice Department.[191] The memorandum listed the specific "points of contact" at each agency who would handle referrals,[192] implemented training programs for agency staff,[193] and emphasized data-sharing between the two agencies.[194] Per the memorandum, the purpose of the agreement was to "aid both agencies in more effectively implementing our national workplace statutes."[195]

Nevertheless, the Workplace Safety Memorandum held back from binding or quasi-binding language. The memorandum avoided mandatory language and, in fact, expressly stated that it was nonbinding.[196] The nonbinding approach in the Workplace Safety Memorandum stands in sharp contrast to the language surrounding the Family Separation Policy, which stressed "zero-tolerance" and placed significant pressure on prosecutors.[197]

As the Workplace Safety Memorandum illustrates, the president has a range of options for administering criminal enforcement: he can craft policies that are binding or quasi-binding upon prosecutors, or he can create less-binding policies that encourage criminal referrals without expressly binding lower-level officials.

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[189] *See* Workplace Safety Memorandum, *supra* note 3, (describing criminal sanctions in the Occupational Safety and Health Act, including sanctions for "willfully violating a specific standard, and thus causing the death of an employee"); *see also* 29 U.S.C. § 666(e) (describing criminal penalties including a criminal fine "of not more than $10,000" or imprisonment "for not more than six months" for a willful violation of the Occupational Safety and Health Act causing death to employee).

[190] *See* Andrias, *supra* note 12, at 1065 (describing President Obama's workplace efforts after a "series of crises," including the Deepwater Horizon oil spill and an explosion in the Massey Energy Upper Big Branch Mine).

[191] *See* Workplace Safety Memorandum, *supra* note 3, at 3 (describing "principles of coordination and cooperation" between the Justice Department and the Department of Labor).

[192] *Id.*

[193] *Id.* at 4.

[194] *Id.*

[195] *Id.* at 1.

[196] The Workplace Safety Memorandum expressly stated that "Nothing in this MOU commits DOJ to investigate or prosecute any particular worker-safety incident." *Id.* at 5. This disclaimer might also have been prompted by *Heckler*-like concerns about workplace advocacy groups that might try to compel agency enforcement. *See* Heckler v. Chaney, 470 U.S. 821, 831–33 (1985) (holding that agency nonenforcement is presumptively committed to the agency's discretion).

[197] *See* Family Separation Memorandum, *supra* note 1; *see also supra* notes 179–86 (discussing pressure placed on federal prosecutors who objected to the Family Separation Policy).

4. Mandatory Minimum Sentences (Obama Administration)

President Obama also used criminal enforcement as a tool for leniency, not severity, by directing prosecutors to reduce their use of mandatory minimum sentences. As part of his larger reform agenda, President Obama highlighted racial disparities in policing[198] and proposed the "Smart on Crime" program, which aimed to reduce mandatory minimum sentences for nonviolent drug offenses.[199] According to President Obama, his policy sought to "[g]ive judges some discretion around nonviolent crimes" so that judges could "steer a young person who has made a mistake in a better direction."[200]

President Obama's policy was announced by Attorney General Eric Holder, who issued a memorandum that directed prosecutors to decline to bring charges that triggered mandatory minimum sentences for certain nonviolent drug offenses.[201] The Holder memorandum laid out four criteria, such as lack of significant criminal history and lack of significant ties to large-scale drug trafficking organizations, and directed prosecutors to avoid mandatory minimum sentences for defendants who met the four criteria.[202] The memorandum also urged prosecutors to reduce their use of 21 U.S.C. § 851 sentencing enhancements, which imposed longer sentences on offenders with prior convictions.[203]

The Holder memorandum represented a push toward *leniency* in criminal enforcement, rather than a push toward *severity*. While the empirical effects of the Holder memorandum are disputed, most scholars agree that the overall messaging of the Justice Department shifted toward leniency.[204] As one professor put it:

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[198] *See, e.g.*, David Hudson, *President Obama: "Our Criminal Justice System Isn't as Smart as It Should Be,"* WHITE HOUSE BLOG (July 15, 2015), https://obamawhitehouse.archives.gov/blog/2015/07/15/president-obama-our-criminal-justice-system-isnt-smart-it-should-be [https://perma.cc/SQH3-8KMX] ("A growing body of research shows that people of color are more likely to be stopped, frisked, questioned, charged, detained.").

[199] *See* U.S. DEP'T OF JUST., SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY (2013), https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf [https://perma.cc/Y2RG-8QBA] ("[T]he Attorney General is announcing a change in Department of Justice charging policies so that certain people who have committed low-level, nonviolent drug offenses, who have no ties to large-scale organizations, gangs, or cartels will no longer be charged with offenses that impose draconian mandatory minimum sentences.").

[200] Hudson, *supra* note 198 (quoting President Obama's speech to the NAACP).

[201] *See* Memorandum from Eric Holder, Jr., Att'y Gen., U.S. Dep't of Just., to the U.S. Att'ys and Assistant Att'y Gen. for the Crim. Div. (Aug. 12, 2013) [hereinafter Holder memorandum], https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policypon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf [https://perma.cc/U9VF-ZFCE].

[202] *See id.* at 2 (describing the four criteria).

[203] *See* 21 U.S.C. § 851.

[204] *See New Smart on Crime Data Reveals Federal Prosecutors Are Focused on More Significant Drug Cases and Fewer Mandatory Minimums for Drug Defendants*, U.S. DEP'T OF JUST. (Mar. 21, 2016), https://www.justice.gov/opa/pr/new-smart-crime-data-reveals-federal-prosecutors-are-focused-more-significant-drug-cases-and [https://perma.cc/BA5N-N8TB]

> The tone/attitude of DOJ ultimately matters even more than the particulars of the [Holder] memo . . . . Things got a lot more lenient during Obama's second term in part because a signal was coming from everyone that federal prosecutors should be a lot more lenient, and the Holder memo was the most essential piece of this story for prosecutors.[205]

President Obama's efforts show that presidentially directed criminal enforcement need not always tilt toward severity. Instead, the president can use his influence to push prosecutors towards leniency.

5. Gonzales v. Oregon *(Bush Administration)*

President Bush used a different variation on presidential administration when his administration challenged physician-assisted suicide in *Gonzales v. Oregon*.[206] The memorandum at issue in *Gonzales* combined *enforcement* and *interpretation* of the criminal law, because it reinterpreted existing regulations in order to expand civil and criminal liability for Oregon doctors.[207] If upheld, the *Gonzales* memorandum would have given the Bush administration the "power to criminalize" physician-assisted suicide in Oregon.[208]

The *Gonzales* memorandum directed the Drug Enforcement Administration ("DEA") to intensify enforcement against Oregon doctors.[209] According to the *Gonzales* memorandum, "assisting suicide" was not a "'legitimate medical purpose'" under existing regulations for medical drug dispensing.[210] Under this interpretation, physicians who complied with the Oregon Death with Dignity Act could lose their federal medical registrations (a civil penalty) and face up to twenty years of imprisonment (a criminal penalty).[211] The

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(reporting that the Holder memorandum "is showing impressive results"). *But see* Jacob Sullum, *How Many Drug Offenders Benefited from the Holder Memo That Sessions Rescinded?*, Reason Mag. (May 17, 2017), https://reason.com/2017/05/17/how-many-drug-offenders-benefited-from-t/ [https://perma.cc/C9YW-FMMQ] (arguing that "the impact" of the Holder memorandum was "not as big as the DOJ implied").

[205] Sullum, *supra* note 204 (interviewing Douglas Berman, at Ohio State's Moritz College of Law, about the impact of the Holder memorandum).

[206] *See* 546 U.S. 243, 274–75 (2006) (refusing to uphold Attorney General's interpretation).

[207] The *Gonzales* memorandum instructed agencies to intensify enforcement, while also reinterpreting existing regulations. Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56607 (Nov. 9, 2001) [hereinafter *Gonzales* memorandum].

[208] *See Gonzales*, 546 U.S. at 262 ("This power to criminalize . . . would be unrestrained.").

[209] *See Gonzales* memorandum, *supra* note 207.

[210] *Id*. ("I hereby determine that assisting suicide is not a 'legitimate medical purpose' within the meaning of 21 C.F.R. § 1306.04 (2001), and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the [Controlled Substances Act].").

[211] *See* Controlled Substances Act, 21 U.S.C. § 841 (imposing criminal penalties, including twenty years of imprisonment, for violations of the Controlled Substances Act); *see also Gonzales*, 546 U.S. at 261 (noting that violation of the Controlled Substances Act is a "criminal offense, and often a felony").

Gonzales memorandum also explained how Drug Enforcement Agency staff could obtain the dispensing records of Oregon doctors.[212]

After several years of litigation, the Supreme Court enjoined the enforcement of the *Gonzales* memorandum in a 6–3 opinion that cited a welter of different arguments. The Court argued that the *Gonzales* memorandum violated the statute's power-sharing scheme,[213] and it also cited an "antiparroting" canon criticized by Justice Scalia in his dissent.[214] In another part of its opinion, the Court critiqued the Bush administration's attempts to create a new crime. According to the Court, the *Gonzales* memorandum "purports to declare that . . . physician-assisted suicide is a crime."[215] If upheld, the *Gonzales* memorandum would have given the Attorney General a "power to criminalize" that was "unrestrained" by statutory limits.[216]

Even though it was ultimately enjoined by the Court, the *Gonzales* memorandum revealed a powerful variant on presidential administration. By reinterpreting existing statutes, the *Gonzales* memorandum expanded criminal liability (in effect, allowing the president to create a new crime) while simultaneously intensifying enforcement. The *Gonzales* memorandum thus illustrates the potential breadth of the president's criminal enforcement powers.

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Part III provided five in-depth examples of criminal enforcement used as a tool for presidential administration. In addition, some brief examples are listed below:

- The Biden administration announced a "Strategic Civil-Criminal Enforcement Policy" against environmental pollution.[217]
- The Obama administration used criminal enforcement to strategically crack down on national security leakers, as described by Mila Sohoni.[218]

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[212] *See Gonzales* memorandum, *supra* note 207 (noting that "the State of Oregon's Health Division must require any health care provider upon dispensing medication pursuant to the Death with Dignity Act to file a copy of the dispensing record with the Division").

[213] *See Gonzales*, 546 U.S. at 265 ("The Attorney General does not have the sole delegated authority under the [Controlled Substances Act]. He must instead share it with, and in some respects defer to, the Secretary [of Health and Human Services], whose functions are likewise delineated and confined by the statute.").

[214] *Id*. at 278 (Scalia, J., dissenting) ("Even if there were an antiparroting canon, however, it would have no application here.").

[215] *Id*. at 261 (majority opinion).

[216] *Id*. at 262 ("If the Attorney General's argument were correct, his power to deregister necessarily would include the greater power to criminalize . . . . This power to criminalize—unlike his power over registration, which must be exercised only after considering five express statutory factors—would be unrestrained.").

[217] *See* Uhlmann, *supra* note 2.

[218] *See* Sohoni, *supra* note 27, at 36–37 (recounting how the Obama administration used criminal prosecutions to selectively crack down on "leaks of government information related to national security." The crackdown was carried out strategically, in ways intended to "enhance[] the administration's interests.").

- The Biden administration intensified criminal enforcement against corporate crimes and white-collar crimes.[219]
- The Bush administration rolled back criminal enforcement of workplace violations, and instead promoted a policy of "voluntary compliance," as documented by Kate Andrias.[220]
- The Obama administration created a "Financial Crimes" unit to help address the mortgage lending crisis and other financial crimes.[221]

As Part III illustrates, criminal enforcement has become a popular tool for recent presidents from both parties. President Trump's policies, however, have been unusual because of their bindingness upon prosecutors.

IV. Kagan's Arguments in Favor of Presidential Control

When Kagan introduced her theory of presidential administration, she largely endorsed President Clinton's shift toward greater presidential control. The president brought important virtues to administrative agencies, she argued, injecting them with energy, effectiveness, and democratic accountability.[222] While Kagan acknowledged some potential downsides to presidential administration, such as the threat of "presidential lawlessness," she argued that these dangers could be managed through judicial review.[223]

Part IV critiques Kagan's traditional normative arguments in favor of presidential administration. Kagan's arguments apply most squarely to agency rulemaking (which is presumptively reviewable under the APA), but her reasoning applies less squarely to agency enforcement policy (which is largely exempt from judicial review).[224] As a result, Kagan's arguments are much less applicable to the context of criminal enforcement policy, rather than rulemaking.

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[219] *See, e.g.*, *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group*, U.S. Dep't of Just. (Sep. 15, 2022), https://www.justice.gov/d9/pages/attachments/2022/09/15/2022.09.15_ccag_memo.pdf [https://perma.cc/47H9-289G] (describing new corporate crimes policies to be implemented by the U.S. Attorneys and other divisions of the Department of Justice).

[220] Andrias, *supra* note 12, at 1062 ("Not surprisingly, the Bush DOL's enforcement tactics differed significantly from those of the Clinton DOL; under Bush, the agency shifted resources towards voluntary compliance and away from punitive enforcement.").

[221] *See id.* at 1066 n.158 (discussing President Obama's creation of a "Financial Crimes Unit of highly trained investigators to crack down on large-scale fraud" and another unit "focused on the mortgage crisis").

[222] *See* Kagan, *supra* note 9, at 2332–46.

[223] *See infra* Part IV.B (discussing "presidential lawlessness" and Strauss's concerns about President Clinton's appropriation of agency rulemakings).

[224] Enforcement discretion is typically exempt from APA review. *Cf.* 5 U.S.C. § 701 (exempting agency action that is "committed to agency discretion by law"). For a longer discussion about the lack for judicial review for agency enforcement choices, see *infra* notes 263–66 and accompanying text.

A. Kagan on the Presidential Virtues

1. Energy and Effectiveness

In her article, Kagan praised the energy and effectiveness of the president, which she contrasted with the "indecision and inefficiency" of agencies.[225] Agencies could be slow and disorganized, she argued, because they were "collective entities" with multiple decision-makers and multiple layers of internal review.[226] By contrast, the president was a single, "unitary" actor who was less reliant on multiple stakeholders.[227] She argued that the president brought effectiveness and efficiency to the federal bureaucracy.[228]

Kagan acknowledged that the president's effectiveness came with a dark side: it could be "threatening" or even dangerous when it served bad ends.[229] As Kagan noted:

> There remains, of course, a question whether to count this presidential capacity for leadership over administration as virtue or vice, as a promise or a danger. Some will say that it is neither—or to state the point another way, that it is contingently both. The desirability of such leadership depends on its content; energy is beneficial when placed in the service of meritorious policies, threatening when associated with the opposite.[230]

Yet despite acknowledging the potential downsides of presidential effectiveness, Kagan nevertheless defended her model of presidential control. In Kagan's telling, the president "alone" had the ability to drive effective policymaking in administrative law.[231]

2. Democratic Accountability

Kagan emphasized a second virtue of the president's—democratic accountability—because she believed it brought much-needed legitimacy to the administrative state.[232] As Kagan noted, most agency officials are unelected and have no "electoral link" to the public.[233] Due to their lack of electoral accountability, agencies might be less responsive to voters' concerns.[234]

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[225] *See* Kagan, *supra* note 9, at 2339 ("Because he is a unitary actor, he can act without the indecision and inefficiency that so often characterize the behavior of collective entities.").
[226] *Id.*
[227] *Id.*
[228] *See id.*
[229] *Id.* at 2341.
[230] *Id.*
[231] *Id.*
[232] *Id.* at 2331–39 (discussing the president's democratic accountability).
[233] *Id.* at 2332.
[234] *Id.* at 2333 (discussing agency "responsiveness to the policy preferences of the general public").

Kagan frequently cited agency capture theorists, who worried that agencies would tend to fall under the sway of narrow interest groups.[235]

To counter the dangers of agency capture, Kagan promoted strong oversight from the president. She argued that the president is less likely to be captured by local or "parochial" interests, because he is electorally beholden to a "national" constituency.[236] During his first term, the president depends on voters for reelection, and during his second term, he retains "strong incentives" to appeal to a national audience.[237] According to Kagan, the president is more responsive than agencies to the "preferences of the general public."[238]

B. Objection: The Threat of "Presidential Lawlessness"

Even though she praised the president's virtues, Kagan acknowledged that the president might also pose a threat of "lawlessness."[239] In her article, she discussed an objection from Professor Peter Strauss, who had critiqued President Clinton's moves toward greater presidential control.[240] As Strauss noted, President Clinton had taken a "proprietary interest" in rulemakings that went far beyond the actions of any prior presidents.[241] Strauss argued that President Clinton had politicized rulemaking and eroded the delicate balance of power between agencies, the president, and Congress.[242] Per Strauss, "[t]he [p]resident as lawmaker is more hazardous than the Environmental Protection Agency . . . as lawmaker, precisely because he is omnicompetent, remote from effective check by courts or even Congress."[243] In Strauss' view, President Clinton had threatened important democratic values by claiming rulemakings as his own.[244]

When Kagan discussed the critique from Strauss, she acknowledged that the president might pose a threat to "rule of law" values.[245] As she noted, the president had a tendency to "push the envelope" on statutory interpretations and to adopt more aggressive interpretations than an agency would adopt

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[235] *See, e.g.*, *id.* at 2264–65 (discussing agency capture concerns); *id.* at 2360–61 (arguing the president is less likely than agencies to be captured).

[236] *Id.* at 2335.

[237] *Id.*

[238] *Id*.

[239] *Id.* at 2349 ("[T]he history of presidential administration may suggest that it poses a danger of such lawlessness—that Presidents, more than agency officials acting independently, tend to push the envelope when interpreting statutes.").

[240] *See id.* at 2248 (citing Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965 (1997)).

[241] Strauss, *supra* note 240, at 967.

[242] *See id.* at 967–68 (discussing the "tension" between Congress's power to create agencies and the president's authority to lead agencies).

[243] *Id.* at 983.

[244] *See id.* at 984 ("[M]y conclusion is that the President is simply in error and disserves the democracy he leads when he behaves as if rulemakings were his rulemakings.").

[245] Kagan, *supra* note 9, at 2368–69 (discussing "rule of law" concerns associated with the president's exercise of discretion).

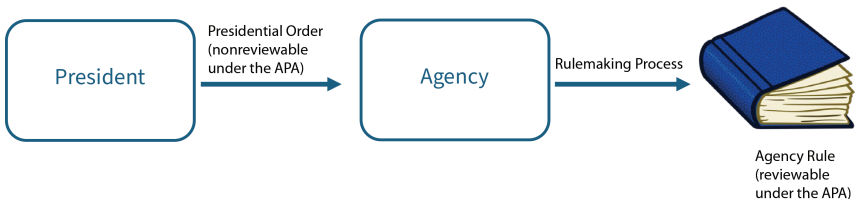
on its own.[246] This tendency, she argued, could create a "threat of presidential lawlessness," in which the president pushed agencies far beyond their statutory mandates.[247] To address the threat, Kagan proposed a solution: judicial review.[248]

C. Kagan's Response to the Objection: Judicial Review

Kagan argued that judicial review could assuage Strauss's concerns, because the courts would limit the president's most aggressive uses of agency rulemaking.[249] As Kagan acknowledged, the president's actions are not *directly* reviewable under the APA, because the president is not considered an "agency."[250] However, Kagan argued that the president's actions are *indirectly* reviewable,[251] because the APA establishes a broad presumption of reviewability for agency action, including action undertaken at the president's behest.[252] Judicial review will still apply, albeit indirectly, because the agency's (subsequent) action is reviewable even if the president's (initial) action is not.

Kagan's reasoning works best when applied to rulemaking, for example, as depicted below:

Presidential Control over Agency Rulemaking:



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[246] *Id.* at 2349 ("Presidents, more than agency officials acting independently, tend to push the envelope when interpreting statutes.").

[247] *Id.* at 2350.

[248] *Id.* ("There is, in any event, a simple, if sometimes imperfect, solution to the problem [of presidential lawlessness]: judicial review of agency action, including action that the [p]resident orders.").

[249] *Id.* at 2350–51 ("In an article attacking Clinton's assertions of control over agency action, Strauss argued that a prime danger of this practice inhered in the President's insulation from normal forms of judicial control. But Strauss offered no reason for concluding that such insulation necessarily accompanies presidential control.").

[250] *Id.* In *Franklin v. Massachusetts*, the Court ruled that the president is not an "agency" under the APA. 505 U.S. 788, 800–01 (1992) (holding that the president's actions are not reviewable under the APA, despite the APA's broad definition of "agency," because of the Court's "respect for the separation of powers and the unique constitutional position of the President").

[251] *See* Kagan, *supra* note 9, at 2350 ("There is, in any event, a simple, if sometimes imperfect, solution to the problem: judicial review of agency action, including action that the President orders.").

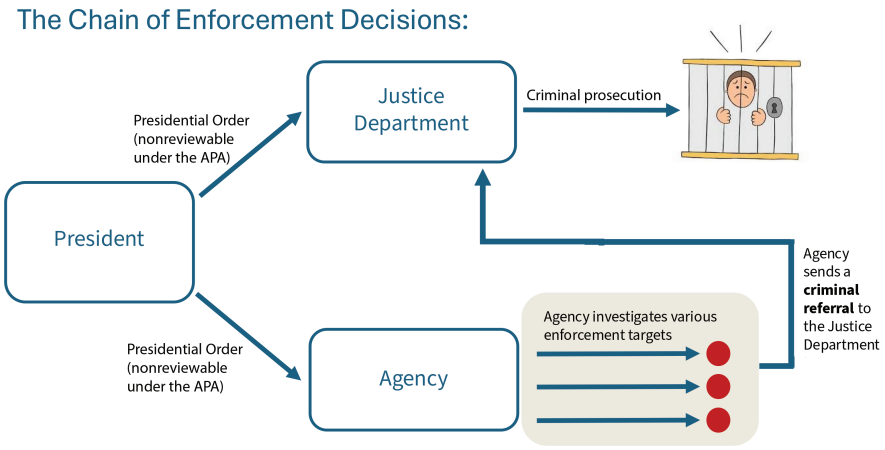
[252] *See* 5 U.S.C. §§ 701–706 (establishing a broad right to judicial review of agency action); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (expanding the APA's presumption of reviewability); *see also* Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 229 n.2 (2006) ("*Overton Park* set the stage for a substantial expansion in the availability (and stringency) of judicial review governing informal, discretionary decisions.").

In the diagram above, the president directs an agency to engage in a rulemaking.[253] While the president's initial order is nonreviewable under the APA,[254] the subsequent agency actions are reviewable—thus subjecting the president's actions to indirect judicial review. According to Kagan, this indirect judicial review helps assuage Strauss's concern about overly aggressive presidential actions.[255]

D. Enforcement as an Exception to Judicial Review

1. The Chain of Enforcement Decisions

Kagan, however, largely overlooked enforcement. Her reasoning applies most squarely to rulemaking (which is reviewable), yet her reasoning does not apply to enforcement policy (which is largely unreviewable).[256] As a result, courts typically cannot review presidentially directed criminal enforcement choices, as depicted below:



This diagram depicts the chain of enforcement decisions which precede a criminal prosecution. On the left, the president directs both the Justice Department and an agency. These presidential orders are nonreviewable

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[253] This Article uses the broad term "presidential order" to refer to the president's written directives to agencies. In so doing, this Article adopts the same convention used by Lisa Manheim and Kathryn Watts. *See* Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1748–49 (2019) ("[T]his Article uses the term 'presidential orders' as an inclusive shorthand, intending it to cover various forms of unilateral written directives publicly issued by the president, regardless of whether a given directive is formally labeled as an 'executive order,' a 'proclamation,' or a 'presidential memorandum.' The labels generally have no bearing on the substance or the legal effect of presidential orders, and presidents tend not to use these labels in a consistent fashion.").

[254] Presidential orders are unreviewable under the APA, but they are subject to constitutional review and statutory review. *See generally id.* (providing a more detailed discussion).

[255] *See* Kagan, *supra* note 9, at 2351 ("[S]o long as the courts remain open to legal challenges, the use of presidential directive authority cannot too greatly displace the clear preferences of the prior enacting (as opposed to the current overseeing) Congress with respect to agency action.").

[256] *See* 5 U.S.C. § 701 (exempting agency action that is "committed to agency discretion by law"); *see also* Barkow, *supra* note 27, at 1131–33 ("Most aspects of agency enforcement policy generally escape judicial review.").

under the APA.[257] Next, on the bottom, the agency selects enforcement targets in accordance with the president's order (again, the agency's choice of enforcement targets is nonreviewable).[258] In the next step, the agency opens an investigation into enforcement targets, then criminally refers cases to the Justice Department (again, these agency actions are nonreviewable because the actions are not final and because they involve the agency's enforcement discretion).[259] Finally, at the top, the Justice Department decides whether to bring criminal charges, a decision which is largely unreviewable as well.[260]

In this diagram, the president faces few judicial checks. While each individual criminal defendant will have the opportunity to go to trial (or to negotiate a favorable plea),[261] the president's policy decision—to intensify criminal enforcement in the aggregate—is not subject to review.[262]

2. Nonreviewability of Agency Enforcement Discretion

In administrative law, enforcement is largely insulated from judicial review.[263] Rachel Barkow has commented on the courts' reluctance to second-guess agency enforcement decisions:

> Most aspects of agency enforcement policy generally escape judicial review. A decision not to enforce is presumptively unreviewable under *Heckler v. Chaney*, as is an agency's decision not to monitor those it is charged with regulating. Courts tend to steer clear of second-guessing an agency's selection of which actors to target and which to ignore. The judiciary takes a similarly hands-off approach to reviewing an agency's broader plans for how it will proceed with enforcement, changes in its nonbinding enforcement policies,

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[257] *See supra* note 253.

[258] *See* Asimow, *supra* note 20, at 243–45 (discussing the lack of judicial review over agency enforcement).

[259] *Id.* at 243–44 ("The judiciary cannot review charging decisions because they are not 'final order[s]. Moreover, charging decisions are typically unreviewable because they are committed to agency discretion. . . . If the case is judicially reviewed, the court considers the merits of the decision, not the preliminary decision to charge." (internal citations omitted)).

[260] *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1985) ("In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute. . . . This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." (internal citations omitted)); *see also infra* notes 268–70.

[261] In the federal criminal system today, over 95 percent of cases are resolved with plea deals. *See* Barkow, *supra* note 24, at 871.

[262] Sohoni made the same point in her excellent analysis of crackdowns. *See* Sohoni, *supra* note 27, at 50 ("[T]he crackdown eludes these upstream and downstream checks for validity. The top-level choice to crack down—a choice anterior to and distinct from the choice to charge a given individual—is insulated from external challenges.").

[263] *See, e.g.*, Asimow, *supra* note 20, at 243–45 ("[C]harging decisions are typically unreviewable because they are committed to agency discretion."); Barkow, *supra* note 19, at 1131 ("Most aspects of agency enforcement policy generally escape judicial review."); Max Minzner, *Should Agencies Enforce?*, 99 MINN. L. REV. 2113, 2120 (2015) ("[T]he federal courts have held that key agency enforcement choices are largely non-reviewable.").

> or how it will allocate funds from a lump-sum appropriation for enforcement needs.[264]

In administrative law, then, agencies have great freedom to set their enforcement priorities. Agencies can decide *whom* to bring enforcement actions against, how *severely* to enforce, and *whether* to bring enforcement actions criminally or civilly.[265] And agencies can make these decisions largely unencumbered by judicial review.[266]

In criminal law, too, nonreviewability doctrines shield prosecutors from judicial review. Prosecutors have almost total discretion over charging decisions,[267] as long as there is probable cause.[268] Prosecutors have the power to choose the charge, to negotiate a plea deal, or to dismiss charges.[269] Many of these prosecutorial decisions are nonreviewable or subject only to light judicial review.[270] While courts may overturn prosecutions that are motivated by unconstitutional motives (for example, racist or sexist motives), these challenges are "exceedingly difficult" to prove.[271] In the words of Professor Sohoni: "Both criminal law and administrative law protect . . . executive discretion with doctrines that shield enforcement policy choices from judicial review."[272]

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[264] Barkow, *supra* note 19, at 1131–32 (citations omitted).

[265] Some agencies publish public "enforcement manuals" which describe their typical enforcement practices. However, these manuals are generally non-binding upon agency personnel. *See* Jordan Lee Perkins, Admin. Conf. of the U.S., Regulatory Enforcement Manuals 2, 9–10 (2022), https://www.acus.gov/sites/default/files/documents/Regulatory%20Enforcement%20Manuals%20Final%20Report%2012.14.22.pdf [https://perma.cc/2XCK-AKRF].

[266] Why have the courts granted such wide latitude to agency enforcement? Generally speaking, the courts have reasoned that the delicate "balancing" of enforcement factors is a task best left to agencies. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 831–32 (1985) (holding that agency nonenforcement is presumptively immune from judicial review, because judges are ill-suited to undertake the "complicated balancing of a number of factors" related to agency enforcement).

[267] *See, e.g.*, United States v. Batchelder, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.").

[268] *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1985) (stating that "the Government retains 'broad discretion' as to whom to prosecute") (quoting United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982)); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

[269] Barkow, *supra* note 28, at 1046 ("Prosecutors can obtain plea agreements by threatening criminal defendants with longer sentences or additional charges if they exercise their right to trial . . . . [P]rosecutors are free to condition significant sentence and charge reductions on the waiver of judicial process as long as there is a factual basis for the plea.") (citations omitted).

[270] *See* Stuntz, *supra* note 24, at 558 (noting that the "commitment to prosecutorial discretion" discourages judicial review that "would seek out and correct enforcement disparities among different population groups and would bar irregular and sporadic enforcement altogether"); *see also* Barkow, *supra* note 24, at 886 (noting that "claims of selective or discriminatory prosecution" are "almost impossible to bring").

[271] Sohoni, *supra* note 27, at 45–46.

[272] *Id.* at 46.

Kagan's argument, is weaker when applied to criminal enforcement. Kagan had argued that judicial review would curb the threat of "presidential lawlessness."[273] Yet enforcement is often exempt from review. As such, the president can largely evade judicial review if he opts for criminal enforcement rather than rulemaking.

V. Constraining the President's Use of Criminal Enforcement

Part V argues for a more robust conception of mens rea, which would serve to constrain the president's use of criminal enforcement. This more protective conception of mens rea already exists in glimmers of caselaw like *Morissette v. United States*[274] and in more recent cases like the New Mexico prosecutions.[275] This Article urges the courts to adopt this more protective conception of mens rea which can act as a constraint on the president. Under this more robust conception of mens rea, the president would be free to set general enforcement priorities, but he would be prevented from issuing binding directives that squeeze out decision-making power from lower-level officials.

A. Mens Rea as a Constraint on the President

Mens rea is a basic concept in criminal law. As every first-year law student learns, a crime involves two components: mens rea and actus reus. Actus reus, or the "act" requirement, ensures that the government cannot punish you for thought alone—you can only be punished for some voluntary act.[276] Mens rea, also known as *scienter* or "guilty mind," helps determine your degree of culpability: you are less culpable when you negligently hit someone with your car, but more culpable if you intentionally mow them down in a fit of road rage. Mens rea is often divided into four levels of intent—negligence, recklessness, knowledge, and purposefulness.[277]

The mens rea determination involves a fact-specific inquiry that hinges on details about a defendant's mental state. For example, law students are often taught to distinguish between premeditated murder versus murder that is committed in the heat of the moment. For a defendant who killed someone in a bar fight—did the defendant pull the gun out of his pocket? Or did he

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[273] *See* Kagan, *supra* note 9, at 2350. Kagan acknowledged that presidential administration could sometimes raise "rule of law concerns," but she argued that these concerns would mostly "dissipate" because "the APA's judicial review provisions . . . apply" to the agency's actions. *See id.* at 2368–69.

[274] 342 U.S. 246, 251 (1952) (using mens rea to protect the defendant from a criminal conviction and holding that a crime requires the "concurrence of an evil-meaning mind with an evil-doing hand").

[275] *See supra* Part III.B.1 (discussing the New Mexico cases).

[276] *See generally* Gabriel S. Mendlow, *Thoughts, Crimes, and Thought Crimes*, 118 Mich. L. Rev. 841 (2020) (describing why "thought crimes" are generally prohibited in liberal democracies).

[277] *See* Model Penal Code § 2.02 (Am. L. Inst. 1962) (describing the four categories of mens rea).

walk to his car to fetch a gun, forming a pre-meditated intent in the five minutes it took him to retrieve his weapon? These kinds of fact-specific analyses are essential to mens rea determinations, which seek to peer into the mind of criminal defendants.[278]

So how does mens rea relate to the president? The point is simple—the president is rarely in a position to assess the mens rea for any given defendant, because the president is too high-level to possess the necessary facts. My claim here is epistemic: namely, the president does not have access to the requisite facts about mens rea. And the epistemic claim also carries a normative pay-off: namely, the president should avoid issuing binding directives in criminal enforcement, out of respect for mens rea. If the president attempts to bind lower-level officials, then he risks infringing upon the mens rea requirement.

This mens rea constraint may play out in different forms, depending on the context. In the lower courts, mens rea can function as a hard constraint that halts criminal prosecutions, full stop. This recently occurred in New Mexico, where a federal magistrate judge dismissed the Trump administration's criminal charges against immigrants for lack of sufficient proof of mens rea.[279] The magistrate judge applied an expansive conception of mens rea that was strongly protective of defendants' rights.[280] In one part of his opinion, the judge critiqued prosecutors for providing generalized allegations that failed to establish the mens rea for any individual defendant: while prosecutors had alleged that "'signs' were posted," they had alleged no individualized facts that might bear on mens rea.[281] As the judge put it:

> Beyond the reference to signage, the United States provides no facts from which one could reasonably conclude that the Defendant knew he was entering the NMNDA [New Mexico National Defense Area]. Consequently, the Criminal Complaint fails to establish probable cause to believe that Defendant knew he/she was entering the NMNDA.[282]

In another part of his opinion, the judge applied the "presumption in favor of scienter," which assumes an implicit mens rea requirement even for statutes that do not explicitly include a mens rea element.[283] The presumption of scienter can be used to insert a mens rea requirement into statutes that would otherwise

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[278] *See, e.g.*, Ruffin v. United States, 642 A.2d 1288, 1291 (D.C. 1994) ("To support a finding of premeditation the government must show that before acting the accused 'gave thought to the idea of taking a human life and reached a definite decision to kill.'") (quoting Mills v. United States, 599 A.2d 775, 781 (D.C. 1991)), *holding modified by* Perez Hernandez v. United States, 286 A.3d 990 (D.C. 2022); 3 CRIM. PRAC. MANUAL § 95:20 (Thomson Reuters 2025) ("[P]remeditation need only exist for a few moments prior to the act which causes the death, and may be inferred from the circumstances surrounding the crime.").

[279] *See supra* Part III.B.1.

[280] *See, e.g.*, United States v. Lopez-Gonzalez, 782 F. Supp. 3d 1062, 1070–74 (D.N.M. 2025).

[281] *Id.* at 1071.

[282] *Id.*

[283] *Id.* at 1072–73.

create strict liability crimes, and it assumes that Congress did not intend to criminalize "otherwise innocent conduct"[284] without evidence of criminal intent.[285]

In the New Mexico scenario, and other scenarios with similar fact patterns, mens rea might function as a hard constraint on the president. The constraint applies at the final step of the process, after prosecutors have already carried out the president's binding directives. In other instances, mens rea might also more softly constrain the president's decision-making prudentially. When the president issues a directive about criminal enforcement, he might acknowledge his relative lack of knowledge about mens rea, at least relative to prosecutors and agency officials who are closer to the facts. Guided by this prudential concern, the president might choose to make his directives less binding rather than more binding.

To illustrate how this prudential constraint might operate in practice, we can compare two presidential interventions: the Workplace Safety Memorandum (which was less binding), and the Family Separation Policy (which was more binding). In the Workplace Safety Memorandum, the president refrained from directing mandatory prosecutions.[286] Instead, he allowed lower-level officials to choose civil or criminal enforcement for any given defendant.[287] In the Family Separation Policy, by contrast, the president issued highly binding instructions that applied across the board.[288] The Family Separation Policy was unusually binding upon prosecutors (as discussed in Part III), and it arguably violated the prudential constraint of mens rea.[289]

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[284] *See id.* at 1072 ("[T]he Supreme Court has held that we presume 'that Congress intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct.'") (quoting Rehaif v. United States, 588 U.S. 225, 228–29 (2019)).

[285] In a long line of cases, the Supreme Court has grappled with strict liability crimes which include no explicit mens rea elements. In some instances, the Court has applied the presumption of scienter. *See, e.g.*, *Rehaif*, 588 U.S. at 229 ("We apply the presumption in favor of scienter even when Congress does not specify any scienter in the statutory text.") (citing Staples v. United States, 511 U.S. 600, 606 (1994)).

[286] Workplace Safety Memorandum, *supra* note 3.

[287] *See id.* at 5 ("Nothing in this MOU commits DOJ to investigate or prosecute any particular worker-safety incident.").

[288] *See* Family Separation Memorandum, *supra* note 1 (describing the "zero-tolerance" policy from Attorney General Jeff Sessions).

[289] To be sure, the discretion of line-level prosecutors may generate its own set of problems, as has been amply discussed by criminal law scholars. *See also* Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 Va. L. Rev. 271 (2013) (proposing institutional reforms to prosecutorial discretion). *See generally, e.g.*, I. Bennett Capers, *Against Prosecutors*, 105 Cornell L. Rev. 1561 (2020) ("It has now become common, at least among progressive criminal justice scholars, to argue that the criminal justice system could be fixed—or at least greatly improved—if we simply regulated prosecutors more. If we curbed their unfettered discretion."). This Article does not wish to paper over the flaws in prosecutorial discretion, which many scholars have already discussed. This Article instead contributes something new—it points out how the *president* can misuse prosecutorial discretion on a large scale, when he issues binding directives about criminal enforcement.

As this section makes clear, mens rea may constrain the president in different ways, depending on the context. In some instances, mens rea may create a hard constraint, stopping criminal prosecutions in their tracks.[290] In other instances, mens rea may exert a prudential pull on the president, nudging him toward less-binding directives that leave room for lower-level officials to exercise their discretion.[291] In both instances, mens rea acts as a constraint on the president.

B. Justice Scalia's Dissent in Morrison v. Olson

The mens rea-based constraint is compatible with Justice Scalia's dissent in *Morrison v. Olson*.[292] In *Morrison*, Justice Scalia argued that "all" executive power is vested in the president, including the prosecutorial power.[293] Justice Scalia's interpretation of the Vesting Clause creates a significant obstacle for courts that attempt to constrain the president's use of criminal enforcement.[294] Yet a mens rea-based constraint largely avoids the Vesting Clause obstacle, because mens rea is entirely conceptually distinct from the Vesting Clause. Even if the Justices hold a range of views about the Vesting Clause, they might still support a more protective version of mens rea.

Furthermore, Scalia's dissent can be read narrowly—within its political context—in order to harmonize it with a mens rea-based constraint on the president. As Justice Scalia wrote, *Morrison* arose from a "bitter power dispute" between President Reagan and Congress, after Congress sought an independent counsel who would investigate Reagan officials.[295] The Reagan administration challenged the Independent Counsel Act, arguing that the Act unconstitutionally diluted the president's power over criminal enforcement.[296] The Court ultimately upheld the Independent Counsel Act, ruling against the president in an 8–1 majority.[297]

Justice Scalia, the lone dissenter, wrote an opinion that became hugely influential in subsequent decades. He argued that the Independent Counsel

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[290] *See supra* notes 280–91 (discussing the New Mexico military zone and the magistrate judge's use of mens rea to dismiss criminal charges).

[291] *See supra* Part III.B (comparing bindingness in the Family Separation Policy and the Workplace Safety Memorandum).

[292] 487 U.S. 654 (1988).

[293] *Id.* at 705 (Scalia, J., dissenting) ("[T]his does not mean *some of* the executive power, but *all of* the executive power.").

[294] Many scholars have disputed Justice Scalia's interpretation of the Vesting Clause. Peter Shane, for example, has argued that prosecutors were historically considered "judicial officers" associated with the judicial branch rather than "executive officers" associated with the executive branch. *See* Shane, *supra* note 12, at 256–57.

[295] *Morrison*, 487 U.S. at 703 (Scalia, J., dissenting).

[296] *See id.* at 685 (majority opinion) (considering the Reagan administration's argument that the "Act violates the separation of powers by reducing the President's ability to control the prosecutorial powers wielded by the independent counsel").

[297] *Id.* at 696–97 ("[W]e conclude today that . . . the Act does not violate the separation-of-powers principle by impermissibly interfering with the functions of the Executive Branch.").

Act violated the Constitution because it interfered with the president's exercise of his "quintessentially" executive powers, including the prosecutorial power.[298] In Justice Scalia's view, the Constitution vested *all* executive powers in the president, including the power to direct criminal enforcement.[299] Justice Scalia's dissent—which read the Vesting Clause as granting exclusive control of prosecutions to the president—laid the intellectual foundations for modern-day unitary executive theory.[300]

Justice Scalia's dissent repeatedly cited the political context of the separation of powers at issue in *Morrison*, including the incentives for Congress, the president, and the independent counsel. For example, Justice Scalia wrote that Congress might be tempted to avoid a formal impeachment if it could instead pursue an easier option via a criminal investigation.[301] As he put it: "How much easier it is for Congress, instead of accepting the political damage attendant to the commencement of impeachment proceedings against the President on trivial grounds . . . simply to trigger a debilitating criminal investigation of the Chief Executive under this law".[302]

As Justice Scalia observed, the Independent Counsel Act created strong incentives for Congress. The Act allowed Congress to weaken the president without incurring the "political damage" of an impeachment.[303] Just a few years later, Justice Scalia's assessment of the incentives played out in practice, when President Clinton faced a protracted investigation from Independent Counsel Kenneth Starr.[304]

In other parts of his dissent, Justice Scalia once again appealed to the political context of *Morrison*. He noted that the independent counsel had only one mandate—to investigate the president—unlike most federal prosecutors

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[298] *Id.* at 706 (Scalia, J., dissenting) ("Governmental investigation and prosecution of crimes is a quintessentially executive function.").

[299] *See id.* at 705 (discussing the Vesting Clause).

[300] *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 546 n.11 (1994) (discussing unitary executive theory and citing Justice Scalia's dissent in *Morrison*).

[301] *Morrison*, 487 U.S. at 713 (Scalia, J., dissenting).

[302] *Id.*

[303] *Id.*

[304] While President Clinton ultimately avoided conviction, the wide-ranging and damaging investigation by Kenneth Starr seemed to prove Justice Scalia's point. After the Starr investigation, many Democrats publicly embraced Justice Scalia's *Morrison* dissent. According to the Senate Judiciary Committee: "Then-Deputy Attorney General Eric Holder testified before Congress that the law was 'too flawed to be renewed.' . . . In another congressional hearing, Attorney General Janet Reno said, 'I have come to believe—after much reflection and great reluctance—that [the statute] is structurally flawed and those flaws cannot be corrected within our constitutional framework,' and explained she was 'paraphrasing Justice Scalia's dissent in *Morrison*.'" Press Release, S. Comm. on the Judiciary, Independent Counsels and the Supreme Court (Sep. 4, 2018), https://www.judiciary.senate.gov/press/rep/releases/independent-counsels-and-the-supreme-court [https://perma.cc/PE5H-PQRN].

who face a heavy caseload and "competing responsibilities."[305] Justice Scalia predicted that an independent counsel might lose "perspective" and begin to pursue relatively trivial or "technical" violations by the president and his staff.[306] As Justice Scalia observed, the independent counsel had "nothing else to do but to investigate" the president, unlike other federal prosecutors.[307]

Justice Scalia's dissent, then, drew heavily on the political context. He argued that Congress had a strong incentive to weaken the president without an impeachment, and that the independent counsel had a strong incentive to prolong the investigation.[308] Crucially, Justice Scalia's political analysis applies primarily to high-level interbranch disputes, where Congress, the president, and the independent counsel clash over investigations of the president and his staff.

So not only does a mens rea-based constraint avoid a direct confrontation with the Vesting Clause issue, but also this insight allows us to apply the now-popular conception of presidential control over prosecution described by Justice Scalia more narrowly, to high-stakes disputes involving an independent counsel. If a case involves a high-stakes conflict where an independent counsel investigates the president or his staff, then Justice Scalia's dissent weighs more heavily, because the political context is most salient. But if a case involves no independent counsel and no investigation of the president or his staff, then considerations like mens rea weigh more heavily. This approach allows the mens rea constraint to operate in its proper context and harmonizes the mens rea constraint with Justice Scalia's *Morrison* dissent.

VI. Conclusion

Criminal enforcement has become a powerful tool for presidential administration. Recent presidents, including Presidents Bush, Obama, Biden, and Trump, have used criminal enforcement across a wide range of policy areas.[309] In some instances, the president has used criminal enforcement to set prosecutorial priorities, and in other instances, the president has issued binding or quasi-binding directives to prosecutors and lower-level officials.[310] This Article argues against the president's use of binding directives, because binding directives can be constrained by the mens rea proof requirement. When

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[305] *Morrison*, 487 U.S. at 732 (Scalia, J., dissenting) ("How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile—with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities").

[306] *Id.*

[307] *Id.*

[308] *See* Shane, *supra* note 12, at 256–57.

[309] *See supra* Part III.B.

[310] *See id.* (discussing the Obama administration's Workplace Safety Memorandum and the Trump administration's Family Separation Policy).

the president issues binding directives, he squeezes out decision-making by prosecutors and lower-level officials who have greater knowledge about the facts, including those involving mens rea.

In response to the president's use of binding directives, this Article proposes a more robust and protective conception of mens rea. In the lower courts, relying on the mens rea proof requirement would protect defendants during criminal prosecutions, as occurred in the recent New Mexico cases.[311] At the Supreme Court, the Justices would emphasize mens rea as a signal to prosecutors and the president, urging the president to exercise restraint in his use of criminal enforcement.

Of course, it remains to be seen whether the Court might be willing to adopt a more robust conception of mens rea as a constraint on the president. On the one hand, the Court has defended the president's "conclusive and preclusive" authority over criminal prosecutions.[312] On the other hand, many conservative jurists are deeply committed to mens rea,[313] and Justice Gorsuch has spent over a decade promoting stronger mens rea protections for defendants.[314] My argument uses mens rea in a novel fashion—to protect defendants against the *president*'s use of criminal enforcement—and it might find traction with Justices who are attracted to mens rea and who harbor misgivings about the president's growing use of criminal enforcement.

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[311] *See supra* Part III.B (discussing the New Mexico cases); *see also* United States v. Lopez-Gonzalez, 782 F. Supp. 3d 1062 (D.N.M. 2025).

[312] Trump v. United States, 603 U.S. 593, 620 (2024).

[313] In recent years, mens rea has been associated with conservative jurists and the Republican Party. *See* Michael Serota, *Strict Liability Abolition*, 98 N.Y.U. L. Rev. 112, 137 (2023) (describing the Republican Party's "failed congressional effort to limit strict liability under the federal criminal code").

[314] *See, e.g.*, United States v. Games-Perez, 695 F.3d 1104, 1116 (10th Cir. 2012) (Gorsuch, J., dissenting) ("People sit in prison because our circuit's case law allows the government to put them there without proving a statutorily specified element[, mens rea,] of the charged crime.").