The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments

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I. INTRODUCTION

Prosecutorial discretion is a central component of the federal criminal justice system.[1] Prosecutors decide which cases to pursue and plea bargains to accept, determining the fates of the vast majority of criminal defendants who choose not to stand trial. Prosecutors' decisions are generally not, however, subject to judicial review.[2] According to federal case law, the separation of powers doctrine is the "primary ground" upon which courts abstain from reviewing prosecutorial decisions.[3] The constitutional separation of powers doctrine does not adequately account for expansive prosecutorial discretion. In tracing the federal case law on prosecutorial discretion to the eighteenth century, one can identify a connection between the modern theory of prosecutorial discretion and a writ of English criminal procedure that substantially predated the American separation of powers doctrine.

In England, the tradition of private prosecution by the crime victim was dominant, at least in theory, until late in the twentieth century.[4] The English Attorney General could dismiss an ongoing prosecution (usually initiated by a private party) with a procedural device called the *nolle prosequi*, but the state lacked a public prosecutor who controlled criminal prosecutions as a matter of routine.[5] In the United States, by contrast, the first Judiciary Act established the federal public prosecutor as early as 1789.[6] The Judiciary Act gave federal prosecutors the exclusive power to bring federal criminal prosecutions,[7] in a departure from the English tradition. The state monopoly over prosecution is not unique; Germany, for example, largely bans private prosecution.[8] In Germany, however, a rule of compulsory prosecution constrains prosecutorial discretion, checking the prosecutor's ability to pick and

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[1] *See* 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §1.9(c) (3d ed. 2007) ("There is universal agreement in the modern commentary as to the central role of discretionary authority in the administration of the criminal justice process.").

[2] *See id.* §13.2(g).

[3] *See* Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973).

[4] *See* Jonathan Rogers, *Restructuring the Exercise of Prosecutorial Discretion in England*, 26 OXFORD J. LEGAL STUD. 775, 797–98 (2006) (noting that "the recognition of the role of the public prosecutor is still a comparatively recent development in England").

[5] *See infra* Part II.B.

[6] *See* Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 ("And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, . . . whose duty it shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States . . . .").

[7] *Id.*

[8] *See* John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 443 (1974).

choose which cases to pursue.[9] No comparable regime restrains American prosecutors.

The origins of prosecutorial discretion in the federal criminal justice system are poorly understood. Historical scholarship has not explained how the American public prosecutor emerged from a common law tradition of private prosecution to obtain the power he has today. Contemporary federal cases attribute prosecutorial discretion to the separation of powers doctrine: federal prosecutors are said to be agents of the executive branch, and for that reason the courts cannot review their decisions.[10] This broad application of the separation of powers doctrine is, however, inconsistent with the more measured application of the doctrine in other areas of law.[11] The doctrine requires more justification than contemporary cases provide.

The historical question raised is how the federal courts came to accept the separation of powers doctrine as a justification for expansive prosecutorial discretion. Federal case law from the eighteenth century contains the historical roots for prosecutorial discretion and provides some insight into how the separation of powers justification developed.[12] In federal case law, the separation of powers theory of prosecutorial discretion evolved, at least in part, from the rationale for a procedure that actually predated the American public prosecutor: the *nolle prosequi*.

Part II reviews the federal law of prosecutorial discretion. Part II.A emphasizes the small number of legal restraints on prosecutorial decisions and the frequency with which prosecutors make discretionary decisions—rather than taking everything to court—in practice. Part II.B describes the common modern justification for broad prosecutorial discretion, the separation of powers doctrine. This Part points to tensions between the Framers' original notion of separated powers and the modern federal prosecutor's concentrated discretion. Part II.B also compares applications of the separation of powers doctrine in criminal procedure with administrative law, which does provide for judicial review of executive agencies' decisions.

Part III of this article examines case law on prosecutorial discretion from the late eighteenth century, when courts discussed prosecutorial powers in the context of the *nolle prosequi*, through the early twentieth century, when courts began to invoke the separation of powers doctrine

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[9] *Id.*

[10] *See infra* Part I.B.1.

[11] *See infra* Part I.B.2.

[12] To clarify, I am referring here to the development of the separation of powers principle only as applied to the federal prosecutor (what I call the "separation-of-prosecutorial-power" theory), not as an independent constitutional doctrine.

as a justification for prosecutorial discretion. Furthermore, Part III reviews evidence of incremental changes in the theory of prosecutorial discretion as the theory has been construed in federal case law. Based on these incremental changes, the *nolle prosequi*'s royal origins facilitated the development of the notion that criminal prosecution is an unreviewable executive function. These historical roots help to account for, if not justify, the modern theory of prosecutorial discretion.

II. PROSECUTORIAL DISCRETION TODAY

In American criminal procedure, there are few legal constraints on prosecutorial discretion. The limits that exist stem from other areas of law—equal protection and due process—and these constraints rarely lead to successful prosecutorial misconduct claims.[13] According to modern case law, the separation of powers doctrine requires judges to permit broad prosecutorial discretion. In comparing judicial review of prosecutorial decisions with judicial review of administrative regulations, however, the breadth of prosecutorial discretion stands out, even though the separation of powers doctrine applies to both areas of law. Kenneth Culp Davis, who remarked on this comparison in 1969, concluded that "[i]n our entire system of law and government, the greatest concentrations of unnecessary discretionary power over individual parties are not in the regulatory agencies but are in police and prosecutors."[14]

Prosecutors have such concentrated discretionary powers because of two complementary features of American criminal procedure. First, federal law permits prosecutors to make a number of decisions that are not subject to review.[15] Second, some features of the modern criminal justice system enlarge prosecutorial discretion in practice.[16] In this Part, I briefly review each of these trends to convey the scope of modern prosecutorial discretion.

A. The Law Governing Public Prosecutors

Under federal law, a public prosecutor has exclusive discretion to decide whether or not to prosecute any crime that is supported by

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[13] *See* Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After* United States v. Armstrong, 34 AM. CRIM. L. REV. 1071, 1076 (1997) (analyzing the Supreme Court's case law on selective prosecution and concluding that "the protection from selective prosecution has been a disfavored right").

[14] *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 222 (1969).

[15] *See infra* Part I.

[16] *See infra* Part I.

probable cause.[17] If a prosecutor decides not to pursue a case, the federal courts are reluctant to interfere. The Second Circuit has observed that "[t]his judicial reluctance to direct federal prosecutions at the instance of a private party asserting the failure of United States officials to prosecute alleged criminal violations" is so strong that it applies even when "serious questions are raised as to the protection of the civil rights and physical security of a definable class of victims of crime and as to the fair administration of the criminal justice system."[18]

In addition, standing requirements can bar a claim that a prosecutor has wrongfully failed to prosecute a crime. In *Linda R.S. v. Richard D.*, the Supreme Court held that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."[19] As a result, neither a victim nor another interested party can contest a prosecutor's decision not to pursue a case.

A criminal defendant, who does have standing under *Linda R.S.*, can raise a limited array of challenges to "the policies of the prosecuting authority."[20] Despite the federal courts' reluctance to interfere with prosecutorial decisions, the law protects defendants from prosecutions motivated by unconstitutional considerations.[21] A vindictive prosecution, in which the prosecutor penalizes the defendant for exercising a constitutional or statutory right by charging the defendant with a more serious crime, violates the Due Process Clause.[22] This

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[17] *See* 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."); *see, e.g.*, *In re* United States, 397 F.3d 274, 284 (5th Cir. 2005) (noting that the decision to prosecute rests in the prosecutor's discretion as long as probable cause exists); Belmontes v. Woodford, 350 F.3d 861, 892 (9th Cir. 2003) (same); United States v. Wilson, 262 F.3d 305, 315 (4th Cir. 2001) (same); United States v. Suarez, 263 F.3d 468, 481 (6th Cir. 2001) (same); Am. Disabled for Attendant Programs Today v. HUD, 170 F.3d 381, 384 (3d Cir. 1999) (observing that the decision not to prosecute is within the province of the executive branch).

[18] Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973) (internal citations omitted).

[19] 410 U.S. 614, 619 (1973). *Linda R.S.* was distinguished and found inapplicable in *Inmates of Attica Correctional Facility*, 477 F.2d at 378.

[20] *Id.*

[21] *See Prosecutorial Discretion*, 34 GEO. L.J ANN. REV. CRIM. PROC. 197, 201–210 (2005) (discussing constitutional constraints on prosecutorial discretion and reviewing the case law).

[22] *See Bordenkircher*, 434 U.S. at 363 ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional.") (internal citations

principle does not, however, preclude the type of negotiations common in the plea bargaining process.[23] Similarly, a selective prosecution based on race, religion, or other impermissible criterion violates the Equal Protection Clause.[24] To sustain either claim (typically in a motion to dismiss the indictment or in a *habeas* petition), the defendant bears a heavy burden of proof.[25] The prosecutor's cost benefit assessments, or judgments about the public interest at stake in certain types of prosecutions, are not subject to challenge.[26]

Beyond the decision of whether or not to prosecute, a federal prosecutor also has discretion in deciding how to prosecute. The prosecutor chooses which crime to charge, as the Supreme Court "has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants."[27] The prosecutor chooses when to grant immunity,[28] accept a plea bargain,[29] and dismiss charges.[30]

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omitted); United States v. Wilson, 262 F.3d 305, 314 (4th Cir. 2001) (finding that a vindictive prosecution claim arises when the prosecution brings more serious charges after the defendant exercises his right to appeal, in the context of the defendant's motion to dismiss the indictment).

[23] *See Bordenkircher*, 434 U.S. at 363 (addressing a *habeas* petition). The Court differentiated between the "unilateral" imposition of a penalty and the "give-and-take negotiation" of the plea bargaining process to draw this distinction. *Id.* at 362.

[24] *See* Wayte v. United States, 470 U.S. 598 (1985) (addressing a motion to dismiss the indictment); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (deciding a *habeas* petition); *see, e.g.*, Carranza v. INS, 277 F.3d 65, 72 n.5 (1st Cir. 2002) (noting that selective prosecution violates equal protection, and that selective prosecution claims are exempted from the general proscription against judicial review of prosecutorial decisions, in the context of a motion to dismiss the indictment).

[25] *See* Poulin, *supra* note 13; *Prosecutorial Discretion*, *supra* note 21, at 202–10.

[26] *See* Wade v. United States, 504 U.S. 181, 186–87 (1992); *Wayte*, 470 U.S. at 607.

[27] *See* United States v. Batchelder, 442 U.S. 114, 123–24 (1979). Under the Reno Memorandum, promulgated in 1993 and superseded by the similarly-worded Ashcroft Memorandum in force today, federal prosecutors are instructed to charge "the most serious offense that is consistent with the nature of the defendant's conduct, that is likely to result in a sustainable conviction." Janet Reno, Reno Bluesheet on Charging and Plea Decisions (Oct. 12, 1993), *reprinted in* 6 FED. SENT'G REP. 352 (1994); *see* Memorandum from Att'y Gen. John Ashcroft 3 (July 28, 2003), *reprinted in* 15 FED. SENT'G REP. 375, 376 (2003). As Kate Stith has observed, however, this departmental policy is largely unenforceable. *See* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1450, 1470 (2008).

[28] *See, e.g.*, United States v. George, 363 F.3d 666, 671 (7th Cir. 2004) (holding that the power to grant use immunity is delegated exclusively to executive branch, and that the prosecutor had discretion to deny a witness use immunity based on the government's desire to collect evidence to use against him if he violated plea agreement); United States v. Flemmi, 225 F.3d 78, 87 (1st Cir. 2000) ("A United States Attorney's authority to grant use immunity is implied from her statutory authority to make decisions anent prosecution.").

[29] *See* Newman v. United States, 382 F.2d 479, 481–82 (D.C. Cir. 1967).

Once those choices are made, "no court has any jurisdiction to inquire into or review" a prosecutor's decision to treat differently "[t]wo persons [who] may have committed what is precisely the same legal offense."[31]

B. Opportunities to Exercise Discretion in Practice

The modern criminal justice system provides federal prosecutors with incentives to make many decisions that have dramatic consequences for criminal defendants, but are never reviewed in court. As a result, prosecutorial discretion in practice is even broader than the case law implies. The large federal criminal code, heavy caseloads, and prevalent plea-bargaining all increase the federal prosecutor's influence over criminal adjudications.

The federal criminal code has grown substantially in the last two centuries. In the December 1873 Revised Statutes, the title on federal crimes listed 183 separate offenses.[32] Today, Title 18 of the U.S. Code contains over one thousand distinct crimes,[33] including many enacted in

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[30] Federal Rule of Criminal Procedure 48(a) provides that "The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent." FED. R. CRIM. P. 48(a). Some federal circuits have held that courts can withhold leave to dismiss if and only if the prosecutor's request is "clearly contrary to manifest public interest." *See* United States v. Cowan, 524 F.2d 504, 513 (5th Cir. 1975), cited without disapproval in Rinaldi v. United States, 434 U.S. 22, 30 (1977). As Judge Posner has noted, though, "[w]e are unaware, however, of any appellate decision that actually upholds a denial of a motion to dismiss a charge on such a basis." *In re* United States, 345 F.3d 450, 453 (7th Cir. 2003).

[31] *Newman*, 382 F.2d at 481–82.

[32] 70 Rev. Stat. (2d ed. 1878).

[33] *See* William J. Stuntz, *The Pathological Politics of Criminal Law,* 100 MICH. L. REV. 505, 514 (2001). Stuntz provides an institutional account of the federal criminalization phenomenon, analyzing the incentives of the legislature, judiciary, and executive branch that lead to the expansion of the criminal law. His account implicates prosecutorial discretion:

> [D]iscretionary enforcement frees legislators from having to worry about criminalizing too much, since not everything that is criminalized will be prosecuted; likewise, legislative power liberates prosecutors, widening their range of charging opportunities. Next is the relationship between legislatures and courts: the accumulation of criminal statutes constrains courts, both by taking away lawmaking opportunities and by blunting the effect of judicial tools like vagueness doctrine and the rule of lenity. Last comes the relationship between prosecutors and courts: prosecutors keep courts at bay by using the charging opportunities legislators give them to generate guilty pleas. Guilty pleas, of course, avoid adjudication altogether; they leave courts very little role to play. Notice the nature of these relationships: prosecutorial and legislative power reinforce each other, and together both these powers push courts to the periphery.

Id. at 528.

the past three decades.[34] When criminal statutes overlap, as many federal crimes do,[35] the prosecutor can choose among the statutes in pursuing prosecution. As a result, the rule that "when an act violates more than one criminal statute, the Government may prosecute under either" provides federal prosecutors with even more discretionary power today than it did when the Supreme Court stated it in 1979.[36]

The increase in the number of federal crimes has led to an increase in the number of federal criminal prosecutions.[37] Prosecutors with large caseloads lack the resources to take every case to trial.[38] Today, plea bargains are far more common than trials. The plea bargaining process facilitates "prosecutorial adjudication,"[39] in which the prosecutor serves as the "central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues and of the appropriate sentence to be

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[34] According a 1998 American Bar Association report, "more than a quarter of the federal criminal provisions enacted since the Civil War have been enacted within a sixteen year period since 1980." TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 7 & n.9 (1998).

[35] *Compare* 18 U.S.C. § 1343 (2006) ("Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.") *with* 18 U.S.C. §1344 (2006) ("Whoever knowingly executes, or attempts to execute, a scheme or artifice (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.").

[36] *See supra* note 27; *see also* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2550 (2004) (describing this phenomenon and concluding that "[t]he greater the territory substantive criminal law covers, the smaller the role that law plays in allocating criminal punishment").

[37] From 1870 to 1880, the average number of criminal cases that terminated in the federal courts each year was 6,984. The number peaked (at one point above 95,000) during the Prohibition era, and dropped back to 38,667 in 1934. The figure has increased relatively steadily since then, resulting in an average of 76,519 criminal defendants per year in the federal system between 2000 and 2002. *See* Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 89 (2005).

[38] *See* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 8 (reviewing scholarship that linked caseload pressure to the rise of plea bargaining).

[39] Gerard Lynch coined the term "prosecutorial adjudication" in Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2141 (1998). Westlaw searches of the phrase "prosecutorial adjudication" reveal that Judge Lynch used it first.

imposed)."[40] The prosecutor evaluates culpability and chooses the charge for which he will accept a guilty plea. That charge is accompanied by an "advisory" sentencing guideline promulgated by the U.S. Sentencing Commission, and judges more often than not sentence within the guideline range.[41] As a result, the exercise of prosecutorial discretion affects almost every step of the criminal justice process, from charging to sentencing.

C. The Modern Judicial Theory of Prosecutorial Discretion

Prosecutors could not have acquired their broad discretion without some judicial acquiescence. Many aspects of contemporary prosecutorial practice resemble matters traditionally left to judges, particularly the "prosecutorial adjudication" of the plea bargaining process.[42] A judge could expand or reclaim his discretionary powers by limiting those of federal prosecutors.[43] The federal courts have not done so; instead, federal case law has concluded that judges are constitutionally prohibited from interfering with prosecutorial decisions. The most common support for this conclusion is the separation of powers doctrine,[44] which does not adequately account for expansive prosecutorial discretion.

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[40] Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403–04 (2003).

[41] U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. N (2007), *available at* http://www.ussc.gov/ANNRPT/2007/TableN.pdf (citing 2007 statistics revealing that federal judges sentence within the Guideline range 60.8% of the time and that in an additional 25.6% of the cases, the departure responds to a government motion). Thus, in the vast majority of cases, the defendant's sentence is determined by the public prosecutor.

[42] *See supra* note 39 and accompanying text.

[43] It is possible to read the Supreme Court's decision in *Booker*, for example, as a reclamation of the powers of the sentencing judge from the federal prosecutor. *See* Stith, *supra* note 27, at 1482 (arguing that *Booker* effected a "reinvigoration of the sentencing judge"). By rendering the Sentencing Guidelines advisory, the Supreme Court ensured that prosecutors' charging and plea bargaining decisions would not be the last word in determining criminal sentences. Instead, the federal judiciary reclaimed some of its authority over this task. In this respect, *Booker* demonstrates the necessity of judicial compliance in maintaining broad prosecutorial discretion—when judges choose to constrain prosecutorial discretion, they can do so.

[44] *See* Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973) ("The primary ground upon which this traditional judicial aversion to compelling prosecutions has been based is the separation of powers doctrine."); *Prosecutorial Discretion*, *supra* note 21, at 197.

D. The Separation of Prosecutorial Powers Doctrine

In *United States v. Cox*, the Fifth Circuit stated that "it is as an officer of the executive department that [the federal prosecutor] exercises a discretion as to whether or not there shall be a prosecution in a particular case."[45] Accordingly, the court reasoned that "[i]t follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."[46] The Supreme Court has endorsed this theory, remarking that "the decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch."[47] Lower federal courts also invoke the separation of powers doctrine to defend their hands-off approach to prosecutors' decisions.[48] Since "the exercise of prosecutorial discretion is at the very core of the executive function,"[49] limiting that discretion by imposing judicial review "would invade the traditional separation of powers doctrine."[50]

The "Take Care" Clause (providing that the President "shall take care that the laws be faithfully executed") is the constitutional text cited most frequently to support this argument,[51] although the clause itself does not explicitly provide for executive control over criminal prosecutions.[52] Otherwise, courts provide few doctrinal justifications for

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[45] United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965).

[46] *Id.*

[47] Heckler v. Chaney, 470 U.S. 821, 832 (1985); *see also* United States v. Armstrong, 517 U.S. 456, 464 (1996) (holding that the separation of powers doctrine requires broad prosecutorial discretion).

[48] *See, e.g.*, *In re* United States, 345 F.3d 450, 452–54 (7th Cir. 2003) (observing that courts should refrain from interfering with decisions to dismiss charges, because the power to prosecute is lodged in the executive branch); United States v. Arenas-Ortiz, 339 F.3d 1066, 1068 (9th Cir. 2003) (holding that the decision to bring charges is constitutionally assigned to executive branch); United States v. Goodson, 204 F.3d 508, 512 (4th Cir. 2000) (holding that judicial review of prosecutorial decisions poses separation of powers problems); United States v. Smith, 178 F.3d 22, 26 (1st Cir. 1999) (holding that prosecutorial discretion is central to the executive function); United States v. Robertson, 45 F.3d 1423, 1438 (10th Cir. 1995) (expressing concern that second-guessing prosecutorial decisions about plea agreements would raise separation of powers issues); Newman v. United States, 382 F.2d 479, 482 (D.C. Cir. 1967) (noting, in the context of prosecutorial discretion, that "it is not the function of the judiciary to review the exercise of executive discretion whether it be that of the President himself or those to whom he has delegated certain of his powers").

[49] *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 976 (D.C. Cir. 2005).

[50] United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n, 228 F.Supp. 483, 489 (S.D.N.Y. 1964) (holding that the courts cannot compel the prosecution of an indictment).

[51] *See* U.S. CONST. art. 2, § 3; William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 484 (1989).

[52] *See infra* Part II.

broad prosecutorial discretion; the Fifth Circuit's formulation of the doctrine in *Cox* is widely cited and treated as conclusive.[53] The *Cox* court's statements typify the "modern separation of prosecutorial powers doctrine," which, as suggested below, is more controversial than contemporary courts typically acknowledge.

E. Criticism by Comparison to Related Areas of Law

In the case law on prosecutorial discretion, the separation of prosecutorial powers doctrine supports two conclusions: that the federal prosecutor has discretion to decide whether and how to prosecute a case, and that a federal court cannot review the prosecutor's decisions. The constitutional separation of powers doctrine does not, however, adequately explain expansive prosecutorial discretion. Instead, prosecutorial discretion is in tension with the account of separated powers that appears elsewhere, particularly in administrative law.[54]

The federal prosecutor's broad and unreviewable authority is an anomaly in our system of separated powers. The Framers' "constant aim [was] to divide and arrange the several offices [of government] in such a manner as that each may be a check on the other,"[55] yet the other branches of government provide almost no check on prosecutorial powers. Rachel Barkow has remarked that "[o]ne need not be an expert in separation-of-powers theory to know that combining [modern prosecutorial] powers in a single actor can lead to gross abuses."[56] The federal judiciary has avoided confronting this tension by invoking the separation of powers doctrine in name only,[57] without addressing why

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[53] *See, e.g.*, United States v. Friday, 525 F.3d 938, 960 (10th Cir. 2008); United States v. Navarro-Vargas, 408 F.3d 1184, 1206 (9th Cir. 2005); United States v. Davis, 285 F.3d 378, 383 (5th Cir. 2002); Nathan v. Smith, 737 F.2d 1069, 1078 (D.C. Cir. 1984); United States v. Berrigan, 482 F.2d 171, 180 (3rd Cir. 1973); Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973).

[54] *Accord* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 993 (2006) (arguing that "the existing approach to separation of powers in criminal matters cannot be squared with constitutional theory or sound institutional design"). Barkow argues that criminal law could be improved if it applied the constitutional separation of powers doctrine more rigorously. As a result, prosecutorial discretion would be limited, since a system "where prosecutors make all the key judgments does not fit comfortably with the separation of powers." *Id.* at 1049. I do not engage Barkow's policy suggestions, but I do adopt her characterization of the separation of prosecutorial powers theory.

[55] THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

[56] Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 869 (2009).

[57] One noteworthy exception is *United States v. Abreu*, 747 F.Supp. 493 (N.D. IL 1990), in which an Illinois district court denied an Assistant United States Attorney's motion to dismiss an indictment based on Federal Rule of Criminal Procedure 48a. *See*

that doctrine should bar all judicial review of prosecutorial decisions. Federal judges commonly review actions undertaken by other branches of government, such as administrative agencies within the executive branch. Such judicial review is an important component of the system of separated powers; the judiciary both checks the power of other branches and asserts its own "emphatic" duty "to say what the law is."[58] The Supreme Court has addressed these separation of powers issues extensively in administrative law[59] and has developed principles of judicial review that enable administrative agencies to function while protecting against abuse.

In criminal procedure, the Court has not developed comparable safeguards against abuse by federal prosecutors.[60] As a result, the separation of powers doctrine invoked in prosecutorial discretion cases differs from the separation of powers doctrine in administrative law. Administrative agencies, many of which are part of the executive branch, are subject to judicial review and reversal for "arbitrary and capricious" actions.[61] Agencies must articulate rational, legally acceptable reasons for their decisions.[62] Federal prosecutors have no such obligation, ostensibly because they are situated in the executive branch—but so are most agencies.[63] Remarking on this comparison between administrative and criminal procedure, Kenneth Culp Davis contended that if separated powers really barred judicial review of executive decisions, "then more

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supra note 30. Responding to the government's argument that the separation of powers doctrine precluded the court from denying its motion, the court observed that "the government has failed to carry its 'separation of powers' argument to the next logical step. Equally intrinsic to our system of government is a delicate system of 'checks and balances.' . . . From this, it seems altogether proper to say the phrase "by leave of court" in Rule 48(a) was intended to modify and condition the absolute power of the executive, consistently with the framers' concept of separation of powers, by erecting a check on the abuse of executive prerogatives." *Abreu*, 747 F.Supp. at 502. Although the *Abreu* court's point seems right, it is uncommon one in the federal jurisprudence of prosecutorial discretion.

[58] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also Abreu*, 747 F.Supp. at 502 (noting the importance of judicial review to the "checks and balances" inherent in a system of separated powers).

[59] *See* Barkow, *supra* note 54, at 991–93. Barkow argues that the rise of the administrative state prompted the Court to address separation of powers issues in administrative law.

[60] *Id.*

[61] 5 U.S.C. § 706(2)(A) (2006).

[62] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43, 52 (1983).

[63] Even the federal agency responsible for determining criminal sentences, the U.S. Sentencing Commission, differs from other administrative agencies in that it is not subject to arbitrary and capricious review. *See* Barkow, *supra* note 54, at 995.

than a hundred Supreme Court decisions spread over a century and three-quarters will have to be found contrary to the Constitution!"[64]

III. PROSECUTORIAL DISCRETION IN HISTORICAL PERSPECTIVE

In the wake of the breadth of prosecutorial discretion, and the fact that the separation of powers doctrine does not fully account for this concentration of power in one executive actor, the narrower historical question still remains as to how federal courts came to accept the separation of prosecutorial powers theory as justification for prosecutorial discretion. Davis thought that "the best short answer seems to be that no one has done any systematic thinking to produce the[se] assumptions, but that the customs about prosecuting . . . are the product of unplanned evolution."[65] This Part traces this evolution in the American case law on prosecutorial discretion, beginning with the law of the *nolle prosequi* and ending with the first modern statement of the separation of prosecutorial powers doctrine. First, however, Part II.A briefly reviews evidence of the executive's control over law enforcement in early American history to provide some background for the cases that follow.

A. The Executive's Control Over Law Enforcement

One premise of the separation of prosecutorial powers theory is that criminal law enforcement is, and always has been, an exclusively executive function. The executive has not, however, always had exclusive control over criminal prosecutions.

In the 1980s, the Supreme Court's decision in *Morrison v. Olson* inspired a small body of historical scholarship addressing executive control over criminal prosecutions. In *Morrison*, the Court upheld the appointment of a special prosecutor not accountable to the President.[66] In dissent, Justice Scalia wrote, "[g]overnmental investigation and prosecution of crimes is a quintessentially executive function," and is "the virtual embodiment of the power to 'take care that the laws be faithfully executed.'"[67] According to Justice Scalia, the executive had "always and everywhere" controlled criminal law enforcement.[68]

In *Morrison*'s aftermath, many scholars—including Harold Krent, William Gwyn, Lawrence Lessig, and Cass Sunstein—disagreed with

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[64] DAVIS, *supra* note 14, at 210 (criticizing the language of *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965), quoted above).

[65] *Id.* at 189.

[66] 487 U.S. 654 (1988).

[67] *Id.* at 706, 727 (Scalia, J., dissenting).

[68] *Id.* at 706 (Scalia, J., dissenting).

Justice Scalia and argued that as a historical matter, prosecution was not an exclusively executive function.[69] Several pointed out that the constitutional text upon which Justice Scalia relied, the "Take Care" Clause, does not explicitly provide for executive control over criminal prosecutions.[70] The "Take Care" Clause's origins suggest that it was intended to be a statement of the President's duties, not a conferral of power.[71] Similarly, no other part of the Constitution grants the executive full control over federal law enforcement.[72]

Most of the scholars writing after *Morrison* concluded that in practice, the executive branch had only limited control over early criminal prosecutions. The Judiciary Act of 1789 created the Attorney General and vested his appointment with the President, but the Framers did not establish an executive department underneath the Attorney General to conduct criminal prosecutions.[73] The same act created "district attorneys" (the first federal prosecutors), but they did not report to the Attorney General until 1861.[74] This state of affairs persisted despite repeated complaints to Congress from attorneys general and presidents.[75] With the executive having little direct control over criminal prosecutions, private citizens and the other branches of government played a large role in enforcing criminal law.[76] Reviewing these

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[69] *See* Susan Low Bloch, *The Early Role of the Attorney General in our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561; Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function?* Morrison v. Olson *and the Framers' Intent*, 99 YALE L.J. 1069 (1990); Gwyn, *supra* note 51; Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U.L. REV. 275 (1989); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

[70] *See* Krent, *supra* note 69, at 282; Lessig & Sunstein, *supra* note 69, at 15.

[71] *See* Dangel, *supra* note 69, at 1077–78; Gwyn, *supra* note 51, at 491–92. The history of the first Judiciary Act supports a limited reading of the "Take Care" Clause as well. As enacted, the Act vested appointment of the Attorney General with the President. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93 (1861). An original draft of the Judiciary Act, however, vested appointment of the Attorney General and U.S. Attorneys (then called "district attorneys") with federal district courts. *See* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 108–09 (1924). At least half of the relevant Senate committee members accepted this formulation, suggesting that they did not consider executive control over criminal prosecutors to be constitutionally compelled. *See* Gwyn, *supra* note 51, at 494.

[72] *See* Krent, *supra* note 69, at 282; Lessig & Sunstein, *supra* note 69, at 15.

[73] *See* Bloch, *supra* note 69, at 567; Lessig & Sunstein, *supra* note 69, at 16. The Department of Justice was not established until 1870. *See* Act of June 22, 1870, ch. 150, 16 Stat. 162.

[74] *See* The Confiscation Cases, 74 U.S. 454, 456–57 (1868); Krent, *supra* note 69, at 286–90; Lessig & Sunstein, *supra* note 69, at 16–17.

[75] *See* Krent, *supra* note 69, at 286–90.

[76] *See* RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634–1941 at 27–28 (1963) (noting the influence of citizen grand juries in early

arguments, Lessig and Sunstein concluded that "[i]f the framers' and early Congresses' actual practice is any indication of their original understanding, then they did not understand prosecution to be within the notion of 'executive Power' exclusively. . . ."[77]

American history); Dangel, *supra* note 69, at 1086–87 (describing the role of private citizens and judges in criminal prosecutions); Lessig & Sunstein, *supra* note 69, at 19–21 (describing the role of private citizens in criminal prosecutions); Krent, *supra* note 69, at 293-310 (describing the role of private citizens and state officials in criminal prosecutions); Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQUENCY 568 (1984).

[77] Lessig & Sunstein, *supra* note 69, at 15. Saikrishna Prakash has written the most notable scholarly article disagreeing with this conclusion. *See* Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005). Prakash argued that American prosecutors inherited their membership in the executive branch from English criminal procedure, in which "the king was regarded as the constitutional prosecutor of all offenses." *Id.* at 547. In England, however, the tradition of private prosecution by the crime victim was dominant, at least in theory, until late in the twentieth century, *see supra* note 4, and the English Crown was not in exclusive control of criminal prosecutions. Prakash also provided accounts of early American presidents directing Attorneys General or district attorneys to enforce a particular law or to issue a *nolle prosequi*. Prakash, *supra* at 553–63. He acknowledged evidence, however, that district attorneys received direction from other branches of government as well. *See* Prakash, *supra* at 549 n.171 (noting evidence that district attorneys received similar instructions from the judiciary). As a result, Prakash demonstrated that the executive branch exercised some control over early criminal prosecutions. He did not, however, prove that criminal prosecution was originally an exclusively executive function.

B. The Nolle Prosequi[78]

In England, the *nolle prosequi* was a procedural device that the royally appointed Attorney General could use to terminate an ongoing criminal prosecution.[79] Most likely beginning in the sixteenth century, the Attorney General used the procedure to dismiss prosecutions that he regarded as frivolous or in contravention of royal interests.[80] Since most criminal prosecutions in the early modern period were initiated and managed by private citizens, the *nolle prosequi* was the only form of "prosecutorial discretion" exercised by a public figure. The *nolle* was an executive procedure, available only to the Attorney General and often exercised at the explicit direction of the Crown. No form of judicial review was available if a party contested the propriety of the procedure: when the Attorney General issued a *nolle*, the court would terminate the prosecution without any inquiry.[81]

American criminal procedure absorbed the *nolle prosequi*, and in federal practice both the American President and line prosecutors

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[78] In turning to the case law on prosecutorial discretion, a brief note must be made regarding the sources underlying the arguments put forth in this section. Although I have made an effort to locate district court cases, reported case law originates mostly from appellate-level courts. As a result, the sources are skewed away from those discretionary decisions made by the judges who most frequently make them—district court judges. In the states, the development of prosecutorial elections beginning in the mid-nineteenth century prompted a justification for prosecutorial discretion entirely distinct from the federal separation of powers doctrine. Direct voter control over the district attorney might justify a range of discretionary powers broader than that supported by the executive supervision of federal prosecutors. *See, e.g.*, William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure As An Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1339–44 (1993) (arguing that an official making decisions as important as those made by public prosecutors should answer directly to voters, and highlighting the American preference for local control over governmental authority). State court judges sometimes cite a prosecutor's elected status as an explanation for their refusal to interfere with his decisions. *See, e.g.*, State v. Annala, 484 N.W.2d 138, 146 (Wis. 1992) ("On numerous occasions, we have explained that in general the district attorney is answerable to the people of the state and not to the courts or the legislature as to the manner in which he or she exercises prosecutorial discretion."). *See also* JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 25-27 (1980); NICHOLAS PARRILLO, THE RISE OF NON PROFIT GOVERNMENT IN AMERICA (forthcoming) (manuscript at 67–68, on file with SETON HALL CIRCUIT REVIEW).
Accordingly, I have not included any state case law from this period or later, with the exception of an 1806 case evidencing the fact that early state courts treated the *nolle prosequi* similarly to federal courts.

[79] *See* ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA 12 (1981).

[80] *Id.*; *see, e.g.*, Goddard v. Smith, 87 Eng. Rep. 1007, 91 Eng. Rep. 632 (K.B. 1704) (issuing a *nolle prosequi* to remedy a wrongful charge).

[81] *See* GOLDSTEIN, *supra* note 79.

inherited the power to *nol pros*.[82] Although the name was the same, the *nolle* served a different function in America than it had in England. In the English system of private prosecution, the *nolle* was an isolated control point available to the Crown. In America, public prosecutors used the *nolle* to terminate prosecutions that they had themselves initiated. As a result, the American *nolle* was one of many procedural devices that public officials used to control criminal prosecutions.

Public debate regarding the *nolle prosequi* power in the United States occurred at the end of the eighteenth century. In February 1799, Jonathan Robbins (also known as Thomas Nash) was arrested in South Carolina and accused of participating in a mutiny on a British ship, the *Hermione*.[83] Britain formally requested his extradition pursuant to the Jay Treaty.[84] Robbins was one of many sailors who had participated in the *Hermione* mutiny, and his was not the first case to reach American courts. A year earlier, three of his fellow *Hermione* crewmembers had been arrested in Trenton, New Jersey.[85] In the case of one such crewmember, William Brigstock, the district attorney had issued a *nolle prosequi* "in obedience to the special command of the President of the United States."[86] President Adams's interpretation of the Jay Treaty changed, however, in the year following Brigstock's arrest.[87] As a result, Secretary of State Pickering told the federal district judge hearing Robbins's case that the "President has . . . authorized me to communicate to you 'his advice and request,' that Thomas Nash may be delivered up," provided that "such evidence of his criminality be produced, as by the laws of the United States, or of South Carolina, would justify his apprehension and commitment for trial."[88] After a hearing, in which Robbins claimed to be an American citizen and defended his actions aboard the *Hermione*,[89] the judge acquiesced to Pickering's request and ordered Robbins delivered to the British.[90] British troops brought

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[82] *See* Prakash, *supra* note 77, at 549–60.

[83] *See* Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 237 (1990).

[84] Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, art. 27, 8 Stat. 116, 129, T.S. No. 105.

[85] *See* Wedgwood, *supra* note 83.

[86] *Id.* at 278 (citing Notice of *Nolle Prosequi* (1798), *reprinted in* untitled pamphlet headed "Circuit Court of the United States, Middle Circuit of the New-Jersey District. The United States (a.) William Brigstock," *available in* EARLY AMERICAN IMPRINTS, 1639–1800, Evans No. 38723).

[87] *See* Wedgwood, *supra* note 83, at 288–89.

[88] 4 STATE PAPERS AND PUBLICK DOCUMENTS OF THE UNITED STATES [WAIT'S AMERICAN STATE PAPERS] 304 (2d ed. Boston 1817).

[89] United States v. Rob[b]ins, 27 F. Cas. 825, 827–31 (D.C.S.C. 1799).

[90] *See id.* at 833.

Robbins to Jamaica, where they court marshaled and executed him within a week.[91]

The *Robbins* case caused a public outcry, and President Adams narrowly escaped congressional censure and impeachment. In the House of Representatives, John Marshall was President Adams's most persuasive advocate.[92] Marshall argued:

> It is not the privilege, it is the sad duty of courts to administer criminal judgment. It is a duty to be performed at the demand of the nation, and with which the nation has a right to dispense. If judgment of death is to be pronounced, it must be at the prosecution of the nation, and the nation may at will stop that prosecution. In this respect the president expresses constitutionally the will of the nation; and may rightfully, as was done in the case at Trenton, enter a *nolle prosequi*, or direct that the criminal be prosecuted no further. This is no interference with judicial decisions, nor any invasion of the province of a court. It is the exercise of an indubitable and a constitutional power.[93]

Marshall insisted that the President had discretion to issue a *nolle prosequi*, and followed the English law that the court is powerless to review or deny an exercise of the writ. The *nolle* is an executive prerogative, not a judicial power.[94] In the precise context of the *nolle prosequi*, this statement of unreviewable executive discretion had a solid foundation in English history. Marshall's speech suggests that American criminal procedure absorbed from English law the principle that an exercise of the *nolle* power was immune from judicial review.

Marshall's reasoning, however, went beyond English precedent. In Marshall's account, the duty of administering criminal judgment "is a duty to be performed at the demand of the nation, and with which the nation has a right to dispense."[95] As a result, a judgment "must be at the prosecution of the nation;" since the President "expresses constitutionally the will of the nation," he may "rightfully" direct the prosecution—in this case, by entering a *nolle*.[96] In defending the President's *nolle* power, then, Marshall implied that executive control over criminal prosecutions more generally was appropriate because of the President's representative capacity. Marshall did not go so far as to state that all executive

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[91] *See* Wedgwood, *supra* note 83, at 304.

[92] *See id.* at 234.

[93] 10 ANNALS OF CONG. 615 (1800). Marshall's famous speech was also recorded in the Appendix of Wheaton's Supreme Court opinions. *See* 18 U.S. (5 Wheat.) app. (1820).

[94] *See supra* notes 81–83 and accompanying text.

[95] 10 ANNALS OF CONG. 615.

[96] *Id.*

prosecutorial decisions were insulated from judicial review. In expanding on the President's *nolle* power, however, Marshall's speech created the first connection between the *nolle prosequi* and the theory of unreviewable executive prosecutorial discretion.

From the Nolle Prosequi to Prosecutorial Discretion

There are two important differences between executive control over the *nolle prosequi* and modern prosecutorial discretion. The President's power to direct criminal prosecutions does not necessarily imply that all line prosecutors should exercise the same unreviewable discretion. Moreover, the power to terminate a prosecution using the *nolle prosequi* is, in chronology and significance, distinct from the discretion to make an initial charging decision. This section explores the limited case law that eliminated these two distinctions, bridging the gap between the executive *nolle prosequi* and the modern theory of prosecutorial discretion.

From the Chief Executive to Line Prosecutors

In England, the royal Attorney General did not share the *nolle prosequi* with other government officials; no formal public prosecutor existed.[97] In the American system of public prosecution, by contrast, the President shared the power to *nol pros* with public prosecutors, even though the first American "district attorneys" were not clearly under the President's control.[98] An 1802 case, *Virginia v. Dulany,* is among the first to make this clear. In *Dulany*, a District of Columbia federal court held that the private prosecutor who initiated the case "had no right to withdraw the prosecution," and the court "refused to permit it to be done without the consent of the attorney for the United States."[99] The *Dulany* court thereby implied that the U.S. attorney had the power to *nol pros.* Although the *Dulany* opinion did not discuss this deviation from English

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[97] *See supra* note 82 and accompanying text.

[98] *See supra* Part II.A. The line between "presidential" and "executive" functions—the former limited to the President himself, and the latter to all members of the executive branch—is not always clear. *See* A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787, 793–95 (1987). Drawing this line with respect to prosecutorial discretion in early American history is even more difficult because, as described above, the first "district attorneys" were not clearly under the President's control. As a result, the power of early public prosecutors to *nol pros* unilaterally should not have been inherently obvious, considering the ambiguous position early prosecutors held within the branches of government. In addition, Marshall's popular representation theory of the *nolle prosequi* does not apply directly to unelected public prosecutors.

[99] Virginia v. Dulany, 28 F. Cas. 1223, 1223 (D.D.C. 1802).

practice, the case is the first to eliminate (or blur) the distinction between the royal or presidential *nolle prosequi* and the powers of the line prosecutor.

From an early time, line prosecutors also shared the President's immunity from judicial review in using the *nolle prosequi*. A Massachusetts case, *Commonwealth v. Wheeler*, indicates as much.[100] The *Wheeler* defendants had been indicted for assault and battery on "one Deliverance Brown."[101] In their defense, they pointed out that the state's public prosecutor had issued a *nolle prosequi* on an earlier indictment for the same offense. The court held that the earlier *nolle* was not a bar to subsequent indictment. The judge remarked on the procedure's "ancient" origins and observed that "[c]ertainly, the court are not legally competent to give any advice on this subject. The power of entering a *nolle prosequi* is to be exercised at the discretion of the attorney who prosecutes for the government, and for its exercise he alone is responsible."[102]

Like *Dulany, Wheeler* affirmed the line prosecutor's power to enter a *nolle prosequi*. *Wheeler* also emphasized that the *nolle* was not subject to judicial review, even when a public prosecutor—rather than the President or monarch—entered it. In this respect, the *nolle prosequi* appears to have provided the first American manifestation of the notion that prosecutorial discretion was not reviewable. American courts recognized the line prosecutor's right to enter a *nolle*, applied the same form of judicial review to the *nolle* that had been practiced in England, and thereby adopted a hands-off approach to at least one prosecutorial decision.

From the Power to Nol Pros to the Power to Charge

When the prosecutor can unilaterally dismiss a case, ordering him to initiate a criminal prosecution is futile. As a result, the prosecutor's unreviewable *nolle* power appears to have contributed to the expansion of prosecutorial discretion to include the charging decision as well. An 1809 opinion by John Marshall contains clues to this development. In

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[100] Commonwealth v. Wheeler, 2 Mass. 172 (1806). Although my primary focus here is on federal cases, I would be remiss to ignore *Commonwealth v. Wheeler*, which provides one of the most extended early discussions of the *nolle prosequi* in American case law. For a full discussion of *Wheeler* and other early state court cases that came to similar conclusions, see PARRILLO, *supra* note 78, at 55–57. In describing this case law, Parrillo does not discern any difference between federal and state sources that would preclude *Wheeler* from being relevant for my federally-oriented analysis. *Id.* At this point in American history, both state and federal prosecutors were appointed, not elected.

[101] *Wheeler*, 2 Mass. at 172.

[102] *Id.* at 174.

United States v. Hill, a grand jury returned formal indictments and informal presentments against the defendant.[103] The federal prosecutor entered a *nolle prosequi* exclusively with respect to the indictments, and the defendant moved to quash the presentments.[104] Declining to do so, Justice Marshall, sitting as the trial judge, observed that American courts would typically "pass over, unnoticed, presentments on which the attorney does not think it proper to institute proceedings. This usage is convenient, because it avoids the waste of time, which would often be consumed in the inquiry, whether the court could take jurisdiction of the offence presented."[105]

The jurisdictional inquiry that Marshall describes would only be "wasted" if its resolution had no bearing on the case's outcome. At the time *Hill* was decided, federal prosecutors used the *nolle prosequi* frequently.[106] Since public prosecutors could (and often did) *nolle* any charges, proceeding with a presentment "on which the [district] attorney [did] not think it proper to institute proceedings" would presumably lead only to a *nolle*. Marshall's observation reflects the connection between the power to *nol pros* charges and the power to initiate them. The "usage" of deferring to the prosecutor's decision on when to institute proceedings saved time for the courts, and effectively increased the scope of prosecutorial discretion to include the charging decision.

Nascent Separation of Powers Arguments

In the second half of the nineteenth century, federal courts began to associate the *nolle prosequi* and prosecutorial discretion with executive power more explicitly. *The Confiscation Cases* of 1868 provide the best example. During the first months of the Civil War, Congress passed a statute subjecting to forfeiture all property that was knowingly used in rebellion against the United States.[107] The statute provided that an informer who supplied information leading to a forfeiture would share in the proceeds with the United States, although only the federal public prosecutor could bring the confiscation suit.[108] In *The Confiscation Cases*, the Attorney General moved to dismiss an ongoing confiscation suit and the informers who stood to benefit from the confiscation

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[103] United States v. Hill, 26 F.Cas. 315 (Marshall, Circuit Justice, D. VA 1809).
[104] *Id.* at 315.
[105] *Id.* at 316.
[106] Between 1801 and 1828, a full third of all federal indicted cases ended with a *nolle prosequi*. *See* DWIGHT F. HENDERSON, CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801–1829, Appx. I, at 213 (1985).
[107] *See* The Confiscation Cases, 74 U.S. 454, 454–55 (1868) (discussing the Act of August 6, 1861).
[108] *Id.* at 455.

opposed the motion.[109] The Supreme Court affirmed the Attorney General's power to dismiss the suit. Although the case was civil in nature, the Court discussed the executive's powers in both civil and criminal matters, and the case is widely cited for its application to prosecutorial powers.[110] The Court stated that "[p]ublic prosecutions . . . are so far under [the district attorney's] control that he may enter a *nolle prosequi* at any time before the jury is empanelled."[111]

Most significantly, the Court also offered a justification for the district attorney's control over public prosecutions: "[a]ppointed, as the Attorney-General is, in pursuance of an act of Congress, to prosecute and conduct such suits, argument would seem to be unnecessary to prove his authority to dispose of these [confiscation] cases in the manner proposed," that is, dismissing them.[112] The "act of Congress" to which the Court referred was the Judiciary Act, under which the President had appointed the Attorney General. According to the Court, then, the Attorney General's discretion to dispose of criminal cases was justified by his executive appointment. As a result, neither the Court nor private citizens could interfere with the Attorney General's decision. The separation of powers rationale is not here in so many words, but the public prosecutor's discretion is indirectly linked to executive power.

The Supreme Court's *Confiscation Cases* opinion cited a South Carolina district court case from a decade earlier, *United States v. Corrie*.[113] *Corrie* involved jurisdictional issues surrounding the application of an anti-slavery law. The U.S. attorney's motion for a *nolle prosequi* provided the court with an opportunity to discuss executive power over a criminal prosecution.[114] For the first time in federal case

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[109] *Id.*

[110] Westlaw reveals 185 citing references for *The Confiscation Cases*, many of which have been mentioned earlier in this Article. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 831 (1985); United States v. Batchelder, 442 U.S. 114, 124 (1979); *In re* United States, 345 F.3d 450, 454 (7th Cir. 2003); United States v. Cox, 342 F.2d 167, 191 (5th Cir. 1965); United States v. Flemmi, 283 F.Supp.2d 400, 407 (D. Mass. 2003).

[111] *Confiscation Cases*, 74 U.S. at 457.

[112] *Id.* at 458. Although "argument would seem to be unnecessary," the Court does provide one citation in support of its conclusion, to a case called *The Gray Jacket*. *The Gray Jacket,* 72 U.S. (5 Wall.) 370 (1866), holds only that "in causes where the United States is a party, and is represented by the Attorney-General or the Assistant Attorney-General, or special counsel employed by the Attorney-General, no counsel can be heard in opposition on behalf of any other of the departments of the government." 72 U.S. at 370.

[113] 74 U.S. at 457 n.5. (citing United States v. Corrie, 25 F.Cas. 658 (D.C.S.C. 1860)).

[114] *Corrie* was unusual, as the judge denied the U.S. attorney's requests to enter a *nolle prosequi*. *Id.* at 669. Towards the middle of the nineteenth century, some American courts began to express concerns about the public prosecutor's discretionary power to enter a *nolle prosequi*. *See, e.g., id.*; United States v. Shoemaker, 27 F.Cas. 1067, 1069–

law, the district court in *Corrie* identified the "Take Care" Clause as the textual source of the President's power over criminal prosecutions.[115] The executive's *nolle* power was not originally derived from the "Take Care" Clause, but *Corrie* Americanized the procedure by connecting it to the constitutional text and the President's powers. Today, the "Take Care" Clause is the most commonly cited textual support for executive control over criminal prosecutions.[116] Like *The Confiscation Cases*, *Corrie* linked the *nolle* and prosecutorial discretion more broadly to the executive's constitutional powers, making a nascent separation of prosecutorial powers argument.

The Modern Theory Replaces the Nolle

In the early twentieth century, the *Corrie* court's approach to prosecutorial discretion was adopted more broadly and the separation of prosecutorial powers theory became well-established in federal case law. As a result, prosecutorial discretion was no longer linked to the *nolle prosequi*; the separation of prosecutorial powers theory began to stand alone. Two cases from the 1920s, which ground prosecutorial discretion in the separation of powers doctrine rather than in the *nolle* power, reveal as much.

The Emergence of the Modern Theory

In the 1922 case *Ponzi v. Fessenden*, the Supreme Court connected the executive's power over criminal prosecutions to the "Take Care" Clause for the first time.[117] The district court in *Corrie* had done the same while discussing the *nolle* power sixty-two years earlier,[118] but *Ponzi* was a much more influential case.[119] Unlike *Corrie*, *Ponzi* made

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69 (D. IL 1840). As a result, disagreement developed over the proper role of the court in responding to a prosecutor's motion to enter a *nolle prosequi*. *See* United States v. Krakowitz, 52 F.Supp. 774, 784 (S.D. OH 1943) (summarizing, after a lengthy review, contradictory case law on this question). Most courts read the Supreme Court's opinion in *The Confiscation Cases* as putting an end to this dispute. *See id*. at 779–80.

[115] 25 F.Cas. at 668.

[116] *See* Gwyn, *supra* note 51, at 484.

[117] *See* Ponzi v. Fessenden, 258 U.S. 254, 262 (1922) (stating that the Attorney General was "the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed").

[118] *Ponzi* did not cite *Corrie*. Instead, *Ponzi* cited three previous Supreme Court cases to support the proposition quoted in note 119, but none were on point: two addressed the Attorney General's power in civil cases, and one addressed the President's relationship with U.S. Marshals. *See id.*; Kern River Co. v. United States, 257 U.S. 147 (1921); *In re* Neagle, 135 U.S. 1 (1890); United States v. San Jacinto Tin Co., 125 U.S. 273 (1888).

[119] Lower federal courts addressing prosecutorial discretion occasionally cite *Ponzi*. *See, e.g.,* Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967); United States v. Cox,

no mention of the *nolle prosequi*, and instead affirmed the executive's control over criminal prosecutions independently of the historic *nolle* power. The Fifth Circuit cited *Ponzi* in its leading case on the separation of prosecutorial powers doctrine, *United States v. Cox*.[120]

In 1925, a federal district court in New York stated the separation of powers theory of prosecutorial discretion unequivocally, in *Milliken v. Stone*.[121] During Prohibition, American shipping companies complained that the Attorney General was not enforcing liquor laws against British ships that carried alcohol. The American companies sought an injunction prohibiting government officials from "failing, refusing, or neglecting to institute suits under [the National Prohibition Act], to abate and/or enjoin liquor nuisances, and to prosecute . . . offenders under said act."[122] The court dismissed the suit, concluding, "the federal courts are without power to compel the prosecuting officers to enforce the penal laws, whatever the grounds of their failure may be. The remedy for inactivity of that kind is with the executive and ultimately with the people."[123]

Milliken expressed what has come to be the modern theory of prosecutorial discretion: the prosecutor on behalf of the executive makes criminal law enforcement decisions, which the courts are "powerless" to review. Like John Marshall in his 1799 speech, the *Milliken* court left it to the citizenry to control its law enforcement officers.[124] Marshall was referring to the president and the *nolle prosequi*, but his rationale for unreviewable executive discretion was not inherently limited to a president's decision to issue a *nolle*. Nineteenth century case law expanded prosecutorial discretion, recognizing that it applied to line prosecutors and to decisions other than the *nolle*. Until the early twentieth century, however, the case law on prosecutorial discretion almost always mentioned the *nolle prosequi* and the judicial deference that accompanied the procedure. By the time *Milliken* was decided, judges no longer felt the need to make this connection; unreviewable prosecutorial discretion was the established rule. The *nolle* disappeared from judicial opinions on prosecutorial discretion, but the affiliated theory of exclusive executive power remained. The procedure that once

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342 F.2d 167 (5th Cir. 1965). *Corrie*, by contrast, was only cited by four cases in the twentieth century. Westlaw search for citing references last conducted on July 28, 2009.

120 *See Cox*, 342 F.2d at 172 n.6.

121 Milliken v. Stone, 7 F.2d 397 (S.D.N.Y. 1925).

122 *Id.* at 398.

123 *Id.* at 399.

124 *See supra* note 95 (stating that administering criminal judgment is a "duty to be performed at the demand of the nation, and with which the nation has a right to dispense").

constituted the government's only basis for controlling criminal prosecutions had provided a doctrinal foundation for the public prosecutor's broad discretionary power.

Twentieth Century Limitations on the Nolle

In 1944, Congress amended the rules of procedure to require judicial approval for a prosecutor's use of a *nolle prosequi*. By this time, however, the separation of powers theory of prosecutorial discretion was established in federal case law, and no longer linked to the *nolle prosequi.* As a result, legislative efforts to limit the *nolle* did little to check prosecutorial discretion more broadly.

Congress and the state legislatures that limited the *nolle* were responding to concerns that prosecutors were abusing the power to *nol pros* as case loads increased.[125] In 1930, Roscoe Pound contended that "[w]here the number of prosecutions each year has become enormous—far beyond the possibilities of trial—the common-law unlimited power of *nol pros* becomes a means of selection of those to be prosecuted . . . ."[126] The *nolle*, originally "a public check upon private prosecutions," had become "a power needing check" according to Pound.[127] In 1944, the federal courts adopted Federal Rule of Criminal Procedure 48(a), which provides that "[t]he government may, *with leave of court*, dismiss an indictment, information, or complaint."[128] At least formally, the *nolle prosequi* was no longer the best example of unreviewable prosecutorial discretion. Instead, it was one of the few prosecutorial decisions subject to judicial review.

In practice, however, legislative efforts to limit the *nolle* had "remarkably little impact" and judges rarely denied prosecutors' motions to dismiss.[129] By the time Rule 48(a) was amended, the notion of unreviewable prosecutorial discretion was well-established in federal case law, grounded in the separation of powers doctrine rather than the *nolle prosequi*.

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[125] *See* GOLDSTEIN, *supra* note 82, at 14–15.

[126] ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 187 (1930).

[127] *Id.*

[128] FED. R. CRIM. P. 48 (a) (emphasis added); *see also id.*, advisory committee's note ("The first sentence of this rule will change existing law. The common-law rule that the public prosecutor may enter a *nolle prosequi* in his discretion, without any action by the court, prevails in the Federal courts. This provision will permit the filing of a *nolle prosequi* only by leave of court. This is similar to the rule now prevailing in many States.") (internal citations omitted).

[129] GOLDSTEIN, *supra* note 79, at 15; *see* LAFAVE ET AL., *supra* note 1, §1.6(e); PARRILLO, *supra* note 78, at 59. *See also supra* note 30.

Contemporary "Prosecutorial Discretion"

In 1961, the term "prosecutorial discretion" first appeared in American case law in a Supreme Court case, *Poe v. Ullman*.[130] *Poe* involved a married couple's request for declaratory relief against the enforcement of Connecticut's anti-contraception laws.[131] The prosecutor claimed that he had a right to enforce the Connecticut statute; in his dissent, Justice Harlan described this as a statement of "unbounded prosecutorial discretion."[132] The next judge to use the phrase was David Bazelon of the D.C. Circuit, in a dissent from a petition for rehearing en banc by a drug addict convicted of possession under federal law rather than more permissive state law.[133] Bazelon expressed concern that "[t]he wide disparity in sentencing rigor under the two sets of statutes raises serious questions whether the permissible bounds of prosecutorial discretion have not been exceeded. What standards, if any, are applied in choosing between the statutes?"[134] Like Harlan, Bazelon used the words "prosecutorial discretion" while expressing concern about its use. By 1975, the phrase "prosecutorial discretion" had appeared in nearly one hundred federal cases and marginally fewer state cases. Twenty years later, there were over one thousand of each.[135] "Prosecutorial discretion," like the separation of prosecutorial powers doctrine that supports it, is now entrenched in modern case law.

IV. CONCLUSION

Today, plea-bargaining and prosecutorial discretion determine the outcome of the vast majority of criminal cases. The prosecutor evaluates evidence and determines culpability in a process that is governed by very few legal standards. In doing so he exercises broad discretionary

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[130] Poe v. Ullman, 367 U.S. 497, 530 (1961) (Harlan, J., dissenting). Westlaw search of all cases for the term "prosecutorial discretion" last conducted on May 4, 2009.

[131] *Id*. at 523.

[132] *Id.* at 530. Harlan may have borrowed the phrase from a Note that appeared the previous year in the *University of Pennsylvania Law Review*, which used the words only in passing—in a footnote—but for the first time in any American law review or journal. *See* Note, *Types of Activity Encompassed by the Offense of Obstructing a Public Officer*, 108 U. PA. L. REV. 388, 408 n.144 (1960). Westlaw search of all law reviews for the term "prosecutorial discretion" last conducted on May 4, 2009. Westlaw does not cover law reviews and journals as thoroughly as it covers case law, however.

[133] Westlaw search of all cases for the term "prosecutorial discretion" last conducted on May 4, 2009.

[134] Lloyd v. United States, 343 F.2d 242, 246 (D.C. Cir. 1964) (internal citations omitted). Bazelon's concern with prosecutorial discretion continued throughout his career.

[135] Westlaw search of all cases for the term "prosecutorial discretion" last conducted on May 4, 2009.

powers, whose doctrinal foundation—the separation of prosecutorial powers theory—is based, to some extent, on a procedure that originated in a system of private prosecution.

There are other explanations for modern prosecutorial discretion, though, which reflect the reality of the criminal justice system rather than focusing on more abstract legal doctrine. Heavy caseloads require prosecutors to prioritize between cases and dispose of many prosecutions by obtaining guilty pleas.[136] Most of the discretionary decisions that prosecutors make in this process would, in practice, be very difficult for a court to review. The Supreme Court has acknowledged as much: "[s]uch factors as . . . the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake."[137] By steadily adding to the federal criminal code, Congress forced law enforcement and prosecutors to choose which criminals to pursue and how to charge them. Some prosecutorial discretion is inevitable in such a system.

Gerard Lynch has argued that nostalgia for the criminal trial and regret over prosecutorial discretion distract from the projects of analyzing and improving the system we actually have.[138] Instead, he accepts the inevitability of "prosecutorial adjudication" and advocates improving the system by introducing process values (such as hearings and discovery) into the pre-trial phase.[139] None of Lynch's suggestions would curtail prosecutorial discretion; as a result, he recognizes that they may be unsatisfying.[140] Nor would his suggestions (or other realistic reform efforts) address the doctrinal concerns associated with the separation of powers justification for prosecutorial discretion.

The question raised in this Article is not how to limit prosecutorial discretion, however, but how to account for the theory of prosecutorial discretion in federal case law. I have argued that in federal case law, the *nolle prosequi* was, to some extent, the predecessor to the separation of powers theory of prosecutorial discretion. The *nolle prosequi* was the only form of public "prosecutorial discretion" in England at the time of the American Revolution, and English courts did not review the Attorney General's decision to use the procedure. Although the United States

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[136] *See supra* notes 32 to 41 and accompanying text.

[137] Wayte v. United States; 470 U.S. 598, 607 (1985).

[138] *See* Lynch, *supra* note 39.

[139] *See id.*

[140] Lynch describes his article as "a defense of existing prosecutorial practice by reference to an administrative law model, coupled with a reluctance to impose administrative law standards on prosecutors, sounds suspiciously like an endorsement of the status quo—a dangerous position for an academic." *Id.* at 2145.

developed different arrangements for prosecuting criminal cases, American courts adapted the practice of judicial *nolle* deference to prosecutorial decisions. The executive's power to issue a *nolle* unilaterally likewise became the executive's power to make all prosecutorial decisions unilaterally.

These origins help to explain, but not justify, the theory's weaknesses and its tension with other areas of law. Prosecutorial discretion may be necessary, but not because the separation of powers doctrine makes it so. As a result, the federal courts may be better served by a theory of prosecutorial discretion designed for the American system of public prosecution, rather than adapted from a system very different from our own.