

Runaway Prosecutorial Discretion

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Abstract

The federal prosecutor’s power is unprecedented, and no one seems to want to do anything about it. The Executive believes its views on prosecutorial discretion control, and the Judiciary has thrown up its hands, content to let the Executive do as it sees fit. The Framers would have been stunned.

This Note argues that the accumulation of power in the hands of the Executive with respect to prosecutorial discretion, which I term “runaway” prosecutorial discretion, is unconstitutional under the nondelegation doctrine. Relying on the Court’s own precedents defining legislative power, I analyze how the traditional view of prosecutorial discretion as wholly executive power misses the mark. Instead, I contend that some subset of prosecutorial discretion ought to be considered legislative in nature.

Tools created and relied on by the Executive to guide its discretion, such as the Principles of Federal Prosecution, require more than nil congressional input under the nondelegation doctrine. The Department of Justice’s repeated reversals on

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enforcing mandatory minimum sentences demonstrate the danger of flouting Congress’s instructions here. Any real conception of the nondelegation doctrine, whether under the intelligible principle test or a more rigorous framework like the one proposed by Justice Gorsuch in Gundy v. United States, demands more.

Introduction

Attorney General Merrick Garland recently clarified his view of federal prosecutors’ role in the American criminal justice system:

“[The Department of Justice’s] job is not to take orders from the President, from Congress, or from anyone else, about who or what to criminally investigate. As the President himself has said and I reaffirm today, I am not the President’s lawyer. I will also add I am not Congress’ prosecutor. The Justice Department works for the American people.”¹

Garland’s view echoes one of his most influential predecessors, Robert Jackson²—but would have greatly surprised the Framers. One scholar observed that, “Presidents Washington, Adams, and Jefferson *routinely* and *publicly* directed district attorneys and the attorneys general to start and stop prosecutions.”³ The entire notion of prosecutorial independence is thus disputed. Some argue that the rule of law requires the

¹ *Oversight of the U.S. Department of Justice Before the H. Judiciary Comm. on the Judiciary*, 118th Cong. 7 (2023) (statement of Merrick Garland, U.S. Att’y Gen.).

² See Robert Jackson, U.S. Att’y Gen., *The Federal Prosecutor*, Address Before the Second Annual Conference of United States Attorneys (Apr. 1, 1940), in 24 J. AM. JUDICATURE SOC’Y 18 (1940).

³ Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 527 (2005) (emphasis added).

Department of Justice to operate independently from the President while others contend that the opposite is true.⁴

However, in one area of the prosecutorial independence debate, there is consensus: prosecutorial discretion. All three branches take for granted that prosecutors' exercise of discretion is executive power.⁵ In this Note, I argue that this is a mistake—our current understanding of prosecutorial discretion is inconsistent with the Constitution's mandate of checks and balances under the nondelegation doctrine.⁶ I've termed this state of affairs "runaway prosecutorial discretion." Proceeding in three Parts, this Note first describes the overwhelming power bestowed on federal prosecutors and observes how each branch agrees that prosecutorial discretion is executive power.⁷ Part II then surveys the nondelegation doctrine's meaning and application in our constitutional system.⁸ In Part III, I argue that the exercise of some subset of prosecutorial discretion exemplifies legislative, not executive, power because of the breadth and unreviewability of the Principles of Federal Prosecution and the Department of Justice's mandatory minimum policies.⁹ After addressing potential counterarguments raised by *SEC v. Jarkesy*, Part III then turns to how runaway prosecutorial discretion fails the nondelegation tests. By analogizing to *Panama Refining* and *A.L.A. Schechter Poultry*, I argue that Congress has provided no intelligible principle to the Executive to guide the exercise of prosecutorial discretion.¹⁰ I then examine how the

⁴ See *id.* at 522–26 (collecting sources); Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 3–7 (2018) (collecting sources).

⁵ See *infra* subpart I(B).

⁶ See *infra* Part III.

⁷ See *infra* Part I.

⁸ See *infra* Part II.

⁹ See *infra* subpart III(A).

¹⁰ See *infra* section III(B)(1).

nondelegation analysis offered by Justice Gorsuch in his dissent in *Gundy v. United States* likely prohibits runaway prosecutorial discretion.¹¹

It's not enough for Congress to set out crimes and leave the rest to the prosecutor. For prosecutorial discretion to pass constitutional muster under the nondelegation doctrine, Congress needs to provide more. I conclude by proposing potential solutions to rein in runaway prosecutorial discretion and solve this separation of powers problem.

I. The Unchecked Prosecutor

This Part lays the groundwork for my argument that prosecutorial power is not wholly executive in nature. I begin by describing the vast power afforded to federal prosecutors and discussing the consequences that flow from the exercise of that power. I then comment on how the Executive Branch and the Judiciary traditionally understand prosecutorial power as executive power.

A. *Federal Prosecutors Are Among the Most Powerful People in America.*

Federal prosecutors wield tremendous power in American life.¹² The Supreme Court has referred to the prosecutorial power as “enormous,”¹³ “immense,”¹⁴ and “expansive.”¹⁵ Attorney General Robert Jackson, in his seminal speech to the U.S. Attorneys more than eighty years ago, contended that no person commands more influence over the “life, liberty, and reputation” of her fellow citizens than the prosecutor.¹⁶ “Only

¹¹ See *infra* section III(B)(2).

¹² See, e.g., Jackson, *supra* note 2, at 18.

¹³ *Arizona v. Manypenny*, 451 U.S. 232, 247 (1981).

¹⁴ *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting).

¹⁵ *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811 (1987).

¹⁶ Jackson, *supra* note 2, at 18.

someone who has worked in the field of law enforcement,” Justice Scalia remarked, “can fully appreciate the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation.”¹⁷

A prosecutor “can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts,” bring an indictment and detain the defendant prior to his trial.¹⁸ Nearly every question related to a criminal prosecution is left up to the prosecutor.¹⁹ Who decides whether to investigate? The prosecutor.²⁰ Whether to charge? That’s in the prosecutor’s “exclusive authority and absolute discretion.”²¹ And which statute to charge with? Again: up to the prosecutor.²² Justice Scalia went so far as to claim that the Executive essentially “nullif[ies] some provisions of law by the mere failure to prosecute—the exercise of so-called prosecutorial discretion.”²³

Once charges are brought, it is a near certainty that a defendant’s life will be devastated.²⁴ Defendants plead guilty nearly ninety percent of the time.²⁵ And those who do brave a

¹⁷ *Morrison*, 487 U.S. at 727.

¹⁸ Jackson, *supra* note 2, at 18.

¹⁹ See *Prosecutorial Discretion*, 51 GEO. L.J. ANN. REV. CRIM. PROC. 269, 269–73 (2022).

²⁰ See *Vuitton et Fils S.A.*, 481 U.S. at 807.

²¹ *United States v. Nixon*, 418 U.S. 683, 693 (1974) (citing *The Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1869)).

²² See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

²³ *Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J., concurring).

²⁴ See, e.g., Selwyn Raab, *Donovan Cleared of Fraud Charges by Jury in Bronx*, N.Y. TIMES (May 26, 1987), <https://www.nytimes.com/1987/05/26/nyregion/donovan-cleared-of-fraud-charges-by-jury-in-bronx.html> (“Which office do I go to to get my reputation back?”).

²⁵ See U.S. DISTRICT COURTS, CRIMINAL DEFENDANTS DISPOSED OF, BY TYPE OF DISPOSITION AND OFFENSE, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2022 (2023),

trial have only a seventeen-percent chance of winning an acquittal.²⁶ This has transformed the prosecutor into more than just the representative of the government in a criminal action,²⁷ but also judge, jury, and executioner in the vast majority of cases.²⁸ Tens of thousands of individuals face the might of the federal prosecutor each year: in the twelve months leading up to October 2022, nearly 72,000 defendants had their cases resolved in federal court.²⁹ As of early 2024, there were over 155,000 federal inmates.³⁰ The prosecutor’s power comes with real consequences for the American people, and so when she “acts from malice,” she can be “one of the worst” forces in our society.³¹ The Framers warned against the concentration of such extensive power in one branch, which raises separation of powers questions about the status quo.³²

B. The Judiciary and the Executive Branch View Prosecutorial Discretion as Executive Power.

Courts traditionally conceive of prosecutorial discretion as executive power, and this conclusion is uncontroversial within

https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2022.pdf [[hereinafter DISPOSITIONS OF CRIMINAL DEFENDANTS](#)].

²⁶ See *id.*

²⁷ See *United States v. Texas*, 599 U.S. 670, 679 (2023) (“The Executive Branch—not the Judiciary—makes arrests and prosecutes offenses on behalf of the United States.”) (citing *United States v. Nixon*, 418 U.S. 683, 693 (1974)); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (describing prosecutors as “the President’s delegates”).

²⁸ See Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 8–9 (2009).

²⁹ [DISPOSITIONS OF CRIMINAL DEFENDANTS](#), *supra* note 25.

³⁰ U.S. DEP’T OF JUST., FEDERAL BUREAU OF PRISONS, POPULATION STATISTICS (Feb. 29, 2024), https://www.bop.gov/mobile/about/population_statistics.jsp#.

³¹ Jackson, *supra* note 2, at 18.

³² See THE FEDERALIST NO. 47 (James Madison).

the Judicial Branch.³³ The Supreme Court has said that prosecutorial discretion is an “integral,”³⁴ “core power[] of the Executive Branch”³⁵ that is “deeply rooted” in American history.³⁶ In this reading, the prosecutorial power flows from the Take Care Clause.³⁷ The Attorney General “is the hand of the President in taking care that the laws of the United States . . . in the prosecution of offenses be faithfully executed.”³⁸ The federal prosecutor, according to this understanding, is an Executive Branch official wielding executive authority when she levies a charge against a defendant.³⁹ However, one leading scholar has noted that this unanimity stems from jurists “merely reiterating what their predecessors [have] been saying for well over two centuries.”⁴⁰ Unsurprisingly, the Executive also takes a broad view of its power to exercise prosecutorial discretion.⁴¹ According to the Principles of Federal Prosecution, which the Department of Justice has promulgated to guide its attorneys’ enforcement discretion, the prosecutor has “wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of federal criminal law.”⁴² In practice, this

³³ See, e.g., *Morrison v. Olson*, 487 U.S. 654, 691 (1988); *id.* at 705–06 (Scalia, J., dissenting).

³⁴ *United States v. LaBonte*, 520 U.S. 751, 762 (1997) (Breyer, J., dissenting).

³⁵ *United States v. Armstrong*, 517 U.S. 456, 467 (1996).

³⁶ *United States v. Texas*, 599 U.S. 670, 684 (2023).

³⁷ See U.S. CONST. art. II, §3; Tara Leigh Grove, *Standing as an Article II Non-delegation Doctrine*, 11 U. PA. J. CONST. L. 781, 783 (2009).

³⁸ *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922) (citation omitted).

³⁹ See *Texas*, 599 U.S. at 679.

⁴⁰ Prakash, *supra* note 3, at 532.

⁴¹ See Theodore B. Olson, *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101–02 (1984); Karl R. Thompson, *Prosecutorial Discretion Regarding Citations for Contempt of Congress*, 38 Op. O.L.C. 1 (2014).

⁴² Principles of Federal Prosecution, U.S. Dep’t of Just., Just. Manual § 9-27.110 cmt. (2023) [hereinafter Principles of Federal Prosecution].

deference allows the Executive to set all of the rules determining who gets prosecuted.⁴³

The consequences of this broad conception of prosecutorial power demand a closer look because courts have indicated that the Executive’s authority in this area comes with little oversight from the other branches of government.⁴⁴ The Judiciary tends to balk when litigants have implored it to inquire into prosecutors’ motives.⁴⁵ “[T]he decision to prosecute,” the Court has remarked, “is particularly ill-suited to judicial review.”⁴⁶ It has declared that “the choice of how to prioritize and how aggressively to pursue legal actions against defendants” is in the Executive’s discretion.⁴⁷ Lawsuits claiming that the Executive isn’t arresting or prosecuting enough wrongdoers “run up against the Executive’s Article II authority to enforce federal law” and are dismissed.⁴⁸ The Court has even suggested that explicit grants from Congress allowing the Judiciary to inquire into the Executive’s enforcement discretion could run afoul of Article II.⁴⁹ Just last Term, the Court remarked that the Executive’s need to “prioritize its enforcement efforts” in response to a lack of resources and “the ever-shifting public-safety and public-welfare needs of the American people” puts such decisions beyond the reach of the Judiciary.⁵⁰

⁴³ See generally *id.* § 9-27.001–.760.

⁴⁴ See *Texas*, 599 U.S. at 677 (concluding that there is no “precedent, history, or tradition” of courts intervening in the Executive’s prosecution policies).

⁴⁵ See, e.g., *id.* at 678; *United States v. LaBonte*, 520 U.S. 751, 762 (1997).

⁴⁶ *Wayte v. United States*, 470 U.S. 598, 607 (1985).

⁴⁷ *TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021).

⁴⁸ *Texas*, 599 U.S. at 678; see also *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973) (“[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”).

⁴⁹ See *Texas*, 599 U.S. at 682 n.4.

⁵⁰ *Id.* at 679–80.

To be sure, the Court has recognized constitutional limitations on the Executive's exercise of prosecutorial discretion.⁵¹ The Executive does not have "some freestanding or general constitutional authority to disregard statutes requiring or prohibiting executive action."⁵² Selective prosecutions, where prosecutors discriminate against a protected class, and vindictive prosecutions, where prosecutors impermissibly retaliate against defendants, are forbidden.⁵³ But proving such claims is rare,⁵⁴ and courts must presume that prosecutors act appropriately.⁵⁵ And while the Court has suggested that "an extreme case of non-enforcement" may exceed the Executive's authority,⁵⁶ the remedy in such a case is unclear because the Judiciary cannot compel a prosecutor to bring an indictment.⁵⁷ Beyond these claims, the Court has not expounded on what other constitutional limitations there are on prosecutorial discretion.⁵⁸

⁵¹ *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) ("And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise.").

⁵² *Texas*, 599 U.S. at 684.

⁵³ See *United States v. Armstrong*, 517 U.S. 456, 464–65 (1996) (selective prosecution); *United States v. Goodwin*, 457 U.S. 368, 371 (1982) (vindictive prosecution).

⁵⁴ Kristin E. Kruse, *Proving Discriminatory Intent in Selective Prosecution Challenges—An Alternative Approach to United States v. Armstrong*, 58 SMU L. REV. 1523, 1534 (2005) ("This leaves it difficult, if not impossible, for defendants to offer the requisite proof for a prima facie case of selective prosecution.").

⁵⁵ *Armstrong*, 517 U.S. at 464.

⁵⁶ *Texas*, 599 U.S. at 683.

⁵⁷ See *United States v. Cox*, 342 F.2d 167, 172 (5th Cir. 1965), *cert. denied*, 381 U.S. 935 (1965).

⁵⁸ See *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) ("And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise."); *United States v. Batchelder*, 442 U.S. 114, 115 (1979) ("A prosecutor's discretion to choose between [statutes] is not 'unfettered'; selectivity in the enforcement of criminal laws is subject to constitutional constraints.").

And so emerges a dissonance between the prosecutor's vast power and the limited checks on it: as the courts currently see it, the prosecutor may wield her overwhelming, essentially unchecked power over American citizens with little to no oversight from the other branches of government. Vesting such significant authority in the Executive raises serious separation of powers implications for both individuals and our constitutional structure.⁵⁹ While judicial deference to the Executive may appear to respect the separation of powers,⁶⁰ in the area of prosecutorial discretion it is an abdication of the checks and balances *also* required by the Constitution.⁶¹ This state of affairs, I argue, can aptly be understood as “runaway” prosecutorial discretion—a condition where the careful, measured discretion expected of federal prosecutors could bleed into caprice without constitutional safeguards. I now turn to the nondelegation doctrine, which has not been previously discussed in the context of prosecutorial discretion, to argue that it requires reining in the expansive power exercised by the Executive here.

II. The Nondelegation Doctrine and Legislative Power

This Part explains the history and purpose of the nondelegation doctrine in our constitutional system and examines a fundamental issue that applies to every nondelegation question: what exactly is legislative power? This discussion provides

⁵⁹ See *Bordenkircher*, 434 U.S. at 365 (“There is no doubt that the breadth of discretion that our country’s legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse.”); *In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process.”).

⁶⁰ See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

⁶¹ See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 993 (2006) (“[T]he government faces almost no institutional checks when it proceeds in criminal matters . . . tak[ing] the worst possible approach to separation of powers in the criminal law.”).

foundation for my argument that the nondelegation doctrine precludes runaway prosecutorial discretion.

A. *The Nondelegation Doctrine Implicates Prosecutorial Discretion.*

The Framers constructed a constitutional system in which “the power to make the law and the power to enforce it” are cabined in separate branches of the government.⁶² In addition to this separation of powers, the Framers’ constitutional order requires the branches to maintain checks and balances on each other.⁶³ As Madison observed, giving each branch the ability to “resist encroachments” from the others is “the great security” from excessive power accumulating in any one branch,⁶⁴ which, according to Thomas Jefferson, would be “despotic.”⁶⁵ Were such constraints not to exist, there would be “tyranny.”⁶⁶ Even in situations where a branch attempts “to accomplish desirable objectives,” checks and balances will kick in to prevent an offending branch from “exceeding the outer limits of its power.”⁶⁷

The nondelegation doctrine is one of the principles that serves to implement this constitutional stricture.⁶⁸ The doctrine

⁶² *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 74 (2015) (Thomas, J., concurring).

⁶³ See THE FEDERALIST NO. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961); see also *Mistretta v. United States*, 488 U.S. 361, 380–82 (1989).

⁶⁴ THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961); see also *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2202 n.8 (2020) (deriding an executive agency because it “acts as a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens”).

⁶⁵ Thomas Jefferson, *Query 13*, in NOTES ON THE STATE OF VIRGINIA 126 (1787).

⁶⁶ THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

⁶⁷ *INS v. Chadha*, 462 U.S. 919, 951 (1983).

⁶⁸ See *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

stems from Article I vesting “*all*” legislative power in Congress,⁶⁹ which forbids it “from transferring its legislative power” to the Executive Branch.⁷⁰ This reflects the separation of powers maxim that the American people shall not “be bound by any laws” except for the ones enacted by the legislators they pick.⁷¹ But how exactly to understand and apply the nondelegation doctrine is an open question.⁷² For nearly a century, the leading view held that a nondelegation problem existed only where Congress has delegated *excessive* discretion to the Executive, which is reflected in the intelligible principle test.⁷³ Under this test, where Congress provides the Executive with an “intelligible principle” for how to exercise delegated legislative power, it’s constitutionally allowed to do so.⁷⁴ The inquiry proceeds by asking (1) whether Congress has handed over its legislative power to the Executive, and, if yes, (2) whether it has provided the Executive with an intelligible principle to guide the exercise of that discretion.⁷⁵ Any discussion of the intelligible principle test requires noting that, historically, application of the test has resulted in capacious delegations of power to the Executive.⁷⁶ Constitutional intelligible principles have included the “public

⁶⁹ U.S. CONST. art. I, § 1 (emphasis added) (cleaned up).

⁷⁰ See *Gundy*, 139 S. Ct. at 2121.

⁷¹ *Id.* at 2133–34 (Gorsuch, J., dissenting) (quoting JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 141 (1690)).

⁷² See Ilan Wurman, *As-Applied Nondelegation*, 96 TEXAS L. REV. 975, 1007 (2018).

⁷³ See *id.* at 979–81.

⁷⁴ See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (internal quotations omitted).

⁷⁵ See *Gundy*, 139 S. Ct. at 2123 (plurality opinion).

⁷⁶ See *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 85 (2015) (Thomas, J., concurring).

interest”;⁷⁷ “fair and equitable” prices;⁷⁸ and measures “requisite to protect the public health.”⁷⁹ The intelligible principle test reflects the judgment that if Congress had to do everything that conceivably constitutes legislative power, our government would grind to a halt.⁸⁰ It can get help from the Executive, so long as “the extent and character of [the] assistance [is] fixed according to common sense and the inherent necessities of the government co-ordination.”⁸¹

The minority view of what constitutes a nondelegation problem, instead of focusing on excessive discretion, forbids granting to the Executive “*any* amount of discretion to determine *certain* things”⁸² This view has gained more traction in recent years and is championed by Justice Thomas and Justice Gorsuch.⁸³ The Justices’ concerns with the intelligible principle test stem in part from the Court repeatedly upholding “even very broad delegations” under it.⁸⁴ For Justice Thomas, there exists a category of “core [legislative] functions” that cannot be delegated away; “the discretion inherent in executive power does *not* comprehend the discretion to formulate generally applicable rules of private conduct.”⁸⁵ Justice Thomas’s “formalist” approach would likely annul a significant portion of

⁷⁷ Nat’l Broad. Co. v. United States, 319 U.S. 190, 216 (1943) (internal quotations omitted).

⁷⁸ Yakus v. United States, 321 U.S. 414, 427 (1944).

⁷⁹ Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 472 (2001) (internal quotations omitted).

⁸⁰ See, e.g., Mistretta v. United States, 488 U.S. 361, 372 (1989).

⁸¹ *Id.* (quoting J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928)).

⁸² Wurman, *supra* note 72, at 1007.

⁸³ See *id.*; Gundy v. United States, 139 S. Ct. 2116, 2135–37 (Gorsuch, J., dissenting)

⁸⁴ See *Gundy*, 139 S. Ct. at 2129 (plurality opinion).

⁸⁵ Dep’t of Transp. v. Ass’n of Am. R.Rs., 575 U.S. 43, 69–70 (2015) (Thomas, J., concurring).

the administrative state.⁸⁶ Justice Gorsuch, on the other hand, explored a more workable framework for analyzing nondelegation questions in his dissent in *Gundy v. United States*. He laid out three categories of permissible delegations: (1) where Congress sets the policy, the Executive may “fill up the details”; (2) where Congress writes the rule, it may condition the rule’s applicability on “executive fact-finding”; and (3) “Congress may assign the executive and judicial branches certain non-legislative responsibilities.”⁸⁷

While the Court seems poised to curb the Executive’s discretion under the nondelegation doctrine in other areas of jurisprudence, such as the administrative state,⁸⁸ it has not discussed doing so in the area of prosecutorial discretion.⁸⁹ But the Judiciary’s near-total capitulation to the Executive as described in Part I is complicated further because the Court has considered, at least obliquely, that the nondelegation doctrine is implicated by prosecutorial discretion. It has twice described the prosecutorial power as delegated to the Executive by Congress: first, in *United States v. Nixon*, where it said that “Congress has vested” the power to prosecute in the Attorney General,⁹⁰ and second, in *United States v. Batchelder*, where it described prosecutorial discretion as “the power that Congress has delegated to” federal prosecutors.⁹¹ Both of these pronouncements suggest that the nondelegation doctrine should

⁸⁶ See Kimberly L. Wehle, *Defining Lawmaking Power*, 51 WAKE FOREST L. REV. 881, 908 (2016).

⁸⁷ *Gundy*, 139 S. Ct. at 2136–37 (Gorsuch, J., dissenting).

⁸⁸ See Daniel E. Walters, *Decoding Nondelegation After Gundy: What the Experience in State Courts Tells Us About What to Expect When We’re Expecting*, 71 EMORY L.J. 417, 437–41 (2022).

⁸⁹ See *supra* subpart I(B).

⁹⁰ *United States v. Nixon*, 418 U.S. 683, 694 (1974) (citing 28 U.S.C. § 516).

⁹¹ *United States v. Batchelder*, 442 U.S. 114, 126 (1979).

be a live issue here despite not having yet been directly addressed by the Court.

B. The Definition of Legislative Power Is Uncertain.

If prosecutorial discretion is indeed a purely executive function, then there is not a constitutional issue with it as currently understood; a prosecutor may exercise her discretion in any fashion she chooses (subject to the constitutional bounds discussed in Part I) because the Constitution allows her to do so.⁹² In this section, I argue that a narrow view of legislative power—one that would exclude any segment of prosecutorial discretion—is inconsistent with the Court’s jurisprudence. At a minimum, both the traditional nondelegation framework and the evolving nondelegation analysis ascendant at the Court reflect confusion and disagreement over what constitutes legislative power.

This is no surprise because there is no consensus definition of legislative power.⁹³ As Madison wrote, “Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary.”⁹⁴ Over two centuries ago, the Court remarked that the interplay between each of the branches and the exercise of legislative power “never has been, and perhaps never can be, definitely stated.”⁹⁵ Since then, the Court has not cleared up the

⁹² See *Gundy*, 139 S. Ct. at 2137 (2019) (Gorsuch, J., dissenting) (quoting David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1260 (1985)); *Marbury v. Madison*, 5 U.S. 137, 162 (1803) (“The discretion of the executive is to be exercised until the appointment has been made.”).

⁹³ See M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 612–14 (2001) (collecting authority to argue that the branches’ powers “are far from self-defining”).

⁹⁴ THE FEDERALIST NO. 37, at 228 (James Madison) (Clinton Rossiter ed., 1961).

⁹⁵ See *Fletcher v. Peck*, 10 U.S. 87, 136 (1810).

meaning of legislative power.⁹⁶ Scholars debate it as well.⁹⁷ “[L]egislative power,” according to one particularly unhelpful definition, “is the power to make law.”⁹⁸ Justice Douglas once described it as a “determination that sanctions should be applied, that the hand of the law should be placed upon the parties, and that the force of the courts should be directed against them.”⁹⁹ Justice Gorsuch defines legislative power as the ability to prescribe “the rules by which the duties and rights of every citizen are to be regulated” or the “general rules for the government of society.”¹⁰⁰ And for Justice Thomas, the “formulation of generally applicable rules of private conduct” is legislative power.¹⁰¹

The Court wrestled with the difficulty of defining legislative power by testing its contours in *INS v. Chadha*.¹⁰² The case concerned the constitutionality of a statute allowing a single House of Congress to overrule the Attorney General’s suspension of an individual’s deportation proceedings¹⁰³; Chadha appealed because the House of Representatives passed a resolution

⁹⁶ See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2624–25 (2022) (Gorsuch, J., concurring).

⁹⁷ Compare Schoenbrod, *supra* note 92, at 1227 (delegating legislative power is unconstitutional), with Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. UNIV. L. REV. 323, 324–28 (1987) (delegating legislative power is necessary).

⁹⁸ *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018); see also John Harrison, *Legislative Power and Judicial Power*, 31 CONST. COMMENT. 295, 296 (2016) (arguing that legislative power is “the power to make legal rules”).

⁹⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 630 (1952) (Douglas, J., concurring) (cleaned up).

¹⁰⁰ *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (quoting THE FEDERALIST NO. 78, at 465 (Clinton Rossiter ed., 1961) (Alexander Hamilton); then quoting *Fletcher*, 10 U.S. at 136).

¹⁰¹ *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring).

¹⁰² *INS v. Chadha*, 462 U.S. 919, 951–59 (1983).

¹⁰³ *Id.* at 923.

requiring his deportation.¹⁰⁴ The Court—ruling for Chadha—held that while the statute’s “one-House veto is a useful political invention,”¹⁰⁵ the Article I bicameral passage and presentment requirements on legislative action demand the statute be found unconstitutional.¹⁰⁶ Whether actions are considered legislative “depends not on their form but upon ‘whether they contain matter which is properly to be regarded as legislative in its character and effect.’”¹⁰⁷ In *Chadha*, the House’s purported veto constituted legislative action because it “had the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the Legislative Branch.”¹⁰⁸

This array of opinions characterizing legislative power demonstrates that defining it is often an exercise in line drawing, especially when considered in the criminal justice context. At one end of the spectrum is an easy case: a criminal statute. Under Justice Douglas’s definition, Congress passing a criminal statute would surely be an example of exercising legislative power because it is “a determination that sanctions should be applied” to a person who engages in prohibited conduct. Under Justice Gorsuch’s definition, Congress creating a criminal code is legislative power because it regulates the duties and rights of every citizen. And criminal statutes are generally applicable rules regulating private conduct, making them legislative power under Justice Thomas’s test, too. At the other end of the spectrum is the everyday choice made by a prosecutor deciding whether to charge a target or not; this is uncontroversially executive power.¹⁰⁹ In Part III, I argue that, at a minimum, some

¹⁰⁴ *Id.* at 927–28, 952.

¹⁰⁵ *Id.* at 945 (internal quotations omitted).

¹⁰⁶ *See id.* at 957–59.

¹⁰⁷ *Id.* at 952 (quoting S. REP. NO. 54-1335, at 8 (1897)).

¹⁰⁸ *Id.*

¹⁰⁹ *See supra* subpart I(B).

subset of prosecutorial discretion falls on the other side of the line and ought to be considered legislative power.

III. Runaway Prosecutorial Discretion Flouts the Nondelegation Doctrine

In Part II, I discussed the nondelegation doctrine and explained how the courts understand legislative power. The upshot is that an argument claiming that prosecutorial discretion is *solely* legislative power would collide with insurmountable precedent and defy common sense.¹¹⁰ This Part instead argues that, if legislative power means what the Court *says* it means, then there must exist some actions taken by the Executive vis-à-vis prosecutorial discretion that at least implicate legislative power. I contend that two distinct aspects of prosecutorial discretion—the Principles of Federal Prosecution and the Department of Justice’s mandatory minimum policies—reflect the exercise of legislative power because of their breadth and unreviewability. I then demonstrate why each of these items fail both the expansive intelligible principle test and a potential new nondelegation paradigm.

A. *Some Subset of Prosecutorial Discretion Is Legislative Power.*

This subpart argues that the Principles of Federal Prosecution and the Department of Justice’s policies on mandatory minimum sentences should be considered legislative power because of their breadth and unreviewability. In examining these instances of prosecutorial discretion, I seek to show how they differ from a more ordinary application of prosecutorial discretion, such as the decision to prosecute in a particular case.

¹¹⁰ See *id.*; Paul D. Clement, Distinguished Lecturer in Law, Separation of Powers Seminar Lecture at Georgetown University Law Center (Nov. 9, 2023) (“Asking for intelligible principles in this context makes no sense.”).

1. The Principles of Federal Prosecution Are Legislative Power.

The Principles of Federal Prosecution¹¹¹ appear to fall within the limits of legislative power. The Principles are paramount to the criminal justice system; they guide the decision-making of every federal prosecutor.¹¹² Crafted by the Department of Justice to promote “the fair and effective administration of justice,”¹¹³ whether or not a prosecutor may subject a defendant to her authority hinges on implementing the Principles.¹¹⁴ The Principles cover every aspect of a prosecution, including initiating or declining to charge,¹¹⁵ selecting charges,¹¹⁶ offering alternatives to prosecution¹¹⁷ or immunity agreements,¹¹⁸ engaging in plea bargaining,¹¹⁹ and making sentencing recommendations.¹²⁰ While the Principles purport to allow prosecutors “flexibility,”¹²¹ departing from their commands may subject an attorney to disciplinary action.¹²² Indeed, at least one prominent U.S. Attorney has publicly stated that he believes the Principles bind him.¹²³

¹¹¹ See generally Principles of Federal Prosecution, *supra* note 42, § 9-27.001–.760.

¹¹² *Id.* § 9-27.110 cmt.

¹¹³ *Id.*

¹¹⁴ See *id.* § 9-27.220 (describing the grounds for commencing or declining prosecution).

¹¹⁵ *Id.* § 9-27.200–.260.

¹¹⁶ *Id.* § 9-27.300–.320.

¹¹⁷ *Id.* § 9-27.250.

¹¹⁸ *Id.* § 9-27.600–.630.

¹¹⁹ *Id.* § 9-27.330–.530.

¹²⁰ *Id.* § 9-27.710–.745.

¹²¹ *Id.* § 9-27.001.

¹²² *Id.* § 9-27.130.

¹²³ See Devlin Barrett & Jacqueline Alemany, *Hunter Biden Prosecutor David Weiss Says Justice Officials Never Blocked Him*, WASH. POST (Nov. 7,

Promulgating the Principles should not be considered executive in nature because they meet every test of legislative power. They don't just "resemble" lawmaking—they *are* lawmaking under *Chadha* because they have the "purpose and effect of altering the legal rights" of defendants, who are individuals "outside the legislative branch." By delineating when a charge should be brought, the Principles operate as "a determination that sanctions should be applied" to a defendant. They decide when "the hand of the law" and "the force of the courts" shall be placed against a defendant by compelling his participation in a criminal proceeding; they fail Justice Douglas's test. Under Justice Gorsuch and Justice Thomas's definitions, it's a closer call. The Principles *do* regulate "the duties and rights of every citizen" in the same way a criminal statute does, and they are "generally applicable rules" that regulate private conduct because they determine which behavior will be punished and which will escape the prosecutor's attention. But a plausible argument can be made that the Principles govern official behavior—the behavior of the prosecutor—not private conduct. This is significant because at the Founding, it was likely permissible for Congress to delegate the "power to direct official behavior," as opposed to private conduct.¹²⁴ At bottom, though, this is a distinction without a difference. While the Principles *de jure* guide the *prosecutor*, they *de facto* function to regulate private conduct because it is the *defendant's* behavior that triggers a clause's applicability.

If one remains convinced that the Executive Branch and the Judiciary have it right, and the Principles are executive power, then that belief must be squared with being a constitutional

2023, 2:48 PM) (statement of federal prosecutor David C. Weiss), <https://www.washingtonpost.com/national-security/2023/11/07/hunter-biden-weiss-testimony-congress/> ("I am bound by federal law, the Principles of Federal Prosecution, and DOJ guidelines.").

¹²⁴ See Wurman, *supra* note 72, at 1008–09.

rarity. The accretion of power in the Executive here is precisely what the separation of powers is supposed to guard against.¹²⁵ Lawmaking, under the Constitution’s design, should not be this easy—if condoned, it could “pose a serious threat to individual liberty.”¹²⁶ The Principles illustrate this danger in two ways: their breadth and their unreviewability, which are what separate them from the everyday exercise of prosecutorial discretion. The Principles’ breadth makes them no different from the criminal statutes passed by Congress because they are binding on every prosecution. Compared to a prosecutor’s decision in a particular case, creating a policy that applies across the board should give us pause because it gets closer to lawmaking.

Just as worrisome from the separation of powers perspective is the Principles’ unreviewability. The *Chadha* Court posited that executive action can “*always*” be checked by its authorizing legislation, subjected to judicial review, or modified or revoked by Congress.¹²⁷ But no law authorizes the Principles; the Executive claims inherent authority to create them.¹²⁸ And, as already discussed, judicial review of prosecutorial decisionmaking is heavily disfavored. Even if this were not the case, a defendant would likely remain without recourse—the Principles include a “Non-Litigability” clause that seeks to prevent parties from suing over them: “[The Principles] are not intended to create a substantive or procedural right or benefit, enforceable at law, and may not be relied upon by a party to litigation with the United States.”¹²⁹ And so defendants have become bound by

¹²⁵ See THE FEDERALIST NO. 47 (James Madison).

¹²⁶ *West Virginia v. EPA*, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring) (first citing THE FEDERALIST NO. 48, at 309–12 (James Madison) (Clinton Rossiter ed., 1961); then citing THE FEDERALIST NO. 73, at 441–42 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

¹²⁷ *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (emphasis added).

¹²⁸ See Principles of Federal Prosecution, *supra* note 42, § 9-27.110 cmt.

¹²⁹ *Id.* § 9-27.150.

the Principles that were not written by legislators, did not pass either House of Congress, were not presented to the President, and are effectively immune from oversight by any other branch of government; the prosecutors wrote their own rules.¹³⁰ For these reasons, the Principles should be considered legislative in nature.

2. Executive Mandatory Minimum Policies Are Legislative Power.

The prior section argued that a proper understanding of legislative power encompasses the Principles of Federal Prosecution. This section provides another example of where this is likely the case: the Department of Justice's shifting policies on enforcing mandatory minimum punishments.

The Principles of Federal Prosecution show what has resulted in the absence of congressional authorization. But what happens when the Executive *displaces* Congress's policy preferences for its own? Under our current understanding of prosecutorial discretion, the Executive wins every time, stretching the Constitution's checks and balances to their limit. Armed with this expectation, in 2013, Attorney General Eric Holder issued a memorandum forbidding prosecutors from charging defendants under statutes that would make them eligible for mandatory minimum penalties in certain circumstances.¹³¹

¹³⁰ Justice Gorsuch suggests that "Congress . . . pass[ing] off its legislative power to the executive branch" is constitutionally problematic. See *Gundy v. United States*, 139 S. Ct. 2116, 2133–35 (2019) (Gorsuch, J., dissenting) (quoting JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 141 (1690)).

¹³¹ Memorandum from Eric Holder, U.S. Att'y Gen., Dep't of Just., to the U.S. Att'ys and Assistant Att'y Gen. for the Crim. Div., Dep't Pol'y on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases 2 (Aug. 12, 2013) [hereinafter Holder Memorandum], <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policypon-charging->

While the merits of mandatory minimums are debated,¹³² Congress has decided that individuals who commit certain crimes or offend repeatedly require long sentences.¹³³ Contra this judgment, Attorney General Holder went in another direction.¹³⁴ He decided that, in certain cases—even where the conduct at issue met the threshold established by the statute to qualify for the mandatory minimum punishment—federal prosecutors “should decline to charge the quantity necessary to trigger a mandatory minimum sentence.”¹³⁵ As rationale for this decision, Holder argued that “[l]ong sentences for low-level, non-violent drug offenses do not promote public safety, deterrence, and rehabilitation.”¹³⁶ Holder’s initiative worked; in the year after he instituted the policy change, federal prosecutors “pursued mandatory minimums at the lowest rate on record.”¹³⁷ But three years later, the American people voted in a

mandatory-minimum-sentences-convict-enhancements-in-certain-drugcases.pdf.

¹³² See generally U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf.

¹³³ Compare, e.g., 21 U.S.C. § 841(b)(1)(A), with 21 U.S.C. § 960(b)(1), and 18 U.S.C. § 924(c)(1)(C)(i). But see First Step Act of 2018, Pub. L. No. 115-391, § 401(a)(2)(A)(ii), 132 Stat. 5194, 5220 (2018) (reducing mandatory minimum sentencing from life to twenty-five years for certain repeat drug offenders).

¹³⁴ Holder Memorandum, *supra* note 131, at 2.

¹³⁵ *Id.*

¹³⁶ *Id.* at 1.

¹³⁷ OFF. OF PUB. AFF., U.S. DEP’T OF JUST., IN MILESTONE FOR SENTENCING REFORM, ATTORNEY GENERAL HOLDER ANNOUNCES RECORD REDUCTION IN MANDATORY MINIMUMS AGAINST NONVIOLENT DRUG OFFENDERS (Feb. 17, 2015), <https://www.justice.gov/opa/pr/milestone-sentencing-reform-attorney-general-holder-announces-record-reduction-mandatory>.

new President, who appointed a new Attorney General.¹³⁸ Attorney General Jeff Sessions rescinded his predecessor's memorandum, instructing prosecutors to seek "the most serious, readily provable offense."¹³⁹ Then, in 2021, when a new administration entered office, the Acting Attorney General rescinded Sessions' rescission,¹⁴⁰ and Attorney General Merrick Garland then reinstated Holder's policy.¹⁴¹ If you're struggling to keep up, then just imagine how lost an overwhelmed public defender or, worse, a *pro se* defendant would be trying to stay apprised of the law.

Deciding in a particular case whether to subject a defendant to a charge demanding a longer sentence is just ordinary prosecutorial discretion.¹⁴² But each of the Attorneys General directed *every* federal prosecutor to comply with their sweeping policies, potentially affecting thousands of prosecutions each year. Throughout this decade of prosecutorial whiplash, while Congress changed how certain mandatory minimums operated with the First Step Act,¹⁴³ Congress never directed any Attorney

¹³⁸ See Eric Lichtblau & Matt Flegenheimer, *Jeff Sessions Confirmed as Attorney General, Capping Bitter Battle*, N.Y. TIMES (Feb. 8, 2017), <https://www.nytimes.com/2017/02/08/us/politics/jeff-sessions-attorney-general-confirmation.html>.

¹³⁹ Memorandum from Jeff Sessions, U.S. Att'y Gen., Dep't of Just., to All Fed. Prosecutors, Department Charging and Sentencing Policy 1 (May 10, 2017), <https://www.justice.gov/archives/opa/press-release/file/965896/download>.

¹⁴⁰ Memorandum from Acting U.S. Att'y Gen. Monty Wilkinson, Dep't of Just., to All Fed. Prosecutors, Interim Guidance on Prosecutorial Discretion, Charging, and Sentencing 1 (Jan. 29, 2021), <https://www.justice.gov/ag/page/file/1362411/download>.

¹⁴¹ See Memorandum from Merrick Garland, U.S. Att'y Gen., Dep't of Just., to All Fed. Prosecutors, Additional Department Policies Regarding Charging, Pleas, and Sentencing in Drug Cases 1 (Dec. 16, 2022), <https://www.justice.gov/media/1265321/dl?inline>.

¹⁴² *United States v. LaBonte*, 520 U.S. 751, 762 (1997).

¹⁴³ See *generally* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

General to issue any of the prosecutorial policies like the ones they implemented. Even worse, Congress had already made clear what it wanted—for the mandatory minimums to apply. Holder’s policy effectively usurped Congress’s authority, demonstrating why the nondelegation doctrine ought to forbid such an act. Caught in the crosshairs of the indecisive Executive are criminal defendants, some of whom will escape Congress’s mandatory minimum requirement and some of whom will languish in prison.

This series of events should not be considered solely executive power. The mandatory minimum policies are legislative power under *Chadha* because the policies have the “purpose and effect of altering the legal rights” of defendants who will either face mandatory minimum sentences or will not. They are legislative power under Justice Douglas’s test because they are, by definition, “a determination that sanctions should be applied.” And for the same reasons as the Principles of Federal Prosecution, they should also be considered legislative power under Justice Gorsuch and Justice Thomas’s interpretations.¹⁴⁴ The breadth of the policies sweeps just as broadly as the Principles do, and defendants have no recourse to their review. Both of these considerations suggest that the policies ought to be considered legislative power.

3. The Fifth Circuit’s Misreading of Legislative Power in *SEC v. Jarkesy* Is Not Dispositive.

The strongest argument against my claim is that the Court long ago resolved this question and concluded that prosecutorial discretion is executive in nature.¹⁴⁵ But one need not look further than the blockbuster Fifth Circuit decision in *SEC v.*

¹⁴⁴ See *supra* section III(A)(1).

¹⁴⁵ See Brief for Petitioner at *34–44, *SEC v. Jarkesy* (filed Aug. 28, 2023), No. 22-859, 2023 WL 5655520.

Jarkesy, and its misreading of *Chadha*, to see the ramifications of a broad definition of legislative power that would likely wholly encompass prosecutorial discretion.¹⁴⁶ In *Jarkesy*, the Court of Appeals relied on the *Chadha* definition of legislative power to conclude that Congress violated the nondelegation doctrine by improperly delegating to the SEC the ability to choose whether to charge defendants in federal court or in administrative proceedings.¹⁴⁷ The Supreme Court appears poised to vacate the Circuit’s nondelegation holding but to uphold the decision on other grounds.¹⁴⁸ As the government argued in its brief in *Jarkesy*, the definition of legislative power in *Chadha* was not intended “to delimit the powers of the Executive Branch” but instead “to distinguish the congressional actions that require bicameralism and presentment from the actions that a single House of Congress may undertake.”¹⁴⁹

Applied too broadly, the *Chadha* definition of legislative power would result in every action taken by a prosecutor relating to a criminal defendant being considered legislative power because the prosecutor seeks to “alter the legal rights” of someone who is “outside the legislative branch.” This is obviously an untenable result that would completely upend the status quo discussed in Part I. The *Chadha* Court considered this objection by explaining that when the Attorney General acts under a statute, “he does *not* exercise legislative power” and

¹⁴⁶ See generally *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), cert. granted, 143 S. Ct. 2688 (2023).

¹⁴⁷ See *id.* at 459–63.

¹⁴⁸ See generally Transcript of Oral Argument, *SEC v. Jarkesy* (argued Nov. 29, 2023), No. 22-859 (omitting any discussion of the nondelegation doctrine).

¹⁴⁹ See Brief for Petitioner at *41, *SEC v. Jarkesy* (filed Aug. 28, 2023), No. 22-859, 2023 WL 565520.

“acts in his presumptively Art. II capacity.”¹⁵⁰ Following this reasoning would lead one to conclude that prosecutorial discretion is an exercise of executive, not legislative, power because when a prosecutor charges a defendant under the criminal code passed by Congress, she operates in her “presumptively Art. II capacity.”

The crucial difference here is that the *Chadha* Court included an explicit caveat to its analysis by explaining that executive action is “always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.”¹⁵¹ In the case of prosecutors, there is no statute that explicitly authorizes the use of discretion, and courts shy away from reviewing prosecutors’ decisions.¹⁵² Moreover, if prosecutorial discretion is indeed entirely executive in nature, then Congress is almost certainly out of luck.¹⁵³ On the one hand, it could attempt to tie the Executive’s hands by requiring a statute authorizing every single prosecution of every single defendant through individual bills. On the other, it could take all the laws off the books, giving the Executive no statutes to enforce. Either of these options is absurd and warrants no further discussion. The checks on the Executive that the *Chadha* Court assumed would be present are therefore absent from runaway prosecutorial discretion and counsel toward considering it legislative in nature.

¹⁵⁰ *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213–14 (1976)) (internal quotations omitted) (emphasis added).

¹⁵¹ *Id.*

¹⁵² See subpart I(B); Principles of Federal Prosecution, *supra* note 42, § 9-27.110 cmt.

¹⁵³ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

B. Runaway Prosecutorial Discretion Fails the Nondelegation Tests.

Having established that some subset of prosecutorial discretion constitutes legislative power, I now analyze how it fares under the intelligible principle test and the framework announced by Justice Gorsuch in *Gundy*. I argue that runaway prosecutorial discretion fails both tests.

1. No Intelligible Principle Guides Runaway Prosecutorial Discretion.

Congress did not provide the Executive with an intelligible principle to guide the creation of the Principles of Federal Prosecution or the implementation of the Attorneys' General mandatory minimum policies. While the Court has not struck down a statute on nondelegation grounds in nearly a century, it did so twice in 1935 in *Panama Refining Co. v. Ryan*¹⁵⁴ and *A.L.A. Schechter Poultry Corp. v. United States*.¹⁵⁵ Each case mirrors the situation of runaway prosecutorial discretion.

In *Panama Refining*, an oil company argued that the National Industrial Recovery Act (NIRA), passed in the wake of the Great Depression, unconstitutionally delegated legislative authority to the Executive.¹⁵⁶ The statute gave the President the authority to seize as much oil as he wanted, and it prescribed no standards for how he should determine the amount to be seized.¹⁵⁷ This failed the intelligible principle test because the statute “establishe[d] no criterion to govern the President’s course . . . giv[ing] to the President an unlimited authority to

¹⁵⁴ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

¹⁵⁵ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

¹⁵⁶ See *Panama Refining*, 293 U.S. at 410–11.

¹⁵⁷ See National Industrial Recovery Act, Pub. L. No. 73–67, § 709(c), 48 Stat. 195, 200 (1933).

determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit.”¹⁵⁸

In *Schechter Poultry*, the Court found that “codes of fair competition” promulgated by the President under NIRA also violated the intelligible principle test.¹⁵⁹ These codes held the power of law; violating them constituted a crime.¹⁶⁰ But the statute “supplie[d] no standards” governing how to write the codes, effectively giving the President the ability “to make whatever laws” he wanted.¹⁶¹ This, for the Court, was not sufficient guidance to pass the intelligible principle test because it was no guidance at all.¹⁶²

Prosecutors don’t get any guidance from Congress either.¹⁶³ Congress has deemed the Attorney General “the head of the Department of Justice,”¹⁶⁴ and the Attorney General may delegate his authority to subordinates.¹⁶⁵ Separately, U.S. Attorneys must “prosecute for all offenses” committed in their districts, but, beyond that command, there is no direction given from Congress for how they should exercise their discretion.¹⁶⁶ But just because the U.S. Code is silent does not mean that federal prosecutors are operating aimlessly—they have the Principles of Federal Prosecution. The purpose of the Principles is to “mak[e] certain that the general purposes of the criminal law—assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from offenders, and

¹⁵⁸ See *Panama Refining*, 293 U.S. at 415.

¹⁵⁹ See *Schechter Poultry*, 295 U.S. at 523, 537–38.

¹⁶⁰ See *id.* at 529.

¹⁶¹ See *id.* at 537–38, 541.

¹⁶² See *id.* at 541, 551.

¹⁶³ See 28 U.S.C. § 547 (outlining the general duties of U.S. Attorneys and making no reference to the Legislative Branch).

¹⁶⁴ *Id.* § 503.

¹⁶⁵ *Id.* § 510.

¹⁶⁶ See *id.* § 547.

rehabilitation of offenders—are adequately met, while making certain also that the rights of individuals are scrupulously protected.”¹⁶⁷

To be sure, these are noble goals. And if they were supplied by Congress, they would pass constitutional muster under the intelligible principle test.¹⁶⁸ But the entire point of the test is that if Congress hasn’t supplied the Executive with *any* guidance on how to exercise its enforcement discretion—let alone the goals just articulated—then no matter how “desirable”¹⁶⁹ its goals may be, the Constitution necessitates more. Just like in *Panama Refining*, Congress has not given any “criterion to govern the [Executive’s] course” in how to write the Principles of Federal Prosecution. Whoever wrote the guidelines had functionally “unlimited authority to determine the policy” guiding prosecutors’ exercise of discretion just as the President did in *Panama Refining*. And the same can be said of *Schechter Poultry*. Substitute “Principles of Federal Prosecution” for “codes of fair competition,” and the similarity is stark. Not only did Congress “supply no standards” to the Executive to write the Principles—*there’s no statute at all*, and so the Executive “makes whatever” guidance it wants for prosecutors to follow.

The problem is even more glaring in the case of the mandatory minimum policies. While the Principles show what has happened in the absence of an intelligible principle, the mandatory minimum policies demonstrate that, at least in regard to its enforcement discretion, the Executive feels free to disregard Congress’s commands. Forget about an intelligible principle—the policies could not have possibly been guided by one because they *directly contravened* Congress’s stated will of applying the penalties in the first place. This should not stand, as the

¹⁶⁷ Principles of Federal Prosecution, *supra* note 42, § 9-27.110 cmt.

¹⁶⁸ See *supra* subpart II(A).

¹⁶⁹ *INS v. Chadha*, 462 U.S. 919, 951 (1983).

Executive lacks a “freestanding or general constitutional authority to disregard statutes requiring” it to act.¹⁷⁰ Indeed, these policies are so far out-of-bounds that the intelligible principle test itself appears ill-equipped to confront them.

2. A Reinvigorated Nondelegation Analysis Should Constrain Runaway Prosecutorial Discretion.

The intelligible principle test seems like it’s on its way out. At least five current Justices have signaled their support for Justice Gorsuch’s dissent in *Gundy* that criticizes the intelligible principle test and proposes more stringent standards for non-delegation cases.¹⁷¹ Assuming that the intelligible principle test is due for a reckoning, I now examine how prosecutorial discretion could be reined in under a future conception of the doctrine. Justice Gorsuch’s dissent in *Gundy* grapples with the same questions that apply in the prosecutorial discretion context, suggesting that his interpretation of the nondelegation doctrine would constrain runaway prosecutorial discretion.

In *Gundy*, a closely divided, eight-member Court upheld a delegation to the Attorney General, with the four liberals supplying a plurality and Justice Alito concurring in the judgment.¹⁷² The case concerned the authority delegated to the Attorney General by a statute that mandated the registration of sex offenders, the Sex Offender Registration and Notification Act (SORNA).¹⁷³ SORNA granted to the Attorney General “the authority to specify the applicability of the requirements” of

¹⁷⁰ *United States v. Texas*, 599 U.S. 670, 684 (2023).

¹⁷¹ See *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) (joined by Chief Justice Roberts and Justice Thomas); *id.* at 2130–31 (Alito, J., concurring in the judgment); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of cert.).

¹⁷² *Gundy*, 139 S. Ct. at 2121 (plurality opinion).

¹⁷³ *Id.*

the statute to offenders convicted prior to the law's enactment¹⁷⁴—essentially, to choose whether or not the law applied to hundreds of thousands of offenders.¹⁷⁵ The case arose because it was practically impossible for offenders who had been released from prison before SORNA went into effect to comply with it, as the statute required them to register prior to leaving prison.¹⁷⁶ Congress contemplated this difficulty, but instead of solving the problem, it dodged the issue and left it up to the Attorney General to figure it out.¹⁷⁷ In *Gundy*, the plurality let this slide and found no nondelegation violation.¹⁷⁸

Justice Gorsuch lamented that SORNA “purports to endow the nation’s chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens,” which jumbles the constitutional command “that only the people’s elected representatives may adopt new federal laws restricting liberty.”¹⁷⁹ Justice Gorsuch disagreed with Justice Alito in waiting for a more appropriate case to consider the wisdom of the intelligible principle test.¹⁸⁰ But *Gundy* is a curious case in which to question the test because it deals squarely with prosecutorial discretion—an area in which, as we have already seen, the Judiciary gives significant deference to the Executive.¹⁸¹ How is SORNA any different from the authority *already* exercised by the Executive with respect to every other criminal statute? Put differently, each of Justice Gorsuch’s concerns about SORNA apply with equal, if not greater, force to policies guiding prosecutorial discretion. At least in SORNA Congress

¹⁷⁴ Sex Offender Registration and Notification Act, 34 U.S.C. § 20913(d).

¹⁷⁵ See *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting).

¹⁷⁶ See *id.* at 2124–25 (plurality opinion).

¹⁷⁷ See *id.* at 2125.

¹⁷⁸ See *id.* at 2124.

¹⁷⁹ *Id.* at 2131 (Gorsuch, J., dissenting).

¹⁸⁰ *Id.* (“Respectfully, I would not wait.”).

¹⁸¹ See *supra* subpart I(B).

tried to grant to the Executive the discretion to implement regulations for certain offenders.¹⁸² With criminal statutes, there is silence, leaving it up to the Executive to determine whether or not, and how vigorously, to enforce the laws proscribing criminal conduct.¹⁸³ Justice Gorsuch, commenting on *Schechter Poultry*, reasoned that, “If allowing the President to draft a code of fair competition for slaughterhouses was delegation running riot, then it’s hard to see how giving the nation’s chief prosecutor the power to write a criminal code rife with his own policy choices might be permissible.”¹⁸⁴ This is exactly the problem with runaway prosecutorial discretion because the Principles of Federal Prosecution and the Attorneys’ General mandatory minimum policies reflect policy judgments.

Justice Gorsuch presented three classes of delegations that are likely permissible in his view: “fill[ing] up the details” after Congress sets the policy; conditioning the application of rules on “executive fact-finding”; and assigning the Executive “non-legislative responsibilities.”¹⁸⁵ The first category is inapposite because the Executive has set the policy with the Principles and the mandatory minimum procedures. The second category also doesn’t make sense: if the Executive finds enough evidence to support an indictment, then it would be obligated to indict; this would obviate the need for any discretion at all. The third category, on the other hand, would allow the Court to choose: perhaps runaway prosecutorial discretion *is* just executive power after all. But Justice Gorsuch’s concerns about SORNA as

¹⁸² See Sex Offender Registration and Notification Act, 34 U.S.C. § 20913(d).

¹⁸³ See, e.g., 18 U.S.C. § 1344 (bank fraud); *id.* § 371 (conspiracy); *id.* § 111 (assault); 21 U.S.C. § 841 (drugs).

¹⁸⁴ *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 552–53 (1935) (Cardozo, J., concurring)) (cleaned up).

¹⁸⁵ *Id.* at 2136–37.

expressed in *Gundy* show that a solution to this constitutional puzzle should not be so simple.

Conclusion

This Note has attempted to show why runaway prosecutorial discretion requires further examination. We have given colossal power to prosecutors, entrusting them not only with the ability to subject us to the force of the criminal justice system, but also to wreck our reputations if they so desire. We expect them to wield this power fairly, but should a rogue decide to weaponize her authority in the pursuit of corrupt objectives, there isn't much we can do. The courts will turn us away in almost every circumstance should we plead with them to check the prosecutor's dominance. It shouldn't—it cannot—be this way. The nondelegation doctrine exists for a reason: to protect the greatest invention of the Framers, the system of separation of powers and checks and balances in our constitutional system. Assuming that prosecutorial discretion is wholly executive in nature is a mistake, and one that ought to be remedied to protect individual freedoms. The nondelegation doctrine requires more from the other branches in this regard. The exercise of legislative power in the absence of any guidance from Congress has resulted in runaway prosecutorial discretion; the implementation of the Principles of Federal Prosecution and the mandatory-minimum policy flip-flops each show why this must be the case. Indeed, the existence of guardrails on the prosecutor's immense power comports with fundamental separation of powers principles.

While this essay has focused on diagnosing rather than resolving this constitutional problem, a few potential solutions are readily apparent. Of course, it is unlikely that the Executive Branch will act on its own. But Congress could ratify the Executive's policies by adopting the Principles of Federal Prosecution into law, subject to any revisions it deems necessary. Or it could

toss out the Principles and write its own in recognition that it is Congress's duty to set policy. And it could impeach and remove officials who attempt to contravene its statutes through policies of nonprosecution. The courts, too, could jump into the fray. By taking Justice Gorsuch's reasoning in *Gundy*, the Judiciary could carve out a more operative role in determining whether the Executive's prosecutorial decisions are constitutional. These issues are not easy, but the Constitution beseeches us to consider them anyway.