Professional Responsibility as a Limitation on Executive Power

Author : Melissa Mortazavi

Date : December 6, 2018

Bruce Green and Rebecca Roiphe, *Can the President Control the Department of Justice?*, ___ **Ala. L. Rev.** ___ (forthcoming), available at SSRN.

One need look no further than Donald Trump's tweets berating the Attorney General and Deputy Attorney General to view the pronounced tension between the oval office and the Department of Justice ("DOJ"). Not merely hypothetical or academic for this generation of scholars, the topic of executive power and its parameters has been thrust into the limelight. However, scholarly interest in executive power, usually stoked by fraught historical moments (Watergate, the Lewinsky affair, post-9/11 torture memos, and now the Russia investigations), rarely focuses on history itself. Much of the existing and growing body of work in the legal academy examines presidential power in constitutional and administrative terms. However, the question posed by this article, "Can the President Control the Department of Justice?" lives in a textualist's wasteland bereft of guidance from these usual suspects. Neither the Constitution nor leg-reg provides an answer—instead, both are conspicuously silent.

Enter Green and Roiphe. Where others find a void, their article finds meaning in Congressional silence as it traces the power of professional institutional norms built incrementally over time. Starting with the originalist rationale for executive control over government lawyers, to the emergence of today's federal bar and administrative state, Roiphe and Green craft a vivid picture of the modern legal profession generally, and prosecutors specifically. Drawing on historical sources ranging from public confirmation hearings and opinions to personal letters, this narrative reveals federal prosecutors to be a doggedly independent group, providing a check on partisan politics through professional commitments to rule of law and bureaucratic neutrality. As such, "prosecutors may not accept direction from the President but must make the ultimate decision about how to conduct individual investigations and prosecutions, even at risk of being fired for disobeying." (P. 64.) In their telling, the modern prosecutor knows that politically motivated action is illegitimate, and therefore, in some cases, resignation is preferable to capitulation. Resignation leaves intact a culture of commitment to rule of law, bureaucratic neutrality, and independence.

The core assertion here is simple, but compelling: when Congress allocates power to lawyers, and particularly prosecutors, it does so expecting them to be bounded by historically established norms and standards of professional conduct. These standards are found in everything from DOJ internal policy documents, to the substance of Attorney general confirmation hearings, all of which extoll as an "essential qualification" of a prosecutor a commitment to independence and need to remain unbiased by political considerations. (P. 19). Thus, our system of governance relies on lawyers' professional norms to separate legitimate policy from partisan interference. It is "professional independence [that] helps ensure that prosecutor will be able to exercise that discretion and seek a fair and just administration of criminal law in individual cases rather than sacrifice justice to further political ends." (P. 5.) Green and Roiphe argue that imbedded in what the law leaves unsaid (and assumed), Congress has acquiesced to a diffuse balance of power within the executive between the President and the Attorney General, with the President expressing views and generalized policy and the Attorney General and subordinate attorneys retaining ultimate charging power (the authors reserve for further treatment the specific exercise of the presidential foreign affairs power).

Exhibiting the rare alchemy of being timely, methodologically refreshing, and substantively weighty, this article provides a vital piece in understanding executive power. Here, Roiphe and Green apply their ample expertise and knowledge to the present day's arguably most pressing issue, making clear that a President does not generally have the right to interfere with individual cases before the DOJ. But this is undervaluing the contribution of the Article. Its broader point is more interesting and ominous: it is not the Constitution, but rather the professional norms of independent and non-

partisan lawyering, that safeguard the state from executive overreach and corruption.

Cite as: Melissa Mortazavi, *Professional Responsibility as a Limitation on Executive Power*, JOTWELL (December 6, 2018) (reviewing Bruce Green and Rebecca Roiphe, *Can the President Control the Department of Justice?*, ___ **Ala. L. Rev.** ___ (forthcoming), available at SSRN), https://legalpro.jotwell.com/professional-responsibility-as-a-limitation-on-executive-power/.