



Why Politics of Prosecutorial Discretion Raises Fundamental Issues in American Public Life

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Many political scientists, policymakers, and political commentators focus so intensely on what judges pronounce in courts, that they fail to perceive the extraordinary importance of the politics of prosecution. That politics surrounds executive decisions about what cases to bring to court and choices about how to proceed after courts have decided individual cases. These choices invoke core legal and value issues and represent sweeping exercises of government power.

Earlier Research on the Politics of Prosecution

Unpacking this complex set of issues requires attention to scholarship beyond that conducted in recent times. The work of Frank J. Goodnow is a good place to start, along with scholarship by political scientists and public law scholars from the 1920s to the 1950s. In this time frame, researchers developed three key principles for understanding the prosecutorial powers and decisions about when (and when not) to prosecute in localities, states, and the federal government. Before detailing areas that require closer public scrutiny, it is useful to outline these principles:

- **According to the Moley Principle, American prosecutors have broad reach and essentially unreviewable discretion.** This principle is named after Raymond Moley, who published *Politics and Criminal Prosecution* in 1927 and later served as a close advisor to Franklin Delano Roosevelt.
- **The Wallace Principle – shows that prosecutors exercise their own value judgments in making decisions about whether to prosecute, or not.** This principle, named after Schuyler C. Wallace, who conducted the political science's first mail survey to assess the opinions of executives, helps explain the U.S. Justice Departments overly-broad discretion. What happens when prosecutors' value judgments are not aligned with the values of the executive branch or the public?
- Before considering these questions, we must know what prosecutors consider. **The Miller Principle** – specifies four issues prosecutors say they consider: What is the "strength of the evidence"? What is the character of the accused? What is the attitude of the community? What are the costs and benefits of proceeding with a prosecution?

Broad Prosecutorial Authority Creates the Ability to Police Societal Values

The principles just outlined contribute to a better understanding of the Department of Justice and American politics. The Department of Justice's broad power has been well established by experience and in contemporary academic research. The Department clearly enjoys a great deal of *prosecutorial discretion* – meaning its officials often determine when to pursue – or just as importantly, when not to pursue – legal actions in criminal or civil courts against persons in the United States on behalf of the government. Important consequences follow.

The Justice Department's broad, unchecked power to prosecute gives it the power to police patriotism and loyalty. Take the Palmer Raids as an example. During World War I under the presidential administration of Woodrow Wilson, the Department of Justice conducted a series of raids that targeted, captured, and in some cases deported radical leftists, especially anarchists. Here the Department of Justice took up the charge of policing the terms of citizenship and civic duty. Most importantly, these instances were, in their own time, legally permissible. They helped validate the reach of the executive. By supporting the claims of the executive power on what constituted legal action, the Justice Department created "outsiders" and "deviants."

The Justice Department's broad prosecutorial power has also given it one-sided authority to shape voting and election practices. For example, in the 2007 case *United States vs. Ike Brown*, the Department of Justice took a group of black officials to court alleging they discriminated against white voters in Noxubee County, Mississippi. This was the first such case – in contrast to the nearly 600 cases that had defended potential black voters. The trial judge noted that “The court does not doubt that similar discrimination against blacks continues to occur throughout this state, perhaps routinely.” Moreover, the judge said “And it may be true, though the court makes no judgment about this, that the Justice Department has not been responsive or fully responsive, to complaints by black voters... [however] the politics of the decision to prosecute this case... cannot be a factor in the court's decision.”

Ike Brown and the other black officials involved lost this case and were slapped with a harsh punishment that barred them from participating in the election process for four years. In my view, Noxubee County Republicans pushed this case onto the agenda of the U. S. Attorney General. But empirical political science and public records provide no database or methodology to test this claim, or to show how, recurrently, decisions at the everyday, professional level later create new openings for political moves, or how political happens conversely shift everyday routines. This case suggests that the Department of Justice can use its prosecutorial discretion to benefit a particular party with no repercussions. To rest content with saying that “this should trouble both Republicans and Democrats” is a moralistic value gesture with little political effect.

Finally, **the Justice Department can also serve as the ethical decision-maker on issues with partisan political overtones.** For example, Eliot Spitzer, the former governor of New York, faced federal charges for sexual misconduct in 2008. To understand the Justice Department's decision to prosecute, one must also understand that the prosecutors certainly used their own judgments about whether to pursue a case against the party in control of the executive. In other instances, prosecutors have not proceeded with similar cases.

Many say that “These broad, unchecked powers of the Justice Department should concern political actors on both sides of the aisle. Policymakers, activists, and scholars should push to reform the existing political infrastructure to check the Justice Department's power.” That is a proposition open to rational debate as to whose interest will be served, whose interests denied, and on what terms contending groups will occupy the same turf. But the historical record certainly suggests that there are important issues of law and ethics to consider.

Read more in Matthew Holden, “Public Administration and Political Power,” *Rothbaum Lecture on Representative Government at University of Oklahoma*, 2001.