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**"*The Will of the Nation:*" An Examination of Prosecutorial Discretion in Relation to John Locke's Concept of Prerogative of the Executive**

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*“The Will of the Nation:”* An Examination of  
Prosecutorial Discretion in Relation to John Locke’s  
Concept of Prerogative of the Executive

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A Thesis Submitted to Fulfill Requirements of the  
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*“The Will of the Nation:”* An Examination of  
 Prosecutorial Discretion in Relation to John Locke’s  
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## I. Introduction

In June of 2012, President Barack Obama enacted an executive, non-enforcement policy under the title of DACA which stands for the Deferred Action for Childhood Arrivals. This scheme came after weeks of Congressional silence and inaction in response to President Obama's push for immigration reform. The overall goal of DACA was to help the department of homeland security narrowly tailor their focus and only deport dangerous felons, all the while making sure to remain lenient and merciful to young students or military officials who also faced the possibility of deportation because their parents had brought them into this country illegally years ago. These students and military members had to be under the age of thirty and were also required to have lived in the United States for the past five years in order to qualify for deferred action.

DACA, in this context, was of the utmost necessity for these individuals for without the program, they would all be deported to their parent's homeland, a land of which was not their own. It would be foreign to them, and most of the students might not have been able to speak the countries native tongue nor would they have been able to enter the United States, *ever again*.

Even though deferred action constitutes as prosecutorial discretion, the executive branch did use this discretion in the right manner and context in order to save and preserve the lives of those who might not be able to save themselves. And since their deportation would be deferred for an upwards of three years and they would also be granted work authorization, this allowed the children, teenagers and young adults to stay within the country in order to obtain full, legal citizenship status.

However, with the institution of DACA, supporters and dissenters both questioned the constitutionality behind this non-enforcement policy. It also caused me to originally question

whether or not the President of the United States could use a discretionary power that is seemingly not his own? These issues prompted me to delve deeper into what exactly prosecutorial discretion was, first and foremost. But in order to do so, I had to familiarize myself with the history and origins of the American prosecutor. Although the prosecutor may be a uniquely American contribution, it has its roots deeply embedded in the history of the English tradition. From private to public prosecutions and everything in between, both Europe and the American colonies experienced similar trials, triumphs and tribulations, alike, as they attempted to remedy the ills and harm caused by crime over the past few hundred and even thousands of years.

The most analogous figure in the early English system that resembles the American prosecutor is the English Attorney General. The English Attorney General was originally an aid to the King and dealt with matters solely relating to the crown. As time passed, the functions of the Attorney General metamorphosed, as well. In the American colonies during the latter half of the nineteenth century, the Attorney General was a General by name only. His abilities were severely limited even though the Department of Justice specifically stated they were to be in charge of overseeing all assistant attorneys and prosecutors that fell below him. However, this oversight never occurred. The Attorney General refrained himself from interfering in the daily operations of the nascent American prosecutor for he felt that local governments would be more apt to serve as a check upon their power. This lack of oversight allowed the prosecutor to absorb an almost unabridged and unprecedented amount of power.

Moreover, the power of the prosecutor started with another historical phenomenon: the *nolle prosequi*. The *nolle* is a legal instrument to halt the prosecution of a proceeding case. It was

originally used by the English Attorney General and then it was inherited by the entire line of American prosecutors. And its influence did not end there.

According to John Marshall, as seen in historical Congressional records,<sup>1</sup> The President of the United States at the time, John Adams, issued a *nolle prosequi* to stop the prosecution of Jonathan Robbins.<sup>2</sup> The President was under fire due to his use of the prosecutorial instrument, but John Marshall came to John Adams' aid and stated that it was a said duty of the President to issue a *nolle*. Not only this, but the *nolle* was directly in the executive's line of power and is indubitably a constitutional power, as well. This is because one of the President's responsibilities is to express the "will of the nation"<sup>3</sup> and if the nation's will is to be in accordance with a greater societal interest or substantive end that calls for the use of the *nolle*, then the act will forever be accordance with the founding principles of the American Republic. Moreover, President Adams use of the *nolle* was in no way interfering with the other channels of government nor does it interfere with traditional judicial proceedings.

Upon the rendering of Marshall's judgment, there was suddenly an influx in the usage of the *nolle prosequi* by prosecutors and the executives that followed Adams. Not only was the popularity of the *nolle* increasing but the *nolle*, itself, also became entrenched into the records and opinions of case law. This is because the courts ruled in favor of the *nolle* time and time again and went as far as to presume its constitutionality. Additionally, judges felt that they were both incapable of reviewing the reasoning behind issuing a *nolle pros*, in the first place.

Both the power of the *nolle* and the power of the American prosecutor continued to slip away from the publics grasp and accountability slipped away with it. The lack of accountability

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<sup>1</sup> 10 Annals of Congress. 618; Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 18.

<sup>2</sup> Krauss, 17 (See footnote on Ruth, 100, 288-89); *United States v. Rob[b]ins*, 27 F. Cas. 825, 827-31.

<sup>3</sup> 10 Annals of Congress. 618; Krauss, 18.

allowed even more room for the power of the prosecutor to grow. The courts became so complacent with the *nolle* that they stopped using the term and then shortly after, the term “prosecutorial discretion” began to appear in both everyday language as well as more court records.

But prosecutorial discretion is much different than the original *nolle*. As early as the twentieth century the prosecutor now had complete reign over all criminal proceedings including if and when to charge an individual, what charges to bring against them, whether or not to issue a plea bargain or deal and everything else in between. The American prosecutor was now the most dominant figure in the entire criminal justice system and they still are to this day.

However, prosecutorial accountability issues and even their immunity from misconduct are all threats to the American democratic order. Nonetheless, even though these are legitimate fears, prosecutors and their discretion are both a necessary evil.<sup>4</sup> For without this figure and their immense power, there would be overly strict adherence to the law. In turn, this would undermine justice, criminal punishment would be all the more disproportionate, and most importantly, mercy and greater societal interests would simply be forgotten.<sup>5</sup> And, the executive department would not be able to function properly since the American prosecutor directly falls within the scope of the branch, as well. Therefore, the merits of prosecutorial discretion outweigh the risks.

After discovering the necessity of prosecutorial discretion, I began to question whether or not the same could be said about executive discretion. In order to gain a better understanding of this discretion, I turned to history, once again, as well as political philosopher John Locke and his concept of prerogative from his *Second Treatise*. Locke defines prerogative as “the power to

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<sup>4</sup> Angela Davis, *Arbitrary Justice*, 6-8.

<sup>5</sup> Peter L. Markowitz, PROSECUTORIAL DISCRETION POWER AT ITS ZENITH: THE POWER TO PROTECT LIBERTY,” 496.



act according to discretion for the publick good, without the prescription of the Law, and sometimes even against it.”<sup>6</sup> And, prerogative shall only be used “for the benefit of the Community.”<sup>7</sup>

Prerogative is wholly necessary because laws, themselves, do not always provide for the public good or good of society. And, since it is impossible to foresee all “accidents and necessities,” the executive is left with an impressive “latitude [...] to do many things of choice, which the Laws do not prescribe.”<sup>8</sup> But one must remember when exercising prerogative is that its sole, and sole purpose only, is for the preservation of the people.<sup>9</sup>

John Locke’s philosophies also had a strong influence upon the American founding and the Founding Fathers. Even Hamilton once said, “extraordinary exigencies demand extraordinary means.”<sup>10</sup> The extraordinary means he is referring to is none other than prerogative and prerogative needs to be without limitation, as well. And, as long as the extraordinary act or measure does not violate the rights of individuals, state rights, and is considered moral, there is strong evidence to suggest its constitutional viability.<sup>11</sup> However, is prerogative meant to be intertwined with the workings of the American Republic? After all, it is never explicitly mentioned in the Constitution. But, despite the ambiguities and questions surrounding prerogative powers, Peter L. Markowitz has been able to locate prosecutorial discretion or discretionary powers in general, in the framework of the Constitution with certainty.<sup>12</sup> The three main sources of power are Article II’s Take Care Clause, the Executive Vesting Clause, and the

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<sup>6</sup> Locke, §160.

<sup>7</sup> Locke, §163.

<sup>8</sup> Locke, §160.

<sup>9</sup> Locke, §159-160.

<sup>10</sup> Fatovic, 437; Hamilton, *Alexander Hamilton’s Writings*, 58.

<sup>11</sup> Fatovic, 437; Hamilton, *Alexander Hamilton’s Writings* (“*Opinions on the Constitutionality of the National Bank*”), 613, 621.

<sup>12</sup> Markowitz, 516.

Pardon Clause.<sup>13</sup> His findings are in accord with Locke's treatise for Locke identifies two specific prerogative powers, the pardon power, thus mentioned by Markowitz and the presidential power to convoke or dissolve the legislature. Although these are not parallel findings, Locke believed it was more beneficial for prerogative powers to be left almost entirely unenumerated. This was to ensure that executive acts of prerogative had an optimal amount of flexibility and the least amount of legal or constitutional restraints as possible, especially in times of great need. This is a stark contrast to the Royal Prerogative powers, as seen in Great Britain, which are numerous and quite explicit.

However, in America, the Founding Fathers, especially Hamilton and Jefferson, agreed that prerogative is an extraconstitutional power. This means that not only is prerogative attached to the Constitution, but it is within its prose just as Markowitz suggests. By no means is prerogative extra-legal for as both Hamilton and Jefferson claim, prerogative is irreducible to law and also immune from judicial review.<sup>14</sup> After all, acts of prerogative are meant to be temporary or transient. Its effects are not meant to be long-lasting. The Founders knew the importance of keeping prerogative out of the judiciary because if explicit boundaries were not rendered, prerogative would become entrenched in precedent just as prosecutorial discretion has become entrenched into American case law. Otherwise, this would make it harder for future presidents to act in a discretionary manner and further restrict the secrecy and speed of the executive department, as a whole. And the president needs sufficient power and flexibility in order to preserve the liberty of the nation and its people.

Furthermore, prerogative is not in opposition to the American Republic and Hamilton often prefers it in times of need as opposed to the typical rigid, time-consuming mechanisms of

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<sup>13</sup> Markowitz, 517; U.S. Constitution, Article II, §1, 2, 3.

<sup>14</sup> See section III.

democracy. Without prerogative, the executive would be severely limited, and the other branches of government would constantly have to expand his power by force or by law. That, Hamilton claims is far more dangerous than simply letting the president use his discretion on a case-by-case basis. But of course, discretion cannot be used whenever the president so wishes.

Markowitz believes there should be a limiting principle placed upon discretion, especially prosecutorial discretion for that matter. He states that prosecutorial discretion should only be used in times where physical liberty is at stake, for as we can recall, the merits of prosecutorial discretion help secure justice, social interests and mercy. Justice Scalia also reveres the necessity of prosecutorial discretion because it can balance innumerable and practical considerations that also may arise and can protect innocent people from experiencing deprivations of freedom, as well.

These facts and findings, along with Locke's insights on prerogative, display the importance and necessity of discretionary powers from the start. And, these findings as we will discover, have led me to argue and advocate for DACA's overall constitutionality. This is because it has preserved the safety and the welfare of those who were innocent and could not otherwise have defended themselves. Without DACA, the United States would not be the same country as it is today, because the people are what truly constitutes this great nation. President Obama, in this regard, was truly a beacon of salvation for all the DREAMERS in 2012.

#### a. The Three Actors: The American Prosecutor, John Locke's Concept of Prerogative, & the Executive

Due to the complexities and intricacies of this thesis, it is beneficial to regard each figure or concept independently and then reflect upon them, cohesively, in the final sections. It is only

logical to start by examining the prosecutor and prosecutorial discretion before decoding DACA. However, before attempting that, I also have to explain the origins and significance of prerogative not only in a historical context but also what it means for the American Republic and how it is accurately applied. Only then will I be able to fully examine the executive and his use of prerogative and discretionary powers.

And one final note, I do often use the terms “prerogative” and “prosecutorial discretion,” interchangeably. However, prosecutorial discretion is only one sector or portion of prerogative power, on the whole.

## II. The American Prosecutor

The American prosecutor is often referred to as a minister of justice, an advocate, and an officer of the court.<sup>15</sup> Prosecutors are responsible for charging the criminally accused, plea-bargaining, and even assisting law enforcement during criminal investigations. However, the main focus of this section will be the very phenomenon, of which, prosecutors use to make their everyday decisions. This “decision-making” phenomenon is none other than prosecutorial discretion. Prosecutorial discretion has indubitably transformed the prosecutor into “the most powerful official[s] in the American criminal justice system,”<sup>16</sup> today. However, before pursuing a more conclusive investigation into this type of discretion, it is necessary to recount the complex historical origins of the American prosecutor first and foremost. This will help further explain the rapid growth of their power as well as further elucidate their role as a public figure.

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<sup>15</sup> Pryde, *The Prosecutor's Handbook*, 7.

<sup>16</sup> Angela Davis, *Arbitrary Justice*, 5.

### a. The History of the American Prosecutor

Although the prosecutor is believed to be “a product of the American experience,” as well as a “distinct and uniquely American contribution,”<sup>17</sup> the prosecutor still has prominent historical origins that are deeply rooted in the European tradition.

During the middle ages, England’s, as well as the entire European continent’s,<sup>18</sup> *modus operandi* for dealing with crime was the “crime victim”<sup>19</sup> method or the “Frank-pledge system.”<sup>20</sup> This is where the victim’s family acted as the police, prosecutor and the judge in order to bring the guilty to justice. Or in other words, track down the offender, inflict punishment upon them and then seek restitution.<sup>21</sup> This is because there were no organized police forces<sup>22</sup> and the only formal prosecutor, at the time, was said to be an aide to the king.<sup>23</sup> Although kings, generally, were only concerned with matters related to the crown, they still placed restrictions upon private vengeance<sup>24</sup> in order to alleviate as much disruption as possible. And of course, to collect revenue.<sup>25</sup>

As time went on, the Anglo-Saxon legal system transformed. There were now nascent judicial settlements for private disputes. Although private vengeance was removed from the equation, the responsibility of accusing an individual of a crime still fell upon the family. Surprisingly, even after the Norman Conquest of 1066, the Normans preserved many of the

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<sup>17</sup> Kress, 100.

<sup>18</sup> Yue Ma, *Exploring the Origins of Public Prosecution*, 196.

<sup>19</sup> Davis, 10.

<sup>20</sup> Ma, 192.

<sup>21</sup> Davis, 9.

<sup>22</sup> Ma, 192.

<sup>23</sup> “The French king employed the *procurer du roi* (the king’s prosecutor) to protect his own interests.” He later transformed into the public prosecutor or *ministère publique* in the 16<sup>th</sup> century; Ma, 197-198.

<sup>24</sup> A. Esmein *A history of continental criminal procedure*; C.L.V. Bar, *A history of continental criminal law*; Ma, 191; W. Forsyth, *History of trial by jury*.

<sup>25</sup> Ma, 192.

Anglo-Saxon institutions for determining guilt.<sup>26</sup> These included the judicial settlement method, as well as “trial by oath-taking or ordeal,” to name a few.<sup>27</sup> The trials were often combative, according to Yue Ma, as well as:

[...] accusatory and adversarial in nature. The aggrieved party and the alleged offender, no longer permitted to battle one another in private vengeance, fought with oaths, sticks, or swords under the formal guidance of the court. Because of the private nature of crime, it was the duty of the injured party or his kin to take the initiative to set the proceeding in motion. Bringing a criminal accusation was a risky venture. The accuser could either fall in a judicial combat or be forced to undergo the punishment he had hoped to inflict on the accused if he failed to prove his case (Ma, *Exploring the Origins of Public Prosecutions*, 192).

Moreover, the oath-taking method involved twelve “oath-helpers.” These oath-helpers did not attest to the evidence that surrounded the criminal matter but rather, they did attest to an individual’s reputation or innocence.<sup>28</sup>

As time continued to progress, criminal and legal developments also progressed during the 12<sup>th</sup> and 13<sup>th</sup> centuries.<sup>29</sup> For instance, the Norman kings became heavily concerned with law and order within the state, the jury of presentment was now underway, and archaic methods of proof were disregarded and replaced by rational means.<sup>30</sup> This was all due in part to the Magna Carta of 1215. It specifically stated that “that no one should be prosecuted except by the judgment of his peers.”<sup>31</sup>

During the 13<sup>th</sup> century and onward, England finally developed the act of private prosecutions.<sup>32</sup> However, the remainder of the European continent had already made the radical switch to public prosecutions by then.<sup>33</sup> All the while England held onto private prosecutions,

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<sup>26</sup> Ma, 192.

<sup>27</sup> Ma, 192.

<sup>28</sup> Esmein; Ma, 192; R.C. Van Caenegem, *Legal history: A European perspective*.

<sup>29</sup> Ma, 193.

<sup>30</sup> Ma, 193.

<sup>31</sup> Claire Brey & Julian Harrison, “*Magna Carta an Introduction*.”

<sup>32</sup> Ma, 193.

<sup>33</sup> G. O. W. Mueller & F. L. Poole-Griffiths, *Comparative criminal procedure*; Ma, 196.

France's system advocated for them to go public. This shift in prosecutions stemmed from the French Code of Criminal Procedure of 1808 during the Napoleonic era. It was so influential that "Belgium, the Netherlands, Luxembourg, Italy, the western region of Germany, and part of Poland"<sup>34</sup> adopted it and refined it to their liking.

Even though the transfer from private to public prosecutions was long and drawn out in England, the transition did occur with the help of the constable, justices of the peace, the police, the attorney general and with the institution of the director of prosecutions.<sup>35</sup> The constable was the arresting officer, but he was very limited when it came to criminal investigations.<sup>36</sup> Justices of the peace were directly appointed by the king and gained their powers through the Marian Committal Statute of 1555.<sup>37</sup> This statute defined their functions as keepers of peace within the community and they had the duty to question individuals that were considered to be involved in serious, local crimes.<sup>38</sup> They also presented the accused before a grand jury. However, the constable and justices of the peace were soon outdated during the wake of the industrial revolution.<sup>39</sup> This is when private police agents, or "thief-takers," began to capture wanted felons. These agents would also receive monetary rewards for their services. But, reward systems often produced false witnesses as well as false convictions. This is when defense counsels began to make their presence known during criminal trials in order to remedy these injustices.<sup>40</sup>

Families also enjoyed the option of hiring private barristers, after the establishment of the London Metropolitan Police force in 1829.<sup>41</sup> Although the family unit was still responsible for

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<sup>34</sup> Ma, 198

<sup>35</sup> Ma, 193.

<sup>36</sup> Ma, 193.

<sup>37</sup> Ma, 194.

<sup>38</sup> Ma, 193.

<sup>39</sup> Ma, 194.

<sup>40</sup> Ma, 194.

<sup>41</sup> Davis, 9.

initiating the criminal investigation by accusing an individual, they became more reluctant to do so, due to the growing complexities of the legal system.<sup>42</sup> It was also extremely expensive to hire private barristers and the cost was a disadvantage to those who belonged to a lower socio-economic class.<sup>43</sup> Sir Robert Peel, especially during his years as a prime minister from 1834-1835 and 1841-1846, was cognizant of this seemingly insurmountable obstacle. As a result, he began to advocate for system reform.<sup>44</sup> This social advocacy was strengthened by the prior advocacy of Jeremy Bentham in the years prior Sir Robert Peel's time in office. Unfortunately, in the end, both of the men's efforts fell upon deaf ears.<sup>45</sup>

Nonetheless, public opinion still shifted despite the lack of improvement of the criminal justice system. Accusing someone of a crime now became a public responsibility as opposed to the victim's family members.<sup>46</sup> This originated from the centuries-old tradition that it was a citizen's duty to uphold the law and preserve the king's peace.<sup>47</sup> This notion finally dissolved the traditional role of the "justice of the peace," mentioned earlier. The private citizen and police were now responsible for "the maintenance of law and order."<sup>48</sup>

All the while the private prosecution system was evolving, the system of official prosecutions evolved, as well. The official prosecutor was and is still known as the attorney general.<sup>49</sup> His early duties included appearances in civil court, the ability to commence or terminate a prosecution and also review cases to see if they involved a royal interest.<sup>50</sup> This is

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<sup>42</sup> Ma, 194.

<sup>43</sup> Davis, 9; Ma, 194.

<sup>44</sup> Davis, 9.

<sup>45</sup> Davis 9-10. Reform came in 1879 when Parliament passed the "Prosecutions of Offenses Act." This act was responsible for not only the emergence of police departments but also for dissolving all family ties to criminal proceedings from then onward.

<sup>46</sup> Ma, 194.

<sup>47</sup> Ma, 194.

<sup>48</sup> Ma, 195.

<sup>49</sup> Ma, 195.

<sup>50</sup> Ma, 195.



because the Attorney General, is and always has been, the king's attorney throughout history. In regard to the commencement and termination of prosecutions, that will be addressed and examined in the following subsection.

The Attorney General, before 1879, was considered to be the only public prosecutor in England. During that year, the position of the post director of prosecutions was formed and absorbed some of the functions and duties of the Attorney General. However, he was quite limited and could only intervene in a select number of prosecutable cases. These obstacles kept undermining both the operation and the significance of public prosecutions. Private prosecutions were still viewed more favorably. Nevertheless, great miscarriages of justice continued to persist in both systems.<sup>51</sup> Angela Davis also stated that both systems were considered to be chaotic and inefficient.<sup>52</sup>

General dissatisfaction continued to fester in response to the growing problems that plagued the English criminal justice system well into the late 20<sup>th</sup> century. Reform finally came with the enactment of the Crown's Prosecution Service in 1985.<sup>53</sup> This service was the first, *official*, public prosecution agency in all of England and inspired the rest of the British criminal justice system to follow suit.<sup>54</sup> Public prosecutions became the new wave of the future. But this wave had already crashed upon the shores of the American colonies many centuries ago, just as it had crashed upon the surrounding European countries, as well.

As history has come to show, the American colonies were undoubtedly influenced by the English court system, not to mention the very premise of the American legal system rests upon

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<sup>51</sup> Ma, 195.

<sup>52</sup> Davis, page 10.

<sup>53</sup> Ma, 196.

<sup>54</sup> Bennion; Fionda; Ma, 196.

the English common law.<sup>55</sup> This is why during early colonial times “the [English] grand and petit juries, the sheriff, the justices of the peace and the tradition of private prosecutions”<sup>56</sup> all made their formal appearance in the colonies. However, it is interesting to note that the American colonists did not view private prosecutions favorably. They were said to be “incompatible with their ideals of justice” and equality.<sup>57</sup> Therefore, to account for the growing interests, Virginia instituted the very first attorney general and public prosecutor in 1643.<sup>58</sup> The American Attorney General is analogous to the English Attorney General.<sup>59</sup> This is because the American Attorney General’s primary interest still resided in the king. He also provided “advisory opinion to the courts.”<sup>60</sup> It was not until the latter half of the century when his role transitioned into the realm of public prosecution and his aide to the king formally dissolved.<sup>61</sup>

At first, the attorney general was able to handle all criminal matters. But then, the colonies grew, and deputy attorneys began to make their appearance:

The deep fear of centralized governmental power among colonists played a significant role in the shaping of the early prosecutorial apparatus. The desire to keep local autonomy laid the ground for the development of strong American tradition of local government, including the decentralized judiciary and the local prosecutorial structure. Deputy attorneys general originally were appointed by the attorney general. But the local courts soon assumed the responsibility of selecting deputy attorneys general. The deputy attorneys general became local rather than colonywide officials. As the attorney general lost control of deputy attorneys general, prosecution of crime also became largely a local affair (Chittwood; Ma, 199-200).

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<sup>55</sup> Ma, 191.

<sup>56</sup> A. H. Flaherty, *An introduction to early American legal history*; L. M. Friedman, *A history of American law*; Ma, 199; W. Pencak & W. W. Holt, Jr., *The law in America: 1607-1861*.

<sup>57</sup> F.R. Aumann, *The changing American legal system: Some selected phases*; B. Chapin, *Criminal justice in colonial America*; Ma, 199; Pencak & Holt.

<sup>58</sup> Davis, page 10. They were also appointees of the court.

<sup>59</sup> Ma, page 191.

<sup>60</sup> Ma, 199.

<sup>61</sup> Ma, 199.

A similar “pattern of development” followed in the other colonies. Maryland and New Hampshire appointed their first attorney general in the years 1666 and 1683,<sup>62</sup> respectively.

In the other colonies such as New York, New Jersey and Delaware, their mode of prosecution fell under Dutch influence—especially the Dutch *schout*.<sup>63</sup> The *schout* was both “a constable and a court officer” who “ha[s] the power to make an arrest and present the alleged offender before the court,” and “shall,” under the Dutch ordinance of 1660, “*ex officio*, prosecute all contraveners, defrauders and transgressors of any Edicts, Laws, Statutes and Ordinances which are already made and published, or shall hereafter be enacted and made public.”<sup>64</sup> Although, it was not long before the *schout* transformed into the sheriff.<sup>65</sup> The sheriff of the Dutch colonies still retained the same original duties and responsibilities.

Like most of continental Europe, Louisiana was influenced by the French system’s mode of prosecution. They also had a “Superior Council” that embodied Louis XIV’s authority. This council was both a legislature and a court of last resort for both criminal and civil matters.<sup>66</sup> It also operated under traditional French statutes and procedures, even the Civil Code of Napoleon.<sup>67</sup> But after the Louisiana purchase, the civil law tradition finally “exerted its influence” over the territory.<sup>68</sup> For example, the judge, the structural nuances of a trial, and of course, the art of public prosecution<sup>69</sup> became the new norm.

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<sup>62</sup> Ma, 200.

<sup>63</sup> Ma, 200.

<sup>64</sup> W.S. Van Alstyne, *The district attorney: A historical puzzle*, 130.

<sup>65</sup> Ma, 200.

<sup>66</sup> Ma, 200.

<sup>67</sup> J. E. Goulka, *The first constitutional right to criminal appeal: Louisiana’s Constitution of 1845 and the clash of the common law and natural law traditions*; A.A. Levasseur, *The major periods of Louisiana legal history*; Ma, 200-201.

<sup>68</sup> M.A. Coffey & J. B. Norman, *Selected problems of the Louisiana grand jury*; Goulka, 2002; K. A. Lambert, *The suffocation of a legal heritage: A comparative analysis of civil procedure in Louisiana and France; The corruption of Louisiana’s civilian tradition*; Ma, 201.

<sup>69</sup> Goulka, 2002; Lambert, 1992; Ma, 201.

Public prosecutions were further facilitated after the American Revolution and the establishment of the Judiciary Act of 1789.<sup>70</sup> This act not only instituted the federal court system and official system of prosecution, it also separated law enforcement officers and prosecutors into two separate and distinct roles.<sup>71</sup> Furthermore, the deputy attorney generals soon became district attorneys in various colonies, such as New York and New Jersey.<sup>72</sup> Massachusetts followed suit and created its own office for the county attorney in 1807.<sup>73</sup> They were also required to take an oath of office before the appointment process was complete:

[A] person learned in the law is to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned (“Establishment of the Judicial Courts of the United States,” 1789; Ma, 201).

All district or county attorneys were intended to fall under the “supervision” of the United States Attorney General. There are quotations marks surrounding the term “supervision” because even though the attorneys enjoyed a great sense of independence, they were actually “subject to almost no centralized control.”<sup>74</sup> This lack of supervision changed during and after the Civil War when the Attorney General was required to superintend all those who fell below him. The power and the duties of the attorney general were further strengthened by the establishment of the Department of Justice in 1870.<sup>75</sup> Even though power had become centralized, the Attorney General refrained from interfering with the daily operations of the U.S. attorneys due to the

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<sup>70</sup> “Establishment of the Judicial Courts of the United States,” 1789; Ma, 201.

<sup>71</sup> Ma, 200-201.

<sup>72</sup> Ma, 201.

<sup>73</sup> G. Fisher, *Plea bargaining's triumph*; J. E. Jacoby, *The American prosecutor: A search for identity*; W.S. Van Alstyne, *The district attorney: A historical puzzle*; Ma, 201.

<sup>74</sup> Ma, 201-202.

<sup>75</sup> Friedman, 1985; Jacoby, 1980; Ma, 202.

American tradition of accountability at the local level.<sup>76</sup> As a result, the prosecutors enjoyed “considerable autonomy in [their] decision making.”<sup>77</sup>

However, this was not the case for certain prosecutors who were appointed by either the governor, the state Attorney Generals<sup>78</sup> or even judges. These individuals “had to consider the wishes of the actors who had appointed them”<sup>79</sup> and in turn, this diminished their legitimacy as important figures in the criminal justice system.<sup>80</sup>

This issue soon began to fade as the Jacksonian era began.<sup>81</sup> Instead of official appointments, prosecutors now appeared on ballot slips and thus gained the right to their electoral status.<sup>82</sup> Their newly obtained electoral status was revolutionary and a truly “distinctive feature in the American prosecutorial system.”<sup>83</sup> But as time went on, especially in the 20<sup>th</sup> century, prosecutors began to disappear from the ballot.<sup>84</sup> Today, only four states still officially elect prosecutors.<sup>85</sup> Not only did this result in full control of all criminal prosecutions,<sup>86</sup> but it also suggests that prosecutors are now able to escape all forms of accountability. Davis argues that this could lead to arbitrary justice and arbitrary decision making.<sup>87</sup> And this decision making is none other than prosecutorial discretion, itself.

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<sup>76</sup> Ma, 202.

<sup>77</sup> S. Goldman & T. P. Jahnige, *The federal courts as a political system*; Ma, 202; National Commission on Law Observance and Enforcement, *Report on Prosecution*, 1931.

<sup>78</sup> Ma, 202.

<sup>79</sup> Jacoby, 1980; Ma, 202.

<sup>80</sup> Ma, 202.

<sup>81</sup> Davis, 10.

<sup>82</sup> Davis, 10; Ma, 202.

<sup>83</sup> Ma, 203.

<sup>84</sup> Ma, 205.

<sup>85</sup> Davis, 10-11.

<sup>86</sup> Ma, 203.

<sup>87</sup> Davis, 14-15.

## b. The Origins of Prosecutorial Discretion and its Modern Effects

The American prosecutor is an active member of the “decentralized” and “fragmented” criminal justice system, according to Ma, and is entitled to “overly broad and largely uncontrolled discretion[ary]”<sup>88</sup> powers. These powers “determine the fate of a majority of criminal defendants” and yet, these powers are *not* subject to judicial review.<sup>89</sup> But where does this power originate from? Rebecca Krauss states that the American separation of powers doctrine is not an adequate explanation to account for the growth of prosecutorial power.<sup>90</sup> But that does not stop Peter L. Markowitz from claiming that prosecutorial discretion is deeply interwoven into the United States Constitution, namely Article II.<sup>91</sup> Krauss takes a different approach to the ever perplexing-question. She claims prosecutorial discretion has emerged from the common law tradition,<sup>92</sup> especially with the *nolle prosequi*.<sup>93</sup> Both sides of the argument are just as enlightening and there is nothing wrong with the theories working in accordance with one another.

In terms of the *nolle prosequi*, according to Krauss, dates back to the sixteenth century and was a procedural device of the English Attorney General to halt criminal prosecutions.<sup>94</sup> However, not just any prosecution was forgone. It only applied to cases that were seen as frivolous or contravened the crown’s royal interest.<sup>95</sup> Upon issuing a *nolle*, “the court would terminate the prosecution without any inquiry.”<sup>96</sup> The executive of the United States as well as

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<sup>88</sup> Ma, 205 & 206.

<sup>89</sup> Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 2; Ma, 206.

<sup>90</sup> Krauss, 2.

<sup>91</sup> Peter L. Markowitz, *Prosecutorial Discretion Power at its Zenith: The Power to Protect Liberty*, 519.

<sup>92</sup> Krauss, 3.

<sup>93</sup> Krauss, 4, 16.

<sup>94</sup> Krauss, 16.

<sup>95</sup> Abraham S. Goldstein, *The Passive Judiciary: Prosecutorial Discretion and the Guilty Plea* 12 (1981); Krauss, 16.

<sup>96</sup> Goldstein; Krauss, 16.

the entire line of prosecutors absorbed and inherited this power.<sup>97</sup> But in America, the *nolle* was exercised differently: it able to terminate prosecutions that prosecutors themselves had originally initiated.<sup>98</sup> The termination of cases caused great concern, especially towards the end of the eighteenth century. This concern is manifest in the Jonathan Robbins, or Thomas Nash, case:<sup>99</sup>

[Johnathan Robbins] was arrested in South Carolina and accused of participating in a mutiny on a British ship, the *Hermione*. Britain formally requested his extradition pursuant to the Jay Treaty. 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. 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.” President Adams’s interpretation of the Jay Treaty changed, however, in the year following Brigstock’s arrest. 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.” After a hearing, in which Robbins claimed to be an American citizen and defended his actions aboard the *Hermione*, the judge acquiesced to Pickering’s request and ordered Robbins delivered to the British. British troops brought Robbins to Jamaica, where they court marshaled and executed him within a week (Krauss, 17; Ruth, 100, 288-89; *United States v. Rob[b]ins*, 27 F. Cas. 825, 827-31).

President Adams faced congressional censure and barely escaped impeachment.<sup>100</sup> Thankfully, in the year 1800, John Marshall came to President Adams’ aid as seen in Congressional records:<sup>101</sup>

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 (10 Annals of Cong. 615; Krauss 18).

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<sup>97</sup> Krauss, 16.

<sup>98</sup> Krauss, 17.

<sup>99</sup> Krauss, 17; Ruth Wedgewood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100.

<sup>100</sup> Krauss, 18.

<sup>101</sup> 10 Annals of Cong. 615 (1800); Krauss 18.

Marshall’s statement not only renders both presidential and prosecutorial use of the *nolle* as a fundamental and inseparable feature of the American Republic, but it also renders the *nolle* as Constitutionally viable, legitimate and even an “executive prerogative.”<sup>102</sup> This is because the discretion associated with the *nolle* is clearly traceable throughout English history, English law and, as stated prior, has been absorbed into the American tradition. Furthermore, he also states that this executive discretion is immune from judicial review,<sup>103</sup> but of course there is always room for exception. Krauss views the *nolle* in a more conservative light. She claims that this definition goes well beyond English precedent since the English Attorney General did not share this power with any other government official as seen in America.<sup>104</sup>

Nevertheless, Justice Marshall was the first individual to illuminate, and almost blur, the seemingly hidden bands that connect “the *nolle prosequi* and the theory of unreviewable executive prosecutorial discretion,” together.<sup>105</sup> But it is also important to note that even though the executive’s use of the *nolle* is excused from judicial review, this should not be the case for public prosecutors or assistant district attorneys, according to Marshall.<sup>106</sup> However, as history has shown us, his advice was not taken into full consideration. Prosecutors not only have escaped almost all forms of accountability, but they have also escaped judicial review, all thanks to judicial precedent as seen in case law.

In *Commonwealth v. Wheeler*,<sup>107</sup> the court established that when entering a *nolle prosequi* “it is to be exercised at the discretion of the attorney who prosecutes for the government, and for

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<sup>102</sup> Goldstein; Krauss, 18; Saikrishna Praskash; Wedgwood, 100.

<sup>103</sup> Krauss, 18.

<sup>104</sup> Krauss, 18, 19.

<sup>105</sup> Krauss, 18.

<sup>106</sup> Krauss, 19.

<sup>107</sup> *Commonwealth v. Wheeler*, 2 Mass. 172 (1809); Krauss, 20.



its exercise he alone is responsible.”<sup>108</sup> This case also affirmed that line prosecutors did have the power to issue the *nolle*, and moreover, that the *nolle* was not subject to judicial review, either.<sup>109</sup> Krauss states that the remainder of the American courts adopted this hands-off method in regard to the exercise of the *nolle*. Marshall was conscious of this, especially in *United States v. Hill*.<sup>110</sup> Here, he noticed numerous courts passing over certain proceedings of which prosecutors felt were not worth pursuing or simply just a waste of time.<sup>111</sup> But as stated before, the disposal of cases “was justified by [the Attorney General’s] executive appointment.”<sup>112</sup> In turn, prosecutorial discretion continued to expand,<sup>113</sup> but this time, it grew under the guise of the separation of powers doctrine.

Prosecutorial discretion becomes intertwined with the President’s “Take Care Clause”<sup>114</sup> in *United States v. Corrie*.<sup>115</sup> This case established that this clause is the textual source of executive control over criminal prosecutions.<sup>116</sup> *Ponzi v. Fessenden*<sup>117</sup> held this as well, but this case was far more influential than *Corrie*. It reaffirmed the connection between the executive department and criminal prosecutions, but it did so in the absence of the *nolle*. Later, this case became the core of *United States v. Cox*<sup>118</sup> which accounted for the separation of prosecutorial powers doctrine.<sup>119</sup> This doctrine was furthered in *Milliken v. Stone* which states that “the prosecutor on behalf of the executive makes criminal law enforcement decisions, which the

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<sup>108</sup> Commonwealth v. Wheeler, 2 Mass. at 174 (1809); Krauss, 20.

<sup>109</sup> Commonwealth v. Wheeler, 2 Mass. at 174 (1809); Krauss, 20.

<sup>110</sup> United States v. Hill, 26 F. Cas. 315 at 315-316 (Marshall, Circuit Justice, D. VA 1809).

<sup>111</sup> Krauss, 21; United States v. Hill, 26 F. Cas. 315 at 315-316 (Marshall, Circuit Justice, D. VA 1809).

<sup>112</sup> Krauss, 22; The Confiscation Cases, 74 U.S. 454, 454-55 (1868).

<sup>113</sup> Krauss, 20.

<sup>114</sup> United States Constitution, Article II, § 3.

<sup>115</sup> United States v. Corrie, 25 F. Cas. 658 (D.C.S.C. 1860).

<sup>116</sup> Krauss, 23; United States v. Corrie, 25 F. Cas. 658 (D.C.S.C. 1860).

<sup>117</sup> Krauss, 23; Ponzi v. Fessenden 258 U.S. 254, 262 (1922).

<sup>118</sup> Krauss, 24; United States v. Cox 342 F.2d at 172 n.6.

<sup>119</sup> Krauss, 24.

courts are ‘powerless’ to review.”<sup>120</sup> These criminal law enforcement decisions now included the prosecutor’s power to charge.<sup>121</sup>

With all of this case law backing the prosecutor, they became more powerful than ever. All the while the prosecutor was growing as a presidential symbol, the *nolle* started to slip away from judicial consciousness, especially during the twentieth century. The judges no longer felt the need to reference the *nolle* since it had been so well established.<sup>122</sup> After the *nolle* finally disappeared, the term “prosecutorial discretion” first made its appearance in the case *Poe v. Ullman*.<sup>123</sup> Krauss claims that “by 1975, the phrase [prosecutorial discretion] had appeared in nearly one hundred federal cases” and has become “entrenched in modern case law.”<sup>124</sup> Not only this, but it has also become intertwined into the prosecutor’s themselves and has caused them to be one of the most dominant figures in all of the criminal justice system.<sup>125</sup> This idea is touched upon in the case *Wayte v. United States*.<sup>126</sup> The *Wayte* court recognized that prosecutorial discretion is very ill-suited for judicial review and the courts also lack the competency to undertake these cases, anyway. For if they did, this would further delay criminal proceedings, threaten law enforcement as a whole, undermine prosecutorial effectiveness and even reveal governmental enforcement policy.<sup>127</sup>

The *Wayte* court has also described the prosecutor as “an officer of the state unprejudiced by any motives of private gain [...] and possessed the ability to ensure that “the criminal laws of the state are honestly and impartially administered.”<sup>128</sup> This appears to be a blind assumption

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<sup>120</sup> Krauss, 24; *Milliken v. Stone*, 7 F.2d 397 (S.D.N.Y. 1925).

<sup>121</sup> Krauss, 21.

<sup>122</sup> Krauss, 24.

<sup>123</sup> Krauss, 26; *Poe v. Ullman*, 367 U.S. 497, 530 (1961) (Harlan J. dissenting).

<sup>124</sup> Krauss, 26.

<sup>125</sup> Davis, 5.

<sup>126</sup> Davis, 14-15; *Wayte v. United States*, 470 U.S. 598, 607 (1985).

<sup>127</sup> Davis, 14-15; *Wayte v. United States*, 470 U.S. 598, 607 (1985).

<sup>128</sup> *Biemel v. The State* 37 N.W., 244; Ma, 206.

made by the courts. Misconduct does and will occur, and this is what causes prosecutorial discretion to become something rather dangerous.

The danger behind the power of prosecutorial discretion is also seen when looking at the judge as an agent of interpreting the law. Judges fear reprisal for even considering the possibility of reviewing prosecutorial discretion. If they did, not only would there be an immense backlash, but criminals could easily obtain pertinent government information and use it to their advantage.<sup>129</sup> Although this seems like a legitimate concern, it is still unsettling to know that the American judicial branch is indebted with these anxieties every day. How can this be when the American Republic calls for and demands accountability at all levels?<sup>130</sup>

Not only have prosecutors escaped all forms of accountability at this point, but they have also escaped the repercussions normally associated with any form of misconduct.<sup>131</sup> Even though the American Bar Association has set strict guidelines for prosecutorial conduct, but these standards are not enforceable by any means. They are merely meant to serve as a self-regulatory measure for “the sake of justice”<sup>132</sup> but even that is too aspirational claims Davis. The Department of Justice has also set similar guidelines for their federal prosecutors, but these standards are not enforced, either.

Similarly, individual states have forgone establishing laws that bind prosecutors to ethical codes and certain standards.<sup>133</sup> This is why Davis believes that justice has, in fact, become quite arbitrary.<sup>134</sup> If every decision made under the broad umbrella of prosecutorial discretion was “just” or “fair,” then it would never be problematic.<sup>135</sup> But “we have become complacent” and

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<sup>129</sup> Davis, 15.

<sup>130</sup> Davis, 15.

<sup>131</sup> Davis, 5.

<sup>132</sup> Davis, 15.

<sup>133</sup> Davis, 15-16.

<sup>134</sup> Davis, 16-17.

<sup>135</sup> Davis, 8.

“afford[ed] trust without requiring responsibility.”<sup>136</sup> Even in *Imbler v. Pachtman*, the court ruled that prosecutors are immune from civil liability in criminal cases, regardless of its outcome, due to the prosecutor’s innate responsibilities of bringing cases to trial.<sup>137</sup> Davis also feels that it is time for reform.<sup>138</sup>

Nonetheless, prosecutorial discretion is still vital because prosecutor’s do fall under the executive authority and in turn, it is their job to enforce the laws to the best of their ability when the president is not able to do so and because most matters do not involve national security.<sup>139</sup> In *United States v. Chemical Foundation* the court states that in order for prosecutors, as officials of the executive branch, to perform their functions properly the courts should not “unduly interfere with prosecutorial decision making.”<sup>140</sup> And it is important to note enforcement of the law is impossible without discretion.<sup>141</sup> Discretion provides both prosecutors and the executive with credibility and legitimacy, but only if it is used in the proper manner and context. This is why Davis states that although prosecutorial discretion may be evil it is still necessary.<sup>142</sup> Peter L. Markowitz identifies some of prosecutorial discretion’s major purposes. The first is that “prosecutorial discretion can be aimed at achieving justice when the strict application of the law or full enforcement of the proscribed penalties is disproportionate to the specific circumstances of the offense committed.”<sup>143</sup> This is because “prosecutors nearly universally decline to seek the full penalties warranted under law.”<sup>144</sup> Or, offenses can call for full punishment. But sometimes, prosecutors are merciful and use their discretion when deciding what to charge a criminal with

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<sup>136</sup> Davis, 18.

<sup>137</sup> Davis, 127-128; *Imbler v. Pachtman* 424 U.S. 409 (1976).

<sup>138</sup> Davis, 18.

<sup>139</sup> Davis, 13, 120-121.

<sup>140</sup> *Ma*, 207; *United States v. Chemical Foundation* 272 U.S. 1 (1926).

<sup>141</sup> Davis, 13.

<sup>142</sup> Davis, 6-8.

<sup>143</sup> Markowitz, 496.

<sup>144</sup> Markowitz, 496.

especially if they are older, young or even infirm.<sup>145</sup> Prosecutors are also concerned with larger societal interests.<sup>146</sup>

But apart from “justice, mercy, and societal utility, prosecutorial discretion is perhaps most commonly described as serving a purpose related to the efficient allocation of limited enforcement resources.”<sup>147</sup> Since there are only a limited number of resources, prosecutors cannot prosecute every single case that makes its way to their desk. This is why they need to make a choice at which case to pursue and which to forego. Markowitz makes an interesting point in relation to this: “prosecutors, whether they be administrative or criminal, the theory goes, are in a better position than Congress and the judiciary to assess how to most efficiently utilize the available enforcement resources.”<sup>148</sup> They know exactly what resources will be needed based upon the available evidence and they are able to foreshadow the likelihood of prosecuting a successful case.<sup>149</sup>

As discovered, prosecutorial discretion serves numerous purposes and even acts as a humanitarian aid or mechanism under the pretext of certain circumstances. However, this fact alone should not overshadow the problems surrounding prosecutorial accountability in our modern, democratic regime. Moreover, since John Marshall deemed prosecutorial discretion as an “executive prerogative,”<sup>150</sup> the executive is escaping accountability, as well. But what exactly is prerogative and what is its primary function?

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<sup>145</sup> Markowitz, 496.

<sup>146</sup> Markowitz, 496.

<sup>147</sup> Markowitz, 496.

<sup>148</sup> Markowitz, 496.

<sup>149</sup> Markowitz, 496.

<sup>150</sup> Goldstein; Krauss, 18; Saikrishna Praskash; Wedgwood, 100.

### III. Prerogative

The notion of prerogative is almost as old as history, itself. The term is often interchangeable with the term “discretion,” and it has been exercised by kings and executives, alike. It has been studied by numerous philosophers such as John Locke, David Hume and Sir William Blackstone. For Locke, prerogative of the executive should be employed in times of emergency and must be in accord with the laws of nature and the public good. But his *Second Treatise of Government* is quite ambiguous and falls silent upon many critical issues: who is to be the judge of correct uses of prerogative? How many prerogative powers are there, truly? To attempt to find answers to these questions, I turn to Bartlett, Gail and Everett who have closely examined Royal Prerogative throughout history, and all the way up until today. Their insights led me to examine the American political tradition and just exactly how the Founding Fathers grappled with prerogative in 1789, and whether or not it is constitutionally viable. However, let us first begin by discussing and examining the history and the definitions of the term in question.

#### a. Prerogative: History & Definitions

During the Medieval period, prerogative originated in the wake of absolute rulers. These rulers were both feudal lord and head of the kingdom, according to Gail and Everett.<sup>151</sup> Their powers were quite vast and often cited as “an undefined residue of power which he might use for the public good,”<sup>152</sup> and the preservation of the realm.<sup>153</sup> This “undefined residue of power” can be viewed as the nascent stage of prerogative.

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<sup>151</sup> Bartlett, Gail & Everett, *The Royal Prerogative Briefing Paper*, 21.

<sup>152</sup> D L Keir & F H Lawson, *Cases in Constitutional Law*, 6th edition, 1979, 70.

<sup>153</sup> Bartlett, Gail & Everett, 21.

With the establishment of the common law courts, the king's power grew immensely. The king could now punish felons and legally settle land disputes over titles.<sup>154</sup> In turn, this sparked the dissolution of the feudal system and also allowed the king to possess his very first “defined” prerogative power: immunity from civil and criminal matters. The king even had unrestricted powers in regard to the conduct of foreign policy, but he was limited in respect to raising taxation without Parliamentary consent.<sup>155</sup>

Even though the king's powers were becoming more concrete and defined, he still retained the various prerogative powers that came before the common law system. Without these residual powers, the king would not have been able to administer justice through his personal Council due to the insufficiencies of the early common law courts. Even though this was only done on a case by case basis, numerous uncertainties still arose in regard to the proper use of kingly prerogative. Therefore, the Stuart kings decided to take advantage of their undefined and residual powers. Their seemingly endless abuses of prerogative helped aid the Glorious Revolution of 1688.<sup>156</sup>

After the revolution ended, the Declaration of Rights of 1689 was created.<sup>157</sup> This document states certain and “specific uses and abuses of prerogative,”<sup>158</sup> on behalf of King James II. These acts were deemed illegal, *ex post facto*. Although this is a slight tangent, it is worthwhile to note that this declaration influenced the birth of the British Constitutional Monarchy.<sup>159</sup>

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<sup>154</sup> Bartlett, Gail & Everett, 21.

<sup>155</sup> Bartlett, Gail & Everett, 21.

<sup>156</sup> Bartlett, Gail & Everett, 21.

<sup>157</sup> Bartlett, Gail & Everett, 21.

<sup>158</sup> Bartlett, Gail & Everett, 21; Factsheet G4: The Glorious Revolution, *The Declaration of Right*, February 13, 1689 (See Appendix a. for specific uses and abuses of prerogative in regard to King James II).

<sup>159</sup> Bartlett, Gail & Everett, 22. The *Declaration of 1689* could have also influenced *the Bill of Rights* of the United States Constitution.

Turning back to the discussion, Political and Liberal Philosopher John Locke was a sober spectator of the events that led to the Glorious Revolution. This is not only made evident in light of the publication date of his *Second Treatise of Government*,<sup>160</sup> in 1689, but also because of the underlying message of his treatise—the foundation for *civil* governments and societies alike. For Locke, civility no longer stems from an aristocratical or monarchical regime but rather from a democracy. Therefore, all sovereignty is plucked from the king’s omnipotent grasp and handed directly to the people, once and for all. This is established in §162 of his treatise:

It is easie to conceive, that in the Infancy of Governments, when Commonwealths differed little from Families in number of People, they differ'd from them too but little in number of Laws: And the Governours, being as the Fathers of them, watching over them for their good, the Government was almost all *Prerogative*. A few establish'd Laws served the turn, and the discretion and care of the Ruler supply'd the rest. But when mistake, or flattery prevailed with weak Princes to make use of this Power, for private ends of their own, and not for the publick good, the People were fain by express Laws to get Prerogative determin'd, in those points, wherein they found disadvantage from it: And thus declared *limitations of Prerogative* were by the People found necessary in Cases, which they and their Ancestors had left, in the utmost latitude, to the Wisdom of those Princes, who made no other but a right use of it, that is, for the good of their People.<sup>161</sup> (John Locke, *Second Treatise of Government*, §162)

Locke also states that prerogative was often the largest in the hands of the wisest and best princes.<sup>162</sup> This is because the people acquiesced with the least complaint since the ruler acted in accordance with the “Letter of the Law.”<sup>163</sup> Resultingly, the King’s Prerogative naturally “inlarged.”<sup>164</sup> Although, this was not the case for the Stuart Kings. They exercised their prerogative in an arbitrary manner that was harmful to their people.<sup>165</sup> Any form of harm greatly offends Cicero’s famous maxim: *Salus Populi Suprema Lex*.<sup>166</sup> This maxim suggests that the

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<sup>161</sup> Locke, *Second Treatise*, §162.

<sup>162</sup> Locke, §165.

<sup>163</sup> Locke, §162.

<sup>164</sup> Locke, §162.

<sup>165</sup> Locke, §163.

<sup>166</sup> Cicero, *De Legibus*, Book III, Part III, sub. VIII; Locke, §158.



highest law is that of which promotes the safety, goodness and welfare of the people and allows it to prevail. Whoever “sincerely follows it,” according to Locke, “cannot dangerously err.”<sup>167</sup>

The same maxim may be applied to civil governments and civil societies as well.

Locke’s definition of prerogative is as follows: “the power to act according to discretion for the publick good, without the prescription of the Law, and sometimes even against it.”<sup>168</sup> This prerogative power shall be “employed for the benefit of the Community and to trust the ends of Government” because men are rational creatures and enter society for their mutual good.<sup>169</sup> So long as prerogative is exercised in this manner, it is to be considered “*undoubted*” and just “*Prerogative.*”<sup>170</sup>

In civil society there are two, unified powers: the *Executive* and the *Federative*.<sup>171</sup> These powers derive their force from society.<sup>172</sup> The executive’s main function is none other than the execution of the laws, while the federative is concerned with management and “the security and interest of the publick [...] that it may receive benefit or damage.”<sup>173</sup> In order to pursue these tasks, the executive is necessarily equipped with both “Prudence” and “Wisdom.”<sup>174</sup> This is because “the Executor of the Laws” has the “common Law of Nature,” within “his hands” and he has “a right to make use of it” when “the municipal law has given no direction.”<sup>175</sup> Although, the executive has this power until the legislature assembles in order to create and enact new legislation. However, the “law-making power” is far too slow for requisite dispatch,<sup>176</sup> and

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<sup>167</sup> Locke, §158.

<sup>168</sup> Locke, §160.

<sup>169</sup> Locke, §163.

<sup>170</sup> Locke, §161.

<sup>171</sup> Locke, §147.

<sup>172</sup> Locke, §147.

<sup>173</sup> Locke, §147.

<sup>174</sup> Locke, §147.

<sup>175</sup> Locke, §159.

<sup>176</sup> Locke, §160.

because “institutional or temporal constraints make it too difficult or impractical for the legislature to act effectively.”<sup>177</sup>

Moreover, laws do not always provide for the public good or good of society. For Locke, this means the executor is therefore left to his own discretion, in order to preserve the lives of his people.<sup>178</sup> Once this happens, the laws naturally give way to the executive power.<sup>179</sup> And, since it is impossible to foresee all “accidents and necessities,” the executive is left with an impressive “latitude [...] to do many things of choice, which the Laws do not prescribe.”<sup>180</sup>

Locke’s theory of prerogative, and the rest of his *Second Treatise*, has significantly impacted the American Founding due to its influence upon the American Founders. Even the Founders repudiated the idea of a monarchical regime. This is why they were very wary of establishing “an executive who would possess powers not explicitly granted by law, let alone one who would be permitted to act against the law.”<sup>181</sup> The whole concept of prerogative tells the tale as old as time and it “implies a return to [...] to a kind of discretionary, and potentially arbitrary, one person rule antithetical to the impersonal liberal ideal of government under law.”<sup>182</sup> Samuel Adams absolutely resounded the idea of a regime that still exercised prerogative due to its lack of a legal foundation. Thomas Paine was also abhorred by the idea for he felt that when it came to America, “the law is king [...] and there ought to be no other.”<sup>183</sup>

However, in *Democracy in America*, Alexis De Tocqueville offers a neutral viewpoint on executive prerogative. He states that “the practical part of a Government must not be judged by

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<sup>177</sup> Clement Fatovic, *Constitutionalism and Presidential Prerogative: Jeffersonian and Hamiltonian Perspectives*, 2004, 430.

<sup>178</sup> Locke, §159-160.

<sup>179</sup> Locke, §159.

<sup>180</sup> Locke, §160.

<sup>181</sup> Fatovic, 431.

<sup>182</sup> Fatovic, 431.

<sup>183</sup> Fatovic, 431; Thomas Paine, *Common Sense*, 1976, 98.

the theory of its constitution” and that “the President of the United States is in the possession of almost royal prerogatives, which he has no opportunity of exercising; and those privileges which he can at present use are very circumscribed. The laws allow him to possess a degree of influence which circumstances do not permit him to employ.”<sup>184</sup> This definition seems to suggest that prerogative is extralegal instead of extraconstitutional. He also views prerogative as a mechanism for the security of the union, but due to the precise boundaries that circumscribe the discretionary powers, this weakens prerogative entirely.<sup>185</sup>

Nevertheless, other philosophers such as David Hume, Sir William Blackstone, and Jean-Louis de Lolme were on the same wave length as Locke when it came to the concept of executive prerogative: it was only meant to be exercised in the wake of legitimate national emergencies.<sup>186</sup> Instead of upholding the legal maxim *fiat justitia ruat coelum*, or let justice be done though heaven may fall, they stood by the more pragmatic maxim of *inter arma silent leges*. This translates to “the laws are silent in time of war.”<sup>187</sup> This is because if the heavens were to fall, one would sacrifice the ends to the means and that would be a subordination of the duties of government, overall.<sup>188</sup> Hume also stated that “in every government, necessity, when real, supersedes all laws, and levels all limitations.”<sup>189</sup> This is because for Hume, a perfect society that only relies on law is beyond the scope of human nature. The imperfections of humans, and even the imperfections of the law, necessarily calls for the executive to exercise

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<sup>184</sup> Alexis de Tocqueville, *Democracy in America*, Chapter VIII: The Federal Constitution, Part 3.

<sup>185</sup> Tocqueville, Chapter VIII: The Federal Constitution, Part 3.

<sup>186</sup> Fatovic, 431.

<sup>187</sup> Fatovic, 431.

<sup>188</sup> Fatovic, 432; David Hume, *Essays: Moral, Political, and Literary* (“Of Passive Obedience”), 1985, 489.

<sup>189</sup> Fatovic, 432; David Hume, *The History of England from the Invasion of Julius Caesar to the Revolution in 1688*, 1983, Volume V, 128.

discretionary judgment.<sup>190</sup> All of their theories allow for an optimal amount of flexibility when dealing with unforeseeable circumstances.<sup>191</sup>

Moreover, if prerogative is used in the right manner and context, Harvey Mansfield sees this as entirely unproblematic. After all, he states that the executive power is the sole remediator for the inconsistencies of human reason,<sup>192</sup> and prerogative may very well be a perfect instrument in times of great crises. These instances of crises not only call for the exercise of prerogative power, but they also call for a strong executive, as well. This is how the executive can be both the defender of the laws and his people while simultaneously exercising a necessary feature of his character.

Blackstone also mimics these latter arguments and was as Lockean as one could possibly be when it came to the concept of prerogative. He claimed that prerogative was “the discretionary power of acting for the public good, where the positive laws are silent.”<sup>193</sup> These ideas are more or less found directly in Locke’s *Second Treatise*, as stated. However, “Lockean prerogative works towards many of the same ends as the rule of law, but through radically different means:” the Laws of Nature and self-preservation.<sup>194</sup> Even though prerogative may act against the established law, if exercised properly, it should never stray from the precepts of morality that are closely tied to the natural law tradition.<sup>195</sup>

Although in light of this new information and insight, many questions still remain. Is there more than one prerogative power(s)? Is the executive of the state the only individual who is able to exercise prerogative? And how exactly can prerogative be accurately employed in times

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<sup>190</sup> Fatovic, 432.

<sup>191</sup> Fatovic, 432.

<sup>192</sup> Harvey Mansfield, *Taming the Prince*, 20.

<sup>193</sup> Sir William Blackstone, *Commentaries on the Laws of England*, 1979, Volume I, 244; Fatovic, 432.

<sup>194</sup> Fatovic, 432; Locke, §158.

<sup>195</sup> Fatovic, 432.

of emergencies or special circumstances? In order to answer these questions, it is most beneficial to regard specific prerogative powers so that we can develop an even better understanding of prerogative and all of its intricacies.

#### b. Specific Prerogative Powers

According to Bartlett, Gail and Everett's article, Great Britain's Public Administration committee has categorized the Royal Prerogative powers into three parts: the sovereign's constitutional powers, the legal prerogatives of the Crown, and Prerogative executive powers. The sovereign's constitutional powers are the discretionary powers of which remain in the hands of the sovereign such as "the right to advise, encourage, warn Ministers, to appoint the Prime Minister" and "to assent to legislation."<sup>196</sup> The legal prerogatives of the Crown assert that the "Crown can do no wrong" nor is Crown bound to statutes either by word or implication. And lastly, the executive's Prerogative powers are the residual and historical powers thus left to the sovereign, however, these powers are now exercised by Government ministers thus acting in the sovereign's name. Various powers include creating and ratifying treaties, conducting diplomacy, governing overseas territory, and the deployment of the armed forces.<sup>197</sup>

Not only has the Royal Prerogative been classified in this way, but Constitutional Lawyers Bradley, Ewing and Knight have further identified general prerogative powers, as well.<sup>198</sup> The powers are as follows: powers relating to the legislature, the judicial system, foreign affairs, the armed forces, powers of appointment and honours, immunities and privileges, prerogative in emergency times as well as miscellaneous prerogative powers.<sup>199</sup>

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<sup>196</sup> Bartlett, Gail & Everett, 5.

<sup>197</sup> Bartlett, Gail & Everett, 5.

<sup>198</sup> Bartlett, Gail & Everett, 9.

<sup>199</sup> Bartlett, Gail & Everett, 9.

The powers relating to the legislature include summoning and proroguing of parliament and even the granting of royal assent to bills, to name a few. In terms of the English judiciary, these prerogative powers, including pardoning offenders and reducing sentences, are carried out by the Attorney General. The foreign affairs prerogatives include the creation of treaties, the declaration of war and keeping the peace.<sup>200</sup> Moreover, the powers of the armed forces declare the sovereign as the commander in chief under the Crown's authority. Appointments and honours include appointing ministers, judges, holders of public offices among others. The immunities and privileges are solely for the Crown, these are the Crown's legal prerogatives as mentioned at the beginning of this section. The emergency powers are restricted to times of war and the miscellaneous powers pertain to royal charters, mining precious metals, and guardianship of infants.<sup>201</sup> Many of these general prerogatives run parallel to the American political tradition, namely the functions of the executive as seen in the Constitution, and even the specific prerogative powers thus mentioned in John Locke's *Second Treatise of Government*.

Locke's first explicit mention of prerogative power, in terms of the Executive, is the Executive's ability to "*Convok[e] and dissolve[e] the Conventions of the Legislative.*"<sup>202</sup> This power, according to Locke, also applies to the Prince.<sup>203</sup> Furthermore, since the goal of civil society is for the preservation of all, it is only fitting that the next prerogative power involves the pardoning of offenders for "even the guilty are to be spared" and the executive necessarily must "mitigate the severity of the Law" upon occasion.<sup>204</sup> However, these are the only two specific powers that Locke mentions. Nonetheless, Locke does put much emphasis on the flexibility of

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<sup>200</sup> Bartlett, Gail & Everett, 9.

<sup>201</sup> Bartlett, Gail & Everett, 9.

<sup>202</sup> Locke, § 156.

<sup>203</sup> Locke, § 156.

<sup>204</sup> Locke, § 159.

prerogative, as we have already discovered. This is because Locke sees undefined prerogative powers as more beneficial in terms of prolonging the preservation and well-being of society. If all powers were explicitly defined, then the executive's functions would be severely limited. Strict boundaries upon prerogative in times of emergencies or national peril would be extremely dangerous, just as Hume suggests. Therefore, the impressive latitude the executive possesses to do things of which the law does not prescribe is the ultimate safeguard for society as a whole.

However, this is where America's Founding Fathers find themselves at a crossroads with Locke. Is prerogative meant to be an intrinsic part of the America regime? Alexander Hamilton and Thomas Jefferson say it is so, but they do not see eye to eye with the exact details of when, where and why.

### c. Prerogative's Influence Upon the American Founding: Hamiltonian and Jeffersonian Perspectives

There has been much ambivalence about prerogative and whether it fits into the Constitutional framework of the American Republic. Even though there are extensive legal and institutional mechanisms that limit the expansion or creation of powers that go beyond the scope of normal everyday circumstances, there have been a number of occasions where the executive has carried out extraordinary acts.<sup>205</sup> Such acts include President Lincoln's suspension of *habeas corpus*, the Bush administration's "Clean Air Act," and most recently, President Obama's DACA decision. However, these extraordinary measures will be explored in greater detail in section IV, *The Executive*.

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<sup>205</sup> Clement Fatovic, *Constitutionalism and Presidential Prerogative: Jeffersonian and Hamilton Perspectives*, 429; Harvey C. Mansfield Jr., *Taming the Prince*, 1993.

Moreover, the courts are even reluctant to issue any verdict as to whether or not prerogative is constitutional or whether the president is even authorized to take these measures.<sup>206</sup> This is because the constitution is not only silent when it regarding the role of prerogative, but prerogative, as we know, is also incompatible with judicial review, in the first place.<sup>207</sup> Although, this is due in part, thanks to the American Founders. In particular, Alexander Hamilton and Thomas Jefferson are two Founding Fathers that speak extensively about prerogative and its function in relation to the American Republic. Although they have their differences, they nonetheless agree that “the president may legitimately exercise prerogative powers in genuine cases of emergency that threaten vital substantive ends, including, primarily, the preservation of society.”<sup>208</sup> This echoes the Lockean tradition and theory of prerogative and also illuminates the seemingly hidden residual prerogative powers of the English tradition that have made their way across the Atlantic, as well.

Hamilton views the powers of prerogative to be innately intertwined in the executive’s vesting clause of Article II of the U.S. Constitution.<sup>209</sup> This was abhorrent in the eyes of Jefferson, the strict constructionist. He contested “that the national government including the executive, possesses only those powers ‘specifically enumerated’ in the Constitution,” and anything beyond the parchment’s scope “would be nothing short of an awful ‘prostitution of our laws, which constitute the pillars of our whole system of jurisprudence.’”<sup>210</sup> According to Fatovic, the Hamiltonian executive would invoke powers that are implicit in the Constitution as justification for performing an extraconstitutional exercise of prerogative while the Jeffersonian

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<sup>206</sup> Fatovic, 429.

<sup>207</sup> Fatovic, see 2<sup>nd</sup> footnote on 429.

<sup>208</sup> Fatovic, 430.

<sup>209</sup> Fatovic, 430.

<sup>210</sup> Fatovic, 430; Jefferson, “*Jefferson’s Opinion on the Constitutionality of a National Bank*,” 1791; *McCulloch v. Maryland* 17 U.S. 316 (1819).



executive would openly admit to violating the laws and publicly seek *post hoc* approval.<sup>211</sup> Even though these are two polarized views of a characteristic executive, they both agree that prerogative is an extraconstitutional power.<sup>212</sup> However, an executive prerogative that suspends or goes against the law seems incompatible with the formal principles of liberal constitutionalism. This is because the regime often views the law as its primary end and it is even the basis of order.

Locke would disagree since there is far too much emphasis on the law in this hypothetical scenario and he claims at the end of the day, the law is an instrument and prerogative can help achieve and realize more substantive ends.<sup>213</sup> If we recall, prerogative is axiomatically intertwined with promoting and maintaining the public good or the welfare of the people.<sup>214</sup> Even Fatovic reminds us that the public good is the “normative standard built into the very definition” of the term.<sup>215</sup> Moreover, Locke’s theory also calls for the formal rules to yield, but only in the presence of fundamental or substantive interests of course.<sup>216</sup>

Therefore in the context of substantive ends, prerogative *is* consistent with liberal constitutionalism. After all, one of its “chief ‘metaprinciples’ [...] is based on the ‘Fundamental Law of Nature and Government’” insofar as “all Members of the Society are to be preserved.”<sup>217</sup>

Despite this normative standard, the Constitution is still a legal document and sets rules and laws for the nation to abide by. Hamilton and Jefferson abjure the precedents set forth, both by interpretation and construction, because prerogative, by its very nature, is considered to be *sui*

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<sup>211</sup> Fatovic, 430.

<sup>212</sup> Fatovic, 430, 442.

<sup>213</sup> Fatovic, 430.

<sup>214</sup> Fatovic, 430; Locke §158.

<sup>215</sup> Fatovic, 430.

<sup>216</sup> Fatovic, 430; Locke §158.

<sup>217</sup> Fatovic, 431; Locke, §158.

*generis*.<sup>218</sup> And the uniqueness of prerogative and its implementation into practice is what makes it immune from judicial review or rather, judicial review is an inadequate “check” upon it.<sup>219</sup> However, we cannot avoid the tensions between prerogative and the American Republic forever. But is it even possible to locate prerogative in the text of the constitution in the first place? Hamilton claims it is possible, but Jefferson did not agree in the slightest.

Throughout Jefferson’s political life, he had always strictly adhered to the plain text of the Constitution and rarely, if ever, deviated from its original meaning or context. This is seen in a personal letter addressed to Samuel Kercheval where he discusses the following precept: “only lay down true principles and adhere to them inflexibly.”<sup>220</sup> It is true, for what good would transient principles serve as the core of the nation? They would not.

Nevertheless, the United States Constitution *does* employ true and everlasting principles, and this is what inclines Jefferson to view the document as a social contract among citizens and government. Any slight departure from the enumerated powers would undermine the system and be a usurpation of authority, altogether. Moreover, this authority is derived from the people themselves. Jefferson felt that it was of the utmost necessity to appeal to the people during times of great need in order to amend the document rather than perverting what it stands for and violating the people’s will. Although this would take up much needed time, it would help improve the constitution in the long run.

However, I cannot help but see certain faults in this line of thought. As history has shown us, the amendment process is long, and it often leads to Congressional gridlock due to the polarization of opinion. There is no guarantee an agreement will ever be reached, let alone a

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<sup>218</sup> Fatovic, 431.

<sup>219</sup> Fatovic, 431.

<sup>220</sup> Fatovic, 433.

newly enacted amendment. Since the ratification of the constitution in 1789, there have only been seventeen new amendments, after *the Bill of Rights*, over the course of a two hundred and thirty-year period. That is roughly the equivalent of an amendment every thirteen and a half years. Not only is Jefferson's proposal unrealistic but it also undermines the intrinsic energy of the executive: his secrecy and speed.<sup>221</sup> The second rebuttal that can be made in response to Jefferson is that the executive would only violate the will of the people insofar as if his actions are in accord with his private, or personal interests. Acts of this nature would hardly escape public scrutiny and the president would be held accountable. But this is a rare occurrence because one of the primary objectives of the president is to represent the will of his people, and not stray from it.<sup>222</sup> And if their will is in accord with some other substantive interest or end other than what the statutory law prescribes or goes beyond the limited boundaries of the constitution's enumerated text, does Jefferson's argument slip away? I am inclined to say that it may.

When Jefferson examined prerogative in greater detail he admitted that no nation could afford to function without it, especially in extraordinary circumstances.<sup>223</sup> He also confesses that a strict observance of the laws is not the highest duty of them all. Instead, it is prudent to follow the laws of necessity such as self-preservation in order to save the country from imminent danger. If we were to lose the country due to "scrupulous adherence to the written law" we would lose "the law itself, with life, liberty, property and all those who are enjoying them."<sup>224</sup>

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<sup>221</sup> Publius, *Federalist* No. 70.

<sup>222</sup> 10 *Annals of Cong.* 615 (1800); Krauss 18.

<sup>223</sup> Fatovic, 434.

<sup>224</sup> Fatovic, 434. Thomas Jefferson, *Thomas Jefferson: Writings* (Jefferson to John B. Colvin, Sept. 10, 1810), 1984, 1231-32.

The constitution often imitates these higher principles or duties, according to Fatovic, but due to the limits and defects of the document, it is incapable of providing for all of them.<sup>225</sup> If the constitution were able to provide for these necessities without fail, who is to say we would need external mechanisms of government at all? Even Publius so eloquently states in *Federalist No. 51* that men will never be angels and both internal and external forms of government will always be necessary. And sometimes, the ambition of the constitution may very well counteract the ambition of the executive, especially if the people will the executive to do so.<sup>226</sup> James Madison also claims that the struggle for governmental power is not only necessary but essential for the preservation of liberty.<sup>227</sup>

Yet, Jefferson is still is not willing to concede the argument to Hamilton. He strongly views the use of prerogative in extreme circumstances as both illegal and legitimate for each act is embedded with a criminal presumption of guilt until the president can prove its merits.<sup>228</sup> The public is meant to be the judge and jury. However, Jefferson further contradicted himself with the notion of *post hoc* approval for prerogative. He knowingly went beyond the scope of the Constitution's enumerated powers and still bought the Louisiana territory because his exceptionally high confidence in the people allowed him to presume that they would approve the act.<sup>229</sup> Not to mention, this did not fall under the pretexts of an emergency, either. Although, in Jefferson's defense, the purchase of new territory was to prolong "the republican experiment in self-government."<sup>230</sup> But then again, this was Jefferson's own ideology and he also expressed his distaste for those who indulge in their private feelings, when it comes to the exercising and

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<sup>225</sup> Fatovic, 434.

<sup>226</sup> Publius, *Federalist No. 51*. "Ambition must be made to counteract ambition."

<sup>227</sup> Publius, *Federalist No. 51*; Markowitz, 514.

<sup>228</sup> Fatovic, 434.

<sup>229</sup> Fatovic, 434-435.

<sup>230</sup> Fatovic, 435.

evaluating prerogative.<sup>231</sup> For Hamilton, this turns Jefferson’s executive into a sort of “law-breaker,”<sup>232</sup> and this is problematic in and of itself. Hamilton has a “more expansive reading” of the president, one who has “the best intentions for the sake of the nation” and “could always try to find some justification for his actions in the Constitution, itself.”<sup>233</sup>

Hamilton claims that sufficient power is, in fact, necessary and even goes as far to claim – indispensable – in order to protect liberty to the fullest extent.<sup>234</sup> Not only does this power supply the president with vigor, but also energy. Energy, according to Hamilton is the leading characteristic of a good government and it is essential for the protection of the community, property and even the steady administration of the laws.<sup>235</sup> Even though energy and prerogative belong to effective and sovereign governments, “these qualities are most naturally suited to the executive.”<sup>236</sup> And a powerful executive for Hamilton, is “a beacon of salvation in times of danger,”<sup>237</sup> even though emergencies are not as frequent. This is because “the contingencies of society are not reducible to calculations” for “they cannot be fixed or bounded even in imagination.”<sup>238</sup> This leads Fatovic to argue that it is necessary to leave many things up to the executive discretion rather than to spell out everything in detail; this would restrain and limit the government’s ability to protect the supreme value of self-preservation.<sup>239</sup>

Hamilton also agrees with Jefferson that prerogative is an extraconstitutional instrument in times of emergencies. He also sees the constitution as a viable document and understands the

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<sup>231</sup> Jefferson, *Writings (Jefferson to Governor William C.C. Claiborne)*, 1172.

<sup>232</sup> Fatovic, 435.

<sup>233</sup> Fatovic, 435 (Citing Alexander Hamilton and *Alex Hamilton Writings*)

<sup>234</sup> Fatovic, 435.

<sup>235</sup> Fatovic, 436; Publius, Federalist No. 70.

<sup>236</sup> Fatovic, 436.

<sup>237</sup> Fatovic, 436.

<sup>238</sup> Fatovic, 436; Alexander Hamilton, *Alex Hamilton Writings*, 505.

<sup>239</sup> Fatovic, 436.

proper relationship between its means and its ends, as does Locke.<sup>240</sup> This is why Hamilton felt the need to leave the term “executive power,” as seen in Article II of the Constitution as undefined as possible. If it was explicitly defined, it would further restrict the executive branch the ability to carry out necessary functions, especially in times of emergencies.<sup>241</sup> Hamilton even goes as far to say that the constitution contains very few restrictions that would hinder the government’s ability to deal with emergencies, anyway.<sup>242</sup> Moreover, “emergencies compel the government to resort to measures that have not been constitutionally specified in advance”<sup>243</sup> and as Hamilton once stated: “extraordinary exigencies demand extraordinary means.”<sup>244</sup> These extraordinary means need to be without limitation, as well. James Madison also shared Hamilton’s view because “political circumstances do not always conform to the constitution” and this much rather calls for the constitution to conform to the political environment, instead.<sup>245</sup>

History has also shown us that there can be no precise bounds in response to exigencies which requires a power of equal vigor and strength which must necessarily reside in the executive.<sup>246</sup> As long as the extraordinary act or measure does not violate the rights of individuals, state rights, and is considered moral, “there is a strong presumption in favor of its constitutionality.”<sup>247</sup> Therefore, when analyzing whether or not an act of prerogative is constitutional, we can not only use Locke’s “normative standard,” as identified by Fatovic, but we can use this additional standard thus established by Hamilton.

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<sup>240</sup> Fatovic, 436.

<sup>241</sup> Fatovic, 436-437; Publius, *Federalist No. 36*.

<sup>242</sup> Fatovic, 437; Hamilton, *Alexander Hamilton’s Writings* (“*Opinion on the Constitutionality of the Bank*”), 618.

<sup>243</sup> Fatovic, 437.

<sup>244</sup> Fatovic, 437; Hamilton, *Alexander Hamilton’s Writings*, 58.

<sup>245</sup> Fatovic, 437.

<sup>246</sup> Fatovic, 437; Publius, *Federalist No. 26*.

<sup>247</sup> Fatovic, 437; Hamilton, *Alexander Hamilton’s Writings* (“*Opinions on the Constitutionality of the National Bank*”), 613, 621.

Although Hamilton and the rest of the *Federalist* never explicitly mention the term prerogative, the papers still establish clues and ambiguities that point us to believe that not all powers are necessarily enumerated as they were originally intended. Even Fatovic explains that Hamilton was extremely cautious about strictly defining constitutional terms at the convention. He warned other delegates to be careful as well, he knew that “something would always be wanting”<sup>248</sup> because, in the instance of necessity, undefined powers become “discretionary powers, limited only by the object for which they were given.”<sup>249</sup> He also responds to Jefferson’s post hoc approval proposition by stating that would diminish the president’s dignity and also potentially demerit the nation, as a whole.<sup>250</sup>

After examining both perspectives, Fatovic argues that Hamilton and Jefferson also agree that prerogative is the most preferred mechanism for dealing with emergencies as opposed to regular institutional methods. Prerogative is even less dangerous than trying to constrain or expand presidential powers, first and foremost.

For a moment, let us turn back to the discussion on prerogative’s incompatibility with judicial review. The reason behind this is because the founders wanted to avoid the “juridification of prerogative [...] to avoid setting formal precedents that would hamstring the ability of the presidents to respond effectively to genuine emergencies in the future or enlarge their discretionary powers in ordinary circumstances.”<sup>251</sup> The founders certainly had the foresight to make sure that prerogative did not become entrenched into our regime throughout the course of history. Their reasoning behind preventing the juridification was also accurate because as we have come to see, prosecutorial discretion has not only emerged from state and federal case law,

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<sup>248</sup> Max Farrand, *The Records of the Federal Convention of 1787*, Volume I, 298; Fatovic, 438.

<sup>249</sup> Fatovic, 438.

<sup>250</sup> Fatovic, 439.

<sup>251</sup> Fatovic, 439.

but it has become so intertwined into our Republic to the point where it can never be detached. It has caused prosecutors to escape accountability and even the president, as we will discover in the next section.

If prerogative can only be used in cases of extreme emergencies, in what manner or under which circumstances can executive prosecutorial discretion be invoked? Prosecutors use it every day to make ordinary decisions, it seems as if it is only a matter of time before the executive does as well. But we know one thing for sure, prerogative is simply “irreducible to law”<sup>252</sup> and irreducible it shall remain, in the American Republic that is. This is entirely different than in the English system since The Royal Prerogative is regularly reviewed by the courts:

In October 2009 the Government published the review of prerogative powers first promised in the Governance of Britain Green Paper in July 2007. The paper discussed definitions of the prerogative and the uncertainty over its extent. The Review went on to state that there are a number of ways in which the exercise of prerogative powers can be controlled and examined by Parliament, including through legislation, accountability to Parliament and Parliamentary approval of expenditure (Bartlett, Gail & Everett, 18).

If we are to learn anything from Royal Prerogative, it would be this: if there came a time in American history where the executive’s use of his prerogative or discretionary powers is so controversial that even the public sentiment is divided, and all other democratic mechanisms fail, then it would necessarily fall upon the courts to render the final verdict even if prerogative is irreducible to law, as previously suggested. Nevertheless, it is highly unlikely that this hypothetical scenario would ever come to fruition. Instead of looking at hypotheticals, it is now time to reflect upon and examine actual instances and cases where the executive has exercised prerogative or other discretionary powers.

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<sup>252</sup> Fatovic, 439.



#### IV. The Executive

In the modern era, executive power has become a sort of necessity, according to Harvey Mansfield.<sup>253</sup> Every state needs a strong executive or else it becomes a “courting disaster” and it is “regarded with pity and contempt by those more fortunate.”<sup>254</sup>

As we have come to know, the President is granted numerous powers. Mansfield cites a few of these powers like the ability to veto the legislature and even the president’s capacity as the commander-in-chief.<sup>255</sup> He is also “quicker and more masterful,” when it comes to “decision-making”<sup>256</sup> and this is why he is left with “personal power.”<sup>257</sup> The president “must acquire and use personal power in order to secure the formal power promised, but not guaranteed, by the ‘literary theory,’ the constitutional forms, and the developed expectations of the office.”<sup>258</sup> This is because the Constitution, itself, grants the executive to be strong and allows him to “sit where he sits.”<sup>259</sup> This personal power is also prerogative power as we have already established.

Therefore, it seems repetitive to recount the origins of the executive and his power. Instead, the overall focus of this section is looking at various acts of executive prerogative or the executive’s use of prosecutorial discretion. Under each administration that engages in these silent discretionary powers, every exercise is just as *sui generis*, or unique, as Fatovic claims.<sup>260</sup> The most recent use of prosecutorial discretion was issued by President Barack Obama and his DACA decision.

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<sup>253</sup> Mansfield, 1.

<sup>254</sup> Mansfield, 1.

<sup>255</sup> Mansfield, 4.

<sup>256</sup> Mansfield, 4.

<sup>257</sup> Mansfield, 8.

<sup>258</sup> Mansfield, 6.

<sup>259</sup> Mansfield, 6 (Referencing Neustadt’s “favorite phrase borrowed from Harry Truman”).

<sup>260</sup> Fatovic, 431.

Another major theme in this section will be Markowitz's account of prosecutorial discretion appearing in the United States Constitution. This suggests that prosecutorial discretion is more so rooted in the separation of powers doctrine instead of case law, as suggested by Krauss in earlier sections. Nonetheless, both theories help illuminate the ambiguities of executive prerogative in their very own way and both theories can be argued for, coextensively.

However, my ultimate goal for this section is to reach a verdict in regard to the constitutionality of the DACA decision and whether or not its underlying message runs parallel to Locke's theories on executive prerogative. And if it just so happens to pass the Lockean test of morality as seen under the natural law and the basic principle of self-preservation, it is all the more important to show why the repeated use of prosecutorial discretion by the executive will not necessarily lead to more usurpations of power. Nor will it result in tyranny.

#### a. Executive Prosecutorial Discretion and the Constitution

Even though there "was no direct conversation about the general power of prosecutorial discretion in the record of the framing of the Constitution," Markowitz claims, "prosecutorial discretion was" and still is "an uncontroversial power of the President from the start."<sup>261</sup> For example, President Washington initiated, directed and even halted both criminal and civil procedures.<sup>262</sup> These acts were uncontested by Congress as well as the Supreme Court. This is because, as we recall, prosecutorial discretion was an indubitable feature of the American executive and it allowed the President to determine "the will of the nation."<sup>263</sup>

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<sup>261</sup> Markowitz, 497.

<sup>262</sup> Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1034, 1053 (2013); Markowitz, 497.

<sup>263</sup> 10 *Annals of Congress* 596, 615 (1800); Markowitz, 497.

Along with Washington and Adams, Jefferson, Madison, Lincoln and Johnson have also exercised their broad prosecutorial powers to grant amnesty and to restore civil order in “the best interests of the nation.”<sup>264</sup> However, Markowitz states that the framers did intend “to deprive the President of the arguably related dispensing and suspending powers” thus exercised and enjoyed by the English Kings before the Glorious Revolution.<sup>265</sup>

It has been well documented that the delegates of the Constitutional Convention rejected the notion of supplying the president with these powers anyway.<sup>266</sup> But we have to remember that the suspension and dispensing of the laws is entirely different than the precepts of prosecutorial discretion. Prosecutorial discretion is merely temporal and more backward-looking, according to Markowitz,<sup>267</sup> and pardoning dispenses penalties, but not the legal obligation behind them. On the other hand, a King is able to dispense the penalties, as well as the concrete legal precedents and the obligations that follow.<sup>268</sup> The latter is certainly more arbitrary and problematic, even though the king’s prerogative powers were meant to be more limited; they could only be invoked when there was an offense or violation against the state.<sup>269</sup> The events that unfolded before the Glorious Revolution have proven otherwise.

Moreover, Markowitz claims that it is quite difficult to gauge whether the Framers intended on limiting executive prosecutorial power since it is never explicitly mentioned in the Constitution,<sup>270</sup> anyway. But as we learned from John Marshall, the essence of prosecutorial discretion is still embodied within its parchment because “the Framers were brilliant politicians”

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<sup>264</sup> Markowitz, 498-499.

<sup>265</sup> Markowitz, 499; Jack N. Rakove, *Original Meanings*, 20.

<sup>266</sup> Max Farrand, *The Records of the Federal Convention of 1787*, 103-04; Markowitz, 499-500

<sup>267</sup> Markowitz, 500.

<sup>268</sup> Sir Matthew Hale, *the Prerogatives of the King*, 177; Markowitz, 500.

<sup>269</sup> Markowitz, 500.

<sup>270</sup> Markowitz, 501.

but even more “cautious draftsmen.”<sup>271</sup> And Hamilton made it very clear that the executive vesting clause was partially undefined and ambiguous for a reason. That reason is none other than to provide the president with ample flexibility during times of great danger or in the wake of national emergencies.

Despite the ambiguous nature of the presidential powers, Markowitz still has managed to expertly trace the essence of prosecutorial discretion in the framework of the Constitution—even though no single provision can be identified as its sole source.<sup>272</sup> The three main sources are Article II’s Take Care Clause, the Executive Vesting Clause, and the Pardon Power.<sup>273</sup>

The basic premise of the Take Care Clause is for the executive to enforce the law to the best of his ability. The Supreme Court went as far as citing this clause as the main source of prosecutorial discretionary power as seen in *Heckler v. Chaney*.<sup>274</sup> Markowitz is very wary about this overly broad grant of power and suggests that there needs to be a limiting principle associated with it so that the functions of the legislature are not usurped due to enforcement discretion.<sup>275</sup>

The discretionary authority granted by the Executive Vesting Clause has been debated for centuries. Interestingly enough, Justice Scalia was perfectly in tune with the Founders when he issued his dissenting opinion in response to *Morrison v. Olson*.<sup>276</sup> He stated that he agreed with the majority opinion when they wrote that “prosecutorial discretion authority falls squarely

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<sup>271</sup> Mansfield, 10.

<sup>272</sup> Markowitz, 516.

<sup>273</sup> Markowitz, 517; U.S. Constitution, Article II, §1, 2, 3.

<sup>274</sup> *Heckler v. Chaney* 470 U.S. 821, 823, 824, 831, 832, 833, 845 (1985); Markowitz, 505-6, 517.

<sup>275</sup> Markowitz, 519.

<sup>276</sup> *Morrison v. Olson*, 487 U.S. 654, 705 (1988), Justice Scalia dissenting.

within the executive power,”<sup>277</sup> and prosecutorial discretion is a core component of the clause because it can be used to balance “innumerable legal and practical considerations.”<sup>278</sup>

In regard to the pardon clause, a pardon is a much greater power compared to an act of prosecutorial discretion, even though prosecutorial discretion has been absorbed or rather attached to the pardon power, itself.<sup>279</sup> Since the pardon power is associated with prosecutorial discretion, the presidential power naturally broadens all the more. Even in the early days of the Union, the power to grant categorical amnesties from prosecution was part of the public’s interest and for it helped maintain civil tranquility and prevent rebellion.<sup>280</sup> Additionally, there is no terminology in the pardon clause that would serve to limit its context to only apply to criminal matters. Therefore, this ambiguity allows the pardon clause power to extend to any offense against the United States and it even serves as a “fail-safe protection against unjust deprivation of liberty,”<sup>281</sup> according to Markowitz.

Moreover, in *United States v. Wilson*, the court held that “the scope of the pardon power was coextensive with the scope of the king’s prerogative at the time of the framing.”<sup>282</sup> This jurisprudence suggests that the pardon power may extend into the modern administration as well, especially where liberty interests lie.<sup>283</sup> This idea is manifest within Judge Cavanagh’s decision for *In Re Aiken County* when he was at the D.C. Circuit Court of Appeals:<sup>284</sup>

The Executive’s broad prosecutorial discretion and pardon powers illustrate a key point of the Constitution’s separation of powers. One of the greatest unilateral powers a President possesses under the Constitution, at least in the domestic sphere, is the power to protect individual liberty by essentially under-enforcing federal

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<sup>277</sup> *Morrison v. Olson*, 487 U.S. 654, 705 (1988); Markowitz, 520.

<sup>278</sup> *Morrison v. Olson*, 487 U.S. 654, 705 (1988), Justice Scalia dissenting at 708; Markowitz, 521.

<sup>279</sup> Markowitz, 521.

<sup>280</sup> Markowitz, 522.

<sup>281</sup> Markowitz, 523, 525.

<sup>282</sup> Markowitz, 524; *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833); *Ex parte Wells*, 59 U.S. (18 How.) 307, 209 (1855).

<sup>283</sup> Markowitz, 526.

<sup>284</sup> *In Re Aiken County*, 725 F.3d 255, 264 (D.C. Cir. 2013); Markowitz, 530.

statutes regulating private behavior . . . . [T]he President's prosecutorial discretion and pardon powers operate as an independent protection for individual citizens against the enforcement of oppressive laws that Congress may have passed (*In Re Aiken County*, 725 F.3d 255, 264 (D.C. Cir. 2013), Cavanagh; Markowitz, 530).

And the protection of individual liberty is the very heart of the Due Process Clause of the Constitution, anyway. But, Markowitz knows, all too well, that a robust view of prosecutorial discretion across all administrative contexts allows for more instances of executive inaction and this would be detrimental to liberty in the long run.<sup>285</sup>

In closing, these three clauses hint at the president's duties but also give way to the tensions<sup>286</sup> and uncertainties that arise with his power--despite the extensive case law that allows executive prosecutorial discretion to thrive. Nevertheless, there are still many that oppose the very notion of a discretionary executive, especially today. But this will be discussed in greater detail in the following sections. It is now time to examine specific exercises of prosecutorial discretion.

#### b. Executive Prosecutorial Discretion in Action

Markowitz claims that the executive's use of prosecutorial discretion becomes controversial when he enforces categorical or rule-based policies.<sup>287</sup> This is because these policies tend to be driven by independent and normative judgments instead of justice, mercy or efficiency considerations for the government as a whole.<sup>288</sup> One example of a categorical policy is when President Carter pardoned half a million men who violated draft laws in order to avoid military service in Vietnam. The main reason behind this use of the pardon power was to "heal

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<sup>285</sup> Markowitz, 531.

<sup>286</sup> Markowitz, 527.

<sup>287</sup> Markowitz, 501.

<sup>288</sup> Markowitz, 501.

the war's psychic wounds.”<sup>289</sup> President Truman and Ford acted in a similar vein for they granted clemency to thousands of individuals after World War II and Vietnam, as well.<sup>290</sup>

President Clinton enacted a “Corporate Leniency Policy” under the Department of Justice to grant corporations immunity from criminal prosecution, as long as the corporation is the first one to come forward and report illegal antitrust activity and agree to take a remedial course of action.<sup>291</sup> The Department of Justice has specifically stated that “the grant of amnesty is certain and is not subject to the exercise of [individualized] prosecutorial discretion.”<sup>292</sup>

Markowitz also claims that the Supreme Court is very clear about the constitutionality when presidents use their absolute discretion whether to prosecute a criminal case or whether or not to grant broad categorical amnesties.<sup>293</sup> Or in other words, the Supreme Court does not involve themselves with reviewing acts of prosecutorial discretion.<sup>294</sup> Therefore, no matter when the executive uses prosecutorial discretion, the constitutionality is presumed, until proven otherwise. *Heckler v. Chaney*<sup>295</sup> hints at this presumed constitutionality, as seen above. In this case, the Court drew the connections between an “agency’s refusal to institute proceedings” and “the decision of the prosecutor in the Executive Branch not to indict” which, in turn, has been considered as a “special province of the Executive Branch.”<sup>296</sup>

As of recently, executive discretion has taken on a new form. Instead of executing, forgoing or enforcing the laws, there has been a major surge in rulemaking or nonenforcement policies.<sup>297</sup> President Bush was the first to use categorical nonenforcement after his provision for

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<sup>289</sup> Markowitz, 502.

<sup>290</sup> Markowitz, 502.

<sup>291</sup> Markowitz, 502.

<sup>292</sup> Markowitz, 502-503.

<sup>293</sup> Markowitz, 503; *United States v. Nixon* 418 U.S. 683, 693 (1974).

<sup>294</sup> *United States v. I.D.P.*, 102 F.3d 507, 511 (11<sup>th</sup> Cir. 1996).

<sup>295</sup> *Heckler v. Chaney* 470 U.S. 821, 823, 824, 831, 832, 833, 845 (1985); Markowitz, 505-6.

<sup>296</sup> *Heckler v. Chaney* 470 U.S. 821, 823, 824, 831, 832, 833, 845 (1985); Markowitz, 505-6.

<sup>297</sup> Markowitz, 503.

the Clean Air Act was struck down by the D.C. Circuit Court.<sup>298</sup> Therefore, he bypassed the courts and Congress and went straight to the EPA, or the Environmental Protection Agency and issued an enforcement policy that entailed the agency officials *not* to initiate enforcement action against the power plants that would have been protected under the original provision.<sup>299</sup> This nonenforcement policy created numerous economic conflicts and was harmful to not only society but directly countered the public interest. Therefore, it is hard to see the justification for this use of executive discretion.<sup>300</sup> Unfortunately, this pattern of nonenforcement also appeared in the Food and Drug Administration the Department of Labor, and even in regard to civil or voting rights,<sup>301</sup> even though there were no explicit or specific policies to cite as evidence under the Bush Administration.<sup>302</sup>

President Obama also used nonenforcement policies during his time in office. Although, he did ensure public awareness before instituting these policies—*unlike* the Bush Administration.<sup>303</sup> The Affordable Care Act is one policy I am referring to. Here, President Obama stated that he, nor any enforcement agency, will initiate action in response to certain provisions under that act during the transitional period because it would not be in the public's

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<sup>298</sup> Markowitz, 503; *New York v. EPA*, 443 F.3d 880, 890 (D.C. Cir. 2006).

<sup>299</sup> Markowitz, 504.

<sup>300</sup> Markowitz, 544.

<sup>301</sup> Markowitz, 504 (See MINORITY STAFF OF H. COMM. ON GOV'T REFORM, 109TH CONG., PRESCRIPTION FOR HARM: THE DECLINE IN FDA ENFORCEMENT ACTIVITY 7 (2006) (documenting fifty percent reduction in FDA warning letters); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-75, U.S. DEPARTMENT OF JUSTICE: INFORMATION ON ENFORCEMENT EFFORTS FROM FISCAL YEARS 2001 THROUGH 2007, at 23-37, 57-83 (2009), <http://www.gao.gov/assets/300/297337.pdf> [<https://perma.cc/BZ7Y-PT4W>] (documenting the Bush Administration's reduction in enforcement of employment and voting rights laws); Goodwin Liu, *The Bush Administration and Civil Rights: Lessons Learned*, 4 DUKE J. CONST. L. & PUB. POL'Y 77, 81 (2009) (same); see also Andrias, *supra* note 16, at 1062-63 (documenting the Bush Administration's nonenforcement of securities and civil rights laws); Norman S. Poser, *Why the SEC Failed: Regulators Against Regulation*, 3 BROOK. J. CORP. FIN. & COM. L. 289, 309-17 (2009) (detailing the SEC's enforcement failures under the Bush Administration).

<sup>302</sup> Markowitz, 504.

<sup>303</sup> Markowitz, 505.



best interest.<sup>304</sup> Markowitz states that this is a more difficult case to interpret but eventually he ruled that the ACA exceeded the bounds of prosecutorial discretion.<sup>305</sup> One, because the statute was too ambiguous and did not give a concrete timeline for its implementation. And second, the statutory scheme appears to be motivated by his political desires and agenda, rather than a desire held by the people.<sup>306</sup> And not only is the will of the nation meant to be regarded with the utmost importance, but it is also a prerequisite for exercising executive discretion, forthrightly. But this was not the only nonenforcement policy he enacted during his terms as President. The other is known as DACA.

#### i. The DREAM Act & DACA

In June of 2012, President Barack Obama addressed the nation about immigration reform and his newly envisioned DREAM Act. The dreamers, he claimed:

[Are] young people and are Americans in their heart, in their minds, in every single way but one: on paper. They were brought to this country by their parents -- sometimes even as infants -- and often have no idea that they're undocumented until they apply for a job or a driver's license, or a college scholarship. Put yourself in their shoes. Imagine you've done everything right your entire life -- studied hard, worked hard, maybe even graduated at the top of your class -- only to suddenly face the threat of deportation to a country that you know nothing about, with a language that you may not even speak. That's what gave rise to the DREAM Act. It says that if your parents brought you here as a child, if you've been here for five years, and you're willing to go to college or serve in our military, you can one day earn your citizenship. And I have said time and time and time again to Congress that, send me the DREAM Act, put it on my desk, and I will sign it right away (President Obama, "Remarks by the President on Immigration," 2012).

However, Congress at the time did not see eye to eye with the President. Therefore, after weeks of Congressional inaction, President Obama decided to transform "prosecutorial

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<sup>304</sup> Markowitz, 505.

<sup>305</sup> Markowitz, 545.

<sup>306</sup> Markowitz, 544.

discretion policy” by “forestall[ing] the deportations of millions of undocumented immigrants.”<sup>307</sup> His policy also transformed from the title of the DREAM Act to DACA or the Deferred Action for Childhood Arrivals. This is another nonenforcement policy, just like the ACA, and it is even more difficult to interpret and unpack:

In the absence of any immigration action from Congress to fix our broken immigration system, what we’ve tried to do is focus our immigration enforcement resources in the right places [...] we focused and used discretion about whom to prosecute, focusing on criminals who endanger our communities rather than students who are earning their education [...] we’ve improved on that discretion carefully and thoughtfully. Well, today, we’re improving it again. Effective immediately, the Department of Homeland Security is taking steps to lift the shadow of deportation from these young people (President Obama, “Remarks by the President on Immigration,” 2012).

Not only is President Obama enforcing the Department of Homeland Security to follow a nonenforcement policy, but he when he uses the term “discretion” he is referring to prosecutorial discretion. The DACA program is dictated as follows:

[DACA applies to] any person who (1) came to the United States before the age of sixteen, (2) had been present in the United States for at least five years on the date of the announcement, (3) was engaged in or had completed certain educational programs or military service, and (4) was under the age of thirty could be “considered for an exercise of prosecutorial discretion” if that person had not committed certain criminal offenses. The memorandum announcing the program stated that decisions about prosecutorial discretion under the DACA program are to be made on a “case-by-case basis” and that the memorandum does not ensure that all persons meeting the prima facie eligibility criteria will be granted prosecutorial discretion. When discretion was exercised under the program, however, the memorandum made clear that individuals would be granted “deferred action status” and that they could apply for work authorization (Markowitz, 509).

Deferred action is an act of prosecutorial discretion and has been recognized by the Supreme Court and Congress in regard to immigration statutes.<sup>308</sup>

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<sup>307</sup> Markowitz, 489.

<sup>308</sup> Markowitz, 509; *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999).

Nevertheless, it does not matter if DACA is an improvement, or rather, expansion of executive discretion, there are still many opponents that argue against it; for these individuals have claimed that the president attempted to dispense the nation's deportation laws.<sup>309</sup> When regarding this policy upon its face, the president appears to be acting in a manner that runs parallel to the King of England. As mentioned earlier, a King dispenses both the penalties as well as suspends the concrete legal precedents and the obligations that follow.<sup>310</sup> He also undermined the will of Congress by foregoing the typical legislative process and seemingly violated the separation of powers doctrine enshrined in the Constitution, itself,<sup>311</sup> even though the motives behind the policy were deemed to be in accordance with the public's interest.

Moreover, Markowitz reminds us that President Obama took it upon himself to reach this normative judgment through the use of prosecutorial discretion. The core principles of prosecutorial discretion as we know include justice, mercy and societal unity. If the executive's use of prosecutorial discretion were to be limited, this "would be at odds with historic and modern practice and would significantly undermine the institutional design goals of transparency, uniformity and accountability."<sup>312</sup> This is why Markowitz proposes that the power of prosecutorial discretion should be "dependent upon the context of enforcement and that the power is at its zenith when a president exercises her discretion to protect physical liberty."<sup>313</sup> And when discretion is used to prevent liberty deprivations, it can serve as a check upon overly robust or punitive statutory schemes.<sup>314</sup>

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<sup>309</sup> Markowitz, 500; *Texas v. United States*, 86 F. Supp. 3d 591.

<sup>310</sup> Sir Matthew Hale, *the Prerogatives of the King*, 177; Markowitz, 500.

<sup>311</sup> Markowitz, 490.

<sup>312</sup> Markowitz, 490.

<sup>313</sup> Markowitz, 490.

<sup>314</sup> Markowitz, 490.

It also makes sense for the executive to use prosecutorial discretion in the immigration context because the limits on immigration authority have never been constitutionally articulated before.<sup>315</sup> And, when DACA was instituted, there were over thirteen million who were potentially subject to deportation proceedings<sup>316</sup> and it was necessary to distinguish between the criminals from the innocent victims of circumstance. Immigration operations, alone, cost the government almost twenty billion dollars annually.<sup>317</sup> It is impossible to prosecute thirteen million individuals, let alone deport or even detain them. There are simply not enough funds or resources available to execute that vast number of proceedings, anyway. Moreover, the Department of Homeland Security is only capable of deporting, at a maximum, one hundred thousand people per-year.<sup>318</sup>

Since there is such a large number of potential deportation victims, does this constitute a national emergency? President Obama never officially declared immigration reform to be one, so does this mean that executive prerogative and prosecutorial discretion standards naturally slip away? I am inclined to say they still apply since immigration is both a societal and governmental interest.<sup>319</sup> But then again, the Founding Fathers were extremely silent in regard to immigration. Although, it was simply not a major theme during the Constitutional Convention. After all, the Founders did leave the document with a sort of “open texture” thus plagued with imperfections in order to be amended or considered in greater detail in the later generations. What better time to consider these societal interests other than right here and right now?

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<sup>315</sup> Markowitz, 507.

<sup>316</sup> Markowitz, 507, 547.

<sup>317</sup> Markowitz, 507.

<sup>318</sup> Markowitz, 508.

<sup>319</sup> Markowitz, 532.

The very act of deportation is the gravest form of a liberty deprivation of them all.<sup>320</sup> For the Supreme Court has held that deportation is akin to the “loss of all that makes life worth living.”<sup>321</sup> Because of the millions involved in possible deportations, the very *potential* is what triggers a heightened sense of executive prosecutorial discretion.<sup>322</sup> Therefore, Markowitz claims that President Obama fell within the precise and defined limits of his discretionary powers.<sup>323</sup> This is because “if the primary interest belongs to the government, on behalf of the people, the government should be free to forego enforcement to vindicate that interest at its discretion.”<sup>324</sup>

Additionally, the affirmative grant of the work authorization attached to the DACA memorandum did, in fact, flow directly from a preexisting Congressional statute and not from executive discretion.<sup>325</sup> Therefore, President Obama never actually bypassed the formal functions of the Legislature as once proposed. But there is another portion of DACA that still remains in question. Is DACA retrospective or can be used in the future?<sup>326</sup> This question arises because deferred action is only meant to be temporary,<sup>327</sup> but the effects of this program even appear in the current administration—despite the revisions and rescindments of various parts of the statutory scheme, today, but that is a discussion for another time. Nonetheless, it is incontestable that DACA has latched onto the American consciousness, and it does not seem to be letting go any time soon.

DACA is such a unique use of prosecutorial discretion because Fatovic explains that prerogative “makes it unnecessary to establish institutional changes” because prerogative “settles

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<sup>320</sup> Markowitz, 546.

<sup>321</sup> *Padilla v. Kentucky*, 559 U.S. 356, 361 (2010); Markowitz, 546.

<sup>322</sup> Markowitz, 547.

<sup>323</sup> Markowitz, 547.

<sup>324</sup> Markowitz, 533.

<sup>325</sup> Markowitz, 547.

<sup>326</sup> Markowitz, 547.

<sup>327</sup> Markowitz, 509.

nothing and prescribes nothing beyond the immediate present.”<sup>328</sup> And there is always an increased danger if these changes are made permanent or become entrenched into the constitutional system, much like prosecutorial discretion.<sup>329</sup> Moreover, anything temporal may become permanent if given the time and opportunity. Not to mention, acts of prerogative might acquire a long-lasting tenor as seen with the formal law. And it appears that DACA has managed to acquire this tenor, as well. But that is not necessarily a bad thing.

In the end, Markowitz reminds us that the statute does explicitly mention that deferred action can only be claimed for upwards of a total of three years and even the following DAPA statute, enacted in the years proceeding DACA, states that it does not protect these individuals from future prosecution or deportation.<sup>330</sup>

Therefore DACA is and was in accordance with President Obama’s executive authority.<sup>331</sup> But most importantly, DACA did not deprive liberty. It much rather expanded it in an unconventional and quite resourceful manner, if I may. However, what would John Locke have to say about the viability and constitutionality of DACA?

### c. Locke on Immigration, & DACA

Although the United States is heavily focused on immigration reform—either flexible or inflexible—John Locke is a zealous advocate of open immigration under all circumstances, especially in regard to moral and economic reasons.<sup>332</sup> Locke also views immigration as a “self-

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<sup>328</sup> Fatovic, 440.

<sup>329</sup> Fatovic, 440.

<sup>330</sup> Markowitz, 548.

<sup>331</sup> Markowitz, 548.

<sup>332</sup> Brian Smith, “HANDS NOT LANDS: JOHN LOCKE, IMMIGRATION AND THE ‘GREAT ART OF GOVERNMENT,’” 479-480.

regulating phenomenon.”<sup>333</sup> This is because “Locke believed that refugees and migrants would only move to a foreign land if they knew they could prosper there.”<sup>334</sup>

Moreover, Brian Smith states that a central theme of Locke’s thought is “that no one is born with political commitments, much less a political subjugation.”<sup>335</sup> What Locke writes about property owners mirrors this idea:

So that whenever the owner who has given nothing but such tacit consent to the government will, by donation, sale, or otherwise, quit the said possession, he is at liberty to go and incorporate himself into any other commonwealth, or to agree with others to begin a new one, in *vacuis locis*, in any part of the world they can find free and unpossessed (Locke, Second Treatise, §121).

Or in other words, individuals are free to move and covenant themselves to whatever body politic they so choose, or that will rightly have them.<sup>336</sup>

Interestingly enough, Smith also argues that the government has no claim upon immigrants who have not expressly consented to a particular country’s authority. Although some may have tacitly consented, which obliges them to follow those particular laws.<sup>337</sup> Nevertheless, they are not fully political members until explicit consent is given.<sup>338</sup> But this does not mean that they are not afforded equal protection for as we know no “state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,”<sup>339</sup> even if they are not formal citizens. And because of this, executive discretion is of the utmost necessity when it comes to the statutory scheme of DACA. Moreover, Locke also states:

But what is to be done in reference to *Foreigners*, depending much upon their actions, and the variation of designs and interests, must be *left* in great

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<sup>333</sup> John Locke, “For General Naturalization,” 325.

<sup>334</sup> Smith, 480.

<sup>335</sup> Smith, 480.

<sup>336</sup> Smith, 480.

<sup>337</sup> Smith, 480-81.

<sup>338</sup> Smith, 481, 485.

<sup>339</sup> United States Constitution, 14<sup>th</sup> Amendment.

part to the *Prudence* of those who have this Power committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth.” (Locke, *Second Treatise*, §147).

Those who qualify for deferred action are students and young individuals who are not criminals in the slightest. Not only do these individuals and students deserve the flexibility afforded to them under DACA, but they deserve the opportunity to, one day, become members of not just the political society, but also the American Republic. If they were deported due to a strict adherence to the laws, once in a lifetime opportunities would immediately be stripped away from them for the rest of their lives.

These young minds are an advantage to the “Commonwealth” because “people are the strength of any government”<sup>340</sup> according to Locke. And the very number of people is what truly makes the country rich, first and foremost. This “richness” can be economic in nature or even be considered in a culturally or ethnically diverse manner, or anything in between. After all, Locke does argue that “hands” are the fastest way to grow economic and political progress and immigration should be encouraged to ensure this growth of a collective and tolerant nation.<sup>341</sup> And this is exactly what America and Americans alike should aspire to create.

President Obama’s statutory scheme, DACA, is truly in accord with Cicero’s maxim *Salus Populi Suprema Lex*<sup>342</sup> for it allows for the safety, goodness, the welfare and, especially, *the preservation of the people*<sup>343</sup> that would otherwise be in jeopardy of deportation. Additionally, President Obama had a right to exercise his discretion in this manner since Locke proclaims that acts of prerogative are justified when the municipal laws fall silent or give no direction<sup>344</sup>—in this

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<sup>340</sup> Locke, *Second Treatise*, §118.

<sup>341</sup> Smith, 489.

<sup>342</sup> Locke, §158.

<sup>343</sup> Locke, §159-160.

<sup>344</sup> Locke, §160.



case, the silence originated in Congress with their failure to create the Dream Act. President Obama also exercised his prudence and wisdom when formulating the provisions of DACA and even made sure to narrowly tailor it to the precepts of morality and the greater societal interests, just as Blackstone and Hamilton once suggested.<sup>345</sup> But, if the people are still scrupulous and inquire about an executive's use of prerogative now or in the future, "the good or the hurt of the People" Locke claims, "will easily decide the question,"<sup>346</sup> just as it has easily decided the question posed before us today. But what about a widespread, continuous use of executive prosecutorial discretion in the future? Is there anything that we should fear?

#### d. Executive Prosecutorial Discretion and Tyranny?

Tyranny will forever remain as a legitimate fear due to the imperfections and sometimes unreasonableness<sup>347</sup> of the written laws. For if laws were reasonable, they would make all necessary distinctions among individual cases<sup>348</sup> and then there would never be the issue of the "penumbra" as often discussed by H.L.A Hart.<sup>349</sup>

Moreover, reasonable laws must also be "exact and self-sufficient or perfect."<sup>350</sup> Unfortunately, this will never be the case due to the limitations of human reason and because of those who are recalcitrant to reason, itself.<sup>351</sup> Therefore, instead of fearing tyranny we must force ourselves to come to terms with it.<sup>352</sup> Although this concept may seem strange, Mansfield brings up two excellent points in its favor. He claims that Aristotelian philosophy tamed the issue of tyranny instead of escaping it. Aristotle removed the tyrant and replaced him with the political

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<sup>345</sup> Fatovic (referencing Blackstone), 432.

<sup>346</sup> Locke, §161.

<sup>347</sup> Mansfield, 17.

<sup>348</sup> Mansfield, 17.

<sup>349</sup> H.L.A. Hart, *The Concept of Law*, 1961.

<sup>350</sup> Mansfield, 17.

<sup>351</sup> Mansfield, 17.

<sup>352</sup> Mansfield, 19.

scientist and made him into the guardian of the law instead of its destroyer.<sup>353</sup> Machiavelli did not escape tyranny either, but instead of taming it, he embraced it and saw tyranny as a wholly necessary feature of the prince's character; for the zeal and the vigor of a tyrant is what ultimately allows for not only initiation but also innovation in any regime.

John Locke and the American Founders adopted the Machiavellian model, but they democratized it, of course. This was completed by juxtaposing the executive power with that of the legislative power in order to ensure there are little to no abuses of the executive prerogative.<sup>354</sup>

Even though the use of executive prerogative has been increasing in the last few decades, it is by no means a widespread issue nor is it wholly threatening to the democratic order. This is because prerogative is immune from judicial review which further protects the republic from becoming intertwined with prerogative based precedents. And if there is no precedent, then there is no need to fret. The more important issue at hand is for the executive to be in tune with the will of the nation and the greater substantive or societal interests that are at large, instead. Not to mention, the proceeding President is able to veto any previously existing executive action or law that was created during the prior administration and I am sure the same may be said in terms of acts of executive discretion.

Nevertheless, if prerogative does become dangerous, Locke suggests that the people should "appeal to heaven"<sup>355</sup> but of course, other constitutional mechanisms will come into play before that will ever happen, even if the executive and prosecutors both escape accountability at

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<sup>353</sup> Mansfield, 19.

<sup>354</sup> Mansfield, 19.

<sup>355</sup> Locke, §168.

more than one level. It is up to the people to stand up and use their voice to protest the abuses or usurpations of power thus posed upon them.

In the end, prerogative is not tyrannical. Prerogative can become tyrannical in the hands of a prince who adheres to his self-interest and his self-interest only. But the Glorious Revolution has long been finished and there have been numerous scholars and philosophers alike that have all reached the consensus that prerogative is wholly necessary in times of national peril or emergencies with unforeseen outcomes. It is only wise and prudent for a prince or executive to be equipped with the laws of nature, as Locke suggests, in order to remedy these ills before they begin or to halt their devastation immediately in their tracks.

Even though Locke once stated that “wherever law ends, tyranny begins,”<sup>356</sup> prerogative is not a matter of ending the law for good. It is a matter of discretion to act in such a way that may or may not run parallel to the written law, itself. Therefore, tyranny will never begin simply because prerogative happens exists within the very parchment of the American Republic, the Constitution, and elsewhere.

## V. Final Remarks

When “a law sweeps too broadly and bristles with harshness against a significant sector of the American public, the first and best response is legislative reform,”<sup>357</sup> according to Markowitz and I agree. However, the American legislative process is often unable or even unwilling to react to crises for that matter especially as we have seen during the Obama administration and the immigration arena. Therefore, he had to take matters into his own hands by using his extraordinary discretionary powers in the wake of a liberty deprivation in order to

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<sup>356</sup> Locke, §202.

<sup>357</sup> Markowitz, 549.

balance the public interest<sup>358</sup> and to restore the nation's will. Moreover, these substantive values or principles cannot always be remedied by the formal mechanisms of our governmental institutions. Fatovic even suggests that a viable constitution must simultaneously accomplish two inconsistent goals: first it must enable statesmen to deal with the ordinary and extraordinary problems or politics; second, it must prevent those same statesmen from becoming threats to the liberties and other values they are appointed to preserve."<sup>359</sup> The second goal requires the executive to possess discretionary powers and the first goal cannot be "reduced to legalistic rules or doctrinal formulae" in order to preserve political judgment.<sup>360</sup> There needs to be a "delicate balance"<sup>361</sup> between the two, and prerogative and prosecutorial discretion may just very well be the solution.

Although it is not wise "to empower the President to substitute [his] own vision of sound public policy for that of Congress," for "such a cure would be worse than the disease."<sup>362</sup> But, if the president is willing to work "alongside the Constitution's individual rights framework, robust presidential prosecutorial discretion authority in the liberty deprivation context can provide another important constitutional tool to protect disfavored groups from unjust applications of the most coercive power of the federal government."<sup>363</sup> Markowitz suggests that using discretionary powers in this context is one way to cabin heightened prosecutorial discretion authority used by the executive branch. It is even consistent with both the historical practice and the very structure of the Constitution, itself.<sup>364</sup> But what can be said in terms of cabining or even doing away with

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<sup>358</sup> Markowitz, 549.

<sup>359</sup> Fatovic, 442.

<sup>360</sup> Fatovic, 442.

<sup>361</sup> Fatovic, 442.

<sup>362</sup> Markowitz, 549.

<sup>363</sup> Markowitz, 549.

<sup>364</sup> Markowitz, 549.

prosecutorial discretion in terms of the American prosecutor? Cabining, yes. Doing away with their discretion overall? No.

Let us take a moment to reflect upon and examine a few examples that epitomize the problems of law without prosecutorial discretion:

a grandmother in Delaware sent her granddaughter to her third-grade class with a birthday cake and a knife with which to cut it. The teacher used the knife to cut and serve the cake, but then called the principal's office to report the girl for bringing a weapon to school. The school district had a zero-tolerance policy for weapons (to avoid accusations of discriminatory enforcement) so it had no choice but to expel the girl for a year. After a public outcry, Delaware legislators passed a law giving administrators some case-by-case flexibility to modify expulsions from school. The next year, Delaware first-grader Zachary Christie, excited about joining the Cub Scouts, brought his camping combination fork, spoon, and knife to use at lunch. Zachary had violated the school's zero tolerance policy for weapons, so [the school] suspend him for forty-five days. The board had no choice but to suspend Zachary, since the new law created flexibility only for expulsions. Because these rigid laws left too little room for enforcement discretion, they produced absurdly unjust results (Stephanos Bibas, "The Need for Prosecutorial Discretion," 3).

It is certain that more unjust and absurd results would arise in a system without this vital, constitutional power. It's almost analogous to James Madison's *Federalist 10* essay: factions cannot be eliminated so instead, their effects must be controlled. But how can prosecutorial discretion be controlled? The answer is simple. The people should demand accountability. Not necessarily at every stage of the criminal process, but at least portions of it when questionable issues or motives arise. But of course, this is easier said than done.

Although this may be extreme, Germany requires its prosecutors to prosecute every case that comes before them as long as they have enough evidence to convict whoever is responsible.<sup>365</sup> On its face, this method seems plausible but at the same time, it also seems as if this overly rigid system could produce unfair or unjust results, as well.

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<sup>365</sup> Krauss, 2.

But if in the future there is another issue surrounding prosecutorial discretion or even executive discretion what I can say is this: the American people, including those in government, should always relate the timeless texts of yesterday to the timely problems that have the potential to occur, tomorrow. Even H.L.A. Hart once claimed, "jurisprudence trembles so uncertainly on the margin of many subjects that there will always be a need for someone, in Bentham's phrase, 'to pluck the mask of mystery' from its face."<sup>366</sup> The same may be said for discretion, as well; for my thesis is just one of the numerous attempts to unveil the mystery of prerogative and prosecutorial discretion. And I am sure I will not be the last.

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<sup>366</sup> Jeremy Bentham, *A Fragment on Government*, in *I Works* 221, 235 (Browning ed. 1859) (preface, 41st para.); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, *Harvard Law Review*, 1958, 594.

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## VII. Appendix a.

## Factsheet G4: The Glorious Revolution

*The Declaration of Rights: February 13, 1689*

Whereas the late King James the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of the kingdom.

1. By assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without the consent of parliament.
2. By committing and prosecuting divers worthy prelates for humbly petitioning to be excused concurring to the said assumed power.
3. By issuing and causing to be executed a commission under the Great Seal for erecting a court called the Court of Commissioners for Ecclesiastical Causes.
4. By levying money for and to the use of the Crown by pretence of prerogative, for other time and in other manner than the same was granted by parliament.
5. By raising and keeping a standing army within this kingdom in time of peace without the consent of parliament and quartering soldiers contrary to the law.
6. By causing several good subjects, being Protestants, to be disarmed at the same time when papists were both armed and employed contrary to the law.
7. By violating the freedom of election by members to serve in parliament.

8. By prosecutions in the Court of King's Bench for matters and causes cognizable only in parliament; and by divers other arbitrary and illegal courses.

9. And whereas of late years, partial, corrupt, and unqualified persons have been returned and served on juries in trials, and particularly divers jurors in trials for high treason, which were not freeholders.

10. Excessive bail hath been required of persons committed in criminal cases, to elude the benefit of laws made for the liberty of the subjects.

11. And excessive fines have been imposed; and illegal and cruel punishments inflicted.

12. And several grants and promises made of fines and forfeitures, before any conviction or judgment against the persons, upon whom the same were to be levied.

All which are utterly and directly contrary to the known laws and statutes and freedom of this realm. And whereas the said late King James the Second having abdicated the government and the throne being thereby vacant, his Highness the Prince of Orange (whom it hath pleased Almighty God to make the glorious instrument of delivering this kingdom from popery and arbitrary power) did (by the advice of the lords spiritual and temporal, and divers principal persons of the Commons) cause letters to be written to the lords spiritual and temporal, being Protestants; and other letters to the several counties, cities, universities, boroughs, and Cinque Ports, for the choosing of such persons to represent them, as were of right to be sent to parliament, to meet and sit at Westminster upon January 22, 1689 . . . And thereupon the said lords spiritual and temporal and Commons . . . do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties, declare:

1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.
2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.
3. That the commission for erecting the late Courts of Commissioners for Ecclesiastical Causes and courts of like nature are illegal and pernicious.
4. That levying money for or to the use of the Crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is, or shall be granted, is illegal.
5. That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.
6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.
7. That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law.
8. That election of members of parliament ought to be free.
9. That the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament.
10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.
11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.
12. That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.



13. And that for redress of all grievances, and for the amending, strengthening and preserving of the laws, parliaments ought to be frequently held.

And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties; and that no declaration, judgments, doings or proceedings, to the prejudice of the people in any of the said premises, ought in any wise to be drawn hereafter into consequent of example. To which demands of their rights they are particularly encouraged by the declaration of His Highness the Prince of Orange, as being the only means for obtaining a full redress and remedy therein. Having therefore an entire confidence that his said Highness the prince of Orange will perfect the deliverance so far advanced by him, and will still preserve them from the violation of their rights, which they have here asserted, and from all other attempts upon their religion, rights and liberties. The said Lords Spiritual and Temporal, and Commons, assembled at Westminster do resolve that William and Mary, Prince and Princess of Orange be, and be declared, King and Queen of England, France, and Ireland, and the dominions thereunto belonging, to hold the Crown and royal dignity of the said kingdoms and dominions to them the said Prince and Princess during their lives, and the life of the survivor of them; and that the sole and full exercise of regal power be only in, and executed by the said Prince of Orange, in the names of the said Prince and Princess, during their joint lives; and after their deceases, the said Crown and royal dignity of the said Kingdoms and dominions to be to the heirs of the body of the said Princess; and for default of such issue to the Princess of Anne of Denmark and the heirs of her body; and for default of such issue to the heirs of the body of the said Prince of Orange. And the Lords Spiritual and Temporal and the Commons do pray the said Prince and Princess to accept the same accordingly.