The Attorney General's Supervisory Power: Theory and Reality

Overview

This article explains the legal principles involved in the debate about how much responsibility Senator Kamala Harris deserves for criminal convictions that occurred during her tenure as California's attorney general. The basic answer is: very little.[1] She and her office were uninvolved in the overwhelming majority of individual trial court convictions that occurred during her tenure, because the attorney general has very little practical or legal responsibility for criminal trial matters. And that office has a statutory duty to defend those convictions on appeal, which may sometimes require taking positions that conflict with an attorney general's personal policy preferences.

California's attorney general does have constitutional power to supervise county prosecutors; it may assume control over local criminal cases (known as supersession); and the attorney general defends most criminal convictions on appeal. As we recently wrote, this means that in theory an attorney general could end new and existing capital cases. Yet no attorney general has ever tried to so direct local prosecutors, who in practice make the vast majority of California prosecution decisions. In most cases, an attorney general's actions are dictated by the office's legal duties, and it is rarely appropriate for an attorney general to decline those duties. As a result, blaming (or praising) an attorney general for criminal charges and convictions obtained by district attorneys is generally unwarranted.

Analysis

An attorney general has supervisory power over local prosecutors, but theory and reality differ

The problem here is the distinction between theory and reality. In theory, an attorney general has constitutional supervisory power over county district attorneys. In reality, the distinctions between the state and local offices explain why in practice that supervisory power is exercised softly and rarely.

An attorney general's supervisory power flows from Article V, section 13: "Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney . . . ."[2]
The California Supreme Court has read this section literally: "each county district attorney is supervised by the Attorney General."[3]
The power goes beyond single case charging decisions. "[T]he constitutional and statutory supervisory power accorded the Attorney General is not reasonably susceptible to an interpretation that it is limited to oversight of a district attorney's actions when he or she is prosecuting a particular case."[4]

These supervisory powers are sometimes employed. When actual conflicts have arisen between the constitutional officer and local prosecutors, the courts have consistently upheld the attorney general's authority to overrule a district attorney (supersession).[5]
But those conflicts, or more general instances of state control over local prosecution, are rare. And the reverse of supersession (recusal) is equally rare. For example, in 2017, the attorney general responded to only 66 recusal motions statewide, and 85 in 2018.

Instead, the attorney general deploys that office's limited criminal justice resources on statewide matters and in coordinating

the state's law enforcement agencies. There are practical reasons for this. Prosecutors in the 58 counties collectively number approximately 4,000 attorneys — that's about quadruple the 1,000 deputy attorneys general.[6] Even that comparison is deceptive, because only around 250 deputy attorneys general work on criminal appeals and trials; most deputies work on the state's civil matters. And the 4,000 county prosecutors try about 9,000 jury trials on average per year.[7] That's far too many cases for an attorney general to handle with its smaller staff. Instead, the deputy attorneys general in the criminal section handle the 5,000 criminal appeals filed on average each year.[8] The upshot: the attorney general's office is not generally responsible for prosecuting local crime.[9]

The next section details the legal reasons underlying that practical reality, which also explain why an attorney general ordinarily will not refuse to defend appeals.

An elected official's duty to obey the law restricts an attorney general's ability to impose policy decisions on criminal cases

Could an attorney general, resource concerns aside, impose a statewide decision to not defend on appeal low-level substance possession cases, or order all 58 district attorneys to not charge those cases? (We addressed a similar issue in our previous article, which posited an attorney general deciding not to pursue special circumstances allegations.) The answer here is the same: the constitutional supervisory power seems to support such an action, but the different roles the attorney general and district attorneys play, and the official duty to follow the law, counsel against an attorney general attempting to make policy decisions by executive action.

Charging crimes and defending criminal appeals are distinct roles in California: one is discretionary, the other mandatory. The attorney general is required by statute to defend on appeal all

causes to which the state is a party.[10]
By contrast, local prosecutors have wide and virtually unreviewable discretion in deciding what cases to charge. The autonomy district attorneys have to prosecute crime limits an attorney general's ability to (for example) attempt to direct decisions about certain crimes by fiat.[11]

The prejudicial error rule also limits an attorney general's ability to make policy judgments about which cases to defend. The attorney general's duty to defend criminal judgments is only relieved when the office is persuaded that prejudicial error occurred; then the duty to seek justice compels the office to concede that error. And even if an attorney general declined to defend a criminal judgment, California constitution article VI, section 13 requires a court to affirm unless it finds a miscarriage of justice.

An attorney general's duty to defend the state on appeal also limits executive discretion. That duty has both ministerial and discretionary aspects because it combines an executive officer's duty to obey the law with an attorney's ethical duties and those of a prosecutor. The remedy for an attorney general who believes its clients are acting contrary to law is to withdraw from the statutorily imposed duty to act as their counsel — without taking a position adverse to those clients.[12]
And once an attorney general declares a conflict and withdraws, she is barred from harming the former client's interests. She has effectively lost influence in that matter.

But the attorney general's client in criminal cases is the people of the state, so the attorney general is neither separate from the district attorney (who also represents the people) nor can the attorney general's office be conflicted from a criminal case.[13]
So even the withdrawal remedy is unavailable. That leaves an attorney general with few options, and together these legal restrictions prevent an attorney general from influencing criminal justice policy by strategically refusing to defend criminal convictions on appeal.

By contrast, a district attorney's decision whether to initiate criminal proceedings is a classic example of a discretionary act, over which for an attorney general has little direct control; for the practical reasons discussed above, and on the law. "The prosecution of criminal offenses on behalf of the People is the sole responsibility of the public prosecutor," who "ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek."[14] The initial charging decision "is clearly the province historically of the public prosecutor, i.e., the discretion whether or not to prosecute."[15]

The prosecutor's charging discretion is "unreviewable" by the courts.[16] "An unbroken line of cases in California has recognized this discretion and its insulation from control by the courts."[17] This well-settled rule rests on the complex considerations required for the effective administration of law enforcement and on the principle of separation of powers, with the result that prosecutorial discretion "generally is not subject to supervision by the judicial branch."[18]

This broad prosecutorial discretion substantially limits an attorney general's power to dictate charging policy statewide. Because the discretionary charging decision process is so insulated from judicial review, suing the 58 district attorneys to compel obedience to an attorney general order is a dim prospect. Mandate is unavailable because the district attorney has charging discretion.[19] An attorney general's only remedy in that scenario is to intervene on a case by case basis — which the office lacks resources to do on a grand scale.

Finally, the state constitutional requirement that judgments may only be reversed for prejudicial error limits an attorney general's supervisory power.[20] Ordinarily read as a limit on a court's power to reverse a judgment, this rule requires the attorney general to defend criminal judgments unless and until it (or a court) determines a miscarriage of justice has occurred. This explains

why settling capital cases is so difficult — how can an attorney general compromise on a case where the California Supreme Court has upheld the judgment and no other court has found error?

In the next section we explore why the attorney general and district attorneys use their discretion judiciously, and only occasionally opt to not follow the law.

Examples of attorneys general resisting laws are appropriately rare

Recent examples suggest that political and prudential considerations weigh on an elected attorney general's decisions about which course is best, given the office's constitutional mandates. While Senator Harris was attorney general, for example, her office refused to defend Proposition 8 in the Ninth Circuit and the U.S. Supreme Court. Then-Attorney General Harris explained her position: "[she] declined to defend Proposition 8 because it violates the Constitution. The Supreme Court has described marriage as a fundamental right 14 times since 1888. The time has come for this right to be afforded to every citizen." In that instance, an attorney general balanced defending an initiative constitutional amendment against defending equal protection, a fundamental constitutional principle.

While an attorney general may seek judicial relief from the office's mandatory constitutional duties, this is an edge case. During Attorney General Harris's tenure, someone proposed an initiative titled the "Sodomite Suppression Act," which sought to amend California's Penal Code to outlaw what the proponent described as "sodomy" or "buggery" by requiring "that any person who willingly touches another person of the same gender for purposes of sexual gratification be put to death," and by barring from public employment any person "who is a sodomite or who espouses sodomistic propaganda or who belongs to any group that does." Then-Attorney General Harris sought judicial relief from the duty to process the initiative for signature gathering, on the grounds that it was "patently unconstitutional on its face,"

and that "[r]equiring the Attorney General to prepare a circulating title and summary would be inappropriate, waste public resources, generate unnecessary divisions among the public, and mislead the electorate." The proponent defaulted, and the court relieved the attorney general of "any obligation to prepare a title and summary of the Act."[21]
As with Proposition 8, this situation forced an attorney general to resolve the conflict between an electorate act and the office's duty to safeguard the electoral process.

The political and legal implications of those decisions were further mitigated by the availability of other legal avenues. In *Strauss* the California Supreme Court granted standing to the measure's proponents, permitting them to defend Proposition 8.[22] And a court relieved the attorney general of its obligation regarding the "Kill the Gays" measure. Those being the only two significant recent examples of an attorney general choosing one legal principle over another does not mean that these decisions are rare; government lawyers sort out such conflicts every day. It only means that these conflicts generally do not have major political implications (or that they are not made in the public eye). When these decisions have a political impact, it usually signals the need for a legislative policy solution, not executive action. Wishing for executives to overrule inconvenient laws has deep implications: it is undemocratic, it invites legislative inaction and encourages executive overreach, and it can backfire by empowering the opposing party when government control shifts. And in California it disadvantages minority groups because attorneys general are elected statewide by popular vote.

What if, for example, Governor Gavin Newsom uses his powers under the Emergency Services Act to declare that assault weapons pose a public health emergency in California, and orders the attorney general to begin civil forfeiture proceedings against all assault weapon owners in California? That order would force an attorney general to resolve a conflict between two compelling constitutional mandates: enforcing the governor's read on California law versus upholding the U.S. Constitution.[23]
A fraught decision indeed. Despite the understandable public frustration and

resulting desire for swift action, sorting out the competing policy imperatives in the firearms debate is a clear example of a legislative problem.

An attorney general contemplating a statewide order would need to carefully consider the competing incentives, and some that are specific to the state–local enforcement context. A local prosecutor is well-suited to tailoring available resources to each county. A rural community might have a low tolerance for cattle rustling and be less concerned with concealed firearms, for example, while an urban community could be very concerned with concealed weapons and have few farm animals. The local prosecutor's ability to adapt to the county's concerns contrasts with the state attorney general's need to consider the state as a whole and ensure uniformity in law enforcement. Every attorney general who evaluates a policy option must consider how it will impact 58 counties and 40 million people. And if that policy option requires resistance to existing law, the decision is even harder. These factors contribute to attorneys general using their supervisory powers judiciously and rarely.

Conclusion

The legal authority California's attorney general has over county district attorneys in practice is wielded very softly. The attorney general does supersede district attorneys, and local prosecutors do get conflicted out. But those occur rarely. It is not the attorney general's practice to involve itself in charging decisions. The district attorneys are the elected public prosecutors of their counties, and they are empowered by their constituents to exercise discretionary charging judgment. And no attorney general has ever tried to use the supervisory power to impose a statewide policy decision.

An attorney general who did so, particularly when the policy decision's legality is questionable, faces grave legal and political risks. An officer who orders subordinates to violate the law exceeds the scope of her authority, and the subordinate official also acts

improperly “by abdicating the statutory responsibility imposed directly on him or her as a state officer.”[24]
If the law in question is valid, the official duty to obey it is clear: “An executive or administrative officer can no more abdicate responsibility for executing the laws than the Legislature can be permitted to usurp it.”[25]
An attorney general who fails or refuses to follow the law can be sued (for example, in a mandate proceeding), recalled in a special election, or voted out in a general election.

Given these considerations (and barring the rare instance of a deputy attorney general prosecuting a case at the trial level) it is unfair to assign Senator Harris much responsibility for local criminal convictions that occurred during her tenure as California’s attorney general. It also is difficult to realistically consider suggestions that an attorney general should decline to defend an entire class of convictions on appeal, or to order all 58 district attorneys to stop prosecuting a particular class of crime. Those suggestions warrant greater attention on the state legislature as the proper forum for addressing an entire class of crimes.

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This article only explains the legal principles that define the relationship between California’s attorney general and district attorneys. We express no opinion on policies or actions implemented (or not) by the Office of the Attorney General under Attorney General Harris, or on Harris’s time as a district attorney.

[2]
See also Gov. Code, § 12550 ("The Attorney General has direct supervision over the district attorneys of the several counties of the State and may require of them written reports as to the condition of public business entrusted to their charge. [¶] When he deems it advisable or necessary in the public interest, or when directed to do so by the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction. In this respect he has all the powers of a district attorney, including the power to issue or cause to be issued subpoenas or other process."); Gov. Code, § 12511 ("The Attorney General has charge, as attorney, of all legal matters in which the State is interested."); § 12512 ("The Attorney General shall attend the Supreme Court and prosecute or defend all causes to which the State, or any State officer is a party in his or her official capacity."); Pen. Code, § 1256 ("It shall be the duty of the district attorney to cooperate with and assist the attorney general in presenting all criminal matters on appeal."); and Code Civ. Proc., § 902.1 (authorizing the Attorney General to intervene and participate in any appeal in any proceeding in which a state statute or regulation has been declared unconstitutional by a court).

[3] *Pitts*
v. County of Kern (1998)
at 345 ("the district attorney represents the state, not the county, when preparing to prosecute and when prosecuting crimes"). See also *People*
v. Honig (1996) at 354–55
(Article V, section 13 "confers broad discretion upon the Attorney General to determine when to step in and prosecute a criminal case"); Gov. Code, § 12524 (authorizes the Attorney General to "conference" with the district attorneys to discuss their duties "with the view of uniform and adequate enforcement" of state law); Pen. Code, § 923(a) ("Whenever the Attorney General considers the public interest requires, he may, with or without the concurrence of the district attorney, direct the grand jury to convene for the investigation and consideration of such matters of a criminal nature as he desires to submit to

it. He may take full charge of the presentation of such matters to the grand jury, issue subpoenas, prepare indictments, and do all other things incident thereto to the same extent as the district attorney may do.”).

[4] *Pitts*,
supra note 3, at 363; see also *D’Amico*
v. Bd. of Medical Examiners (1974)
at 14–15, and *County of Sacramento v. C.*
P. R. R. Co. (1882) 61 Cal. 250, 253 (holding that an attorney general had the right to control a criminal action in the trial court and to appeal from the judgment, even to the extent of intervening to override the local prosecutor’s position).

[5] See,
e.g., *People*
v. Hy-Lond Enterprises, Inc.
at 751–53 (rejecting any local authority to restrain the attorney general); *Abbott Laboratories v. Super. Ct.*
at 25–26 (district attorney’s jurisdiction is limited to its county, and the county officer could not restrict an attorney general’s constitutional power to obtain relief on behalf of the entire state).

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Cal. Dept. of Justice, Criminal
Justice Personnel All Counties 2009–2018.

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Judicial Council of Cal., Court
Statistics Report (2018) Statewide Caseload Trends 2007-2008 Through 2016-2017
at 103 (felony and misdemeanor cases combined).

[8]
Judicial Council of Cal., Court
Statistics Report (2018) Statewide Caseload Trends 2007-2008 Through 2016-2017
at 53 (statewide criminal appeal filings) and 54 (statewide criminal appeal dispositions).

[9]
"Responsible" here meaning being answerable or accountable for something within one's direct power, control, or management.

[10] Gov.
Code, § 12511 provides that the attorney general "has charge, as attorney, of all legal matters in which the State is interested," and Gov. Code, § 12512 provides that the attorney general "shall . . . prosecute or defend all causes to which the State, or any State officer, is a party in his official capacity." *People*
ex rel. Deukmejian v. Brown (1981)
at 154. An attorney general "has the duty to defend all cases in which the state or one of its officers is a party. *D'Amico*
v. Board of Medical Examiners (1974)
at 14–15, citing Gov. Code, § 12512; see
also § 11040 (AG may delegate that authority to other agencies).

[11]
Although the attorney general has supervisory powers, its charge is to see that the laws are faithfully enforced. Because
California law permits the death penalty as a lawful form of punishment, a district attorney's decision to seek it in appropriate cases based on the allegations pleaded is not necessarily an abuse of charging discretion. If a district attorney then refused an attorney general order to not seek a death judgment, mandate would not lie to compel the district attorney because it is not available to compel an exercise of discretion; the only other possible remedy in that circumstance is overriding the district attorney.

[12] *Deukmejian*,
supra note 10, at 157–58.

[13]
Pen. Code, § 1424; see *People*
v. Super. Ct. (Hollenbeck) (1978)
at 504. Even if an individual state or local prosecutor is conflicted, the

entire state Department of Justice would not be conflicted. The law on recusals and conflicts by prosecutors recognizes the prosecuting authority's ability to erect ethical walls between the conflicted prosecutor and the assigned prosecutor. And with the power to designate special prosecutors, a prosecutor free of conflicts can always be found even in the unlikely event one person could create a conflict for the entire office.

[14] *Steen v. App. Div. of Super. Ct. (2014)* at 1053–54 (quotations and citations omitted); Gov. Code, §§ 26500, 26501; *Hoines v. Barney's Club, Inc. (1980)* at 611 (decision of when and against whom criminal proceedings are to be instituted is one to be made by the district attorney).

[15] *People v. Super. Ct. (Alvarez) (1997)* at 976; see also *People v. Eubanks (1996)* at 589.

[16] *Super. Ct. (Alvarez)*, *supra* note 15, at 976. "Traditional mandamus will, of course, not lie to compel a particular method of exercising discretion." *Saleeby v. State Bar (1985)* at 561.

[17] *People v. Mun. Ct. (1972)* at 207, citing *Board of Sup'rs of Los Angeles County v. Simpson (1951)* at 676 ("Ordinarily a district attorney cannot be compelled by mandamus to prosecute a criminal case").

[18] *People v. Birks (1998)* at 134.

[19] *Mun.*
Ct., *supra* note 17, at 208 (“Except for the
situation where the district attorney is himself charged with a crime, his failure to act, even if improperly or corruptly motivated, is not a matter for the courts. In the final analysis, the district attorney, like a judge, is answerable to the electorate for the manner in which he conducts his office.”).

[20] Cal.
Const., art. VI, § 13 (“No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.”).

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This discussion is drawn from Carrillo, et al., California Constitutional Law: Direct Democracy, available at https://works.bepress.com/davida_carrillo/.

[22] *Strauss*
v. Horton (2009).

[23]
There is no California constitutional firearms possession right analogous to the U.S. Constitution’s second amendment.

[24] *Lockyer*
v. City and County of San Francisco (2004)
at 1080–81. The California Supreme Court has described the duty to obey the law as the basic nature of an office: “A public officer is a public agent and as such acts only on behalf of his principal. . . . The most general characteristic of a public officer . . . is that a public duty is delegated and entrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting.” *Coulter v. Pool* (1921) 187 Cal. 181, 187.

[25] *Carmel*
Valley Fire Protection Dist. v. State of California (2001) at 305 n.5.