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# Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys

Ross E. Wiener<sup>†</sup>

The Supreme Court's landmark opinion in *Morrison v. Olson*, upholding the court appointment of the Independent Counsel, sparked an intense debate that focused in part on the propriety of courts appointing prosecutors.<sup>1</sup> With the expiration of the Independent Counsel Act in June 1999,<sup>2</sup> many believed this controversial practice had become a historical footnote. This belief is unfounded, however, because the U.S. Code empowers district courts to pick their own United States Attorneys (U.S. Attorneys) when there is no presidentially nominated, Senate-confirmed U.S. Attorney for more than 120 days.<sup>3</sup> Since the Independent Counsel Act expired, the U.S. Attorney remains the only executive-branch officer who courts have the power to appoint. Given the increased politicization of the appointments process, this power raises serious constitutional concerns.

The Constitution endows the President of the United States with the solemn power to deprive citizens of life, liberty, and property through invocation of the criminal justice system.<sup>4</sup>

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1. 487 U.S. 654, 696-734 (1988).

2. See 28 U.S.C. § 599 (1994); see also Roberto Suro, *As Special Counsel Law Expires, Power Will Shift Back to Reno*, WASH. POST, June 30, 1999, at A6.

3. See 28 U.S.C. § 546(d) (1994).

4. See U.S. CONST. art. II, § 3; see also *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) (“[The President is] entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law—it is the President who is charged constitutionally to ‘take Care

Through the Department of Justice, the President can call upon an awesome array of investigative and prosecutorial resources to execute the nation's laws.<sup>5</sup> This responsibility, and the discretion that comes with it, is exercised primarily through the ninety-three U.S. Attorneys who supervise the career federal prosecutors around the country.<sup>6</sup> As impressive as the Justice Department's resources may be, it is also an unwieldy behemoth of over 100,000 employees.<sup>7</sup> Although the Attorney Gen-

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that the Laws be faithfully executed'. . .").

5. See generally DANIEL J. MEADOR, *THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE* 10-43 (1980).

6. There are ninety-four judicial districts—geographic zones within the jurisdiction of a district court—in the United States. See U.S. DEP'T OF JUSTICE, *UNITED STATES ATTORNEYS' MANUAL* § 1-2.500 (1997) [hereinafter U.S. ATTORNEYS' MANUAL], available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/) (last visited Sept. 23, 2001). Each state has at least one district and no district crosses a state line. JAMES EISENSTEIN, *COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS* 11 (1978). There are also districts for Puerto Rico, Guam, and the Northern Mariana Islands. U.S. ATTORNEYS' MANUAL, *supra*, § 1-2.500. There is one U.S. Attorney in each judicial district, but the U.S. Attorney for the Northern Mariana Islands can also serve simultaneously as the U.S. Attorney for another judicial district. See 28 U.S.C. § 545(a) (1994). Traditionally, the U.S. Attorney for Guam also serves as the U.S. Attorney for the Northern Mariana Islands so that, while there are ninety-four judicial districts, there are only ninety-three U.S. Attorneys. See U.S. ATTORNEYS' MANUAL, *supra*, § 3-2.100 (explaining that there is one U.S. Attorney per judicial district "with the exception of Guam and the Northern Marianas, where a single United States Attorney serves in both districts").

7. U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES* 355 (120th ed. 2000). In addition to conducting litigation on behalf of the federal government, the Department of Justice administers many ancillary law enforcement agencies, including the Federal Bureau of Investigation, the Immigration and Naturalization Service, the Drug Enforcement Administration, the Bureau of Prisons, and the Marshals Service. See U.S. ATTORNEYS' MANUAL, *supra* note 6, §§ 1-2.300 to 1-2.306; MEADOR, *supra* note 5, at 18-24 (cataloging and describing the law enforcement bureaus and agencies administered by the Department of Justice). In 2000, the federal budget authorized the Department of Justice to employ approximately 126,000 people. Justice Mgmt. Div., U.S. Dep't of Justice, *2000 Budget Summary*, available at <http://www.usdoj.gov/jmd/2k-summary/2ktoc.html> (last visited Nov. 8, 2001). This includes approximately 5000 career prosecutors assigned to the various U.S. Attorneys' offices (Assistant U.S. Attorney or AUSA) and approximately 2500 attorneys assigned to the Washington, D.C. headquarters of the Department known as "Main Justice." *Id.*; cf. Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 *FORDHAM L. REV.* 1049, 1049 (1978) (representing that the Department of Justice employed 3806 attorneys in 1978—2008 in Washington, D.C., and 1798 in the U.S. Attorneys' offices (citing U.S. DEP'T OF JUSTICE, *LEGAL ACTIVITIES* 2 (1977))). In 1904, the Department of Justice employed approximately 260 officers and employees in Washington, D.C. and nearly

eral heads the Department of Justice,<sup>8</sup> a U.S. Attorney serves as the chief federal law enforcement official within each judicial district.<sup>9</sup> The U.S. Attorneys are statutorily empowered, and with few exceptions, have been delegated the authority to make the critical decisions that drive criminal prosecutions.<sup>10</sup>

As the scope and scale of federal law enforcement expands,<sup>11</sup> so too does the U.S. Attorneys' ability to affect the daily life of every American citizen. The exercise of this awesome power can have dire consequences for the citizens within a particular U.S. Attorney's district.<sup>12</sup> For example, U.S. Attorneys routinely decide whether to focus limited investigative

1300 "field officers and employees" in the various U.S. Attorneys' offices. JAMES S. EASBY-SMITH, *THE DEPARTMENT OF JUSTICE; ITS HISTORY AND FUNCTIONS* 25 (1904).

8. 28 U.S.C. § 503 (1994) ("The Attorney General is the head of the Department of Justice."); *id.* § 519 (authorizing the Attorney General to supervise the work of the U.S. Attorneys).

9. *Nadler v. Mann*, 951 F.2d 301, 305 (11th Cir. 1992) ("A United States Attorney, appointed by the President and confirmed by the Senate, is the chief federal law enforcement official for the judicial district he serves and is responsible for the prosecution of all offenses against the United States within his district."); *see* 28 U.S.C. § 541(a) (1994).

10. *See* 28 U.S.C. § 547 (1994) (establishing duties of U.S. Attorneys and vesting U.S. Attorneys with authority to "prosecute for all offenses against the United States").

11. For a discussion of the expansion of federal criminal jurisdiction, *see* Charles D. Bonner, *The Federalization of Crime: Too Much of a Good Thing?*, 32 U. RICH. L. REV. 905, 920-25 (1998). The dramatic proliferation in federal crimes is largely a product of the Twentieth Century. *See* HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* 474-75 (1937) (commenting that for most of the nation's history "the federal criminal law was limited in purpose to the protection of federal property and restricted federal functions"). The punishment of common law crimes was reserved to the jurisdiction of the states. *Id.* at 475.

12. According to the Court of Appeals for the D.C. Circuit,

Authority to prosecute an individual is that government power which most threatens personal liberty, for a prosecutor "has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life."

*In re Sealed Case*, 838 F.2d 476, 487 (D.C. Cir. 1988) (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987)), *rev'd sub nom.* *Morrison v. Olson*, 487 U.S. 654 (1988); *see also* Robert W. Gordon, *Imprudence and Partisanship: Starr's OIG and the Clinton-Lewinsky Affair*, 68 *FORDHAM L. REV.* 639, 642 (1999) ("[T]he arsenal of investigative and punitive weapons modern prosecutors may deploy against lawbreakers and potential witnesses is devastating in its destructive powers.").

and prosecutorial resources on petty criminals, white-collar criminals, loan sharks, cyberspace pirates, or violent street gangs. These judgments are informed by the U.S. Attorney's prosecutorial philosophy and her assessment of the particular problems and vulnerabilities within her district.<sup>13</sup> Under our constitutional system, an official who is politically accountable must make these decisions.

The procedure for appointing U.S. Attorneys is established in 28 U.S.C. §§ 541 and 546.<sup>14</sup> Normally, the President appoints each U.S. Attorney with the advice and consent of the United States Senate.<sup>15</sup> In the event that a vacancy occurs in the office of a U.S. Attorney, the Attorney General is authorized to appoint a U.S. Attorney to serve for up to 120 days,<sup>16</sup> within which time, in an ideal world, the President could be expected to nominate, and the Senate to confirm, a successor to the office.<sup>17</sup> If this process does not produce a new, duly nominated and confirmed U.S. Attorney, however, federal law vests the authority to name a successor in the federal district court in which there is a vacancy.<sup>18</sup>

This appointment mechanism has an intuitive appeal and initially appears to comply with the letter of the United States Constitution's Appointments Clause, but closer scrutiny raises serious concerns about such a procedure. Whether an appointment is valid under the Appointments Clause depends on whether a U.S. Attorney is a "principal" or an "inferior" officer.<sup>19</sup> If U.S. Attorneys are regarded as principal officers, then the Constitution prescribes but one method for their appointment: nomination by the President and confirmation by the Senate.<sup>20</sup> Even if U.S. Attorneys are deemed inferior officers, their appointments by federal district court judges are invalid under the Appointments Clause if such appointments are con-

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13. See EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS ANNUAL STATISTICAL REPORT 1 (2000) ("Each United States Attorney is responsible for establishing law enforcement priorities within his or her district.").

14. 28 U.S.C. §§ 541, 546 (1994) (establishing procedures for the appointment of U.S. Attorneys).

15. *Id.* § 541(a).

16. *Id.* § 546(c).

17. See *id.* § 546(c)(1).

18. *Id.* § 546(d).

19. See U.S. CONST. art. II, § 2, cl. 2; see also *infra* Part III (discussing the distinction between principal and inferior officers).

20. U.S. CONST. art. II, § 2, cl. 2.

sidered incongruous with appropriate judicial activity.<sup>21</sup> Finally, even if such an appointment mechanism satisfies the Appointments Clause, it is unconstitutional if it violates the separation-of-powers doctrine.<sup>22</sup>

This Article argues that, under any of these three scenarios, the court appointment of U.S. Attorneys is inconsistent with the United States Constitution. Part I establishes the relevant factual predicate by describing the history of federal law enforcement, the place of the U.S. Attorney in that system, and the unique relationship between the U.S. Attorneys and the Attorney General. Part II provides the legal framework for assessing the appointment of U.S. Attorneys by exploring the structure and operation of the Appointments Clause and explaining the processes for appointing and removing U.S. Attorneys. Part III reviews the judicial precedents that have distinguished between principal and inferior officers and shows how the responsibilities conferred on U.S. Attorneys are inconsistent with inferior officer status. Therefore, this Part concludes that U.S. Attorneys, by virtue of their status as principal officers, must be nominated by the President and confirmed by the Senate. Part IV argues that, even if U.S. Attorneys can be considered inferior officers, their appointment by the district court judges before whom they will be required to appear is incongruous with appropriate judicial activity. Part V concludes that, even if the mechanism providing for court-appointed U.S. Attorneys satisfies the Appointments Clause, it nonetheless violates the separation-of-powers doctrine by disturbing the balance of power between the executive and legislative branches and defeating the accountability intended under the Constitution. The Article concludes by suggesting steps to improve the processes of appointing U.S. Attorneys.

## I. THE OFFICE OF U.S. ATTORNEY

### A. THE HISTORY OF FEDERAL LAW ENFORCEMENT

The United States has not always had a centrally administered criminal enforcement system. The First Congress initially occupied itself with the creation of the “great departments” of Foreign Affairs, War, and Treasury.<sup>23</sup> These

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21. See *Morrison v. Olson*, 487 U.S. 654, 675-76 (1988).

22. *Id.*

23. See MEADOR, *supra* note 5, at 5 (discussing the First Congress’s de-

departments embodied the most basic responsibilities entrusted to the newly established executive: a single, national voice in dealings with other nations; a plan for the common defense; and a national treasury, as finances under the Articles of Confederation had been a critical weakness.<sup>24</sup> But Congress, even as it created the offices and departments of the federal government, sought to limit the power of the President through the structure of the executive branch.<sup>25</sup> For instance, Congress controlled the power of the purse and remained wary of delegating too much fiscal authority to the President.<sup>26</sup> This may explain why the Department of the Treasury was not named an "executive" department, as were the Departments of Foreign Affairs and War.<sup>27</sup> Moreover, in contrast to the relatively free

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bates over the structure of the executive branch ("It is of large yet overlooked historical significance that the [F]irst Congress did not deal with the office of Attorney General in connection with the creation of the executive departments of the new government."); see also Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 572-75.

That these offices were considered vital to the existence of any national government is illustrated by their creation under the Articles of Confederation. By 1781, Congress had established the executive departments of War, Foreign Affairs, and Finance. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 600-01 (1994).

24. See CUMMINGS & MCFARLAND, *supra* note 11, at 1-2 ("The old Articles of Confederation had conferred upon the Continental Congress authority over peace and war, but even then the states might veto requests for men and money.").

25. See Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 286 (1989).

26. See Bloch, *supra* note 23, at 576-78; Krent, *supra* note 25, at 284 ("Congress[s] control over the appropriations process affords the legislature a potent weapon with which to influence the Executive's criminal law enforcement authority."). Congress has an explicit, constitutional grant of authority over national finances: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." U.S. CONST. art. I, § 9, cl. 7.

27. See Bloch, *supra* note 23, at 576 & n.50 (noting that the Departments of Foreign Affairs and War were labeled as executive departments, whereas the Department of the Treasury was not). Moreover, while the statutes creating the Secretaries of War and Foreign Affairs explicitly called for presidential direction and control, the statute defining the duties of the Secretary of the Treasury "was silent on the subject of presidential direction." Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 240 (1989). However, the Secretary of the Treasury was removable by the President, see *id.* at 240, and was paid according to a schedule set for "Executive Office[s]." See Bloch, *supra* note 23, at 576 n.50. For competing interpretations of these discrepancies, compare Calabresi &

hand granted to the President in organizing the "executive" Departments of Foreign Affairs and War, Congress took a much more active role in the internal structure of the Department of the Treasury.<sup>28</sup>

In contrast, law enforcement had not emerged as a foundational principle in the creation of the new national government. Although enforcement of federal laws had been a problem under the Articles of Confederation<sup>29</sup> and the supremacy of federal law had been conclusively established by the Constitution,<sup>30</sup> the states enjoyed concurrent jurisdiction to enforce federal laws<sup>31</sup> and law enforcement was not necessarily viewed as a national issue requiring a national solution.<sup>32</sup> With law enforcement comes discretion, and with discretion, the potential for abuse. Those responsible for defining the early role of

Prakash, *supra* note 23, at 647-55, with Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 34-38 (1994).

28. See Bloch, *supra* note 23, at 576 (citing Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65, 65 (creating and defining offices of the Secretary of the Treasury, Comptroller, Auditor, Treasurer, Register, and Assistant to the Secretary)). This desire for more detailed control may signify Congress's desire to guard its control over the purse.

The Framers had even considered a proposal to have the Treasurer appointed by a joint resolution of the two houses of Congress. See 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 233 (1911). There is some evidence that the House of Representatives viewed the Secretary of the Treasury as an extension of its appropriations authority. For example, upon Alexander Hamilton's confirmation as the first Secretary of the Treasury in July 1789, Congress disbanded its Ways and Means Committee and did not establish a standing committee on Ways and Means until 1795. See Casper, *supra* note 27, at 241 ("In the Congress, the Secretary of the Treasury was seen as an indispensable, direct arm of the House in regard to its responsibilities for revenues and appropriations.").

29. See *THE FEDERALIST* NO. 21, at 138-39 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

30. U.S. CONST. art. VI, § 1, cl. 2. The Supremacy Clause states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

*Id.*

31. See Krent, *supra* note 25, at 303-07; see also Bloch, *supra* note 23, at 570 (describing the extensive concurrent state jurisdiction in the early federal scheme and concluding that "very little [jurisdiction] was exclusively federal").

32. See CUMMINGS & MCFARLAND, *supra* note 11, at 475 (stating that "[t]he policy and practice of a hundred and thirty years or more prior to the [First] World War had left the punishment of common law crimes to the states").

the federal government were in no hurry to confer broad criminal enforcement powers to it.<sup>33</sup>

Moreover, even to the extent that law enforcement was recognized as a federal responsibility, the First Congress<sup>34</sup> was unsure that law enforcement was properly or exclusively an executive-branch function.<sup>35</sup> Draft legislation was considered that would have vested the authority in the Supreme Court to appoint the Attorney General and the authority to appoint U.S. Attorneys (then known as district attorneys)<sup>36</sup> in the federal

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33. See Bell, *supra* note 7, at 1051 (describing the First Congress's fear of a strong, centralized federal law enforcement apparatus as one possible motive for their creation of a weak Attorney General); Bloch, *supra* note 23, at 568-71 (stating that the creation of a weak Attorney General was consistent with the First Congress's reluctance to create a strong federal judicial system).

34. The debates and enactments of the First Congress have long been regarded as significant indications of the original meaning of the Constitution. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986) (stating the decisions of the First Congress afford "contemporaneous and weighty evidence" of the meaning of the Constitution (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983))); cf. Lessig & Sunstein, *supra* note 27, at 13-14 n.47 (questioning the "usefulness of post-enactment practice for interpreting the meaning of the Constitution" and discussing the Alien and Sedition Acts).

35. See Krent, *supra* note 25, at 286-87. The characterization of where law enforcement sits in our tripartite government has been the subject of much scholarship and intense debate. Many view law enforcement, and in particular, criminal prosecutions, as "core" executive functions. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) ("Governmental investigation and prosecution of crimes is a quintessentially executive function."); Calabresi & Prakash, *supra* note 23, at 658-61 (arguing that presidential practice and English tradition support the argument that prosecutorial authority is inherently an executive function). Others have argued persuasively that law enforcement occupies a more ambiguous position, where the legislative, judicial, and executive branches can all play a constructive role. See, e.g., Bloch, *supra* note 23, at 562-63 (arguing that history is indeterminate with regard to exclusivity of executive authority over prosecutions); Lessig & Sunstein, *supra* note 27, at 14-22 (recounting the historical placement of law enforcement authority in different power structures).

This Article does not attempt to discern which of these competing theories has the stronger claim on the Framers' intentions. Instead, it describes the history of law enforcement as one helpful tool in understanding the complex relationship between the U.S. Attorneys and the Attorney General. Although this history is not determinative of the relationship today, it is still significant. The historical roles and responsibilities of the U.S. Attorneys, and the U.S. Attorneys' relationships to other executive-branch officials, are relevant to understanding the stature U.S. Attorneys enjoy today and assist in analyzing the propriety of the U.S. Attorneys' court appointment.

36. Throughout this discussion of the history of federal law enforcement, "U.S. Attorney," the contemporary title, is used interchangeably with "district attorney," the original title of the same office. See Bell, *supra* note 7, at 1051 (noting that U.S. Attorneys were once known as district attorneys); Bloch, *su-*

district courts.<sup>37</sup> In the provision that creates the Attorney General in the Judiciary Act of 1789, there is no indication that the Attorney General should report to or take orders from the President.<sup>38</sup> Initially, it was unclear whether the Attorney General was even considered an executive-branch official<sup>39</sup> and President Washington's Attorney General did not attend cabinet meetings until 1792.<sup>40</sup> It appeared Congress believed "that the Attorney General would take orders from Congress, as well as the President, in representing the interests of the United States."<sup>41</sup> Indeed, the early debates concerning federal law enforcement focused less on formal separation-of-powers principles and more on practical solutions.<sup>42</sup> For example, while

*pra* note 23, at 567 (same).

37. 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES 490 (1971); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 108-09 (1923); see also Bloch, *supra* note 23, at 567 & n.24, 571 & n.32 (examining the available legislative history of the appointment provisions in the Judiciary Act of 1789).

38. See An Act to Establish the Judicial Courts of the United States (Judiciary Act of 1789), ch. 20, § 35, 1 Stat. 73, 93 (1789). Although the Judiciary Act of 1789 required the Attorney General to give legal opinions when requested to do so by the President, *id.*, it is in contrast to the legislation defining the duties of the Secretaries of War and Foreign Affairs, which made presidential direction and control explicit. See Bloch, *supra* note 23, at 572 ("In establishing the two 'great executive departments' of Foreign Affairs and War, Congress was notably concerned with assuring presidential control and limiting congressional interference with presidential powers." (citing 1 ANNALS OF CONG. 368 (J. Gales ed. 1790))).

39. See, e.g., Bloch, *supra* note 23, at 578-80 (describing the ambiguous relation of the Attorney General to the rest of the executive branch).

40. See CUMMINGS & MCFARLAND, *supra* note 11, at 25; MEADOR, *supra* note 5, at 6; see also EASBY-SMITH, *supra* note 7, at 4-5 (noting that the Attorney General was not formally recognized as the fourth-ranking cabinet member until 1886). The Attorney General has traditionally attended cabinet meetings since 1792.

In 1828, there was some question as to whether the Attorney General should tender his resignation, as was expected of other cabinet members, at the end of the Quincy-Adams administration. CUMMINGS & MCFARLAND, *supra* note 11, at 98. This was only the second transition from one party to another, the first being Jefferson's ascension to the presidency in 1801. Former President James Monroe suggested to Attorney General William Wirt that, while other cabinet members could be expected to resign, Wirt need not tender his resignation, because "[t]he President has less connection with, and less responsibility for the performance of" the duties of the Attorney General. *Id.* (citing Letter from James Monroe to William Wirt). Nonetheless, Wirt resigned on the eve of Andrew Jackson's inauguration. *Id.*

41. Bloch, *supra* note 23, at 581.

42. See *id.* at 563 ("[The Framers and the early legislators] created a unitary Presidency, but did not mandate complete presidential control over all administrative offices that Congress might establish. Their approach to ques-

deputy marshals were appointed by the executive branch, they were removable by the courts.<sup>43</sup>

The establishment of even the most rudimentary criminal enforcement administration was taken up by Congress only as an adjunct to the creation of federal courts, as opposed to during the earlier deliberations on the form of the "executive departments."<sup>44</sup> Although the offices of the Attorney General and the district attorneys were created pursuant to the Judiciary Act of 1789,<sup>45</sup> it should be remembered that the federal judiciary initially established by Congress was itself very limited. Federal courts exercised only a very limited portion of the jurisdiction authorized by the Constitution and almost no jurisdiction exclusive from the states.<sup>46</sup> The Framers of the Constitution grappled over whether to create a federal judiciary in addition to the Supreme Court and ultimately left that determination to Congress, but it was presumed that most of the litigation in the country—criminal as well as civil—would con-

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tions of control was neither rigid nor doctrinaire. On the contrary, it was remarkably subtle and pragmatic.").

43. See Judiciary Act of 1789, ch. 20, § 27; see also Krent, *supra* note 25, at 286.

Although the court appointment and removal of U.S. Marshals might at first blush seem a convenient and probative comparison to the appointment of U.S. Attorneys, the role and responsibilities of U.S. Marshals are not analogous to those of the U.S. Attorneys. The primary functions of U.S. Marshals are "holding people in detention, serving subpoenas and civil summonses, and providing some protective services for government witnesses. The U. S. Marshal no longer performs any investigative function." WHITNEY NORTH SEYMOUR, JR., UNITED STATES ATTORNEY: AN INSIDE VIEW OF "JUSTICE" IN AMERICA UNDER THE NIXON ADMINISTRATION 23 (1975); see also 28 U.S.C.

§ 566 (1994) (defining powers and duties of U.S. Marshals). "[M]arshals themselves had become almost exclusively court officers when the First Congress met." CUMMINGS & MCFARLAND, *supra* note 11, at 17; see also *Ex Parte Siebold*, 100 U.S. 371, 397 (1879) ("The marshal is pre-eminently the officer of the courts . . .").

Even though U.S. Marshals are much more akin to court officers than are U.S. Attorneys, the Attorney General is given sole authority to appoint marshals in the event of a vacancy. 28 U.S.C. § 562 (1994). The district court is granted no authority with respect to filling vacancies in the office of U.S. Marshal. See *id.*

44. See MEADOR, *supra* note 5, at 5 ("The question of legal counsel for the government was considered only in the context of the creation of the judiciary.").

45. See Judiciary Act of 1789, ch. 20, § 35.

46. See CUMMINGS & MCFARLAND, *supra* note 11, at 15; see also Bloch, *supra* note 23, at 568 (commenting that it is not surprising that the Attorney General was so weak "in view of the First Congress's general reluctance to create a strong federal judicial system").

tinue to be conducted in state courts.<sup>47</sup>

The original office of the Attorney General created by the First Congress was a far cry from the powerful position it is today. The Attorney General was vested with the authority "to prosecute and conduct all suits *in the Supreme Court* in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments."<sup>48</sup> In addition, consistent with Congress's ambivalence about the creation of a federal law enforcement establishment,<sup>49</sup> the Attorney General was hamstrung by limited resources and no direct control over the district attorneys.<sup>50</sup> The Attorney General position was not even considered a full-time endeavor; the Attorney General was paid only \$1500 per

47. See Bloch, *supra* note 23, at 568-69; see also Krent, *supra* note 25, at 305-07 (discussing early enforcement of federal criminal laws by state officials and concurrent state court jurisdiction over criminal prosecutions under federal laws).

During the Whiskey Rebellion, civil cases to collect federal revenues were litigated in the state courts of Pennsylvania, while criminal prosecutions were handled in federal court. See CUMMINGS & MCFARLAND, *supra* note 11, at 44.

48. Judiciary Act of 1789, ch. 20, § 35 (emphasis added). The entire statutory description of the Attorney General's responsibilities was included in a single paragraph of the Judiciary Act of 1789:

And there shall . . . be appointed to a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.

*Id.*

Attorney General Homer Cummings opined that this limited jurisdiction may have been accidental. CUMMINGS & MCFARLAND, *supra* note 11, at 16. Cummings suggested that it may have been incidental to the proposal to have the Supreme Court appoint the Attorney General but that, even when this provision was rejected, "the wording of the section was not revised and the Attorney General remained charged only with the duty of appearing before the Supreme Court." *Id.*

49. See Bell, *supra* note 7, at 1051 ("Those early representatives vividly remembered the tyranny that could result from strong central enforcement of laws, and they hesitated to create machinery in the executive branch that possibly could serve as an engine of oppression.").

50. See EASBY-SMITH, *supra* note 7, at 6; MEADOR, *supra* note 5, at 6.

year,<sup>51</sup> while the Secretaries of the Treasury and Foreign Affairs both were paid \$3500,<sup>52</sup> and the Secretary of War received \$3000.<sup>53</sup> Furthermore, the Attorney General was expected to maintain a private law practice,<sup>54</sup> was not authorized to hire a single clerk, and was not appropriated any money for supplies, office space, or even expenses.<sup>55</sup> Beginning with President Washington and the first Attorney General, Edmund Randolph, every President and Attorney General requested appropriations for the basic provisions of a clerk and a budget for supplies, but Congress, with an eye on the federal budget and a particular concern that law enforcement remain primarily with the states, consistently refused.<sup>56</sup> Even if the Attorney General

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51. See Bloch, *supra* note 23, at 567 n.21 (citing Act of September 23, 1789, ch. 18, § 1, 1 Stat. 72, 72 (Act setting compensation for the judiciary)).

52. *Id.* (citing Act of September 11, 1789, ch. 13, § 1, 1 Stat. 67, 67 (Act setting the salaries of executive officials)).

53. *Id.*

54. See *id.* at 567. According to James Easby-Smith,

[The meager salary] was due to the arguments that the duties of the Attorney-General would be very light, that he could and would engage in private practice, and that the prestige of the office would be so great that it would be well worth the while of any lawyer to accept the office with only a nominal compensation.

EASBY-SMITH, *supra* note 7, at 5. Many of the early Attorneys General did not live in Washington, "but remained at their homes and transmitted their advice and opinions by mail." *Id.* at 8.

The Attorney General was paid on a fee-basis for representing the government outside the Supreme Court. For example, Attorney General William Wirt was paid \$1500 for prosecuting pirates in Baltimore and on another occasion was paid \$1000 for prosecuting mail robbers. CUMMINGS & MCFARLAND, *supra* note 11, at 90. Incumbent Attorneys General argued many early and important Supreme Court cases representing paying clients in their private practices. *Id.* at 154.

Caleb Cushing, Attorney General under President Franklin Pierce, became the first full-time Attorney General when, in 1853, Congress raised his salary to \$8000, commensurate with other cabinet secretaries' salaries. *Id.* at 155.

55. See EASBY-SMITH, *supra* note 7, at 6 (noting that, in addition to the legal duties of the office, the Attorney General "was obliged to perform all the physical labor of the office, for Congress had failed to provide for him clerical assistance, and he had not even a single clerk"); see also Bloch, *supra* note 23, at 586-88 (describing the challenges facing the first Attorney General, Edmund Randolph). Edmond Randolph also served as George Washington's personal, private attorney. CUMMINGS & MCFARLAND, *supra* note 11, at 1.

56. See Bell, *supra* note 7, at 1051 (suggesting that, while early Congresses were motivated by "frugality," a more important factor in denying the repeated requests "was fear of a strong Attorney General"); Bloch, *supra* note 23, at 589 n.91 (arguing that an aversion to centralization thwarted attempts to create a well-funded Attorney General's office); see also Krent, *supra* note

had sufficient funds, Congress refused to grant the Attorney General any authority to appoint, supervise, or direct district attorneys, even though Congress gave district attorneys full prosecutorial authority on behalf of the United States.<sup>57</sup> The Attorney General did not have responsibility for criminal prosecutions and did not have any official role in determining which cases would be brought or what positions would be advanced by the United States. The Attorney General, whose litigation responsibilities were limited solely to representing the United States before the Supreme Court, was relegated to litigating on the basis of the records and reasoning developed in lower court proceedings over which he had no control.<sup>58</sup> “The Attorney General . . . had virtually no say in the positions taken by the district attorneys in [federal criminal] suits, and had little opportunity to coordinate the positions taken by the district attorneys.”<sup>59</sup>

As mentioned above, with the passage of the Judiciary Act of 1789, Congress created the position of district attorney for each judicial district.<sup>60</sup> Early drafts of the Judiciary Act of 1789 granted the district courts the authority to appoint the district attorney, but this provision did not survive.<sup>61</sup> Although

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25, at 286-90 (describing repeated attempts to consolidate legal representation of the government under the Attorney General). The repeated entreaties of various Presidents and Attorneys General to expand the staff and supervision granted to the Attorney General are catalogued by James Easby-Smith. EASBY-SMITH, *supra* note 7.

57. See Judiciary Act of 1789, ch. 20, § 35 (providing for district attorneys in each judicial district “to prosecute . . . 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”); Bloch, *supra* note 23, at 567; see also MEADOR, *supra* note 5, at 6 (noting that Congress failed “to give the Attorney General any control or supervision of the district attorneys”). In the beginning, the Attorney General was not even involved in the selection or appointment process of the U.S. Attorneys. EASBY-SMITH, *supra* note 7, at 38. In fact, the State Department, exercising its early role somewhat akin to Britain’s “Home Department,” conducted all business and correspondence relating to the selection and appointment of “district attorneys, marshals and other officials properly under the jurisdiction of the Attorney-General.” *Id.* In 1850, this work was transferred to the office of the Attorney General. *Id.* Nonetheless, officers of the Department of Justice received their commissions from the Secretary of State until 1888, when this responsibility was finally transferred to the Department of Justice. *Id.* at 39.

58. See Bell, *supra* note 7, at 1051.

59. Krent, *supra* note 25, at 286-87.

60. Judiciary Act of 1789, ch. 20, § 35.

61. See Bloch, *supra* note 23, at 567 n.24; Warren, *supra* note 37, at 108-09; *supra* note 37 and accompanying text.

no appointment provision was included in the legislation as enacted, the President, consistent with the Appointments Clause, assumed responsibility for nominating district attorneys and submitted nominees to the advice and consent of the Senate.<sup>62</sup>

These district attorneys were charged with representing the United States in all cases in which the United States had an interest, despite their independence from central control.<sup>63</sup> As Congress had enacted few federal criminal statutes, the district attorneys conducted relatively few criminal prosecutions.<sup>64</sup> In fact, most of the district attorneys' early work involved debt collection, and the first official grant of supervisory authority over district attorneys was delegated to the Treasury Department.<sup>65</sup> Even this nominal grant of authority did not change

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62. Bloch, *supra* note 23, at 567 n.24 (“[The Judiciary Act of 1789] did not specify how the Attorney General or the district attorneys would be appointed. The President nevertheless immediately assumed that responsibility, went to the Senate for advice and consent, presumably reading [A]rticle II, section 2 to support and perhaps require this approach.” (citation omitted)). Today, the relevant appointment provisions are codified at 28 U.S.C. § 501 (Attorney General) and 28 U.S.C. §§ 541, 546 (U.S. Attorneys).

63. See Judiciary Act of 1789, ch. 20, § 35 (defining the duty of a district attorney 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”); see also Bell, *supra* note 7, at 1051 (remarking that the Judiciary Act of 1789 vested the U.S. Attorneys with “exclusive[]” power with respect to “the enforcement of penal law and the representation of the federal government in civil litigation at the trial level”).

64. See CUMMINGS & MCFARLAND, *supra* note 11, at 474-75.

65. See Act of Mar. 3, 1797, ch. 20, § 1, 1 Stat. 512, 512 (1797) (granting the Comptroller of the Treasury authority to direct legal proceedings against delinquent revenue officers); CUMMINGS & MCFARLAND, *supra* note 11, at 74; see also John G. Heinberg, *Centralization in Federal Prosecutions*, 15 MO. L. REV. 246 (1950) (providing the history of Treasury Department supervision of U.S. Attorneys); Lessig & Sunstein, *supra* note 27, at 17 (discussing the relative independence of the Comptroller General).

The Department of the Treasury's supervision of government litigation was to persist for many years. Heinberg, *supra*, at 246. In 1828, the Treasury Agent (successor to the Solicitor's responsibilities with respect to overseeing district attorneys) supervised more than 3000 pending cases in which the United States had an interest. CUMMINGS & MCFARLAND, *supra* note 11, at 144. President Jackson, upon his inauguration in 1829, took up the call to strengthen the Attorney General's supervisory authority. “But Congress instead of carrying out the President's recommendations and increasing the powers and duties of the Attorney-General, created, in 1830, the office of Solicitor of the Treasury, giving to that officer control of civil suits in which the Government was interested.” EASBY-SMITH, *supra* note 7, at 11. The Solicitor of the Treasury was granted the power “to instruct the district attorneys in all matters and proceedings in which the United States was interested.” MEADOR, *supra* note 5, at 7 (citing Act of May 29, 1830, ch. 153, 4

the district attorneys' ability to act as free agents, primarily because of their remote location and the limited means of communication and transportation available during this time period.<sup>66</sup>

Federal legal authority was distributed around the country not only by virtue of the geographic dispersion of the district attorneys, but also by the subject matter of the various departments.<sup>67</sup> As Congress created new departments, it invariably vested each of them with a chief legal officer, known as the solicitor of the department.<sup>68</sup> The resulting lack of coordination meant the United States was unable to develop a coherent legal strategy and could not ensure that compatible legal positions were advocated in different cases.<sup>69</sup> In support of the legislation that would create the Department of Justice, Representative Jenckes of Rhode Island described the results of having many federal law offices operating independently of each other:

This host of officers, giving opinions or deciding questions [of law], are [sic] not controlled by any common head to secure uniformity, and the result is that no citizen, no lawyer, can ever learn what has been decided, what are the rules governing any Department, bureau, or, officer; or if these could be learned, so great is the confusion and conflict that we might as well attempt to read the whirlwind.<sup>70</sup>

Eventually, this broad diffusion of authority over federal legal affairs was recognized as being too expensive and generally unworkable, but the process of consolidating supervision in the office of the Attorney General was lengthy.<sup>71</sup> The Attorney

Stat. 414 (1830)). The Attorney General was relegated to advising the Solicitor of the Treasury only when the Solicitor requested such assistance. CUMMINGS & MCFARLAND, *supra* note 11, at 146 (citing Act of May 29, 1830, ch. 153, § 10, 4 Stat. 414, 416 (1830)).

66. See Lessig & Sunstein, *supra* note 27, at 70 ("[I]n conditions like those of the founding, it made little sense to vest in the President centralized control over district attorneys, given their distance from the center, and it would be fully understandable that they would function relatively independently of the President."); see also Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 126 (1988) ("In the first decades of the Republic, federal prosecutors . . . had no direct superior in the federal government, and they acted with considerable independence . . .").

67. See MEADOR, *supra* note 5, at 9-10 & n.2.

68. See *id.* at 9 (citing CUMMINGS & MCFARLAND, *supra* note 11, at 220-21); Bell, *supra* note 7, at 1052.

69. See NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789-1990*, at 49 (1992).

70. CONG. GLOBE, 41st Cong., 2d Sess. 3038 (1870).

71. See CUMMINGS & MCFARLAND, *supra* note 11, at 220-22.

General was provided with a single clerk in 1819.<sup>72</sup> In 1861, the Attorney General was nominally granted general supervisory authority over the district attorneys,<sup>73</sup> but the legislation left ambiguities regarding to whom the district attorneys were to report.<sup>74</sup> In addition, Congress remained ambivalent about the accumulation of so much power in the Attorney General and refused to clarify the relationship between the department solicitors and the Attorney General.<sup>75</sup> As a result, the department solicitors remained in their respective departments' buildings and were subject to each department's hierarchy, illustrating that Congress was not yet committed to consolidating effective control over the legal bureaucracy under the Attorney General.<sup>76</sup> Finally, in 1870, Congress created the Department of Justice.<sup>77</sup> With the creation of the Justice Department, the

72. See Act of Mar. 3, 1819, ch. 54, 3 Stat. 496, 500 (1819). Congress had approved the position two years earlier, but did not fund the newly created position of clerk to the Attorney General until 1819. See Bloch, *supra* note 23, at 619 n.185. By 1857, the Attorney General had a staff of twenty assistants, mostly due to the Attorney General's responsibility to review the decisions of the land commissions and to represent the government in land claims. See CUMMINGS & MCFARLAND, *supra* note 11, at 120-41.

73. Act of Aug. 2, 1861, ch. 37, § 1, 12 Stat. 285, 285 (1861). *But cf.* CUMMINGS & MCFARLAND, *supra* note 11, at 219 (noting that, even after being charged with the supervision of the district attorneys in 1861, "[o]nly in cases of 'peculiar' importance did the Attorney General have time to advise district attorneys"). Even after the Civil War, the district attorneys "remained all but completely independent." *Id.* at 218. Attorney General Homer Cummings recounted an episode from 1882, where the district attorney for Washington, D.C. allowed the grand jury to be dismissed (knowing that the statute of limitations would soon expire) in order to frustrate the Attorney General's plans for vigorous enforcement of postal fraud violators. See *id.* at 257.

74. CUMMINGS & MCFARLAND, *supra* note 11, at 219-20; see also 20 Op. Att'y Gen. 714, 715-16 (1894) (recognizing that the Department of the Treasury, not the Department of Justice, had control over criminal prosecutions of revenue fraud); Bloch, *supra* note 23, at 619 n.187.

75. See Bell, *supra* note 7, at 1054 ("Congress [exhibited] a curious ambivalence about the role of the Attorney General and the Department of Justice, appearing to give them total control over the nation's legal business on the one hand but failing to take action necessary to make that control effective on the other.").

76. *Id.*; see also CUMMINGS & MCFARLAND, *supra* note 11, at 487.

77. Act of June 22, 1870, ch. 150, § 1, 16 Stat. 162, 162 (1870) ("[T]here shall be, and is hereby, established an executive department of the government of the United States, to be called the Department of Justice, of which the Attorney-General shall be the head."); see also 28 U.S.C. § 501 (1994) (current version) ("The Department of Justice is an executive department of the United States . . .").

Congress did not give the Department of Justice its own building until 1934, so the Department of Justice took shape in offices in the Treasury De-

Attorney General exercised, for the first time, definite supervision over the U.S. Attorneys.<sup>78</sup> These events were the beginning of the long struggle between central control and local autonomy that still defines the relationship between the U.S. Attorneys and "Main Justice."<sup>79</sup>

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partment building and in disparate, rented space across Washington. Bloch, *supra* note 23, at 619 n.188; *see also* EASBY-SMITH, *supra* note 7, at 21 (citing Congressional findings that in 1899 the building occupied by the Justice Department was "too small for its purpose, [was] unsafe, over-crowded, and dangerously over-loaded, and [had] been pronounced unsafe after examination by the proper officials of the Treasury Department"). As a result, the department solicitors remained in their own buildings, further complicating the Department's efforts to unify the government's legal representation under the Attorney General's command. *Id.*

78. § 16, 16 Stat. at 164 ("[T]he Attorney General shall have supervision of the conduct and proceedings of the various attorneys for the United States in the respective judicial districts . . ."); *see also* EASBY-SMITH, *supra* note 7, at 19-20. *But cf.* Bell, *supra* note 7, at 1054 (arguing that, at least with respect to attorneys assigned to other executive departments, Congress continued to take "steps that showed it had not been serious about centralizing all legal activity under the Attorney General").

79. The Department of Justice management in Washington, D.C. is known as "Main Justice." *See* JIM MCGEE & BRIAN DUFFY, MAIN JUSTICE: THE MEN AND WOMEN WHO ENFORCE THE NATION'S CRIMINAL LAWS AND GUARD ITS LIBERTIES 7 (1996); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Authority*, 46 UCLA L. REV. 757, 781 (1999). The term "Main Justice" refers not only to the historic 1934 building that serves as the Department's headquarters, but also more generally to the Department's management as well as the "litigating divisions," which are located in Washington, D.C. and directed by an Assistant Attorney General. *See* MEADOR, *supra* note 5, at 15. The litigating divisions are the Criminal Division, the Civil Division, the Civil Rights Division, the Environment and Natural Resources Division, the Antitrust Division, and the Tax Division. *See id.* at 15-17.

The geographic distance between Main Justice and the U.S. Attorneys' offices is indicative of a larger difference in perspective. Charles Ruff characterized the distinction between Main Justice and the field:

[T]he Criminal Division lawyer is trained to respond to the demands of the Department [of Justice] and its national policies and practices, while the [A]ssistant United States [A]ttorney must respond to the needs of his community, of the law enforcement agencies who bring him cases, and of the judges of his district . . .

Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1207 (1977). This is perhaps an idealized view. A former U.S. Attorney characterized intervention by Main Justice as more nuisance than technical assistance: "A good U.S. Attorney's office . . . is usually much better equipped to handle a complex criminal prosecution than the young trial attorneys from the Department of Justice, who travel around the country primarily because they are looking for courtroom experience." SEYMOUR, *supra* note 43, at 48.

## B. ROLES AND RESPONSIBILITIES OF THE U.S. ATTORNEY

The history discussed above informs the contemporary operation of the various U.S. Attorneys' offices. In part because U.S. Attorneys operated without interference from Washington, D.C. for one hundred years, they retain an autonomy and independence from Washington, D.C. that is "perhaps unmatched by any other field service in the federal government."<sup>80</sup> There are ninety-three different U.S. Attorneys around the country, making coordination and control difficult.<sup>81</sup> In addition, U.S. Attorneys have a political base outside the executive-branch chain of command they officially serve: Senators, particularly those of the President's political party, exercise a customary privilege to influence the nominating process.<sup>82</sup> This independent political base distinguishes U.S. Attorneys from traditional subordinates and bolsters their autonomy from Main Justice.<sup>83</sup>

The relationship between U.S. Attorneys and the Attorney General has been refined over time by statute, regulation, and practice. It is clear today that the Attorney General has ultimate authority over U.S. Attorneys.<sup>84</sup> The Attorney General can assert control over a given case or investigation by directing more immediate subordinates to supervise closely the U.S. Attorney's handling of a case, or assistants can be dispatched from Main Justice to conduct the litigation directly.<sup>85</sup> Nonetheless, U.S. Attorneys continue to exercise significant independent authority.<sup>86</sup> Although the Attorney General is technically

80. EISENSTEIN, *supra* note 6, at 11. According to Daniel Meador, Because U.S. Attorneys were not brought under the Attorney General until 1870 and because they come into office through presidential appointment with heavy senatorial involvement, an aura of independence and autonomy has grown up around these offices. This has always made it difficult to coordinate their work effectively with departmental policies.

MEADOR, *supra* note 5, at 17

81. See MEADOR, *supra* note 5, at 17.

82. See *infra* Part II.B (discussing senatorial courtesies).

83. See MEADOR, *supra* note 5, at 138-40 (comments of Griffin Bell, former Attorney General, and Philip Heymann, former Assistant Attorney General and Deputy Attorney General).

84. 28 U.S.C. § 519 (1994) (directing the Attorney General to "supervise . . . [and] direct all United States [A]ttorneys . . . in the discharge of their respective duties").

85. See 28 U.S.C. § 518(b) (1994) (authorizing the Attorney General to remove U.S. Attorneys from particular cases when she believes that it would be "in the interests of the United States").

86. For a discussion of the broad discretion exercised by prosecutors generally, see James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94

empowered to direct any litigation from Main Justice, the scale of federal law enforcement activities makes the possibility of such interference remote,<sup>87</sup> and while there is an enumerated list of actions for which a U.S. Attorney is directed to seek approval,<sup>88</sup> for the most part, prosecutorial judgment calls are within the province of the U.S. Attorneys. This means that investigations are undertaken, indictments filed, and criminal defendants prosecuted and convicted under the supervision of a U.S. Attorney without giving notice to or receiving approval from the Attorney General or Main Justice.<sup>89</sup> As one observer concluded, “[T]he prosecutorial discretion of the U.S. Attorney is vast and unchecked by any formal, external constraints or regulatory mechanisms.”<sup>90</sup> In the words of another commentator,

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HARV. L. REV. 1521, 1524-37 (1981).

87. There are approximately 2500 Attorneys assigned to “Main Justice” in Washington, D.C. and approximately 5000 Attorneys in the various U.S. Attorneys’ offices. Justice Mgmt. Div., U.S. Dep’t of Justice, *2000 Budget Summary*, available at <http://www.usdoj.gov/jmd/2k-summary/2ktoc.html> (last visited Nov. 8, 2001). In 1999, the ninety-four U.S. Attorneys’ offices filed 50,779 criminal indictments against 71,560 defendants. EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP’T OF JUSTICE, *supra* note 13, at 12.

For an interesting discussion on how the expanded scale of federal law enforcement is affecting the role of the U.S. Attorney, see *Panel Discussion: The Prosecutor’s Role in Light of Expanding Federal Criminal Jurisdiction*, 26 FORDHAM URB. L.J. 657 (1999).

88. See, e.g., U.S. ATTORNEYS’ MANUAL, *supra* note 6, § 9-2.136 (requiring prior authorization for overseas terrorism cases); *id.* § 9-110.101 (same for RICO charges); *id.* § 9-2.400 (listing prosecutorial decisions requiring prior approval).

89. The public record does not evidence an accurate assessment of the relative authority of U.S. Attorneys and Main Justice. Because prosecutorial discretion is cloaked in secrecy and because of the institutional loyalty of Department of Justice employees, the public rarely knows when Washington, D.C. is directing prosecutive decisions or even when a struggle for control has occurred. James Eisenstein’s study of the U.S. Attorneys contains a lengthy discussion of the “undercurrent of tension and subdued hostility” that characterizes most interactions between the U.S. Attorneys’ offices and Main Justice. EISENSTEIN, *supra* note 6, at 58. See generally *id.* at 54-125 (describing the “fascinating and complex relations between [the U.S. Attorneys] and the Department of Justice”). Eisenstein’s *Counsel for the United States* remains the seminal study of the U.S. Attorneys and their relationship to the Department of Justice, but even this book is forced to rely on anonymous, anecdotal evidence because of the dearth of recorded evidence relating to the endemic struggles for control and autonomy that pervade this relationship. See *id.* at 56-58 (quoting anonymous sources).

90. Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 303 (1980).

The huge majority of criminal cases are brought, not by the litigating divisions under the direct control of assistant attorneys general, but by the ninety-four U.S. Attorneys' Offices, whose chiefs are appointed by the [P]resident, usually with considerable local input. These offices, whose prosecutorial authority predates the Justice Department's, have a long tradition of independence from Washington.<sup>91</sup>

This practice of decentralized criminal enforcement "has acquired a special power in the context of the federal system, in which even legislators of the [P]resident's party see U.S. [A]ttorneys as providing a critical counterweight to Washington politics."<sup>92</sup> This is because of the U.S. Attorneys' ability to affect Department of Justice policy and administration in a variety of ways.<sup>93</sup> U.S. Attorneys exercise the entire range of prosecutorial discretion literally on a daily basis. For example, on behalf of the United States, U.S. Attorneys routinely decide what crimes grand juries will investigate; what evidence and witnesses will be presented to the grand jury;<sup>94</sup> whether to pursue an investigation, or to close one;<sup>95</sup> what charges will be brought, against whom, and on how many counts;<sup>96</sup> and

91. Richman, *supra* note 79, at 781 (footnote omitted); see also U.S. ATTORNEYS' MANUAL, *supra* note 6, § 3-2.140 ("United States Attorneys conduct most of the trial work in which the United States is a party.").

92. Richman, *supra* note 79, at 808 (discussing the integrity exhibited by the U.S. Attorneys' offices during the Watergate era); see also SEYMOUR, *supra* note 43, at 76.

93. *Appropriations for 1961: Hearings on the Dep't of Justice Before the Subcomm. on the Dep'ts of State and Justice, the Judiciary, and Related Agencies of the House Comm. on Appropriations*, 86th Cong. 251 (1960) (statement of John J. Rooney, Subcommittee Chairman) ("The U.S. [A]ttorneys are not only the field representatives of the Department of Justice—they are the sole instruments through which the [f]ederal laws are enforced . . . The effectiveness of their work materially influences the degree of respect and compliance which the citizenry accords the Nation's laws.").

94. See *United States v. Williams*, 504 U.S. 36, 44-45 (1992) (discussing federal prosecutors' broad discretion in what to present to the grand jury).

95. Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 560 (1999) ("The law does not pretend to dictate when a prosecutor may open an investigation." (citing *United States v. Luttrell*, 923 F.2d 764 (9th Cir. 1991) (holding that probable cause or reasonable suspicion are not prerequisites for initiating investigations of individuals))).

96. See *United States v. Armstrong*, 517 U.S. 456 (1996) (discussing prosecutorial discretion in the charging decision); see also SEYMOUR, *supra* note 43, at 47 ("Even when a grand jury returns an indictment, a United States Attorney may refuse to sign the document, thereby rendering it null."); Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1516-18 (2000) (discussing prosecutors' "enormous power" in the charging decision).

As "determinate sentencing" narrows the range of available sentences

whether charges will be dropped or reduced in exchange for a guilty plea and cooperation.<sup>97</sup> Further, through the inevitable rationing of limited resources, U.S. Attorneys set the federal law enforcement agenda for their districts by determining which crimes are worth major investigative resources, which crimes are better left to the state criminal justice systems, when justice will be served by leniency, and what magnitude of fraud deserves to be prosecuted.<sup>98</sup> Although U.S. Attorneys are “functionally a part of the Department of Justice,”<sup>99</sup> according to Charles Ruff,

Each United States [A]ttorney . . . to a greater or lesser degree, operates independently of the Justice Department in a broad range of his daily activities. He must do so because he is responsible for the investigation and prosecution of hundreds of criminal cases in addition to substantial civil litigation, and it would be virtually impossible for him to consult with the various divisions and sections of the Department on each issue of policy or procedure.<sup>100</sup>

In their capacity as the chief federal law enforcement officer in each judicial district, U.S. Attorneys exercise significant and largely independent prosecutorial discretion on behalf of the

for any particular crime, and parole and early release provisions are repealed, the power of U.S. Attorneys increases. The charging decision, in which the U.S. Attorney is imbued with vast discretion, determines the sentence in a way that used to depend largely on judges’ discretionary authority. *See infra* notes 101-04 and accompanying text (discussing Sentencing Guidelines).

97. *See* 28 U.S.C. § 547 (1994) (defining the authority of U.S. Attorneys). *See generally* Richman, *supra* note 79, at 759 (discussing standards of prosecutorial discretion and determining that “substantive federal criminal law unquestionably delegates a staggering degree of discretionary authority to federal prosecutors”).

98. *See* MEADOR, *supra* note 5, at 27-28. According to Daniel Meador, If the Department of Justice is to function rationally, policies must be established as to how the government’s legal and investigative resources are to be used. This necessarily involves decisions that some laws are to be enforced more vigorously than others. These decisions will be grounded in the general philosophy and policies of the Administration in power.

*Id.*; *see also* EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP’T OF JUSTICE, *supra* note 13, at 1 (remarking on the policy-setting role of the U.S. Attorneys); H. Richard Uviller, *Poorer But Wiser: The Bar Looks Back at Its Contribution to the Impeachment Spectacle*, 68 *FORDHAM L. REV.* 897, 899-902 (1999) (arguing that limited resources and the need to allocate insufficient resources is “essential in the development of the sense of justice, . . . and no decent prosecutor can survive without it”).

99. Ruff, *supra* note 79, at 1201.

100. *Id.* at 1201-02 (footnote omitted); *see also* SEYMOUR, *supra* note 43, at 47 (“[T]he Attorney General is not in a position to review the facts and various considerations that go into most cases, and the job therefore falls to the United States Attorney.”).

federal government.

In addition to their traditional authority as prosecutors, the power of U.S. Attorneys has risen dramatically since the introduction of the Sentencing Guidelines.<sup>101</sup> The Sentencing Guidelines aimed to decrease the disparity in sentences by reducing judges' discretion when imposing sentences in individual cases.<sup>102</sup> The Sentencing Guidelines, however, have merely taken the exercise of discretion away from judges and placed it into the hands of the prosecutors. In so doing, the consequences of U.S. Attorneys' discretionary charging decisions have been magnified.<sup>103</sup> Judge Harry T. Edwards of the Court of Appeals for the D.C. Circuit stated,

[T]he Guidelines have not eliminated sentencing discretion. Rather, they have merely transferred it from district judges—who, whatever their perceived failings, are at least impartial arbiters who make their decisions on the record and subject to public scrutiny and appellate review—to less neutral parties who rarely are called to account for the discretion they wield.<sup>104</sup>

As a result, the discretion to ensure that the punishment fairly

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101. Pursuant to the Sentencing Reform Act of 1984, 18 U.S.C. § 3551, the "Sentencing Commission" was created to "establish a range of determinate sentences for categories of offenses and defendants according to various specified factors." *Mistretta v. United States*, 488 U.S. 361, 368 (1989). The guidelines are "binding on the courts." *Id.* at 367. If the sentencing court exercises its discretion to depart from the applicable guideline, it must "state its reasons for the sentence imposed" and "the 'specific reason' for imposing a sentence different from that described in the guideline." *Id.* at 367-68.

102. See Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1696-98 (1992).

103. See Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 72-73 (1993) (arguing that mandatory sentences strengthen prosecutors' ability to secure plea bargains); see also Levenson, *supra* note 95, at 565 ("While the formal act of sentencing rests with the court, a prosecutor's charging decisions very much will dictate what the judge's options are at the time of sentencing.").

104. *United States v. Harrington*, 947 F.2d 956, 966-67 (D.C. Cir. 1991) (Edwards, J., concurring); see also *Panel Discussion: The Expanding Prosecutorial Role from Trial Counsel to Investigator and Administrator*, 26 FORDHAM URB. L.J. 679, 686 (1999) (comments of U.S. District Judge John Martin, Jr. (S.D.N.Y.)) ("[W]hen you put into the hands of one person the decision of what crime to investigate, who to prosecute, and what the sentence should be, you have taken out of the system any check or balance."); Richman, *supra* note 79, at 763 ("Congress's creation (or approval) of a sentencing scheme that puts such a high premium on prosecutorial favor has thus contributed significantly to the movement of effective lawmaking authority from the courts to the executive branch." (footnote omitted)).

fits the crime, long the province of judges, is now exercised primarily by U.S. Attorneys.

Fairly characterized, the U.S. Attorney position is one of awesome power and immense discretion.<sup>105</sup> These discretionary powers led Attorney General Robert Jackson to conclude that “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America.”<sup>106</sup> Because of this power and its attendant discretion, it is important that federal prosecutors remain independent of partisan battles. But it is just as important that they be accountable through political channels. Thus, in our federal system, U.S. Attorneys always have been nominated by the President and confirmed by the Senate. To determine whether a court is also permitted to appoint an official who exercises the authority and discretion of the U.S. Attorney requires an examination of the Appointments Clause of the United States Constitution.

## II. STRUCTURE, HISTORY AND OPERATION OF THE APPOINTMENTS CLAUSE

The Constitution establishes the process for the appointment of government officers:

[The President] by and with the Advice and Consent of the Senate, . . . shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the

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105. In his dissenting opinion in *Morrison*, Justice Scalia opined that the prosecutor’s power and discretion are so unique that “[o]nly someone who has worked in the field of law enforcement can fully appreciate the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation.” *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting). In the words of Attorney General Robert Jackson,

One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. . . . What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

Attorney General Robert Jackson, *The Federal Prosecutor*, Address Delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940) [hereinafter *Jackson Address*], reprinted in 24 J. AM. JUDICATURE SOC’Y 18, 19 (1940), quoted in *Morrison v. Olson*, 487 U.S. 654, 727-28 (1988) (Scalia, J., dissenting).

106. *Jackson Address*, *supra* note 105, at 18.

Heads of Departments.<sup>107</sup>

By its terms, the Appointments Clause applies to all officers of the United States “regardless of the kind or extent of power to be held by the officials being appointed.”<sup>108</sup> The courts have defined an officer under the Appointments Clause as “any appointee [of the United States government] exercising significant authority pursuant to the laws of the United States.”<sup>109</sup> For those considered principal (i.e., not inferior) officers,<sup>110</sup> the Appointments Clause provides a single mechanism for appointment: nomination by the President and confirmation by the Senate.<sup>111</sup> This interaction constitutes an important component of the relationship between the President and the Senate, and more generally, between the President and Congress. Currently, there are more than 1200 high-level executive-branch positions that are subject to the confirmation process.<sup>112</sup>

Executive-branch appointments in particular represent an important opportunity to set the tenor and agenda of government administration:

The nomination power . . . enables the [P]resident to imprint presidential priorities or views onto the policymaking process through the appointments of every “Officer of the United States,” many of whom wield significant policymaking authority. For instance, through the nominations of all U.S. Attorneys, a [P]resident may influence the enforcement of the federal criminal laws by, for example, helping to determine which laws are enforced more vigorously and by which level of government.<sup>113</sup>

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107. U.S. CONST. art. II, § 2, cl. 2.

108. Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 477 (1998); *id.* at 478 (“The Clause’s allocation of authority means that that [sic] both the president and the Senate will be involved with a wide variety of appointments.”).

109. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam).

110. See *infra* Part III (discussing the distinction between principal and inferior officers).

111. U.S. CONST. art. II, § 2, cl. 2.

112. See U.S. SENATE, COMM. ON GOVERNMENTAL AFFAIRS, 106TH CONG. POLICY AND SUPPORTING POSITIONS (2000), available at [www.opm.gov/plum-book/](http://www.opm.gov/plum-book/). Including judges and military officers, there are more than 3000 offices that are subject to Senate confirmation. See Gerhardt, *supra* note 108, at 478.

113. Gerhardt, *supra* note 108, at 481 (footnote omitted). The Senate, through its role in the confirmation process and the invocation of senatorial courtesy, discussed *infra* Part II.B, also seeks to influence the operation and administration of the executive branch. See Michael J. Gerhardt, *Putting Presidential Performance in the Federal Appointments Process in Perspective*, 47 CASE W. RES. L. REV. 1359, 1366 (1997) (“The more offices requiring confirmation created by Congress the more chances Senators have had to consult

To provide context for understanding the processes governing the appointment of U.S. Attorneys, this Part discusses the original intent and historical operation of the Appointments Clause. This Part concludes by describing the procedures utilized to appoint U.S. Attorneys: presidential appointment with Senate confirmation, appointment by the Attorney General, and appointment by the local district court. This history, and the processes utilized for appointing U.S. Attorneys, provides the basis for analyzing the current appointment regime.

#### A. THE STRUCTURAL AND POLITICAL ACCOUNTABILITY OF THE APPOINTMENTS CLAUSE

Although the Framers considered several alternative methods, the Appointments Clause as ratified represented their best attempt to use the checks and balances of the constitutional structure to ensure “a higher quality of appointments.”<sup>114</sup> The Framers created a national government that would exercise significant jurisdiction and authority under the leadership of a single President.<sup>115</sup> The power to appoint those officers who would administer this government on a day-to-day

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with the President in filling those positions and thus the more bargaining chips Senators have had available to use in dealing with the President on appointments and related legislative matters.”).

114. *Edmond v. United States*, 520 U.S. 651, 659 (1997). Professor Gerhardt argues that the process was not designed to ensure the highest quality of appointments, but rather to reduce the likelihood of particularly inappropriate appointments. Gerhardt, *supra* note 108, at 474.

115. Many legal scholars have endeavored to divine the extent to which the Framers intended to create a “unitary” executive, and what implications this has on the separation-of-powers issues generally and the appropriateness of particular limits on presidential appointment and removal authority. *See, e.g.*, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992) (making the case for a unitary executive); Lessig & Sunstein, *supra* note 27 (responding to Professors Calabresi and Rhodes and arguing that the Constitution is ambiguous with respect to how much authority is vested in the President); *see also* Calabresi & Prakash, *supra* note 23 (responding to Professors Lessig & Sunstein).

Even a narrow reading of the executive authority probably must admit that “[i]t is the President’s duty to stop his subordinates from executing the laws oppressively and from using their positions of power to contravene the law.” John R. Martin, *Morrison v. Olson and Executive Power*, 4 TEX. REV. L. & POL. 511, 520 (2000); *see* U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”). This academic debate, consequential as it is in other contexts, is not germane to this Article, which takes the office of the U.S. Attorney as it is found—ensconced within the executive branch in the Department of Justice.

basis was, therefore, of some consequence. Some were concerned that presidential authority would be too monarchical—and hence, too despotic—if the President were granted sole authority to appoint all officials within the executive branch.<sup>116</sup> Others worried that legislative appointments would arise from raw political patronage, without due regard for the national perspective.<sup>117</sup>

Ultimately, a compromise was reached and the power was divided: The President and the Senate would be forced to work together on appointments.<sup>118</sup> After twice considering and rejecting presidential nomination with Senate confirmation, the delegates to the Constitutional Convention of 1787, on the third vote, adopted the eventual structure of the Appointments Clause.<sup>119</sup>

Through the power to nominate, the President was given primary authority to select officials.<sup>120</sup> By requiring the Presi-

116. See *Freytag v. Commissioner*, 501 U.S. 868, 883 (1991) (“The ‘manipulation of official appointments’ had long been one of the American revolutionary generation’s greatest grievances against executive power because ‘the power of appointment to offices’ was deemed ‘the most insidious and powerful weapon of eighteenth century despotism.’” (quoting GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 79, 143 (1969))).

117. See JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 6 (1953) (discussing the debate over the Appointments Clause at the Constitutional Convention of 1787 (“The evils of legislative appointment of public officers were well known to members of the Constitutional Convention of 1787, who frequently referred to the intrigue, caballing, and irresponsibility which had marked the selection of officers by the state legislatures.”)); see also Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointments Clause*, 37 SYRACUSE L. REV. 1037, 1061-70 (1987) (describing debates on the Appointments Clause at the Constitutional Convention of 1787).

118. See *Ryder v. United States*, 515 U.S. 177, 182 (1995) (“The [Appointments] Clause is a bulwark against one branch aggrandizing its power at the expense of another branch . . .”).

119. See William G. Ross, *The Senate’s Constitutional Role in Confirming Cabinet Nominees and Other Executive Officers*, 48 SYRACUSE L. REV. 1123, 1130-31 (1998).

120. It was by no means inevitable that the chief executive would be granted primary authority for nominating officers. The tradition of executive appointment was a vestige of royal prerogative, one that had raised the ire of the pre-Revolutionary War colonists. See *THE DECLARATION OF INDEPENDENCE* para. 12 (U.S. 1776) (“He [King George III of England] has erected a multitude of New Offices, and sent hither swarms of Officers to harass our People, and eat out their substance.”). In the words of one commentator,

The [F]ramers came to Philadelphia mindful of the colonial legacy of monarchical appointment abuses, yet equally fearful of legislative tyranny. Unlike their commitment to functional divisions of government, a bicameral legislature and judicial tenure and salary protec-

dent alone to take responsibility for nominating the principal officers of the administration, the Appointments Clause “preserves . . . the Constitution’s structural integrity by preventing the diffusion of the appointment power.”<sup>121</sup> “The Framers anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body. ‘The sole and undivided responsibility of one man will naturally beget a livelier sense of duty, and a more exact regard to reputation.’”<sup>122</sup>

At the Constitutional Convention, some argued that nomination was tantamount to appointment.<sup>123</sup> Thus, to check this executive authority, the Senate was granted the power to block the President’s nominees.<sup>124</sup> It was argued that the Senate’s role was nothing more than a salutary check on the power of

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tions . . . neither political theory nor history spoke with even a modicum of clarity about the appointment prerogative’s proper locus.

Blumoff, *supra* note 117, at 1069. On the one hand, the power to appoint was most commonly assigned to the executive in colonial governments, with varying degrees of legislative oversight. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 81, at 68 (Ronald D. Rotunda & John E. Nowack eds., 1987) (1833) (discussing appointment practices in the colonial governments (“The governors also had power, with advice of council, to establish courts, and to appoint judges and other magistrates, and officers for the province . . . Under this form of government the provinces of New-Hampshire, New-York, New-Jersey, Virginia, the Carolinas, and Georgia, were governed . . .”). In Massachusetts, the royally appointed governor had the “right of nominating and with the advice of the council [also appointed by the crown] of appointing all . . . sheriffs, provosts, marshals, and justices of the peace, and other officers of [the] courts of justice.” *Id.* § 27, at 25. On the other hand, some colonial governments had experimented with legislative appointment of executive-branch officers. The 1701 Charter of Pennsylvania provided for an annual assembly of delegates from each county “to have the usual legislative authority of other colonial assemblies, and also power to nominate certain persons for office to the governor.” *Id.* § 57, at 53; see also Casper, *supra* note 27, at 217 (discussing the original appointment practices utilized in the newly constituted state governments (“[S]tates distributed the power of appointments in various ways, but legislative controls predominated.”)).

121. *Freytag*, 501 U.S. at 878.

122. *Edmond v. United States*, 520 U.S. 651, 659 (1997) (quoting THE FEDERALIST NO. 76 (Alexander Hamilton)).

123. See THE FEDERALIST NO. 76, at 456-57 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[E]very advantage to be expected from such an arrangement would, in substance, be derived from the power of nomination . . . There can, in this view, be no difference between nominating and appointing.”).

124. See Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1269 (1988) (citing THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

the President: "As the President was to nominate, . . . there would be responsibility, and as the Senate was to concur, there would be security."<sup>125</sup> At the ratifying conventions, however, delegates raised questions about the appointments procedure and were apprehensive about the Senate's veto prerogative. They objected that allowing the legislative branch to intrude on this executive function would make the Senate too powerful and would eventually allow the Senate to dominate the process. Addressing the North Carolina ratifying convention, Samuel Spencer warned,

The President may nominate, but they [the Senate] have a negative on his nomination, till he has exhausted the number of those he wishes to be appointed. He will be obliged, finally, to acquiesce in the appointment of those whom the Senate shall nominate, or else no appointment will take place.<sup>126</sup>

The structure of the Appointments Clause is intended to protect the branches from one another, but also to provide for accountability to the public at large.<sup>127</sup> In the eyes of the Framers, accountability in the appointments process was as significant as accountability in any aspect of governmental operations.<sup>128</sup> By dividing the responsibility for appointments, the Framers intended to divide not only the spoils, but the political ramifications as well:

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125. HARRIS, *supra* note 117, at 24 (internal quotation marks omitted) (quoting Gouverneur Morris in THE DEBATES OF THE FEDERAL CONVENTION OF 1787, REPORTED BY JAMES MADISON 529 (Gaillard Hunt and James Scott Brown eds., 1920)).

126. HARRIS, *supra* note 117, at 26 (alteration in original) (citing JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION IV at 116-18 (1888)). John Adams also criticized the Senate's role. Writing to Roger Sherman, Adams worried that granting the power to "advise and consent" to the Senate would cede an unacceptable influence over the administration of the executive branch:

[The Senate's role] will weaken the hands of the Executive. . . . Officers of the Government, instead of having a single eye and undivided attachment to the Executive branch, as they ought to have, consistent with law and the constitution, will be constantly tempted to be factious with their factious patrons in the Senate. The President's own officers, in a thousand instances, will oppose his just and constitutional exertions, and screen themselves under the wings of their patrons in the Senate.

*Id.* at 30 (quoting Letter from John Adams to Roger Sherman, in 4 THE WORKS OF JOHN ADAMS 427-42 (Charles Francis Adams ed., 1852-65)).

127. See HARRIS, *supra* note 117, at 376 ("If one principle in regard to appointments was prized above others by the [F]ramers of the Constitution, it was that of establishing definite responsibility.")

128. See Freytag v. Commissioner, 501 U.S. 868, 884 (1991).

In the Framers' thinking, the process on which they settled for selecting principal officers would ensure "judicious" appointments not only by empowering the President and the Senate to check each other, but also by allowing the public to hold the President and Senators accountable for injudicious appointments. . . .

"[T]he blame of a bad nomination would fall upon the president singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the senate . . ."129

By generating "conflicts, confusion, and discordance" on "great issues affecting the people," the Framers hoped to engage the citizenry in the important decisions of their national leaders.<sup>130</sup> Practices that evade the structural safeguards of the Appointments Clause deprive "the public of any realistic ability to hold easily identifiable elected officials to account for bad appointments."<sup>131</sup> As a consequence, "Neither Congress nor the Executive can agree to waive th[e] structural protection[s]" provided therein.<sup>132</sup>

Although this shared responsibility makes the process less efficient, it has been noted that "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government."<sup>133</sup> Moreover, the Senate was expected to acquiesce in the majority of presidential appointments.<sup>134</sup> Because the President controls the nomination, and ostensibly, the selection process, the Senate, structurally, is relegated to exercising a veto.<sup>135</sup> The procedure, therefore, places a "politi-

129. *Weiss v. United States*, 510 U.S. 163, 186 (1994) (Souter, J., concurring) (quoting THE FEDERALIST NO. 77 (Alexander Hamilton)).

130. *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). *But cf.* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 442-43 (2001) (questioning the effectiveness of the Appointments Clause in increasing accountability in the appointment or performance of U.S. Attorneys).

131. *Weiss*, 510 U.S. at 191 (Souter, J., concurring).

132. *Freytag*, 501 U.S. at 880; *see also Weiss*, 510 U.S. at 188 (Souter, J., concurring) ("[N]o branch may abdicate its Appointments Clause duties.").

133. *INS v. Chadha*, 462 U.S. 919, 944 (1983).

134. *See, e.g., THE FEDERALIST NO. 76*, at 456-57 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing the President's power to nominate as tantamount to power to appoint).

135. Gerhardt, *supra* note 108, at 480. The Senate "has turned down only 105 of the 2.4 million executive appointments that the President has made during the past two centuries." Ross, *supra* note 119, at 1127. This figure does not accurately reflect the interplay between the President and the Senate, however, because many candidates are not nominated after Senators informally articulate their misgivings, and many more nominees are withdrawn when it is clear they will not be confirmed. Moreover, while the structure gives the President an advantage in naming officers to the federal government

cal burden on the Senate [that] makes it difficult [for the Senate] to successfully oppose a President of ordinary political strength for narrow or partisan reasons."<sup>136</sup> This forces Senate deliberations to focus on factors that could disqualify the nominee, rather than conducting an independent evaluation of the President's selection.<sup>137</sup> Nonetheless, subjecting appointments to a political process increases the public's ability to evaluate the judgment and temperament of their elected officials and to call them to account if necessary.<sup>138</sup>

## B. ACCOUNTABILITY IN PRACTICE: SENATORIAL COURTESY

In hindsight, it appears that, as the opponents claimed, the Senate has been able to assert an overriding influence pursuant to its right to "advise and consent." A mere recitation of the Appointments Clause does not reveal the political gloss it

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in Washington, D.C., the tradition of senatorial courtesy, discussed *infra* Part II.B, grants the Senate a more prominent role with respect to state-based field officers of the federal government (such as U.S. Attorneys).

136. John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 653 (1993) (alteration in original).

137. STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 159 (1994) (identifying the Senate's focus on disqualifying factors as a problem). *But cf.* Gerhardt, *supra* note 108, at 480 n.26 ("Though Professor Carter does not acknowledge it, this focus is a product of the constitutional design of the process.").

138. Confirmation battles have, at various times, engaged the public's interest and exposed politicians to opprobrium and eventual electoral defeat for taking positions unacceptable to their constituents. *See* Gerhardt, *supra* note 108, at 489-91. The most striking contemporary example was the confirmation battle that culminated in Justice Thomas's elevation to the Supreme Court. *See* JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 352-54 (1994) (describing the repercussions of the Senate's bitter confirmation battle over Clarence Thomas and stating that over a year after Justice Thomas's confirmation Senators "continued to feel the wrath of dissatisfied voters"). The confirmation hearings were credited with focusing national attention on sexual harassment and with exposing several Senators to reproach. *See* Ronald Dworkin, *One Year Later, the Debate Goes On*, N.Y. TIMES, Oct. 25, 1992, § 7 (Book Review), at 33 (commenting that the hearings "taught us much about the character of some of our most prominent officials"); *see also* Gerhardt, *supra* note 113, at 1372-73 (discussing the character-revealing nature of confirmation battles).

It must be remembered, however, that confirmation hearings are a fairly recent invention and that the Senate did not always conduct its business as publicly as today. *See infra* note 139. Given the popular election of the Senators and the prominence that confirmation battles have come to enjoy, the nomination and confirmation procedure can be characterized as providing not only structural but also political accountability to the appointments process.

has acquired through the tradition of senatorial courtesy.<sup>139</sup> Since the earliest days of the Republic, Senators have insisted on playing an active role in the selection of executive-branch officials for their respective states.<sup>140</sup> Where the Senators belong to the President's political party, "Nominations to federal offices situated within a state have long since come to be looked

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139. An accurate understanding of the intent underlying the Appointments Clause and its reliance on the Senate needs to be informed by an understanding of the original composition of the Senate. Under the original constitutional structure, Senators, in addition to serving six-year terms, were selected by the state legislatures. U.S. CONST. art. I, § 3 (requiring two Senators from each state to be "chosen by the Legislature thereof"), *amended* by U.S. CONST. amend. XVII. These features were supposed to bestow a high-minded, judicious, and deliberative nature on the Senate and an appropriate temperament for working with the executive to ensure competent appointments. See Gerhardt, *supra* note 108, at 476.

Whatever validity this presumption enjoyed in 1789, the ratification of the Seventeenth Amendment in 1913, which calls for the popular election of Senators, altered this original dynamic and has transformed the Senate into a much more democratically accountable institution. See U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . ."). Indeed, until 1929 the Senate operated under the rule that it met in closed executive session, including confirmation proceedings. See HARRIS, *supra* note 117, at 249-55. Nominees, even to the judiciary, were never requested to appear before the Senate (or any of its committees) before 1925. See *id.* at 117-18; Gerhardt, *supra* note 108, at 491. The practice of requesting that nominees to the Supreme Court appear before the Senate Committee on the Judiciary to answer questions dates only to the mid-1950s when Southern Senators, disturbed by the Supreme Court's Equal Protection jurisprudence, demanded that John Harlan appear before them in 1955 to answer questions about his views on desegregation. Gerhardt, *supra* note 108, at 491. Every nominee to the Supreme Court since has appeared to answer questions from Senators. *Id.* Confirmation hearings have become public spectacles and the Senators are "subject to popular review, comment, and reprisal" for their performance in the appointments arena. *Id.* at 489.

140. The Senate insisted on such deference even from President Washington. HARRIS, *supra* note 117, at 40-41. President Washington nominated Benjamin Fishbourn to the post of naval officer of the Port of Savannah, Georgia. *Id.* at 40. There was no objection to the nominee's fitness to serve in the office, but the Georgia Senators favored their own candidate. *Id.* at 40-41. Out of "courtesy" to their colleagues, the Senators rejected President Washington's nominee. *Id.* at 40. Washington acceded and nominated the Georgia Senators' choice. *Id.* at 40-41. According to Joseph Harris,

The Fishbourn case initiated the custom which requires the President to consult with the [S]enators from the state in which a vacancy occurs, and to nominate a person acceptable to them; if he fails to do so, the Senate as a courtesy to these [S]enators will reject any other nominee regardless of his qualification.

*Id.* at 41.

upon as the perquisite of the [S]enators of that state.”<sup>141</sup> The tradition of senatorial courtesy obliges the President to consult with, and in most instances accept, candidates for U.S. Attorney recommended by the Senator(s) of the President’s political party from the state in which a vacancy exists.<sup>142</sup> If there are no Senators from the President’s party in the affected state, the courtesy is traditionally extended to Representatives of the President’s political party from the state in which the vacancy occurs.<sup>143</sup>

This practice by now is well established and plays an important role not only in checking executive power, but also in ensuring that local concerns inform the appointment of federal field officers.<sup>144</sup> By virtue of their office, Senators are likely to have a greater understanding of their respective states than any President. Through their networks and in-state activities, the Senators are better positioned to canvass the field of able candidates and assess the desires and tolerances of the communities within their states.<sup>145</sup> A Senator’s local understanding is particularly relevant to the selection of a U.S. Attorney. By bringing this political judgment to bear on the selection of each (federal) district’s chief law enforcement officer, senatorial courtesy helps ensure local acceptance of the exercise of the prosecutor’s authority. It also can ensure that federal officers

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141. *Id.* at 27.

142. *See id.* at 215-37. This practice has traditionally given Senators a strong hand in the selection of U.S. Attorneys. *Id.* For example, Strom Thurmond, Jr., twenty-eight years old and just three years out of law school, was recommended for U.S. Attorney in South Carolina by his father, Strom Thurmond. “In a nod to senatorial courtesy on such appointments, [President] Bush obliged.” Robert E. Pierre, *In South Carolina, It’s All in the Family: Thurmond Jr. Wins Bipartisan Support for U.S. Attorney Despite Inexperience*, WASH. POST, Aug. 19, 2001, at A5. Professor Meador has commented that the “selection of U.S. Attorneys may be even more politically charged than selection of judges; [S]enators may feel more of a patronage claim on U.S. Attorneys’ positions.” MEADOR, *supra* note 5, at 47; *cf.* Griffin B. Bell & Daniel J. Meador, *Appointing United States Attorneys*, 9 J.L. & POL. 247 (1993) (arguing that the Attorney General should be vested with sole authority to appoint U.S. Attorneys).

143. *See* CONGRESSIONAL QUARTERLY’S GUIDE TO CONGRESS 282 (5th ed. 2000) (stating that, when neither Senator is from the President’s party, the courtesy is traditionally extended to “party members in the House [of Representatives] or to local party officials”).

144. *See* Richman, *supra* note 79, at 790.

145. At the Constitutional Convention, those in favor of the Senate’s role argued that Senators would be more likely than any single President to know qualified candidates throughout the country. *See* 2 MAX FARRAND, *supra* note 28, at 41, 81.

are cognizant of local concerns<sup>146</sup>—surely a goal of the Framers. Of course, there is the potential for pure patronage and cronyism to infect this process.<sup>147</sup> Senators who insist on senatorial prerogative for purely partisan or personal reasons, however, can be held accountable if their insistence is seen as petty instead of principled.<sup>148</sup>

The tradition of senatorial courtesy has been criticized as a violation of the Framers' original intent.<sup>149</sup> In fact, it may work just as planned: Presidential nomination and Senate confirmation serve several objectives. Accountability is established. Through the role of the Senators, the primacy of the states is respected and separation of powers is obeyed, but checks and balances are included to produce, at least in design, a system that functions responsibly.

### C. THE EXCEPTING CLAUSE

The Constitution requires the President and Congress to follow the nomination and confirmation procedure for the appointment of principal officers. An alternative, however, exists under the Appointments Clause as applied to inferior officers: "[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in

146. See Richman, *supra* note 79, at 790 (remarking that senatorial courtesy generally ensures "that U.S. Attorneys have firm roots in the local power structure and at least appreciate the preferences of the special interests that dominate it").

147. Harris focuses on the abuse and corrosive effect of the patronage process that has characterized senatorial courtesy at different times in our history. See HARRIS, *supra* note 117, at 228-31. There is a coordinate concern that such patronage undermines executive control. See *supra* note 126.

148. Harris cites several examples of senatorial over-reaching that led to negative political consequences. HARRIS, *supra* note 117. One example involved the appointment of a U.S. Attorney. *Id.* at 88-90. President Cleveland sought the removal of George Duskin and the appointment of John Burnett to the position of U.S. Attorney (then still known as district attorney) for Alabama. *Id.* When the Senate became obstreperous, President Cleveland mounted a spirited defense of the Presidents' authority to control the service of executive-branch officers. According to Harris, "The Senate lost prestige in this contest with the President. Public opinion responded to the vigorous message of the President defending the executive power and regarded the controversy as merely a maneuver by Republican [S]enators" to serve partisan interests. *Id.* at 90; see also Michael J. Gerhardt, *supra* note 113, at 1383 ("[President Andrew] Jackson decided to use the Senate's blatant partisanship [in the appointments process] against it in the next presidential election.").

149. See generally HARRIS, *supra* note 117, at 231-37 (discussing the debate over whether senatorial courtesy is consistent with the Constitution and the Framers' original intentions).

the Courts of Law, or in the Heads of Departments."<sup>150</sup> Known as the "Excepting Clause," this provision "was added to the proposed Constitution on the last day of the Grand Convention, with little discussion."<sup>151</sup>

If the Appointments Clause strives for accountability, the Excepting Clause promotes efficiency. The Excepting Clause protects the effective operation of the federal bureaucracy by requiring inter-branch cooperation only for truly consequential positions within the government. By allowing Congress to vest the authority to appoint "inferior" officers in a single body, the Framers allowed for administrative convenience and efficiency in the appointment of subordinate governmental officials.<sup>152</sup> Justice Story commented that, pursuant to the Appointments Clause,

The president is by law invested, either solely, or with the senate, with the appointment . . . of the most important civil officers, and especially of those connected with the administration of justice, the collection of the revenue, and the supplies and expenditures of the nation. The courts of the Union possess the narrow prerogative of appointing their own clerk, and reporter, without any farther patronage. The heads of department are, in like manner, generally entitled to the appointment of the clerks in their respective offices.<sup>153</sup>

Because of the overriding concern that the national government remain politically accountable, resort to the truncated process of the Excepting Clause is limited to the appointment of inferior officers.<sup>154</sup> Accountability is not thereby sacrificed because the principal officers to whom inferior officers ostensibly report can be held accountable for an inferior officer's performance. As a consequence, the distinction between principal and inferior officers is of great constitutional significance.

#### D. PROCEDURES FOR APPOINTING U.S. ATTORNEYS

Given the range of discretion exercised by U.S. Attorneys,

150. U.S. CONST. art. II, § 2, cl. 2.

151. *Edmond v. United States*, 520 U.S. 651, 660 (1997) (citing 2 MAX FARRAND, *supra* note 28, at 627-28); see also Akhil Reed Amar, *Inratextualism*, 112 HARV. L. REV. 747, 808 (1999) (discussing this history and suggesting that the Excepting Clause "was viewed as a minor housekeeping measure"). As one commentator concluded, "The lack of discussion no doubt reflects the unspoken consensus that the President (as well as the judiciary, and the heads of executive departments) must have the authority to hire and fire their own assistants." Blumoff, *supra* note 117, at 1069 n.194.

152. See *United States v. Germaine*, 99 U.S. 508, 510 (1878).

153. STORY, *supra* note 120, § 793, at 566-67 (emphasis added).

154. *Edmond*, 520 U.S. at 660.

it is no surprise that Congress has sought to retain as great a role as possible in their selection, and as a corollary, to restrict the President's discretion as much as possible.<sup>155</sup> Congress has limited the President's ability to name U.S. Attorneys in two ways. First, it subjects the President's nominees to confirmation by the Senate, and second, in the absence of a Senate-approved presidential appointment, Congress vests the power to name U.S. Attorneys in the district court in the district in which a vacancy exists.

1. In the Usual Course, U.S. Attorneys are Nominated by the President and Confirmed by the Senate.

U.S. Attorneys are nominated by the President and confirmed by the Senate.<sup>156</sup> Each U.S. Attorney is confirmed for four years, although the statute allows a Senate-confirmed U.S. Attorney to remain in office at the expiration of the four-year term.<sup>157</sup> Subjecting U.S. Attorneys to the Senate's confirmation process restricts the President's authority through both formal and informal means. Formally, the President's nominee is required to undergo public scrutiny by the Senate. Perhaps of even greater significance than the public scrutiny endured by the Senate confirmation are the prerogatives of senatorial courtesy,<sup>158</sup> which attach to executive-branch officers, including the U.S. Attorneys, whose geographic jurisdiction is confined within one state. For the purposes of this analysis, senatorial courtesy is significant because it affects the U.S. Attorneys' independent political base. Although most high executive-branch officials are handpicked by the cabinet secretary to whom they report, U.S. Attorneys more likely owe their allegiance to a Senator and the myriad of local political figures who supported their nomination,<sup>159</sup> rather than to the Attorney General. This

155. No procedure for appointing U.S. Attorneys (or for that matter, the Attorney General) was specified in the Judiciary Act of 1789. Nevertheless, from the outset, the President has nominated individuals to serve as U.S. Attorneys and submitted the nominations to the Senate for advice and consent. See *supra* note 62 and accompanying text.

156. See 28 U.S.C. § 546(a) (1994).

157. See *id.* § 541(b) (establishing a four-year term but stating that a U.S. Attorney "shall continue to perform the duties of his [or her] office until his [or her] successor is appointed and qualifies").

158. See MEADOR, *supra* note 5, at 47 ("[S]election of U.S. Attorneys may be even more politically charged than selection of judges; [S]enators may feel more of a patronage claim on U.S. Attorneys' positions." (emphasis added)).

159. See Richman, *supra* note 79, at 785 (noting that in the federal system

process "has long been recognized as a means through which [S]enators influence prosecutorial behavior in their respective states."<sup>160</sup>

## 2. Filling U.S. Attorney Vacancies

The U.S. Code also provides for the appointment of a U.S. Attorney when there is a vacancy in the office. The Attorney General "may appoint a United States [A]ttorney for the district in which the office of United States [A]ttorney is vacant" and this appointment is valid until "the expiration of 120 days after [the] appointment by the Attorney General."<sup>161</sup> If, as is almost always the case, a Senate-confirmed U.S. Attorney is not in place at the expiration of 120 days, the authority to appoint the U.S. Attorney shifts to the affected district court: "If an [Attorney General's] appointment expires under subsection (c)(2), [then] the district court for such district may appoint a United States [A]ttorney to serve until the vacancy is filled

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"prosecutorial discretion is primarily exercised" by U.S. Attorneys, who are "beholden to legislators, who in turn nurture ties to state and local institutions" (footnote omitted)).

160. *Id.* at 789. Of course, court-appointed U.S. Attorneys do not necessarily have this political pedigree or support. Court-appointed U.S. Attorneys rely on, and in turn reflect on, the stature and standing of the district court.

161. 28 U.S.C. § 546(a), (c)(2) (1994). This system was adopted pursuant to section 69 of the Criminal Law and Procedure Technical Amendments Act of 1986, approved November 10, 1986. Pub. L. No. 99-646, § 69, 100 Stat. 3592, 3616-17 (1986) (amending 28 U.S.C. § 546). Prior to that enactment, the Attorney General had no authority to appoint a U.S. Attorney in the event of a vacancy; the district court had sole discretion to appoint a U.S. Attorney when there was a vacancy. *See United States v. Solomon*, 216 F. Supp. 835, 836 (S.D.N.Y. 1963) (citing 28 U.S.C. § 506 (1948), 1 ch. 646 § 1, 62 Stat. 909 (codified as amended at 28 U.S.C. § 546 (1994)); *see also United States v. Gantt*, 194 F.3d 987, 998 (9th Cir. 1999) (remarking that district courts have "[s]ince the Civil War . . . been empowered to fill vacancies in the office of United States Attorney"). Whatever the defects of the current system, they are obviously less offensive than the old one, which denied the executive branch any formal ability to affect the person appointed as U.S. Attorney in the inevitable interim between the emergence of a vacancy and the eventual Senate confirmation of a presidential nominee. *See In re Grand Jury Proceedings*, 673 F. Supp. 1138, 1142 n.10 (D. Mass. 1987) (remarking that "[t]he 1986 amendments . . . would appear to further insulate [the court appointment of U.S. Attorneys] from constitutional attack").

The only statutory constraint on whom the Attorney General may appoint is that, pursuant to subsection (b), "[t]he Attorney General shall not appoint as United States [A]ttorney a person to whose appointment by the President to that office the Senate refused to give advice and consent." 28 U.S.C. § 546(b) (1994).

[through presidential nomination and Senate confirmation].<sup>162</sup> The statute does not require the district court to appoint a U.S. Attorney once the 120-day period has run on the Attorney General's appointment. Instead, the statute provides that the district court "may" make its own appointment.<sup>163</sup>

In the usual course, very little changes upon the expiration of the 120-day term of the Attorney General's appointee.<sup>164</sup> This is because, as a matter of practice, the Department of Justice works behind the scenes to affect smooth transitions. When a vacancy initially arises or is about to arise, where advance notice has been provided, representatives of the Attorney General contact the chief judge of the appropriate district court to explain the provisions dealing with the interim appointment of the U.S. Attorney.<sup>165</sup> The Department of Justice officials inform the chief district court judge<sup>166</sup> of the Attorney General's likely appointee and solicit the judge's reaction.<sup>167</sup> The Attor-

162. 28 U.S.C. § 546(d) (1994). Nothing in the statute constrains the district court's discretion in who to appoint as the U.S. Attorney.

163. *Id.*; see also *Gantt*, 194 F.3d at 1000 ("The judicial branch is not required to appoint a United States Attorney; it is simply empowered to do so."). Although the statute does not use that term and there is no limitation on their authority, U.S. Attorneys who are appointed pursuant to this process are referred to as "interim" U.S. Attorneys. See *United States v. Hilario*, 218 F.3d 19, 24 (1st Cir. 2000), *cert. denied*, 121 S. Ct. 572 (2000). There is no specific limit on the duration of an "interim" U.S. Attorney's tenure, other than the nomination by the President and confirmation by the Senate of another U.S. Attorney. See *id.* at 23; Tom Rickhoff, *The U.S. Attorney: Fateful Powers Limited*, 28 ST. MARY'S L.J. 499, 500 (1997) (remarking that the Western District of Texas "languished without a presidentially-appointed leader since the Branch Davidian nightmare" from 1992 through 1997).

The statute does not address the scenario where an Attorney General-appointed U.S. Attorney's 120-day tenure has expired, but the district court has not exercised its discretionary authority to appoint a U.S. Attorney. The district court in Massachusetts upheld the authority of the Attorney General to appoint an "acting" U.S. Attorney after the expiration of an "interim" U.S. Attorney's 120-day appointment. See *In re Grand Jury Proceedings*, 673 F. Supp. 1138, 1142-43 (D. Mass. 1987).

164. See Interview with David Margolis and Bernie Delia, Associate Deputy Attorneys General, in Washington, D.C. (Dec. 28, 2000) (on file with author) (characterizing the process utilized by the Department of Justice in administering 28 U.S.C. § 546(c)-(d)).

165. See *id.*

166. The statute confers authority on "the district court." 28 U.S.C. § 546(d) (1994). How the various district courts exercise this authority (i.e., through consensus, committee, or delegation exclusively to the chief judge) is a matter of internal court policy and is not a matter of public record.

167. See Interview with David Margolis and Bernie Delia, Associate Deputy Attorneys General, in Washington, D.C. (Dec. 28, 2000) (on file with au-

ney General almost always selects a career Assistant U.S. Attorney from the district in which the vacancy arises. Sometimes, though infrequently, the Attorney General selects a career prosecutor from Main Justice.<sup>168</sup> By keeping the chief district court judge "in the loop" during the Attorney General's selection process and by choosing, in most instances, a career prosecutor with whom the judge is familiar, the Attorney General can reasonably expect that her appointee will continue to serve as U.S. Attorney at the expiration of the 120 days.<sup>169</sup> This may occur either through subsequent court appointment of the same individual or through court inaction that leaves the Attorney General's appointee, albeit precariously, in place.<sup>170</sup> Near the expiration of the Attorney General's appointee's 120-day tenure, representatives of the Attorney General send a letter to the chief district judge reminding the judge of the court's authority to appoint a U.S. Attorney.<sup>171</sup> The letter also includes a proposed court order reappointing the Attorney General's appointee.<sup>172</sup> This informal contact (i.e., outside the context of a

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168. *See id.*

169. *See id.*

170. *See id.*

171. *See id.*

172. *See id.* Although the practice of including the district judge from the outset has been relatively successful at ensuring that the Attorney General's nominee is accepted by the district court, it has not been foolproof. For example, during Attorney General Janet Reno's tenure, two separate district courts each replaced the Attorney General's appointee with a U.S. Attorney of its own choosing. The two appointments that departed from the Attorney General's 120-day appointee occurred in Puerto Rico and in one district within the continental United States.

In Puerto Rico, a vacancy occurred in the office of the U.S. Attorney in May 1993. *See United States v. Hilario*, 218 F.3d 19, 21 (1st Cir. 2000), *cert. denied*, 121 S. Ct. 572 (2000). The Attorney General appointed Charles Fitzwilliams to fill the vacancy. *Id.*

Because the President failed to name a replacement within 120 days, Fitzwilliams' appointment lapsed and the position once again became vacant. On September 9, 1993, the judges of the United States District Court for the District of Puerto Rico responded to the exigency and appointed a career Justice Department lawyer, Guillermo Gil, as interim United States Attorney.

*Id.* (citation omitted). President Clinton never nominated a U.S. Attorney for the District of Puerto Rico; Gil served as the district court's appointee as U.S. Attorney for more than seven years. *See United States v. Sotomayor-Vazquez*, 249 F.3d 1, 20 (1st Cir. 2001).

In the other instance, according to Associate Deputy Attorneys General David Margolis and Bernie Delia, a Senate-confirmed U.S. Attorney died in office. *See Interview with David Margolis and Bernie Delia, Associate Dep-*

particular case and lacking the public character of a motion or other court filing) between federal prosecutors and sitting federal judges raises questions about the appropriate role of judges in decisions otherwise reserved to politically accountable actors.<sup>173</sup>

Furthermore, ambiguity exists concerning the Attorney General's appointment authority when no U.S. Attorney has been confirmed by the Senate at the expiration of the 120-day limit imposed by 28 U.S.C. § 546(c). Because the statute limits the Attorney General-appointed U.S. Attorney's term to 120 days, the position is legally "vacant" after the 120 days have expired.<sup>174</sup> The plain language of the statute appears to vest the Attorney General with the authority to appoint another U.S. Attorney.<sup>175</sup> The paltry legislative history on § 546, however, implies that such a subsequent appointment by the At-

uty Attorneys General, in Washington, D.C. (Dec. 28, 2000) (on file with author). The Attorney General chose an interim U.S. Attorney who served for 120 days. *Id.* At the expiration of the 120-day term, the district court refused to reappoint the Attorney General's appointee, instead choosing its own U.S. Attorney. *Id.* The court-appointed U.S. Attorney served in that capacity for over two years. *Id.*

The courts took these actions without explanation. Perhaps the courts should be required to make their appointment process more transparent. There is no accepted method for inquiring into judges' motives and procedures for making particular decisions, however, and if such inquiries were issued, there would be little incentive for the judges to respond (unlike politically accountable actors). This illustrates one of the problems with the court appointment of U.S. Attorneys: It shields an inherently political process from public scrutiny.

173. See, e.g., SEYMOUR, *supra* note 43, at 50 (remarking that, while maintaining good relations with the local federal judges is an important responsibility of the U.S. Attorney, it "is a delicate balancing act, for the United States Attorney is a litigant who may not engage in *ex parte*, or private, communication with the judge").

174. See *In re Farrow*, 3 F. 112, 115-17 (C.C.N.D. Ga. 1880) (recognizing the President's authority to make a recess appointment even where the court had named a U.S. Attorney to fill the vacancy because the position remained legally "vacant"); *Staebler v. Carter*, 464 F. Supp. 585, 594 (D.D.C. 1979); see also Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, to William P. Tyson, Director, Executive Office for United States Attorneys 3 (Nov. 13, 1986) [hereinafter Alito Memorandum] (on file with author) (concluding that a vacancy exists in the office of U.S. Attorney at the expiration of the 120-day period defined in 28 U.S.C. § 546(c)).

175. See 28 U.S.C. § 546(a) (1994) ("[T]he Attorney General may appoint a United States [A]ttorney for the district in which the office of United States [A]ttorney is vacant."); see also *In re Grand Jury Proceedings*, 673 F. Supp. 1138, 1142 n.11 (D. Mass. 1987) (recognizing that "it is not clear from this Court's reading of the statute, that the Attorney General himself would be foreclosed from making a second interim appointment").

torney General was not what Congress intended. As Congressman Berman stated on the floor of the House of Representatives, "Once the appointment of an interim United States Attorney expires, the district court appoints a United States Attorney to serve until a presidentially appointed United States Attorney is qualified."<sup>176</sup> As such, while the statute envisions the court-appointed prosecutor serving "until a presidentially appointed United States Attorney is qualified,"<sup>177</sup> it does not address the situation where the office becomes vacant after a court-appointed U.S. Attorney leaves or is removed by the President before a presidentially nominated U.S. Attorney has been confirmed by the Senate.

The Justice Department has taken the position that a second appointment by the Attorney General would be inappropriate because "[t]he statutory plan discloses a [c]ongressional purpose that after the expiration of the 120-day period further interim appointments are to be made by the court rather than by the Attorney General."<sup>178</sup> This interpretation suggests that after an initial 120-day appointment, appointments to the U.S. Attorney position must come either from the district court or from the President with the Senate's approval. Even where the district court-appointed U.S. Attorney serves for several years before that office becomes vacant again, the Attorney General is apparently without authority to appoint a replacement. In a later interpretation of 28 U.S.C. § 546(c), however, the Department of Justice's Office of Legal Counsel argued that, if the President removed a court-appointed U.S. Attorney, then the Attorney General would have the power to appoint another U.S. Attorney.<sup>179</sup> The Office of Legal Counsel noted the De-

176. 132 CONG. REC. 32707, 32806 (statement of Rep. Berman).

177. *Id.*

178. Alito Memorandum, *supra* note 174, at 3 (citing legislative history); see also 17 Op. Off. Legal Counsel 1, 1-5 (1993) (contrasting Attorney General's statutory authority to fill U.S. Marshal vacancies which reserves no role for courts and citing Alito Memorandum, *supra* note 174).

179. See Memorandum from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, to Arnold I. Burns, Deputy Attorney General 1 (Apr. 15, 1987) [hereinafter Cooper Memorandum] (on file with author). According to the Office of Legal Counsel,

It could be argued that, after the removal by the President of a court appointed United States Attorney, the power to appoint an interim United States Attorney shifts back to the Attorney General, because the court's power of appointment is conditioned on the expiration of a 120-day appointment by the Attorney General.

*Id.*

partment of Justice Criminal Division's disagreement with this interpretation.<sup>180</sup> These competing interpretations have never been reconciled because this authority has apparently never been tested.<sup>181</sup>

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Given the legal definition of "vacancy," it is unclear why the Attorney General would need to wait for the President to remove the court-appointed U.S. Attorney. See *Farrow*, 3 F. at 115-17.

180. Cooper Memorandum, *supra* note 179, at 1.

181. If the current, court-appointment system is deemed to be constitutional and is retained, Congress should at least clarify its intended operation. See *United States v. Hilario*, 218 F.3d 19, 24 (1st Cir. 2000) ("If we were writing on a pristine page and wished to devise a template for the appointment of United States Attorneys, we might design it differently."), *cert. denied*, 121 S. Ct. 572 (2000). First, Congress should direct the district courts to appoint interim U.S. Attorneys under 28 U.S.C. § 546(d). The permissive "may" should be replaced with "shall," so that the statute would read as follows: "If [the Attorney General's] appointment expires under [the 120-day limit of] subsection (c)(2), the district court for such district shall appoint a United States [A]ttorney to serve until the vacancy is filled." In at least one instance, the judiciary has refused (or at least failed) to exercise its authority to appoint a U.S. Attorney, allowing the Attorney General to name an "acting" U.S. Attorney after the expiration of a prior 120-day "interim" appointment by the Attorney General. *In re Grand Jury Proceedings*, 673 F. Supp. 1138, 1138 (D. Mass. 1987).

The uncertainty that is created by the permissive "may" exacerbates the statute's ambiguity with respect to the authority of the district court and the authority of the Attorney General. Therefore, Congress should clarify whether the Attorney General's authority is limited to one 120-day appointment. Although the Department of Justice currently interprets the statute in this way, the statutory language is susceptible to the reasonable interpretation that the Attorney General can affect successive 120-day appointments, particularly if the court does not act. Indeed, this construction has been suggested in one published district court opinion, *see id.*, and by an Office of Legal Counsel interpretive memorandum. See Cooper Memorandum, *supra* note 179, at 1. If Congress intends to limit the Attorney General to no more than one 120-day appointment in the interim between presidential appointments (no matter how long the interim), it should say so unambiguously.

Lastly, Congress should decide whether the office of the U.S. Attorney is "vacant" when it is occupied by a court-appointed U.S. Attorney. Prior judicial and executive-branch interpretations have reached the conclusion that the office is indeed vacant during the pendency of a court appointment. See *supra* note 174 and accompanying text. Although Congress cannot legislatively alter the President's constitutional authority to make recess appointments, Congress can determine when that office is legally "vacant," assuming, of course, that the U.S. Attorney is indeed an inferior officer. This is significant because if the position of U.S. Attorney is legally "vacant" while a court-appointed incumbent is in office, it could be argued that, under the statute as currently written, the Attorney General could replace a court-appointed U.S. Attorney with her own 120-day appointment. Congress ought to make these policy choices explicitly instead of leaving them open to executive-branch abuse, and ultimately, judicial branch resolution.

## E. PROCEDURES FOR REMOVING U.S. ATTORNEYS

Only the President may remove a U.S. Attorney.<sup>182</sup> This is true regardless of how the U.S. Attorney was appointed to her position.<sup>183</sup> Consequently, U.S. Attorneys have come to regard themselves as independent presidential agents. Although the Attorney General has the legal authority to direct U.S. Attorneys and may remove individual cases from a U.S. Attorney's supervision, the U.S. Attorneys' presidential commissions and senatorial support allow them to resist effectively the Attorney General's control.<sup>184</sup>

## III. PRINCIPAL VERSUS INFERIOR OFFICERS

Having explained the roles and responsibilities of U.S. Attorneys and the procedures for their appointment and removal, the constitutionality of the appointment of U.S. Attorneys by federal judges can be examined. U.S. Attorneys are, without any doubt, "officers" as the term is used in the Appointments Clause of the Constitution.<sup>185</sup> As the preceding discussion illustrates, Congress has chosen to vest the authority to appoint U.S. Attorneys, under certain circumstances, in the Attorney General and the district court.<sup>186</sup> Because the Appointments

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182. See 28 U.S.C. § 541(c) (1994) ("Each United States [A]ttorney is subject to removal by the President."); *Parsons v. United States*, 167 U.S. 324 (1897). Of course, U.S. Attorneys can also be removed through the impeachment process. See U.S. CONST. art. II, § 4.

183. See *United States v. Solomon*, 216 F. Supp. 835, 843 (S.D.N.Y. 1963).

184. See EISENSTEIN, *supra* note 6, at 12, 16. The Department of Justice has sought in recent years to "exercise greater supervisory control over decision-making by United States [A]ttorneys in the field, with a view to making federal prosecutive policy more uniform nationwide." Richman, *supra* note 79, at 781 (quoting NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 6 (2d ed. 1993)). Nonetheless, "U.S. [A]ttorneys retain a remarkable degree of power." *Id.*; see also EISENSTEIN, *supra* note 6, at 108 (commenting on the independence of the U.S. Attorney's Office for the Southern District of New York (Manhattan), which "serves as a constant reminder to the department that its field offices can achieve a position of semi-autonomy . . . provid[ing] other U.S. [A]ttorneys with a model of how much independence is possible."). Indeed, "because of its legendary independence and tenacity" the Southern District of New York "is known as the 'sovereign district' of New York." Chitra Ragavan, *The Pardon Buck Stops Here: U.S. Attorney Mary Jo White Takes the Lead*, U.S. NEWS & WORLD REPORT, Mar. 26, 2001, at 24.

185. See *United States v. Gantt*, 194 F.3d 987, 999 (9th Cir. 1999) ("United States Attorneys are clearly 'officers' of the United States." (citing Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam))).

186. See *supra* Part II.D.2.

Clause validates such a delegation only with respect to inferior officers, the first step in assessing the validity of the court appointment of U.S. Attorneys requires determining whether U.S. Attorneys are principal or inferior officers.<sup>187</sup>

The Supreme Court has had relatively few occasions to define the difference between principal and inferior officers. Most decisions have proceeded on an ad hoc analysis and the Supreme Court has “not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes.”<sup>188</sup> An analysis of the existing jurisprudence, however, reveals that U.S. Attorneys should be considered principal officers.

Two Supreme Court cases decided within ten years of each other illustrate the ad hoc nature of Appointments Clause jurisprudence and offer divergent approaches to distinguishing between principal and inferior officers. *Morrison v. Olson*<sup>189</sup> scrutinized the Ethics in Government Act and the office of the Independent Counsel, which that act created, and concluded that, for purposes of the Appointments Clause, the Independent Counsel was an inferior officer.<sup>190</sup> *Edmond v. United States*,<sup>191</sup> employing a different, more formal analytical framework, concluded that judges on the Coast Guard Court of Criminal Appeals were also inferior officers and consequently validated their appointment by the Secretary of Transportation against an Appointments Clause challenge.<sup>192</sup> Although both of these cases resulted in the conclusion that those officers were inferior, their reasoning leads to the conclusion that U.S. Attorneys

187. See *Edmond v. United States*, 520 U.S. 651, 659-60 (1997) (noting that the administrative convenience of delegating authority to appoint was “deemed to outweigh the benefits of the more cumbersome procedure only with respect to . . . ‘inferior Officers’”); see also *United States v. Hilario*, 218 F.3d 19, 24 (1st Cir. 2000) (“[T]he Clause makes nomination and confirmation the requisite appointment protocol for what have come to be known as ‘principal officers’ of the United States but allows Congress to permit a limited class of officials to appoint ‘inferior officers’ without the need for confirmation.”), cert. denied, 121 S. Ct. 572 (2000).

188. *Edmond*, 520 U.S. at 661; see also STORY, *supra* note 120, at 566 (“In the practical course of the government, there does not seem to have been any exact line drawn, who are, and who are not, to be deemed *inferior* officers in the sense of the [C]onstitution, whose appointment does not necessarily require the concurrence of the [S]enate.”).

189. 487 U.S. 654 (1988).

190. *Id.* at 671-73.

191. 520 U.S. 651.

192. *Id.* at 658-66.

are principal officers.

#### A. THE FUNCTIONAL APPROACH: *MORRISON V. OLSON*

The legislation creating the Independent Counsel has been allowed to expire,<sup>193</sup> but the seminal Appointments Clause case of *Morrison v. Olson*, which upheld the validity of the appointment process for the Independent Counsel, sheds important light on the court appointment of U.S. Attorneys. This is because the Independent Counsel represents a relevant analogy to the U.S. Attorney for purposes of an Appointments Clause analysis.<sup>194</sup>

Reacting to the constitutional crisis and drop in public confidence in government occasioned by the Watergate scandal, Congress passed the Ethics in Government Act in 1978.<sup>195</sup> The Ethics in Government Act was an attempt to remove discretion over criminal investigations and prosecutions of high-level government officials from the political arena, providing for the appointment of an Independent Counsel "to investigate and, if appropriate, prosecute certain high ranking Government officials for violations of federal criminal laws."<sup>196</sup> A "Special Division" of the Court of Appeals for the District of Columbia, consisting of three circuit court judges appointed to two-year terms by the Chief Justice of the United States Supreme Court, was created to appoint such Independent Counsels.<sup>197</sup>

The Ethics in Government Act purported to require the Attorney General to apply to the Special Division for the appointment of an Independent Counsel when the Attorney General received information sufficient to warrant a criminal

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193. The Independent Counsel Act expired on June 30, 1999. See 28 U.S.C. § 599 (1994); see also Suro, *supra* note 2, at A6.

194. See Donald C. Smaltz, *The Independent Counsel: A View From Inside*, 86 GEO. L.J. 2307, 2331 (1998) (characterizing the Independent Counsel as one who "stands in the shoes and is the functional equivalent of a United States Attorney, albeit with a narrow jurisdictional mandate").

195. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified at 28 U.S.C. §§ 49, 591-99).

196. *Morrison v. Olson*, 487 U.S. 654, 660 (1988).

197. 28 U.S.C. § 49 (1994). One can question whether the Special Division actually constituted a "court of law," given that it heard no cases and had no jurisdiction except to administer the Independent Counsel provisions of the Act. See *id.* Although this tangential issue is not implicated when district courts appoint U.S. Attorneys (for district courts are surely "courts of law"), the district courts' continued interaction with the U.S. Attorney in the government's cases raises other serious issues. See *infra* Part IV.

investigation.<sup>198</sup> Once the Attorney General applied, the Special Division was required to appoint an Independent Counsel to investigate and prosecute suspected criminal activity on the part of certain high-ranking government officials.<sup>199</sup> The Special Division was directed to set the Independent Counsel's jurisdiction.<sup>200</sup> Within such jurisdiction, the Ethics in Government Act granted the Independent Counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice."<sup>201</sup>

The Court was understandably eager not to strike down a cornerstone of the Watergate-era reforms.<sup>202</sup> Because the Independent Counsel was appointed by the courts of law, however, the appointment was valid only if the Independent Counsel was an inferior officer.<sup>203</sup> In determining that the Independent Counsel "clearly [fell] on the 'inferior officer' side of th[e] line," the Court took an entirely functional approach.<sup>204</sup>

198. See 28 U.S.C. § 592(c)(1)(a) (1994) (requiring the Attorney General to apply for the appointment of an Independent Counsel if the Attorney General determines that there are "reasonable grounds to believe that further investigation [or prosecution] is warranted"); see also *Morrison*, 487 U.S. at 661 (citing 28 U.S.C. § 592 (1994)).

199. 28 U.S.C. § 593(b)(1) (1994). Instead of appointing a new Independent Counsel, the Special Division could also add a new matter to the jurisdiction of an existing Independent Counsel.

200. *Id.* The Special Division's authority beyond the act of appointing the Independent Counsel—setting jurisdiction, and eventually, terminating the office—presented further complications with which *Morrison* had to grapple. See *Morrison*, 487 U.S. at 680-84. The Supreme Court characterized these powers as "incidental" to the appointment authority. *Id.* at 679. This determination is among the holdings in *Morrison* that have been criticized by scholars. See, e.g., Krent, *supra* note 124, at 1321.

This related issue is not presented in the context of 28 U.S.C. § 546(d)'s authorization to appoint U.S. Attorneys; the district courts are not given any responsibilities to set the U.S. Attorneys' jurisdiction or to supervise their work. See *United States v. Hilario*, 218 F.3d 19, 27 (1st Cir. 2000) (finding it "significant that section 546(d) neither grants the judges of the district court authority to supervise or remove an interim United States Attorney whom they have appointed nor gives them power to determine (or even influence) how the appointee will enforce the laws"), *cert. denied*, 121 S. Ct. 572 (2000).

201. 28 U.S.C. § 594 (1994).

202. See *In re Sealed Case*, 838 F.2d 476, 517 (D.C. Cir. 1988) (recognizing that the circumstances leading to the passage of the Act had "divide[d] the nation politically"), *rev'd sub nom.* *Morrison v. Olson*, 487 U.S. 654 (1988).

203. *Morrison*, 487 U.S. at 670-71.

204. *Id.* at 671.

The Court's inquiry centered on Congress's overriding policy interests in passing the Act and balanced these interests against the Act's interference with the traditional executive-branch hierarchy. Ultimately, the Court found a compelling congressional purpose that justified the intrusion into presidential prerogative.<sup>205</sup>

First, the Court noted that the Independent Counsel was "subject to removal by a higher Executive Branch official."<sup>206</sup> Recognizing that the Independent Counsel may not be "subordinate" to the Attorney General "insofar as [the Independent Counsel] possesses a degree of independent discretion to exercise the powers delegated to her under the Act," the Court still found significance in the removal authority granted to the Attorney General.<sup>207</sup> Notwithstanding the fact that the statute restricted the Attorney General's power to remove an Independent Counsel only in instances of "good cause,"<sup>208</sup> the Court construed the removal authority as an indication that the Independent Counsel was an inferior officer.<sup>209</sup>

Second, the Court focused on the Independent Counsel's authority "to perform only certain, limited duties."<sup>210</sup> The Court reasoned that Independent Counsels were inferior—rather than principal—officers because the Independent Counsel focused only on enumerated, high-ranking government officials and also because the Independent Counsel was only intended to investigate the alleged commission of certain federal crimes.<sup>211</sup> In this vein, the Court observed that the Act's broad grant of prosecutorial authority and discretion, albeit within certain limited factual contexts, did "not include any authority to formulate policy for the Government or the Executive Branch."<sup>212</sup> The Court credited the Act with limiting the Inde-

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205. *Id.* at 677 (stating that Congress "was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers").

206. *Id.* at 671.

207. *Id.*

208. *Id.* at 663 (citing 28 U.S.C. § 596(a)(1) (1994)).

209. *Id.* at 671.

210. *Id.*

211. *Id.*

212. *Id.* In retrospect, it is clear that the authority to litigate without supervision carried with it the ability to establish policy. In the course of the Whitewater investigation and ensuing prosecutions, the Whitewater Independent Counsel challenged executive-branch assertions of executive privilege

pendent Counsel's discretion to set policy by "specifically provid[ing] that in policy matters [the Independent Counsel] is to comply to the extent possible with the policies of the Department [of Justice]."<sup>213</sup>

Third, the Court emphasized that the Independent Counsel's office was one of limited jurisdiction.<sup>214</sup> The initial appointment of any Independent Counsel was triggered exclusively by the Attorney General's formal application to the Special Division on suspicion of certain, serious criminal activity.<sup>215</sup> The Attorney General's decision not to apply for the appointment of an Independent Counsel was not reviewable.<sup>216</sup> Furthermore, an Independent Counsel was only authorized to "act within the scope of the jurisdiction . . . granted by the Special Division pursuant to a request by the Attorney General."<sup>217</sup> The Court neglected to mention that the Independent Counsel's jurisdiction could be expanded, either upon motion by the Attorney General or through a broad interpretation of the original jurisdictional grant.<sup>218</sup>

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and consequently affected executive-branch policy, and policy-making ability, in this area. See *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998) (per curiam) (refusing to extend the protection of the government attorney-client privilege to communications between the President, the President's personal counsel, and Deputy White House Counsel, and requiring Deputy White House Counsel to testify in front of a grand jury regarding the content of such communications), *cert. denied*, 526 U.S. 996 (1998); *In re Sealed Case*, 148 F.3d 1073, 1077 (D.C. Cir. 1998) (per curiam) (dismissing the Clinton Administration's claim of national security concerns as "speculative" and ordering secret service agents to testify about presidential actions over the President's objections), *cert. denied*, 525 U.S. 990 (1998); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922-24 (8th Cir. 1997) (refusing to extend the attorney-client privilege to communications between White House lawyers, the First Lady, and her private attorney, and allowing the Independent Counsel to inquire into such communications), *cert. denied*, 521 U.S. 1105 (1997). For a critique of these cases' narrow interpretation of executive privilege, see Akhil Reed Amar, *Nixon's Shadow*, 83 MINN. L. REV. 1405, 1417-18 (1999).

213. *Morrison*, 487 U.S. at 672 (emphasis added) (citing 28 U.S.C. § 594(f) (1994)). *But cf. id.* at 707 (Scalia, J., dissenting) (describing this limitation as "an empty promise").

214. *Id.* at 672.

215. See 28 U.S.C. § 592(c) (1994).

216. See *id.* § 592(b)(1), (f).

217. *Morrison*, 487 U.S. at 672.

218. See 28 U.S.C. §§ 593(c)(2), 594(e). Although the Special Division was not authorized to expand the Independent Counsel's jurisdiction without a request from the Attorney General, the Special Division was authorized to refer "related" cases to the Independent Counsel and could construe the original jurisdictional grant broadly so as to nullify this limitation. See *In re Madison Guar. Sav. & Loan Ass'n*, 1994 WL 913274 at \*1 (D.C. Cir. Aug. 5, 1994)

Fourth, the Court noted that each particular Independent Counsel was "limited in tenure."<sup>219</sup> Despite acknowledging that there was no particular time limit associated with the service of an Independent Counsel, the Court nonetheless found it significant that the Independent Counsel was "appointed essentially to accomplish a single task, and when that task [was] over the office [was] terminated, either by the counsel herself or by action of the Special Division."<sup>220</sup> "Unlike other prosecutors, [the Independent Counsel had] no ongoing responsibilities . . . beyond the accomplishment of the mission that [it] was appointed for and authorized by the Special Division to undertake."<sup>221</sup>

Finally, the Court noted that such a conclusion was "consistent with [its] few previous decisions that considered the question whether a particular Government official is a 'principal' or an 'inferior' officer."<sup>222</sup> Indeed, the Court does not appear to have had occasion to conclude that any executive-branch official represented a principal officer.

It is difficult to extend the *Morrison* holding beyond its specific context; the opinion does not establish bright lines or generally applicable rules and appears to rely largely on the immediate historic and political context in which the Ethics in Government Act arose. Indeed, despite the constitutional significance of this determination, the entire analysis concluding that Independent Counsels were inferior officers takes up less than three pages in the United States Reports.<sup>223</sup> Notwithstanding the criticism engendered by the *Morrison* decision, it

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(granting the Independent Counsel's Office jurisdiction and authority to investigate other allegations "related" to the Whitewater matter); *In re Sealed Case*, 838 F.2d 476, 480 (D.C. Cir. 1988) (describing the Special Division's formal refusal to expand the Independent Counsel's jurisdiction but concurrently finding the requested jurisdiction "implicit" in the original jurisdictional grant), *rev'd sub nom.* *Morrison v. Olson*, 487 U.S. 654 (1988); see also *In re Espy*, 80 F.3d 501, 508-09 (D.C. Cir. 1996) (per curiam) (ordering the referral of matters that arose out of and were connected with the Independent Counsel's original investigation to the Independent Counsel).

219. *Morrison*, 487 U.S. at 672.

220. *Id.*

221. *Id.* (emphasis added).

222. *Id.* (discussing previous decisions including *United States v. Nixon*, 418 U.S. 683, 694, 696 (1974) (referring to Watergate Special Prosecutor as a "subordinate officer"); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352-53 (1931) (stating that "United States Commissioners are inferior officers."); and *Ex parte Siebold*, 100 U.S. 371, 397-99 (1879) (holding that supervisors of elections were inferior officers)).

223. See *Morrison*, 487 U.S. at 671-73.

is a seminal interpretation of the Appointments Clause, and in particular, the distinction between principal and inferior prosecutorial officers. Moreover, even though Congress has allowed the Ethics in Government Act to expire, *Morrison*, ostensibly, remains good law. As such, its analysis must inform this discussion.

Application of *Morrison* leads to the conclusion that the U.S. Attorney does not qualify as an inferior officer. A U.S. Attorney is not removable by a higher executive-branch official, except by the President.<sup>224</sup> It always has been presumed, however, that the President must retain the ability to remove purely executive principal officers at will.<sup>225</sup> Consequently, requiring presidential action to remove a U.S. Attorney can hardly be considered an indication of inferior officer status. Prior to *Morrison*, the ability to remove any officers whose duties significantly implicated the President's ability to achieve policy goals was viewed as a necessary corollary of the President's responsibility and authority to execute the laws.<sup>226</sup> *Morrison* signaled a dramatic jurisprudential shift in this regard. The case did not, however, disturb the understanding that principal officers serve at the pleasure of the President because the Court concluded that Independent Counsels were inferior officers.<sup>227</sup> The U.S. Attorney, it should be noted, presents a different scenario on removability. Whereas the Attorney General could remove the Independent Counsel for cause,<sup>228</sup> the Attorney General has no authority to remove a U.S. Attorney;<sup>229</sup> and whereas the President had no authority to remove an Independent Counsel,<sup>230</sup> the President has unlimited discretion to remove a U.S. Attorney.<sup>231</sup> The Attorney General's discretion

224. 28 U.S.C. § 546(c) (1994).

225. See *Myers v. United States*, 272 U.S. 52, 176 (1926); see also *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627-28 (1935) (interpreting *Myers* to stand for the proposition that the President has "illimitable power of removal" over purely executive officers). But see *Morrison*, 487 U.S. at 695 (stating that Congress may limit removal of executive officers if doing so does not impair the President's ability to accomplish "constitutionally assigned functions"). See generally *id.* at 724-27 (Scalia, J., dissenting) (analyzing removal discussions in *Myers* and *Humphrey's Executor*).

226. See *Meyers*, 272 U.S. at 119.

227. *Morrison*, 487 U.S. at 671.

228. *Id.*

229. See 28 U.S.C. § 541(c) (1994); *United States v. Hilario*, 218 F.3d 19, 27 (1st Cir. 2000), cert. denied, 121 S. Ct. 572 (2000).

230. See *Morrison*, 487 U.S. at 663, 671.

231. See 28 U.S.C. § 541(c) (1994); 3 Op. Off. Legal Counsel 448, 448-50

to remove the U.S. Attorney from any particular case or matter may be interpreted as indicative of inferior-officer status. The fact that U.S. Attorneys are removable solely by the President, and by no other executive-branch official, however, serves as a powerful indication of principal-officer status. Thus, *Morrison's* removability factor is not determinative of the U.S. Attorneys' status.

By turning to the other *Morrison* factors, U.S. Attorneys can be distinguished from Independent Counsels in critical respects. Instead of performing "certain, limited duties,"<sup>232</sup> the U.S. Attorney is empowered to exercise significant discretion in both scope and depth. All people within the judicial district, and with few limited exceptions, all federal laws, fall within the U.S. Attorneys' jurisdiction. U.S. Attorneys determine which areas of federal law deserve the greatest allocation of prosecutorial resources through everyday decisions and personnel assignments. In the case of the Independent Counsel, the political branches decided that certain crimes allegedly committed by specific officials deserved singular attention without regard to limitations on resources. In contrast, U.S. Attorneys must consider the entire range of federal law enforcement interests in light of limited resources and set their agendas accordingly.<sup>233</sup> Further, not only must U.S. Attorneys take into account the possibility of securing a conviction against a particular defendant when weighing a case and deciding whether to prosecute, but they must also consider the case's "general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan."<sup>234</sup> One former U.S. Attorney lamented that "[p]olicy-making on the national level is nonexistent in most areas of criminal justice. Individual United States Attorneys are allowed to set their own enforcement policy in important and

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(1979).

232. *Morrison*, 487 U.S. at 671.

233. According to one observer,

"A U.S. Attorney has hundreds of thousands of cases to look at and a need to make cost judgments about what is worth pursuing. . . . The truth is, because of the way the independent counsel statute works, things a U.S. [A]ttorney would never investigate get investigated under this statute because the independent counsel has one [case] and one case only."

Joseph diGenova, former U.S. Attorney for the District of Columbia and former special counsel, *quoted in* Susan Page, *Are Independent Counsels Out of Control?*, USA TODAY, Nov. 14, 1997, at 2A.

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

sensitive fields.”<sup>235</sup> Because U.S. Attorneys decide what positions to take on unresolved issues in federal law and how such positions will affect other litigation and other federal interests, they formulate and execute policy on behalf of the United States.<sup>236</sup> In determining the inferior-officer status of the Independent Counsel, the Supreme Court found it significant that the office of the Independent Counsel was created to focus on certain limited executive-branch officials who were alleged to have committed certain serious crimes.<sup>237</sup> Because U.S. Attorneys exercise jurisdiction over all the people in their districts and virtually all federal statutes, U.S. Attorneys cannot be described as performing “certain limited duties” like the Independent Counsel.

Furthermore, the jurisdiction of a U.S. Attorney is not limited like that of the Independent Counsel. In contrast to the discrete jurisdictional grant bestowed upon the Independent Counsel by the Special Division, U.S. Attorneys “ha[ve] plenary authority” over all federal criminal and civil matters within their district.<sup>238</sup> Without any supervision, except in very limited circumstances, U.S. Attorneys are authorized to empanel grand juries, determine what crimes they will investigate, decide what evidence to present to grand juries, secure and file indictments, and prosecute individuals for the entire range of federal crimes.<sup>239</sup>

In one respect, the Independent Counsel’s jurisdiction could be considered broader than that of a U.S. Attorney: The former was vested with total discretion to appeal adverse rulings,<sup>240</sup> whereas the latter is constrained in that regard. The Attorney General has determined that no appeals can be pursued by U.S. Attorneys without the prior approval of the Solicitor General.<sup>241</sup> By determining which cases will set the appellate precedents that bind entire regions of the country, Main Justice reserves a powerful policy-setting decision and limits U.S. Attorneys’ discretion. That said, the prosecutorial and

235. SEYMOUR, *supra* note 43, at 237 (recommending imposition of a higher degree of uniformity on the discretionary authority exercised by U.S. Attorneys).

236. See *United States v. Mendoza*, 464 U.S. 154, 160-61 (1984).

237. *Morrison*, 487 U.S. at 672.

238. U.S. ATTORNEYS’ MANUAL, *supra* note 6, §§ 4-1.100, 9-2.001.

239. *Id.* § 9-2.010, 9-2.030.

240. *Morrison*, 487 U.S. at 662 (citing 28 U.S.C. § 594(a) (1994)).

241. See 28 C.F.R. § 0.20(b) (2000).

other litigation-related decisions routinely made by U.S. Attorneys in the district courts<sup>242</sup> indicate their status as principal officers.

Moreover, a U.S. Attorney's tenure cannot be considered "temporary" in the sense that the term was used in *Morrison*.<sup>243</sup> Although § 541(b) establishes a four-year "term" for U.S. Attorneys,<sup>244</sup> this temporal limit is illusory as either a positive or negative limitation on a U.S. Attorney's tenure. The President may remove a U.S. Attorney at will, and even when a U.S. Attorney's four-year term "expires," the U.S. Attorney "shall continue to perform the duties of his [or her] office until his [or her] successor is appointed and qualifies."<sup>245</sup>

This analysis of *Morrison* would not be complete without a discussion of Justice Scalia's impassioned and lone dissent in which he argued that the Independent Counsel was a principal officer, particularly considering the demise of the statutory authority for the Independent Counsel in the wake of the White-water Independent Counsel investigation.<sup>246</sup> In his dissenting opinion, Justice Scalia focused on the inverse relationship be-

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242. "Most cases, of course, never reach the Supreme Court. They are finally determined in the district courts, the circuit courts of appeal, and in the custom courts. They must be tried or defended without the spotlight, and yet to all but a few they represent the administration of justice." CUMMINGS & MCFARLAND, *supra* note 11, at 503.

243. See *Morrison*, 487 U.S. at 672.

244. 28 U.S.C. § 541(b) (1994).

245. *Id.* One consequence of this four-year term is that the President may have the authority to replace a U.S. Attorney occupying the office in excess of four years with a recess appointment. This is because offices occupied by "holdovers" (those serving in an office for which their term has expired) are considered to be vacant in the eyes of the law. See *Staebler v. Carter*, 464 F. Supp. 586, 594 (D.D.C. 1979) (concluding that where an incumbent is serving past the statutorily defined tenure, the office is vacant within the meaning of the Recess Appointments Clause of the Constitution (citing U.S. Const. art. II, § 2, cl. 2)); see also *In re Farrow*, 3 F. 112, 115-17 (C.C.N.D. Ga. 1880) (recognizing the President's right to make a recess appointment even where the court had named a U.S. Attorney to fill the vacancy because the position remained legally "vacant").

This suggests that when a U.S. Attorney has served more than four years, the Attorney General could remove the incumbent by appointing a U.S. Attorney pursuant to 28 U.S.C. § 546(c). The replacement U.S. Attorney could only serve for 120 days, however, at which time the authority would shift to the district court to appoint a U.S. Attorney pursuant to 28 U.S.C. § 546(d). It would nonetheless allow the Attorney General to remove a U.S. Attorney without presidential action. This hypothetical represents a removal authority in the Attorney General that has not been heretofore exercised.

246. The Independent Counsel Act expired on June 30, 1999. See 28 U.S.C. § 599 (1994).

tween independence and accountability that is inherent in the creation of an Independent Counsel.<sup>247</sup> Justice Scalia concluded that the level of independence conferred on the Independent Counsel would demand the accountability ensured through presidential nomination and Senate confirmation.<sup>248</sup>

Starting from the proposition that law enforcement—the power to prosecute individuals for legal transgressions—is a “quintessentially executive function,”<sup>249</sup> Justice Scalia recognized that “the balancing of various legal, practical, and political considerations, none of which is absolute, is the very essence of prosecutorial discretion.”<sup>250</sup> Because Justice Scalia did not consider the Independent Counsel to be subordinate to the Attorney General in the exercise of these core executive functions, he could not consider the Independent Counsel to be an inferior officer.<sup>251</sup> In a significant recognition for determining the status of U.S. Attorneys, Justice Scalia stated that “[e]ven an officer who is subordinate to a department head can be a principal officer.”<sup>252</sup>

247. In the case of the Independent Counsel, loss of accountability proved far from being merely an academic concept. The scenario predicted by Justice Scalia played out perfectly in the impeachment of President Clinton. Impeachment—and the process leading up to it—is fraught with political consequences for the members of Congress who are responsible for the administration of impeachment proceedings. The country was intended to endure such a rending process only when political consensus could be developed to proceed.

One need look only as far back as Watergate to appreciate that the system can work as planned. Congress undertook to investigate whether President Nixon had betrayed the national trust. Although significant political forces were mustered in opposition, Congress was able to convince the public of the propriety of pursuing its investigation. It was an episode of historic and constitutional significance. If Watergate illustrated what was wrong with American government, it also surely illustrated the enduring wisdom and strength of the Constitution. According to Professor Amar,

Prosecutorial self-dealing is not something that the Framers failed to anticipate. And the solution they provided, based on publicity (via grand juries, the press, and legislative oversight) and impeachment (if necessary) still works and works well. . . . This, I suggest, is the lesson that emerges when we compare Watergate—where the Framers’ system worked beautifully—with Whitewater, where the flawed statute has not.

Amar, *supra* note 151, at 803 n.216.

248. See Morrison, 487 U.S. at 723, 728 (Scalia, J., dissenting).

249. *Id.* at 706.

250. *Id.* at 708.

251. *Id.* at 716-19.

252. *Id.* at 722 (referring to debates at the Constitutional Convention indicating the Framers’ assumption on this point and citing 2 MAX FARRAND, *supra* note 28, at 627).

If *Morrison* were the lone standard to be applied, it would be easy to conclude that U.S. Attorneys constitute principal officers under the Appointments Clause. They are not removable by the Attorney General (although, formally, they are subject to her control); they exercise significant policy-setting discretion over the range of federal law enforcement issues; their jurisdiction is broad; and their tenure is, ostensibly, as long as the President's and perhaps longer.

#### B. THE FORMAL APPROACH: *EDMOND V. UNITED STATES*

*Morrison*, however, is not the Court's last word on the principal-versus-inferior-officer debate, and some commentators have questioned *Morrison*'s continuing vitality after the Court's 1997 decision in *Edmond v. United States*.<sup>253</sup> In that case, with a solid majority behind his Appointments Clause approach, Justice Scalia recast the principal-versus-inferior-officer inquiry in the mold of his *Morrison* dissent.

In *Edmond*, the Court considered whether judges on the Coast Guard Court of Criminal Appeals (CGCCA) were principal or inferior officers. Because Congress vested the authority to appoint CGCCA judges in the Secretary of Transportation (a department head), the judges could only validly occupy such positions if they could be characterized as inferior officers.<sup>254</sup> *Edmond* concedes that it would be difficult to categorize these judges as inferior officers on the basis of their tenure or jurisdiction, both of which were key components of the *Morrison* analysis.<sup>255</sup> This recognition, however, does not figure prominently in the *Edmond* analysis. Seemingly unconstrained by the reasoning in *Morrison*, the *Edmond* opinion borrows certain sections from *Morrison* but fails to address other aspects.<sup>256</sup> In-

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253. 520 U.S. 651 (1997); see, e.g., Amar, *supra* note 151, at 810 (suggesting that "the Court [has] apparently abandoned *Morrison*'s ad hoc test"); Steven G. Calabresi, *The Structural Constitution and the Countermajoritarian Difficulty*, 22 HARV. J.L. & PUB. POL'Y 3, 5 (1998) (reading *Edmond* as "essentially displac[ing] the faulty Appointments Clause analysis of *Morrison v. Olson*"); Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103 (1998). *But cf.* *United States v. Hilario*, 218 F.3d 19, 25 (1st Cir. 2000) ("The *Edmond* Court did not overrule *Morrison* . . . but cited it as precedent."), *cert. denied*, 121 S. Ct. 572 (2000).

254. *Edmond*, 520 U.S. at 660-61.

255. *Id.* at 661.

256. Ironically, Justice Scalia invokes the *Ex parte Siebold* precedent that he so convincingly discredited in his *Morrison* dissent, asserting that the Court had previously "found" an election supervisor to be an inferior officer.

stead, *Edmond* makes supervision the touchstone of its principal-versus-inferior inquiry:

Generally speaking, the term “inferior officer” connotes a relationship with some higher ranking officer or officers below the President: Whether one is an “inferior” officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. . . . Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that “inferior officers” are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.<sup>257</sup>

*Edmond* makes no further attempt to define the necessary amount of supervision except to say that the “directed-and-supervised-at-some-level” standard is satisfied in the CGCCA judge context. *Edmond* instead teaches by example, examining how the work of judges on the CGCCA was supervised and directed. The Court emphasized that the CGCCA judges could be removed—without cause—by the Judge Advocate General of the Coast Guard (a subordinate of the Secretary of Transportation):<sup>258</sup> “The power to remove officers . . . is a powerful tool for control.”<sup>259</sup> Although the Court noted that CGCCA judges exercised some modicum of independence in their consideration and adjudication of individual cases, it stressed that the Court of Appeals for the Armed Forces exercised appellate review over the CGCCA’s decisions: “What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.”<sup>260</sup>

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*Id.* But cf. *Morrison v. Olson*, 487 U.S. 654, 721-22 (1988) (Scalia, J., dissenting) (criticizing the majority’s reliance on *Ex parte Siebold* because the Court had not been presented with the principal versus inferior issue in *Siebold* but had merely asserted, in dicta, that federal “Judges of Election” were inferior officers). Moreover, the supervisors at issue in *Siebold* provide an inapt analogy because they were in essence merely poll observers with no prosecutorial authority. See *Ex Parte Siebold*, 100 U.S. 371, 379-80 (1879) (describing the duties of election supervisors without reference to prosecutorial authority); see also *In re Sealed Case*, 838 F.2d 476, 485-86 (D.C. Cir. 1988) (characterizing the duties of such commissioners as “relatively modest”).

257. *Edmond*, 520 U.S. at 662-63; cf. *Morrison*, 487 U.S. at 722 (Scalia, J., dissenting) (“Even an officer who is subordinate to a department head can be a principal officer.”).

258. *Edmond*, 520 U.S. at 664.

259. *Id.* (citing *Bowsher v. Synar*, 478 U.S. 714, 727 (1986), and *Myers v. United States*, 272 U.S. 52, 121-36 (1926)).

260. *Id.* at 665. This description would not accurately describe the super-

Justice Souter filed a concurrence in *Edmond*, reminding the Court of Justice Scalia's admonition in *Morrison*: "Having a superior officer is necessary for inferior officer status, but not sufficient to establish it."<sup>261</sup> After suggesting, in passing, that the Solicitor General may be a principal officer despite his statutory "inferiority" to the Attorney General, Justice Souter's approach to the principal-versus-inferior dilemma reverts to the Court's functional balancing test: "What is needed . . . is a detailed look at the powers and duties of these judges to see whether reasons favoring their inferior officer status within the constitutional scheme weigh more heavily than those to the contrary."<sup>262</sup> Justice Souter, after surveying the salient factors with respect to the judges of the CGCCA, concurred in the determination of their status as inferior officers.<sup>263</sup>

*Edmond* offers a contrasting approach to the *Morrison* Ap-

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vision of U.S. Attorneys, who do possess the power to render a final decision for the United States without being "permitted" to do so by some other executive-branch officer. The *Edmond* court focused on the appellate review to which CGCCA judges are subjected. *Id.* at 664-65. In this way, the CGCCA is "inferior" in the same way that lower federal courts are inferior to appellate courts. Such an analogy does not characterize the relationship of U.S. Attorneys to Main Justice. Charles Ruff noted that, while the structure of appellate review ensured uniformity within the courts, "We have not developed . . . within that part of the executive branch charged with representing the legal interests of the federal government a comparable mechanism for controlling diversity of judgment." Ruff, *supra* note 79, at 1205.

There are additional, significant distinctions between the nature of appellate review regularly exercised by courts and the Attorney General's supervision of criminal prosecutions. In the federal system, at least one appeal is a matter of right; there is no such guarantee of review with respect to criminal prosecutions initiated by U.S. Attorneys. Moreover, an appellate court can step in to prevent injustice from occurring by staying implementation of a trial court's judgment until an appeal can be decided. Beyond the practical limitations that limit the Attorney General's realistic supervision to only a fraction of high profile or egregious cases, such supervision is generally invoked only after the institution of criminal charges. Yet the initiation of an investigation or the return of an indictment often occasions serious consequences (both in reputation and money). Even if they are later abandoned, criminal investigations and prosecutions can have dire consequences on even the innocent suspect or defendant. The supervision exercised by appellate courts, therefore, is an inapt analogy to the Attorney General's supervision of a U.S. Attorney.

261. *Edmond*, 520 U.S. at 667 (Souter, J., concurring) (citing *Morrison*, 487 U.S. at 722 (Scalia, J., dissenting)).

262. *Id.* at 668. As an element of the balancing test, Justice Souter suggests that it is appropriate to defer "to the political branches' judgment" for the determination of whether a particular officer has principal or inferior status. *Weiss v. United States*, 510 U.S. 163, 194 (1994) (Souter, J., concurring).

263. *Edmond*, 520 U.S. at 668.

pointments Clause jurisprudence: *Edmond* takes its cues from the bare language of the Constitution and relies heavily on contemporaneous sources (i.e., the writings of the Framers and the Acts of the First Congress) to inform the Court's analysis. Nonetheless, while it refrains from the kind of functional balancing employed in *Morrison*, *Edmond* does not establish an easily applied standard for subsequent cases. The *Edmond* Court's inquiry focused on whether the officer's "work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."<sup>264</sup> If so, according to the Court, they are inferior officers. The level of supervision that distinguishes a principal from an inferior officer, however, is not explained.

Under the *Edmond* rationale, there is a strong argument that U.S. Attorneys are inferior officers because U.S. Attorneys are, by statute, subject to the supervision and direction of the Attorney General.<sup>265</sup> Indeed, two United States Circuit Courts have addressed this issue and found this supervision to be determinative of the U.S. Attorneys' inferior status, relying on *Edmond*.<sup>266</sup> When called upon specifically to determine whether U.S. Attorneys constitute principal or inferior officers, the Ninth Circuit reconciled *Edmond* with *Morrison* by deciding that "supervision by a superior officer is a sufficient but perhaps not a necessary condition to the status of inferior officer."<sup>267</sup> Under this formulation, which was subsequently adopted by the First Circuit,<sup>268</sup> U.S. Attorneys can be considered inferior officers. Although U.S. Attorneys are granted wide latitude in the ordinary course of affairs, the Attorney

264. *Id.* at 663 (majority opinion). Professor Amar endorses this approach, concluding that it is consistent with the usage of "inferior" in other parts of the Constitution. See Amar, *supra* note 151, at 806-07 ("[W]hen Article III speaks of 'inferior' courts, it likewise means 'inferior to' their superior—the Supreme Court. Symmetrically, when the Article II Appointments Clause speaks of 'inferior' officers, it likewise means 'inferior to' their superior—the relevant unilateral appointing authority.").

265. See 28 U.S.C. § 519 (1994) (stating that the Attorney General "shall direct all United States [A]ttorneys . . . in the discharge of their respective duties").

266. See *United States v. Hilario*, 218 F.3d 19, 25 (1st Cir. 2000), *cert. denied*, 121 S. Ct. 572 (2000); *United States v. Gantt*, 194 F.3d 987, 999 (9th Cir. 1999).

267. *Gantt*, 194 F.3d at 999 n.6. It should be noted that this represents the converse of the analysis suggested in Justice Souter's concurrence in *Edmond*. See *Edmond*, 520 U.S. at 667 (Souter, J., concurring).

268. See *Hilario*, 218 F.3d at 25.

General is statutorily empowered to supervise the U.S. Attorneys,<sup>269</sup> remove them from any particular case,<sup>270</sup> determine the location of their offices,<sup>271</sup> and approve their staffing decisions.<sup>272</sup> The Attorney General, to be sure, has *some* authority to supervise the work of the U.S. Attorney, therefore arguably qualifying the U.S. Attorney for inferior-officer status under the *Edmond* formulation.<sup>273</sup>

There are competing and compelling reasons to consider U.S. Attorneys principal officers. In its simplicity, the *Edmond* test would ignore the complex reality of federal law enforcement, the tension between local autonomy and central control that characterizes the relationship between U.S. Attorneys and Main Justice, and the pervasive role of the U.S. Attorneys in shaping and implementing policy on behalf of the United States. The extent to which U.S. Attorneys are "supervised" by the Attorney General defies characterization in typical hierarchical terms.<sup>274</sup> U.S. Attorneys exercise a great deal of authority that, for all intents and purposes, is unsupervised.<sup>275</sup> U.S. Attorneys do not seek approval to initiate investigations, file indictments, enter plea bargains, or prosecute cases at trial;

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269. 28 U.S.C. § 519 (1994).

270. *See id.* § 518(b).

271. *Id.* § 545(b).

272. *Id.* § 550.

273. This analysis raises serious questions about the vitality of *Morrison* and whether the Independent Counsel would still be considered an inferior officer. *See supra* text accompanying note 251.

274. In determining the status of U.S. Attorneys, courts need not, and should not, be constrained by the formal statutory inferiority of the U.S. Attorneys if, in fact, they exercise the discretion indicative of a principal officer.

In defending the Supreme Court's determination that the Comptroller General was subject to the will of Congress, and hence, institutionally unfit to wield the budget-balancing axe of the Gramm-Rudman-Hollings Act, *see Bowsher v. Synar*, 478 U.S. 714, 727-34 (1986), Professor Strauss suggests that the Court's analysis may have been properly informed by the actual relationship that had developed between the Comptroller and Congress, and eschewed reliance on formal, statutory definitions. *See* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 498-99 (1987) ("The Court might have looked more globally at the relationships between Congress and the General Accounting Office, seeing how the bundle of relationships, formal and informal, creates for the agency a distinctive atmosphere and self-image that does not characterize other agencies.").

275. *See* Frase, *supra* note 90, at 250 (arguing that while there is some modicum of supervision, "In most cases . . . the U.S. Attorney has complete control over which charges, if any, will be filed in his district").

nor is any such approval required.<sup>276</sup> They do not seek permission from, or even inform, a supervisor who is ultimately responsible to the Attorney General. In many instances, Main Justice is not even aware of criminal prosecutions. The Attorney General's immediate subordinates in Washington, D.C. are only likely to become aware of and involved in a case when there is a problem or negative publicity. Moreover, without the authority to remove U.S. Attorneys, the Attorney General's actual authority is limited.<sup>277</sup> For example, even when the Attorney General attempts to exercise her supervisory authority, U.S. Attorneys sometimes balk. As Professor Charles Ruff put it, directives emanating from Main Justice are "most often honored in the breach."<sup>278</sup>

An additional and important distinction in determining principal-versus-inferior status is removal authority. Removal authority has always been associated with control: It is the *sine qua non* of effective supervision—the guarantee that subordinates will take direction. As the Court noted in *Bowsher*, "[o]nce an officer is appointed, it is only the authority that can remove him . . . that he must fear and, in the performance of his functions, obey."<sup>279</sup> U.S. Attorneys are removable only by the President, but not by the Attorney General or any other executive-branch official. Although the removal authority is located in the executive branch, Congress has denied that authority to the Attorney General, signaling the functional independence of U.S. Attorneys.<sup>280</sup>

It is important to note that there is nothing inconsistent or inherently unconstitutional in the autonomy that U.S. Attorneys exercise; Congress enjoys wide latitude in establishing the structure of the executive branch. The autonomy of the U.S. Attorneys most likely represents a policy choice by Congress to maintain "a moderating balance of power between . . . Wash-

276. See Ruff, *supra* note 79, at 1204 ("In the great majority of cases handled by the United States [A]ttorneys, the Criminal Division is unfamiliar with the development of the investigation, and the prosecutive decision is made before the Division has an opportunity to act." (emphasis added)).

277. See *supra* note 184 and accompanying text.

278. Ruff, *supra* note 79, at 1207-08.

279. *Bowsher*, 478 U.S. at 726 (quoting *Synar v. United States*, 626 F. Supp. 1374, 1401 (D.D.C. 1986)).

280. See Ruff, *supra* note 79, at 1205 ("Statutorily, the commands of the Attorney General and his designees bind the United States [A]ttorneys, but the presidential commission provides more than merely symbolic support for the exercise of independent discretion.").

ington and the districts."<sup>281</sup> Such an arrangement may be entirely appropriate, but it indicates that U.S. Attorneys are principal officers and therefore must be appointed only pursuant to the President's nomination and the Senate's confirmation.

Ultimately, while the *Edmond* rule may be simpler than a functional-balancing analysis, it is not necessarily clearer and has the potential to undermine drastically the accountability sought by the Appointments Clause. Officials exercising the discretion reposed in the U.S. Attorneys ought to be a reflection on the politicians who chose them (i.e., the President and the Senate).<sup>282</sup> Where there is disaffection with the U.S. Attorney, the citizens of that jurisdiction should be able to blame the President and their Senators. By cutting out the elected branches, the court appointment of U.S. Attorneys leaves citizens without a clear path to affect prosecutorial priorities. One traditional method for the political control over prosecutorial authority involves contacting Representatives and Senators so that these individuals can gauge a U.S. Attorney's performance and express displeasure if, in their judgment, the prosecutor is not acting in the public interest. Where the traditional nomination and confirmation process has been adhered to, the U.S. Attorney will have ample incentive to heed even informal disapproval from her political patrons. Because U.S. Attorneys belong to the same political community and in many instances rely upon political support for their plans,<sup>283</sup> they are likely to respond to the priorities and criticisms of locally elected officials. There is nothing inherently nefarious in this; the Framers were all too familiar with prosecutorial power that was not politically accountable and rejected this structure.<sup>284</sup>

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281. Richman, *supra* note 79, at 787-88; *see id.* at 810 ("What the evidence strongly suggests . . . is that Congress gives considerable attention to the balance of power between Washington and the [U.S. Attorneys'] districts, and that its failure to impose more approval requirements reflects, not apathy or thrift, but a conscious selection of a particular equilibrium."); *see also* Ruff, *supra* note 79, at 1205 (suggesting that "responsiveness to varying local concerns by the criminal justice system is not only acceptable, but desirable").

282. Under our system of government, the primary check against prosecutorial abuse is a political one. *See Morrison v. Olson*, 487 U.S. 654, 728 (1989) (Scalia, J., dissenting).

283. For a discussion of the aspirations and subsequent political careers of U.S. Attorneys, *see* EISENSTEIN, *supra* note 6, at 229-31. *See also* Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 486 (1996) ("U.S. Attorneys are extraordinarily ambitious and frequently enter electoral politics after leaving office.").

284. *See Freytag v. Commissioner*, 501 U.S. 868, 883 (1991); *In re Sealed*

Likewise, where there is a vacancy in the office, citizens ought to be able to look at the process and judge their leaders accordingly. If the Senate has blocked the President's nominee(s), the Senator responsible for blocking the nomination can be held accountable.<sup>285</sup> Court appointment of U.S. Attorneys undermines this process of accountability and in so doing eviscerates the protections of the Appointments Clause. It allows the President and the Senate to avoid making constitutionally prescribed political decisions by which they are intended to be evaluated. It also may place courts on the receiving end of criticisms more appropriately directed at the politically responsive branches.

The *Hilario* court reasoned that "Congress may well have determined that it would be worse for a district to be without a United States Attorney than for the district to have one who had not been nominated and confirmed in the ordinary course, no matter how long the interim appointment lasted."<sup>286</sup> Because U.S. Attorneys are principal officers of the United States, however, the Constitution, via the Appointments Clause, denies Congress the power to make this determination.

#### IV. INCONGRUITY WITH APPROPRIATE JUDICIAL FUNCTIONS

Assuming that U.S. Attorneys are inferior officers, a literal reading of the Excepting Clause permits their appointment by "courts of law."<sup>287</sup> There are some limits, however, on the type

Case, 838 F.2d 476, 487 (D.C. Cir. 1988) (describing the Framers' experience with abusive prosecutorial practices that made them "justly fearful of this [prosecutorial] power"), *rev'd sub nom.* *Morrison v. Olson*, 487 U.S. 654 (1988).

285. See *supra* note 148 and accompanying text.

286. *United States v. Hilario*, 218 F.3d 19, 23 (1st Cir. 2000), *cert. denied*, 121 S. Ct. 572 (2000).

287. This textual grant of authority to the courts of law distinguishes the appointment power from other contexts where Congress has vested the courts with authority outside the traditional judicial sphere. See *Morrison*, 487 U.S. at 678-79; *Ex Parte Siebold*, 100 U.S. 371, 398 (1879). Courts have steadfastly insisted that they may not act outside the context of the "cases or controversies" to which Article III extends "the judicial [power] of the United States." See U.S. CONST. art. III, § 1; *Buckley v. Valeo*, 424 U.S. 1, 123 (1976) (*per curiam*) ("[E]xecutive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution." (citing *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852))).

Proposals to vest judges with additional roles were rejected at the Constitutional Convention because the Framers were concerned that too much involvement with the political branches would undermine the independence of the judiciary. See 1 MAX FARRAND, *supra* note 28, at 430 (comments of Luther

of inferior executive-branch officials that judges may properly appoint.<sup>288</sup> One such limitation recognized by the Court suggests that "Congress'[s] decision to vest the appointment power in the courts would be improper if there was some 'incongruity' between the functions normally performed by the courts and . . . their duty to appoint."<sup>289</sup> The incongruity inquiry seeks

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Martin) (arguing that the people would lose confidence in the impartiality of judges if judges were vested with extra-judicial authority)). Thus, courts have refused to give advisory opinions. See *United States v. Frehauf*, 365 U.S. 146, 157 (1961) (listing cases in which the Court refused to issue advisory opinions); *Muskrat v. United States*, 219 U.S. 346 (1911). Courts have also refused to adjudicate cases where such judgments are subject to another branch's review on the merits. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 411 n.2 (1792) (refusing to adjudicate war pensions claims because the courts' judgments were to be subjected to review by the Department of the Treasury, and as such, "inconsistent with the independence of [the judiciary]"). "But the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts," and thus falls outside the normal prohibition. *Siebold*, 100 U.S. at 398. Even though the Appointments Clause authorizes such action, courts should be wary of accepting such power from the political branches because it implicates their independence.

288. See U.S. CONST. art. II, § 2, cl. 2; *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (characterizing judicial appointments of inferior officers as constitutional "unless Congress has vested in the [judges] powers that are more appropriately performed by the other Branches or that undermine the integrity of the Judiciary").

One plausible reading of the Excepting Clause would have prohibited all inter-branch appointments, such that "courts of law" would be limited to appointing inferior judicial officers, such as clerks. Commentators have suggested this as a rational limiting principle to the Appointment power, and this approach was alluded to by the Court in early opinions. Although the Supreme Court opined that "[t]he appointing power . . . was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged," *Ex parte Hennen*, 38 U.S. (13 Pet.) 225, 257-58 (1839) (holding that courts could appoint their own clerks), there is "no absolute requirement to this effect." *Siebold*, 100 U.S. at 397.

Professor Amar makes an interesting argument that inter-branch appointments do not comport with a holistic reading of the Constitution. See Amar, *supra* note 151, at 747 (1999). *But cf.* Lessig & Sunstein, *supra* note 27, at 117 n.482 (positing that the limits of acceptable arrangements under the Excepting Clause may constitute a non-justiciable issue because the Clause grants Congress the discretion to structure such appointments "as they think proper" (quoting U.S. CONST. art. II, § 2, cl. 2)). Inter-branch appointments, however, have been validated, see *Siebold*, 100 U.S. at 397-98, and this Article does not argue that inter-branch appointments are *per se* unconstitutional. Rather, this Article focuses on the appropriate limits of inter-branch appointments.

289. *Morrison*, 487 U.S. at 676 (citing *Siebold*, 100 U.S. at 398); see also *Hilario*, 218 F.3d at 26-27 ("[T]he district court's appointment power over interim United States Attorneys 'is not unconstitutional unless Congress has vested in the [judges] powers that are more appropriately performed by the

to determine whether "the appointment of the officers in question could, with any greater propriety, and . . . with equal regard to convenience, have been assigned to any other depository of official power."<sup>290</sup>

In 1880, the Supreme Court, in *Ex parte Siebold*,<sup>291</sup> first recognized the validity of inter-branch appointments but also introduced the incongruity analysis to limit such appointments. *Siebold* examined the court appointment of "judges of election," who served as poll watchers for congressional elections.<sup>292</sup> The defendants, *Siebold* among them, had been convicted of engaging in election fraud.<sup>293</sup> In appealing their convictions, the judges of election challenged their own inter-branch appointments as violative of the Appointments Clause.<sup>294</sup> The Supreme Court emphasized that the Constitution explicitly authorized courts to exercise appointive power.<sup>295</sup> As such, where the law conferred appointive authority on the courts it became a "constitutional duty" of the courts to make appointments unless there was "such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void."<sup>296</sup> It was determined in *Siebold* that, with respect to election supervisors, appointment by the district court was not "incongruous" with appropriate judicial activity.<sup>297</sup>

*Siebold* does not necessarily support the significant extensions of inter-branch appointments to which it has been applied. It has been suggested that the propriety of Congress vesting the appointment of election supervisors in the courts

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other Branches or that undermine the integrity of the Judiciary." (quoting *Mistretta*, 488 U.S. at 385)).

290. *Siebold*, 100 U.S. at 398. In concluding that judges could not properly sit on an advisory panel investigating organized crime, the Court of Appeals for the Eleventh Circuit framed the inquiry slightly differently: "[D]oes the imposition of powers traditionally associated with one branch of government on officials of another branch interfere with their ability to perform their constitutionally-required duties in the branch of which they are a part?" *In re Application of President's Comm'n on Organized Crime*, 763 F.2d 1191, 1196-97 (11th Cir. 1985).

291. 100 U.S. 371 (1879).

292. *Id.* at 373.

293. *Id.* at 377-79. *Siebold*, for example, was convicted of "the offence commonly known as 'stuffing the ballot-box.'" *Id.* at 379.

294. *Id.* at 397.

295. *Id.* at 397-98 (stating that "the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts").

296. *Id.* at 398.

297. *Id.*

was influenced by Congress's right, recognized in the Constitution, to superintend the election of its own members.<sup>298</sup> The *Siebold* opinion focused on the "important" and "fundamental" right of Congress to supervise the election of its own members<sup>299</sup> and cautioned that "it must be remembered that we are dealing only with the subject of elections of representatives to Congress."<sup>300</sup>

Court appointment of U.S. Attorneys is incongruous because it threatens to undermine judicial impartiality, and the appearance of impartiality,<sup>301</sup> by thrusting courts into partisan, political battles. As Professor Harold Krent points out, "Judges who become too closely aligned with the interests of another branch cannot be expected to maintain their impartiality in adjudicating that other branch's interests, and the public at large may lose faith in the judiciary's independence."<sup>302</sup> Judges need to protect not only the integrity of the other branches, but their own integrity and impartiality as well: "Impartiality is one of the central, constitutionally-ordained, requirements of the federal judicial office."<sup>303</sup> Moreover, "even if a judge could satisfy himself that he could separate his participation [in executive-branch activities] from his judicial functions, it is not clear that litigants could sustain equal faith in his impartiality."<sup>304</sup> Ap-

298. See Note, *The Proposed Court-Appointed Special Prosecutor: In Quest of a Constitutional Justification*, 87 YALE L.J. 1692, 1697-98 n.27 (1978) (citing Dean Roger Cramton's opinion that "*Siebold* was merely an affirmation of congressional power to enact legislation pursuant to its duty to investigate the qualifications of its own members and did not involve criminal law enforcement"). One distinguished jurist has lamented that the courts should not presume the validity of all congressionally approved inter-branch appointments on the basis of such "conflicting and ambiguous language in 19th century cases." *Hobson v. Hansen*, 265 F.Supp. 902, 921 (D.D.C. 1967) (Skelly Wright, J., dissenting).

299. *Siebold*, 100 U.S. at 382.

300. *Id.* at 393.

301. See *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice.").

302. Krent, *supra* note 124, at 1302 n. 204.

303. *In re Application of President's Comm'n on Organized Crime*, 763 F.2d 1191, 1197 (11th Cir. 1985) (citing *United States v. Will*, 449 U.S. 200 (1980)); see also Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980) (discussing the development of an independent judiciary in the United States and its importance in the constitutional framework).

304. *Application of President's Comm'n on Organized Crime*, 763 F.2d at 1197. Although the quoted passage criticizes judges' participation in a presidential advisory commission, the reasoning applies *a fortiori* to the appointment of the chief prosecutor in the judges' own district.

pointing a prosecutor is intrinsically a political decision.<sup>305</sup> Selecting a U.S. Attorney requires making political judgments about what a district's prosecutorial priorities should be and who is best suited to realize those goals. In recognition of the inherently political nature of appointments, the Code of Judicial Conduct admonishes judges "not [to] make unnecessary appointments."<sup>306</sup> Judges provide an institutional buffer between the individual and the immense power wielded by the prosecutor. If the judge has appointed the supervisory prosecutor, then judicial independence, vital to the role of judges and to the public's perception of fairness, is undermined.

The controversy surrounding the court appointment of the Whitewater Independent Counsel resulted in harsh criticism of Judge David Sentelle and is a textbook example of the perils associated with the court appointment of prosecutors. Shortly before announcing the appointment of the Whitewater Independent Counsel, Judge Sentelle met with two leading conservative Republican Senators, both of whom were long accustomed to picking prosecutors and both of whom were publicly opposed to many of the policies advocated by then-President Clinton.<sup>307</sup> The meeting generated intensely bad press for the court and for the perceived lack of independence of courts in general.<sup>308</sup> As criticism of the Whitewater Independent Counsel mounted, so too did criticism of the court's role in naming

305. See *In re Charge of Judicial Misconduct or Disability*, 39 F.3d 374, 380-82 (D.C. Cir. 1994) (Judicial Council of the D.C. Circuit) (upholding the propriety of judges consulting with political leaders and others in considering who to appoint as independent counsel); *id.* at 380 ("It is hard to imagine how anyone would go about [the task of selecting an Independent Counsel] without seeking advice [from outside sources].").

306. MODEL CODE OF JUDICIAL CONDUCT Canon 3C(4) (1998). The statutory authority to appoint U.S. Attorneys arguably makes such appointments "necessary," see *Ex Parte Siebold*, 100 U.S. 371, 398 (1879), even though the grant of authority is permissive. However, this specific reference in Canon 3 of the Code of Judicial Conduct, which deals with the preservation of judicial impartiality, reveals the seriousness of the concerns that arise when judges appoint prosecutors.

307. See Howard Schneider, *Judge Met Senator Faircloth Before Fiske Was Ousted*, WASH. POST, Aug. 12, 1994, at A1 (reporting on a lunch meeting between Judge David Sentelle, the only judge from the D.C. Circuit—and the presiding judge—on the Special Division, and two Republican Senators); see also *Charge of Judicial Misconduct or Disability*, 39 F.3d at 377 (describing the facts surrounding charges against Judge Sentelle for judicial misconduct).

308. See, e.g., Susan Schmidt, *Former ABA Presidents Criticize Panel That Chose Starr*, WASH. POST, Sept. 27, 1994, at A9 (reporting on a statement issued by the former ABA presidents urging the special division to not only be objective, but to maintain an appearance of objectivity).

him, and the perceived partisan political nature of the appointment.<sup>309</sup>

These criticisms raise similar concerns about whether any interaction between judges and Department of Justice officials should occur with respect to appointing U.S. Attorneys. The regular, informal interaction between top Justice Department officials and the chief judge of the district court responsible for selecting an interim U.S. Attorney ought to put judges on notice that the court-appointment process jeopardizes their impartiality. It is unseemly, if not inappropriate, for district court judges to offer their comments to executive-branch officials on prospective executive-branch appointees—even interim appointees—who will appear before them. A judge may be inclined to select a U.S. Attorney who shares the judge's ideological or prosecutorial philosophy.<sup>310</sup> Alternatively, a judge may recommend that the Justice Department select as interim U.S. Attorney a prosecutor who the judge perceives as apt to settle cases and enter plea bargains, and thus viewed as likely to preserve judicial resources. Of course, prosecutorial philosophy and policy priorities properly inform the selection of U.S. Attorneys who, after all, are supposed to represent the President's administration. But weighing these various factors is inherently political and has practical implications for the district court's docket. This conflict of interest undermines the independence and even skepticism with which judges should scrutinize prosecutors.<sup>311</sup> The incongruity concern is particularly acute in the court appointment of a U.S. Attorney because "the greater the policy-making power of the appointee . . . the more

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309. See HISTORICAL ENCYCLOPEDIA OF U.S. INDEPENDENT COUNSEL INVESTIGATIONS 305-07 (Gerald S. Greenberg ed., 2000) (noting criticism of Judge Sentelle's role in appointing Whitewater Independent Counsel and concluding that "[p]ublic confidence . . . suffers whenever the integrity of the judicial appointment process appears compromised"); CHARLES A. JOHNSON & DANETTE BRICKMAN, INDEPENDENT COUNSEL: THE LAW AND THE INVESTIGATIONS 226-27 (2001) (discussing the persistent criticism of the Independent-Counsel-appointment process during the Whitewater investigation).

310. As Justice Scalia noted in dissent in *Morrison v. Olson*, judges are human and can be influenced by politics. 487 U.S. 654, 730 (1989) (Scalia, J., dissenting) (noting that the panel of judges who select an Independent Counsel may be influenced by their own political views and that there would be no remedy to cure any negative consequences).

311. The impropriety of this contact is compounded by the fact that the Department of Justice administers the process for selecting presidential nominees to the Courts of Appeal, who are often times chosen from the ranks of sitting district court judges.

incongruous and improper it is for Congress to vest the appointment of that official in a court."<sup>312</sup>

In light of the similarities between the U.S. Attorney and the Independent Counsel, *Morrison's* incongruity analysis, which upheld the court appointment of the Independent Counsel, has to be considered. In *Morrison*, the Court dismissed the incongruity concerns with respect to appointing the Independent Counsel,<sup>313</sup> and many of the reasons on which the Court relied apply with equal force to U.S. Attorneys. For instance, the Court recalled its precedents allowing courts to appoint "private attorneys to act as prosecutor for judicial contempt [proceedings]";<sup>314</sup> "United States commissioners, who exercised certain limited prosecutorial powers";<sup>315</sup> and U.S. Marshals, whom the Court "indicated" in *Siebold* could be appointed by courts of law.<sup>316</sup> "[I]n light of judicial experience with prosecutors in

312. Constance O'Keefe & Peter Safirstein, Note, *Fallen Angels, Separation of Powers, and the Saturday Night Massacre: An Examination of the Practical, Constitutional, and Political Tensions in the Special Prosecutor Provisions of the Ethics in Government Act*, 49 BROOK. L. REV. 113, 133 (1982). Although O'Keefe and Safirstein recognize that "the United States [A]ttorney is certainly a policy-maker and the nature of his duties require him to answer to the President," they credited the reasoning of the district court in *Solomon* for upholding the court appointment of U.S. Attorneys: "[T]he exercise of the appointive power . . . in no wise [binds] the executive . . . [T]he executive branch is free to choose another United States Attorney at any time." *Id.* at 134 (quoting *United States v. Solomon*, 216 F. Supp. 835, 838-43 (S.D.N.Y. 1963) (upholding the validity of 28 U.S.C. § 506, the precursor to 28 U.S.C. § 546)). The authors conclude that "[a]bsent a provision for such a choice by the President, the judicial appointment of a United States [A]ttorney would clearly be incongruous with separation of powers considerations." *Id.*

Of course, the executive is not free to choose another U.S. Attorney. The provisions of 28 U.S.C. § 541 require the President to submit his nominee for that office to the Senate for approval; only then can a presidentially appointed U.S. Attorney replace the one appointed by the court. See 28 U.S.C. § 541 (1994). *But cf. In re Farrow*, 3 F. 112, 115 (C.C.N.D. Ga. 1880) (holding that a prosecutorial office filled by a court appointee is "vacant," thereby granting the President the power to replace the court appointee by means of a recess appointment). So even though the President can remove a district court-appointed U.S. Attorney, the President cannot replace a U.S. Attorney without the Senate's concurrence. Moreover, the President is required to expend political capital to remove a district court's appointee.

313. *Morrison*, 487 U.S. at 676-77.

314. *Id.* at 676.

315. *Id.* (citing *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931)). The role of the United States commissioners, featured so prominently in this discussion, is very ambiguous. In another part of the *Morrison* opinion, they are characterized as "court officials." *Id.* at 679 n.16.

316. See *id.* at 679 n.16.

criminal cases, it could be said that courts are especially well qualified to appoint prosecutors.<sup>317</sup> The Court even pointed to the court appointment of U.S. Attorneys, and the lone district court opinion upholding its constitutionality, giving at least tacit approval to the practice.<sup>318</sup>

In rejecting the incongruity argument in *Morrison*, however, the Supreme Court emphasized the significance of the structural protections of the Ethics in Government Act, which shielded the judiciary from conflicts of interest and the appearance of impropriety:

In the light of the Act's provision making the judges of the Special Division ineligible to participate in any matters relating to an independent counsel they have appointed . . . we do not think that appointment of the independent counsel by the court runs afoul of the constitutional limitation on "incongruous" interbranch appointments.<sup>319</sup>

Such protection is entirely absent in the U.S.-Attorney-appointment process. The district court cannot recuse itself from the cases prosecuted by its U.S. Attorney because the U.S. Attorney is responsible for the majority of cases handled by the court.

Instead of relying on the supposed independence that judges bring to the appointment process, § 546(d) relies on the intimate familiarity of district judges with the prominent lawyers in their community. This may represent a rational choice by Congress. It may even lead to higher quality appointments in some instances—district judges are likely to be familiar with

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317. *Id.* at 676 n.13.

318. *Id.* at 676 (citing *United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963)).

319. *Morrison*, 487 U.S. at 677. The Judicial Council of the D.C. Circuit cited this structural protection in validating the propriety of judges seeking the advice of political leaders and others in choosing an independent counsel. See *In re Charge of Judicial Misconduct or Disability*, 39 F.3d 374, 380 (D.C. Cir. 1994) (discussing the statute prohibiting judges from presiding in cases argued by their appointees); see also *In re President's Comm'n on Organized Crime*, 783 F.2d 370, 381 (3d Cir. 1986) (upholding judges' participation in presidential commission because they could recuse themselves from related cases). *But cf. In re Application of President's Comm'n on Organized Crime*, 763 F.2d 1191, 1196-98 (11th Cir. 1985) (finding a judge's participation, even as an individual as opposed to *qua* judicial officer, inconsistent with appropriate judicial activity); Ronald L. Krotoszynski, Jr., *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 WM. & MARY L. REV. 417, 472-75 (1997) (arguing that *Morrison v. Olson* was wrongly decided because the court appointment of independent counsels undermines judicial independence and neutrality).

local legal talent, in many instances through the judges' former service in the office of the U.S. Attorney. In exercising the authority to appoint U.S. Attorneys, however, district courts jeopardize their institutional impartiality. As Judge Skelly Wright warned, the court appointment of government officials normally selected through the political process

cash[es] in on the judicial reputation. Most critically, public confidence in the judiciary is indispensable to the operation of the rule of law; yet this quality is placed in risk whenever judges step outside the courtroom into the vortex of political activity. Judges should be saved "from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties."<sup>320</sup>

The courts should reject the court appointment of U.S. Attorneys because it "risks politicizing the judiciary."<sup>321</sup>

As the Court of Appeals for the First Circuit acknowledged in *United States v. Hilario*, "[S]ection 546(d) lacks some of the safeguards that courts have relied on in the past when they have determined that the impartiality of the Judicial Branch would not be affected by judges' performing interbranch assignments."<sup>322</sup> Most prominently, the district judges must consider the cases and controversies brought before them by the very U.S. Attorney whom they have selected. Asking judges to choose the prosecutor of their liking requires the judges to step outside their traditional role of impartiality. Yet this impartiality is the single greatest asset of the judiciary—conferring on courts their legitimacy and the standing that courts enjoy as the accepted arbiter of justice.

Furthermore, when judges select prosecutors, prosecutorial accountability is sacrificed. Defendants can hardly be expected

320. *Hobson v. Hansen*, 265 F. Supp. 902, 923 (D.D.C. 1967) (Skelly Wright, J., dissenting). *But cf. id.* at 911 (majority opinion) (arguing that the Appointments Clause represents "a deliberate decision by the Framers to enable Congress in its wisdom to authorize 'the Courts of Law' to share with the executive the appointing power of federal officers").

321. According to Professor Amar,

Federal judges are given life tenure to remove them from daily politics, but the Independent Counsel statute risks politicizing the judiciary . . . Judges will not be good at picking prosecutors because they have inadequate information and weak incentives. Whereas the Attorney General has a wealth of information about the track record of prosecutors, judges do not and should not have access to this treasure trove of intra-executive intelligence, implicating various out-of-court activities that lie beyond the proper province of judicial supervision.

Amar, *supra* note 151, at 809.

322. *United States v. Hilario*, 218 F.3d 19, 28 (1st Cir. 2000), *cert. denied*, 121 S. Ct. 572 (2000).

to hold the court responsible for a bad appointment, at least not on the record. "Judges, after all, have life tenure, and appointing a surefire enthusiastic prosecutor could hardly be considered an impeachable offense. So if there is anything wrong with the selection, there is effectively no one to blame."<sup>323</sup> When defendants, and in particular, defense counsel appear before a court with the knowledge that the prosecutor was personally selected by the court, it cannot help but unsettle their confidence in the court's impartiality. This posture is likely to have an effect on the adversarial tactics defense counsel will be willing to employ, thereby undermining the fairness of the adversarial system. Who wants to tell a judge that his or her appointee has acted improperly? Yet we expect defense counsel to play such a role. Indeed, we rely on the adversarial system to ensure due process and fair play, and consequently, to buttress confidence in the courts. Moreover, as a matter of human nature, judges will naturally find it difficult to criticize their chosen prosecutor.<sup>324</sup> In the adjudication of cases, it is beneficial that judges are institutionally aloof and not responsive to the political will. This makes judges uniquely ill-suited to choose chief prosecutors.

There is a final distinction that distinguishes the incongruity analysis in this context from the court appointment of the Independent Counsel. The *raison d'être* of the Independent Counsel was to create an officer not appointed by the executive branch.<sup>325</sup> If such an officer was allowed to exist under the Constitution, as the *Morrison* Court concluded, then it was inevitable that the judicial branch would exercise its appointment authority in furtherance of this valid congressional purpose. This argument is inapplicable in the U.S. Attorney context because U.S. Attorneys are regularly selected through the political process. Instead, court appointment of U.S. Attor-

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323. *Morrison*, 487 U.S. at 730 (Scalia, J., dissenting); see also Amar, *supra* note 151, at 809 ("[W]hen an appointing authority is picking its own assistant, it obviously has strong incentives to pick well. If the subordinate does a bad job, other government officials and ordinary citizens will and should blame the boss.").

324. Some might argue that this natural sympathy would make the appointing judges even more critical of the U.S. Attorney's performance. This, too, undermines the propriety of having the judges make such an appointment. Judges should scrutinize the actions of the U.S. Attorney as the representative of a coordinate branch of government, not more and not less.

325. See *In re Charge of Judicial Misconduct or Disability*, 39 F.3d 374, 382 (D.C. Cir. 1994) (stating that the "entire purpose" of the Independent Counsel Act was to provide "*independence from the Executive Branch*").

neys exposes courts to scrutiny and criticism for undertaking a responsibility usually discharged by politicians.

The *Hilario* court attempts to justify the practice by analogizing it to criminal defendants' constitutional right to be represented by an attorney:

In context, the appointment of defense counsel for indigent criminal defendants would seem to be a necessary step for judges to take in order to provide for fair process. That rationale applies to the appointment of interim United States Attorneys with equal force. It is in keeping with preserving the institutional integrity of the judiciary that judges, faced with an indefinite vacancy in the office of United States Attorney, seek out a competent lawyer to represent the government.<sup>326</sup>

This analysis misperceives the structural and practical considerations at issue by misconstruing a critical distinction between courts appointing defense counsel and U.S. Attorneys. Unless there is a legislative provision for appointing defense counsel to represent indigent defendants, courts either appoint them or there will be none. Structurally, criminal prosecutions do not require defense counsel; for much of our nation's history, defense counsel was only required to be furnished to those who could afford to pay for it.<sup>327</sup> Such injustice, however, clearly implicates the court's integrity. The *Gideon* case establishes that criminal defendants have a constitutional right to counsel.<sup>328</sup> A criminal trial requires a prosecutor, on the other hand, not only to ensure that the government has an able advocate, but also to exercise prosecutorial discretion to determine in the first instance whether to file criminal charges and what charges to pursue. Because the decision to file criminal charges is a matter conferred exclusively to the executive branch and is not reviewable, a court is forced to preside over a criminal trial only after the prosecutor makes a positive determination that criminal charges are warranted.<sup>329</sup> The *Hilario* court appears

326. *Hilario*, 218 F.3d at 28-29.

327. See WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 21-33 (1955) (describing the development of constitutional jurisprudence on the right to counsel).

328. See *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

329. See *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ."); see also WAYNE R. LAFAYE ET AL., 4 *CRIMINAL PROCEDURE* § 13.2(a) (2d ed. 1999) (discussing the prosecutor's discretion in deciding whether to prosecute); O'Keefe & Safirstein, *supra* note 312, at 132 n.83 (listing cases describing prosecutorial responsibilities as an executive function).

to assume that the United States is just another party to federal criminal prosecutions that happen to end up in front of the courts. Such a characterization misconstrues the role of the government in such prosecutions. The United States is not just a *party* to criminal prosecutions—it is the sovereign prosecuting the charge(s) and vindicating the right of the people to demand justice. The necessity of a court's authority to appoint defense counsel is not analogous to the authority to appoint prosecutors.<sup>330</sup>

The judicial role is meant to be a passive one: Judges rule on cases and controversies that are presented by active, interested litigants. Our adversarial criminal justice system presumes that justice is best served when each side is given the opportunity to put its best case forward and a neutral third party determines the outcome.<sup>331</sup> It is a bedrock of contemporary constitutional jurisprudence that justice is not served if criminal defendants do not have a learned advocate to contest the charge and test the evidence.<sup>332</sup> Judges are compelled by forces outside their control, namely prosecutors, to secure criminal defense counsel in order to maintain the courts' integrity. The reverse proposition is not true with respect to prosecutors: Judges, as judges, do not have an interest in whether

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330. The *Hilario* opinion attempts to bolster its argument that the court appointment of prosecutors "is in keeping with preserving the institutional integrity of the judiciary" by citing to *Young v. United States ex rel. Vuitton et Fils S.A.* See *Hilario*, 218 F.3d at 29 (citing 481 U.S. 787, 800-01 (1987)). *Young*, however, cannot support the Court of Appeals for the First Circuit's judicial-integrity argument. In *Young*, the Supreme Court criticized the district court for appointing private counsel (with an interest in the outcome) to prosecute a contempt-of-court charge. *Young*, 481 U.S. at 802. The Supreme Court did recognize an inherent authority in the judiciary to convene contempt-of-court proceedings to ensure that its orders are respected and the integrity of the courts maintained. *Id.* at 800-01. But the Court held that courts must request the executive branch to prosecute the contempt charge(s) in the first instance; only when and if the executive branch refuses to prosecute the contempt charge(s) can the court appoint a prosecutor pursuant to the court's inherent authority to vindicate its own orders. *Id.* at 800-02.

Such inherent authority is inapposite in the context of criminal prosecutions. Courts have no inherent authority or any legitimate interest in the institution of criminal proceedings outside the limited circumstance of criminal contempt for lack of compliance with a court's own orders.

331. See *Powell v. Alabama*, 287 U.S. 45, 68-71 (1932) (recognizing that the right to effective assistance of counsel is fundamental to due process).

332. See *Evitts v. Lucey*, 469 U.S. 387, 394 (1985) (recognizing the "obvious truth that lawyers are 'necessities, not luxuries' in our adversarial system of criminal justice" (quoting *Gideon*, 372 U.S. at 344)).

criminal charges are filed.<sup>333</sup> Thus, by selecting U.S. Attorneys, judges lose their institutional distance and impartiality as to whether charges are filed (or settled). In addition, court appointment also raises the specter that, by choosing a prosecutor of the their liking, charges will be brought or disposed of in furtherance of the judges' real or perceived agendas. These same issues simply do not arise in the context of providing defense counsel to the indigent.<sup>334</sup>

On a more practical level, the government is not without prosecutors, even in the absence of U.S. Attorneys. The various offices of the U.S. Attorneys are staffed with career prosecutors. Assistant U.S. Attorneys actually conduct the litigation to which the United States is a party—a massive caseload of 157,987 cases pending in fiscal year 1999.<sup>335</sup> These Assistant U.S. Attorneys ensure continuity through changes in leadership. It is unclear why the *Hilario* court feels the need to impose a judicially selected supervisor on the prosecutors who would otherwise look to executive-branch appointees—the Attorney General and other Department of Justice officials—for direction.<sup>336</sup>

The court appointment provision of § 546 interjects judges into a political decision that is incongruous with proper judicial functions. Although judges may have the expertise needed to select good prosecutors, such appointments compromise the

333. See CUMMINGS & MCFARLAND, *supra* note 11, at 511 (“The administration and enforcement of the laws . . . begin not in the courts but in the offices and agencies of government to which necessarily there has been committed the authority to enforce many statutes. This, indeed, is the gist of the executive function.”).

334. See *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (articulating the “fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free”).

335. EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, *supra* note 13, at 16, 75 (discussing the total number of pending civil and criminal cases at the end of fiscal year 1999); see also *id.* at 130-32 (presenting a table of the total pending cases).

336. See *United States v. Hilario*, 218 F.3d 19, 29 (1st Cir. 2000) (“[J]udges' appointment of an interim United States Attorney assists the functioning of the court: at bottom, it assures the skillful processing of cases in which the United States is a party.”), *cert. denied*, 121 S. Ct. 572 (2000).

The *Hilario* analysis proves too much when it represents that federal prosecutorial authority is unacceptably compromised when the office of U.S. Attorney is vacant; such an argument undermines its conclusion that U.S. Attorneys are inferior officers. If a U.S. Attorney is so crucial to the functioning of the executive branch in its enforcement of the laws, surely U.S. Attorneys are principal officers whom the President must select.

courts' impartiality and create the appearance of a conflict of interest.

## V. COURT APPOINTMENT OF U.S. ATTORNEYS AND THE SEPARATION OF POWERS

The processes of appointing inferior officers, even those whose court appointment is not incongruous with appropriate judicial activity, must also survive scrutiny under the separation-of-powers doctrine.<sup>337</sup> In some senses, both the Appointments Clause and the inquiry into the "incongruity" of judicial appointments thereunder can be seen as components of the Constitution's separation of powers. Above and beyond these discrete analyses, however, the separation-of-powers doctrine polices the appropriate relationships and balance of power among the branches.<sup>338</sup>

Although the doctrine may not be explicitly enumerated in the Constitution's text,<sup>339</sup> it is part of "our basic constitutional

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337. Generally speaking, there are two schools of jurisprudential thought on how to approach separation-of-powers issues. The formal approach "stress[es] that the three branches of government should be kept as distinct as possible," while the functionalist approach "generally ask[s] whether the exercise of the contested function by one branch impermissibly intrudes into the core function or domain of [another] branch." Krent, *supra* note 124, at 1254-55; see also Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 583-85 (1991) (comparing formalist versus functionalist approaches); Strauss, *supra* note 274, at 488 (contrasting the Supreme Court's formalist approach in *Bowsher v. Synar* with its functionalist analysis in *Commodity Future Trading Comm'n v. Schor*). There is an argument that a more formal analysis is appropriate when the judicial branch is assigned responsibilities traditionally assigned to the executive or legislative branch, in order to protect the judiciary from being forced to make unnecessary political decisions. See Krotoszynski, *supra* note 319, at 478.

338. The incongruity analysis and the more general separation-of-powers analysis are related, yet distinct. The incongruity analysis is introspective, in that it is specifically concerned with whether the appointing authority in question undermines the court's own ability to function properly. The more general separation-of-powers analysis focuses on whether the court's exercise of the appointing authority either inappropriately aggrandizes the power of one branch or interferes with the proper functioning of another branch.

339. Responding to concerns that the Constitution did not contain an explicit recognition of the separation of powers, James Madison proposed to add an article to do just that. Madison proposed to add a new Article VII, which would have read as follows:

The powers delegated by this constitution, are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial; nor the executive exercise the powers vested in

doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government."<sup>340</sup> The Framers determined that the exercise of certain governmental powers was too consequential to be granted to any one branch, and accordingly forced the branches to work with one another.<sup>341</sup> The Appointments Clause, requiring presidential nomination and Senate confirmation, is one such safeguard.<sup>342</sup> Nevertheless, the Constitution largely confines the legislative, executive, and judicial actors to their predominant spheres.

The criminal justice system is a perfect illustration of the separation of powers. Each branch—legislative, executive, and judicial—has a constitutionally prescribed role. The legislative branch enacts laws that establish what behavior constitutes a criminal offense. The President cannot create crimes by executive order, nor can judges recognize crimes in the absence of a duly enacted statute.<sup>343</sup> The executive branch, directed by the

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the legislative or judicial; nor the judicial exercise the powers vested in the legislative or executive departments.

12 THE PAPERS OF JAMES MADISON 202 (Charles F. Hobson & Robert A. Rutland eds., 1979). Another proposal would have placed a separation-of-powers amendment in the Bill of Rights. Casper, *supra* note 27, at 221-22. Ultimately, neither proposal was adopted. *Id.*

340. *United States v. United States Dist. Court*, 407 U.S. 297, 317 (1972). The structure of the Appointments Clause—dividing responsibility for appointments between the executive and the legislature—can be seen as a structural blending of the separation of powers. Nonetheless, in order to maintain the accountability guaranteed by the system, the separation of powers must be respected and each of the branches must be limited to exercising the authority granted by the Constitution and not more.

341. *See, e.g.*, U.S. CONST. art. I, § 7, cl. 2 (granting the President a veto over legislative enactments). The Constitution "does not place comparable internal checks upon the executive branch." Krent, *supra* note 124, at 1293. Professor Krent argues that this lack of restrictions on the executive branch was based upon the belief that the branch was sufficiently constrained by congressional directive, and that "the need for dispatch in enforcing the laws militated against any cumbersome requirements delaying executive action." *Id.* The Appointments Clause, however, represents a structural blending of powers—granting Congress the authority to structure the appointments process for inferior officials and giving Congress a veto over the President's nominees for principal offices—aimed at instilling inter-branch cooperation and accountability, and ultimately, better government. *See id.* at 1269 (discussing the role of the Appointments Clause in "foster[ing] accountability").

342. The goal was to "contriv[e] the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

343. This country rejected the judicial recognition of common law crimes.

President, then prosecutes crimes by identifying transgressions of the law, investigating suspects, indicting defendants, and presenting evidence of guilt at trial. "The power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws . . ."<sup>344</sup> Neither Congress nor the courts can mandate a criminal prosecution. Finally, the Constitution provides for a neutral judiciary, institutionally invested in neither the drafting nor the execution of the law, to hear such cases and controversies as may be brought to its attention.<sup>345</sup> Neither the legislative nor the executive branch is entitled to sit in judgment on the innocence or guilt of individuals.<sup>346</sup> Assigning these responsibilities to different branches and actors was considered an "essential precaution in favor of liberty."<sup>347</sup>

By policing the appropriate roles of the branches, the separation-of-powers doctrine serves as a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."<sup>348</sup> No branch was considered more dangerous in this regard than Congress: "[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches."<sup>349</sup> It has been suggested that, through inter-branch appointments, Congress has the capacity to

Only Congress can enact criminal laws. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

344. *Cnty. for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986); *see also United States v. Armstrong*, 517 U.S. 456, 464 (1996) (stating that the Attorney General and the U.S. Attorneys may decide how to enforce federal laws "because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'" (quoting U.S. CONST. art. II, § 3)).

345. *See Amar, supra* note 151, at 809 ("Judges should never be in the business of picking prosecutors—this blurring of adjudicatory and prosecutorial roles ill fits the general liberty-enhancing architecture of separation of powers.").

346. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder . . . shall be passed [by Congress].").

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

348. *Mistretta v. United States*, 488 U.S. 361, 381-82 (1989) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam)).

349. *Buckley*, 424 U.S. at 129. *See* THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961) ("The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.").

“wreak havoc with the system of checks and balances” so that they “should be permitted only in the narrowest circumstances.”<sup>350</sup> According to Professor Harold Krent, “The balance of powers among the branches will be altered irrespective of whether Congress directly adds to its own authority because Congress’s power vis-à-vis the other branch will have increased in either instance.”<sup>351</sup>

Congress, while not explicitly granting itself any power, has altered the balance of power in the U.S. Attorney appointment process through the provisions of § 546. In the absence of § 546(d), authority to name the individual to oversee field prosecutions would inherently revert to the Attorney General as the head of the Department of Justice. Even if Congress could limit the ability of the Attorney General or the President to name unilaterally a successor pending Senate confirmation,<sup>352</sup> the authority would, by default, reside in the executive

350. Lessig & Sunstein, *supra* note 27, at 117.

351. Krent, *supra* note 124, at 1288. There may be two distinct separation-of-powers inquiries: (1) whether the challenged policy expands (or aggrandizes) one branch’s power beyond its constitutional confines; and (2) whether the challenged practice unduly interferes with or undermines another branch’s constitutionally vested authority. Although these may be two sides of the same coin, they may also represent a more nuanced way of approaching separation-of-powers controversies. See Strauss, *supra* note 274, at 517 (suggesting “an approach that would tend to treat a constitutional actor’s ‘aggrandizement’ of its own function and its ‘undermining’ or restriction of another’s function as separable issues.”).

352. Congress sought to limit the executive branch’s unilateral ability to fill vacancies in offices of the government through the Vacancies Act. 5 U.S.C. §§ 3345-3349 (1994) (current version at 5 U.S.C. 3345-3349 (2000)) (limiting appointment of acting officials in several ways including, in most circumstances, limiting the tenure of acting officials to 120 days). The Justice Department has historically declared itself unaffected by the Vacancies Act. See *Oversight of the Implementation of the Vacancies Act, Hearing on S.1764 Before the Senate Comm. on Governmental Affairs*, 105th Cong. 138-49 (1998) (statement of Joseph Onek, Principal Deputy Associate Attorney General, Department of Justice) (maintaining that the Vacancies Act does not constrain acting appointees of the Attorney General); 6 Op. Off. Legal Counsel 119, 120-21 (1982). The Department of Justice has argued that the basis for compliance with the Vacancies Act, indeed, compliance with the procedure established by the Appointments Clause generally, is “more practical and political than legal.” See *id.* at 121. Congress sought to change this with the passage of the Vacancies Reform Act of 1998 which extended the period that acting officers could serve from 120 to 210 days but unambiguously sought to cover vacancies in the Department of Justice. See 5 U.S.C. §§ 3345-3349 (2000).

The Vacancies Act raises interesting questions of separation of powers, but because of the explicit statutory scheme for filling U.S. Attorney vacancies, Vacancy Act issues are beyond the scope of this Article. See *id.* § 3347 (2000) (excepting from the Vacancies Act those appointments made pursuant

branch. Congress, by interposing the courts in this political process, makes it more likely that the President will compromise or accede.

By removing executive-branch authority to name an interim U.S. Attorney and placing that authority in the judiciary, Congress has changed the playing field dramatically. Under the process established by the Appointments Clause, if the Senate is displeased with a presidential nominee, Senators have to decide whether it is worth expending the necessary political capital to fight the President through non-confirmation.<sup>353</sup> Of course, the costs are higher if the objections are meritless or purely political: "The censure of rejecting a good [nominee] would lie entirely at the door of the Senate, aggravated by the consideration of their having counteracted the good intentions of the executive."<sup>354</sup> But Congress has found a way to have its cake and eat it too. In rejecting the President's nominee or making it known they will do so, which is usually sufficient, Senators need not worry that they will be blamed for halting effective law enforcement. The district court will pick up where the politically accountable branches have left off and appoint a U.S. Attorney to "assure[] the skillful processing of cases in which the United States is a party."<sup>355</sup> If the Senate finds that it has more in common with the prosecutorial phi-

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to an explicit statutory provision authorizing other means of appointment).

353. In order for this process to function properly, there has to be political pressure to reach consensus. Professor Gerhardt has opined that consensus in the appointments context is only likely where (1) both the Senate and the President believe that each will be held politically accountable for frustrating or slowing down the process; and (2) the Senate deliberates carefully before obstructing the President's choices because of "the high odds of failure and the high costs both to the institution and to individual Senators." Gerhardt, *supra* note 108, at 482. According to Professor Gerhardt, due to the structure of the Appointments Clause,

[I]t is difficult, if not impossible, for [Senators] to oppose *all* presidential nominations and still expect to keep the federal government operating effectively or to maintain credibility in claiming a purely non-partisan motivations [sic] for their actions. Consequently, Senators are forced to pick and choose their confirmation fights with the President carefully.

Gerhardt, *supra* note 113, at 1366. Although this analysis is most applicable to the Washington-based officers over whose nomination the Senate has less influence, it nonetheless informs an appreciation of the structural and institutional dynamics inherent in appointment practices.

354. THE FEDERALIST NO. 77, at 461 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

355. *United States v. Hilario*, 218 F.3d 19, 29 (1st Cir. 2000), *cert. denied*, 121 S. Ct. 572 (2000).

losophy of the district court than with the current President, it need never confirm a U.S. Attorney. To be sure, such a strategy would reduce the congressional role in selecting a U.S. Attorney, and presumably, the U.S. Attorney's responsiveness to congressional inquiry and suggestion. Depending on the political climate prevailing at the time, this may not be a bad bargain for the Senators.<sup>356</sup> But it is always a bad bargain for the political accountability sought by the Framers and woven into the Constitution.

Moreover, as distinguished from the Independent Counsel, U.S. Attorneys are not intended to operate independent of presidential control. The *Morrison* Court deferred to Congress's perceived legitimate interest in shielding the Independent Counsel from executive-branch control.<sup>357</sup> There is no similar purpose to support removing authority to appoint U.S. Attorneys from the politically accountable executive branch. The only explanation for diverting the appointment authority to the courts is Congress's desire to alter the balance of power vis-à-vis the executive branch. Vesting authority to appoint U.S. Attorneys in the district courts is an attempt to raise Congress's profile in the appointments process and to put pressure on the President to reach consensus with the Senate.<sup>358</sup> Courts should be wary of entering such a politically charged fray.

Court appointment further defeats political accountability by allowing the President to avoid making tough decisions for which he or she is constitutionally responsible. The President may decide that it is expedient to have a court-appointed U.S. Attorney. For example, the President may wish to avoid displeasing the Senate or other constituencies through his or her nominee, and instead of being responsible for poor prosecutorial decisions, the President may prefer to deflect criticism onto the

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356. Professor Richman has offered a similar argument to explain why Congress has not consolidated authority in Main Justice but has left the U.S. Attorneys' offices with a great deal of power and discretion: "In a period of divided government, a Congress controlled by one party might well prefer in the short term that power not be centralized in an executive controlled by the other party." Richman, *supra* note 79, at 806.

357. See *Morrison v. Olson*, 487 U.S. 654, 677 (1988).

358. Although Professors Lessig and Sunstein argue that "some degree of independence is constitutionally acceptable" when dealing with the prosecution of high-level presidential appointees, they concede that "[o]ther efforts to insulate prosecution would be more difficult, because the prosecutorial power is now intermingled with substantive policymaking." Lessig & Sunstein, *supra* note 27, at 110.

court. Just as Congress can use the potential for court appointment as leverage, the President can use the courts' appointment authority for political cover.<sup>359</sup> Courts should not countenance, much less contribute to, executive avoidance of the constitutional obligation to choose the U.S. Attorney.

Although it is true that the President can remove a court-appointed U.S. Attorney, he or she cannot stop the court from naming another (until the President can convince the Senate to confirm his or her nominee). Nothing prevents a district court from reappointing a U.S. Attorney who was removed by the President. It is untenable, however, that a court should be vested with such authority. Under the Constitution, the President is the head of the executive branch and must be able to be held accountable for the actions taken by the executive branch.<sup>360</sup> In no context is accountability more important to our civil society than the front lines of law enforcement and the exercise of prosecutorial discretion. Under our system of government, accountability resides in the political branches. It therefore violates the separation-of-powers doctrine to repose appointment authority for U.S. Attorneys in the judicial branch.

### CONCLUSION

There are many competing priorities in federal law enforcement, and no system of appointments or administration can equally serve all of them. National uniformity and local control are both important values that naturally oppose one another. A balance must be struck. Apart from the court appointment provisions, the current system of administration strikes a desirable, if inefficient, balance. The President,

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359. See, e.g., Rickhoff, *supra* note 163, at 500 (lamenting that the Western District of Texas "languished without a presidentially-appointed" U.S. Attorney for more than five years "due simply to political inertia").

360. The Solicitor General has been imbued with a tradition of independence from executive-branch loyalty that is in some ways greater than that of the U.S. Attorneys. See *Edmond v. United States*, 520 U.S. 651, 668 (1997) (Souter, J., concurring) (discussing the historical independence of the Solicitor General and suggesting that, at least under *Morrison*, "the Solicitor General of the United States . . . may well be a principal officer, despite his statutory 'inferiority' to the Attorney General"). Yet it would be unacceptable for courts to appoint an acting Solicitor General in the event of a vacancy, even if the President could remove the appointee at will, because the President must be able to choose the government's representative to the Supreme Court (and as a corollary, because the Supreme Court should not choose the government's Supreme Court advocate). The same holds true for U.S. Attorneys.

through the Attorney General, is ultimately responsible for federal law enforcement. But the ninety-three U.S. Attorneys, through congressional and local influences, maintain an independence that makes the reality of federal criminal prosecutions a matter of local discretion. That said, this system of administration places too much power in the hands of the U.S. Attorney to allow for that officer to avoid the scrutiny and accountability ensured through the Appointments Clause.<sup>361</sup>

Congress could, if it so desired, create a national criminal law enforcement administration that would function as a single hierarchy answerable to the Attorney General. Such a system could be used to establish uniformity in the exercise of prosecutorial discretion—discretion that is currently disbursed and disparately applied among the U.S. Attorneys. For example, U.S. Attorneys could be required to submit every decision to initiate an investigation and every charging decision to the Attorney General's office for prior review and approval. In other words, Congress could structure the federal law enforcement bureaucracy differently so as to make U.S. Attorneys genuinely inferior officers, appropriately directed and supervised by superior executive-branch officials. U.S. Attorneys could then, if

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361. A determination that the court appointment of U.S. Attorneys is unconstitutional would not necessarily undermine any of the actions taken (or convictions secured) by court-appointed U.S. Attorneys: "The *de facto* officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." *Ryder v. United States*, 515 U.S. 177, 180 (1995) (citing *Norton v. Shelby County*, 118 U.S. 425, 440 (1886)); see also *McDowell v. United States*, 159 U.S. 596, 602 (1895) ("[W]here there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public."). Courts, however, have become skeptical of invoking the *de facto* officer doctrine. For example, the Court of Appeals for the Ninth Circuit, "[f]ollowing the modern trend," refused to invoke the "ancient 'de facto officer' doctrine" to validate the acts of the court-appointed U.S. Attorney. *United States v. Gantt*, 194 F.3d 987, 998-99 (9th Cir. 1999) (reaching the merits and deciding that the court-appointment process "passes constitutional muster").

Even in the absence of the *de facto* officer doctrine, however, almost every action approved by a U.S. Attorney is carried out by a career Assistant U.S. Attorney, whose commission is not called into question by this analysis. See *id.* ("An infirmity in the United States Attorney's appointment would not generally affect the jurisdiction of th[e] court so long as a proper representative of the government participated in the action."); see also *United States v. Hilario*, 218 F.3d 19, 22 (1st Cir. 2000) (noting that "[b]ecause they are appointed directly by the Attorney General, [Assistant U.S. Attorneys'] ability to act does not hinge on the authority of the local United States Attorney" (citation omitted)), *cert. denied*, 121 S. Ct. 572 (2000).

Congress so chose, be selected from the corps of professional, civil service prosecutors at Main Justice and in the ninety-four U.S. Attorneys' offices through a merit-based promotion system. Alternatively, the Attorney General could be vested with the sole authority to appoint—and to remove—U.S. Attorneys. Under a system of direct supervision and effective control, the U.S. Attorneys properly could be considered inferior officers under the Appointments Clause, and as a consequence, Congress would have more discretion in structuring their appointments pursuant to the Excepting Clause. Taken to its logical conclusion, the reasoning of the *Hilario* and *Gantt* cases, for example, would even permit Congress to remove the selection of U.S. Attorneys from the executive branch altogether and vest the appointment of U.S. Attorneys exclusively in the courts.

Congress is unlikely to endorse such a dramatic change in the character of federal law enforcement for several interrelated reasons. As it stands, Senators exercise significant influence over the selection of U.S. Attorneys. The system provides Congress with a strong hand in ensuring that the federal law enforcement official most affecting their constituents is locally attuned and responsive. It also allows Senators to remain centered in local politics; the U.S. Attorney selection has implications both for individual Senators' legacies and the direction of their political parties. Moreover, by remaking U.S. Attorneys into inferior officers, Congress could not expand its role in selecting U.S. Attorneys. It could only maintain the Senate's current role or remove itself altogether from the appointment process by vesting exclusive appointive authority in the President, the head of a department, or the courts of law. There would seem to be little incentive for Congress to initiate such a change.

This argument brings this Article back to examining the current system and suggesting somewhat more modest modifications. If Congress wants to maintain the independence of the U.S. Attorneys, then U.S. Attorneys must be nominated by the President and confirmed by the Senate. The Appointments Clause brooks no exception to this rule if, as this Article argues, U.S. Attorneys constitute principal officers. But Congress has, for all intents and purposes, granted itself a second option to govern those times when the President has not nominated someone whom the Senate is willing to confirm. In times of appointment gridlock, neither the Senate nor the President need suffer for their obstinacy. The courts, Congress has de-

terminated, should appoint the U.S. Attorney when the political branches are unable to reach consensus. The Constitution, however, designed a different system, one in which the politically accountable branches have an interest in holding the others' feet to the fire. The Appointments Clause requires that the legislative and the executive branches work with one another. They cannot decide that on occasion this requisite cooperation is too onerous or inconvenient. They cannot abdicate their responsibilities and select the judiciary to fill the ensuing void. Yet this is precisely what the current system allows them to do.

This Article does not advocate overhauling the Department of Justice and making U.S. Attorneys truly inferior officers. The present system generally works well at serving many varied interests. It honors our tradition of federalism with national policies tempered by local discretion. The system is not perfect, however, and the partisan political instincts of U.S. Attorneys need to be kept in check. The way to instill that check is for the President and Congress to fulfill their constitutionally prescribed roles.

If U.S. Attorneys are classified as inferior officers, then the Senate's advice and consent is not constitutionally required. Nonetheless, the procedures utilized for appointing U.S. Attorneys should be modified. Consistent with the appropriate independence of the judiciary and the separation of powers, courts should not perform the political function of selecting supervisory prosecutors. The appointment of prosecutors is inherently political, requiring the weighing of policy priorities and personal qualities such as management skills and leadership abilities. Even if judges could be considered qualified to undertake such responsibilities, such appointments threaten their institutional independence, impartiality, and ultimately, the courts' integrity. The court-appointment provisions of 28 U.S.C. § 546 should be recognized as incongruous with appropriate judicial activity. Moreover, it is a function more naturally exercised by the executive-branch department to which U.S. Attorneys belong. As law enforcement is an executive function, the authority to direct the work of a U.S. Attorney's office—either through the appointment of an acting U.S. Attorney or through other means—should reside within the executive branch.

This is not to say that Congress is without means to affect the selection of the interim U.S. Attorney or to force the executive branch to name a successor in a timely fashion. Congress

has the ability to ensure that only responsible, professional prosecutors discharge the responsibilities of the U.S. Attorney during a vacancy. For example, Congress might require that acting U.S. Attorneys be selected from among the career prosecutors in the local U.S. Attorney's office. In the alternative, Congress could require Senate-confirmed officials from Main Justice to administer a U.S. Attorney's office directly where there is a vacancy. Limiting the executive-branch's discretion in this way would also provide a powerful incentive for the President to nominate an acceptable candidate for the permanent position. If a previously confirmed Department of Justice official had to be redirected to administer a U.S. Attorney's office, one can be confident that vacancies would be short-lived. Congress also could play budgetary hardball with an administration that was lagging on U.S. Attorney nominations or trying to skirt the Appointments Clause by functioning with interim or acting U.S. Attorneys. Intense congressional oversight is another avenue for securing executive-branch cooperation. Enlisting the judiciary in this fight, however, is neither necessary nor appropriate.

U.S. Attorneys and district court judges very often must work on the same cases: U.S. Attorneys as representatives of the executive branch as it seeks to enforce the laws, and judges as representatives of the independent judiciary. Having courts appoint U.S. Attorneys undermines the institutional integrity of both groups. Such a process comports with neither the Constitution nor the proper role of judges. Furthermore, such a process is not necessary. The appointment of U.S. Attorneys ought to be left to the executive branch, with the advice and consent of the Senate and with the supervision and oversight that Congress deems necessary. In this way, each branch can perform its proper role in the detection and punishment of crime—duties that are vital to our general welfare and domestic tranquility.