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Nothing Improper? Examining Constitutional Limits, Congressional Action, Partisan Motivation, and Pretextual Justification in the U. S. Attorney Removals

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NOTE

NOTHING IMPROPER? EXAMINING CONSTITUTIONAL LIMITS, CONGRESSIONAL ACTION, PARTISAN MOTIVATION, AND PRETEXTUAL JUSTIFICATION IN THE U.S. ATTORNEY REMOVALS

David C. Weiss*

*The forced mid-term resignations of nine U.S. Attorneys was an unprecedented event in American history. Nearly one year after the administration executed the removals, the House Judiciary Committee was still reviewing and publicizing emails, memoranda, and other documents in an effort to understand how the firings were effectuated. This Note examines many of those documents and concludes that the removals were likely carried out for partisan reasons. It then draws on the Constitution, Supreme Court precedent, and separation of powers principles to argue that Congress is constitutionally empowered to enact removal limitations for inferior officers such as U.S. Attorneys so long as those limitations do not impermissibly infringe on the president's Article II authority or result in congressional aggrandizement. Because of the partisan nature of the attorneys' removals, this Note argues that Congress should consider such legislation to limit the president's removal of U.S. Attorneys. In considering the constitutionality and efficacy of a potential statute, this Note examines three previous pieces of legislation on which such removal limitations could be modeled before proposing a fourth, hybrid statute that would emphasize the separation of powers values of balance and accountability in barring "partisan" removals of U.S. Attorneys. The Note concludes by claiming that the framework that the Supreme Court created in *McDonnell Douglas v. Green* can supply a useful analog to manage the fact-intensive probe into whether a removal was impermissibly "partisan" under the proposed statute or merely a typical, "political" removal, which any removal statute must likely allow to meet constitutional muster.*

* J.D. candidate, December 2008. Thank you to Marvin Krislov for his feedback and encouragement, and Brittany Parling and Samuel Brenner for their invaluable comments. Additional thanks to Stefan Atkinson, Carrie Bierman, Maria L. Domanskis, Josh Eveleth, Adrienne Fowler, Joan L. Larsen, Amie Medley, Bradley W. Moore, Gil Seinfeld, and Christina B. Whitman.

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There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn't blind. 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. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff will be inadequate. . . .

If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical vio-

lation of some act on the part of almost anyone. . . . It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

—Justice Scalia, dissenting opinion in *Morrison v. Olson*,¹ quoting Justice, then Attorney General, Robert H. Jackson’s address to a conference of U.S. Attorneys

INTRODUCTION

A Congressman phones the White House to complain about a U.S. Attorney (“USA”) in his state. He is worried about a public corruption investigation that may implicate him and damage his and the president’s political party. The president contacts the Department of Justice (“DOJ”) and asks the Attorney General (“AG”) to “look into” and “expedite” the situation. The AG convenes a team to plan the prosecutor’s ouster. The USA is removed, and word of the firing leaks. The administration states its rationale for the firing but amends its story as the explanation withers under scrutiny. The reaction: cries of improper partisanship, congressional hearings, introduction of legislation, but little substantive action. The USA: David Marston. The president: Jimmy Carter. The year: 1977.²

Fast forwarding thirty years, December 7, 2006 either marked the beginning of a major constitutional showdown—a date of infamy in a new interbranch conflict—or Senator Trent Lott was correct to mock claims that the Bush Administration had made executive personnel decisions for political reasons as “horrors of horrors.”³ Despite the ensuing controversy, for nearly two months, the media and the public failed even to notice the events of December 7, in which seven USAs received phone calls requesting their resignations.⁴ This inattention ceased when the subsequent

1. 487 U.S. 654, 727–28 (1988).

2. For a discussion of the Marston removal, see generally *Selection and Removal of U.S. Attorneys: Hearing on H.R. 10514 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 95th Cong. 103–14 (1978) [hereinafter *House Marston Hearings*]; Don Holt & Diane Camper, *The Marston Affair*, NEWSWEEK, Jan. 30, 1978, at 34.

3. *FOX News Sunday with Chris Wallace* (FOX News television broadcast Mar. 25, 2007) (transcript), available at <http://www.foxnews.com/story/0,2933,261049,00.html>.

4. This Note uses the terms “fired,” “dismissed,” “removed,” and “resigned” without distinction. The media embraced each term and, while the USAs did resign, there was little objection from the DOJ to the claim that they were fired. See, e.g., *Continuing Investigation into the U.S. Attorneys Controversy: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 26–28 (2007) [hereinafter *Judiciary Subcomm. Continuing Investigation Hearings*] (testimony of James Comey, former Deputy Att’y Gen., Dep’t of Justice) (failing to object to repeated characterizations that the USAs were “fired”). The seven USAs who received the December 7 phone calls requesting their resignation were David Iglesias, New Mexico; John McKay, Western Washington; Margaret Chiara, Western Michigan; Daniel Bogden, Nevada;

developments in this classic Washington cover-up—lead-story media coverage,⁵ congressional oversight hearings, and the AG’s resignation—illustrated the tensions between the president’s removal power and the proper roles of USAs and the DOJ. Commentators have described issues of illegal conduct,⁶ tensions between “Main Justice” in Washington and USAs’ offices,⁷ and implications of executive branch appointment of interim USAs.⁸ They have not, however, examined whether a purely partisan removal is inherently unconstitutional, nor whether Congress can and should limit such a removal—particularly given the likely pretext that the administration used to justify the firings—by statute, regardless of whether the removal is vulnerable to an underlying constitutional attack.

In many regards, Senator Lott was justified in highlighting the naiveté of those who expressed outrage at the suggestion that the administration fired USAs for political reasons.⁹ Defenders of the administration’s actions stated that the president’s use of politics should rarely, if ever, be limited in terms of executive branch personnel decisions.¹⁰ The U.S. Supreme Court has endorsed the view that the president can remove political appointees for political reasons in furtherance of his Article II grant.¹¹ This power can be difficult to square with the fact that, in its own mission statement,¹² and as recognized by the Supreme Court,¹³ the DOJ has historically ensured—and

Paul Charlton, Arizona; Kevin Ryan, Northern California; Carol Lam, Southern California. Richard B. Schmitt, *U.S. attorney firings open new doors for the 9*, L.A. TIMES, Dec. 9, 2007, at A20. In addition, H.E. “Bud” Cummins III, Eastern Arkansas, and Todd Graves, Western Missouri, were asked to resign earlier in 2006 as part of the same DOJ effort and are included as fired USAs in the media, congressional hearings, and this Note. *See, e.g.*, 153 CONG. REC. H5556 (2007).

5. *See* Mark Jurkowitz, *The Scent of Scandal Makes Gonzales the Big Story*, PEJ NEW COVERAGE INDEX, Mar. 18–23, 2007, <http://www.journalism.org/node/4733> (noting that the USAs’ firings were the most heavily covered story in print, television, and radio media in late March 2007).

6. *See, e.g.*, John McKay, *Train Wreck at the Justice Department: An Eyewitness Account*, 31 SEATTLE U. L. REV. 265 (2008).

7. *See, e.g.*, James Eisenstein, *The U.S. Attorney Firings of 2006: Main Justice’s Centralization Efforts in Historical Context*, 31 SEATTLE U. L. REV. 219 (2008).

8. *See, e.g.*, Laurie L. Levenson, *Live and Learn: Depoliticizing the Interim Appointments of U.S. Attorneys*, 31 SEATTLE U. L. REV. 297 (2008).

9. *See, e.g.*, *Judiciary Subcomm. Continuing Investigation Hearings*, *supra* note 4, at 7–41 (testimony of James Comey, former Deputy Att’y Gen., Dep’t of Justice); David C. Iglesias, Op-Ed., ‘Cowboy up,’ *Alberto Gonzales*, L.A. TIMES, May 23, 2007, at A21; Harry Litman, Op-Ed., *Guilty of politics*, L.A. TIMES, Mar. 14, 2007, at A23.

10. *See, e.g.*, *Department of Justice Oversight: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (Apr. 19, 2007) (statement of Sen. Arlen Specter); Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601 (2005).

11. U.S. CONST. art. II; *see Morrison v. Olson*, 487 U.S. 654, 693–95 (1988); *Humphrey’s Executor v. United States*, 295 U.S. 602, 626–28 (1935); *Myers v. United States*, 272 U.S. 52, 119 (1926).

12. United States Department of Justice, Mission Statement, <http://www.justice.gov/02organizations> (last visited Aug. 22, 2008).

13. *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . .”).

is supposed to provide—some modicum of independence in its enforcement of the law.¹⁴

Even adhering to a broad reading of the president's removal power, Congress can assert itself, insisting that removals are executed openly and that the justifications provided are not pretextual. As Justice Scalia explained in *Morrison v. Olson*, a critical limit on the removal power is the political check.¹⁵ If a unitary executive relies on the political check to assuage concerns of those who may be reluctant to accept an expansive removal power,¹⁶ it may be cause for concern when an administration takes purposeful steps to undermine that check.

This Note argues that Congress possesses the constitutional authority to restrain the president's removal of USAs within limits established by separation of powers principles and the Supreme Court's removal power jurisprudence. It maintains that because of the partisan, pretextual removals of the USAs, Congress can and should exercise its authority by passing legislation that requires a report of the grounds for removal and provides a removed USA with a cause of action to challenge her removal. Part I demonstrates why Congress should consider legislation in the wake of the USA firings by describing the controversy surrounding the USAs' removal and arguing that the proffered reason for their firing was pretext for removals motivated by partisanship. Part II asserts that USAs are constitutionally delineated inferior officers and traces the history and current state of removal power jurisprudence, concluding that removal limitations that do not infringe the president's Article II authority can be constitutional. It claims that the fired USAs do not possess a cause of action to challenge their removals, but that Congress is constitutionally empowered to create limits for future removals—as well as a cause of action for a USA to challenge her removal—so long as such constraints do not undermine the president's Article II grant. Part III asserts that, because of the administration's efforts to subvert the political check on the removal power by executing the partisan removals pretextually, Congress would be historically consistent and normatively justified in creating a statutory cause of action for a USA to challenge her removal. It addresses three previous legislative frameworks that Congress has considered in its efforts to insulate the DOJ from executive branch partisanship and concludes that a hybrid statute best incorporates separation of powers values and Supreme Court precedent. Part III concludes by differentiating between “partisan” and “political” removals. It argues that federal employment law and a preexisting Supreme Court

14. See *id.*; Eisenstein, *supra* note 7, at 221–26; Christian M. Halliburton, *The Constitutional and Statutory Framework Organizing the Office of the United States Attorney*, 31 SEATTLE U. L. REV. 213 (2008); Levenson, *supra* note 8, at 303–05. In addition to the statements of the DOJ and the Court, there are also normative reasons why one may desire such independence. See Note, *Government Counsel and Their Obligations*, 121 HARV. L. REV. 1409, 1411, 1415–16 (2008) (arguing that, in their counseling context, government attorneys owe a primary duty to the president except in cases of conflict, when the duty to the public takes precedence).

15. *Morrison*, 487 U.S. at 711 (Scalia, J., dissenting).

16. See *id.*

framework¹⁷ supply a useful analog to manage the fact-intensive probe into partisanship that a court hearing a removal challenge under the proposed statute would face.

I. THE U.S. ATTORNEY REMOVAL CONTROVERSY

In the spring of 2007, dissecting the USA firings became a favorite parlor game among journalists, legal commentators, bloggers, and armchair political observers.¹⁸ The story revealed by the thousands of emails that the DOJ has released more closely resembles a series of snapshots than a coherent narrative. Yet understanding the partisan focus of the removals and the pretextual spin that emerged when the firings garnered public attention is essential. First, this factual background is necessary to unpack the difference between “political” and “partisan” dismissals. As detailed in Part III, a “partisan” removal is one that is potentially improper because it is solely for political party or electoral advantage, but a “political” removal is one that can implicate policy such that it is constitutionally proper if it plausibly comports with the president’s Article II grant.¹⁹ Second, a factual explanation of the pretext at issue is necessary to understand not only why Congress *can* act in this situation, but also why it should.²⁰ Section I.A reconstructs the USAs’ removals, describing the partisan nature of the dismissals. Section I.B discusses the congressional oversight hearings on the nature of the removals. Section I.C examines the DOJ’s explanations and concludes that the proffered reasons for the firings were pretextual.

A. A History of the U.S. Attorney Firings

Despite the difficulties in constructing a factual account from the byzantine emails, statements, and explanations, it appears that the DOJ’s initial claim—that the USAs were fired for “performance-related reasons”—was a pretext for dismissals motivated by partisanship. While the nine dismissed USAs were each appointed by President Bush in either 2001 or 2002,²¹ the

17. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

18. See, e.g., Aaron Rutkoff, Inside the U.S. Attorneys Emails: Major Players and Themes, WALL ST. J. ONLINE, July 11, 2007, http://online.wsj.com/public/resources/documents/info-retro_DOJemails_070319.html; Talking Points Memo, U.S. Attorney Purge Timeline, <http://www.talkingpointsmemo.com/usa-timeline.php> (last visited Aug. 22, 2008).

19. See discussion *infra* Section III.C.1.

20. See discussion *infra* Section III.A.

21. Email from Kyle Sampson, Deputy Chief of Staff & Counselor to the Att’y Gen., to Harriet Miers, White House Counsel (Mar. 2, 2005, 21:49 EST), available at <http://judiciary.house.gov/hearings/pdf/DOJDocsPt1070313.pdf>, at OAG000000005-11; see also *supra* note 4 (explaining that nine USAs were actually fired). Part I does not include a detailed account of the reasons behind each of the USA firings because the justifications for some of the removals are still unclear. See Memorandum from John Conyers, Jr., Chairman, House Comm. on the Judiciary, to Members of the Comm. on the Judiciary (July 24, 2007), at 20–30 [hereinafter Conyers Memo], available at http://media.washingtonpost.com/wp-srv/politics/documents/contempt_memo_072407.pdf. This lack of information strengthens the argument that Congress should create a cause of action through which a USA could challenge her removal and bring transparency to the removal process.

initial effort to remove USAs began in the White House Counsel's office after the 2004 election.²² The idea floated at that time was to remove all ninety-three USAs.²³ The DOJ advised against this plan. In replying to the White House, Kyle Sampson, AG Gonzales's chief of staff, instead recommended replacing "15–20 percent" of the USAs, stating that the other "80–85 percent . . . are doing a great job, are loyal Bushies, etc. . . ."²⁴ The email from Sampson noted that he had discussed the issue with Gonzales and stated that "if Karl [Rove] thinks there would be political will to [proceed with the firings], then so do I."²⁵

Throughout 2005, the White House Counsel's office and the DOJ continued to work on their USA replacement plan. Following Harriet Miers's inquiry regarding the possibility of replacing all ninety-three USAs,²⁶ Sampson emailed Miers, the White House Counsel, a chart ranking all USAs on a variety of criteria including "loyalty to the President."²⁷ David Iglesias, the USA for New Mexico, appeared on this list as "recommended retaining,"²⁸ which was consistent with Sampson's previous view of Iglesias as a "diverse up-and-comer; solid."²⁹ However, during this time, the New Mexico Republican Party Chairman complained about Iglesias to Rove.³⁰

While planning for the USAs' removal was ongoing, the DOJ requested that the Senate Judiciary Committee insert language into the 2005 Patriot Act reauthorization giving the AG alone, without Senate advice and consent, the power to appoint interim USAs.³¹ This change in the Patriot Act emboldened

See discussion *infra* Section III.B.4 (evaluating the "informational" benefit of the legislation that this Note proposes).

22. Email from Kyle Sampson, Deputy Chief of Staff & Counselor to the Att'y Gen., to William Mercer, Acting Assoc. Att'y Gen. (Dec. 5, 2006, 20:51 EST), available at <http://judiciary.house.gov/hearings/pdf/DOJDocsPt2070313.pdf>, at OAG000000056.

23. See *id.*

24. Email from Kyle Sampson, Deputy Chief of Staff & Counselor to the Att'y Gen., to David G. Leitch, Deputy White House Counsel (Jan. 9, 2005, 19:34 EST), available at http://online.wsj.com/public/resources/documents/WSJ_5DOJ20070313_p1.pdf. The subject line of the email was "RE: Questions from Karl Rove [Deputy Chief of Staff]." *Id.*

25. *Id.*

26. Dan Eggen & John Solomon, *Firings Had Genesis in White House*, WASH. POST, Mar. 13, 2007, at A1.

27. Email from Kyle Sampson, Deputy Chief of Staff & Counselor to the Att'y Gen., to Harriet Miers, White House Counsel (Mar. 2, 2005, 17:42 EST), available at <http://judiciary.house.gov/hearings/pdf/DOJDocsPt1070313.pdf>, at OAG000000003.

28. *Id.* (explaining chart); email from Kyle Sampson to Harriet Miers (Mar. 2, 2005, 21:49 EST), *supra* note 21 (containing chart).

29. Email from Kyle Sampson, Deputy Chief of Staff & Counselor to the Att'y Gen., to Susan Richmond, Assistant to the Att'y Gen. & Deputy White House Liaison (Apr. 29, 2004, 12:11 EST), available at <http://judiciary.house.gov/hearings/pdf/DOJDocsPt7-1070319.pdf>, at OAG000000155.

30. Margaret Talev & Marisa Taylor, *Rove was asked to fire U.S. attorney*, MCCLATCHY NEWSPAPERS, Mar. 10, 2007, available at http://www.mcclatchydc.com/staff/margaret_talev/story/16356.html.

31. U.S.A. Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 502, 120 Stat. 191, 246 (2006) (amended 2007). 28 U.S.C. § 546 was subsequently returned to its pre-2006 form. Preserving United States Attorney Independence Act of 2007, Pub. L. 110-34, § 2,

the White House and the DOJ to dismiss the USAs.³² Shortly after the reauthorization Sampson emailed Miers suggesting that instead of firing all USAs they could remove seven of them based on evaluations that Sampson conducted within the DOJ.³³

In April 2006 the partisan pressure on the USAs increased. Senator Pete Domenici called the Office of the AG to complain about Iglesias's performance,³⁴ and on the same day that the *L.A. Times* reported that USA Carol Lam's inquiry had extended to reach Congressman Jerry Lewis,³⁵ Sampson emailed the White House mentioning that "[t]he real problem we have right now with Carol Lam that leads me to conclude that we should have someone ready to be nominated."³⁶ Lam was coming under increased scrutiny from Congressman Randy "Duke" Cunningham, who had signed a letter to the AG criticizing her,³⁷ and whom she was investigating.³⁸ While Lam continued to absorb criticism, the DOJ sent a letter in August to Senator Diane Feinstein replying to an inquiry she had made as to immigration enforcement.³⁹ In the letter, the DOJ defended Lam's immigration enforcement strategy.⁴⁰

In addition to Lam, Iglesias continued to face partisan complaints in the summer of 2006. In June, Scott Jennings, who reported directly to Rove, emailed Monica Goodling, Director of Public Affairs at the DOJ, regarding

121 Stat. 224, 224 (2007); see also Levenson, *supra* note 8, at 320; Amy Goldstein & Dan Eggen, *Prosecutor Posts Go to Bush Insiders; Less Preference Shown for Locals, Senators' Choices*, WASH. POST, Apr. 1, 2007, at A1.

32. See email from Monica Goodling, Dir. of Pub. Affairs, Dep't of Justice, to Kyle Sampson, Deputy Chief of Staff & Counselor to the Att'y Gen. (Sept. 13, 2006, 16:17 EST), available at <http://judiciary.house.gov/hearings/pdf/DOJDocsPt4070313.pdf>, at OAG000000121-22. As Sampson noted in an email, the new powers would allow the DOJ to get "our preferred person appointed" with "far less deference to home-State Senators," *id.*; however, after the controversy became a major media story, William Moschella, Principal Associate Deputy AG, claimed that he alone was responsible for requesting that the change be made to the Patriot Act, Margaret Talev & Marisa Taylor, *Justice Dept. distances White House from firings of U.S. attorneys*, McCLATCHY NEWSPAPERS, Mar. 14, 2007, available at http://www.mcclatchydc.com/staff/marisa_taylor/story/15779.html.

33. Email from Kyle Sampson to Harriet Miers (Mar. 2, 2005, 21:49 EST), *supra* note 21. Sampson's list of potential removals included Chiara, Cummins, and Lam, but not Iglesias, Ryan, or Charlton. *Id.*

34. Dan Eggen, *Domenici Says He Contacted Prosecutor*, WASH. POST, Mar. 5, 2007, at A1.

35. Peter Pae, *Lewis Surfaces in Probe of Cunningham*, L.A. TIMES, May 11, 2006, at A1.

36. Email from Kyle Sampson, Deputy Chief of Staff & Counselor to the Att'y Gen., to William Kelley, Deputy White House Counsel (May. 11, 2006, 11:36 EST), available at <http://judiciary.house.gov/hearings/pdf/DOJDocsPt3070313.pdf>, at OAG000000022.

37. See letter from nineteen members of Congress to Alberto Gonzales, Att'y Gen. (Oct. 20, 2005), available at http://online.wsj.com/public/resources/documents/WSJ_DOJDocsPt1-070319_p25-26.pdf.

38. See David Johnston, *Ex-C.I.A. Official Indicted In Inquiry Into Contracts*, N.Y. TIMES, Feb. 14, 2007, at A24. Due to Lam's investigation, Cunningham eventually plead guilty to accepting gifts valued at more than \$2 million. *Id.*

39. Letter from William E. Moschella, Assistant Att'y Gen., to Sen. Diane Feinstein (Aug. 23, 2006), available at <http://www.talkingpointsmemo.com/docs/doj-lam/?resultpage=1&>.

40. See *id.*

a donor who was “heavily involved in the President’s campaign’s legal team” and wanted to meet with someone at the DOJ regarding Iglesias.⁴¹ Goodling suggested that the donor meet with her if the matter was “sensitive,” as opposed to a “more generic resources type of conversation”;⁴² Jennings replied that it was indeed “sensitive.”⁴³

While Iglesias was facing this pressure, the sword had already fallen on USA Bud Cummins, who was asked to resign in June so that someone else could serve as the USA for the Eastern District of Arkansas.⁴⁴ Cummins’s replacement was Timothy Griffin, a former aide to Karl Rove and the first USA appointed under the new Patriot Act procedures.⁴⁵ Commentators assumed that his nomination would have been difficult to confirm in the Senate due to the appearance that the placement was a reward for his service under Karl Rove in the White House, and allegations that Griffin was instrumental in a plan to disenfranchise minority voters in the 2004 election.⁴⁶

USAs John McKay and Paul Charlton also defended themselves from partisan attacks in the summer of 2006. McKay, of Washington, responded to criticisms of his conduct following Washington’s 2004 gubernatorial election, which was narrowly won by the Democratic candidate.⁴⁷ McKay later explained in his congressional testimony that following the 2004 election Congressman Doc Hastings’s chief of staff contacted him and inquired whether McKay would be pursuing charges of voter fraud.⁴⁸ Charlton, of Arizona, was also conducting public corruption investigations involving members of Congress. Six weeks before Charlton was fired, Congressman Rick Renzi’s chief of staff placed a call to Charlton questioning his federal

41. Email from Scott Jennings, Special Assistant to the President & Deputy Political Advisor, to Monica Goodling, Dir. of Pub. Affairs, Dep’t of Justice (June 20, 2006, 10:16 EST), available at <http://www.talkingpointsmemo.com/docs/jennings-nm>.

42. Email from Monica Goodling, Dir. of Public Affairs, Dep’t of Justice, to Scott Jennings, Special Assistant to the President & Deputy Political Advisor, (June 20, 2006, 11:30 EST), available at <http://www.talkingpointsmemo.com/docs/jennings-nm>.

43. Email from Scott Jennings, Special Assistant to the President & Deputy Political Advisor, to Monica Goodling, Dir. of Pub. Affairs, Dep’t of Justice (June 20, 2006, 11:42 EST), available at <http://www.talkingpointsmemo.com/docs/jennings-nm>.

44. Donna Leinwand & Kevin Johnson, *Gonzales’ deputy attorney to step down: Has testified 7 of 8 prosecutors fired for performance*, USA TODAY, May 15, 2007, at 5A.

45. Warwick Sabin, *End Around: Senators question U.S. attorney appointment*, ARK. TIMES, Dec. 28, 2006.

46. *Id.*

47. A 261-vote margin separated the Democrat and Republican candidates. See Wash. Sec’y of State, 2004 Governor’s Race, http://www.secstate.wa.gov/elections/2004gov_race.aspx (last visited Aug. 22, 2008).

48. Dan Eggen & Paul Kane, *Prosecutors Say They Felt Pressured, Threatened*, WASH. POST, Mar. 7, 2007, at A1. In addition to this contact, the Chairman of Washington’s Republican Party, while in “regular” contact with Karl Rove regarding the election, contacted McKay regarding the investigation into voter fraud in the gubernatorial race that he hoped McKay would pursue more aggressively. David Bowermaster, *GOP Chair called McKay about ’04 election*, SEATTLE TIMES, Mar. 14, 2007, at A1. Washington businessman and Republican contributor Tom McCabe also made “repeated” calls to the White House asking that McKay be fired for failing to adequately investigate the alleged voter fraud. David Bowermaster, *McKay “stunned” by report on Bush*, SEATTLE TIMES, Mar. 13, 2007, at A9.

probe of Renzi's role in a land deal that benefited his friend and former business partner.⁴⁹ Charlton later told House investigators that he alerted the DOJ about the call because he believed it was potentially improper.⁵⁰

In September, the DOJ and the White House continued planning the removals,⁵¹ increasing the partisan pressure on the USAs. McKay stated that in September, during an interview for a federal judgeship, White House officials asked him to explain why he had "mishandled" the governor's race.⁵² Iglesias recounted that one month before the 2006 election he received calls from Republican members of New Mexico's congressional delegation seeking information and making veiled threats about his voter-fraud investigation.⁵³ It was during this period that President Bush spoke with the AG, alerting him to complaints that some USAs had failed to pursue voter-fraud cases.⁵⁴ Iglesias was then added to the dismissal list just before the November 7 elections, after Rove complained to the DOJ regarding Iglesias's investigation.⁵⁵

On November 27, 2006, Sampson organized a high-level DOJ meeting, which Gonzales attended, to discuss the removals.⁵⁶ Also in November, an

49. Amy Goldstein & Dan Eggen, *Renzi Aide Called U.S. Attorney to Ask About Probe*, WASH. POST, Apr. 26, 2007, at A4.

50. *Id.*

51. In September, the list of USAs to be fired included all of the eventually fired attorneys except Iglesias and Ryan; Sampson urged that, "as a matter of Administration policy, we utilize the new statutory provisions that authorize the AG to make USA appointments." Email from Kyle Sampson, Deputy Chief of Staff & Counselor to the Att'y Gen., to Harriet Miers, White House Counsel (Sep. 13, 2006, 16:25 EST), available at <http://judiciary.house.gov/hearings/pdf/DOJDocsPt2070313.pdf>, at OAG000000032.

52. Eggen & Kane, *supra* note 48. In addition, William Kelley asked McKay to explain "why Republicans in the state of Washington would be angry with [him]." R. Jeffrey Smith, *Ex-Prosecutor Says He Faced Partisan Questions Before Firing*, WASH. POST, Mar. 26, 2007, at A3.

53. Iglesias testified that Congresswoman Heather Wilson and Senator Domenici contacted him to inquire about his voter-fraud and corruption probe of Democrats in New Mexico relating to possible kickbacks. Eggen, *supra* note 34. Wilson was in the middle of a reelection campaign that she would win by just 861 votes. See New Mexico Sec'y of State, *Canvass of Returns of General Election Held on November 7, 2006*, <http://www.sos.state.nm.us/06GenResults/Statewide.pdf>, at 1. Iglesias stated that he felt "leaned on" and "sickened" by the calls, stating that Wilson asked him, "[w]hat can you tell me about sealed indictments?" and that when he was unresponsive, Wilson became upset and ended the phone call. Eggen & Kane, *supra* note 48. Approximately ten days after the call from Wilson, Iglesias stated that he received a call at his home from Domenici who asked him if the kickback charges were "going to be filed before November." *Id.* However, Domenici claimed that "'at no time in that conversation or any other conversation with Mr. Iglesias did I ever tell him what course of action I thought he should take on any legal matter. I have never pressured him nor threatened him in any way.'" Eggen, *supra* note 34. Wilson similarly claimed that she "'did not ask about the timing of any indictments and [she] did not tell Mr. Iglesias what course of action [she] thought he should take or pressure him in any way.'" Paul Kane & Dan Eggen, *Second Lawmaker Contacted Prosecutor*, WASH. POST., Mar. 6, 2007, at A1.

54. Eggen & Solomon, *supra* note 26.

55. Dan Eggen & Paul Kane, *Ex-Aide Contradicts Gonzales on Firings*, WASH. POST, Mar. 30, 2007, at A1.

56. See CQ Transcripts Wire, *Transcript: Gonzales Testifies Before Senate Panel*, WASHINGTONPOST.COM, Apr. 19, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/04/19/AR2007041902035_pf.html; Letter from Senator Patrick Leahy, Chairman, S. Comm. on the Judiciary, to Glenn A. Fine, Inspector Gen., Dep't Justice (Aug. 16, 2007), available at <http://>

email exchange between Tasia Scolinos, Director of Public Affairs, DOJ, and Catherine Martin, Deputy Assistant to the President and Deputy Communications Director for Policy and Planning, White House Counsel's Office, illustrated a media strategy of ex post justification for the firings by drawing the immigration thread between Charlton, Lam, and Iglesias.⁵⁷

Finally, on December 7, 2006, Mike Battle, Director of the Executive Office for U.S. Attorneys, phoned the USAs to ask for their resignations; none were given a reason for the dismissal.⁵⁸ The dismissals were conducted privately so there was no immediate public backlash; however, by January Senators Patrick Leahy and Feinstein had noticed the firings, and on January 11, 2007, Feinstein issued a press release that generated national news about the firings for the first time.⁵⁹

B. Congressional Oversight of the Removals

Following the publicity surrounding the USA removals, Congress attempted to uncover the reasons for the removals with a particular focus on whether the removals were pretextual and whether the administration had actually orchestrated them for partisan reasons. At the outset of the congressional investigation into the USA firings, the DOJ was adamant that it had been transparent and proper. On January 18, 2007, Gonzales testified that he would “‘never, ever make a change in a United States attorney for political reasons or if it would in any way jeopardize an ongoing serious investigation. I just would not do it.’”⁶⁰

leahy.senate.gov/press/200708/8-16-07%20PJL%20tr%20to%20Glenn%20Fine-AG.pdf; email from Kyle Sampson, Deputy Chief of Staff & Counselor to the Att'y Gen., to Andrew Beach (Nov. 21, 2006, 18:49 EST), available at <http://judiciary.house.gov/hearings/pdf/OAG878-914.pdf>, at OAG000000878 (inviting Gonzales to attend the meeting).

57. In discussing possible political fallout from the firings and the communications strategy to deal with it, Scolinos wrote Martin: “The one common link here is that three of them are along the southern border so you could make the connection that DOJ is unhappy with the immigration prosecution numbers in those districts.” Email from Tasia Scolinos, Dir. of Public Affairs, Dep't of Justice, to Catherine Martin, Deputy Assistant to the President & Deputy Commc'ns Dir. for Policy and Planning, White House Counsel's Office (Nov. 21, 2006, 13:20 EST), available at http://online.wsj.com/public/resources/documents/WSJ_onecommonlink-email-p5-6.pdf, at OPA000000005.

58. Eggen & Solomon, *supra* note 26. According to Iglesias, when he asked Battle why he was being asked to resign, Battle responded, “‘I don't know and I don't want to know.’” Questions from Subcommittee Chair Linda Sánchez for David Iglesias, H. Comm. on the Judiciary, <http://judiciary.house.gov/Media/PDFS/Chair-Iglesias070430.pdf>. According to Bogden, after he was told to resign, he contacted Associate AG Mercer to find out why he was being fired, and that Mercer told him that the administration had a short, two-year window in which to provide more Republicans with the opportunity to have been USAs so that more Republicans would make strong candidates for the Federal bench and future political positions. Questions from Subcommittee Chair Linda Sanchez for Daniel Bogden, H. Comm. on the Judiciary, <http://judiciary.house.gov/Media/PDFS/sanchezQnA070430.pdf>.

59. Press Release, Office of U.S. Senator Dianne Feinstein, Senators Feinstein, Leahy, Pryor to Fight Administration's Effort to Circumvent Senate Confirmation Process for U.S. Attorneys (Jan. 11, 2007), available at http://feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&ContentRecord_id=18a696d7-7e9c-9af9-7a2b-397a786a69fc&Region_id=&Issue_id=

60. Dan Eggen, *Prosecutor Firings Not Political, Gonzales Says*, WASH. POST, Jan. 19, 2007, at A2.

One month after the AG's claims, Deputy AG Paul McNulty testified that the USAs were removed because of "performance-related" issues.⁶¹ This testimony was likely a critical turning point in the USA firing controversy. Until the "performance-related" justification, not one of the fired USAs had spoken out in her own defense. At least one USA reported to the *Washington Post* that the performance-related justification spurred the fired attorneys into action, and "'was the moment the gloves came off.'"⁶² In the weeks following McNulty's testimony, USAs McKay and Daniel Bogden (of Nevada) defended their offices, stating that neither had received reviews indicating performance-related problems.⁶³ By March Mike Battle announced his resignation,⁶⁴ amid reports that six of the dismissed USAs had received positive job evaluations.⁶⁵

On March 6 the USAs testified on Capitol Hill, claiming pretextual justifications for the firings. Iglesias and McKay testified to the pressuring calls that they had received from members of Congress and staff.⁶⁶ Bogden and Charlton testified that William Mercer, Acting Associate AG, told them that they were removed to allow other Republicans to build their resume.⁶⁷ Cummins testified that Michael Elston, Chief of Staff and Counselor, Office of the Deputy AG, called him before the hearing to discuss the implications of further public comments by the fired USAs.⁶⁸ Following that call, Cummins sent an email to the other USAs, alerting them that what Elston had

61. Marisa Taylor, *Official denies prosecutors were ousted for political reasons*, MCLATCHY NEWSPAPERS, Feb. 6, 2007, available at http://www.mcclatchydc.com/staff/marisa_taylor/story/15563.html. McNulty testified that the DOJ "'never [has] and never will seek to remove a United States attorney to interfere with an ongoing investigation or prosecution, or in retaliation for prosecution,'" but he conceded that Cummins was not removed for a performance-related reason. *Id.*; see also *Preserving Prosecutorial Independence: Is The Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (Feb. 6, 2007) (testimony of Paul J. McNulty, Deputy Att'y Gen., Dep't of Justice).

62. Dan Eggen, *6 of 7 Dismissed U.S. Attorneys Had Positive Job Evaluations*, WASH. POST, Feb. 18, 2007, at A11. *But see* McKay, *supra* note 6, at 270–71 (claiming that the USAs were spurred into action after Gonzales's January 18 testimony during which they believed he was "lying" to the Senate Judiciary Committee).

63. Dan Eggen, *Fired Prosecutor Disputes Justice Dept. Allegation*, WASH. POST, Feb. 9, 2007, at A6; Adrienne Packer, *U.S. attorney rebuts claim performance led to firing*, LAS VEGAS REV.-J., Feb. 8, 2007, at 1B.

64. Laurie Kellman, *Probe of Prosecutor Firings Intensifies*, WASH. POST, Mar. 5, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/05/AR2007030500170.html>.

65. See Eggen, *supra* note 62.

66. *Restoring Checks and Balances in the Confirmation Process of United States Attorneys: Hearing on H.R. 580 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 49–50, 54 (2007) [hereinafter *House Confirmation Process Hearings*] (testimony of David C. Iglesias, former U.S. Att'y for the D.N.M., and John McKay, former U.S. Att'y for the W.D. Mich.).

67. *Id.* at 73, 76 (testimony of Daniel Bogden, former U.S. Att'y for the D. Nev., and Paul K. Charlton, former U.S. Att'y for the D. Ariz.).

68. *Id.* at 78–79 (testimony of H.E. (Bud) Cummins, former U.S. Att'y for the E.D. Ark.).

told him could be interpreted as a threat.⁶⁹ At the same hearing, Principal Associate Deputy AG William Moschella testified that the dismissals were motivated by a number of factors, including a desire for “renewed vigor,” insubordination, failure to follow DOJ policy, and “a need for greater leadership.”⁷⁰

The day after the USAs’ testimony, Gonzales wrote in *USA Today* that the scandal was merely an “overblown personnel matter” and that the fired USAs had simply lost Gonzales’s confidence.⁷¹ However, by March 13 Kyle Sampson had resigned as Gonzales’s chief of staff.⁷² In conjunction with the resignation, the DOJ claimed that Sampson failed to share information regarding his work on the USAs’ removal within the DOJ.⁷³ The next day Gonzales claimed that he was only peripherally aware of the firing process, which Sampson had directed.⁷⁴ But despite Gonzales’s claims, on March 16, Sampson asserted that he had not misled anyone at the DOJ and that “[t]he fact that the White House and Justice Department had been discussing this subject since the election was well known to a number of other senior officials

69. Email from H.E. “Bud” Cummins to Dan Bogden, Paul K. Charlton, David Iglesias, Carol Lam, John McKay (Feb. 20, 2007, 17:06 EST), available at <http://www.talkingpointsmemo.com/docs/usa-email>. Cummins wrote in the email:

The essence of [Elston’s] message was that [the people at DOJ] feel like they are taking unnecessary flak to avoid trashing each of us specifically or further, but if they feel like any of us intend to continue to offer quotes to the press, or organize behind the scenes congressional pressure, then they would feel forced to somehow pull *their* gloves off and offer public criticisms [Elston] reacted quite a bit to the idea of anyone voluntarily testifying and it seemed clear that they would see that as a major escalation of the conflict meriting some kind of unspecified form of retaliation.

Id.

70. *House Confirmation Process Hearings*, *supra* note 66, at 19–20 (testimony of William Moschella, Principal Associate Deputy Att’y Gen.).

71. Alberto R. Gonzales, Op-Ed., *They lost my confidence*, USA TODAY, Mar. 7, 2007, at 10A.

72. Sheryl Gay Stolberg & Jeff Zeleny, ‘Mistakes’ Made on Prosecutors, Gonzales Admits, N.Y. TIMES, Mar. 14, 2007, at A1.

73. *Id.*

74. Transcript, Attorney General Gonzales On the U.S. Attorney Firings (Mar. 13, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/13//AR2007031300891.html>. Gonzales stated:

[S]o, as far as I knew, my chief of staff was involved in the process of determining who were the weak performers; where were the districts around the country where we could do better for the people in that district.

. . . .

But that is, in essence, what I knew about the process. I was not involved in seeing any memos, was not involved in any discussions about what was going on. . . .

. . . .

. . . I never saw documents. We never had a discussion about where things stood.

Id.

at the department, including others who were involved in preparing the department's testimony to Congress.'⁷⁵

Following Sampson's statement, the White House and the DOJ faced continued pressure as details of the November 27, 2006 meeting attended by Gonzales became public, appearing to contradict the AG's previous statements.⁷⁶ On March 28, Acting Assistant AG Richard Hertling sent a letter to Representatives John Conyers and Linda Sanchez stating that previous statements supplied to Congress were inaccurate.⁷⁷ Namely, despite Sampson writing on December 19 that the appointment of Griffin was "important to Harriet [Miers], Karl [Rove], etc."⁷⁸ Sampson and Hertling signed off on a February 23, 2007 letter to Senator Charles Schumer stating that "[t]he Department is not aware of Karl Rove playing any role in the decision to appoint Mr. Griffin."⁷⁹

On March 29, 2007, Sampson testified that he had at least five discussions with Gonzales regarding the removals and that Gonzales's testimony to the contrary was not "accurate."⁸⁰ Sampson also testified that "'the decision makers in this case were the attorney general and the counsel to the president [Miers].'"⁸¹ Gonzales testified before the Senate Judiciary Committee on April 19, 2007, in what was largely perceived as a hearing on which his job

75. *Former Justice Dept. Official Defends Actions*, N.Y. TIMES, Mar. 18, 2007, at A23 (quoting Brad Berenson, Kyle Sampson's lawyer).

76. See Dan Eggen, *Gonzales Met With Top Aides On Firings*, WASH. POST, Mar. 24, 2007, at A1; David Stout & David Johnston, *A Top Aide to Gonzales Resigns, Becoming Latest Fallout Casualty*, N.Y. TIMES, Apr. 7, 2007, at A1. Goodling took a leave of absence from her position and resigned on April 6. Stout & Johnston, *supra*.

77. Letter from Richard A. Hertling, Acting Assistant Att'y Gen., to Rep. John Conyers, Jr. and Rep. Linda T. Sanchez (Mar. 28, 2007), available at <http://judiciary.house.gov/hearings/pdf/Conyers-Sanchez070328.pdf>.

78. Email from Kyle Sampson, Deputy Chief of Staff & Counselor to the Att'y Gen., to Monica Goodling, Dir. of Pub. Affairs, United States Department of Justice (Dec. 19, 2006, 18:27 EST), available at <http://judiciary.house.gov/hearings/pdf/DOJDocsPt3070313.pdf>, at OAG000000127.

79. Compare Letter from Richard A. Hertling, Acting Assistant Att'y Gen., to Sen. Charles E. Schumer (Feb. 23, 2007), available at <http://www.talkingpointsmemo.com/docs/schumer-letter/?resultpage=1&> (indicating that the letter was from Hertling), with email from Kyle Sampson, Chief of Staff, Dep't of Justice, to Paul J. McNulty, Deputy Att'y Gen., Dep't of Justice, et al., at DAG00000228-29 (Feb. 8, 2007, 16:15 EST), available at <http://judiciary.house.gov/hearings/pdf/DAG2228-2293.pdf> (providing the draft text of the letter that Hertling eventually signed).

80. Eggen & Kane, *supra* note 55. Recalling that Gonzales "'had received a complaint from Karl Rove about U.S. attorneys in three jurisdictions,'" Dana Milbank, *Taking One for the Team, When He Could Remember*, WASH. POST, Mar. 30, 2007, at A2, Sampson stated, "'I don't think the attorney general's statement that he was not involved in any discussions of U.S. attorney removals was accurate . . . I remember discussing with him this process of asking certain U.S. attorneys to resign.'" Eggen & Kane, *supra* note 55.

81. Eggen & Kane, *supra* note 55. Sampson, however, stressed that, to his knowledge, neither he nor any other DOJ official did anything improper in the USA removals. *Id.* Sampson explained the apparent contradiction between the letter to Schumer, which claimed that Rove played no role in the appointment of Griffin, and his statement in his email, claiming that the appointment of Griffin was important to Miers and Rove, by explaining that he had actually discussed the appointment only with Rove's aides and thus assumed the importance to Rove. See David Johnston & Eric Lipton, *Ex-Aide Disputes Gonzales Stand Over Dismissals*, N.Y. TIMES, Mar. 30, 2007, at A1.

depended.⁸² Prior to the hearing, Gonzales published an op-ed in the *Washington Post* in which he wrote that none of the removals was pursued for an “improper reason.”⁸³

In his testimony Gonzales again claimed that nothing improper had occurred: “‘It would be improper to remove a U.S. Attorney to interfere with or influence a particular prosecution for partisan political gain. I did not do that. I would never do that.’”⁸⁴ Gonzales did not remember many details the committee desired, including the discussions leading up to the USAs’ firing and the November 27 meeting that he attended.⁸⁵ Though he claimed that the USAs were not removed for improper reasons, Gonzales did confirm Sampson’s testimony that Rove had discussed frustration with Iglesias and other USAs regarding voter-fraud investigations.⁸⁶

Although Gonzales survived the April hearing, trouble lay ahead for the embattled AG. The removal revelations continued in Spring 2007 with the USAs’ direct supervisor’s testimony that the reasons supplied by the DOJ for the dismissals had “not been consistent with [his] experience;”⁸⁷ the resignation of Paul McNulty, Deputy AG;⁸⁸ an increased focus on USA resignations and the connection to voter-fraud cases in battleground election states;⁸⁹ more calls from members of Congress, including Republicans, for

82. Dan Eggen & Paul Kane, *Senate Delays Gonzales Testimony on Firings*, WASH. POST, Apr. 17, 2007, at A14.

83. Gonzales wrote:

I know that I did not—and would not—ask for the resignation of any U.S. attorney for an improper reason. . . .

....

... To be clear: I directed my then-deputy chief of staff, Kyle Sampson, to initiate this process; fully knew that it was occurring; and approved the final recommendations. Sampson periodically updated me on the review. As I recall, his updates were brief, relatively few in number and focused primarily on the review process.

During those conversations, to my knowledge, I did not make decisions about who should or should not be asked to resign.

Alberto R. Gonzales, Op-Ed., *Nothing Improper*, WASH. POST, Apr. 15, 2007, at B7.

84. Dan Eggen & Paul Kane, *Senators Chastise Gonzales at Hearing*, WASH. POST, Apr. 20, 2007, at A1.

85. *Id.*

86. *Id.* In addition, the DOJ began an internal review as to whether Monica Goodling violated the Hatch Act in considering political affiliation in the appointment of interim or acting USAs. Dan Eggen and Amy Goldstein, *Ex-Aide to Gonzales Accused Of Bias*, WASH. POST, May 3, 2007, at A1.

87. *Judiciary Subcomm. Continuing Investigation Hearings*, *supra* note 4, at 10 (testimony of James Comey, former Deputy Att’y Gen., Dep’t of Justice).

88. Letter from Paul J. McNulty, Deputy Att’y Gen., to Alberto Gonzales, Att’y Gen. (May 14, 2007), available at http://media.washingtonpost.com/wp-srv/politics/documents/McNulty_Resignation_051407.pdf.

89. Dan Eggen & Amy Goldstein, *Voter-Fraud Complaints by GOP Drove Dismissals*, WASH. POST, May 14, 2007, at A4. These cases included USAs Todd Graves and Steven Biskupic, of Milwaukee, who was initially targeted to be removed but was saved, perhaps because he brought

Gonzales's resignation;⁹⁰ and, finally, the use-immunity testimony of Monica Goodling. In her testimony on May 23, Goodling minimized her role in the firings. She continued to create problems for Gonzales, however, describing a conversation she had with the AG after she told him of her desire to leave the DOJ—a conversation that made her “uncomfortable” and in which, she gave the impression, Gonzales had coached her testimony.⁹¹ Goodling also stated that McNulty had been “not fully candid [with Congress] about his knowledge of White House involvement in the replacement decision.”⁹²

C. *The End for Gonzales*

Eventually this constant pressure became too great for the AG, the DOJ, and the White House to ignore. In August, Gonzales testified that senior DOJ officials had not received political briefings from the White House, but he was forced to amend his testimony by letter a week later, admitting that Goodling, Sampson, and others had attended such briefings led by, among others, Karl Rove.⁹³ On August 24, Gonzales announced his resignation without providing his reasons.⁹⁴

The major issue raised by these facts, allegations, and denials is self-evident: It is extremely difficult in termination cases to understand motive

fourteen voter-fraud cases after he was added to an early version of the firing list. See Conyers Memo, *supra* note 21, at 30.

90. See, e.g., Press Release, Office of U.S. Senator Norm Coleman, Statement on Attorney General Alberto Gonzales (May 17, 2007); Press Release, Office of U.S. Senator Chuck Hagel, Hagel Calls for Resignation of Attorney General Gonzales (May 16, 2007).

91. *Continuing Investigation into the U.S. Attorneys Controversy and Related Matters (Part I): Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 90 (2007) [hereinafter *Judiciary Comm. Continuing Investigation Hearings*] (testimony of Monica Goodling, Dir. of Pub. Affairs, Dep't of Justice). According to Goodling, “[Gonzales] laid out for me his general recollection of . . . [s]ome of the process regarding the replacement of the U.S. attorneys. . . . [A]nd then he asked me . . . if I had any reaction to his iteration.” *Id.* Commentator Jon Stewart ridiculed the assumed result that Gonzales was trying to achieve and the AG's explanation that he was trying to comfort Goodling, not influence her testimony. Stewart mocked:

By the way, who comforts people by laying out their recollection of events? I know this is a very difficult time for you. I also had a very difficult time between the hours of eight and eleven a.m. on the morning of November 12, at which time I was in no way authorizing political firings.

The Daily Show with Jon Stewart (Comedy Central television broadcast May 24, 2007), available at <http://www.thedailyshow.com/video/index.jhtml?videoId=87519&title=as-goodling-as-it-gets>.

92. *Judiciary Comm. Continuing Investigation Hearings*, *supra* note 91, at 8 (testimony of Monica Goodling). Goodling's testimony that she “crossed the line” in asking political questions of job applicants covered by the Hatch Act led to an expanded internal investigation of DOJ hiring by its Office of Professional Responsibility. Dan Eggen, *Justice Dept. Expands Probe to Include Hiring Practices*, WASH. POST, May 31, 2007, at A4.

93. Dan Eggen & Paul Kane, *Gonzales Now Says Top Aides Got Political Briefings*, WASH. POST, Aug. 4, 2007, at A5.

94. See Associated Press, *Gonzales' Resignation Text*, SFGATE, Aug. 27, 2007, <http://www.sfgate.com/cgi-bin/article.cgi?file=/n/a/2007/08/27/national/w074739D02.DTL>; Letter from Alberto Gonzales, Att'y Gen., to President George W. Bush (Aug. 26, 2007), available at http://www.usdoj.gov/ag/speeches/2007/ag_resign_letter.pdf.

and intent without something like a smoking gun email or statement.⁹⁵ For example, on the day of the firings, William Kelley sent an email stating that Domenici's chief of staff was "happy as a clam,"⁹⁶ and, a week later, Sampson wrote to Goodling, "Domenici is going to send over names tomorrow (not even waiting for Iglesias' body to cool)."⁹⁷ Whether this is evidence of improper interference or simply excitement at the removal of an underperforming USA is challenging to determine.

While demonstrating pretextual dismissals is difficult, the executive's contradictions in this case are so numerous that the "performance-related" justification for the removals is likely pretext for removals motivated by partisanship. The administration contradicted itself as follows: first, between Gonzales's own claims regarding his involvement;⁹⁸ second, between the White House's statement that Rove forwarded complaints from Republican officials to the DOJ,⁹⁹ and the DOJ's previous claim that it was unaware of Rove's role in the USA removals;¹⁰⁰ third, between the purpose demonstrated by the DOJ's removal planning,¹⁰¹ and the immigration rationale it suggested to the White House for the firings;¹⁰² and finally, between McNulty's testimony that offered the "performance-related" justification,¹⁰³ and the USAs' testimony regarding their performance reports and what they were told when they were fired.¹⁰⁴ These contradictions indicate that performance was not the motivation behind the firings.¹⁰⁵ However, the facts

95. As this Note went to press, the DOJ's Office of the Inspector General and Office of Professional Responsibility jointly issued a 358-page report detailing the timeline of the USA removals and analyzing the reasons for the firings. U.S. Dep't of Justice, Office of Prof'l Responsibility & Office of Inspector Gen., *An Investigation into the Removal of Nine U.S. Attorneys in 2006* (Sept. 2008), available at <http://www.usdoj.gov/opr/us-att-firings-rpt092308.pdf>. Despite conducting approximately ninety interviews, *id.* at 2, and producing the most detailed USA removal report produced to date, the DOJ was "unable to fully develop the facts regarding the removal of Iglesias and several other U.S. Attorneys because of the refusal by certain key witnesses to be interviewed" and because of "the White House's decision not to provide internal White House documents" to the DOJ investigation, *id.* at 325–26.

96. Eggen & Solomon, *supra* note 26.

97. Email from Kyle Sampson, Deputy Chief of Staff & Counselor to the Att'y Gen., to Monica Goodling, Dir. of Pub. Affairs, Dep't of Justice (Dec. 14, 2005, 18:47 EST), available at <http://judiciary.house.gov/hearings/pdf/DOJDocsPt3070313.pdf>, at OAG000000125.

98. Compare note 74 and accompanying text, with note 83 and accompanying text.

99. See, e.g., Ron Hutchesson et al., *White House says Rove relayed complaints about prosecutors*, MCLATCHY NEWSPAPERS, Mar. 11, 2007, available at <http://www.mcclatchydc.com/whitehouse/story/15873.html>.

100. Letter from Richard A. Hertling to Sen. Charles E. Schumer, *supra* note 79. Despite contradicting the White House, Sampson's emails themselves indicate that the DOJ was aware of Rove's involvement. See *supra* note 78 and accompanying text.

101. See *supra* notes 23–33, 56 and accompanying text.

102. See *supra* notes 56–57 and accompanying text.

103. See *supra* note 61 and accompanying text.

104. See *supra* notes 66–69 and accompanying text.

105. These contradictions say nothing of inconsistencies like the DOJ initially targeting neither Iglesias, nor McKay, nor Charlton, see email from Kyle Sampson to Harriet Miers, *supra* note 21, but then removing these USAs after influential Republicans, including members of Congress,

that are harmful to the DOJ have only been made public due to congressional interest and happenstance.¹⁰⁶ If a USA facing a similar situation in the future tried to bring a claim challenging her removal, it would be difficult for her to produce such evidence. While the DOJ's Office of Professional Responsibility and Office of the Inspector General have already released reports in their investigation of the USA firings, facts indicating a clear obstruction of justice related to the USA firings—such as a prosecution or decision not to prosecute motivated by a potential target's political party—have not yet come to light.¹⁰⁷ If such information were available, the removals would be plainly illegal.¹⁰⁸ If no one unearths such facts, however, whether these partisan, pretextual removals exceed the scope of the removal power is a difficult inquiry because of remaining questions regarding the president's removal power and the constitutional status of USAs.

complained about investigations—or lack of investigations—in elections or affairs implicating that member, her family, or her close political allies, *see supra* notes 30, 34, 43, 46–50, 52–55 and accompanying text. The recent DOJ investigation into the USA firings similarly concluded that partisan politics likely motivated at least some of the USA removals:

The most serious allegations that arose were that the U.S. Attorneys were removed based on improper political factors, including to affect the way they handled certain voter fraud or public corruption investigations and prosecutions. Our investigation found significant evidence that political partisan considerations were an important factor in the removal of several of the U.S. Attorneys. The most troubling example was David Iglesias, the U.S. Attorney in New Mexico. We concluded that complaints from New Mexico Republican politicians and party activists about Iglesias's handling of voter fraud and public corruption cases caused his removal, and that the Department removed Iglesias without any inquiry into his handling of the cases.

U.S. Dep't of Justice, *supra* note 95, at 325–26.

106. An argument that the firing of a USA would always generate public and congressional interest is rebutted by the fact that neither Bud Cummins's nor Todd Graves's firings were a major public issue until the mass USA firings came to light. *See Conyers Memo, supra* note 21, at iii (describing the January 2006 firing but the delayed investigation of the removal of USA Todd Graves); CQ Transcripts Wire, *Transcript: U.S. Senate Judiciary Committee Holds a Hearing on Dismissal of U.S. Attorneys*, WASHINGTONPOST.COM, Mar. 6, 2007, http://media.washingtonpost.com/wp-srv/politics/documents/senatejudiciary_hearing_030607.htm 44 (illustrating that Cummins was notified in June 2006 that he was being forced to resign). This delayed outcry demonstrates that when a USA resigns without protest, timely public protest is normally impossible.

107. *See* U.S. Dep't of Justice, *supra* note 95; U.S. Dep't of Justice, Office of Prof'l Responsibility & Office of Inspector Gen., *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General* (July 28, 2008), available at <http://www.usdoj.gov/opr/goodling072408.pdf>; U.S. Dep't of Justice, Office of Prof'l Responsibility & Office of Inspector Gen., *An Investigation of Allegations of Politicized Hiring in the Department of Justice Honors Program and Summer Law Intern Program* (June 24, 2008), available at <http://www.usdoj.gov/opr/oig-opr-investigation-hire-slip.pdf>. On September 29, 2008, AG Michael Mukasey named a special prosecutor, Nora Dannehy, the acting USA in Connecticut, to further the investigation into the USA removals and determine whether any administration officials or members of Congress should face criminal charges arising from their involvement in the removal process. Eric Lichtblau & Sharon Otterman, *Special Prosecutor Named in Attorney Firings Case*, N.Y. TIMES, Sept. 30, 2008, at A16.

108. *See* 18 U.S.C. § 1512(c) (2000 & Supp. 2005).

II. THE REMOVAL POWER

The Constitution does not explicitly address removal from office except by way of impeachment.¹⁰⁹ The removal power is, however, a critical tool for the president to control the executive branch.¹¹⁰ Section II.A addresses the history and breadth of the removal power, focusing on the constraints that the Supreme Court has allowed on the power. It claims that, under a plain reading of *Morrison*, Congress may create indirect removal limitations for inferior officers, provided that they neither involve Congress in the removal process nor inhibit the president's mandate to ensure that the laws are faithfully executed. Section II.B concludes that Supreme Court precedent, explicit circuit court consideration, and the role of the USA office indicate that USAs are inferior officers within the meaning of the Constitution. Section II.B relies on Supreme Court decisions, the Constitution, debates of the First Congress, and subsequent historical practice to support the claim that, despite the fact that USAs perform some "executive" functions, Congress is empowered to enact removal limitations over USAs so long as the limitations comport with *Morrison*. Section II.C examines a number of potential theories on which a USA could challenge her removal, but concludes that the USAs currently have no viable cause of action on which to ground such a challenge.

A. *The Source of the Removal Power and Congressional Limitations on the President*

Although the Constitution does not explicitly address the removal power, a number of theories support it. The power is primarily grounded in the Vesting Clause, "The executive Power shall be vested in a President of the United States of America,"¹¹¹ and the Take Care Clause, "[The President] shall take Care that the Laws be faithfully executed."¹¹² In what has come to

109. See U.S. CONST. art. I, § 2, cl. 5 (conferring sole power of impeachment upon the House of Representatives); *id.* § 3, cl. 6 (granting sole power to try cases of impeachment to the Senate); *id.* art. II, § 4 (president, vice president, and other civil officers of the United States subject to impeachment for "Treason, Bribery, or other high Crimes and Misdemeanors"); *id.* art. III, § 1 (judges to have tenure during "good Behaviour").

110. See, e.g., Yoo et al., *supra* note 10.

111. U.S. CONST. art. II, § 1.

112. *Id.* § 3. Though "Take Care Clause" is more common, this clause is also sometimes referred to as the "Faithful Execution Clause." E.g., Peter M. Shane, *Returning Separation-of-Powers Analysis to Its Normative Roots: The Constitutionality of Qui Tam Actions and Other Private Suits to Enforce Civil Fines*, 30 ENVTL. L. REP. 11081, 11102 (2000). Under a third theory, the removal power is derived from the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, and "[t]he right to remove is an incident to the power of appointment." *Ex parte Hennen*, 38 U.S. (3 Pet.) 230, 253 (1839). Commentators have explained that this theory, while symmetrical, is not supported constitutionally, practically, or historically. See, e.g., Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 161 (1994); Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1834–36 (2006). *But see* Halliburton, *supra* note 14, at 214. The Supreme Court and recent administrations have seemed more reluctant to abandon this view despite its deficiencies. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 678–79 (1988); 7 Op. Off. Legal Counsel 95, 97–100 (1983). A more thorough discussion of the derivation of the removal

be known as the Decision of 1789, the First Congress concluded that the president retained a constitutional right to remove executive officers,¹¹³ but it did not agree on a lone textual source for the power.¹¹⁴ The debate focused on whether the president could remove officers by himself,¹¹⁵ James Madison's view, or if he needed the advice and consent of the Senate, as originally advocated by Alexander Hamilton.¹¹⁶

The Supreme Court first attempted to define the scope of the removal power in *Marbury v. Madison*.¹¹⁷ Chief Justice Marshall viewed the power narrowly, finding that an appointment created vested legal rights to office.¹¹⁸ While Marshall's view was merely dicta,¹¹⁹ the Supreme Court has used the reasoning behind it—that a president's removal powers may be limited when that limitation does not infringe on his Article II duties—in subsequent removal decisions.¹²⁰

Recognizing that the discussion of the removal power in *Marbury* was not binding, the Court in *Parsons v. United States* made one of its first forays into the removal power, but failed to rule on the constitutional issue.¹²¹ The Court rejected the claim of a USA who sought pay for his entire four-year commission despite being removed by President Cleveland.¹²² The

power is beyond the scope of this Note and has been extensively discussed in the literature. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Martin S. Flaherty, *Relearning Founding Lessons: The Removal Power and Joint Accountability*, 47 CASE W. RES. L. REV. 1563 (1997); Greene, *supra*; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963 (2001); Prakash, *supra*.

113. *Myers v. United States*, 272 U.S. 52, 111–15 (1926).

114. See Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 658 (2004).

115. *Myers*, 272 U.S. at 119–33.

116. THE FEDERALIST NO. 77 (Alexander Hamilton). But note that, as secretary of the treasury in President Washington's Cabinet, Hamilton changed his view expressed therein. Prakash, *supra* note 112, at 1829.

117. 5 U.S. (1 Cranch) 137 (1803).

118. In dicta, Marshall wrote:

[W]hen the officer is not removeable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.

....

... [A]s the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country.

Marbury, 5 U.S. (1 Cranch) at 162.

119. *Parsons v. United States*, 167 U.S. 324, 335–36 (1897).

120. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 689–90 (1998); *Humphrey's Executor v. United States*, 295 U.S. 602, 631–32 (1935) (citing *Marbury*, 5 U.S. (1 Cranch) at 162, 165–66).

121. 167 U.S. 324 (1897).

122. See *id.*

Court was not yet willing to rule on whether Congress possessed the constitutional authority to restrain the president's removal power; it instead relied on its interpretation of an act addressing the appointment power to hold that the president had statutory authority to remove USAs.¹²³

In *Myers v. United States*, the Court subsequently changed tacks, squarely addressing Congress's ability to limit the removal power.¹²⁴ *Myers* involved the firing of a postmaster notwithstanding a statute providing that postmasters could only be removed before the end of their term with the advice and consent of the Senate.¹²⁵ Chief Justice Taft read the framers' debates and the Constitution to stand for the president's exclusive power of removal.¹²⁶ However, even *Myers* conceded that Congress possessed the power to shield inferior officers, including those who served political functions, from the president's plenary removal power.¹²⁷

The broad reading of presidential power in *Myers* lasted only eleven years as the Court, without a former president at its head,¹²⁸ took a different stance and limited the scope of *Myers* in *Humphrey's Executor v. United States*.¹²⁹ Unlike the split Court in *Myers*,¹³⁰ the *Humphrey's Executor* Court unanimously upheld the authority of Congress to limit the removal of a commissioner of the Federal Trade Commission ("FTC") in cases of "inefficiency, neglect of duty, or malfeasance in office,"¹³¹ a standard that the Court referred to as "for cause."¹³² The Court drew a distinction between "purely executive officers," such as the postmaster in *Myers*, whom the president alone could remove, and "quasi-legislative" or "quasi-judicial" officers, like those at the FTC, for whom the president's removal power could be limited.¹³³ The Court drew this distinction because it was concerned that if Congress could not check the removal of these officers, the only check on removal would be review by the judiciary.¹³⁴

While the classification of the officer being removed is no longer a sufficient test to determine whether Congress can limit the president's removal power,¹³⁵ the Court has not fully discarded the *Humphrey's Executor*

123. *Id.* at 342–43.

124. 272 U.S. 52 (1926).

125. *Id.* at 107.

126. *Id.* at 106, 161.

127. *See id.* at 173–74.

128. Taft retired from the Court in 1930. ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 297–98 (1965).

129. 295 U.S. 602 (1935).

130. *See Myers*, 272 U.S. at 240 (Brandeis, J., dissenting); *id.* at 177 (Holmes, J., dissenting).

131. *Humphrey's Executor*, 295 U.S. at 623.

132. *Id.* at 629.

133. *Id.* at 629–32.

134. *Id.* at 629.

135. *See Morrison v. Olson*, 487 U.S. 654, 689–91 (1988).

reasoning. The Court deployed it in *Wiener v. United States*,¹³⁶ the next major removal power case. *Wiener* expanded on *Humphrey's Executor*, holding that even when no statutory limit on removal existed, the president may not be able to remove executive officers where independence from the president was desirable.¹³⁷ *Wiener* was a former member of the War Claims Commission ("WCC") who had been appointed by President Truman but removed by President Eisenhower without good cause.¹³⁸ The statute creating and governing the WCC was silent on removal, but the Court held that the president's removal authority over a "quasi-judicial" officer was not plenary when there was reason that the officer should exert some independence and that Congress may have assumed such independence in drafting the statute.¹³⁹

Most recently, in *Morrison v. Olson*, the Court resisted the Assistant AG, Theodore Olson, and two other executive officers in their challenge to the constitutionality of the independent counsel provisions of the Ethics in Government Act.¹⁴⁰ The Act provided that the AG could only remove the independent counsel ("IC") for good cause and would then have to file a report with the House and Senate Judiciary Committees describing the grounds for the removal.¹⁴¹ The Court recognized that *Humphrey's Executor* had rejected part of the reasoning in *Myers*—at least in practice—because in allowing removal limitations for officers performing a "quasi-judicial" or "quasi-legislative" function,¹⁴² the Court had gone against *Myers* in sanctioning removal limitations on officers who exercised some "purely executive" functions.¹⁴³

Justice Rehnquist, writing for the *Morrison* majority,¹⁴⁴ engaged in a functional analysis and clarified that an officer's description as "executive" is not dispositive in considering whether Congress can limit the president's removal power.¹⁴⁵ The critical inquiry is, first, whether an officer is a principal officer, over whom the president possesses plenary removal power, or an inferior officer for whom congressionally-imposed removal limitations can

136. 357 U.S. 349 (1958).

137. *Wiener*, 357 U.S. at 356; see also ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 351–52 (3d ed. 2006).

138. *Wiener*, 357 U.S. at 350.

139. *Id.* at 352, 354–56. While the Court continued to rely on *Wiener's* function as the key issue in the case, *Wiener* remains important today for its holding that where independence from the president is desirable, the Court may be more willing to find an outer limit to the president's removal power. See *id.* at 352–56.

140. 487 U.S. at 659–62.

141. 28 U.S.C. § 596(a)(1)–(2) (2000).

142. See *Morrison*, 487 U.S. at 687–91; *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

143. See M. Elizabeth Magill, *The Revolution that Wasn't*, 99 Nw. U. L. REV. 47, 52 (2004).

144. *Morrison*, 487 U.S. at 659.

145. *Id.* at 689–90.

be constitutional.¹⁴⁶ Second, if the officer is an inferior officer, the Court asks whether the limitation on the removal power with regard to that officer interferes with “the President’s exercise of the ‘executive power’ and his constitutionally appointed duty to ‘take care that the laws be faithfully executed’ under Article II.”¹⁴⁷

The Court held that the IC was an inferior officer and that the good cause limitation was not an unconstitutional limit on the president’s Article II grant.¹⁴⁸ It explicitly rejected the reasoning that limitations could not be placed on the president’s removal power in cases involving officials who serve “core executive functions.”¹⁴⁹ The Court also upheld the provision of the Act stating that the decision by the AG to remove for good cause was subject to judicial review, finding “no constitutional problem in the fact that the Act provides for judicial review of the removal decision.”¹⁵⁰ It stated that judicial review of the AG’s removal decision in such a case “is a function that is well within the traditional power of the Judiciary.”¹⁵¹

In a lone dissent Justice Scalia claimed that the case was straightforward and that the majority’s approach in relying on the IC’s function was incorrect.¹⁵² For Scalia, the only relevant inquiries were whether the IC’s exercise of prosecutorial power was executive power, and if it was, whether the Act deprived the president of any control over that prosecutorial power.¹⁵³ Scalia concluded that the IC’s prosecutorial role was “a quintessentially executive function” from which it followed that any limitation on the president’s control over the IC was a constitutionally defective violation of separation of powers principles.¹⁵⁴

In rejecting Justice Scalia’s formalistic inquiry,¹⁵⁵ *Morrison* suggests that congressional limits on the removal power are constitutional so long as they do not “unduly trammel[] on executive authority.”¹⁵⁶ Many commentators agree that Congress can provide such limits on the removal of inferior officers.¹⁵⁷ The Court has long recognized the principle that when Congress

146. *See id.*

147. *Id.* at 690.

148. *Id.* at 691.

149. *Id.* at 688.

150. *Id.* at 693 n.33.

151. *Id.* at 695.

152. *See id.* at 705 (Scalia, J., dissenting).

153. *See id.*

154. *Id.* at 705–08.

155. *See id.* at 705.

156. *Id.* at 691 (majority opinion); *see also* Calabresi & Rhodes, *supra* note 112, at 1167 (conceding this reading of *Morrison* but noting that the Supreme Court’s approach to removal is “hopelessly contradictory”).

157. *See, e.g.,* Halliburton, *supra* note 14, at 215; Lessig & Sunstein, *supra* note 112, at 117–18; *see also* Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Séance*, 60 TENN. L. REV. 841, 861 (1993) (“Congress’s ability to fetter the President’s discretion in removing inferior officers has never been seriously doubted.” (citing *United States v. Perkins*, 116

vests the appointment of inferior officers in the heads of Departments, it retains the ability to limit the Executive's exercise of the removal power by statute.¹⁵⁸ The constitutional challenge for Congress is thus twofold: identify which officers are inferior and enact removal limits that do not violate the principles from *Morrison*.¹⁵⁹

B. U.S. Attorneys Are Inferior Officers for Whom Congress Is Constitutionally Empowered to Enact Removal Limitations

Whether USAs are primary or inferior officers is a threshold inquiry for Congress's ability to limit their removal, but drawing such a line is difficult. The Constitution does not define the term "inferior officer," and recognition of this demarcation difficulty is not new.¹⁶⁰ The Court has interpreted the Appointments Clause as creating two classes of executive officers.¹⁶¹ "Principal officers" are nominated by the president and appointed with the advice and consent of the Senate.¹⁶² The Constitution allows Congress to designate the appointment process and limit removal for "inferior officers."¹⁶³ In finding the IC to be an inferior officer, the *Morrison* Court declined to provide a generally applicable line between principal and inferior officers.¹⁶⁴ The Court based its finding that the IC was an inferior officer on the following factors: she held her office subject to removal by the AG, she possessed lim-

U.S. 483 (1886)). What types of limitations are permissible for primary officers, if any, is debatable; however, as this Note claims that USAs are inferior officers, *see* discussion *infra* Section II.B., such a discussion is unnecessary here.

158. *See* *Myers v. United States*, 272 U.S. 52, 159–61 (1926); *United States v. Perkins*, 116 U.S. 483 (1886). A more difficult question is whether Congress can limit the removal of inferior officers for whom it has not vested appointment authority in a department head. *See infra* note 163.

159. *See* discussion *infra* Section III.B.

160. *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 362 (Melville M. Bigelow ed., 5th ed. 1891).

161. *United States v. Germaine*, 99 U.S. 508, 509 (1878).

162. *Buckley v. Valeo*, 424 U.S. 1, 132 (1976). Some inferior officers, such as USAs, are appointed by advice and consent, 28 U.S.C. § 541(a) (2000), but this is the result of Congress choosing to impose that method of appointment by statute, *see id.*

163. U.S. CONST. art. II, § 2, cl. 2; *Morrison v. Olson*, 487 U.S. 654, 670–73 (1988). A subsidiary issue to the inferior officer discussion is whether Congress must exercise its constitutional authority to vest the appointment of an inferior officer in someone other than the President (with the advice and consent of the Senate) in order to be able to enact removal limitations. *Myers*, in demurring from the previous claims of Justice Story, *see* 2 STORY, *supra* note 160, stated that Congress could only create removal limitations for inferior officers when those officers were appointed in some other way. *See* *Myers v. United States*, 272 U.S. 52, 162 (1926) (citing with approval *United States v. Perkins*, 116 U.S. 483 (1886)); *see also* CHARLES E. MORGANSTON, THE APPOINTING AND REMOVAL POWER OF THE PRESIDENT OF THE UNITED STATES 133 (1929). However, *Humphrey's Executor v. United States*, 295 U.S. 602, 629–31 (1935) and *Wiener v. United States*, 357 U.S. 349, 350–52 (1958), allowed removal limitations for officers appointed by the President with Senate advice and consent. While the question is thus not resolved, even if a court were to require that Congress vest the appointment of the USAs, for any of the legislative options discussed below, *see* discussion *infra* Section III.B, Congress could vest the appointment in the AG with advice and consent. This would satisfy any constitutional concern arising from *Myers* and would not, in practice, limit the President's role in the appointment process due to presidential control of the AG.

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

ited duties, her authority was tempered by DOJ policy, her jurisdiction was not plenary, and her tenure was temporally limited.¹⁶⁵

Subsequent to *Morrison*, the Supreme Court clarified its delineation of principal and inferior officers in *Edmond v. United States*, laying the groundwork for appellate courts to conclude that USAs are inferior officers.¹⁶⁶ In *Edmond*, the Court upheld the Secretary of Transportation's appointment of judges of the U.S. Coast Guard Court of Appeals, holding that such judges are inferior officers primarily because the judges' work is supervised by a politically accountable principal officer.¹⁶⁷ The Court reached this holding despite the presence of only one of the considerations from *Morrison*,¹⁶⁸ and did not follow the *Morrison* factors as if they constituted a test.¹⁶⁹ Relying on *Edmond*, the only courts that have squarely addressed the proper categorization of USAs have held that they are inferior officers.¹⁷⁰ The primary reason underlying this determination is that USAs are closely supervised by the AG,¹⁷¹ a principal officer who is politically accountable through the Senate.¹⁷²

The Office of Legal Counsel ("OLC") has also concluded that USAs are inferior officers. Like many commentators,¹⁷³ the DOJ has opined that the

165. *Id.* at 671–72.

166. *See Edmond v. United States*, 520 U.S. 651, 661–64 (1997).

167. *Id.* The *Edmond* Court wrote:

[T]he 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. If that were the intention, the Constitution might have used the phrase "lesser officer." 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.

Id. at 662–63 (emphasis added).

168. *See Morrison*, 487 U.S. at 671–72 (stating that the removal factors, pre-*Edmond*, are whether the officer is: "subject to removal by a higher Executive Branch official;" "empowered by the Act to perform only certain, limited duties;" "limited in jurisdiction;" and "limited in tenure").

169. *See Edmond*, 520 U.S. at 661–65. Commentators and at least one court have recognized the tension between these decisions. *United States v. Hilario*, 218 F.3d 19, 25 n.3 (1st Cir. 2000) ("[T]he Court's 1997 decision in *Edmond v. United States* essentially displaced the faulty Appointments Clause analysis of *Morrison v. Olson*." (citing Steven G. Calabresi, Foreword, *The Structural Constitution and the Countermajoritarian Difficulty*, 22 HARV. J.L. & PUB. POL'Y 3, 5 (1998) (alteration in original)); Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1117–20 (1998)).

170. *E.g.*, *United States v. Hilario*, 218 F.3d 19 (1st Cir. 2000); *United States v. Gantt*, 194 F.3d 987 (9th Cir. 1999); *United States v. Baker*, 504 F. Supp. 2d 402 (E.D. Ark. 2007).

171. *Gantt*, 194 F.3d at 999. The court noted that it was deciding the constitutional issue in the context of an interim USA but that there should be no distinction because interim USAs possess the same powers as non-interim USAs and are to be distinguished from "Acting" USAs. *Id.* at 999 n.5.

172. *See supra* note 167 and accompanying text.

173. *See e.g.*, Magill, *supra* note 143, at 61–62; Ross E. Wiener, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN. L. REV.

Court has failed to provide clear guidance for the inquiry into whether an officer is inferior.¹⁷⁴ OLC has also agreed with courts analyzing *Morrison* in light of *Edmond* by finding that the *Morrison* factors do not constitute an exclusive or exhaustive list of considerations as to the proper categorization of an officer.¹⁷⁵ Despite these difficulties, the DOJ has found that USAs are inferior officers, relying heavily on the fact that their exercise of discretion is governed by the AG and not directly by the president.¹⁷⁶

The USAs are thus inferior officers for whom Congress can statutorily limit removal, provided that such a limitation does not interfere with the president's Article II grant. The decision in *Edmond* called into question the importance of the *Morrison* factors, providing precedent for the inferior officer interpretation.¹⁷⁷ That precedent in combination with courts of appeals opinions,¹⁷⁸ the executive branch's repeated arguments for such an interpretation,¹⁷⁹ and the agreement of the Congressional Research Service and commentators¹⁸⁰ counsels strongly for the determination that USAs constitute inferior officers. Because USAs are inferior officers, Congress possesses the constitutional authority to narrowly limit their removal provided such a limitation neither interferes with "the President's exercise of the 'executive power'" nor his "duty to 'take care that the laws be faithfully executed' under Article II."¹⁸¹

Regardless of whether a USA is an inferior officer, however, whether a USA is a "purely executive officer" remains important after *Morrison*. Before *Morrison*, the constitutionality of congressional limits on removal turned largely on whether an officer was "purely executive."¹⁸² *Morrison*

363, 405–06 (2001) (describing the "ad hoc" nature of the Court's principal-inferior distinction but determining that USAs are principal officers).

174. 20 Op. Off. Legal Counsel 124, 149 (1996).

175. *Id.* at 150 (citing *Silver v. U.S. Postal Serv.*, 951 F.2d 1033 (9th Cir. 1991)).

176. 2 Op. Off. Legal Counsel 58, 58–59 (1978) (citing *Ex parte Siebold*, 100 U.S. 371, 397 (1879)); *see also* 20 Op. Off. Legal Counsel at 150.

177. *See supra* notes 166–169 and accompanying text.

178. *See supra* notes 171–172 and accompanying text.

179. *See United States v. Hilario*, 218 F.3d 19, 24 (1st Cir. 2000) (noting that the government argued that all USAs should be categorized as inferior officers); *United States v. Baker*, 504 F. Supp. 2d 402, 406 (E.D. Ark. 2007) (noting that the government claimed in its briefs that USAs are inferior officers); *supra* notes 174–176 and accompanying text.

180. *House Confirmation Process Hearings*, *supra* note 66, at 132 (statement of T.J. Halstead, Legislative Att'y, Am. Law Div., Cong. Research Serv.); *Levenson*, *supra* note 8, at 306–15. *But see Wiener*, *supra* note 173, at 405–06. At least one recent commentator has noted that "[n]o court, however, has agreed with Wiener's assessment . . . [S]ince the time of his article, it appears that U.S. Attorneys have enjoyed less freedom and discretion than what Wiener described." *Levenson*, *supra* note 8, at 316.

181. *See Morrison v. Olson*, 487 U.S. 654, 689–90 (1988); *supra* note 147 and accompanying text; *see also Yoo et al.*, *supra* note 10, at 695 (disagreeing with the *Morrison* Court's "apparent conclusion that even officers performing such core executive functions as prosecution could be insulated from presidential removal").

182. *See supra* notes 124–139 and accompanying text.

rejected this formalism, and followed a functional analysis.¹⁸³ The majority in *Morrison* did, however, make clear that there is at least an issue as to whether the officer for whom Congress seeks to limit removal is properly categorized as “purely executive.”¹⁸⁴

There is no clear evidence that the framers considered prosecution a necessarily executive function. The history of colonial prosecution is characterized by individual prosecutions, district attorneys performing non-prosecutorial duties, locally based public prosecutions, and colonial and state constitutions that did not consider prosecution an exclusively executive function.¹⁸⁵ The framers appear to have contemplated neither the AG nor the DOJ as both the Constitution and the debates of the Constitutional Convention omit any mention of the DOJ’s creation despite discussion of other executive agencies.¹⁸⁶ Nor did Publius enumerate law enforcement in the list of functions that are “peculiarly within the province of the executive department.”¹⁸⁷ As originally drafted, the Judiciary Act of 1789 granted courts the authority to appoint USAs,¹⁸⁸ suggesting that the framers did not view prosecution as executive.¹⁸⁹ For almost one hundred years there was virtually no executive branch supervision of USAs following appointment, despite efforts of AG Randolph to bring the prosecutors under his control.¹⁹⁰ The USAs operated with a degree of independence and displayed little loyalty to the executive branch.¹⁹¹ The resulting administrative difficulty, not the Constitution, was the primary motivation for the 1870 act creating the DOJ and expressly

183. See *Morrison*, 487 U.S. at 689–91.

184. *Id.* at 690 (“*Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some ‘purely executive’ officials who must be removable by the President at will if he is to be able to accomplish his constitutional role.”); see also *supra* notes 140–151 and accompanying text. The Court went on to state: “We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant.” *Morrison*, 487 U.S. at 691. The value of a formalistic assessment is furthered by the almost complete turnover in the composition of the Court since *Morrison* was decided. The only Justice in the 7–1 *Morrison* majority still serving as of publication of this Note is Justice Stevens.

185. Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function?* *Morrison v. Olson and the Framers’ Intent*, 99 YALE L.J. 1069, 1071 (1990); John A. Fairlie, *The United States Department of Justice*, 3 MICH. L. REV. 352, 358 (1905).

186. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 625 (Max Farrand ed., 1911).

187. THE FEDERALIST NO. 72 (Alexander Hamilton).

188. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 108–09 (1923–1924).

189. See 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, 567.

190. See HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE 142–60 (1937) (describing the office of the Attorney General before the creation of the Department of Justice); Letter from Edmund Randolph, Att’y Gen., to President George Washington (Dec. 26, 1791), reprinted in 1 AMERICAN STATE PAPERS, CLASS X, MISCELLANEOUS 45–46 (Walter Lowrie & Walter S. Franklin, eds., 1834).

191. See CUMMINGS & MCFARLAND, *supra* note 190, at 218; Letter from Edmund Randolph to President George Washington, *supra* note 190, at 45–46.

placing USAs under the supervision and control of the AG.¹⁹² It was not until almost one hundred years after the ratification of the Constitution that USAs came under the practical control of the president.¹⁹³

Because of this uncertainty surrounding the framers' view of prosecution, Justice Scalia's dissent in *Morrison* becomes more questionable as a basis for rejecting limitations on the removal of USAs. Scalia claimed that there is "no possible doubt" that the IC's role in investigation and prosecution is "a quintessentially executive function."¹⁹⁴ However, numerous commentators have examined the historical record and claim that there are no grounds for certainty as to the framers' views of prosecution.¹⁹⁵ One commentator has noted that the AG's position is "quasi judicial."¹⁹⁶ If prosecution was not understood by the framers as an executive function, this counsels for allowance of congressional removal limits over USAs as inferior officers even under a formalistic analysis.¹⁹⁷ Regardless, such a claim regarding prosecution supports, but is not necessary to sustain, the argument that removal limits for USAs are constitutional, because of the *Morrison* Court's allowance of such limits for an inferior officer whom it found "executive."¹⁹⁸ After *Morrison* the fact that a presidential appointee performs some executive functions is no longer dispositive for a reviewing court to reject congressional removal limitations.¹⁹⁹

192. See Act to establish the Department of Justice, ch. 150, 16 Stat. 162 (1870). As Lessig & Sunstein recount, from 1789 to 1820 the federal district attorneys reported to "no one," and from 1820 through 1861 they reported to the Secretary of the Treasury, who, at that time, reported to Congress. Lessig & Sunstein, *supra* note 112, at 16–17.

193. *But see* Calabresi & Prakash, *supra* note 112, at 658–59; Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 453–57 (2001).

194. *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting); *supra* notes 153–154 and accompanying text.

195. See, e.g., *Removing Politics from the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 93d Cong. (1974) [hereinafter *Removing Politics Hearings*]; Stephen L. Carter, Comment, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 126–28 (1988); Dangel, *supra* note 185; Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 286–90 (1989); Lessig & Sunstein, *supra* note 112, at 15–22; Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079, 1096–1101 (2004).

196. Fairlie, *supra* note 185, at 353. *But see* Note, *Removing Politics from the Justice Department: Constitutional Problems with Institutional Reform*, 50 N.Y.U. L. REV. 366, 397 (1975) ("Prosecutorial discretion and law enforcement may not be exclusive or illimitable functions of the executive branch, but they are, according to the prevalent view, prerogatives of the executive and are not easily severed from that branch.").

197. See *Morrison*, 487 U.S. at 705, 708 (Scalia, J., dissenting).

198. *Id.* at 690–93 (majority opinion).

199. See *supra* notes 140–151 and accompanying text; see also Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1144 (2000).

C. *The U.S. Attorneys Lack a Viable Cause of Action to Challenge Their Removals*

Despite Congress's constitutional authority to limit the removal of USAs, the enforceability of a removal limitation is undermined by the fact that the USAs themselves cannot currently bring an action challenging an improper removal or seeking damages. As a Senate-confirmed presidential appointee,²⁰⁰ a USA is unable to challenge her removal through the procedure available to most federal employees: the Merit Systems Protection Board.²⁰¹ In addition, three of the most common constitutional claims for wrongful dismissal—the protection of free speech, a due process property interest in employment, and a due process liberty interest in remaining free from incorrect reputation-damaging charges upon discharge—though seemingly implicated on the facts of the dismissals,²⁰² are not available to the USAs.

Public employees may challenge dismissals by claiming that the firing violated their First Amendment rights to free speech and association; however, that path is unavailable to USAs. The Supreme Court has held that a person cannot be forced to forfeit her First Amendment protections as a condition of public employment,²⁰³ but the prohibition on encroachment of speech is not absolute.²⁰⁴ Generally, if an employee fired for her speech can demonstrate that the speech at issue is a matter of “public concern,”²⁰⁵ a court will engage in a balancing test between the interest of the fired employee and the employer-state in serving the public.²⁰⁶ Despite the Court finding significant safeguards for employees in the First Amendment,²⁰⁷

200. Federal employees are typically divided into the Senior Executive Service, a cadre of high-level positions that are not appointed by the President or confirmed by the Senate, *see* 5 U.S.C. § 3132(a)(2) (2006), the Competitive Service, the majority of federal employees who are hired through the merit hiring system, *see* 5 U.S.C. § 2102 (2006); U.S. GEN. ACCOUNTING OFFICE, THE EXCEPTED SERVICE I (1997), or the excepted service, the employees who are outside both other systems, *see* 5 U.S.C. § 2103 (2006). USAs, however, are presidential appointees, *see* 28 U.S.C. § 541 (2000), who—for formal employment purposes—are designated as “Presidential Appointment with Senate Confirmation” and whose salaries are determined not by a federal pay table but by “administrative determination.” *See* H. COMM. ON GOV'T REFORM, POLICY AND SUPPORTING POSITIONS (“THE PLUM BOOK”) v, 96–98 (2004), *available at* http://www.gpoaccess.gov/plumbok/2004/2004_plum_book.pdf; *see also* JUSTICE MGMT. DIV. PERS. STAFF, DEP'T OF JUSTICE, TRANSITION 2002 HUMAN RESOURCES BRIEFING GUIDE App. B (2002), *available at* <http://www.usdoj.gov/jmd/ps/guitrans.htm#pas>.

201. *See infra* notes 276–282 and accompanying text.

202. *See* discussion *supra* Part I (describing potentially reputation-damaging statements that DOJ officials made about the fired USAs as well as perceived threats made against the USAs if they continued to publicly criticize the DOJ).

203. *See Pickering v. Board of Ed.*, 391 U.S. 563, 568 (1968).

204. *Elrod v. Burns*, 427 U.S. 347, 360 (1976).

205. *See Connick v. Myers*, 461 U.S. 138, 146 (1983). Whether speech is a matter of public concern is governed by “the content, form, and context of a given statement.” *Id.* at 147–48.

206. *See Pickering*, 391 U.S. at 568.

207. In practice, the Court's jurisprudence in this area has created relatively robust protections for public employees' speech. For example, in *Rankin v. McPherson* the Supreme Court held that a

USAs do not enjoy such protection because they are “policymaking” employees.²⁰⁸

Neither can the USAs bring a due process claim based on a property interest in their positions. Property interests in employment are statutory—not constitutional—entitlements.²⁰⁹ The Supreme Court has broadly interpreted “property” protection,²¹⁰ but if an employee’s status is provisional, untenured, or otherwise lacking a reasonable basis for an entitlement to her employment, an employee does not have a property interest in her employment.²¹¹ Government employees who serve as at-will employees do not have a property interest in their continued employment,²¹² and as presidential appointees,²¹³ USAs have no such expectation and possess no property interest in their positions.²¹⁴

Finally, USAs cannot prove that their removals were so stigmatizing that they were deprived of a constitutionally protected “liberty” interest. A series of Supreme Court cases regarding liberty deprivation has created the “stigma plus” standard, which requires a showing of damage to reputation coupled with loss of employment.²¹⁵ Courts typically rely on three broad

constable’s office violated a clerical employee’s First Amendment protections by dismissing her when, discussing the failed assassination attempt of President Reagan, she stated that “if they go for him again, I hope they get him.” 483 U.S. 378, 381, 392 (1987).

208. The Court has clarified that the formal “policymaking” label is not the “ultimate inquiry” as to an employee’s First Amendment Rights. *Branti v. Finkel*, 445 U.S. 507, 518 (1980). It has also conceded that “[n]o clear line can be drawn between policymaking and nonpolicymaking positions,” *Elrod*, 427 U.S. at 367, and that the focus of the inquiry should be on “[t]he nature of the responsibilities,” and whether the employee “formulates plans for the implementation of broad goals.” *Id.* at 367–68. The Court has, however, emphasized an employee’s function, noting that an “employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position,” *id.* at 368, and employees with access to “confidential documents that influenced policymaking deliberations” were more likely to fall under the exception as well. *Branti*, 445 U.S. at 511. A USA “exercises wide discretion in the use of his/her resources to further the priorities of the local jurisdictions and needs of their [sic] communities,” United States Department of Justice, United States Attorneys Mission Statement, <http://www.usdoj.gov/usao> (last visited Aug. 22, 2008), and is almost certainly a policymaking official both formally and functionally. *See Branti*, 445 U.S. at 519 & n.13 (contrasting the role of the public defender for whom the Court found First Amendment protections with that of the prosecutor whose job includes “broader public responsibilities”); *cf. id.* at 523 (Powell, J., dissenting) (“The Court’s vague, overbroad decision may cast serious doubt on the propriety of dismissing United States attorneys, as well as thousands of other policymaking employees at all levels of government, because of their membership in a national political party.”).

209. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

210. *See Bd. of Regents v. Roth*, 408 U.S. 564, 576–78 (1972).

211. *See, e.g., Eddings v. City of Hot Springs*, 323 F.3d 596 (8th Cir. 2003); *Baron v. Port Auth.*, 271 F.3d 81 (2d Cir. 2001).

212. *See, e.g., Bishop v. Wood*, 426 U.S. 341, 345–47 (1976); *Hill v. Borough of Kutztown*, 455 F.3d 225, 234–35 (3d Cir. 2006); *Moulton v. City of Beaumont*, 991 F.2d 227, 230–31 (5th Cir. 1993).

213. *See supra* note 200.

214. *See Doe v. U.S. Dep’t of Justice*, 753 F.2d 1092, 1097 n.4, 1101 n.8 (D.C. Cir. 1985); *Fiorentino v. United States*, 607 F.2d 963, 966–69 (Ct. Cl. 1979); *Commeree v. Hantman*, No. Civ. 97-0242, 1999 WL 1611325, at *5 (D.D.C. Oct. 28, 1999).

215. *See Bishop*, 426 U.S. at 343, 348 (rejecting a liberty infringement claim of a police officer after statements about his poor performance were made during pretrial discovery); *Paul v. Davis*,

requirements that the employee must meet. First, the employee must show that the stigmatization was not solely a reputational injury but occurred in connection with the termination of his employment.²¹⁶ Second, the stigmatizing statements must be made public; internal, deliberative charges do not equate with a stigmatizing injury.²¹⁷ Third, the employee must show that he has been stigmatized by his employer and not a third party.²¹⁸ There is widespread precedent that holds that a dismissal for performance or incompetence, as opposed to a more damaging charge such as dishonesty, immorality, or criminality, is not sufficiently stigmatizing for a liberty infringement claim unless such a charge significantly restricts future employment opportunities.²¹⁹ Because the only pretextual charge the DOJ leveled against the USAs was that they were fired for “performance-related reasons,”²²⁰ and because the USAs subsequently secured employment,²²¹ they would likely be unable to bring a liberty interest infringement claim.²²²

424 U.S. 693, 711–12 (1976) (rejecting a liberty infringement claim arising from the Louisville Police Department’s use of an “Active Shoplifters” poster with the plaintiff’s picture because damage to reputation alone was not enough to implicate Fourteenth Amendment guarantees); *Roth*, 408 U.S. at 573 (rejecting a liberty infringement claim of a public university professor after his contract was not renewed without reason); *see, e.g.*, *Graham v. City of Philadelphia*, 402 F.3d 139 (3d Cir. 2005); *Velez v. Levy*, 401 F.3d 75 (2d Cir. 2005); *Patterson v. City of Utica*, 370 F.3d 322 (2d Cir. 2004); *Lighton v. Univ. of Utah*, 209 F.3d 1213 (10th Cir. 2000); *Johnson v. Morris*, 903 F.2d 996, 999 (4th Cir. 1990). *Paul v. Davis* is often cited as the case creating the “stigma plus” standard. *See, e.g.*, *Siebert v. Gilley*, 500 U.S. 226, 234 (1991).

216. *See, e.g.*, *Paul*, 424 U.S. at 701.

217. *See, e.g.*, *Sims v. Fox*, 492 F.2d 1088 (5th Cir. 1974).

218. *See, e.g.*, *McMath v. City of Gary*, 976 F.2d 1026, 1034–35 (7th Cir. 1992); *Brennan v. Hendrigan*, 888 F.2d 189, 196 (1st Cir. 1989).

219. *See, e.g.*, *Dasey v. Anderson*, 304 F.3d 148, 155 (1st Cir. 2002) (finding that private showing for purposes of termination hearing of police officer smoking marijuana is insufficiently public to be stigmatizing); *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 630 (2d Cir. 1996) (stating that an employee fired for incompetence only suffers a liberty deprivation if the charges of incompetence are sufficiently serious to hinder future employment); *Portman v. County of Santa Clara*, 995 F.2d 898, 908 (9th Cir. 1993) (stating that the court was focusing on the lack of moral turpitude in a termination letter); *Robinson v. City of Montgomery City*, 809 F.2d 1355, 1356 (8th Cir. 1987) (holding that a city press release from the board of aldermen and distributed locally was not sufficiently stigmatizing); *Brouillette v. Bd. of Dirs. of Merged Area IX*, 519 F.2d 126, 128 (8th Cir. 1975) (noting that charges against a teacher of tardiness and an inability to maintain order are “relatively minor” and are not charges that rise to the level of constitutional protection).

220. *See supra* notes 61–63, 98–105 and accompanying text.

221. *See John Cook, Fired federal attorney McKay to join Getty Images*, SEATTLE POST-INTELLIGENCER, May 22, 2007, at E1; Schmitt, *supra* note 4.

222. Even if USAs could show stigmatization providing grounds for a liberty infringement claim, such a showing would be a pyrrhic victory because it would not entitle the USAs to damages or reinstatement. The remedy mandated for a liberty infringement under the Due Process Clause is merely a name-clearing hearing that provides “an opportunity to refute the charge” underlying the dismissal. *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972). A further difficulty for the USAs is that even if they could articulate a constitutional claim, they would be unable to seek damages through a *Bivens* action, *see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), because the claim would arise out of their federal employment, a “special factor” in the Court’s *Bivens* jurisprudence, *see Bush v. Lucas*, 462 U.S. 367, 388–90 (1983).

III. THE NEED FOR ACTION AND A PROPOSED SOLUTION: REVISITING LEGISLATION AND DELINEATING THE REMOVAL POWER THROUGH EMPLOYMENT LAW PRINCIPLES

This Part argues that the removal of the USAs implicates issues of executive overreach for which Congress is normatively justified in providing a legislative check. It names and examines four possible statutory vehicles through which Congress could constitutionally assert itself in partisan removals of USAs: the Independent Appointment and Removal Model, the Civil Service Due Process Amendments Model, the Independent Counsel Model, and the Accountability Model. Looking to the Constitution, Supreme Court precedent, post-Watergate congressional hearings, and the current Congress's reaction to the USA removals, Section III.A explores the normative justifications for Congress to provide a statutory limit to USA removals, particularly given the administration's pretextual explanations for the firings described in Part I. Section III.B examines four potential legislative frameworks, three borrowed from prior legislation, and one a new hybrid, which this Note advocates adopting. Section III.C offers the *McDonnell Douglas* line of cases to rebut the claim that unpacking a distinction between "partisan" removals and "political" removals is not a judicially manageable task.

A. *Supplementing the Political Check: There Is a Need for Congressional Action*

Congress would be constitutionally permitted, historically consistent, and normatively justified in creating a statutory cause of action for a USA to challenge, or at least call attention to, what she claimed was an improper removal.²²³ As described above, *Morrison* confirms that the Constitution does not bar congressional limits to executive power over inferior officers if those limits do not interfere with the president's capacity to perform his executive duties, including his ability to "'take care that the laws be faithfully executed.'"²²⁴ The constitutional arguments account for why Congress is

223. As this Note argues *infra*, in a future case involving a situation similar to the USAs' dismissal or the Marston Affair, the claim of impropriety would be based on an assertion that purely partisan removals are improper as they do not further the president's Article II grant. See discussion *infra* Section III.C. At least two commentators have informally argued this limit to the removal power. See Posting of Michael C. Dorf to Dorf on Law, <http://michaeldorf.org/2007/03/executive-privilege-contempt-of.html> (Mar. 20, 2007, 00:02 EST); Posting of Michael C. Dorf to Dorf on Law, <http://michaeldorf.org/2007/03/dont-say-political-say-partisan.html> (Mar. 19, 2007, 08:19 EST); Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com/2007/03/did-anyone-in-white-house-act.html> (Mar. 21, 2007, 23:12 EST).

224. *Morrison v. Olson*, 487 U.S. 654, 689–90 (1988) (quoting U.S. CONST. art. II, § 3); see also Magill, *supra* note 143, at 51–52 (claiming the "important change" from a focus on whether the officer that Congress seeks to limit is "exercising 'purely executive' authority" to whether the limit impairs the president's duty to "'take care that the laws be faithfully executed' . . . makes one sit up and take notice"); Halliburton, *supra* note 14, at 215 ("[T]he President's otherwise plenary authority is limitable only if independence in the position is constitutionally desirable, and only if the limitation does not prohibit removal altogether, but instead retains some version of a 'good cause' provision."); discussion *supra* Section II.B.

able to limit USA removals, but there are also a number of justifications for why Congress *should* enact such a statute. First, there is both a long historical recognition and a present normative justification for a modicum of independence in the DOJ, the AG, and the offices of USAs.²²⁵ Second, Congress has historically shown concern when it believes that the DOJ is becoming atypically political.²²⁶ Third, the current Congress has expressed its misgivings with the pretextual firings of the USAs and the partisan rationale underlying the firings.²²⁷ Finally, these concerns regarding independence and partisanship are particularly strongly supported when the constitutional scheme to check the removal power is political, and the firings were designed precisely to subvert that political check.²²⁸

The dual role of the DOJ and USAs has long provided a normative policy justification—apart from the justifications offered by the framers and the First Congress—for independence in the administration of justice and some insulation from partisan pressures.²²⁹ The complexity and difficulty of the relationships between USAs, the AG, and the president is longstanding.²³⁰ Yet, the Supreme Court has long recognized a USA's "peculiar" duty to apply the law justly, in addition to her duty to serve the president.²³¹ In 1940, AG Robert Jackson spoke of the balance of independence and presidential control required for a USA to appropriately discharge her sometimes competing duties.²³² The first centralized federal prosecution in the United States was conducted by the Comptroller of the Treasury, who Congress eventually gave the power "to direct suits and legal proceedings."²³³ The Comptroller was not controlled by the president and it was generally agreed that he was

225. See *infra* notes 233–244, 249–256 and accompanying text.

226. See *infra* 233–244 and accompanying text.

227. See discussion *supra* Part I; *infra* 245–248 and accompanying text.

228. See discussion *supra* Part I; *infra* notes 249–256 and accompanying text.

229. See discussion *supra* Section II.B; U.S. Dep't of Justice, *supra* note 95, at 330 ("We believe that removing U.S. Attorneys based on their lack of political support could affect the integrity and independence of the Department's prosecutive decisions and the public's confidence that such decisions are insulated from political considerations.").

230. See DANIEL J. MEADOR, *THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE* 4 (1980); see generally Eisenstein, *supra* note 7 (describing the tensions between USAs and "Main Justice").

231. *Berger v. United States*, 295 U.S. 78, 88 (1935). The Court stated:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

Id.

232. Robert H. Jackson, Att'y Gen., Address at the Second Annual Conference of United States Attorneys: The Federal Prosecutor (Apr. 1, 1940), in 31 AM. INST. CRIM. L. & CRIMINOLOGY 3 (1940).

233. Lessig & Sunstein, *supra* note 112, at 17 (quoting Act of Mar. 3, 1817, ch. 45, § 10, 3 Stat. 366, 367).

“‘relatively independent.’”²³⁴ Madison, one of the ardent advocates during the Decision of 1789 of giving the president the removal power,²³⁵ noted that the Comptroller—who made decisions as to the lawfulness of individuals’ actions—therefore had a “‘judiciary quality as well as executive.’”²³⁶ Madison went on to state that “‘there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the Government.’”²³⁷ More recent commentators have recognized that the AG is both personally and professionally bound to apply the law fairly and evenly to all citizens and that such values are undermined by the threat of partisan dismissals.²³⁸

Congress has historically shown concern for excessive partisanship at the DOJ and with USAs. Throughout the 1960s and 1970s, there was “‘virtually complete agreement” that it was improper for the president to remove a U.S. Attorney for partisan reasons.²³⁹ After Watergate, congressional consideration of the DOJ’s independence,²⁴⁰ and President Carter’s pledge to make the DOJ non-political,²⁴¹ there were lengthy debates regarding the appropriate role of the DOJ.²⁴² In his testimony on USA appointment and removal reforms in 1978, AG Griffin Bell testified—not surprisingly—that USAs need to be controlled by the president rather than Congress.²⁴³ Bell did, however, concede that one of the few clear improprieties a USA could commit would be to enforce the law with an eye toward “‘partisan politics.’”²⁴⁴

The current Congress has clearly demonstrated its concern with pretextual justifications for partisan firings. Throughout the House and Senate hearings on removal of the USAs, it was clear that many members of Congress viewed the removals as improper and perhaps unconstitutional.²⁴⁵ In passing legislation rescinding the authority of the AG to appoint interim USAs without Senate advice and consent, some senators expressed concerns

234. *Id.* (citing DARRELL H. SMITH, *THE GENERAL ACCOUNTING OFFICE: ITS HISTORY, ACTIVITIES, AND ORGANIZATION* 22 (1927)).

235. *See* 1 *ANNALS OF CONG.* 581 (Joseph Gales ed., 1834).

236. *Id.* at 635–36.

237. *Id.* at 636. “I do not say the office is either executive or judicial; I think it rather distinct from both, though it partakes of each, and therefore some modification, accommodated to those circumstances, ought to take place. I would, therefore, make the officer responsible to every part of the Government.” *Id.* at 638. *But see* Lessig & Sunstein, *supra* note 112, at 17 n.70 (claiming that “too much of the anti-unitarian case may be resting upon this single speech by Madison”).

238. *E.g.*, MEADOR, *supra* note 230, at 1; Eisenstein, *supra* note 7, at 260–61.

239. *See* Eisenstein, *supra* note 7, at 234.

240. *See Removing Politics Hearings*, *supra* note 195.

241. *See House Marston Hearings*, *supra* note 2, at 104–05.

242. *See id.*

243. *Id.* at 45 (testimony of Griffin B. Bell, U.S. Att’y Gen.).

244. *Id.* at 46. AG Bell also claimed that he would discharge a USA who politicized her office. *Id.*

245. *See* discussion *supra* Part I.

with improper partisanship within the DOJ.²⁴⁶ The chairman of the House Judiciary Committee, Congressman Conyers, released a detailed report on the firings, claiming that it was “widely accepted” that USAs should not be removed as punishment for their exercise of prosecutorial discretion as it relates to the political advantage of one party.²⁴⁷ The report specifically cited “pretextual” removals and contemplates types of legislation to limit the removal power.²⁴⁸

A final normative reason for Congress to enact a statute limiting USAs’ removal is that a pretextual removal disables the constitutional checks that underlie and buttress the removal power itself. Looking first from the perspective of the “fountainhead” of the Supreme Court’s appointment and removal jurisprudence—separation of powers—a limitation that would allow USAs to challenge a pretextual removal seems desirable.²⁴⁹ The Constitution’s system of divisions and separation of powers was “deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people.”²⁵⁰ The Supreme Court recognized as much in *Morrison*. The *Morrison* Court respected the difference between the direct congressional involvement that the Court rejected in *Myers* and the indirect, “good cause” removal restrictions that the Court allowed in *Humphrey’s Executor*.²⁵¹

In the USAs’ context, vigorous debate is critical because the primary check on an abuse of the removal power is political.²⁵² Consider an ardent formalist who contends that every officer exercising any federal authority must be removable at will by the president.²⁵³ Even he or she must recognize that if one is concerned with the procedural protections that robust separation of powers provides,²⁵⁴ allowing an executive branch strategy of undermining the political check will reduce accountability. If USAs are not doing their job, or the administration makes a decision regarding appointment and removal, the president pays the political cost.²⁵⁵ However, he cannot pay this cost if that administration purposefully misleads the public and Congress about the performance of the USAs and the reason for their

246. See 153 CONG. REC. S1993–97 (daily ed. Feb. 15, 2007) (statements of Sens. Leahy and Feinstein).

247. Conyers Memo, *supra* note 21, at 32–33.

248. *Id.* at 25, 32–62; see also *infra* note 259 and accompanying text.

249. See *Morrison v. Olson*, 487 U.S. 654, 704 (1987) (Scalia, J., dissenting).

250. *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

251. *Morrison*, 487 U.S. at 694–96; *Humphrey’s Executor v. United States*, 295 U.S. 602, 629–30 (1935); *Myers v. United States*, 272 U.S. 52, 161 (1926); Magill, *supra* note 143, at 52.

252. *Morrison*, 487 U.S. at 728–29 (Scalia, J., dissenting).

253. See, e.g., John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 793 (2001) (citing Calabresi & Prakash, *supra* note 112, at 593–99).

254. See, e.g., Philip B. Kurland, *The Rise and Fall of the “Doctrine” of Separation of Powers*, 85 MICH. L. REV. 592, 601 (1986).

255. *Morrison*, 487 U.S. at 728–29 (Scalia, J., dissenting).

removals.²⁵⁶ This is one of a number of reasons that there is almost no criticism of the wholesale replacement of USAs when a new president comes into office: the removals are conducted openly, and the president must (and is easily able to) justify to the public why he is replacing the USAs.²⁵⁷

B. Frameworks for Congressional Action: Revisiting Old Statutory Models

Congress has begun to consider whether a statutory remedy is appropriate to address the administration's efforts to undermine the constitutional structure through its subversion of the political check.²⁵⁸ The chairman of the House Judiciary Committee has written that due to the USA investigation, "Congress may wish to consider some limitation on removal of U.S. Attorneys, such as requiring that they may be replaced only for some cause, or imposing other procedural or substantive limits on the removal of U.S. Attorneys in the middle of a presidential term."²⁵⁹ If Congress chooses to act, the focus will shift to finding the appropriate balance between the president's executive power—including his ability to faithfully execute the laws—and providing for traditional notions of prosecutorial independence and an active political check on the exercise of the removal power.

When faced with problematic adverse personnel actions against U.S. officers in the past, Congress has considered and implemented various statutory responses. Congressional solutions to reduce the partisanship of personnel decisions have often included expanding the class of officers for whom removal is subject to a "good cause" limitation.²⁶⁰ Congress has also previously considered reporting requirements that mandate a report accompanying a removal, explaining why an officer was fired.²⁶¹

Any legislation limiting the removal of USAs should be designed not to further congressional aggrandizement, but rather to protect the constitutional

256. See discussion *supra* Part I.

257. See Eisenstein, *supra* note 7, at 233 (noting that Presidents Eisenhower, Kennedy, Clinton, and George W. Bush undertook a wholesale replacement of USAs at the beginning of their presidential terms); *House Confirmation Process Hearings*, *supra* note 66 (statement of T.J. Halstead, Legislative Att'y, Am. Law Div., Cong. Research Serv.) (noting the "normal turnover" in USAs when a new president comes into office). In contrast, the involuntary removal of a large number of USAs in the middle of a term—especially when personal conduct is not at issue—is unprecedented. See KEVIN M. SCOTT, CONG. RESEARCH SERV., U.S. ATTORNEYS WHO HAVE SERVED LESS THAN FULL FOUR-YEAR TERMS, 1981–2006, at 5–7 (2007) (finding that most USAs serving fewer than a full term had left for other prestigious government positions and that a significant minority had resigned due to misconduct). Another reason for such removals is a president's logical claim that it is necessary under the Vesting Clause of the Take Care Clause to have at least some of his "own men" across all of the USA offices upon beginning his administration.

258. See discussion *supra* Part I. The primary check on the removal power is political. *Morrison*, 487 U.S. at 728–29 (Scalia, J., dissenting).

259. Conyers Memo, *supra* note 21, at 32–33.

260. Indeed, the current House Judiciary Committee has considered the possibility of such a provision for USAs. See *id.* The benefits and constitutionality of this proposal may depend on the manner in which Congress limits the scope of removal.

261. See S. 2803, 93d Cong. § 2 (1973).

value of accountability, strengthen the political check, and assure the USAs' individual rights. Providing the USAs with a cause of action rather than allowing Congress to directly reserve a veto over removal decisions is preferable—and perhaps necessary—for two reasons. First, the Constitution likely requires this more restrained congressional approach. As *Morrison* demonstrates, removal limits for inferior officers are constitutional so long as they “do[] not interfere with the President’s exercise of the ‘executive power’ and his constitutionally appointed duty to ‘take care that the laws be faithfully executed’ under Article II.”²⁶² Indeed, when Congress has claimed a coercive role in the removal process, the Court has rejected such aggrandizement.²⁶³ However, when Congress has instead empowered an officer to challenge her removal, the Court has generally allowed the removal limitation.²⁶⁴ Second, empowering an individual USA is normatively preferable to ensure executive control of the DOJ and the operation of the political check on removal abuses. So long as the president is able to remove a USA for failing to implement a policy, the executive power can be retained.²⁶⁵

1. *The Independent Appointment and Removal Model*

A first possible legislative response, which Congress has previously considered, is removing the DOJ entirely from the president’s control; however, this solution is almost certainly unconstitutional. During the 1970s, Congress focused on the politicization of the DOJ and the offices of USAs because of Watergate, President Carter’s pledge to make the DOJ nonpolitical,²⁶⁶ and the removal of USA David Marston.²⁶⁷ Senator Sam Ervin, whose concern arose out of his chairmanship of the Senate’s Watergate investigation, held hearings on a bill that would have established the DOJ as an independent agency outside of executive branch control.²⁶⁸ Ervin’s bill established a term of six years for the AG, who would be appointed by the president with Senate advice and consent and would not be removable by the president except for “neglect of duty or malfeasance.”²⁶⁹ USAs were removable at will by the AG,²⁷⁰ but because the president could not remove the AG, USAs were effectively beyond executive control.

262. *Morrison*, 487 U.S. at 689–90.

263. See *Bowsher v. Synar*, 478 U.S. 714, 726 (1986); *INS v. Chadha*, 462 U.S. 919, 958–59 (1983); *Myers v. United States*, 272 U.S. 52, 161 (1926); Magill, *supra* note 143, at 52.

264. See *Morrison*, 487 U.S. at 686; *Wiener v. United States*, 357 U.S. 349, 355–56 (1958); *Humphrey’s Executor v. United States*, 295 U.S. 602, 629–630 (1935); Magill, *supra* note 143, at 52.

265. See discussion *infra* Section III.C.

266. See *House Marston Hearings*, *supra* note 2, at 2.

267. See *supra* note 2.

268. See *Removing Politics Hearings*, *supra* note 195.

269. S. 2803, 93d Cong. § 2(a) (1973).

270. See *id.* § 4(a).

Despite potential independence benefits of completely insulating the DOJ from partisan pressures, such an arrangement almost certainly violates the Constitution. Even amid the deep concern surrounding Watergate, commentators doubted that Ervin's proposal was constitutional.²⁷¹ If Congress made such a proposal today, the result would likely be the same. Momentarily putting aside the question of whether the framers viewed prosecution as a function outside the purview of the executive branch,²⁷² if under a formalistic analysis a reviewing court found the DOJ to be an executive department, Congress's attempt to remove the DOJ from executive control would be unconstitutional.²⁷³ From a functional analysis, creating an entirely independent DOJ would inhibit the president's ability to meet his duty under the Take Care Clause because he would lose all control over policy implementation.²⁷⁴ Finally, while there may be benefits arising from impartial enforcement of the laws, such an extreme degree of independence could actually hinder accountability because a completely independent DOJ would likely have no political master.²⁷⁵

2. *The Civil Service Due Process Amendments Model*

A potential avenue for creating a "good cause" standard could involve the expansion of the coverage of the Merit Systems Protection Board ("the Board"). The majority of federal employees' employment relationships with the government are controlled by the Civil Service Reform Act of 1978 ("CSRA").²⁷⁶ The CSRA created the Board to review claims of impropriety brought by federal employees covered under the Act.²⁷⁷ However, the CSRA originally applied only to those employees, in the competitive service, excluding excepted service employees, such as Assistant USAs ("AUSAs"), and presidential appointees, such as USAs.²⁷⁸ Following the scandal-tainted removal of an award-winning, excepted service Navy attorney in 1984, Congress investigated whether excepted service employees should be brought

271. See, e.g., *Removing Politics Hearings*, *supra* note 195, at 427–33 (statement of Robert L. Tienken, Senior Specialist in American Public Law, Library of Congress, Congressional Research Service).

272. See *supra* notes 185–193 and accompanying text.

273. See *Morrison v. Olson*, 487 U.S. 654, 691 (1987); *id.* at 706 (Scalia, J., dissenting). One of the few points on which the majority and Justice Scalia did agree was that prosecution is traditionally considered to be a function of the Executive Branch.

274. See *Removing Politics Hearings*, *supra* note 195 (statement of Robert L. Tienken); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 648 (1984) (claiming that one of the president's core functions is having "significant, ongoing relationships with all agencies responsible for law-administration").

275. See *Morrison*, 487 U.S. at 727–28 (Scalia, J., dissenting) (quoting Jackson, *supra* note 232) (describing the power of unchecked prosecution).

276. Civil Service Reform Act of 1978, Pub. L. No. 95–454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.); see *supra* note 200.

277. See 5 U.S.C. §§ 1205–1208 (2006).

278. 5 U.S.C. § 4301(2)(F)–(G) (2006); see *supra* note 200.

under the CSRA and be given an opportunity to challenge a dismissal before the Board.²⁷⁹ In 1990 Congress passed the Civil Service Due Process Amendments, with the purpose of granting appeal rights in adverse personnel actions to most members of the excepted service.²⁸⁰ The amendments brought AUSAs within the due process protections of CSRA.²⁸¹ However, USAs are still excluded from the CSRA and cannot bring an action to the Board challenging a removal.²⁸² Thus, a second method to provide USAs with an ability to challenge an improper removal, such as the partisan removal in the case of the fired USAs,²⁸³ would be to bring them within the CSRA.

This method of removal limitation offers the benefits of independence in prosecutorial discretion and executive accountability for decision making. Allowing an individual USA a forum in which to bring a claim that an offered explanation for her removal was pretext for a partisan removal could increase the visibility and transparency necessary for a robust political check. While the fired USAs, together, created sufficient publicity to activate the political check, the removal of Bud Cummins and Todd Graves demonstrates that a small number of USAs fired for partisan reasons may be unable to attract media attention.²⁸⁴ If a USA possesses the ability to challenge her dismissal it may increase public focus, thereby strengthening the political check.

The problem with Congress subjecting the USAs to a good cause standard is that such a limit approaches the constitutional gray area because it is unclear if it adequately respects the president's Article II grant to execute policy if a USA simply disagrees with DOJ priorities, a necessary condition to pass constitutional muster. The fact that a good cause limit on a prosecutor did pass muster in *Morrison* is grounds to believe that such a provision would be valid for USAs as well.²⁸⁵ However, because the office of a USA does not primarily investigate high-level executive officials, it may have less need for independence, and removal limitations may be more likely to trammel on the president's Article II authority.

279. See Jay Mathews, *Lawyer's Firing Prompts Hill Inquiry*, WASH. POST, Dec. 27, 1984, at A5. The firing of Navy Ocean Systems Center general counsel, Stephen Stowitz, spurred Congress's legislation in the excepted service, due process area. Jay Mathews, *Attorney's Legal Battle With Navy Gets a Twist*, WASH. POST, Nov. 1, 1987, at A26.

280. Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (1990) (codified as amended at 5 U.S.C. § 7511 (2006)).

281. See 5 U.S.C. § 7511(a)(1)(c). Compare *McGregor v. Greer*, 748 F. Supp. 881, 884 (D.D.C. 1990) (finding an AUSA without a due process cause of action to challenge her removal prior to the Civil Service Due Process Amendments), with *Van Wersch v. Dep't of Health & Human Servs.*, 197 F.3d 1144, 1148-49 (Fed. Cir. 1999) (noting that the Civil Service Due Process Amendments were intended to give excepted-service employees a basis to challenge adverse employment actions).

282. See 5 U.S.C. § 7511(b)(1)-(3) (2006).

283. See discussion *infra* Section III.B.

284. See discussion *supra* Part I.

285. See *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (stating that despite the fact that the IC was an executive officer, "we cannot say that the imposition of a 'good cause' standard for removal by itself unduly trammels on executive authority").

3. *The Independent Counsel Model*

A third possible solution is for Congress to pass a statute restricting the removal of USAs modeled after the statute at issue in *Morrison*—the Ethics in Government Act—that provides the USAs with “good cause” protection, enables a removed USA to challenge her removal in federal court, and includes a reporting requirement.²⁸⁶ The Act vested appointment of the IC, an inferior officer,²⁸⁷ in a special court (the Special Division) set up by the Act, but the Special Division only gained appointment authority if the AG found reasonable grounds for an investigation.²⁸⁸ The AG also possessed the authority to terminate the office of the IC; however, the AG’s—and by extension the president’s—removal authority was limited to “good cause.”²⁸⁹ The Act required that if the AG removed the IC, the AG had to report to Congress the facts and grounds underlying the removal.²⁹⁰ Congress could thus amend the statute governing USA removal,²⁹¹ replacing it with the cause and reporting language that the Court allowed in *Morrison*.

Like the Due Process Amendments model, the IC model provides executive accountability and prosecutorial independence benefits, but it unconstitutionally infringes on the president’s removal power. The IC model may be preferable to the Due Process Amendments model because of the additional requirement that the executive would have to provide reasons for a USA’s removal.²⁹² Reporting to Congress strengthens the constitutional value of accountability. The downside of a USA removal statute modeled after the IC Act is that in the USA context it is not clear that removal only for good cause allows the president to ensure the faithful execution of the laws if he has a policy disagreement with a USA.²⁹³

286. The Act was first enacted in 1978. *Id.* at 660 n.1 (citing Pub. L. 95-521, 92 Stat. 1867). The amended version of the Act at issue in *Morrison* and discussed here is codified at 28 U.S.C. §§ 591–599 (2000). See § 596(a)(3) for an IC’s ability to challenge her removal in the U.S. District Court for the District of Columbia.

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

288. See 28 U.S.C. § 592 (2000).

289. The Act provided:

An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical or mental disability (if not prohibited by law protecting persons from discrimination on the basis of such a disability), or any other condition that substantially impairs the performance of such independent counsel’s duties.

28 U.S.C. § 596(a)(1) (2000).

290. 28 U.S.C. § 596(a)(2) (2000).

291. “Each United States attorney is subject to removal by the President.” 28 U.S.C. § 541(c) (2000).

292. See *supra* note 290 and accompanying text.

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

4. A Hybrid Approach: The Accountability Model

Rather than rely on a model that so closely approaches a constitutional gray area, Congress should adopt legislation that focuses on the constitutional values of balance and accountability. The normative justification for Justice Scalia's version of the removal power is that the president must be able to control executive officers, and worries about such a sweeping version of the removal power are assuaged by the political check, which serves to stop the president from exercising the removal power in an improper way that the public would find offensive.²⁹⁴ This vision is premised on valuing a unitary executive and accountability. New legislation should thus ensure that presidential accountability is robust without undermining the president's "executive power" or his mandate to ensure that the laws are "faithfully executed." Legislation containing an informational component and a cause of action component could improve accountability without undermining the president's Article II authority.²⁹⁵ Further, the constitutional value of balance is a central separation of powers concern.²⁹⁶ While some commentators have criticized *Morrison* for using a functionalist approach that relies on an "ad hoc" sense of separation of powers,²⁹⁷ others have praised its approach as best serving the constitutional value of balance, particularly given the rise of the executive since the founding.²⁹⁸ Legislation should thus endeavor to balance these goals of accountability and unitariness.

The first component of legislation under what this Note terms the Accountability Model is a reporting requirement borrowed from the IC Model. The Ethics in Government Act included a reporting requirement that provided the following:

If an independent counsel is removed from office, the Attorney General shall promptly submit to the division of the court and the Committees on the Judiciary of the Senate and the House of Representatives a report specifying the facts found and the ultimate grounds for such removal. The committees shall make available to the public such report, except that each committee may, if necessary to protect the rights of any individual named in the report or to prevent undue interference with any pending prosecution, postpone or refrain from publishing any or all of the report.²⁹⁹

294. See *Morrison v. Olson*, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting).

295. See *id.* at 691 (majority opinion).

296. See Flaherty, *supra* note 112, at 1821, 1828–32.

297. See *Morrison*, 487 U.S. at 712 (Scalia, J., dissenting); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 175 (1994); Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 345–46 (1989).

298. See, e.g., Flaherty, *supra* note 112, at 1835–36; Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 523–24 (1987) (discussing accountability and balance in a pre-*Morrison* discussion of *Bowsher v. Synar*, 478 U.S. 714 (1986)).

299. 28 U.S.C. § 596(a)(2) (2000).

A similar requirement should be included in the Accountability Model. The same rationale for reporting in the IC model proves beneficial in the USA context. The evidence in the recent USA removals shows that the administration effected partisan removals and supplied a performance-based justification.³⁰⁰ The purpose of this pretextual justification was to subvert the political check and insulate the president from any accountability if the removals were unpopular.³⁰¹

The second component of legislation could be drafted in one of two ways. One option is for the provision to specifically provide that “partisan” removals are prohibited and create a cause of action for a USA to challenge a “partisan” removal in federal court. A second option is for such a provision to create an unspecified cause of action for claims arising under the Constitution and allow the USA challenging the removal to argue that the removal power does not encompass removals that are not necessary to the Take Care Clause or the Vesting Clause.³⁰² In the case of the first option, a challenge to such a provision would likely claim that the removal limitation is unconstitutional, and the USA would be forced to defend the provision under the *Morrison* Court’s reasoning,³⁰³ as well as the accountability, balance, and pretext arguments described in Section II.A.³⁰⁴ In the case of the latter option, the USA would make the constitutional argument directly and claim that the dismissal was an unconstitutional overreach of the removal power.³⁰⁵ In either case the issue would be decided in court and the USA would possess the means to claim that her removal was an unconstitutional executive overreach and—at the very least—further the operation of the political check by bringing attention to the potentially wrongful dismissal.

Because limitations on executive removal can comport with constitutional values of balance and accountability,³⁰⁶ either type of cause of action—whether for prohibited partisan removals or for claims arising under the Constitution—could further separation of powers goals. A cause of action component of new legislation would enhance the constitutional value of accountability. Informational removal requirements are diminished if there is no formal method to challenge a removal that a USA feels is prohibited by the Constitution or the proposed statute. In addition, if there is no way for a USA to challenge a removal, there can be no balance between constitutionally proper congressional limits and executive branch assertion of the removal power because there can be no enforcement. In the past Congress has consid-

300. See discussion *supra* Part I.

301. See discussion *supra* Part I.

302. See *Wiener v. United States*, 357 U.S. 349, 354–56 (1958); *supra* notes 145–159, 249–256 and accompanying text; *infra* notes 310–318 and accompanying text.

303. See *supra* notes 145–151 and accompanying text.

304. See discussion *supra* Section II.A; *infra* notes 311, 317 and accompanying text.

305. See discussion *supra* Section II.A; *infra* notes 311, 317 and accompanying text.

306. Flaherty, *supra* note 112, at 1835–36.

ered giving a USA access to a federal court to challenge her removal;³⁰⁷ this—in combination with the first component of the Accountability Model—would further separation of powers principles. Such a provision will, however, transfer the inquiry into pretextual removals to the judiciary.

C. McDonnell Douglas: *Parsing “Partisan” and “Political”*

Whether a dismissed USA argues under a statute prohibiting “partisan” removals, or under a statute that merely provides a cause of action for claims arising under the Constitution, the USA would make similar arguments regarding accountability and a need for independence in the office of USA. Following the *Morrison* Court’s logic, a USA making such a claim would have to concede that Congress is unable to limit a removal that a president makes for policy reasons—or political reasons where “politics” is a proxy for policy—because such a limitation would interfere with the Take Care Clause by hindering the president’s ability to ensure legitimate policy execution.³⁰⁸ A USA could, however, claim that a purely partisan removal that is justified with pretext is unconstitutional—or barred by the proposed statute—because purely partisan activities that are designed to benefit a political party or specific candidates do not relate to the president’s Article II powers.³⁰⁹ Such a claim raises two issues: first, whether a distinction between a “partisan” removal and a “political” removal is tenable; and second, whether courts are equipped to entertain a factual dispute to determine the true reasons behind a USA’s removal.

1. “Policy,” “Politics,” and “Partisan”

Shortly after he resigned as Gonzales’s chief of staff, Kyle Sampson suggested that any attempt to unpack a distinction between a partisan removal and a performance-related removal must fail because of the nature of the job of a USA.³¹⁰ Commentators have, however, recognized a distinction between “partisan” and “political.”³¹¹ Sampson’s interpretation conflates, or at least fails to distinguish, the two terms. For example, many of the commentators

307. Merit Selection for United States Attorneys Act of 1978, H.R. 10514, 95th Cong. § 2 (1978).

308. See *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (“[T]he real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.”).

309. This argument could be particularly compelling when a court considers a desire for some prosecutorial independence in this calculus. See *id.* at 689–92 (noting that a good-cause removal limitation in the case of the IC, for which some independence from the president was desired, cannot be deemed to “unduly trammel[] on executive authority”).

310. *Prosecutorial Independence: Is The Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part III: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (Mar. 29, 2007) (testimony of D. Kyle Sampson, former Chief of Staff to the Att’y Gen.).

311. The *Bush v. Gore* analogy is drawn from Professor Michael Dorf’s blog. See Posting of Michael C. Dorf to Dorf on Law (Mar. 19, 2007, 08:19 EST), *supra* note 223; Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 Wis. L. REV. 837, 858–70.

who responded critically to *Bush v. Gore* sought to explain their disapproval of that decision by differentiating “political” concerns as relating to policy and ideology from “partisan” concerns as relating to political parties and elections.³¹² The criticisms generally took no issue with a judge deciding policy issues that aligned with her political views, “politics” serving as a proxy for “policy.”³¹³ They instead questioned the legitimacy of a court when a judge rules based on which political party will win—a decision on “partisan” grounds.³¹⁴ Two commentators have differentiated the “‘high’ politics [of] larger political principles and ideological goals” from the “‘low’ politics of partisan political advantage.”³¹⁵ At least one author has noted that determining whether a Justice in *Bush* was acting in a jurisprudential or in a partisan fashion requires an inquiry into whether the proffered doctrinal reasons for the decision were pretext—a requirement similar to the need to look into pretext in assessing whether a removal decision was political or partisan.³¹⁶

One of the difficulties in forcing a court to distinguish partisanship from policy—or worse, partisanship from politics as a proxy for policy—is the necessarily fact-intensive inquiry that is required. Commentators have filled entire volumes debating whether *Bush* was an improper, partisan decision or an exercise of impartial jurisprudence in a difficult case.³¹⁷ As the recent USA removals demonstrate, without intensive factfinding, executive branch officials may offer pretextual, ex post justifications for a firing motivated by partisanship.³¹⁸ Whether a court is equipped to undertake a pretext analysis is thus a critical question.

312. 531 U.S. 98 (2000). Many commentators have discussed the issue of partisanship, distinct from something like politics as a proxy for policy. Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408–09 (2001); Jesse H. Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 CONST. COMMENT. 335, 347 (2001) (“[I]t is critical to distinguish between judicial (or jurisprudential) ideology and political ideology (or crude partisanship.)”); Sanford Levinson, *Return of Legal Realism*, THE NATION, Jan. 8, 2001, at 8; see Bruce Ackerman, *Off Balance*, in BUSH V. GORE 192, 197–98 (Bruce Ackerman ed., 2002); see generally Guido Calabresi, *In Partial (but not Partisan) Praise of Principle*, in BUSH V. GORE, *supra*, at 67, 71–77; ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 4–10, 116–17, 194 (2001); cf. CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDREAL JUDICIARY 129–56 (2006) (discussing judges’ political parties and judicial decision making, particularly on hot “political” issues, but not deploying the same attacks of illegitimacy as the commentators critiquing Bush).

313. Balkin, *supra* note 312; Choper, *supra* note 312.

314. Balkin, *supra* note 312, at 1408–09; Choper, *supra* note 312, at 347–52.

315. See Balkin, *supra* note 312, at 1408–09 (citing Levinson, *supra*, note 312, at 8).

316. See Choper, *supra* note 312, at 348.

317. Compare DERSHOWITZ, *supra* note 312; Ackerman, *supra* note 312; and Balkin, *supra* note 312, with RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001); Nelson Lund, *An Act of Courage*, WKLY. STANDARD, Dec. 25, 2000, at 24, reprinted in FLORIDA 2000: A SOURCEBOOK ON THE CONTESTED PRESIDENTIAL ELECTION 291 (Mark Whitman ed., 2003); and Laurens Walker, *The Stay Seen Around the World: The Order That Stopped the Vote Recounting In Bush v. Gore*, 18 J.L. & POL. 823 (2002).

318. See discussion *supra* Part I.

2. McDonnell Douglas, *Pretext Inquiries in Dismissal Claims, and the Issue of Mixed Motives*

Fortunately, a framework on which a reviewing court could rely to parse a partisan firing from a firing motivated by politics as a proxy for policy already exists. The seminal case is *McDonnell Douglas Corp. v. Green*, in which the Supreme Court recognized the difficulty that a plaintiff faced in proving employment discrimination under Title VII of the Civil Rights Act.³¹⁹ In response, the Court created what came to be known as the *McDonnell Douglas* test, an evidentiary, burden-shifting test to enable plaintiffs to demonstrate prohibited intent in employment discrimination cases.³²⁰ Under the test and its Supreme Court progeny, the plaintiff makes a prima facie case by demonstrating that she was fired for a prohibited reason.³²¹ In the case of a former USA bringing a claim under the proposed cause of action,³²² she could claim that she was fired for purely partisan reasons and that the true reasons for dismissal exceeded the scope of the removal power or are prohibited by the proposed statute.³²³

If a court agreed with a USA that a partisan firing exceeded the removal power or that a statute prohibiting partisan removals was constitutional, the court would have to continue its inquiry and determine whether the executive branch undertook the firing for purely partisan reasons. Under the *McDonnell Douglas* test, once the plaintiff has made a prima facie case of discrimination, the burden shifts to the employer to “articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”³²⁴ If the employer is able to meet its burden of showing a nondiscriminatory justification for the firing, the burden shifts back to the plaintiff. The plaintiff, however, must “be afforded a fair opportunity to show that [the employer’s] stated reason for [the plaintiff’s] rejection was in fact pretext.”³²⁵ In the case of a USA bringing a claim of partisan firing, this component of the *McDonnell Douglas* inquiry would unfurl much like the back-and-forth that occurred between the fired USAs and the DOJ.³²⁶

Through this process, a single USA fired for partisan reasons could gain the benefits that the entire group of fired USAs eventually shared. In private

319. 411 U.S. 792 (1973); *see also* 42 U.S.C. § 2000e-2(a) (2000).

320. HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* 181–92 (2d ed. 2004).

321. *See* *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993) (holding that a plaintiff’s showing of pretext through the most indirect means allowed by *McDonnell Douglas*, simply convincing the trier of fact, permits but does not require judgment for the plaintiff); *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981) (holding that the employer’s rebuttal burden could only be discharged through evidence clearly demonstrating the proffered reason for discharge).

322. *See* discussion *supra* Section III.B.4.

323. *See* discussion *supra* Section II.A; *supra* note 308 and accompanying text.

324. *McDonnell Douglas*, 411 U.S. at 802.

325. *Id.* at 804.

326. *See* discussion *supra* Part I.

employment, by shifting the burden to the employer after the plaintiff makes a prima facie case, the *McDonnell Douglas* test encourages the production of evidence, which is critical to an analysis of the firing but may be difficult to obtain otherwise.³²⁷ Even in the present case, where Congress held hearings on the firings, it complained that the administration was not forthcoming with evidence.³²⁸ If a court employed a burden-shifting framework, it would likely increase the amount of information available regarding the removal.

This Note is not the first authority to suggest increased utilization of the *McDonnell Douglas* framework in adjudicating factual issues relating to partisanship against the backdrop of a constitutional claim.³²⁹ In *Vieth v. Jubelirer* the Supreme Court heard claims from Democratic Pennsylvania voters that the Pennsylvania redistricting following the 2000 census was an unconstitutional partisan gerrymander.³³⁰ In a plurality decision, four Justices found that claims of such gerrymandering were not justiciable;³³¹ the four dissenters believed that the claim was justiciable, but produced three alternative methods for ascertaining unconstitutional partisan gerrymandering.³³² Justices Souter and Ginsburg proposed to “start anew” with an inquiry based on the *McDonnell Douglas* framework.³³³

There are significant similarities between a partisan gerrymandering inquiry and a partisan removal claim. Like the USA removals, the difficulty in recognizing improper gerrymandering arises because political considerations are necessarily part of the process, but the “Court’s job must be to identify clues . . . indicating that partisan competition has reached an extremity of unfairness.”³³⁴ After describing gerrymandering-specific claims for plaintiffs to make a prima facie case,³³⁵ the Justices explained that the burden would then be on the government to show legitimate reasons for its actions “by reference to objectives other than naked partisan advantage.”³³⁶ While Justices Souter and Ginsburg dissented from the plurality, and the state of a gerrymandering test after *Vieth* is muddled at best,³³⁷ it is clear that

327. See *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 509–11 (1993).

328. See, e.g., Conyers Memo, *supra* note 21, at 19, 27, 30–31.

329. One commentator has noted the similarities of the USA firings to the *McDonnell Douglas* inquiry and the potential utility of importing the burden-shifting framework to thinking about the USA firings. Posting of Brad Wendel to Legal Ethics Forum, http://legalethicsforum.typepad.com/blog/2007/03/thinking_about_.html (Mar. 19, 2007, 13:46 EST).

330. 541 U.S. 267, 271–73 (2004).

331. *Vieth*, 541 U.S. at 281.

332. See *id.* at 317 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting).

333. *Id.* at 346 (Souter, J., dissenting).

334. *Id.* at 344.

335. *Id.* at 347–51.

336. *Id.* at 351.

337. E.g., Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 782 (2005) (arguing that *Vieth* created significant uncertainty because the plurality insisted that partisan gerry-

the *McDonnell Douglas* framework can be useful for resolving fact-intensive disputes involving claims of partisanship such as the USA removals.

A final complication to this analysis is the issue of dismissals that occur for both allowed and prohibited reasons, referred to in employment law jurisprudence as “mixed motives” cases. Mixed-motives cases present a problem for the *McDonnell Douglas* framework, which assumes that an employer’s reason for a dismissal was grounded entirely in either an allowed or prohibited reason, but not a combination of the two.³³⁸ In the USA context, the issue of mixed motives would have to serve as an outer limit beyond which Congress could not limit removal and a dismissed USA could not state a cognizable constitutional claim. The difference between the employment law jurisprudence and the framework that this Note advocates arises from the underlying authority. In the employment context, an employer has the burden to show that the employment decision would have been the same regardless of the prohibited motive because “[i]n passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and natural origin are not relevant to the selection, evaluation, or compensation of employees.”³³⁹ In contrast, in the context of a USA firing, the claim need not be that politics “must be irrelevant to employment decisions,”³⁴⁰ instead, the claim should be that, for a removal to constitute a legitimate exercise of the president’s authority, it cannot be pure partisanship designed only to effect electoral advantage.³⁴¹ A claim based solely on allegations that partisan motives played only some role in a removal would thus fail. While this limits the applicability of the framework that this Note suggests, it retains the president’s constitutionally required Article II grant.

CONCLUSION

The Court’s decision in *Morrison* leaves room for Congress to craft narrow removal power limitations for inferior officers that should pass constitutional muster. The facts of the USA firings indicate that the USAs were likely removed because they failed to follow not just political, but partisan, goals that the White House sought to implement through the DOJ. While any new legislation may be no help to the fired USAs, the unprecedented removal of nine USAs should spur Congress to prevent such an

mandering was not justiciable despite all of the Justices’ agreement that excessively partisan gerrymandering is unconstitutional); Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 603–04 (2007) (“[T]he Court . . . failed to resolve several . . . important issues [related to gerrymandering and] . . . is utterly at sea with respect to its role in policing the manipulation of democratic outcomes by political elites.”); Michael S. Kang, *When Courts Won’t Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097, 1097 (2007) (“After two prominent U.S. Supreme Court decisions on partisan gerrymandering during recent years, the law of partisan gerrymandering remains as muddled as beforehand.”).

338. LEWIS & NORMAN, *supra* note 320, at 215.

339. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989).

340. *Id.* at 240.

341. See discussion *supra* Section III.A.

abuse in the future. Congress failed to act after the Marston Affair. If it had, the recent scandal may have been avoided. Despite the availability of a number of previously proposed legislative frameworks, none provides a satisfactory balance between the president's constitutionally mandated control of the executive branch and the separation of powers values of accountability and balance. As such, Congress should adopt new legislation that promotes transparency in personnel practice at the DOJ and permits a U.S. Attorney who believes her removal is an unconstitutional overreach to challenge that removal in federal court.