

LIVE AND LEARN: DEPOLITICIZING THE INTERIM APPOINTMENTS OF U.S. ATTORNEYS

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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.¹

I. INTRODUCTION

U.S. Attorneys play a special role in our federal criminal justice system. As the representatives of the federal government, they have the responsibility of enforcing federal laws in their respective districts.² Although U.S. Attorneys serve “at the pleasure of the President,”³ the goal is to have a fair and impartial prosecutor administering the laws.⁴ The recent firing of eight U.S. Attorneys has called into question attempts to politicize the role of this vital Office. By attempting to give the Attorney General the power to make indefinite interim appointments,

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1. *Berger v. United States*, 295 U.S. 78, 88 (1935).

2. See generally Michael Edmund O’Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predicative Factors*, 41 AM. CRIM. L. REV. 1439 (2004) (discussing factors U.S. Attorneys will use in making prosecutorial decisions for their districts).

3. *Gonzales*: “I Serve at the Pleasure of the President,” ABC NEWS, Mar. 14, 2007, <http://abcnews.go.com/GMA/story?id=2949749>.

4. See Ross E. Wiener, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN. L. REV. 363, 382–84 (2001) (discussing U.S. Attorneys’ vast discretion to decide which crimes to prosecute and the consequential effect on Department of Justice policy); see also *infra* Part II.

the Justice Department has also compromised the independence of U.S. Attorneys and their role as effective and fair federal prosecutors.

In 2006, something happened that jeopardized the role of U.S. Attorneys like never before.⁵ Alberto Gonzales, then Attorney General of the United States, authorized the midterm firings of eight experienced and well-regarded U.S. Attorneys across the country.⁶ With little or no notice, these U.S. Attorneys were unceremoniously asked to leave their posts. Interim U.S. Attorneys were appointed who generally lacked the prosecutorial experience or credentials of the seasoned U.S. Attorneys they replaced.⁷ Shortly thereafter, Congress began investigating allegations of political interference in the sacking of the U.S. Attorneys.⁸

Currently, the investigation continues in order to discover who called for the firing of these individuals and why.⁹ Were they fired because they failed to indict members of the opposing political party?¹⁰ Were they fired because they had the audacity to investigate and indict members of the Administration's political party?¹¹ Who decided

5. Although there have been claims that U.S. Attorneys are routinely replaced, for reasons explained in Part II of this Article, the Bush Administration's recent round of firings was unprecedented. Scott Lilly, *Attorney Scandal Without Precedent: CRS Reveals Audacity of Dismissals*, CENTER FOR AMERICAN PROGRESS, Mar. 20, 2007, http://www.americanprogress.org/issues/2007/03/crs_report.html; see also discussion *infra* Part III.

6. Lilly, *supra* note 5.

7. For example, Bud Cummins of the Eastern District of Arkansas was dismissed in December 2006 and subsequently replaced by Timothy Griffin. Cummins was allegedly removed to "make room" for Griffin, whose appointment was "important to Harriet [Miers], Karl [Rove], etc." Aaron Sadler, *Documents Shed New Light on Griffin Appointment*, ARK. NEWS BUREAU, Mar. 14, 2007, available at <http://www.arkansasnews.com/archive/2007/03/14/WashingtonDCBureau/341041.html>. Griffin's main qualification for the position as interim U.S. Attorney was his work as research director for the Republican National Committee. As for legal experience, Griffin had served in the U.S. Attorney's Office in Arkansas before his interim appointment. Conversely, Cummins had served as a U.S. Attorney for five years before his dismissal and possessed a much stronger legal background than Griffin. See Warwick Sabin, *End Around: Senators Question U.S. Attorney Appointment*, ARK. TIMES, Dec. 28, 2006, at 10, available at <http://www.arktimes.com/Articles/ArticleViewer.aspx?ArticleID=828918ba-6945-4db7-937c-7aaa4efa6a3a>. For a detailed discussion of the recent firings, see John McKay, *Train Wreck at the Justice Department: An Eyewitness Account*, 31 SEATTLE U. L. REV. 265 (2008).

8. See Marisa Taylor, *Political Interference Alleged in Sacking of a U.S. Attorney*, MCCLATCHY NEWSPAPERS, Feb. 28, 2007, http://www.mcclatchydc.com/staff/marisa_taylor/story/15683.html.

9. McKay, *supra* note 7, at 274. Investigations are being conducted by both the Senate and House Judiciary committees, the Department of Justice Office of Inspector General, and the Office of Professional Responsibility. *Id.*

10. Fired U.S. Attorney David Iglesias alleges that "he was dismissed for resisting pressure from two members of Congress before last year's election to rush indictments in a Democratic kick-back investigation." Jennifer Talhelm, *Domenici Says He Called Fired Prosecutor*, WASH. POST, Mar. 5, 2007, at A1.

11. Carol Lam, former U.S. Attorney in the Southern District of California, notably spearheaded the investigation and eventual conviction of "former 50th District U.S. Rep. Randy 'Duke' Cunningham, who pleaded guilty in late 2005 to taking more than \$2.4 million in bribes in exchange

to put these individuals on the hit list? What was the overall goal of the firings—to give party favorites an opportunity to pad their resumes with the position of U.S. Attorney before the Administration's term came to an end,¹² or to fill a true need for new leadership in the U.S. Attorneys' Offices?

The answers to these key questions are still unknown. Congress remains frustrated by what it perceives to be a lack of candor by the former Attorney General¹³ and his high-level deputies.¹⁴ Meanwhile, White

for steering tens of millions to defense contractors." William Finn Bennett, *Issa to Testify on Lam's Firing*, NORTH COUNTY TIMES, Mar. 5, 2007, available at http://www.nctimes.com/articles/2007/03/06/news/top_stories/1_01_443_5_07.txt. Some claim that Lam's dismissal was brought on by her failure to prosecute smugglers of illegal immigrants. See *id.*

12. See Wiener, *supra* note 4.

13. *Sen. Lincoln on Senate Floor: Bill Will Restore Constitutional Process of Confirming U.S. Attorneys*, U.S. FED. NEWS, March 19, 2007; Interview by Robert Siegel with Sen. Arlen Specter, in Pa. (Mar. 29, 2007), available at <http://www.npr.org/about/press/2007/032907.arlen.html>; Keith Koffler, *Bush Expresses Support for Gonzales After Senate Grilling*, NAT'L J., Apr. 20, 2007.

14. Many key figures have since submitted their resignations following the controversy of the midterm firings. Former Deputy Attorney General McNulty submitted his resignation in May 2007, citing personal reasons. *No. 2 Official at Justice Department Resigns*, CNN.COM, May 14, 2007, <http://www.cnn.com/2007/POLITICS/05/14/justice.mcnulty/index.html>. McNulty came under scrutiny after testifying that the firings were performance-related, prompting many to claim the firings were actually politically motivated. *Id.*

Kyle Sampson, former Attorney General Alberto Gonzales's former chief of staff, is another individual whose resignation centered on the controversy. After news surfaced that Sampson himself had drafted the plan to fire the attorneys, Sampson resigned in March 2007. Not only was Sampson the architect behind the plan, but there were also findings that Sampson had been a likely candidate for a vacant U.S. Attorney position in Utah, his home state. See *Who's Who in the U.S. Attorneys Case: Kyle Sampson*, THE WALL STREET JOURNAL ONLINE, <http://online.wsj.com/public/resources/documents/info-keyplayers0703-26.html> (follow "Next" hyperlinks until reaching "Kyle Sampson") (last visited Aug. 13, 2007).

Former Attorney General Gonzales's former senior counsel and White House liaison Monica Goodling resigned from her position after denying that she played any role in the firings. Evidence suggests, however, that Goodling was a major player in discussions regarding several of the firings. She eventually pleaded the Fifth Amendment when testifying in front of Congress. See *id.* (follow "Next" hyperlinks until reaching "Monica Goodling").

Yet another figure, Michael Battle, issued his resignation in March 2007. Battle served as the messenger who informed the attorneys of their dismissal. He claimed that his resignation was unrelated to his role in the firings and had been in the works for some time. Although Battle was likely not a decision-maker behind the firings, his responsibility as messenger and curiously timed resignation raised questions about his role in the firings. See David Johnston, *Messenger in Prosecutors' Firings Quits*, N.Y. TIMES, Mar. 6, 2007, at A14.

Finally, former Attorney General Gonzales himself resigned on August 27, 2007. Gonzales did not offer any clear-cut reasons for his resignation. See Philip Shenon & David Johnston, *A Defender of Bush's Power, Gonzales Resigns*, N.Y. TIMES, Aug. 28, 2007, at A1. Moreover, commentators across the country were surprised by the timing of Gonzales's departure, given that he had steadfastly refused to step down from his post weeks earlier during the height of public scrutiny of the U.S. Attorneys scandal. See, e.g., Editorial, *Gonzales Gone, and None Too Soon*, ODESSA AMERICAN, Aug. 29, 2007; Editorial, *Gonzo: AG's Resignation Best for Country*, THE OKLAHOMAN, Aug. 28, 2007, at 6A. After Gonzales' resignation, the DOJ's inspector general, Glenn Fine, initiated an investigation into "whether sworn statements to Congress by Attorney

House officials have refused to testify, citing executive privilege.¹⁵ Still, one thing is known: the method in place at the time of the firings for appointing interim U.S. Attorneys exacerbated the problem.¹⁶ Shortly before the firings, Congress reauthorized the Patriot Act,¹⁷ which included a provision that shifted the power to make long-term interim appointments from the Chief Judge of a district to the Attorney General.¹⁸ This change, which went unnoticed at the time,¹⁹ gave the Administration the ability to bypass the Senate confirmation process and to put in place its own political choices for interim U.S. Attorneys. Although the Administration claimed that the change was needed for national security purposes,²⁰ its effect was to add to the increasing politicization of U.S.

General Alberto Gonzales were 'intentionally false, misleading or inappropriate.'" Philip Shenon, *U.S. Watchdog Is Investigating Gonzales*, INT'L HERALD TRIB., Sept. 1, 2007, at 2. The investigation continues today, and Gonzales has retained private counsel to assist him with the government's probe. See Marisa McQuilken, *Gonzales' Man in White*, LEGAL TIMES, Oct. 15, 2007, at 3.

15. In fact, in July 2007, President Bush actually ordered his adviser and former White House counsel Harriet Miers not to testify in front of Congress. Miers is said to have suggested a plan to fire all U.S. Attorneys back in 2005. The Administration claims that Miers is immune from the subpoena, while Democrats claim that she no longer enjoys the immunity she maintained during her employment at the White House. Another woman, White House political director Sara Taylor, initially refused to answer any questions regarding President Bush's role in the firings, but later said that Bush played no role whatsoever. The House Judiciary Committee later voted to issue Miers a contempt of Congress citation. David Stout & Jim Rutenberg, *Bush Instructs His Ex-Counsel Not to Appear at Hearing*, N.Y. TIMES, July 11, 2007, available at <http://www.nytimes.com/2007/07/11/washington/11cnd-attorneys.html?ex=1187150400&en=ea26c3bb16f592e4&ei=5070>; see also Jennifer Yachnin, *Contempt Votes to Wait Until Fall*, ROLL CALL, July 26, 2007, available at 2007 WLNR 14304063.

16. This procedure was subsequently abandoned following the uproar caused by the dismissal of the eight U.S. Attorneys and their replacement with interim U.S. Attorneys appointed by the Attorney General. See Michael Posner, *Senate Judiciary Panel Revises Rule for U.S. Attorneys*, CONGRESS DAILY, Feb. 8, 2007, available at 2007 WLNR 2570450.

17. The new Patriot Act, titled the USA Patriot Improvement and Reauthorization Act, was passed March 9, 2006. See CHARLES DOYLE & BRIAN T. YEH, CONGRESSIONAL RESEARCH SERVICE, USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT OF 2005: A LEGAL ANALYSIS (2006), available at <http://www.fas.org/sgp/crs/intel/RL33332.pdf>.

18. USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 502, 120 Stat. 192, 246 (2006).

19. Senator Diane Feinstein (D-Cal.) stated that the measure that allowed the Administration to appoint U.S. Attorneys for an indefinite period of time went unnoticed as the fight for the passage of bill went on for months. Feinstein asserted that Senator Arlen Specter (R-Pa.) had "slipped in" the measure in such a way that no one knew it was in the bill. Specter, however, vehemently denied doing so. In fact, Specter stated that he was unaware of the provision until it was brought to his attention by Senator Feinstein. Also, Specter said that the provision was open for inspection for more than three months. Paul Kiel, *Specter: "I Do Not Slip Things In,"* TPM.COM, Feb. 6, 2007, <http://www.tpmuckraker.com/archives/002487.php>.

20. Before signing the USA Patriot Improvement and Reauthorization Act (the Act), the President addressed the need to enact this piece of legislation in order to win the war on terror and protect the American people. The President asserted that the Act would strengthen national security by allowing authorized law enforcement and intelligence officers to share vital information and by allowing agents to track terrorists with the same tools they use against other criminals. Press

Attorneys' Offices.²¹ Both Republicans and Democrats quickly agreed that the new law was a bad choice and sought to amend it.²²

It was not by accident that the power to appoint interim U.S. Attorneys was shifted from judges to U.S. Department of Justice (DOJ) officials. In 2001, a trial attorney of the DOJ, Ross E. Wiener, had proposed the change. In his article, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*,²³ Wiener proposed that the power to appoint interim U.S. Attorneys shift from the Judicial to the Executive Branch.²⁴ To his credit, he did suggest ways in which Congress could have some oversight in the appointment process.²⁵ None of these, however, were put in place when the Patriot Act was passed.

Following the U.S. Attorney purge of 2006–2007, it is time to reassess the approach used to appoint interim U.S. Attorneys. Recent events have taught us how quickly U.S. Attorneys can become political pawns. Indeed, this scandal has jeopardized the credibility of federal prosecutors, disillusioned career prosecutors in those positions, and called into question the separation between professionalism and politics in the

Release, Office of the Press Secretary, President Signs USA PATRIOT Improvement and Reauthorization Act (Mar. 9, 2006) (on file with author).

21. *Preserving Prosecutorial Independence: Is the Dept. of Justice Politicizing the Hiring and Firing of U.S. Attorneys?*, Hearing Before the S. Judiciary Comm., 110th Cong. (2007) (statement of Laurie L. Levenson, Professor, Loyola Law School) [hereinafter Levenson, *Preserving Prosecutorial Independence*] (explaining that “[u]nder the present system, the Executive Branch can—and appears determined to—bypass the confirmation role of the Senate by making indefinite interim appointments. The result is a system where political favorites may be appointed without any opportunity for the Senate to evaluate those candidates’ backgrounds and qualifications to serve as the chief federal law enforcement officer of their districts.”).

22. The USA Patriot Improvement and Reauthorization Act was signed by President George W. Bush on March 9th, 2006. Posner, *supra* note 16.

23. Ross E. Wiener, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN L. REV. 363 (2001).

24. *Id.* at 445. This article suggests that partisan political instincts of U.S. Attorneys need to be kept in check. In order to do so, the President and Congress must fulfill their constitutionally prescribed roles. The appointment of U.S. Attorneys is an executive function and should reside with the executive branch. *Id.* Congress, however, should have the power to affect the appointment of interim U.S. Attorneys and to force the executive to make a decision in a timely fashion. *Id.* Congress also has the power to make sure that qualified prosecutors take the responsibilities of a U.S. Attorney during a vacancy. *Id.* at 446. By having oversight over the appointment of qualified attorneys, Congress has provided the incentive to the Executive Branch to nominate an acceptable candidate for the position. *Id.* Intense congressional oversight will provide cooperation with the Executive Branch. *Id.*

25. *Id.* at 443. For example, Wiener suggests that Congress edit the laws so that the Executive Branch must appoint an interim U.S. Attorney from among the career prosecutors in the local U.S. Attorney’s office. *Id.* Wiener makes other suggestions that are not as practical, such as having Senate-appointed officials oversee the U.S. Attorneys’ offices themselves when there is a vacancy. *Id.*

enforcement of our federal laws.²⁶ To restore confidence in U.S. Attorneys' Offices, a reexamination of the interim appointment process is critical so that the mistakes of 2006 are not repeated.

Part II of this Article discusses the important role of U.S. Attorneys and why their function is threatened by a growing politicization of the U.S. Attorney's Office. Part III explains how U.S. Attorneys have traditionally been appointed, and why the shift from the traditional approach to one that affords more power to the Executive Branch was unwarranted and unwise. Finally, Part IV proposes an approach that will better ensure that only qualified individuals serve in the position of U.S. Attorney and will stem the tide toward politicization of the office.

The last two years have been a dark period for federal prosecutors. The Attorney General was accused of being a liar, an incompetent leader, or both,²⁷ the accusations were ultimately enough to force his resignation.²⁸ Dedicated public servants have found their names dragged

26. See Eric Lichtblau & Scott Shane, *Attorney General Held Firm on War Policies*, N.Y. TIMES, Aug. 28, 2007, at A1 ("Many say [former Attorney General Gonzales] leaves a Justice Department that has been tainted by political influence, depleted by the departures of top officials and weakened by sapped morale."); Philip Shenon & Jim Rutenberg, *Justice Dept. Lawyers Join Chorus Criticizing Gonzales*, N.Y. TIMES, July 28, 2007, at A11 ("Daniel J. Metcalfe, a lawyer who began his government career in the Nixon administration and retired from the Justice Department last winter, said morale at the department was worse under [former Attorney General Gonzales] than during Watergate Even though they worry that it may hinder their career prospects, a few current and former Justice Department lawyers have begun to add to the chorus of Mr. Gonzales's critics who say that the furor over his performance as attorney general, and questions about his truthfulness under oath, could do lasting damage to the department's work. It is a view that is widely shared on Capitol Hill").

27. Editorial, *The Gonzales Soap Opera*, CHICAGO TRIBUNE, Aug. 1, 2007, at 18; Comment, *Mr. Gonzales' Amnesia*, HARTFORD COURANT, July 29, 2007, at C2.

28. See Tom Brune & Carol Eisenberg, *Gonzales Resigns: Who's Next in Line?*, NEWSDAY, Aug. 28, 2007, at A8; Philip Shenon & David Johnston, *A Defender of Bush's Power, Gonzales Resigns*, N.Y. TIMES, Aug. 28, 2007, at A1. Commenting on Gonzales' resignation, Sen. Leahy stated that

[u]nder this Attorney General and this President, the Department of Justice suffered a severe crisis of leadership that allowed our justice system to be corrupted by political influence. It is a shame, and it is the Justice Department, the American people and the dedicated professionals of our law enforcement community who have suffered most from it.

The obligations of the Justice Department and its leaders are to the Constitution, the rule of law and the American people, not to the political considerations of this or any White House. The Attorney General's resignation reinforces what Congress and the American people already know—that no Justice Department should be allowed to become a political arm of the White House, whether occupied by a Republican or a Democrat.

The troubling evidence revealed about this massive breach is a lesson to those in the future who hold these high offices, so that law enforcement is never subverted in this way again. I hope the Attorney General's decision will be a step toward getting to the truth about the level of political influence this White House wields over the Department of Justice and toward reconstituting its leadership so that the American people can renew their faith in its role as our leading law enforcement agency.

through the mud as DOJ officials have tried to justify their firings.²⁹ Career prosecutors have been demoralized because the scandal has cast a shadow on the integrity and professionalism of federal prosecutors generally.³⁰ Most importantly, the public has had to wonder whether replacement U.S. Attorneys are bound to serve the public's interests or merely their own. It is bad enough to live through this period; it is even worse if we do not learn from it. The appointment of interim U.S. Attorneys should not be a political game. Rather, it should be a process that recognizes that the first and foremost responsibility for prosecutors is "to do justice."³¹

II. THE ROLE OF U.S. ATTORNEYS

U.S. Attorneys, through their power to "prosecute for all offenses against the United States,"³² are the chief law enforcement officials of the federal districts. They have the discretion to decide which cases to pursue and how to allocate resources in order to best serve the priorities

Comment of Sen. Patrick Leahy (D-VT), Chairman, S. Judiciary Comm., on Reports of the Resignation of Attorney General Alberto Gonzales (Aug. 27, 2007), available at <http://leahy.senate.gov/press/200708/082707.html>.

29. Editorial, *Dropping Like Flies*, HOUSTON CHRON., Jan. 25, 2007, at B10 ("U.S. Attorney General Alberto Gonzales denied [that] political motives figured in the multiple resignations of top prosecutors, and pledged that all interim appointments would be submitted to the Senate for confirmation."); Mark Folman, *Inside Bush's Prosecutor Purge*, SALON, Feb. 28, 2005, <http://www.salon.com/news/feature/2007/02/28/attorneys/> ("Justice Department leaders have vigorously denied that the firings were politically motivated.").

30. Jay Ambrose, *Gonzales: Victim or Lickspittle?*, CINCINNATI POST, Aug. 30, 2007, at A; Massimo Calabresi & Brian Bennett, *The Gonzales Legacy*, TIME, Sept. 10, 2007, at 40 ("[T]he scandal and its clumsy handling resulted in the resignations of more than half a dozen top officials at the [Justice Department] and demoralized prosecutors throughout the system."); Levenson, *Preserving Prosecutorial Independence*, *supra* note 21 ("Asking qualified U.S. Attorneys to leave and replacing them with political insiders is demoralizing; it denigrates the work of hardworking and dedicated Assistant U.S. Attorneys and undermines public confidence in the work of their offices."). See generally Randall D. Eliason, Editorial, *Justice Suffers When It's Political*, BALTIMORE SUN, May 29, 2007, at 9A ("The next time a defendant claims that the prosecution's case is simply political, the public—and the jury—may be more receptive. Who could blame them for believing the defendant may have been indicted in order to influence an election?").

31. Circuit Judge Stephen S. Trott, when he was Assistant Attorney General, phrased it this way:

As officials charged with upholding all the laws of the land, the Constitution is our sacred trust. I am confident that we shall avail ourselves of this opportunity to demonstrate without ambiguity to the Supreme Court and to the American people that we are fully capable of discharging this duty.

Stephen S. Trott, Assistant Attorney General, *The Challenge to Law Enforcement of the Reasonable Good-Faith Exception to the Exclusionary Rule*, Address delivered before the Career Prosecutor Course of the National College of District Attorneys (July 5, 1984) (transcript on file with the author); see also Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553 (1998).

32. 28 U.S.C. § 547 (2000).

of their respective jurisdictions.³³ Every year, U.S. Attorneys file thousands of cases.³⁴ Some of the more notable cases in the last decade include terrorism cases:³⁵ the prosecutions of Timothy McVeigh,³⁶ Martha Stewart,³⁷ Scooter Libby³⁸ as well as other celebrity cases.³⁹ By both tradition and function, U.S. Attorneys serve as DOJ employees but maintain the independence necessary to serve the needs of their districts.⁴⁰

Although U.S. Attorneys' Offices are financially supported by the DOJ and rely on the DOJ for coordination and direction, the Offices are separate from the DOJ.⁴¹ Historically, U.S. Attorneys have enjoyed at

33. See EXECUTIVE OFF. FOR U.S. ATT'YS, U.S. DEP'T OF JUSTICE, U.S. ATT'YS ANN. STAT. REP. 1 (2006), available at http://www.usdoj.gov/usao/reading_room/reports/asr2006/06statrpt.pdf ("Each United States Attorney is responsible for establishing law enforcement priorities within his or her district"); see also O'Neill, *supra* note 2, at 1486.

34. During 2004, 126,878 suspects were arrested by Federal law enforcement agencies for violations of Federal law. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS (2004), <http://www.ojp.usdoj.gov/bjs/abstract/cfjs04.htm>. In 2005, 91,578 defendants were charged in felony or misdemeanor cases. See generally *id.*; Federal Justice Statistics Resource Center, Bureau of Justice Statistics, <http://fjsrc.urban.org>.

35. See generally Richard Willing, *FBI Cases Drop as It Focuses on Terror*, USA TODAY, Apr. 13, 2006, at 1A (noting that non-terrorism-related prosecutions dropped as there was an increase in terrorism cases).

36. Timothy McVeigh was responsible for the Oklahoma City bombing, which killed 168 people and was the deadliest act of terrorism in the United States until the September 11th attacks. Jo Thomas, *Agony Relived as U.S. Pursues McVeigh Death*, N.Y. TIMES, June 5, 1997, at A1.

37. Martha Stewart was involved in an insider trading scandal and was convicted of fraud, conspiracy, and obstruction of justice. See Brooke A. Masters, *Stewart Attorney Asks for Prosecution Papers*, WASH. POST, Oct. 8, 2004, at E2.

38. Scooter Libby served as Assistant to President Bush, Chief of Staff to Vice President Cheney, and Assistant to the Vice President for National Security Affairs from 2001 to 2005. Libby resigned his government positions after his indictment on five felony counts in the grand jury investigation into the disclosure of the then-classified identity of covert CIA operative Valerie E. Wilson (Mrs. Joseph C. Wilson), also known as Valerie Plame. See Amy Goldstein & Carol D. Leonnig, *Prosecution Rests Case in Libby's Perjury Trial*, WASH. POST, Feb. 9, 2007, at A3; see also Clarence Page, *Fuzzy Justice Clearly Stinks; Bush Commutation of Libby Prison Term Flies in Face of Precedent*, CHI. TRIB., July 4, 2007, at C15.

39. Bill Hutchinson, *Lil' More Venom in Jail*, N.Y. DAILY NEWS, Oct. 28, 2005, at 16 (discussing rapper Lil' Kim's 366 day sentence for lying before a grand jury).

40. See Bruce A. Green & Fred C. Zacharias, *"The U.S. Attorneys Scandal" and the Allocation of Prosecutorial Power* (Fordham Univ. Sch. of Law, Working Paper No. 1015026, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1015026 (detailing the allocation of prosecutorial power and the role of independence in the work of U.S. Attorneys).

Professor James Eisenstein has written the seminal book on the role of U.S. Attorneys and their role in federal law enforcement. See generally JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS (1978) [hereinafter EISENSTEIN, COUNSEL FOR THE UNITED STATES]. His article in this Issue further describes the nature of the relationship between U.S. Attorneys and the main Department of Justice. See James Eisenstein, *The U.S. Attorney Firings of 2006: Main Justice's Centralization Efforts in Historical Context*, 31 SEATTLE U. L. REV. 219 (2008) [hereinafter Eisenstein, *U.S. Attorney Firings*].

41. O'Neill, *supra* note 2, at 1486; see also Green & Zacharias, *supra* note 40, at 1 (noting that Attorney General Robert H. Jackson had agreed that "some measure of centralized control is

least some independence with respect to job performance. In fact, the independence of the office is rooted in its very creation. Both the Office of the United States Attorney and the position of United States Attorney General were created by the Judiciary Act of 1789.⁴² The 1789 Act provided for the appointment

in each district of a meet person learned in the law to act as attorney for the United States . . . whose duty it shall be to prosecute in each district all delinquents for crimes and offenses, recognizable under the authority of the United States, and all civil actions in which the United States shall be concerned.⁴³

At the outset, the Attorney General was “more of a general attorney than an officer statutorily empowered to command other governmental attorneys.”⁴⁴ The Attorney General did not have power to appoint U.S. Attorneys and had no control over them.⁴⁵ It was not until August of 1861 that Congress passed an act giving the Attorney General authority over U.S. Attorneys by delegating powers of “general superintendence and direction duties” to the Attorney General.⁴⁶ Although the “superintendence” powers were not specified at that time, the Attorney General later received the power to supervise criminal and civil proceedings in any district through the Department of Justice Act of June 22, 1870 and the Act of June 30, 1906.⁴⁷ The primary means of supervising U.S. Attorneys was to adopt policies that guided the U.S. Attorneys in their discretionary decisions.⁴⁸

necessary” to ensure that U.S. Attorneys are consistent in their interpretation and applications of the law but that their judgment should not be overruled except in unusual cases).

42. Judiciary Act of 1789, 1 Stat. 92 (1789); see Henry J. Bourguignon, *The Federal Key to the Judiciary Act of 1789*, 46 S.C. L. REV. 647 (1995); Wythe Holt, “*To Establish Justice*”: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L.J. 1421 (1989); Sandra Day O’Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. CIN. L. REV. 1 (1990).

43. U.S. DEP’T OF JUST., U.S. ATTORNEYS’ MANUAL § 3-2.110 (1997) (quoting Judiciary Act of 1789, 1 Stat. 92) [hereinafter MANUAL], available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/.

44. Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 552 (2005).

45. James R. Harvey III, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1578 (1996).

46. MANUAL, *supra* note 43, at § 3-2.110 (quoting Act of Aug. 2, 1861, Ch. 37, 12 Stat. 185 (1861)).

47. *Id.* As noted by Professors Green and Zacharias, while the establishment of the Department of Justice gave the Attorney General the legal authority to oversee U.S. Attorneys (known as “district attorneys” at that time), there were practical limits on the Attorney General performing under this rule because of the complexities of travel and communications in that early era. “Early U.S. Attorneys had to function relatively autonomously.” See Green & Zacharias, *supra* note 40 at 10.

48. See Green & Zacharias, *supra* note 40, at 10.

Today, U.S. Attorneys are considered “officers” of the United States. An officer is defined as “any appointee exercising significant authority pursuant to the laws of the United States.”⁴⁹ Because the Attorney General has supervisory power over them, U.S. Attorneys are classified as inferior, rather than principal, officers of the Executive.⁵⁰ The Attorney General has “plenary authority” over U.S. Attorneys and “unfettered discretion to reassign cases from United States Attorneys to herself or to ‘any officer of the Department of Justice.’”⁵¹ The Attorney General also establishes the salaries of U.S. Attorneys.⁵² This power gives the Attorney General significant and practical control over U.S. Attorneys.⁵³

Nevertheless, U.S. Attorneys are not merely employees of the Attorney General. 28 U.S.C. § 541 creates a limit on the Attorney General’s power over U.S. Attorneys. It provides that U.S. Attorneys will be appointed by the President with the advice and consent of the Senate.⁵⁴ Each U.S. Attorney is appointed to each judicial district for a four-year term and each attorney is subject to removal only by the President.⁵⁵ Once the four-year term expires, the U.S. Attorney continues to serve until a successor is appointed and approved.⁵⁶ Currently, there are

49. *U.S. v. Gantt*, 194 F.3d 987, 999 (9th Cir. 1999) (quoting *Buckley v. Valeo*, 424 U.S. 1 (1976)). In *Gantt*, the defendant moved to suppress evidence seized from her hotel room on the ground that the police failed to issue a complete copy of the search warrant. *See Gantt*, 194 F.3d at 999. The government failed to comply with 18 U.S.C. § 3731, which limits the right of appeal on criminal cases. *Id.* at 996–97. The defendant argued that the untimely certification was invalid because the appointment of the then-United States Attorney for the Southern District of California by the judges of the Southern District of California, pursuant to 28 U.S.C. § 546(d), violated the Appointments Clause. *Id.* at 998. The court held that (1) the government’s failure to timely comply with certification requirements did not warrant dismissal of the appeal; (2) United States Attorneys are “inferior officers,” so their appointment by the district court did not violate the Appointments Clause; (3) the failure to give defendant, who was present during the search, a complete copy of the search warrant justified suppression of the evidence; and (4) the good faith exception to the exclusionary rule was inapplicable. *See id.*

50. *Id.* at 999.

51. *Id.*

52. *Id.* at 1000.

53. The DOJ also maintains regulations that require approval for certain types of prosecutions and on major policy questions, such as whether to subpoena a lawyer or to seek the death penalty. *See* MANUAL, *supra* note 43, §§ 9-2.400, 9-10.040.

54. 28 U.S.C. § 541 (2006). The statute reads as follows:

United States attorneys: (a) The President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district; (b) Each United States attorney shall be appointed for a term of four years. On the expiration of his term, a United States attorney shall continue to perform the duties of his office until his successor is appointed and qualifies; (c) Each United States attorney is subject to removal by the President.

Id. § 541.

55. *Id.*

56. *Id.*

ninety-three U.S. Attorneys stationed throughout the United States and its territories; one U.S. Attorney is appointed to each judicial district, with the exception of Guam and the Northern Mariana Islands, which share a single U.S. Attorney.⁵⁷

The Attorney General retains the ability to supervise the duties of the U.S. Attorneys and any litigation to which the United States is a party.⁵⁸ U.S. Attorneys possess powers enumerated in 28 U.S.C. § 547; these enumerated powers include the ability to:

- (1) [P]rosecute for all offenses against the United States; (2) prosecute or defend, for the government, all civil actions, suits, or proceedings in which the United States is concerned; (3) appear in behalf of the defendants in all civil actions, suits or proceedings pending in [sic] [the] district against collectors, or other officers of the revenue or customs for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury; (4) institute and prosecute proceedings for the collection of fines, penalties, and forfeitures incurred for violation of any revenue law, unless satisfied upon investigation that justice does not require such proceedings; and (5) make such reports as the Attorney General shall direct.⁵⁹

Given this authority, the Attorney General works with the U.S. Attorneys in much the same way the General Counsel of a company may outsource or retain outside litigation counsel to bring or defend cases.

The vast majority of the cases handled by U.S. Attorneys are criminal prosecutions.⁶⁰ In criminal cases in which the United States is a party, U.S. Attorneys are the “principal federal law enforcement officers in their judicial districts.”⁶¹ U.S. Attorneys have the authority to designate an Assistant U.S. Attorney who would, in the absence of the U.S.

57. U.S. DEP'T OF JUST., U.S. ATT'YS MISSION STATEMENT, <http://www.usdoj.gov/usao/> (last visited Sept. 1, 2007). There are currently fifteen interim U.S. Attorneys (not appointed by the President). It is unusual for U.S. Attorneys to leave their posts before their terms expire. Between 1981 and 2006, there have been fifty-four U.S. Attorneys who have left before their respective terms were over. Of these fifty-four, only two were dismissed and only six resigned. See KEVIN M. SCOTT, CONGRESSIONAL RESEARCH SERVICE, U.S. ATTORNEYS WHO HAVE SERVED LESS THAN FULL FOUR-YEAR TERMS, 1981-2006, (Feb. 22, 2007), available at <http://leahy.senate.gov/issues/USAttorneys/ServingLessThan4Years.pdf>.

58. MANUAL, *supra* note 43, § 3-2.140.

59. 28 U.S.C. § 547 (2006).

60. In 2006, 72,196 defendants were charged in federal criminal cases, the majority of whom were charged with either drug trafficking or immigration-related offenses. Federal Justice Statistics Resource Center, Bureau of Justice Statistics, http://fjsrc.urban.org/fjs.cfm?p=statistics_about&t=c (last visited Aug. 13, 2007).

61. MANUAL, *supra* note 43, § 3-2.140.

Attorney, perform his or her superior's duties.⁶² Generally, Assistant U.S. Attorneys work at the direction of the U.S. Attorney and have infrequent contact with other DOJ officials unless the DOJ and local federal prosecutors jointly handle a case.⁶³ As one former U.S. Attorney quipped, "[a] good U.S. Attorney's Office . . . is usually much better equipped to handle a complex criminal prosecution than the young trial attorneys from the Department of Justice, who travel around the country, primarily because they are looking for courtroom experience."⁶⁴

U.S. Attorneys use their discretion to decide which cases will be prosecuted; they essentially execute their role as the chief federal law enforcement officials for their districts.⁶⁵ Moreover, they have an independent legal and ethical responsibility to ensure that laws are being properly executed.⁶⁶ As a result, neutrality and independence are

62. MANUAL, *supra* note 43, § 3-2.150. The U.S. Attorney ordinarily appoints the Chief Assistant or First Assistant U.S. Attorney for the office to serve in this position. See 28 U.S.C. § 542 (2006); see also MANUAL, *supra* note 43, § 3-2.200.

63. For example, DOJ attorneys will frequently help in specialized prosecutions such as civil rights violations. A good example is the prosecution of four police officers for violating black motorist Rodney King's constitutional rights. After a state court acquitted the four officers of use-of-excessive-force and assault charges, a federal court convicted two of those officers, Lawrence Powell and Stacey Koon, of civil rights violations. The federal prosecution was likely fueled by the riots that occurred after the state court acquittals. See generally Laurie L. Levenson, *Special Issue: The Rodney King Trials: Civil Rights Prosecutions and Double Jeopardy: The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509 (1994).

Typically, complaints against police officers are handled by internal police investigators; criminal prosecutions are referred to the District Attorney's Office. When police misconduct is at issue, federal prosecutors usually defer to local authorities because they want local authorities to have the opportunity to deal with local issues. Furthermore, the Federal Bureau of Investigation (FBI) investigates civil rights violations and, as was the case with the Rodney King incident, often conducts its investigations simultaneously with those of local law enforcement. The FBI may also begin investigations after a referral by local authorities. Once the FBI concludes its investigation, it will refer the matter to the Civil Rights Division of the DOJ. The DOJ will then assign a federal prosecutor from Washington, D.C. to the case, along with a local federal prosecutor from the district in which the offense occurred. See *id.*

Advantages of federal prosecutions of civil rights violations include the ability and time to conduct more thorough investigations. In the Rodney King case, the federal prosecutors held a clear advantage over their state counterparts because they had the opportunity to learn from the state's mistakes, and thus present a more compelling case. See *id.*

64. WHITNEY NORTH SEYMOUR, JR.: AN INSIDE VIEW OF 'JUSTICE' IN AMERICA UNDER THE NIXON ADMINISTRATION 48 (1975); see also EISENSTEIN, COUNSEL FOR THE UNITED STATES, *supra* note 40 (describing the nature of relationships between U.S. Attorneys and the DOJ as an "undercurrent of tension and subdued hostility").

65. O'Neill, *supra* note 2, at 1486 ("It is a practical reality that U.S. Attorneys operate fairly independently of DOJ headquarters in Washington, D.C. While the Attorney General may be the titular head of federal law enforcement efforts, individual U.S. Attorneys possess their own political power base, are not directly accountable to the Attorney General, and may be swayed by the needs of the communities in which they serve.") (footnote omitted).

66. See *Morrison v. Olson*, 487 U.S. 654, 688-93 (1988) (discussing the need for independence from the Executive in order to prevent coercive influence); see also *United States v. Hilario*, 218 F.3d 19, 27 (1st Cir. 2000). U.S. Attorneys, as officers of the court, have a special responsibility to

essential to U.S. Attorneys' abilities to effectively perform their job duties.⁶⁷ Robert Jackson, former Attorney General and former Supreme Court Justice, stated that "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous."⁶⁸ Provided with such power, a prosecutor must practice in a way that is neutral and non-partisan. It would be extremely difficult, if not impossible, for U.S. Attorneys to be completely fair if they were being influenced by a political entity.⁶⁹ Indeed, a lawyer cannot effectively do his or her job if there is such a conflict of interest.⁷⁰

Political influences create a problem when they involve U.S. Attorneys. Attorneys who are not independent of such influences may feel compelled to act in a biased manner.⁷¹ For example, political pressures

ensure that justice is served. Accordingly, they must refrain from making claims that are not supported in law or fact or that do not include a good faith argument regarding an existing law. MODEL RULES OF PROF'L CONDUCT pmbl. (1997). Former Attorney General and former Supreme Court Justice Robert H. Jackson discussed in a speech the ethical responsibility of U.S. Attorneys. Due to the tremendous control U.S. Attorneys have over citizens, U.S. Attorneys must exercise judgment that is fair and, most importantly, non-political. Lincoln Caplan, *What's Really Wrong With the Bush Justice Department*, SLATE, Mar. 14, 2007, <http://www.slate.com/id/2161804/>; see also Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 559 (1999) (the public prosecutor should be guided in her discretionary decisions "by an honest effort to discern public needs and community concerns Morally, prosecutors must consider whether a conviction is 'consistent with the public interest,' in conjunction with their personal sense of the defendant's culpability for the crime"). For excellent articles discussing prosecutors' ethical duties in making charges, see Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513 (1993); Bruce A. Green, *Why Should Prosecutors "Seek Justice?"*, 26 FORDHAM URB. L.J. 607 (1999); H. Richard Uviller, *The Virtuous Prosecutor in Quest for an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145 (1973); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 46 (1991).

67. MANUAL, *supra* note 43, at § 3-2.140 ("In the exercise of their prosecutorial discretion, United States Attorneys construe and implement the policy of the Department of Justice. Their professional abilities and the need for their impartiality in administering justice directly affect the public's perception of federal law enforcement.").

68. See Caplan, *supra* note 66 (quoting Attorney General Robert Jackson, Attorney General of the United States, Address at Second Annual Conference of United States Attorneys, (1940), in 24 J. AM. JUD. SOC'Y 18 (Apr. 1, 1940)).

69. See Caplan, *supra* note 66 (quoting Attorney General Robert Jackson, Attorney General of the United States, Address at Second Annual Conference of United States Attorneys, (1940), in 24 J. AM. JUD. SOC'Y 18 (Apr. 1, 1940)).

70. Eric R. Glitzenstein & Alan B. Morrison, *A Symposium on Morrison v. Olson: Addressing the Constitutionality of the Independent Counsel Statute: The Supreme Court's Decision in Morrison v. Olson: A Common Sense Application of the Constitution to a Practical Problem*, 38 AM. U. L. REV. 359, 379-82 (1989).

71. *Id.* at 379; see Sandra Caron George, *Prosecutorial Discretion: What's Politics Got to Do With It?*, 18 GEO. J. LEGAL ETHICS 739, 751-56 (2005) (discussing range of political influences on prosecutors). Although it may be impossible for prosecutors to remain completely neutral, some influences, such as prosecutors bowing to partisan political powers, are more pernicious than others. See Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 858-59 (2004) (prosecutors should avoid party politics); AMERICAN BAR ASSOCIATION, ABA STANDARDS

may cause prosecutors to pursue prosecutions against political opponents or to fail to investigate violations by members of their own political party.⁷² Moreover, appointments made by a party with an interest in a case will, at the very least, allow for conflicts to arise and for impropriety to appear.⁷³ Often, prosecutors must face the question of whether to bring charges against an individual. However, they will not be able to make fair judgments if they are afraid of being reprimanded for certain types of decisions, like whether to bring charges against elected officials.⁷⁴ Based on these influences, prosecutors may decide to bring charges against individuals when charges are not warranted, or fail to bring charges when they are. This lack of independence from bias and undue influence threatens the fairness of the criminal justice system.⁷⁵

Prosecutorial independence is necessary to assure the public that justice is being served. Independence allows U.S. Attorneys to serve as impartial decision makers better able to serve justice. If a prosecutor acts based on motives other than the search for truth and the administration of

FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 9 (3d ed. 1993) (“[A] prosecutor should not allow . . . ideological or political beliefs to interfere with the professional performance of official duties.”).

72. For instance, David Iglesias, one of the prosecutors ousted during the U.S. Attorneys scandal, claimed that he was terminated because he did not pursue charges against various Democrats for alleged voter fraud preceding the 2006 congressional elections. Michael Kranish & Susan Milligan, *Gonzales Resigns; Probes Will Continue: Democrats Pledge to Pursue Facts on US Attorney Firings*, BOSTON GLOBE, Aug. 28, 2007, at 1A. Many believed that Daniel Bogden, another casualty of the U.S. attorney firings, lost his job because, among other things, his office had indicted a Reno doctor with political ties to the Republican party, initiated an investigation of a Republican congressman’s fundraising efforts, and raided the home of a businessman with close ties to a Republican gubernatorial candidate. Lisa Mascaro, *I’d Given Up on Gonzales Leaving, Bogden Says: Ousted U.S. Attorney Reveals More, Tells of Losing Faith in Justice*, LAS VEGAS SUN, Aug. 28, 2007, at A1. See generally Zacharias & Green, *supra* note 40, at 16–17 & nn.83–86.

73. Glitzenstein and Morrison, *supra* note 70, at 380 (discussing court appointments of attorneys).

74. U.S. Attorney Carol Lam’s story is instructive in this regard. Lam was the U.S. Attorney in the Southern District of California, having been appointed to the post by President Bush in 2002. Lam was purportedly asked to resign because of supposed “job performance issues” related to her unwillingness to make smuggling, gun, and border-crossing cases top priorities of her department. See Eric Lipton & David Johnston, *Justice Dept. Announces Inquiry into Its Hiring Practices*, N.Y. TIMES, May 3, 2007, at A18; Kelly Thornton & Onell R. Soto, *Lam Is Asked to Step Down: Job Performance Said to Be Behind White House Firing*, SAN DIEGO UNION-TRIB., Jan. 12, 2007, at A1. Many believe, however, that Lam was asked to resign because of her high-profile bribery prosecution of Randall “Duke” Cunningham, a former Republican congressman. See, e.g., Editorial, *A Scandal That Keeps Growing*, N.Y. TIMES, May 6, 2007, at 413; Lipton & Johnston, *supra* (stated justifications for dismissal of U.S. attorneys not credible). See generally Thornton & Soto, *supra* (discussing the Cunningham prosecution). As a result, some prosecutors may have perceived Lam’s forced resignation as symbolizing a message from the powers-that-be to refrain from prosecuting elected officials, particularly those within the Republican party.

75. Thomas Heffelfinger, *Something is Fundamentally Broken Within the Department of Justice*, THE HENNEPIN LAWYER, June 27, 2007, available at <http://hennepin.timberlakepublishing.com/article.asp?article=1142&paper=1&cat=147>.

justice, the integrity and effectiveness of the criminal justice system is compromised.⁷⁶

The manner in which U.S. Attorneys are appointed, especially interim U.S. Attorneys, can affect their independence and the public's perception of their integrity. If there is a thorough and transparent screening of a prospective U.S. Attorney's credentials, then there will likely be greater public confidence in the appointment. If there is oversight of the appointment, there is an additional check that the appointee will commit to the fair administration of justice over his or her personal and political interests. As recent events have demonstrated procedural changes, like those discussed in detail in the next Part of this Article, can make all the difference in whether the public respects or is suspicious of federal law enforcement, U.S. Attorneys, and the DOJ.

III. APPOINTMENT PROCESS OF INTERIM U.S. ATTORNEYS

An appointment process for interim U.S. Attorneys is necessary because vacant U.S. Attorney positions are not unusual.⁷⁷ U.S. Attorneys leave for a variety of reasons, often to make more money or advance their careers.⁷⁸ Not surprisingly, a significant number of U.S. Attorneys leave for appointment to the federal bench.⁷⁹

Although it is not unusual for U.S. Attorneys to leave their posts, it is rare for them to be fired. A study conducted by the Congressional Research Service found that from 1981–2006, no more than three of the 486 U.S. Attorneys who served during that time span were fired.⁸⁰ When a U.S. Attorney was terminated, it was only under the most extreme of

76. *Id.*

77. As of March 29, 2007, there were eighteen open U.S. Attorney posts open. David Welna, *Senate Bypassed Many Key Justice Jobs*, NPR, Mar. 29, 2007, available at <http://www.npr.org/templates/story/story.php?storyId=9204310>.

78. Approximately fifty-four U.S. Attorneys left office before the completion of their four-year term between 1981 and 2006. This figure does not include those whose tenure was interrupted by a change in the presidential administration.

Of those 54, 17 left to become Article III federal judges, one left to become a federal magistrate judge, six left to serve in other positions in the executive branch, four sought elective office, two left to serve in state government, one died, and 15 left to enter or return to private practice. Of the remaining eight U.S. attorneys who left before completing a four-year term without a change in presidential administration, two were apparently dismissed by the President, and three apparently resigned after news reports indicated they had engaged in questionable personal actions. No information was available on the three remaining U.S. attorneys who resigned.

Scott, *supra* note 57, Summary. For a more general discussion of the motivations of federal prosecutors in joining and leaving public service, see Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627 (2005).

79. See Scott, *supra* note 57, at 5.

80. See *id.* at 6.

circumstances. For example, U.S. Attorney William Kennedy was appointed by President Reagan and dismissed by the President in 1982.⁸¹ He was dismissed for charging that the DOJ was blocking his attempt to prosecute a key CIA informant.⁸² Another U.S. Attorney, J. William Petro, was dismissed by the President in 1984 for disclosing information from an undercover operation about a pending indictment, which later reached the subject of the investigation.⁸³

In addition, from 1981–2006, only three U.S. Attorneys resigned as a result of questionable conduct. The questionable conduct included grabbing a television reporter by the throat, biting a topless dancer on the arm during a visit to an adult club, and accusing a predecessor of smoking marijuana while at the same time admitting to using the drug himself.⁸⁴

The circumstances surrounding these firings and resignations are very different from those surrounding the recent firings by the Bush Administration. Not only were eight active U.S. Attorneys fired at approximately the same time,⁸⁵ but there were no allegations of serious misconduct cited at the time as the reasons for the firings. It is fair to say that the recent terminations were unprecedented.⁸⁶ Unlike prior Presidents that have asked U.S. Attorneys to resign so they can make their own appointments when their respective administrations take power,⁸⁷ President Bush fired eight U.S. Attorneys during their terms of service and without identifying any specific misconduct that would have justified the terminations.⁸⁸

When a U.S. Attorney's post becomes vacant, an interim U.S. Attorney must be appointed. The Department of Justice will often look to the Chief Assistant United States Attorney to serve as a U.S. Attorney on

81. *Id.*

82. *Id.*

83. *Id.*

84. See Scott, *supra* note 57, at 6–7.

85. Richard B. Schmitt, *The Nation: Bush Refuses to Cooperate in Probe of Attorney Firings*, L.A. TIMES, July 10, 2007, at A9.

86. See Eisenstein, *U.S. Attorney Firings*, *supra* note 40, at 234 (recent firings of U.S. Attorneys were “unprecedented and counter to a long-standing and widespread consensus that they could expect to continue to serve until they either left voluntarily or at the end of an administration”).

87. Mass firings are not unusual at the beginning of a new presidential administration. Traditionally, Presidents dismiss nearly all U.S. Attorneys upon entering office. For example, President Reagan dismissed seventy-one of the ninety-three U.S. Attorneys in his first year of office. President Clinton appointed eighty new U.S. Attorneys in his first year of office. Department of Justice, U.S. Attorneys Offices, <http://www.usdoj.gov/usao/offices/index.html>.

88. Later, President Bush refused to cooperate with investigations into the firings by citing executive privilege. Richard B. Schmitt, *The Nation: Bush Refuses to Cooperate in Probe of Attorney Firings*, L.A. TIMES, July 10, 2007, at A9.

an interim basis.⁸⁹ If the Chief Assistant is unable or unwilling to do so, other senior staff members will be evaluated for the position.⁹⁰

The procedure for appointing interim U.S. Attorneys has varied over the years. “Since the civil war, [and until recently] the judiciary ha[d] been empowered to fill vacancies in the office of United States Attorney.”⁹¹ Then, in 1986, Congress enacted § 546(d) of Title 28 of the United States Code.⁹² That law authorized the Attorney General to “‘appoint a United States Attorney for the district in which the office is vacant’ for 120 days.”⁹³ Once the Attorney General’s ability to appoint expired, the statute provided that the chief judge of the district in which the vacancy existed could appoint an attorney to serve until the vacancy was filled through Presidential nomination and Senate confirmation.⁹⁴

The constitutionality of this method of appointment was upheld in *United States v. Hilario*.⁹⁵ There, the First Circuit held that, although the Attorney General’s ability to appoint was limited to 120 days, the district courts’ ability to make interim appointments without a time limit seemed “deliberate” and would “allow a judicial appointee to serve until the vacancy [was] filled, whenever that may be.”⁹⁶ Furthermore, the court did not find that “the vesting of appointive authority in the courts served to undermine the integrity”⁹⁷ of the Judicial Branch because the ability to make such appointments would comport with other judicial functions such as ensuring “the enforcement of the laws . . . [and] an effective adversarial process.”⁹⁸ Likewise, the court found that this judicial interim

89. *Preserving Prosecutorial Independence: Is the Dept. of Justice Politicizing the Hiring and Firing of U.S. Attorneys?*, Hearing Before the S. Judiciary Comm., 110th Cong. (2007) (statement of Paul J. McNulty, Deputy Attorney General).

90. *Id.*

91. *United States v. Gantt*, 194 F.3d 987, 998 (9th Cir. 1999).

92. “If an appointment expires under subsection (c)(2), the district court for such district may appoint a United States attorney to serve until the vacancy is filled.” 28 U.S.C. § 546(d) (2006).

93. *Gantt*, 194 F.3d at 998 (quoting 28 U.S.C. § 546(d)).

94. *Id.*

95. *Hilario*, 218 F.3d 19 (1st Cir. 2000). In *Hilario*, after the position of U.S. Attorney for the District of Puerto Rico became vacant, the judges of that district appointed a new U.S. Attorney because the President failed to do so. *Id.* at 21. After more than six years, the President had yet to nominate a replacement. *Id.* *Hilario* had been indicted and moved to dismiss the charges against him on the basis of challenging the interim attorney’s authority. *Id.* A lower court granted the motion, reasoning that the interim attorney’s tenure frustrated congressional intent. *Id.* The First Circuit disagreed, holding that the statutory language indicated that an interim appointee could serve until the vacancy was filled. *Id.* at 29. Thus, the court held, the interim attorney’s appointment and continued service complied with the statutory scheme and principles of separation of powers. *Id.*

96. *Id.* at 23.

97. *Dismissals of U.S. Attorneys: Hearing on H.R. 580 Before the Subcomm. On Commercial and Administrative Law of the H. Comm. On the Judiciary*, 110th Cong., at 9 (2007) (statement of T.J. Halstead, Legislative Attorney, Congressional Research Service) [hereinafter Halstead, *Dismissals*].

98. *Hilario*, 218 F.3d at 27.

appointment authority would not encroach upon the powers of the Executive because the functioning of the U.S. government “rests on the assumption that officers can be independent of their appointers.”⁹⁹ The court reasoned that, as inferior officers of the Executive Branch, judicial interim appointees maintain independence from the district courts because the courts lack both supervisory and removal powers and are unable to determine how the appointees will enforce laws.¹⁰⁰

Other legal challenges to the 1986 appointment procedure also failed. For example, in *United States v. Gantt*,¹⁰¹ the defendant contested the government’s authority to prosecute him and seek a search warrant for his hotel room. He based the contest on the grounds that the appointment of the then-current U.S. Attorney for the Southern District of California by the judges of the Southern District of California pursuant to 28 U.S.C. § 546(d) violated the Appointments Clause.¹⁰² The Ninth Circuit held that U.S. Attorneys are “inferior officers.” Thus, their appointment by the district court did not violate the Appointments Clause. The Appointments Clause authorizes Congress to “vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”¹⁰³ The Ninth Circuit held that, because U.S. Attorneys are classified as inferior officers, “§ 546(d) passes constitutional muster.”¹⁰⁴

In March 2006, a provision of the Patriot Act Reauthorization dramatically altered the process for appointing interim U.S. Attorneys. Instead of authorizing judges to make appointments after the initial 120-day period allotted to the Attorney General’s designee, the new Act gave the Attorney General the power to appoint interim U.S. Attorneys for an unlimited period of time.¹⁰⁵ By doing so, the 2006 amendment essentially permitted the Executive to bypass Senate confirmation. If the Executive has the authority to make endless interim appointments, there is no pressure to nominate a permanent U.S. Attorney to go through the confirmation process.¹⁰⁶ This makes the likelihood of abuse and political

99. *Id.*

100. *See id.*

101. 194 F.3d 987 (9th Cir. 1999).

102. U.S. CONST. art. II, § 2, cl. 2.

103. *Id.*

104. *Gantt*, 194 F.3d at 999 (explaining why U.S. Attorneys are classified as inferior rather than principal officers).

105. *See* MANUAL, *supra* note 43, at § 3-2.160 (1997) (amended 2006).

106. *See generally* Susan Crabtree, *Sampson in Hot Seat: Dems Want to Know Who Was Behind Plan to Circumvent Senate*, THE HILL, Mar. 28, 2007, available at <http://thehill.com/leading-the-news/sampson-in-hot-seat-dems-want-to-know—who-was-behind-plan-to-circumvent-senate-2007-03-28.html>.

106. *See generally id.*

favoritism more than just a mere possibility. Rather, it creates an opportunity for the President to remove a U.S. Attorney midterm to disrupt an ongoing investigation or prosecution or to fill the vacant position with a political crony who can help the President pursue his or her own agenda.

Although it is difficult to pinpoint with certainty the exact motivation behind the change in the law,¹⁰⁷ it is clear that such a change had been in the works for years. While working as a DOJ Trial Attorney, Wiener advocated changes in the law that would increase the power of the Attorney General over U.S. Attorneys.¹⁰⁸ Rather than focusing on the importance of independence and neutrality for U.S. Attorneys, Wiener advocated a system that would provide more national uniformity for federal law enforcement.¹⁰⁹ At a minimum, Wiener believed that a change in the law was important to prevent judicial appointments of interim U.S. Attorneys from undermining the institutional integrity of both judges and U.S. Attorneys. He wrote that “[t]he appointment of U.S. Attorneys ought to be left to the executive branch, with the advice and consent of the Senate”¹¹⁰

In support of his proposal, Wiener argued that the Supreme Court’s holding in *Morrison v. Olson*,¹¹¹ which upheld the constitutionality of judges having a role in appointing Independent Counsel, did not apply to U.S. Attorneys because they were not truly inferior officers.¹¹² Wiener presented several arguments in support of his claim. First, he argued that U.S. Attorneys, unlike Independent Counsel, could not be fired by a higher Executive Branch official.¹¹³ Second, he argued that the authority

107. Situations like the following could have provided an impetus for a change in the law. In South Dakota, a dispute began in 2005 when James McMahon resigned as U.S. Attorney. The DOJ appointed Michelle Tapken to serve a limited term until it named Steven Mullins as interim U.S. Attorney. Mullins was sworn in on the same day that Tapken resigned. Meanwhile, U.S. District Judge Larry Piersol of Sioux Falls challenged Mullins’s appointment because, two days before his appointment, Piersol had signed an order appointing Mark Meierhenry as interim U.S. Attorney. The result was that two different attorneys had been appointed to the same position, exemplifying the jurisdictional struggles between the DOJ and the district courts. Kevin Woster, *Legal Eagles Tussle Over U.S. Attorney Appointment*, THE RAPID CITY JOURNAL, Jan. 5, 2006, available at <http://www.rapidcityjournal.com/articles/2006/01/05/news/local/news02.txt>.

108. See Wiener, *supra* note 5, at 443–44.

109. The move toward more DOJ control over U.S. Attorneys’ Offices began with the Reagan and George H.W. Bush Administrations. For example, in an effort to make charging decisions more uniform, former Attorney General Richard Thornburgh directed federal prosecutors to charge the most serious crime supported by the known facts. Office of the Attorney General, Memorandum to All Justice Department Litigators (Mar. 13, 1989), reprinted in 6 FED. SENT. REP. 347, 347 (1994) (directing federal prosecutor to charge most serious, readily provable offense or offenses consistent with defendant’s conduct).

110. Wiener, *supra* note 5, at 446.

111. 487 U.S. 654 (1988).

112. Wiener, *supra* note 4, at 411.

113. *Id.* at 408.

of Independent Counsel is more limited than that of U.S. Attorneys.¹¹⁴ While Independent Counsel are appointed to investigate the alleged commission of certain crimes, U.S. Attorneys are free to investigate a wide array of crimes and suspects. U.S. Attorneys can also formulate policy for their individual offices. Third, Wiener argued that Independent Counsel have limited jurisdiction for their investigation.¹¹⁵ Finally, Wiener argued that Independent Counsel have only a single task and that their tenure ends when they complete that particular task.¹¹⁶

No court, however, has agreed with Wiener's assessment of the differences between U.S. Attorneys and Independent Counsel.¹¹⁷ Moreover, since the time of his article, it appears that U.S. Attorneys have enjoyed less freedom and discretion than what Wiener described.¹¹⁸ If anything, Wiener's discussion supports an argument that, while U.S. Attorneys are technically "inferior" officers because they rely on the Attorney General and DOJ for resources and certain policy directives, they *should* have more independence and discretion than other types of "inferior" officers.

Ultimately, the courts will have to decide whether Wiener was correct in claiming that U.S. Attorneys are principal, rather than inferior, officers for purposes of the Appointments Clause. Acknowledging this, Wiener assumed in the second half of his article that U.S. Attorneys are inferior officers and that "a literal reading of the Excepting Clause permits [U.S. Attorneys'] appointment by courts of law."¹¹⁹ He argued, however, that for policy reasons,¹²⁰ judges should not have a role in the

114. *Id.*

115. *Id.* at 409.

116. *Id.* at 410.

117. *See* United States v. Sotomayor Vazquez, 69 F. Supp. 2d 286, 289–91 (D.P.R. 1999). *See generally* United States v. Cortes, 97 F. Supp. 1305 (S.D.N.Y. 1988); Edmonds v. United States, 520 U.S. 651 (1997).

118. Wiener describes the U.S. Attorneys as generally unsupervised:

U.S. Attorneys do not seek approval to initiate investigations, file indictments, enter plea bargains, or prosecute cases at trial, nor is any such approval required. They do not seek permission from, or even inform, a supervisor who is ultimately responsible to the Attorney General. In many instances, Main Justice is not even aware of criminal prosecutions.

The Attorney General's immediate subordinates in Washington, D.C. are only likely to become aware of and involved in a case when there is a problem or negative publicity.

Wiener, *supra* note 4, at 421 (footnotes omitted). In a recent hearing, David Iglesias, a former U.S. Attorney, claimed that he felt political pressure to issue an indictment on local Democratic officials. *Hearing on the Dismissal of U.S. Attorneys, Before the Subcomm. on Commercial and Admin. Law of the H. Judiciary Comm.*, 110th Cong. (2007) (statement of David Iglesias, U.S. Attorney for the district of New Mexico). Other U.S. Attorneys have recently testified the Justice Department has been trying to micromanage the U.S. Attorneys' Offices and their cases.

119. Wiener, *supra* note 4, at 423 (internal quotation marks omitted).

120. Wiener presented two main policy rationales in support of his argument that courts of law should not appoint interim U.S. Attorneys. First, he contended that "[c]ourt appointment of U.S. Attorneys . . . threatens to undermine judicial impartiality, and the appearance of impartiality, by thrusting courts into partisan, political battles." Wiener, *supra* note 4, at 426 (footnote omitted).

appointment of interim U.S. Attorneys. He contended that the Executive Branch should exclusively control such appointments.¹²¹ Wiener claimed that court appointment of U.S. Attorneys threaten judicial impartiality and violate principles of separation of powers.

Six years and one major scandal later, it has become clear that the greater threat to the integrity of U.S. Attorneys comes not from the courts' involvement in interim appointments, but instead from the unchecked power of the Executive Branch to make interim appointments. There have been relatively few complaints about judges' involvement in the interim appointment process.¹²² By contrast, recent events demonstrate how the Executive Branch can politicize the process and undermine the critical work of U.S. Attorneys.

A. Can Judges Remain Neutral and Make Interim Appointments?

Wiener warned that an irreconcilable conflict of interest is created when judges participate in the appointment of a U.S. Attorney because prosecutors appear regularly before the court.¹²³ He warned that “[t]he courts should reject the court appointment of U.S. Attorneys because it ‘risks politicizing the judiciary.’”¹²⁴ Indeed, once the recent scandal erupted, DOJ officials submitted to the Senate Judiciary Committee examples of problems in the courts' appointment of interim U.S. Attorneys. Accordingly, in several situations, the court declined to make interim appointments.¹²⁵ In one situation, the judge declined to do so because the

Next, Wiener claimed that court appointment of U.S. Attorneys sacrifices prosecutorial accountability because “[d]efendants can hardly be expected to hold the court responsible for a bad appointment, at least not on the record.” Wiener, *supra* note 4, at 431–32. This, Wiener argued, effectively leaves defendants with “no one to blame” for wrongful appointments: “Who wants to tell a judge that his or her appointee has acted improperly?” Wiener, *supra* note 4, at 432.

121. Wiener, *supra* note 4, at 446.

122. In addition to Wiener, others who have criticized the interim appointment process include Justice Scalia, *Morrison v. Olson*, 487 U.S. 654, 729–31, (1988) (Scalia, J., dissenting), and Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 809–10 (1999).

123. Wiener wrote:

[D]istrict judges must consider the cases and controversies brought before them by the very U.S. Attorney whom they have selected. Asking judges to choose the prosecutor of their liking requires the judges to step outside their traditional role of impartiality. Yet this impartiality is the single greatest asset of the judiciary—conferring on courts their legitimacy and the standing that courts enjoy as the accepted arbiter of justice.

Wiener, *supra* note 4, at 431.

124. Wiener, *supra* note 4, at 431.

125. For example, since 2001, the Southern District of Florida, Eastern District of Oklahoma, and Western District of Virginia have declined to exercise their appointment authority, instead allowing the Attorney General to make interim appointments. See E-mail from Monica Goodling to Richard Hertling, Nancy Scott-Finan, Kyle Sampson, Michael Elston, ODAG, William Moschella, and John Nowacki, USAEO, *Examples of Difficult Transition Situations* (Feb. 5, 2007), available at <http://www.usnews.com/usnews/news/graphics/justice-documents/070427-dojdocs-set3.pdf>.

DOJ would not provide the court with background information on the potential candidates.¹²⁶ In what the DOJ officials claimed was the most egregious situation, the Chief Judge in South Dakota sought to appoint someone who the DOJ felt was unqualified. To bypass the court's decision, the Attorney General asked the career prosecutor filling the interim appointment to resign so that the Attorney General could have another 120-day appointment without the court's involvement. The result was that two individuals had seemingly been appointed by two different authorities.

Even DOJ officials have to admit, however, that such problems with judicial involvement in appointments are relatively rare. In general, there are good reasons to believe that judges will generally appoint qualified and respected individuals to an interim position. First, judges have made hundreds of interim appointments; the DOJ has disagreed with the courts' choices only a handful of times. By and large, judges appoint the First Assistant in the office—an individual often designated by the DOJ—as interim U.S. Attorney. Second, the chief judge of a district has a very good idea of the capabilities and reputations of lawyers in the judge's district. With that experience and information, judges are generally in an excellent position to appoint individuals who will be respected by the courts and other prosecutors. Third, judges realize that their appointment power is only temporary. At any time, the Executive Branch may nominate and seek confirmation of another individual. Judges have no illusion that they will start controlling the prosecutors in their district by the appointment of a temporary head of the office. Moreover, if there is a concern that judges will show favoritism to U.S. Attorneys whom they have appointed, judicial recusal rules would provide added protection for defendants.¹²⁷

In 1987 a judge held as valid an appointment by the Attorney General where the court had declined to make an appointment. *See id.*

126. When a vacancy opened up in the Southern District of Florida in 2005, former Attorney General Gonzales appointed Alex Acosta, Assistant Attorney General for the Civil Rights Division, for 120 days. *Id.* At the end of Acosta's term, the Court indicated that it had previously appointed an individual who turned out to be controversial and that it would not make an appointment unless the DOJ turned over its internal employee files and FBI background reports so that the court could review the potential candidates' backgrounds. *Id.* The DOJ refused to do so on the ground that the materials were protected under federal law. *Id.* Subsequently, the Court indicated that it would not make an appointment at all and that the Attorney General should continue to make successive 120-day appointments. *Id.* The Attorney General made three successive 120-day appointments of Acosta until Acosta was selected, nominated, and confirmed for the position. *Id.*

127. Before performing their judicial duties, federal judges must take an oath of impartiality and affirm that they will administer justice faithfully and impartially. Federal judges must avoid bias in all situations to be able to perform their duties impartially. The Code of Conduct for United States Judges governs the conduct of all federal judges. CODE OF CONDUCT FOR UNITED STATES JUDGES Intro. (2004). In addition, the Model Code of Judicial Conduct sets forth standards for the

The Supreme Court addressed concerns about judges' impartiality in *Morrison v. Olson*.¹²⁸ It held that "a judge's role in appointing an independent counsel did not threaten the impartial adjudication of cases, given that the judges in question had no authority to review the actions of the independent counsel and were disqualified from participating in any such related judicial proceedings."¹²⁹ It further found that judicial appointment of independent counsel was in fact consistent with the doctrine of separation of powers, since such authority would be improper only "if there was some 'incongruity' between the functions normally performed by the courts and the performance of their duty to appoint."¹³⁰ In fact, Chief Justice Rehnquist noted that "in light of judicial experience with prosecutors in criminal cases, it could be said that courts are especially well qualified to appoint prosecutors."¹³¹

As the Supreme Court has recognized, judges are both capable and constitutionally permitted to be involved in the appointment of prosecutors, under limited circumstances. The real question is whether their involvement offers advantages over a scheme that relies solely on the Executive Branch to make interim appointments.

ethical conduct of judges. See AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT pmb1. (1990), available at <http://www.abanet.org/cpr/mcjc/home.html>. Many jurisdictions have adopted its various provisions. See, e.g., ILL. CODE JUDICIAL CONDUCT S. CT. RULE 63, Canon 3 cmt. Both codes set forth a general standard of disqualification in situations where the judge's impartiality might reasonably be questioned. See CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(C)-(D); MODEL CODE OF JUDICIAL CONDUCT Canon 3(E). In addition, the United States Code sets forth standards regarding the recusal of federal judges. See 28 U.S.C. § 455 (2006). Section 455 sets forth situations in which federal judges must disqualify themselves. *Id.* § 455(a)-(b). These situations include those in which a judge has "a personal bias or prejudice concerning a party," *id.* § 455(b)(1), or "a financial interest in the subject matter in controversy or in a party to the proceeding," *id.* § 455(b)(4). See Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L. J. 657, 661-74 (2005). Thus, in *Fredonia Broadcasting Corp. v. RCA Corp.*, 569 F.2d 251 (5th Cir. 1978), *overruled on other grounds by Riquelme Valdes v. Leisure Resource Group, Inc.*, 810 F.2d 1345 (5th Cir. 1987), the court held that, where one of the plaintiff's attorneys was a former law clerk of the presiding judge and

had been exposed to the trial judge's innermost thoughts about the case, the trial judge had no alternative to disqualifying himself. No matter how many assurances were given . . . that the former law clerk would withdraw from the case . . . the propriety of continuing the proceedings before [the] judge had been irrevocably tainted and the impartiality of the judge had been reasonably questioned.

Id. at 255. Consequently, the court remanded the case for a new trial before a different judge. *Id.* at 257.

128. 487 U.S. 654 (1988).

129. Halstead, *supra* note 97.

130. *Morrison*, 487 U.S. at 676.

131. *Id.* at 677 n.13.

B. What Appointment Scheme Will Better Preserve Congress's Role and Ensure U.S. Attorneys' Independence?

Recent events have proven that political forces in the DOJ are a much greater threat to the independence of U.S. Attorneys than judges involved in the interim appointment process. Although the investigation continues, preliminary indicators show that at least some U.S. Attorneys were fired midterm so that interim appointments with greater political allegiance to the President and with less controversial prosecutorial agendas could be appointed in their place.¹³²

Moreover, the shift of interim appointment power from judges to the Attorney General has been exposed for what it was—a scheme to avoid congressional scrutiny in the appointment process. In early hearings, then-Deputy Attorney General Paul J. McNulty reassured senators that “the Attorney General’s appointment authority has not and will not be used to circumvent the confirmation process.”¹³³ However, soon thereafter, an email surfaced, written by Kyle Sampson, Attorney General Alberto Gonzales’s chief-of-staff, indicating that the new method of appointment authorized by the Patriot Act Reauthorization was meant to “give far less deference to home state senators and thereby get [the] preferred person appointed . . . far faster and more efficiently at less political costs to the White House.”¹³⁴ Such reference to getting the “preferred” person into a position of great power indicated a startling intent to bypass the system of checks and balances called for by the Constitution. Another email evidenced the Administration’s desire to “‘gum this to death’ and otherwise ‘run out the clock’ in an effort to avoid the confirmation process to replace former U.S. Attorney Bud Cummins,” one of the attorneys fired in the round of midterm firings.¹³⁵

These emails essentially affirm two things: (1) the change in the interim appointment law politicized the process more than any judicial appointment scheme had in the past; and (2) the new appointment protocol

132. See Mark Follman, *Inside Bush's Prosecutor Purge: Why Has the Administration Fired U.S. Attorneys with Sterling Track Records? To Make Room for Its Political Loyalists, Critics Say, and Exert Its Last Shred of Control*, SALON.COM, Feb. 28, 2007, http://www.salon.com/news/feature/2007/02/28/attorneys/index_np.html; see also Lipton & Johnson, *supra* note 73. See also Einstein, *U.S. Attorney Firings*, *supra* note 40, at 245 (“use of political criteria and service in Washington in selecting U.S. Attorneys in the Bush Administration is unprecedented in the modern era”).

133. Editorial, *A Story Unravels: A Hollow Promise of 'Accountability' in the Firing of U.S. Attorneys*, WASH. POST, Mar. 14, 2007, at A14.

134. *Id.*

135. *Sen. Lincoln on Senate Floor: Bill Will Restore Constitutional Process of Confirming U.S. Attorneys*, US FED. NEWS, Mar. 19, 2007.

was part of a concerted effort by the Attorney General to seize greater control of U.S. Attorneys' Offices.¹³⁶

By shifting to an interim appointment process that allowed the Attorney General to make indefinite interim appointments, the Executive Branch was able to avoid congressional oversight over federal prosecutors. The Senate could not perform its constitutional role of providing advice and consent because there was no need for the President to appoint permanent U.S. Attorneys who would have to go through the confirmation process.¹³⁷ This change denied the public an opportunity to assess whether replacement U.S. Attorneys were qualified to serve and why they were being selected to replace their predecessors.¹³⁸ Without transparency, it is easy for political agendas to take hold and for the work of U.S. Attorneys to be disrupted because they conflict with those agendas. An interim appointment process that limits the Executive Branch's ability to evade the confirmation process better preserves Congress' role in the appointment of U.S. Attorneys and provides greater assurance that U.S. Attorneys who bring politically sensitive cases will not be penalized if those cases conflict with the Administration's political agenda.

IV. HOPE FOR THE FUTURE

As the investigations into the U.S. Attorney firings continue,¹³⁹ it has become apparent that members of Congress, on both sides of the aisle, are concerned with the increased politicization of U.S. Attorneys'

136. Professor James Eisenstein has documented Department of Justice efforts "to exercise greater supervisory control over decision-making by United States Attorneys in the field, with a view to making federal prosecutive policy more uniform nationwide." EISENSTEIN, COUNSEL FOR THE UNITED STATES, *supra* note 40, at 12.

137. Senator Russ Feingold emphasized the role of confirmation hearings in preventing the overt politicization of U.S. Attorneys' Offices in his statement at the beginning of the Senate Judiciary Committee hearings on the firing of the eight U.S. Attorneys. *Is the DOJ Politicizing the Hiring and Firing of U.S. Attorneys: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Sen. Russ Feingold, Wisconsin). For an excellent discussion on the general role of confirmation hearings, see William G. Ross, *The Senate's Constitutional Role in Confirming Cabinet Nominee and Other Executive Officers*, 48 SYRACUSE L. REV. 1123 (1998).

138. *Is the DOJ Politicizing the Hiring and Firing of U.S. Attorneys: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Sen. Russ Feingold, Wisconsin) ("I was deeply troubled when I learned that a change made during the Patriot Act reauthorization process allows the Justice Department to sidestep the confirmation process for U.S. Attorneys altogether. There is simply no good reason why the Attorney General needs the power to make indefinite interim appointments. When it exercises that power, whether intended or not, the Administration cuts Congress, and in the case of my state, the people of Wisconsin, out of that process.")

139. Jerry Seper, *Gonzales Battles Will Raise Mukasey Hurdles*, THE WASH. TIMES, Oct. 5, 2007, at A5; Richard B. Schmitt, *Mukasey Hearing Set to Proceed*, L.A. TIMES, Oct. 4, 2007, at A10. See also McQuilken, *supra* note 14.

Offices.¹⁴⁰ The recent shift of appointment power from the judges to the Executive Branch did not protect the integrity of U.S. Attorneys but instead did just the opposite. Consequently, it is not surprising that Congress moved to repeal the new provision by passing the Preserving United States Attorney Independence Act of 2007. This Act restores the previous appointment system of initial 120-day interim appointments by the Attorney General, followed by judicial appointments until there can be Senate confirmation of a permanent successor. In June 2007, President George W. Bush unenthusiastically signed the Act into law.¹⁴¹

Thus, the initial step has been taken. The law has been changed back so that the Attorney General cannot make indefinite interim appointments that will bypass congressional approval. But more needs to be done. The critical issue, now, is what steps can and should be taken to ensure that U.S. Attorneys have the proper independence to perform their duties and to prevent the appointment process for interim U.S. Attorneys from being used to politicize those offices.

First, instead of hit lists being drafted by young staffers,¹⁴² transition reports for resigning U.S. Attorneys should be prepared by the Attorney General. These reports should disclose the reasons for which the U.S. Attorneys are being asked to resign, and how, if at all, those reasons are performance-related. Although the President has the power to fire a

140. Members of Congress have expressed mistrust with the use of power by the DOJ, and there is obvious concern that the dismissals of the U.S. Attorneys were politically motivated. Senator Charles Schumer (D-NY) stated that “[t]he latest revelations prove beyond any reasonable doubt that there has been unprecedented breach of trust, abuse of power and misuse of the Justice Department.” Ari Shapiro, *Gonzales Admits to Errors in Firing U.S. Attorneys*, NPR, Mar. 13, 2007, available at <http://www.npr.org/templates/story/story.php?storyId=8285957>. Senator John Cornyn (R-Tex), generally regarded as one of the White House’s firmest allies, expressed concern regarding the U.S. Attorneys controversy. He stated that he has known the Attorney General for a long time and wants to give him a chance to “explain himself.” Pierre Thomas, Jason Ryan & Theresa Cook, *Attorney General Responds to Questions Over Firings of U.S. Attorneys*, ABC NEWS, Mar. 13, 2007, available at <http://abcnews.go.com/Politics/Story?id=2946995&page=1>. Illinois Senator and presidential candidate Barack Obama expressed his concern with the political motivation surrounding the U.S. Attorneys scandal: “I have long believed that Alberto Gonzales subverted justice to promote a political agenda, so I am pleased that he has resigned today. The President needs to nominate an attorney general who will be the people’s lawyer, not the President’s lawyer.” *Even Some Republicans Happy About Gonzales Resignation*, CNN, Aug. 29, 2007, <http://www.cnn.com/2007/POLITICS/08/27/gonzales.reax/index.html?iref=newssearch>.

141. Dan Froomkin, *No Pardon Anytime Soon*, WASHINGTONPOST.COM, June 15, 2007, available at 2007 WLNR 11431630 (stating that although “[i]t seem[ed] Bush] just [could not] bring himself to sign [the Act],” he finally signed the bill on June 14, 2007).

142. See Dan Eggen & Carol D. Leonnig, *Officials Describe Interference by Former Gonzales Aide*, WASH. POST, May 23, 2007, at A4; see also Paul Kiel, *Goodling, Sampson Attended Rove Political Briefing*, TPM MUCKRAKER, Aug. 6, 2007, http://www.tpmuckraker.com/archives/cats/us_attorneys; Chitra Ragavan, *Behind the Scenes of the U.S. Attorney Firings*, U.S. NEWS & WORLD REPORT, Mar. 13 2007, available at <http://www.usnews.com/usnews/news/articles/070313/13ticktock.htm>.

U.S. Attorney for no cause, Congress can do a better job in its advice and consent role if it has an idea of the real reason why a particular replacement is being sought.

Second, ethics rules barring political figures from trying to influence U.S. Attorneys in their charging decisions¹⁴³ should be strictly enforced.¹⁴⁴ As independent law enforcement officials, U.S. Attorneys should be under no obligation to explain to any individual member of Congress why they are pursuing, or not pursuing, a particular case.¹⁴⁵ Certainly, Congress can conduct hearings as part of its oversight responsibilities, but formal oversight hearings will have much more

143. The Rules of both the House of Representatives and the Senate address the ethics of a situation.

The House Rules state:

A Member, Delegate, or Resident Commissioner may not, with the intent to influence on the basis of partisan political affiliation an employment decision or employment practice of any private entity . . . take or withhold, or offer or threaten to take or withhold, an official act; or . . . influence, or offer or threaten to influence, the official act of another.

110TH CONGRESS, RULES OF THE HOUSE OF REPRESENTATIVES, R. XXIII (14). *See also* 110TH CONGRESS, RULES OF THE SENATE, Rules, R. XXXVII (conflicts of interest).

144. Strict enforcement of ethical rules will help ensure that politicians do not attempt to place political pressure on U.S. Attorneys. For instance, former U.S. Attorney David Iglesias recently alleged that Senator Pete Domenici (R-NM) contacted him via telephone some time ago to inquire about whether Iglesias was going to issue indictments in a high-profile corruption investigation involving a Democrat in New Mexico. Michael Gisick, *Group Seeks Probe of Domenici Call to Iglesias*, ALBUQUERQUE TRIBUNE, Mar. 5, 2007, available at <http://www.abqtrib.com/news/2007/mar/05/iglesias-too-slow-claims-domenici>. According to Iglesias, Domenici asked whether the indictment would be filed "before November." Dan Eggen & Paul Kane, *Prosecutors Say They Felt Pressured, Threatened; Hill Republicans, Justice Dept. Cited*, WASH. POST, Mar. 7, 2007, at A1. When Iglesias responded that it would not, Domenici stated, "I'm very sorry to hear that," and hung up the phone. *Id.* Iglesias stated that he felt pressured by the Senator's questioning and thought it to be wholly improper. *See* Michael Gisick, *Group Seeks Probe of Domenici Call to Iglesias*, ALBUQUERQUE TRIBUNE, Mar. 5, 2007, available at <http://www.abqtrib.com/news/2007/mar/05/iglesias-too-slow-claims-domenici>; *see also* Dan Eggen & Paul Kane, *Prosecutors Say They Felt Pressured, Threatened; Hill Republicans, Justice Dept. Cited*, WASH. POST, Mar. 7, 2007, at A1. Iglesias was later part of the group of U.S. Attorneys who were fired during the United States Attorneys scandal. In response, Senator Domenici initially denied making the phone call but has since admitted to calling Iglesias to inquire about the investigation and to find out the time frame with regard to the corruption case. *See* Michael Gisick, *Group Seeks Probe of Domenici Call to Iglesias*, ALBUQUERQUE TRIBUNE, Mar. 5, 2007, available at <http://www.abqtrib.com/news/2007/mar/05/iglesias-too-slow-claims-domenici>; *see also* Dan Eggen & Paul Kane, *Prosecutors Say They Felt Pressured, Threatened; Hill Republicans, Justice Dept. Cited*, WASH. POST, Mar. 7, 2007, at A1.

145. As former Attorney General Robert Jackson once wrote,

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

Robert Jackson, Attorney General of the United States, Address at Second Annual Conference of United States Attorneys (Apr. 1, 1940), in 24 J. AM. JUD. SOC'Y 18.

transparency and accountability than weekend calls to a U.S. Attorney's home.

Third, the DOJ should be required to communicate to the court both the needs of a particular U.S. Attorney's Office and the qualifications of the potential interim appointees.¹⁴⁶ Because of privacy laws,¹⁴⁷ there may be a need for Congress to pass new laws making internal employee files and Federal Bureau of Investigation reports available to courts. However, greater cooperation and openness in the process will make it difficult for unqualified interim appointees to be named U.S. Attorney.

Ultimately, the debate boils down to what we want our U.S. Attorneys' Offices to be.

If they are to be professional law enforcement offices responding to the needs of the citizens of their districts, they must be led by independent professionals with the support of the Justice Department. If and when they become mere rewards or resume builders for those in the good graces of the Attorney General, they will quickly lose their credibility and thus their ability to perform their jobs effectively.¹⁴⁸

Moreover, "U.S. Attorneys' Offices which become—or are perceived to have become—politicized will cease to attract the best and the brightest . . . lawyers [who are] committed to serving the public . . ." ¹⁴⁹ Further, replacing U.S. Attorneys with under-qualified political insiders will "denigrate the work of hardworking and dedicated Assistant U.S. Attorneys and undermine[] public confidence in the work of their offices."¹⁵⁰ Morale in U.S. Attorneys Offices will continue to remain low¹⁵¹ as the ends of justice are thwarted by political agendas that have no place in a system of justice founded on principles of fairness and truth. In the end, those who will suffer the most will be those who have the greatest stake in ensuring the fair and just administration of the laws:

146. As Ross Wiener noted in his article, even if it is not foolproof, "the practice of including the district judge from the outset has been relatively successful in ensuring that the Attorney General's nominee is accepted by the district court . . ." Wiener, *supra* note 4, at 400 n.172.

147. See 5 U.S.C. § 552 (2007).

148. Levenson, *Preserving Prosecutorial Independence*, *supra* note 21.

149. *Id.*

150. *Id.*

151. Jerry Seper, *Inspector Eyes Gonzales Testimony: Leahy 'Pleased' With Inquiry*, WASH. TIMES, Aug. 31, 2007, at A3; James Oliphant, *Top Cop Must Serve Many Masters: Job Demands Legal, Political, People Skills*, CHICAGO TRIBUNE, Aug. 28, 2007, at Zone C, 10; Lichtblau & Shane, *supra* note 26. ("Many say [that former Attorney General Gonzales left] a Justice Department that has been . . . weakened by sapped morale."); Editorial, *Attorney Firings Taint System Across Nation; Our Turn*, SAN ANTONIO EXPRESS-NEWS, June 22, 2007, at 6B (stating that some attorneys believe that "the controversy over the firings of the U.S. attorneys has tainted the justice system throughout the country. It has hurt morale among U.S. attorneys, and has undermined their credibility . . .").

the American people. Thus, we must do everything in our collective power to ensure that U.S. Attorneys are allowed to pursue rigorously the ends of justice without fear of political retaliation and rebuke.

V. CONCLUSION

Since the founding of this nation, U.S. Attorneys have served as the chief federal law enforcement officers for their districts. They owe their allegiance to the people of their districts.¹⁵² DOJ officials should start thinking of U.S. Attorneys as more than just their elite handmaidens. They are, in fact, the backbone of our federal criminal justice system.

The recent scandal involving the firing of U.S. Attorneys marks a sad period for the DOJ. Prosecutorial credibility, especially that of former Attorney General Gonzales, has eroded much more than Ross Wiener predicted judicial credibility would fall by having judges involved in the appointment process. It may take years for people, including those in the U.S. Attorneys' Offices, to believe officials in Main DOJ.

From a broader perspective, the scandal is consistent with perceptions that the Bush Administration has made concerted efforts to expand and enhance the powers of the Executive Branch at the cost of reduced public confidence in the Administration and government. Over the past few years, these efforts have demoralized large segments of the American population and seriously diminished public confidence in the Administration and the government.¹⁵³ As the Administration approaches the end of its reign, it can take some important steps toward restoring public trust and confidence in the government. One such step would be

152. As Robert Jackson proclaimed many years ago,

[a] sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 6 (1940).

153. Recent opinion polls indicate that Americans' views on, and confidence in, the federal government continue to wane. For instance, a Gallup Poll conducted in February 2007 indicates that 46% of Americans have little-to-no trust and confidence in the federal government with respect to handling international problems, and 48% have little-to-no trust and confidence with respect to handling domestic issues. Gallup Poll, Feb. 1-4, 2007, <http://www.pollingreport.com/institut.htm>. A poll conducted in July 2007 shows that 71% of Americans believe that they can trust politicians in Washington "to do what is right" "only some of the time." CBS News/New York Times Poll, July 9-17, 2007, <http://www.pollingreport.com/institut.htm>.

In addition, a recent CBS News Poll indicates that 69% of Americans disapprove of the way President Bush is "handling the situation with Iraq," CBS News Poll, Aug. 8-12, 2007, <http://www.pollingreport.com/iraq.htm>, and the President's approval ratings continue to remain near all-time lows, Pollingreport.com, Bush: Job Ratings, <http://www.pollingreport.com/BushJob.htm> (displaying the President's approval ratings from a variety of different public opinion polls on October 24, 2007, over 60% of individuals polled disapproved of President Bush).

full and candid disclosure of the criteria the Attorney General used to terminate the fired U.S. Attorneys in 2006. Indeed, the American public is entitled to that information. A more significant step, however, may be a commitment by the DOJ to stop politicizing the work of U.S. Attorneys.¹⁵⁴ Such a commitment would not only assure U.S. Attorneys that they may vigorously pursue the ends of justice without fear of political rebuke but would also help restore some of the faith of the American people in the government and the justice system.

Since the founding of this nation, U.S. Attorneys have served as the chief federal law enforcement officers for their districts. They owe their allegiance to the people of their districts. DOJ officials should stop thinking of U.S. Attorneys as their elite personal staffers. They are, in fact, the guardians of our federal criminal justice system.

154. Judge Michael B. Mukasey, former Attorney General Alberto Gonzales' recently confirmed replacement, emphasized at his Senate confirmation hearing that he would try to remove partisan politics from the Department of Justice by not allowing partisan politics to affect the cases he brings or the prosecutors he hires. Richard B. Schmitt, *Justice Nominee Pledges Reform*, L.A. TIMES, Oct. 18, 2007, at A1.