

systematic analyses of this position have been attempted.⁵ On the eve of the two-hundredth birthday of the office, it is time to examine the complex separation of powers questions surrounding the office: What is the role of Congress in defining the duties of the Attorney General; to what extent can Congress control the Attorney General's decisions on litigation strategy; to what extent must the President have unfettered control of the Attorney General and law enforcement generally?

These issues are not new. Questions concerning authority over the Attorney General and law enforcement arose both in the First Congress's debates and in the Supreme Court's early encounters with the Attorney General. Unfortunately, however, modern efforts to answer these questions make too little use of the history that can inform and guide. In two recent cases, the Supreme Court confronted questions that turned on an interpretation of the role of the Attorney General and, in both cases, the Court could have benefited from a better understanding of the historical background. In *United States v. Providence Journal*, the Supreme Court had to interpret the modern incarnation of section 35 of the Judiciary Act of 1789.⁶ The majority approached the statute as if it had been written yesterday, wholly ignoring its origins and long history.⁷ Similarly, in

Should Speak for Uncle Sam?, 12 NAT'L J. 1098, (1980) (conflict concerning litigation responsibilities of Justice Department and agencies not resolved); Tyler, *The Attorney General of the United States—Counsel to the President or to the Government?*, 45 ALB. L. REV. 1 (1980); cf. Babcock, *Role Can Be Ambiguous, Retiring Justice Aide Says*, Wash. Star, June 29, 1979, at A3, col. 1 (Assistant Attorney General, Civil Division).

5. Former Attorney General Homer Cummings and Special Assistant Carl McFarland wrote the classic study of the office of the Attorney General, H. CUMMINGS & C. MCFARLAND, *FEDERAL JUSTICE* (1937). See also J. EASBY-SMITH, *THE DEPARTMENT OF JUSTICE: ITS HISTORY AND FUNCTIONS* (1904); D. MEADOR, *THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE* 3-18, 26-27, (1980); L. HUSTON, A. MILLER, S. KRISTOV, R. DIXON, *ROLES OF THE ATTORNEY GENERAL* (1968); Hightower, *From "Attornatus" to the Department of Justice—an Historical Perspective of the Nature of the Attorney Generalship of the United States as Embodied in the Department of Justice Act of 1870*, reprinted in *Removing Politics from the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 405-20 (1974) (chronology of historical roots of Attorney Generalship in English precedent, colonial experience, Constitution, Judiciary Act of 1789, and the evolution from office to department 1789-1870); Key, *The Legal Work of the Federal Government*, 25 VA. L. REV. 165 (1938) (history of then-current reforms aiming at the most efficient method of handling government litigation—consolidation under Attorney General); Learned, *The Attorney General and the Cabinet*, 24 POL. SCI. Q. 444 (1909) (historical development of Office of Attorney General); Nealon, *The Opinion Function of the Federal Attorney General*, 25 N.Y.U. L. REV. 825 (1950) (describing Attorney General's role as advising President and Executive Branch on legality and constitutionality of their actions); Comment, *The Confrontation of the Legislative and Executive Branches: An Examination of the Constitutional Balance of Powers and the Role of the Attorney General*, 11 PEPPERDINE L. REV. 331 (1984) (legislative reform needed to prevent undue attachments of the Attorney General to the President and the Executive Branch).

6. 485 U.S. 693 (1988).

7. Having previously decided in *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987), that the judiciary could appoint private attorneys to prosecute criminal contempt of

Morrison v. Olson, the Supreme Court faced the question of the constitutionality of Congress's creation of special prosecutors and the restrictions imposed thereby on the President's and Attorney General's control over law enforcement.⁸ Again, the Court's analysis was too little informed by history.⁹

It is not that these early experiences would necessarily answer today's questions. Indeed, one of the most important contributions that a study of this history offers is precisely the point that, from the start of this Republic, these questions were present and their answers uncertain. Originalists who believe the answers to today's questions are to be found in the framers' intent and the words they chose are mistaken.¹⁰ There are no clear lines now because there were none then.

But while history cannot provide definitive answers, it offers an instructive approach to constitutional interpretation. The framers of the Constitution and the early legislators understood they were creating—"constituting"—a dynamic organism. They created a unitary Presidency, but did not mandate complete presidential control over all administrative offices that Congress might establish. Their approach to questions of control was neither rigid nor doctrinaire. On the contrary, it was remarkably subtle and pragmatic. The simplified model of separation of powers assumed by many modern discussants misses the nuances the framers and early legislators appreciated.

This Article attempts to accomplish two distinct but related objectives. First, it initiates the proposed systematic study of the Office of the Attorney General by examining its early role. Second, it explores how these early experiences help to answer today's questions. To those ends, Part I examines the establishment of the Office of the Attorney General. Studying the genesis of the office and contrasting it to the other significant offices created by the First Congress, such as the Secretaries of Foreign Affairs, War, and Treasury, reveals the priorities and concerns of

court, the Supreme Court in *Providence Journal* had to explore the extent to which these special prosecutors could operate independently of the Attorney General. See *infra* notes 202-14 and accompanying text.

8. 108 S. Ct. 2597 (1988).

9. See *infra* notes 244-75 and accompanying text.

10. While generalizations are inherently suspect, broadly speaking, one can say that the originalist school of constitutional interpretation views constitutional decisionmaking principally as a search for the original historical understanding of a particular constitutional clause. Non-originalist thinkers tend to look to a much wider range of sources for such decisionmaking. For a small sample of the debate between the groups, compare R. BERGER, *CONGRESS V. THE SUPREME COURT* (1969) and Berger, *Paul Brest's Brief for an Imperial Judiciary*, 40 MD. L. REV. 1 (1981), with Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980), Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985), and Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981). See also *infra* note 233.

these early legislators, many of whom had been instrumental in drafting the Constitution.¹¹ This study reveals that the First Congress approached the question of presidential control with a useful mixture of sensitivity and pragmatism that is insufficiently appreciated today.

Part II examines the frustrations Edmund Randolph, the first Attorney General, experienced in the office, focusing particularly on his efforts to persuade the courts to enforce Congress's first pension act for disabled veterans of the Revolutionary War. In *Hayburn's Case*, a 1792 case well-known for its implications for the role of the federal judiciary,¹² Randolph, on behalf of the United States, petitioned the Supreme Court for a writ of mandamus ordering a lower court to administer the Invalid Pensions Act of 1792.¹³ But the Court refused to allow the Attorney General to make his motion.¹⁴ Because the Court did not issue a written opinion in the case, it has been difficult to probe its reasoning. However, the unpublished personal notes of Justice Iredell,¹⁵ coupled with contemporaneous newspaper accounts, letters, and other Supreme Court decisions, suggest that the Court's principal concern was whether the President and the Congress had sufficiently authorized the Attorney General to make such a motion.

11. For an enlightening, detailed analysis of the number of legislators in the First Congress who also participated in various aspects of drafting and ratifying the Constitution, see Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1619-21 (1986).

A complete study of the office of the Attorney General also should include an examination of the experiences of attorneys general in both the colonies and the states. See, e.g., O. HAMMONDS, *THE ATTORNEY GENERAL IN THE AMERICAN COLONIES, ANGLO-AMERICAN LEGAL HISTORY SERIES* (1939); J. NORTON-KYSHE, *COLONIAL ATTORNEYS GENERAL* (1900); Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AMER. J. LEGAL HIST. 304, 304-12 (1958) ("In the new state constitutions the duties of the Attorney General were left largely undefined. Such powers as were exercised stemmed from the common law, colonial custom and legislative act."). These experiences undoubtedly influenced both those establishing the national office and those occupying it. Thus, for example, Attorney General Randolph's approach to his responsibilities as Attorney General of the United States undoubtedly was influenced by his experiences as Attorney General of Virginia, as well as those of his father and uncle who had served as attorneys for the King. See *infra* note 143. Similarly, Justice Iredell's view of the role of Attorney General was no doubt influenced by his experience as Attorney General for North Carolina. Such a study, however, is beyond the scope of this article.

12. *Hayburn's Case* or *In re Hayburn*, 2 U.S. (2 Dall.) 409 (1792), is well-known to federal jurisdiction and constitutional law scholars as the first case in which the Justices of the Supreme Court indicated that (1) federal courts cannot render nonfinal opinions subject to revision by the executive or legislative branches, and (2) the courts can find an act of Congress inconsistent with the Constitution and therefore unenforceable. See *infra* notes 101-03.

13. The Invalid Pensions Act was enacted to provide pensions for those soldiers wounded in the Revolutionary War. See *infra* text accompanying note 94.

14. As will be discussed, see *infra* notes 120-22 and accompanying text, Randolph was later allowed to proceed as private counsel for one of the disabled veterans.

15. James Iredell was one of the original Justices on the Supreme Court and was present when Randolph was forbidden to proceed with his motion. See *infra* note 137.

These efforts by Randolph to secure enforcement of the pension law, offering the Supreme Court its first opportunity to consider the respective roles of the President and Congress in controlling the Attorney General, provide us with an excellent, hitherto unexplored, opportunity to examine the early role of the Attorney General.¹⁶ Studying this experience reveals that many of the current tensions in our tripartite system of government were evident at its inception. From the beginning, there were questions about whom the Attorney General represented, who should and would control the incumbent Attorney General, and what it means to represent the "interests of the United States." In addition, one sees the beginnings of the notably vibrant and enduring debate between those who see the federal courts merely as "resolvers of private disputes" and those who believe they serve a special function as interpreters and protectors of the Constitution.¹⁷

16. A recent article by Maeva Marcus and Robert Teir discusses *Hayburn's Case* and Randolph's abortive motion, but does not use the experience to explore the role of the Attorney General. Marcus & Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527. For further discussion of this interesting article, see *infra* note 182.

17. For useful discussions on the difference between "dispute resolution" and "public action" models of the federal courts, see, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 131-49 (1977); J. VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* (1978); Chayes, *Forward: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982) (illustrating the differences with regard to standing, class actions and remedial discretion); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (focusing on the public law model and its departures from the traditional conception); Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) (examining the legitimacy of structural reform litigation); Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982) (focusing on the legitimacy of remedial discretion used by courts); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (discussing the limits of and ways in which adjudication may be organized and conducted); Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265 (tracing the origins, features, consequences, and problem areas of organizational change decrees); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1034-38 (1968) (arguing that it is not a necessary element of a case to have a plaintiff seeking judicial determination of a question concerning his legal status); Kurland, *Judicial Review Revisited: "Original Intent" and "The Common Will,"* 55 U. CIN. L. REV. 733, 739 (1987) (court's principal role is "resolution of a particular case or controversy on the basis of facts adduced. It is not supposed to be a legislature establishing general rules of behavior for the people of the nation."); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973) (using the two models to determine conditions under which constitutional determinations should be made); Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 587 (1983) (advocating a shift from dispute resolution to the "expository model of adjudication" for article III courts); Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 633 (1977) (describing the difficulties of limiting judicial activity via the standing doctrine); Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965) (federal courts, including Supreme Court, do not pass on constitutional questions because of special function vested in them to enforce Constitution or police other agencies of government; they do so because they must decide litigated issue that is otherwise within their jurisdiction and, in doing so, must give effect to supreme law of land).

Finally, Part III explores the extent to which these early experiences can contribute to modern debates. As the Article indicates, some of the precise uncertainties and frustrations confronting early Attorneys General already have been resolved. However, many fundamental questions remain: Can Congress order an Attorney General to act without regard to the views of the President? Can Congress place law enforcement responsibilities in the hands of individuals outside presidential control? Can the Attorney General act without clear congressional authorization? The early history cannot answer these questions. Indeed, those who find clear answers in this history are probably distorting the history. But the *approach* taken by the framers and early interpreters of the Constitution can and should inform our debate.

I. THE OFFICE OF ATTORNEY GENERAL AT ITS INCEPTION

A. *Created by the First Congress*

The Office of the Attorney General, nowhere mentioned in the Constitution or the debates of the framers,¹⁸ is a creation of Congress. The First Congress established it in section 35 of the Judiciary Act of 1789:

And there shall . . . be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.¹⁹

Thus, the Act gave the Attorney General two principal duties: (1) to prosecute and conduct all suits in the Supreme Court that concern the United States and (2) to give an opinion on questions of law when asked by the President or the heads of departments.²⁰

18. That the concept of an attorney general is nowhere mentioned in the Constitution or the Convention debates is not surprising. The Constitutional Convention was preoccupied with the broad fundamental issues of establishing a new government: how to set up the lawmaking department; whether there should be a national judiciary; whether there should be an independent executive department; how it should be defined and filled. 1 THE RECORDS OF THE FEDERAL CONVENTION 88-92, 289-92 (M. Farrand ed. 1937). After much debate, the framers finally settled these issues late in the Convention. 2 *id.* at 565-66, 572-75 (final provisions referred to the Committee of Style). For a defense of these choices, see THE FEDERALIST NOS. 67-72 (A. Hamilton) (M. Beloff ed. 1987). However, there was little discussion of any other offices of government.

19. The Judiciary Act of 1789, ch. 20, 1 Stat. 73, 92-93.

20. The First Congress also made the Attorney General a member of the Patent Board and the Sinking Fund Commission. Act of Apr. 10, 1790, ch. 7, 1 Stat. 109, 110 (the Attorney General, along with the Secretary of State and Secretary of War, have the power "to cause letters patent to be made out in the name of the United States"); Act of Aug. 12, 1790, ch. 47, 1 Stat. 186, 186. See

The position of Attorney General, as created in 1789, was relatively weak, much weaker than the position we know today. It was a part-time job with a low salary and few prerequisites.²¹ There was no Department of Justice. In fact, the Attorney General had no staff, bought his own pencils and paper, and provided his own office.²² His responsibility to represent the interests of the United States was limited solely to actions in the Supreme Court. District attorneys, known today as United States Attorneys, were given the authority to represent the United States in the district and circuit courts.²³ Moreover, the Judiciary Act gave the Attorney General no authority over district attorneys. Indeed, the initial drafts of the Judiciary Act provided that they were to be appointed by different bodies; the Supreme Court was to appoint the Attorney General and district courts were to appoint the district attorneys.²⁴ As will be seen, this

generally, H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 20 (membership on the Patent Board and Sinking Fund Commission increased the Attorney General's official duties).

While the Attorney General may be either male or female, the male pronoun will be used herein, in recognition of the reality that heretofore all the occupants of this office have been male.

21. The Attorney General was paid \$1,500. Act of Sept. 23, 1789, ch. 18, § 1, 1 Stat. 72, 72 (Act setting compensation for the judiciary). This was considerably lower than the salaries of the other officials whose positions were created by the First Congress. The Secretaries of Foreign Affairs (later renamed State) and Treasury were each paid \$3,500. Act of Sept. 13, 1789, ch. 13, § 1, 1 Stat. 67, 67 (Act setting the executive salaries). The Secretary of War was paid \$3,000 and the Comptroller General of the Treasury \$2,000. *Id.* The First Congress also was generous with the Supreme Court Justices as well as the President and Vice-President. The Justices of the Supreme Court were paid \$3,500, with the Chief Justice getting \$4,000. Act of Sept. 23, 1789, ch. 18, § 1, 1 Stat. 72, 72. The President's salary was set at \$25,000; the Vice-President received \$5000. Act of Sept. 24, 1789, ch. 19, § 1, 1 Stat. 72, 72.

22. Huston, *supra* note 2, at 1-2.

23. *Id.* at 4. The position of district attorneys also was created by section 35 of the Judiciary Act of 1789. *Id.* at 4-5. District attorneys were renamed United States Attorneys in 1948. For a discussion of that change, see *infra* note 24.

24. 1 J. GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 490 (1971); Warren, *New Light on the History of the Judiciary Act of 1789*, 37 HARV. L. REV. 49, 108-09 (1923). Under the draft of the bill initially submitted to the full Senate by a committee specially designated to prepare a judiciary act, each district court was to appoint "a person learned in the law, to act as Attorney for the United States to prosecute 'delinquents' for crimes cognizable under the authority of the United States and all civil action in which the United States might be concerned." J. GOEBEL, *supra*, at 490. According to the draft, the Attorney General was to be appointed by the Supreme Court:

[The Supreme Court shall appoint] a meet person learned in the law to act as Attorney General for the United States, and shall swear him to faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in such Courts in which the United States shall be concerned and to give his advice and opinion upon questions of law when required by the President of the United States and when requested by the Heads of any of the Departments, touching any matters that may concern their Departments.

Warren, *supra*, at 109; see also J. GOEBEL, *supra*, at 490.

However, the Judiciary Act, as finally adopted, modified this provision. Warren inaccurately indicates that the Act "provides for the appointment of United States Attorneys and of the Attorney General by the President," Warren, *supra*, at 108. But in fact the Act did not specify how the Attorney General or the district attorneys would be appointed. See *supra* note 19. The President

lack of central authority over district attorneys remained a continuing source of frustration for many Attorneys General.²⁵

While the legislative history does not indicate why the Office of Attorney General was so weak, its lack of power is not surprising in view of the First Congress's general reluctance to create a strong federal judicial system. The drafters of the Judiciary Act were obviously sensitive to the schisms that had surfaced during the drafting and ratifying of the Constitution, particularly those rifts sparked by article III. The Constitutional Convention, although reaching agreement on the country's need for a Supreme Court, was divided over whether or not to create lower federal courts. Many delegates believed that state courts could adequately serve as trial courts and feared that the establishment of federal trial courts would jeopardize the position of the state courts. The result of this split in opinion was a compromise: article III would establish only the Supreme Court and would empower Congress to decide whether to establish any inferior federal courts.²⁶

nevertheless immediately assumed that responsibility, went to the Senate for advice and consent, presumably reading article II, section 2 to support and perhaps require this approach. For discussion of the legislative history behind the changes in the appointment provision of the Judiciary Act, see *infra* note 32.

Cummings and McFarland suggest that giving the Attorney General power to represent the United States only in the Supreme Court may have been an inadvertent by-product of the provision in the original draft, which had the Attorney General and the district attorneys appointed by different courts. H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 16. But the concept of separate jurisdictional spheres for the Attorney General and the district attorneys is more likely to have been a deliberate decision influenced by the perceived need for local attorneys to be situated near the courts.

25. See *infra* notes 81 and 184-87.

26. For an informative description of the process leading to the compromise, see J. GOEBEL, *supra* note 24, at 196-250; P. BATOR, D. MELTZER, P. MISHKIN, & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 10-11 (3d ed. 1988) [hereinafter HART & WECHSLER]. The wording of article III was the result of a series of compromises. See J. SCHMIDHAUSER, THE SUPREME COURT AS FINAL ARBITER IN FEDERAL-STATE RELATIONS 1789-1957, at 7-8, 13 (1958); J. GOEBEL, *supra* note 24, at 312; see Jay, *Origins of Federal Common Law*, (pt. 1) 133 U. PA. L. REV. 1003, 1035-36 (1985).

Some of the ambiguities in article III apparently were deliberate. See, e.g., Jay, *supra*, at 1035; Forrester, *The Nature of a "Federal Question,"* 16 TUL. L. REV. 362, 367 (1942). Gouverneur Morris seemed to have so confessed in a letter to Timothy Pickering:

That instrument [the Constitution] was written by the fingers, which write this letter. Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which expressing my own notions would not alarm others, not shock their self love, and to the best of my recollection, this was the only part which passed without cavil.

Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), reprinted in 3 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 18, at 419-20.

During the ratification debates, article III, which had engendered relatively minor disputes in the Convention, became much more controversial. Nineteen of the one hundred and three amend-

Congress exercised this power with keen sensitivity to the controversies and compromises underlying article III.²⁷ The Judiciary Act was “an instrument of reconciliation deliberately framed to quiet still smoldering resentments.”²⁸ The First Congress established inferior federal courts, but gave them only a fraction of the judicial power outlined in

ments proposed by six of the initially ratifying states related to the judiciary or judicial proceedings. HART & WECHSLER, *supra*, at 20. See generally, H. AMES, *Proposed Amendments to the Constitution During the First Century of its History*, in 2 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION 3, 153-64 (1886) (describing the proposed amendments that dealt with the jurisdiction of federal courts). Fear of a strong federal government in general and a strong federal judiciary in particular became apparent during the ratification process. See, e.g., 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 1787, at 57, 319, 447, 539-46 (J. Elliott ed. 1836) (Patrick Henry, in Virginia Convention, was concerned with preservation of trial by jury and potential for suing states in federal courts) [hereinafter DEBATES]; *id.* at 521-22 (George Mason, in Virginia Convention, was concerned that state courts would become irrelevant); 2 DEBATES, *supra*, at 109-12 (Holmes, in Massachusetts Convention, foresaw great abuse under the federal judiciary, fearing that Attorney General would indict an individual by information, without a grand jury; that criminal trial could take place far from the defendant's home and before strangers; that there were no limits on possibility of Congress enacting cruel punishments, and that there was no guarantee that the defendant would be allowed to face his accuser); 4 DEBATES, *supra*, at 136-38, 163-64 (Spencer, in North Carolina Convention, believed exclusive federal jurisdiction in all cases arising under the Constitution and laws of the United States to be oppressive; that state courts were fully competent, and therefore that concurrent jurisdiction was suspect; and that federal judiciary was an unnecessary expense); *id.* at 142-43, 151, 167 (Bloodworth of North Carolina wanted trial by jury secured in civil cases and believed concurrent jurisdiction was a threat to that right); *id.* at 143 (McDowall, of North Carolina, wanted a guarantee of trial by jury in civil cases); *id.* at 168-69 (Locke of North Carolina believed it derogatory for states to impose federal jurisdiction, and since federal judges would most probably come from state courts, there would be no greater quality or impartiality in federal courts); *id.* at 174 (Bass of North Carolina was particularly concerned that individuals could be removed from their communities and tried at great distances under the federal judiciary).

27. On the first day after it convened on April 7, 1789, the Senate appointed a special committee to draft a judiciary bill. The Committee was composed of Oliver Ellsworth of Connecticut, William Paterson of New Jersey, William Maclay of Pennsylvania, Caleb Strong of Massachusetts, Richard Henry Lee of Virginia, Richard Bassett of Delaware, William Few of Georgia, and Paine Wingate of New Hampshire. Charles Carroll of Maryland and Ralph Izard of South Carolina were added to the Committee on April 13, 1789. Professor Warren says that five of the committee members—Ellsworth, Paterson, Strong, Few, and Wingate—had served in the Constitutional Convention. Warren, *supra* note 24, at 57. Professor Goebel points out that Wingate never attended the Convention, but Bassett, whom Warren overlooks, did. See J. GOEBEL, *supra* note 24, at 459 n.8. Goebel also tells us that Strong had left the Convention before August 27, and thus was not present when article III was taken up. *Id.* Ellsworth, Paterson, and Strong, the three lawyers on the committee with considerable legal experience as judges and attorneys general in their states, are thought to have been mainly responsible for the bill, with Ellsworth getting the most credit. *Id.* at 459; Warren, *supra* note 24, at 59-61. Ellsworth and Paterson later served as Justices on the Supreme Court. See Jay, *supra* note 26, at 1016.

28. J. GOEBEL, *supra* note 24, at 458. See also Warren, *supra* note 24, at 53 (The Act was a “compromise measure, so framed as to secure the votes of those who, while willing to see the experiment of a Federal Constitution tried, were insistent that the Federal Courts should be given the minimum powers and jurisdiction.”). But cf. Clinton, *supra* note 11, at 1540-52 (arguing that with the exception of jurisdictional amounts, the Judiciary Act of 1789 “came rather close to allocating the entirety” of article III judicial power to some part of the federal judiciary, but not necessarily to

article III. Moreover, the fraction conferred was generally concurrent with state court jurisdiction; very little was exclusively federal.²⁹

The Office of Attorney General, established in the final section of the Judiciary Act, reflected this same mood of caution and compromise.³⁰ The position was apparently not the subject of extensive congressional debate.³¹ The sole controversial issue concerning the Office of

the inferior courts). Everyone was sensitive to the importance of the task of writing the Judiciary Act. As James Monroe indicated in a letter to Madison,

[The bill] to embrace the judi'y[sic] will occasion more difficulty, I apprehend, than any other, as it will form an exposition of the powers of the gov't itself, and shew in the opinion of those who organized it, how far it can discharge its own functions, or must depend for that purpose, on the aid of those of the States. Whatever arrangement shall be now made in that respect, will be of some duration . . .

Letter from James Monroe to James Madison (Aug. 12, 1789), reprinted in 1 WRITINGS OF JAMES MONROE 205, 206 (S. Hamilton ed. 1898).

Warren suggests that the Act satisfied no one completely but "pleased the Antifederalists more than the Federalists." Warren, *supra* note 24, at 53. To support this, he cites a letter from a leading Antifederalist, Joseph H. Nicholson of Maryland, who, in the course of urging repeal of the expansive, short-lived Circuit Court Act of 1801, commended Ellsworth and the Judiciary Act of 1789 as follows:

On no occasion has his wisdom or the solidity of his judgment appeared more conspicuous to my mind than in the formation of the first judiciary system of the United States. In a government like ours, extending over a large tract of country, and composed of sovereign States, independent of each other, confederated for the purpose of mutual defense and mutual protection, it was rightly judged that its judicial powers should not extend to any other cases of judicial cognizance than those which might be deemed somewhat of a general nature, and whose importance might affect the general character or general welfare of the Nation.

Warren, *supra* note 24, at 53 n.12.

29. The district courts were given exclusive jurisdiction only of "civil causes of admiralty and maritime jurisdiction," "seizures" on land or water, "crimes and offenses that shall be cognizable under the authority of the United States," suits for penalties and forfeitures incurred under the laws of the United States, and suits against consuls or vice-consuls." Act of Sept. 24, 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76-79. These cases represent subjects that everyone, including the Antifederalists, believed were properly federal. J. GOEBEL, *supra* note 24, at 470-74, 494; HART & WECHSLER, *supra* note 26, at 11, 14; THE DIARY OF WILLIAM MACLAY, reprinted in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1791, at 1, 85-88 (K. Bowling & H. Veit eds. 1988)[hereinafter MACLAY DIARY].

30. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92-93.

31. See generally 1 ANNALS OF CONG. 45 (J. Gales ed. 1790). Ascertaining the legislative history of this period is fraught with difficulties. Senate debates were not open to the public; thus we must rely, to a considerable extent, on the records saved by the clerk and the diaries of the participants—recollections that are potentially self-serving. The House debates provide somewhat more information because they were open to the public, and thus more frequently the subject of press coverage. The clerk of the House, however, was less fastidious than his Senate counterpart about the records he kept. Because the Judiciary Act was drafted and debated primarily in the Senate, where the legislative history is most difficult to ascertain, reconstructing the history of the Act is problematic. Nonetheless, we can construct a broad outline. Most of the debate addressed the questions that also had confounded the Constitutional Convention: whether to establish lower federal courts and how to define their jurisdiction. The section creating the Attorney General received little attention. See J. GOEBEL, *supra* note 24, at 457-508 (extended history of the Judiciary Act); Warren, *supra* note 24, 65-81 (discussion of debate in the Senate); *id.* at 123-25 (discussion of the debate in the House).

Attorney General was the question of appointment, and even that debate seemed low-key.³² Nonetheless, even without the benefit of much useful recorded dialogue, it is fair to conclude that the First Congress did not expect this part-time attorney, with no staff and little power, to play a major role in the emerging federal government.

In the eyes of the First Congress, the office of Attorney General was also less closely aligned with the President than it is today. To see that, it is instructive to compare the definition of the position of Attorney Gen-

32. As noted, the initial draft of the bill had the judiciary appointing the district attorneys and the Attorney General. See *supra* note 24. But there is little information revealing why that provision was changed. We know that the change occurred sometime between the time the bill was first reported to the Senate on June 12 and the time the Senate voted on the bill on July 17, 1789. Christopher Gore wrote to Rufus King on Aug. 22, 1789:

The report of the Committee to the Senate made the Attorney for the district to rest on the District Judge for his appointment, but the Act as transmitted from the Senate to the House only declared that such an officer should be appointed. I, therefore, conclude that if the Act passes in its present form, the district attorney must be appointed by the President.

Letter from Christopher Gore to Rufus King (Aug. 22, 1789), reprinted in Warren, *supra* note 24, at 109 n.137 (Warren gives the date as Aug. 22, 1788, but he must mean 1789.).

Although we do not know why the change was made, there is some evidence that the impetus came from the judicial community. Several times during the legislative process, members of the Senate committee drafting the bill sought the views of the judicial community. One of the extant letters responding to this inquiry addressed the provision concerning the appointment of the Attorney General. Robert R. Livingston, in a letter thought to have been addressed to Ellsworth, complimented the draft but wondered, *inter alia*, whether it "would not be better that the Attorney General be appointed by the executive to which department he necessarily belongs than to the judicial . . . ?" Letter from Robert R. Livingston (June 24, 1789) (available in the Huntington Library, HM 22571). The only other information we have is a letter from John Adams to Francis Dana in which Adams reports that the Senate voted on an amendment to have the Attorney General appointed by the President. Letter from John Adams to Francis Dana (July 5-14, 1789), reprinted in Adams Family Papers, Reel 115, Massachusetts Historical Society, (tentatively dated as having been written between July 5 and 14) (available in the Library of Congress). There is no record of the pertinent debate either in the committee or the Senate as a whole.

It is interesting that Randolph, also asked to comment on the draft, had no comments on the Attorney General provision. His principal concerns were that the number of Supreme Court Justices was too small "to make head against eleven state judiciaries, always disposed to warfare," and that the jurisdiction, was "inartfully, untechnically and confusedly worded." Letter from Edmund Randolph to James Madison (June 30, 1789), reprinted in 12 PAPERS OF JAMES MADISON 273, 273-74 (C. Hobson & R. Rutland eds. 1979). Randolph had made a related objection to article III of the Constitution previously during the Virginia ratification debates, suggesting that article III should have "been more clearly expressed." Randolph complained: "What do we mean by the words *arising under the Constitution*? What do they relate to? I conceive this to be very ambiguous [T]he word '*arising*' will be carried so far that it will be made use of to aid and extend the federal jurisdiction." 3 DEBATES, *supra* note 26, at 572. Randolph also anticipated a problem that was later to frustrate him personally. Fearing the possibility of an equally divided court, Randolph suggested that Congress avoid this by providing for an odd number of Justices. *Id.* But Congress did not respond and thus Randolph confronted a 3-3 split on his mandamus motion in the pension case. See *infra* note 119 and accompanying text. In fact, Congress did not respond to any of Randolph's suggestions and he had the opportunity to elaborate on them when, as Attorney General, he was asked by Congress to evaluate the judicial system. 2 ANNALS OF CONG., *supra* note 31, at 1719. See also *infra* note 69 and accompanying text.

eral with that of the other major offices created by the First Congress—the Secretaries of Foreign Affairs, War, and Treasury.³³

In establishing the two “great executive departments”³⁴ of Foreign Affairs and War, Congress was notably concerned with assuring presidential control and limiting congressional interference with presidential powers. There was a threshold concern that mere congressional *definition and establishment* of executive departments was an undue intrusion on presidential powers. Senator William Maclay suggested, for example, that the President should have discretion to create whatever administrative institutions he desired.³⁵ The Senate would “advise and consent” to presidential appointments and both houses would approve salary requests, but, Maclay suggested, Congress should not define the various executive offices.³⁶ Although Congress rejected this proposal, its sensitiv-

33. That these were the first departments created by Congress is not surprising. Experience under the Articles of Confederation had proven the need for these offices. M. HINSDALE, *A HISTORY OF THE PRESIDENT'S CABINET 1-16* (1911) (describing how the departments of war, finance, and foreign affairs moved from multi-member committees of the Continental Congress to single-headed departments outside the Congress); Guggenheimer, *The Development of the Executive Departments: 1775-1789*, in *ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES IN THE FORMATIVE PERIOD, 1775-1789*, at 116-85 (J. Franklin Jameson ed. 1970). Moreover, the drafters of the Constitution, while neither creating nor specifying the establishment of administrative offices, clearly contemplated the creations of departments and, in fact, had specifically mentioned the departments of “finance, foreign affairs, and war.” According to Madison’s notes, Gouverneur Morris indicated that “[t]here must be certain great officers of State; a minister of finance, of war, of foreign affairs. These he presumes will exercise their functions in subordination to the Executive, and will be amenable by impeachment to the public Justice.” J. MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 324 (Ohio Univ. Press ed. 1966) (July 19, 1787, comments of Gouverneur Morris on reconsideration of the vote rendering the Executive ineligible for a second term). Hamilton suggested that the President have the sole power to appoint “the heads or Chief Officers of the departments of Finance, War, and Foreign Affairs,” with the Senate involved in the appointment of all other officers. *Id.* at 138 (June 18, 1787, comments of Hamilton in the Committee of the Whole commenting on the proposals of Paterson (the New Jersey Plan) and Randolph (the Virginia Plan)). Similarly, many of the proposals that sought to establish a privy council to advise the President suggested that the proposed membership include the principal officers in the departments of foreign affairs, war, finance, marine, and domestic affairs. *See, e.g.*, Report by J. Rutledge from the Committee on Detail to the Full Convention (Aug. 22, 1787) in *id.* at 509-10 (proposing the establishment of a privy council, consisting of “the president of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the principal officer in the respective departments of foreign affairs, domestic affairs, war, marine, and finance, as such departments of office shall from time to time be established.”).

On Tuesday, May 19, 1789, Representative Boudinot of New Jersey moved that the Committee of the Whole set up the “great Executive departments which were in existence under the late Confederation, [and] are now at an end, at least so far as not to be able to conduct the business of the United States.” 1 *ANNALS OF CONG.*, *supra* note 31, at 368. Boudinot moved that the Congress establish a department of finance, war, and foreign affairs. *Id.* at 368-69.

34. 1 *ANNALS OF CONG.*, *supra* note 31, at 368.

35. *MACLAY DIARY*, *supra* note 29, at 83.

36. *Id.* Senator Maclay was concerned with potential intrusions both on the President’s responsibilities and on the Senate’s prerogatives. He believed the Senate should have a role in the removal of officers and thought the House’s bill was interfering with this power.

ity to the separation of powers issue is striking. As will be shown, Congress made no effort to dictate the internal structure of these departments and explicitly provided that the President had the power to appoint these officers, control their actions, and remove them at his will.

The Secretary of Foreign Affairs, the principal officer of the "Executive Department to be denominated the Department of Foreign Affairs," was given a range of duties, all of which were explicitly to be directed by the President. Thus, for example, the Secretary was to "perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States."³⁷ Further, he was to "conduct the business of the . . . department in such manner as the President of the United States shall from time to time order or instruct."³⁸ In short, the President was to control both what the Secretary did and how he did it.

Congress also decided, after exhaustive debate, that the Secretary should be removable by the President without legislative participation.³⁹ Some legislators thought that under the Constitution impeachment was the exclusive means for removal; others thought the President could remove, but only with the consent of the Senate.⁴⁰ Finally, James Madison

37. Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 29. Section 1 of the "Act for Establishing an Executive Department, to be denominated the Department of Foreign Affairs," reads:

That there shall be an Executive department, to be denominated the Department of Foreign Affairs, and that there shall be a principal officer therein, to be called the Secretary for the Department of Foreign Affairs, *who shall perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States*, agreeable to the Constitution, relative to correspondences, commissions or instructions to or with public ministers or consuls, from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs, *as the President of the United States shall assign to the said department*; and furthermore, that the said principal officer shall conduct the business of the said department in *such manner as the President of the United States shall from time to time order or instruct*.

Act of July 27, 1789, ch. 4, 1 Stat. 28, 28-29 (emphasis added).

On September 15, 1789, Congress changed the names to Department of State and Secretary for the Department of State. Act of Sept. 15, 1789, ch. 14, 1 Stat. 68. An earlier effort in the term to create a Home Department had failed, partly for fear of invading state authority and partly for a concern with excessive spending. 1 ANNALS OF CONG., *supra* note 31, at 667-69. When it became clear that the effort to create a Home Department was doomed, Congress imposed some of those duties on the Secretary of Foreign Affairs—including custody of public records and correspondence with the states—and acknowledged the enhanced scope of the Secretary's duties by changing the name from the Department of Foreign Affairs to the Department of State. Act of Sept. 15, 1789, ch. 14, 1 Stat. 68. These were the ministerial duties that were to be hotly debated several years later in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

38. Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 29.

39. 1 ANNALS OF CONG., *supra* note 31, at 455-586. This is in contrast to the need for presidential direction, which was taken as a given and not debated.

40. That was what Hamilton believed. In FEDERALIST NO. 77, Hamilton indicated that it was self-evident that the President could only remove with the advice and consent of the Senate. Hamilton believed that this would be the desired means since it would promote stability in government. A

convinced the House that the power to remove was vested solely in the President; this power, Madison argued, derived from the President's constitutional responsibility to ensure that the laws of the United States be faithfully executed.⁴¹ The House not only agreed with Madison, but it deliberately adopted wording designed to make it clear that this presidential power to remove was not simply a matter of legislative grace. After initially adopting language that explicitly authorized the President to remove the Secretary from office, the House, and ultimately the Senate, voted to replace it with more passive language that simply designated a successor in the event the President chose to remove the Secretary of Foreign Affairs. As ultimately enacted, section 2 provided:

That there shall be . . . an inferior officer, to be appointed by the said principal officer . . . who, *whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy*, shall during such vacancy have the charge and custody of all records, books, and papers appertaining to the said department.⁴²

As this incident suggests, the First Congress was both strikingly sensitive to the precedential effects its actions would have and fully capable of avoiding ambiguities when necessary. James Madison eloquently captured this spirit when he urged Congress to resolve the removal issue and clarify potential ambiguities:

However various the opinions which exist upon the point now before us, it seems agreed on all sides, that it demands a careful investigation and full discussion. I feel the importance of the question, and know that our decision will involve the decision of all similar cases. *The decision that is at this time made, will become the permanent exposition of the Constitution; and on a permanent exposition of the Constitution will depend the genius and character of the whole Government. It will depend perhaps on this decision, whether the Government shall retain*

new President would not be able to replace competent officers simply to appoint his own. THE FEDERALIST NO. 77, at 391 (A. Hamilton) (M. Beloff ed. 1987).

41. 1 ANNALS OF CONG., *supra* note 31, at 495-97.

42. Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29 (emphasis added). The provision the House had previously adopted provided that the Secretary was "to be removable by the President." 1 ANNALS OF CONG., *supra* note 31, at 578. However, conscious of the precedents it was setting, desirous of removing ambiguities, and reluctant to suggest that it had the power to grant or deny the President the ability to remove this official, the House voted to replace the provision with the language ultimately found in the statute. *Id.* at 580-81. When Madison seconded the motion to amend the Secretary of Foreign Affairs bill to make clear that the President's power to remove was constitutionally, not statutorily, based, he indicated that he wished every ambiguity expunged and the sense of the House explicitly declared. *Id.* at 578-79. For a close, critical analysis of the debates, the voting, and Madison's clever agenda control in the removal decision, see C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 205-10 (1969); L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 60-61 (1985); Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 253, 361-62 (1927). *Cf.* *Myers v. United States*, 272 U.S. 52 (1926), discussed *infra* note 242.

*that equilibrium which the Constitution intended, or take a direction towards aristocracy or anarchy among the members of the Government. Hence, how careful ought we to be to give a true direction to a power so critically circumstanced!*⁴³

The structure of the statute establishing the Department of War was identical to that for Foreign Affairs. Like the Secretary of Foreign Affairs, the Secretary of War, the principal officer of “the Executive Department to be denominated the Department of War,” was to take his orders from the President. He was to “perform and execute such duties as shall from time to time be enjoined on, or intrusted to him by the President of the United States.”⁴⁴ Also, like the Secretary of Foreign Affairs, the War Secretary was subject to presidential removal power.⁴⁵ The Secretary of War was empowered to appoint an inferior officer, known as the Chief Clerk of the Department of War, who would replace him in the event of a vacancy in the office, however that might occur, including presidential firing of the Secretary.⁴⁶

This congressional sensitivity to ensuring presidential control was evident only in these two areas—national defense and foreign affairs—areas in which the Constitution explicitly invests the President with significant authority.⁴⁷ Nothing approaching this level of concern accompanied the First Congress’s other creations: the offices of Secretary of the

43. 1 ANNALS OF CONG., *supra* note 31, at 495 (Madison speaking on June 17, 1789) (emphasis added).

Another example of this sensitivity to the importance of subtleties and of the precedents it was setting may be seen in the First Congress’s decision regarding the appointment of these officials. In enacting the bill establishing the Secretary of Foreign Affairs, Congress struck a section providing that the President would appoint with the advice and consent of the Senate. While that was the desired method, the fear was that if the statute explicitly provided for such appointments, it would be read to suggest that Congress had the discretion to modify that method of appointment. Congress wanted to make clear that, in its opinion, the Constitution mandated this method of appointment. *Id.* at 371.

President Washington was also notably conscious of the precedents that were being set. Writing to Madison on the question of how the President ought to be addressed, Washington observed: “As the first of everything in our situation will serve to establish a precedent, it is devoutly wished on my part that these precedents may be fixed on true principles.” 12 THE PAPERS OF JAMES MADISON, *supra* note 32, at 132.

44. Act of Aug. 7, 1789, ch. 7, 1 Stat. 49, 50.

45. *Id.* at 50.

46. *Id.*

47. For example, article II of the Constitution provides that the President shall be the Commander in Chief of the Army and Navy; shall have the power, with the advice and consent of two-thirds of the Senate, to make treaties; shall appoint, with the advice and consent of the Senate, ambassadors, other public ministers, and consuls; and shall receive ambassadors and other public ministers. U.S. CONST. art. II, § 2.

Treasury and Attorney General.⁴⁸

In contrast to Congress's creation of the Departments of Foreign Affairs and War where it provided virtually no internal structure, Congress explicitly defined several positions inside the Department of the Treasury, including Secretary of the Treasury, Comptroller, Auditor, Treasurer, Register, and Assistant to the Secretary of the Treasury.⁴⁹ Moreover, Congress carefully delineated the responsibilities of each position. Congress also provided no explicit supervisory role for the President; the department was not even labeled an executive department in the statute.⁵⁰ The statute contained no provisions analogous to those directing the Secretaries of Foreign Affairs and War to "perform and execute" the duties "enjoined or entrusted to [them] by the President."⁵¹ Indeed, the defining statute nowhere authorized the President to do anything; the sole reference to the President was the statutory provision recognizing his power to remove the Secretary.⁵² In establishing the Treasury Department, Congress was concerned not that it might be intruding on any presidential prerogatives, but that it had to avoid unconstitutionally delegating its own authority over the purse. To avoid that danger, the Secretary of the Treasury was more closely controlled by the Congress. He was directed to discharge a series of functions enumerated by statute and to "make report, and give information to either branch of

48. The First Congress also established the Postmaster General, but only as an interim office to continue in force until the next session of Congress. Act of Sept. 22, 1789, 1st Cong., 1st sess, ch. 16, 1 Stat. 70. For more on the post office see *infra* note 74.

49. Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65, 65.

50. Act of Sept. 2, 1789, ch. 12, 1 Stat. 65. The Departments of Foreign Affairs and War were explicitly labeled as executive departments in their respective statutes. Act of July 27, 1789, ch. 4, 1 Stat. 28, 28; Act of Aug. 7, 1789, ch. 7, 1 Stat. 49, 50. The Department of the Treasury, however, was not so labeled, Act of Sept. 2, 1789, ch. 12, 1 Stat. 65, 65, although it occasionally was referred to as one of the executive departments during the debates. See, e.g., 1 ANNALS OF CONG., *supra* note 31, at 396 (debates of May 21, 1789). In addition, the Secretary's salary was fixed in a statute establishing the "Executive Office of Government." See *infra* note 56. Guggenheimer, in his account of the development of the modern executive departments, believes the failure to label the Treasury Department executive was significant:

The distinction implied by the omission of "executive" in the title of the Treasury act was still further carried out in the body of the respective laws. Those for War and Foreign Affairs had made the principal officers entirely subordinate to the President, and had only indicated the general scope of their duties. In the Treasury act, on the contrary, no mention whatever is made of the Secretary's dependence upon the President, at least with regard to the conduct of his office, and specific duties are enumerated and assigned to him. The effect of this was probably not precisely what was anticipated. It set up an independent executive official, who, although at the mercy of the President for the tenure of his office, was nevertheless allowed far more freedom of action than either the Secretary of War or of Foreign Affairs.

Guggenheimer, *supra* note 33, at 181.

51. Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 29.

52. Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 65, 67.

the legislature, in person or in writing, (as he may be required)."⁵³ In fact, for a significant period of our early history, the Secretary of the Treasury recommended tax policy directly to Congress and transmitted departmental budget estimates to Congress with virtually no presidential involvement.⁵⁴ In sum, the President could appoint and remove the Secretary of the Treasury, but he was not to have the same day-to-day con-

53. Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 66. The Act provided that it is the duty of the Secretary of the Treasury to "lay before the Senate and House of Representatives, fair and accurate copies of all accounts by him from time [to time] rendered to, and settled with the Comptroller," and "to make report, and give information to either branch of the legislature, in person or in writing (as he may be required), respecting all matters referred to him by the Senate, or the House of Representatives, or which shall appertain to his office." *Id.* at 66. There was concern that allowing the Secretary of the Treasury to report on budgetary matters to the House was unlawfully delegating to the executive the House's responsibility to originate money bills. 1 *ANNALS OF CONG.*, *supra* note 31, at 592-607. Representative Page was particularly concerned with

this interference of an Executive officer in [the] business of legislation; it may be well enough to an absolute monarchy, for a Minister to come to a Parliament with his plans in his hands, and order them to be enacted; but this practice does not obtain even in a limited monarchy like Britain. . . . Now, why we, in the free Republic of the United States, should introducc such a novelty in legislation, I am at a loss to conceive. The Constitution expressly delegates to us the business of revenue.

Id. at 594. Page was not satisfied with the response that the two houses and the President had to enact any proposed legislation; he feared that the legislators, unduly influenced by the "deference commonly paid to men of abilities, who give an opinion in a case they have thoroughly studied," would "support the minister's plan, even against their own judgment." *Id.* at 592. Representative Hartley agreed. But he recognized the need for obtaining information and proposed a modification whereby the Secretary of the Treasury would be "oblige[d] to have his plans ready for the House when they are asked for," but opposed the establishment of a "legal right in an officer to obtrude his sentiments perpetually on [the House]." *Id.* at 600. In his view, such a "legal right" was both "disagreeable," and "dangerous inasmuch as the right conveyed . . . powers exclusively vested by the Constitution in [the] House." *Id.* Ultimately, the House narrowed the proposed authority so that the Secretary would prepare plans, but give them to Congress only when Congress requested them. *Id.* at 601-07.

54. L. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 326 (1948) [hereinafter L. WHITE, *THE FEDERALISTS*]; L. WHITE, *THE JACKSONIANS* 78 (1954) [hereinafter L. WHITE, *THE JACKSONIANS*]; Rosenberg, *Congressional Control of Agency Decisions and Decisionmakers: The Unitary Executive Theory and Separation of Powers*, Congressional Research Report for Congress, October 19, 1987, at CRS-15.

The House of Representatives often used this reporting mechanism to challenge decisions of the first Secretary of the Treasury, Alexander Hamilton, frequently adopting resolutions demanding that he justify various activities through reports to Congress. *See, e.g.*, Report on Public Credit, 2 *ANNALS OF CONG.*, *supra* note 31, at 1992 (1790); Report on a National Bank (Dec. 4, 1790), *id.* at 2032; Report on Manufactures (Nov. 4, 1791), 3 *id.* at 971 (1791). Tiefer suggests that these resolutions both served the partisan interests of Hamilton's opponents and "flushed out waste and abuse in the nation's early financial arrangements, leading to useful corrective action." Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 *B.U.L. REV.* 59, 72 (1983). *See generally* L. FISHER, *PRESIDENT AND CONGRESS: POWER AND POLICY* 86-89 (1972) (describing creation of the Treasury Department and Congress's relationship with the Secretary of the Treasury, including Hamilton's troubled tenure). With slight modifications, the statute has remained in effect. *See* 31 *U.S.C.* § 331 (1982). For a general discussion of this duty, see R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 38-40 (1974).

rol that he exercised over the Secretaries of Foreign Affairs and War.⁵⁵

The position of Attorney General was also notably different from the Secretaries of Foreign Affairs and War. In particular, Congress showed little concern for the possibility that it might be intruding on presidential powers. Unlike the departments of Foreign Affairs and War, the office of Attorney General was nowhere labeled "executive."⁵⁶ The Office was not even established in a statute of its own; it was created by a mere three-sentence provision at the tail-end of the Act establishing the federal judiciary. In contrast to the officers of the "great executive departments" of Foreign Affairs and War,⁵⁷ the Attorney General was not directed to take orders from the President. The sole statutory reference

55. The President's ability to remove, but not direct, the Secretary of the Treasury was used by President Jackson in his struggle over the Second National Bank. Tiefer comments that Congress had "placed federal funds under the control of the Secretary of the Treasury in an attempt to shield the bank from Jackson's efforts to destroy it. In one of the most famous uses of the removal power, President Jackson replaced two Secretaries of the Treasury until he found a third who would follow his directions," remove the funds, and ultimately destroy the bank. Tiefer, *supra* note 54, at 73; see also L. FISHER, *PRESIDENTIAL SPENDING POWER* 16 (1975) (Jackson had to remove two secretaries before finding someone willing to execute his plan.)

Congress used the same distinction between allowing the President to remove but not to direct particular actions for both the Secretary and the Comptroller of the Treasury. James Madison, who had argued successfully that the President should be able to remove the Secretaries of War and Foreign Affairs, had suggested that the Comptroller of the Treasury might be given a term of years. In his view, "there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government." 1 *ANNALS OF CONG.*, *supra* note 31, at 611-12. Madison explained:

It will be necessary to consider the nature of this office . . . [and] in analyzing its properties, we shall easily discover they are not purely of an Executive nature. It seems to me that they partake of a Judiciary quality as well as Executive; perhaps the latter obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens: this partakes strongly of the judicial character.

Id. Madison ultimately withdrew his suggestion. *Id.* at 615. Although Congress did not provide the Comptroller with a term of years, it subsequently provided that his decisions against claimants would be "final and conclusive to all concerned." Act of March 3, 1795, ch. 48, § 4, 1 Stat. 441, 442. Thus, arguably not even the President could overrule him, although he might be able to influence his decision before it became final. See Rosenberg, *supra* note 54, at CRS-37 n.62; Tiefer, *supra* note 54, at 74.

What is noteworthy here is not that Madison failed to accomplish his goal, but that both the distinction he tried to make between the officers and the distinction ultimately adopted by Congress—between control by direction and control by removal—showed that the early legislators saw clear gradations of presidential control and made these decisions along functional lines.

56. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93. As noted earlier, *supra* note 50, the Department of the Treasury was not labeled executive in the statute either. But it was occasionally referred to as an executive department in the congressional debates, see 1 *ANNALS OF CONG.*, *supra* note 31, at 369, and Congress, in establishing salaries, included the officers of the Department of Treasury in the statute entitled, "An Act for establishing the Salaries of the Executive Officers of Government, with their Assistants and Clerks." Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 67, 67. By contrast, the salary of the Attorney General was established in the Act setting the salaries for the judiciary. See *supra* note 21.

57. 1 *ANNALS OF CONG.*, *supra* note 31, at 368.

to the President was a provision ordering the Attorney General to give his "advice and opinion" when "required by the President."⁵⁸ The Attorney General was instructed to "prosecute and conduct all suits in the Supreme Court in which the United States [was] concerned,"⁵⁹ but Congress was notably silent regarding who was to decide when and whether the interests of the United States were "concerned" and warranted representation in the courts. Nothing specified who should control the Attorney General or to whom he should report.⁶⁰ Indeed, some suggested the Attorney General should not be a presidential appointee at all; the first draft of the Judiciary Act provided for appointment by the Supreme Court.⁶¹

The Judiciary Act also failed to address removal of the Attorney General. This silence is particularly striking in view of the extended discussions the Congress had just completed on removability,⁶² after intense debate, Congress ultimately adopted provisions that made explicit the President's power to remove the Secretaries of Foreign Affairs, War, and Treasury.⁶³ Seen in this light, the absence of an analogous provision for

58. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93. According to McFarland and Cummings, Randolph did not even attend Washington's early cabinet meetings. H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 25. He apparently attended his first cabinet meeting on March 31, 1792. 1 FORD, JEFFERSON'S WRITINGS 189 (1895); H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 25. See generally M. HINSDALE, *supra* note 33, at 10-16 (discussing Randolph's role in the First Cabinet). According to Hinsdale, Randolph was not included either in Washington's request for advice on August 27, 1790 regarding the appropriate response to the anticipated request by Lord Dorchester for permission to march troops from Detroit to the Mississippi, or in the preparation for Washington's Annual Address to Congress delivered December 8, 1790. *Id.* at 10-11. But it is unclear whether Randolph was not included because he was busy trying to supplement his income, or because, following the English tradition, the Attorney General initially was not considered to be a member of the cabinet. H. CUMMINGS AND C. MCFARLAND, *supra* note 5, at 26. Whatever the reason, by 1792 he did attend and was probably welcomed by Secretary of State Jefferson as a balance against the more ardent Federalist secretaries, Hamilton, Secretary of the Treasury, and Knox, Secretary of War. *Id.* at 26; M. HINSDALE, *supra* note 33, at 14. Hinsdale suggests that the increased role given to the Attorney General was due in part to Washington's confidence in Randolph's aptitude for foreign affairs: "It was to *Randolph*, rather than the Attorney General, that the increased importance belonged; nevertheless, the office enjoyed a better assured place thereafter." *Id.*

According to Hinsdale, the concept of a cabinet grew slowly and informally. By 1793, Washington was formally summoning his advisors, but did not use the term "cabinet." Instead, he referred to them as "the Secretaries and the Attorney General," or the "Heads of Departments and the Attorney General." *Id.* at 15. Madison, Jefferson, and Randolph were among the first to refer to this group as the Cabinet. *Id.* But the term does not appear in a statute until the General Appropriations Act of February 26, 1907, ch. 1635, § 4, 34 Stat. 935, 993. *Id.* at 15.

59. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

60. See *supra* note 24.

61. *Id.*

62. See *supra* notes 39-42, 55.

63. Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29 (Foreign Affairs); Act of Aug. 7, 1789, ch. 7, § 2, 1 Stat. 49, 50 (War); Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 65, 67 (Treasury).

removal of the Attorney General hardly seems inadvertent. But Congress's reasons for omitting a removal provision remain unclear. Having just decided that the President has authority to remove the Secretary of Foreign Affairs, Congress may have determined that such language would be superfluous with respect to the Attorney General. Yet Congress was unconcerned with any potential redundancy when it included identical removal provisions in the Acts creating both the Secretaries of War and Treasury. In fact, Congress deliberately added these provisions because it "wanted, by repetition, to force upon the minds [that had not yet been] impressed by right reason."⁶⁴ Alternatively, one might argue that having created no Assistant Attorney General, Congress had no convenient way of asserting the President's removal power without appearing to grant the President that power, and chose instead to remain silent. As discussed earlier, in the other statutes Congress had defined an "inferior officer" to be the person to take charge of the department in the event the principal officer was removed by the President. In this way, Congress could recognize the President's removal power without appearing to be bestowing it.⁶⁵ Yet this view suffers from an unduly narrow view of the early legislators' creativity; had Congress wanted to assert the President's power to remove the Attorney General without creating an Assistant, it is unlikely that it could have been so unimaginative as to have been unable to discover a way. The most likely explanation for Congress's failure to specify the removal of an Attorney General was that Congress was simply less sure about and less concerned with his removability. Unlike the other executive positions, where many stressed the particular importance of the President's ability to control foreign affairs and war,⁶⁶ there may have been less concern about the President's need to control the Attorney General and thus more willingness to leave the matter unresolved.⁶⁷

64. 1 ANNALS OF CONG., *supra* note 31, at 592 (Rep. Page). When Mr. Benson proposed amending the Secretary of War bill to include the identical removal language they had provided for the Secretary of Foreign Affairs, Mr. Sherman objected. Sherman thought "it unnecessary to load this bill with any words on that subject [since] the principle [had been] established in the other bill." *Id.* at 591. Mr. Page responded that he had been "of the same opinion" but upon further thought decided that repetition was desirable to avoid any doubt. *Id.* at 592. The majority of the House evidently agreed and added the identical provision to the Secretary of War statute.

65. *See supra* note 42 and accompanying text.

66. *See* 1 ANNALS OF CONG., *supra* note 31, at 493 (Rep. Stone speaking); *id.* at 512 (Rep. Vining states that the Departments of Foreign Affairs and War are peculiarly under the authority of President). During the exhaustive discussion of the removability of executive officials, Congress clearly was concerned most with assuring presidential control over the Secretary of Foreign Affairs and War, offices embodying the quintessential powers of the President. *Id.* at 493, 512, 533.

67. While Madison had persuasively stressed Congress's responsibility to resolve this vitally important issue in the foreign affairs context, *see supra* note 42-43, he may have thought it less essential to resolve it here or have been reluctant to get into another extended debate.

In further contrast to its approach to the Secretaries of Foreign Affairs and War, Congress appeared to believe that the Attorney General would take orders from Congress, as well as the President, in representing the interests of the United States. Notably absent from the statute was any provision regarding taking orders from the President. Moreover, from the beginning it was customary for Congress to seek, and, for the Attorney General to give, advice.⁶⁸ Indeed one of Randolph's more demanding assignments came in 1790 when the House of Representatives ordered the Attorney General, instead of a House committee, to assess the state of the judiciary.⁶⁹ Congress likewise turned to Randolph's successors, William Bradford and Charles Lee, to establish a schedule of fees for compensating federal judicial officers.⁷⁰ Congress also frequently sought the Attorney General's advice on the validity of private financial

68. By 1818, Attorney General Wirt became overwhelmed by the number of opinions he was asked to supply, and began to construe his responsibilities under section 35 very narrowly so as to include only requests from the President and heads of departments. *See infra* note 92. He thus refused to give opinions to Congress. But this was a statutory, not a constitutional, rebellion. Nothing in Wirt's statements suggested that Congress could not make it his duty to serve Congress as well as the President. *See infra* text accompanying note 92.

69. 2 ANNALS OF CONG. 1719 (J. Gales ed. 1790). Randolph's report criticized many of the features of the Judiciary Act of 1789. 1 AMERICAN STATE PAPERS, MISCELLANEOUS 21-36 (1834) (No. 17). For a description of his report, see H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 20-21. Not everyone was pleased with Randolph's report. One of the drafters of the Act being critiqued, Caleb Strong of Massachusetts, wrote to David Sewall on January 17, 1791:

The Attorney General has reported amendments for the Judicial system; the Report is very lengthy and contains nearly 40 folio pages. It is just printed and was it not bulky I would inclose it. I have but just looked into it; he proposes that the District Judges shall be judges of the Circuits, that the Supreme Judges shall have no other service than attending four Supreme Courts in a year at the seat of the Government; that the executions to be issued shall be those in use in England, etc.; in short, I believe it is better calculated for Virginia than New England.

Letter from Caleb Strong to David Sewall (MS. letter available in Manuscript Division of Library of Congress.)

Randolph's suggestions did not get very far in the 1790s. But Congress finally adopted many of his proposals in the Judiciary Act of 1801. Act of February 13, 1801, ch. 4, 2 Stat. 89. *See generally* Surrency, *The Judiciary Act of 1801*, 2 AM. J. LEGAL HIST. 53, 58 (1958); Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494, 494-96 (1961). But those changes were short-lived. Enacted in the final moments of the Adams Administration, the Act of 1801 was repealed by the newly elected Jeffersonian Republicans in 1802. Act of March 8, 1802, ch. 8, 2 Stat. 132. *See generally* F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 24-30 (1927) (discussing "selfish" Federalist political motivation for Judiciary Act of 1801 and its hasty repeal as soon as Congress changed hands); 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 184-230 (1928) (tracing rise and fall of Judiciary Act of 1801, with focus on Federalist judicial decisions that sealed fate of 1801 Act).

70. Fees of Courts, *reprinted in* 1 AMERICAN STATE PAPERS, MISCELLANEOUS 82, 117-22, 152 (1834) (Nos. 54, 61, 89). To acquire the data needed to report on the table of fees charged by the state courts, the Attorney General needed a special Act of Congress. *See id.* at 82 (No. 54) (noting enactment of Joint Resolution, June 9, 1794, 1 Stat. 402).

claims against the government,⁷¹ and even occasionally ordered the Attorney General to bring specific legal actions.⁷² In short, the Attorney General seemed to be as much Congress's lawyer as the President's.

This is not to say that the Attorney General was not an executive official. While Congress's precise view on this question is less than crystal clear, Randolph certainly considered himself such.⁷³ The question was one of degree—the degree of presidential control. The First Congress established varying levels of presidential control over various officials depending on the function of the officer involved. The early legislators established gradations of presidential control along functional, flexible lines. In the case of the Secretaries of War and Foreign Affairs, Congress believed the Constitution required comprehensive presidential control. It thus explicitly ensured that the President would have the essential tools of control: the power to appoint, direct, and remove. By contrast, Congress provided no explicit provision for presidential control over the Attorney General; in particular there was no provision for control by directive or by removal. Thus, in the eyes of these early interpreters of the Constitution the position of the Attorney General was to be both relatively weak, and less subject to presidential control than were the Secretaries of Foreign Affairs and War.⁷⁴

71. See, e.g., Randolph's report on Jackson's claim as district attorney, REP. ATTY. GEN., I, at 140-42; Lee on Land Grant, 1 AMERICAN STATE PAPERS, PUBLIC LANDS 34 (1796) (No. 21) (a report to Congress respecting the title to the land situated in the Southwestern part of the United States); Lee on Contract for Land, *id.* at 67-68 (No. 23); Lee on Relief of Imprisoned Debtors, 1 AMERICAN STATE PAPERS, MISCELLANEOUS 160-61 (1834) (No. 100) (application for a discharge from imprisonment at the suit on the United States); Lee on Relief of a Marshal, Ms. Record Bk., REP. ATTY. GEN., I, at 311; Lee on Claims to Land, *id.* at 180-82, 188-92.

72. An example of this policy was Congress's ordering the Attorney General to seek a Supreme Court adjudication of a particular question in 1793. See *infra* text accompanying note 163.

73. Randolph thought of himself as an executive officer. See Letter from Edmund Randolph to George Washington (December 26, 1791), reprinted in Sparks, 10 Writings of George Washington, 1 AMERICAN STATE PAPERS, MISCELLANEOUS 45-46 (1834) (No. 25) (Washington transmitted letter to Congress on Dec. 28, 1791). Randolph began to sit in on cabinet meetings in 1792. See *supra* note 58. It is thus an overstatement to assert, as one recent commentator has, that the Attorney General originally served as "de facto counsel for Congress" and only later "became absorbed" by the executive branch. See Comment, *supra* note 5, at 348. But it is equally inaccurate to assert, as Justice Stevens did recently, that the early Attorney General was counsel for the President and not for Congress. See *United States v. Providence Journal Co.*, 108 S. Ct. 1502, 1512 (1988) (Stevens, J., dissenting) (discussed *infra* at note 214). In fact, he was the attorney for both.

74. This distinction between the Attorney General and other department heads remained for some time. When the election of 1828 approached and it became apparent that there would be a complete shift in administration with Andrew Jackson's Presidency, the question arose whether the existing cabinet officials should resign. Former President Monroe thought they should, except for the Attorney General. "Your duties are different," he wrote to Attorney General Wirt. "The President has less connection with, and less responsibility for the performance of them." Letter from James Monroe to William Wirt, reprinted in H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 98.

B. *The Incumbents in the First Decade—the 1790s*

The job of Attorney General of the United States was no “plum” and President Washington had to work hard to convince Edmund Randolph to become the first incumbent. Relying on both flattery and the lure of enhanced private earnings to be garnered from this “preeminent” station, Washington finally convinced the former Attorney General of Virginia and key participant in the Constitutional Convention to move north and serve the new federal government.⁷⁵ Randolph served in this

Former Assistant Senate Legal Counsel Charles Tiefer suggests that the distinction the First Congress made between its treatment of the Secretaries of War and Foreign Affairs and its treatment of the Secretary of the Treasury indicated a “contemporary appreciation of the difference between departments intended to be subordinate to presidential control in the performance of ‘political’ functions of diplomacy and war, and the department not intended as a ‘political’ arm, but which was expected instead to follow the direction of law.” Tiefer, *supra* note 54, at 72, 86-87. This distinction resembles the distinction made by the early Court between “politics” and the “law” and the ability of the courts to enforce legal ministerial duties. Thus, in *Marbury v. Madison*, Chief Justice Marshall distinguished between “[q]uestions in their nature political, or which are, by the constitution and laws, submitted to the executive [and] can never be made in this court” and situations in which an officer is “directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid.” 5 U.S. (1 Cranch) 137, 170, 171 (1803); see also *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 526 (1838) (Court may issue mandamus “to enforce performance of a mere ministerial act, which neither [officer] nor the President ha[s] any authority to deny or control”).

The Office of Attorney General was not the only early administrative office over which the President was given little control. In creating a permanent Postmaster General, Congress retained significant control. While the First Congress established an interim office that provided that the Postmaster General should “be subject to the direction of the President of the United States in performing the duties of his office, and in forming contracts for the transportation of the mail,” Act of Sept. 22, 1789, ch. 16, § 1, 1 Stat. 70, 70, no subsequent acts contained such a command. Later congressional debates centered on where to put the power to establish post roads and post offices—with the President, the Postmaster General, or the Congress. The House seemed to believe that (1) the Constitution gave this power to the Congress, (2) it could not be delegated, and (3) Congress could better fulfill the duty. 2 ANNALS OF CONG., *supra* note 31, at 1527-28, 1676-77 (1790). Unable to agree on where to place the power, Congress continued the interim approach for several years. Act of Aug. 4, 1790, ch. 36, 1 Stat. 178 (act to continue the act which temporarily established post office); Act of March 3, 1791, ch. 23, 1 Stat. 218 (act appropriating money for expenses of civil list and war department); 2 ANNALS OF CONG., *supra* note 31, at 1886-90 (Rep. Sherman indicated that disagreement of the two Houses on where to place power to establish routes “occasioned the loss of the bill last session”). Finally, in 1792, Congress passed the first comprehensive bill to establish the post office and post roads. In it, Congress retained the power to establish routes itself and gave the President no power to direct the postmaster or to establish post offices or post roads; the provision that had appeared in the 1789 statute giving the President power to direct the postmaster had lasted only for that short period. Act of Feb. 20, 1792, ch. 7, 1 Stat. 232. For a discussion of the history of this Act, see *Myers v. United States*, 272 U.S. 52, 189-91 (1926) (McReynolds, J., dissenting).

75. “[T]he selection of the fittest characters to expound the laws, and dispense justice, has been an invariable object of my anxious concern,” Washington wrote to Randolph. “I mean not to flatter when I say, that considerations like these have ruled in the nomination of the Attorney-General of the United States, and that my private wishes would be highly gratified by your acceptance” Letter from George Washington to Edmund Randolph (Sept. 28, 1789), reprinted in 30 WRITINGS

capacity from 1789 until President Washington asked him to replace Thomas Jefferson as Secretary of State in 1794.⁷⁶ Randolph was succeeded as Attorney General briefly by William Bradford, who took over on January 27, 1794 but died suddenly on August 23, 1795.⁷⁷ President Washington again had some difficulty finding a successor, offering the position first to John Marshall (who declined) and then to Charles Lee.⁷⁸

OF WASHINGTON 418, 419 (J. Fitzpatrick ed. 1939). Washington acknowledged the "frugality" of the salary, but pointed out that "the Salary of this office appears to have been fixed, at what it is, from a belief that the Station would confer pre-eminence on its possessor, and procure for him a decided preference of Professional employment." *Id.* In a letter to James Madison, Washington explained why he chose Randolph: "Mr. Randolph, in this character, I would prefer to any person I am acquainted of not superior abilities, from habits of intimacy with him." Letter from George Washington to James Madison (before Sept. 24, 1789), *reprinted in* 1 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 665 (M. Marcus & J. Perry eds. 1985) [hereinafter DOCUMENTARY HISTORY OF THE SUPREME COURT]. Randolph officially accepted by letter on December 23, 1789. Letter from Edmund Randolph to George Washington (Dec. 23, 1789), *reprinted in* 1 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra*, at 685.

76. Randolph had served as Governor of Virginia, the first Attorney General of Virginia, and a key member of the Constitutional Convention. He did not sign the Constitution, principally because he feared its vagueness and was opposed to a unitary executive. M. CONWAY, OMITTED CHAPTERS OF HISTORY DISCLOSED IN THE LIFE AND PAPERS OF EDMUND RANDOLPH 92-93 (1888). Hoping that there would be a subsequent convention to make improvements, however, Randolph ultimately helped to get it ratified. *Id.* at 97-100; A. MASON, THE STATES RIGHTS DEBATE 160 (2d ed. 1972); R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS: 1776-1791, at 167-68, 174 (rev. ed. 1983). Randolph served as Attorney General for the United States from September 26, 1789 until January 2, 1794. UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEYS GENERAL OF THE UNITED STATES 1789-1985, at 2 (1985); J. REARDON, EDMUND RANDOLPH: A BIOGRAPHY 248 (1974).

Unfortunately for Randolph, President Washington's optimism about the office and the preeminent station from which its incumbent could enhance his earnings did not materialize. In letters to Madison, Randolph frequently complained about his impecunious position. Thus, for example, in early 1791, Randolph wrote:

With every frugality, almost bordering on meanness, I cannot live upon it, as it now stands. I am a sort of mongrel between the States and the U.S.; called an officer of some rank under the latter, and yet thrust out to get a livelihood in the former, perhaps in a petty mayor's or county-court.

Letter from Edmund Randolph to James Madison (Feb. 27, 1791), *reprinted in* 13 THE PAPERS OF JAMES MADISON 400 (C. Hobson ed. 1981). Congress did help somewhat by raising Randolph's salary by \$400 on March 3, 1791. Act of March 3, 1791, ch. 28, 1 Stat. 215. Nonetheless, Randolph continued to have financial difficulties. *See* L. WHITE, *supra* note 54, at 170 n.28.

77. Bradford had been Attorney General for Pennsylvania for eleven years and Justice of the Supreme Court of Pennsylvania for three years when Washington picked him to be Attorney General for the United States. *See* 2 DICTIONARY OF AMERICAN BIOGRAPHY 566 (A. Johnson ed. 1929); R. GRISWOLD, THE REPUBLICAN COURT 356 (1867).

78. 2 A. BEVERIDGE, LIFE OF MARSHALL 122-123 (1916); 34 WRITINGS OF WASHINGTON 287, 306 (J. Fitzpatrick ed. 1940); Letter from Innes to Carrington, (Oct. 30, 1795), *reprinted in* 34 WRITINGS OF WASHINGTON, *supra* at 233-34; Letter from George Washington to Carrington (Sept. 28, 1795), *reprinted in* 34 WRITINGS OF WASHINGTON, *supra*, at 317.

President Jefferson also had trouble finding capable people willing to serve as Attorney General. He too tried using the prospect of a lucrative private practice as a lure. In his unsuccessful effort to get John Julius Pringle to become Attorney General, Jefferson suggested: "The practice in the Supreme Court and the district courts of Columbia held here and at Alexandria is said to be easy & profitable." June 15, 1805, Jefferson Papers, Lib. Cong., Series 1, Reel 33, CL, 26217. When Prin-

Lee served as Attorney General during the rest of Washington's term and the entire Adams administration (from December 10, 1795 through February 18, 1801).⁷⁹ Thus, the country was served by three Attorneys General during its first formative decade—the only decade in which the Federalist Party controlled all three branches of the federal government.⁸⁰

Randolph quickly became frustrated by the limitations of the office and, on December 26, 1791, complained by letter to President Washington.⁸¹ Randolph's principal concern was the lack of a "fixed relation" with the district attorneys;⁸² the Attorney General not only had no power to direct district attorneys in their lower court litigation, he was not even certain he would be aware of all litigation concerning the interest of the United States.⁸³ Indeed, many observers believed that Secre-

gle declined, Jefferson finally convinced Senator Breckinridge to leave the Senate, replace Jefferson's first Attorney General Levi Lincoln, and become the fifth person to hold the office in fifteen years. Letter from Thomas Jefferson to Senator Breckinridge, Aug. 7, 1805, Jefferson Papers, Lib. Cong., CLI, 26473.

79. 11 *DICTIONARY OF AMERICAN BIOGRAPHY* 101 (D. Malone ed. 1933).

80. As the first decade in the life of the Constitution, the 1790s were filled with manifold precedential decisions, often made by those who had been intimately involved in the drafting and ratifying of the Constitution. During this decade, the First Congress not only decided fundamental questions of government structure and control, it also debated, at considerable length, the appropriate term to be used for addressing the President, *see* L. BANNING, *THE JEFFERSONIAN PERSUASION* 115-18 (1978); the constitutionality of establishing a national bank, *see* 8 A. HAMILTON, *THE PAPERS OF ALEXANDER HAMILTON* 63-134 (H. Syrett ed. 1965); 1 *DOCUMENTARY HISTORY OF BANKING AND CURRENCY IN THE UNITED STATES* 230-336 (P. Samuelson & H. Krooss ed. 1969); and whether judicial process should be issued in the name of the United States or the President. The latter issue was so controversial the Congress could not resolve it and left it to the Supreme Court to decide. *See* J. GOEBEL, *supra* note 24, at 539-40. This decade also witnessed significant efforts by the Supreme Court to establish its independence. For studies of this decade and its general significance, *see* J. GOEBEL, *supra* at 662-721 (during the early years, Court established many ground rules concerning role of the judiciary); A. KELLEY, W. HARBISON, & H. BELZ, *THE AMERICAN CONSTITUTION* 120-41, 164-69 (6th ed. 1983) (central problem of the 1790s was defining the nature of executive, legislative and judicial branches; problem facing the judiciary was how to fashion a distinction between law and politics that would preserve both spheres); Currie, *The Constitution in the Supreme Court: 1789-1801*, 48 U. CHI. L. REV. 819, 819 (1981) (first twelve years were formative period during which Supreme Court Justices established traditions of constitutional interpretation that were to influence future course of Court's decisionmaking).

81. Letter from Edmund Randolph to George Washington (Dec. 26, 1791), *reprinted in* 1 *AMERICAN STATE PAPERS, MISCELLANEOUS* 45-46 (1834) (No. 25).

82. *Id.*

83. Despite the lack of "fixed relations," Randolph and his successors occasionally worked with district attorneys on particular matters. For example, Randolph participated in the trial at Yorktown against those resisting the tax on distilled liquors, H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 29-31, and worked on Henfield's trial for violating the neutrality proclamation, Jay, *supra* note 26, at 1048-49. Attorney General Bradford was involved with the prosecutions arising from the Whiskey Rebellion. H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 43-45. Nevertheless, in general, the district attorneys worked without the participation or direction of the Attorney General. *See* Wirt, Attorney General and District Attorneys, 1 Op. Att'y Gen. 608, 610-611 (1823); Taney, The Jewels of the Princess of Orange, 2 Op. Att'y Gen. 482, 491-92 (1831); Cushing, Office and

tary of State Jefferson had more control over the district attorneys than Attorney General Randolph had.⁸⁴ To correct this deficiency, Randolph requested that the district attorneys be required to inform the Attorney General of all cases involving foreign nations or implicating the "harmony" between state and federal judiciaries, and that the Attorney General be empowered to direct the district attorneys in such matters. In addition, Randolph sought a "transcribing clerk" to help him with his opinions which were "numerous and often lengthy."⁸⁵

Duties of Attorney General, 6 Op. Att'y Gen. 326, 335-36, 347-48 (1854); H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 143.

84. See J. GOEBEL, *supra* note 24, at 545; L. WHITE, *THE FEDERALISTS*, *supra* note 54, at 212, 406-08. Control over the district attorneys was only one of the areas of controversy between Jefferson and Randolph. When the Supreme Court Justices in 1793 refused to answer President Washington's inquiries regarding the declared position of neutrality, Jefferson suggested that Washington set up a board to give legal advice. *Id.* at 169. But when Randolph insisted that such a board be attached to his office, Jefferson objected. As the Secretary of State explained in a letter to Madison, "In plain language, this would be to make [Randolph] the sole arbiter of the line of conduct for the U.S. towards foreign nations." Letter from Thomas Jefferson to James Madison (Aug. 11, 1793), reprinted in M. CONWAY, *supra* note 76, at 190-91. No such board was established. Notwithstanding the close family and personal connections between the men, Jefferson wrote more and more critically of Randolph, whom he viewed as indecisive at best. Writing to Madison, Jefferson complained: "I can by this confidential conveyance speak more freely of R[andolph]. He is the poorest chameleon I ever saw, having no colour of his own, and reflecting that nearest him." *Id.* at 190. It is noteworthy that Ford's collection of Jefferson's writings contains a letter from Jefferson to Madison dated August 11, 1793, that does not contain the strong language found in Conway's reprint. 6 *THE WRITINGS OF THOMAS JEFFERSON* 367-68 (P. Ford ed. 1896). Conway suggests that other biographers of Jefferson have "suppressed" the letter. M. CONWAY, *supra* note 76, at 190. Two years later, Jefferson repeated his criticism: "The fact is that he [Randolph] has generally given his principles to the one party & his practice to the other Whether his conduct is to be ascribed to a superior view of things, an adherence to right without regard to party, as he pretends, or to an anxiety to trim between both, those who know his character and capacity will decide." Letter from Thomas Jefferson to William Branch Giles (Dec. 31, 1795), reprinted in 7 *THE WRITINGS OF THOMAS JEFFERSON*, *supra*, at 42-44. For a defense of Randolph against Jefferson's charges as well as against the serious charges leveled against Randolph when he became Secretary of State, see M. CONWAY, *supra* note 76, at 191-94; E. RANDOLPH, *A VINDICATION OF MR. RANDOLPH'S RESIGNATION* (1795).

85. Letter from Edmund Randolph to George Washington (Dec. 26, 1791), reprinted in 1 *AMERICAN STATE PAPERS, MISCELLANEOUS* 45 (1834) (No. 25). The letter provided:

The office, which I have the honor of holding under the United States has presented, in the course of its execution, some defects which, I trust, will not be deemed unworthy of a remedy. If, however, they were only personally inconvenient, I should certainly forbear to trouble you with a recital of them; but while I consider them as injurious to the public service, I cannot satisfy myself of the propriety of withholding them from you.

Many instances have occurred in which the heads of the departments have requested that suits should be prosecuted in different States under my direction. It has been always my inclination to conform to their wishes; but the want of a fixed relation between the attorneys of the districts and the Attorney General, has rendered it impossible for me to take charge of matters on which I was not authorized to give instructions.

From the same source it may frequently arise that the United States may be deeply affected by various proceedings in the inferior courts, which no appeal can rectify. The peculiar duty of the Attorney General calls upon him to watch over these cases; and being, in the eye of the world, responsible for the final issue, to offer his advice at the earliest stage of any business; and indeed, until repeated adjudications shall have settled a clear line of

On January 18, 1792, President Washington presented Randolph's letter to the House, which appeared sympathetic and prepared to grant Randolph's requests. Within days of receiving the request, the House passed a resolution urging the appropriate committee to prepare a bill that would (1) require the district attorneys to keep the Attorney General informed of judicial business and to follow his instructions on such matters, (2) authorize the Attorney General to advocate the interests of the United States in *any* case in which the United States was interested, whether or not the Attorney General had been involved in bringing the suit, and (3) provide a clerk.⁸⁶

But the Senate opposed the proposed legislation. It would agree only that the district attorneys be required to keep the Attorney General informed of lower court proceedings. Its proposal gave the Attorney General no authority to instruct the district attorneys or to advocate in the lower courts. And the provision failed to provide a clerk.⁸⁷ The rea-

partition between the federal and State courts, his best exertions cannot be too often repeated, to oppose the danger of schism. For this purpose the attorneys of the districts ought, I conceive, to be under an obligation to transmit to him a state of every case in which the harmony of the two judiciaries may be hazarded, and to communicate to him those topics on which the subjects of foreign nations may complain in the administration of justice.

Perhaps, too, in the review which the President takes of the affairs of the Union at the opening of each session of Congress, the judicial department will be comprehended. But the Attorney General, who ought to be able to represent the true situation of it, must be forever incompetent to the task, until he may officially, and with the right of expecting an answer, propound his inquiries to the district attorneys.

I might extend this enumeration much further; but I will only add, that the opinions which the Attorney General gives are many in number, and often lengthy. From this consideration, united with the foregoing, the reasonableness of allowing him a transcribing clerk will, I hope, be obvious.

Permit me, sir, to request you to forward to Congress the subject of this letter, in the manner most agreeable to yourself. I have taken the liberty of addressing it to you, not with an idea of thus obtaining your sanction, but from an impression that the application of an executive officer for the reform of his office ought not, of his own accord, to be laid before the Legislature.

I have the honor, sir, to be, with the most respectful attachment, your most obedient servant.

86. 3 ANNALS OF CONG., 329-31 (J. Gales ed. 1792). Representative Laurence, a member of the Committee appointed to draft a bill, apparently presented a bill to the House the next day; the bill was read twice and committed to the House for its consideration. *Id.* at 331.

87. The picture of this legislative process has some holes but the outline is reasonably clear. Shortly after the House bill was submitted on February 13, 1792, the Senate passed what was to become the Process Act of 1792. *Id.* at 85-88. This Act, containing no provisions concerning the Attorney General, was sent to the House. *Id.* at 407. On April 28, 1792, the House passed the Process Act with amendments. *Id.* at 131. Goebel reports that the House's amendments generally followed the House resolution. It would have given the Attorney General supervisory power over the district attorneys, provided him with a clerk, and established that "it shall be lawful for the Attorney-General, in any suit in which the United States shall be a party, and in any court whatsoever, to advocate the United States although such suit may not have been instituted by him or under his direction." J. GOEBEL, *supra* note 24, at 563, *citing* Senate Files, Sen. 2A-D1, tray 2 (available in National Archives). But the Senate would agree only to a limited provision giving the Attorney General some control over the district attorneys. On May 2, 1792, the Senate reported that it dis-

son for the Senate's opposition to Randolph's proposal is unclear. Presumably, the Senate's position simply reflected its previously described fear of strong central controls. During the enactment of the Judiciary Act of 1789, Congress had been reluctant to give federal courts broad jurisdiction for fear of jeopardizing state courts.⁸⁸ Arguably, this same federalism concern motivated the Senate in its opposition to the House proposal; those concerned with states' rights and the state judiciaries might have feared the creation of a strong centralized federal enforcement mechanism. Disbursing power to minimize abuse was a popular concept in the late eighteenth century.

Whatever the basis for the Senate's opposition, the result was clear. After considerable bicameral wrangling, Congress declined to enact any provision expanding the powers of the Attorney General.⁸⁹ Randolph's efforts to have Congress create even "an embryonic department of law enforcement" had failed.⁹⁰ Thus, Randolph and his successors were destined to carry out their responsibilities under section 35 as originally en-

agreed with the second and fifth of the House's "additional sections" and proposed to amend the fourth additional section so it would read:

And be it enacted, That it shall be the duty of the attorneys in the several districts to correspond with the Attorney General of the United States, on any matter relative to judicial business which shall arise within their respective districts, and upon which he shall request information from them.

3 ANNALS OF CONG., *supra* note 86, at 134.

88. As observed earlier, Congress was very concerned with creating too strong a national judiciary. This same concern was repeated in the unsuccessful effort by the First Congress to enact a Process Act. As Goebel observed, the effort to enact a Process Act had to deal with a struggle between

[t]he legislators who favored creation of a uniform procedure for the new federal courts and those who conceived that in each district state forms and modes of process should prevail. Considered in its historical setting the controversy may be viewed as an aspect of the sustained offensive conducted by the antifederalists against a "consolidated government."

J. GOEBEL, *supra* note 24, at 510.

89. On May 3, 1792, the House "receded" from some of its proposed changes, but continued to insist on "the fourth and fifth sections proposed to be added to the end of the bill," *id.* at 591, sections that probably dealt with the Attorney General. A conference was set up and each house appointed managers. The Senate appointed Ellsworth, King, and Henry. *Id.* at 135. For the House, it was Madison, Laurence, and Clark. *Id.* at 591. On May 7, we learn that the House adhered to its disagreement with the Senate's proposed amendment to the "fourth section proposed to be added"; the House receded from all the other amendments disagreed to by the Senate. *Id.* at 599. At the same time, the Senate receded from its disagreement with the amendments that the House had adhered to. *Id.* at 138, 600 (Senate; House). On May 8, 1792, the Process Act was presented to the President and signed. Act of May 8, 1792, ch. 36, 1 Stat. 275. Thus, as finally enacted, the Process Act contained no provision regarding the Attorney General.

It is curious that the House was not willing to accept the Senate's proposed amendment regarding the Attorney General, since it appeared to follow at least part of the House's January resolve. Perhaps the conference decided not to hold up the Process Act any longer and to deal with the Attorney General debate separately. There is, however, no evidence of this and no evidence of Congress's returning to Attorney General Randolph's request.

90. L. WHITE, *THE FEDERALIST*, *supra* note 54, at 172.

acted—with minimal control over the district attorneys and no clerical support.⁹¹

Of the two principal duties assigned by section 35, opinion writing consumed most of the early Attorney General's public time. Collectively, the first three Attorneys General wrote more than forty opinions on a wide range of issues, including the immunity of diplomats, ownership of ships, Patent applications, and the choice of directors for the Bank of the United States.⁹²

In contrast to this impressive task of formal opinion-writing, the first three Attorneys General collectively represented the United States in

91. Fear of a strong, centralized federal enforcement mechanism was well-entrenched and continued up to the Civil War, frustrating numerous Attorneys General throughout much of the nineteenth century. See *infra* note 184 and accompanying text.

92. The records indicate that Randolph wrote about eight opinions in his three-year term, see 1 Op. Att'y Gen. 2-38 (1791-1793); Bradford wrote sixteen in his year and a half, *id.* at 39-59 (1794-1795); and Lee wrote twenty, *id.* at 60-93 (1795-1800). An overwhelming majority of the requests for opinions came from the Secretary of State—thirty-six of the forty-four requests were from the Secretary of State; four were from the Secretary of the Treasury; two from the President; and two were addressed to district attorneys. *Id.* at 2-93. In addition, the Attorneys General also wrote opinions not formally recorded in this collection. Thus, for example, Randolph advised Washington that he could not convene Congress elsewhere than at the capital, even to protect members from yellow fever. Opinions, Oct. 24 and Nov. 2, 1793, Washington Papers, Lib. Cong., CCLXIII, 146-55, 301-02. But this picture is necessarily incomplete because, as Attorney General Wirt lamented in 1818, the record-keeping of his predecessors had been, to say the least, irregular. In a letter to President Monroe, Wirt complained that there was no "trace of a pen indicating in the slightest manner any one act of advice or opinion which had been given by any one of my predecessors from the first foundation of the federal government to the moment of my inquiry." Letter from Attorney General Wirt to James Monroe (Jan. 17, 1818), Letters sent by the Department of Justice, Roll 2, Vol. 2, National Archives. To remedy this, Wirt began the practice, continued to this day, of keeping "a regular record of every official opinion" of the Attorney General. *Id.* Since "the law was not a science," such a record was required to enable future Attorneys General to avoid inconsistencies with the past. *Id.*

Ultimately, opinion writing became so burdensome that, in 1818, Attorney General Wirt finally rebelled. Overworked and under-staffed, Wirt wrote to President Monroe that, in his opinion, section 35 of the Judiciary Act required the Attorney General to give opinions when requested to do so only by the President and department heads, and he began the process of refusing to answer any other requests. He refused the requests, which had become both common and numerous, of customs collectors, tax collectors, marshals, district attorneys, subordinate officers, private persons, and Congress. Enforcing this against Congress proved to be somewhat difficult, though. The practice of giving opinions to Congress had a long history, starting with Randolph and continuing through Bradford, Lee, Lincoln, Rodney, Pinkney, and Rush, and Congress was not easily deterred. Finally, on January 28, 1820, Wirt refused to answer a question proffered by the House. He reiterated his oft-expressed view that "in a government purely of laws it would be incalculably dangerous to permit an officer to act under the color of his office beyond the pale of the law, no matter what good intentions there might be." H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 86. If Congress wanted the Attorney General to provide opinions for it or its committees, it would have to revise section 35 of the Judiciary Act. Congress never did. See *id.* at 82-87 (describing Wirt's "rebellion"). For further description of Attorney Generals' opinions, see Morse, *Historical Outline and Bibliography of Attorneys General Reports and Opinions*, 30 L. LIB. J. 39 (1937).

the Supreme Court only six times in ten years.⁹³ Yet it is this latter responsibility that is the more interesting and revealing of their activities. In particular, Edmund Randolph's unsuccessful efforts to represent the United States in the Supreme Court in the invalid pension cases are most illuminating. By studying Randolph's abortive efforts—his only attempts to represent the United States in the Supreme Court—and contrasting them with similar efforts by other Attorneys General of the decade, the tensions and uncertainties surrounding the office in the 1790s are dramatically illustrated.

II. THE SUPREME COURT, THE ATTORNEY GENERAL, AND THE PENSION ACTS—*HAYBURN'S CASE* Revisited

A. *The Invalid Pensions Act and Its Legal Complexities*

On March 23, 1792, Congress enacted the "Invalid Pensions Act," establishing a federal pension for Revolutionary War Veterans disabled while serving in the United States military.⁹⁴ The 1792 Congress, unlike its modern-day successor, established no special agency or commission to administer the program. Instead, Congress directed the circuit courts to receive and process applications from would-be pensioners.⁹⁵ Applicants were instructed to go to the circuit court of the district where they resided and present proof of their prior military service for the United States, their war injuries, and the extent of their disability. Upon receipt of the requisite evidence, a circuit court would give its "opinion" on whether the applicant should be put on the pension list, the degree of the applicant's disability, and the proportion of the applicant's monthly pay

93. See *infra* notes 176-83 and accompanying text (discussing the more interesting of these cases).

94. Act of March 23, 1792, ch. 11, 1 Stat. 243 (repealed in part and amended in part by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324).

95. *Id.* at § 2, 1 Stat. 243, 244. The circuit courts of the eighteenth century were very different from the circuit courts of today. Established in 1789 by the First Judiciary Act, circuit courts had no judges of their own. They had a bench composed of three judges—one district judge and two Supreme Court Justices who rotated in "riding circuit"—and were to hold two sessions a year in each district within the circuit. Riding circuit was a significant burden on the Supreme Court Justices. While Congress reduced that burden somewhat in 1793 by reducing the number of Justices per circuit from two to one, see Act of March 2, 1793, ch. 22, 1 Stat. 333, nonetheless, the required traveling remained onerous. The frustrations the Justices encountered in riding circuit, a practice that was to continue for nearly one hundred years, is well documented. See, e.g., J. GOEBEL, *supra* note 24, at 554-5; Marcus, Perry, Buchanan, Jordan, and Tull, *It is My Wish As Well As My Duty to Attend the Court: The Hardships of Supreme Court Service, 1790-1800*, in Yearbook 1984: SUPREME COURT HISTORICAL SOCIETY YEARBOOK 118. The classic account of the evolution of the federal judiciary is F. FRANKFURTER & J. LANDIS, *supra* note 69; see also Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORN. L.Q. 499, 507-15 (1928) (discussing how the various judiciary acts affected the jurisdiction of the federal courts).

that would correspond with that degree of disability.⁹⁶ The court also was asked “to recommend” a sum for the “arrears of the pension”—that is, the back-pay—that the court “may think just.”⁹⁷ The Secretary of War was then directed to place on the pension list the names of those applicants certified by the circuit court, unless the Secretary suspected “fraud or imposition.”⁹⁸ If he had such suspicions, then the Secretary was to withhold the applicant’s name and report the incident to Congress at the next session.⁹⁹

Predictably, the Invalid Pensions Act won popular acclaim.¹⁰⁰ Unfortunately for the disabled veterans, however, the judges directed to administer the Act, while apparently sympathetic toward Congress’s aims, questioned the constitutionality of the system. Although the Supreme Court as a body never ruled on the constitutionality of the 1792 Pension Act, each of the six Justices, while riding circuit in 1792, indicated his concern with the constitutionality of the Act. All six believed that Congress could not constitutionally use circuit courts to process the veterans’ applications. Five of the Justices conveyed their views directly to President Washington by letters.¹⁰¹ The sixth, Justice Johnson, did not write the President and his views are often thought to be unknown. However,

96. Invalid Pensions Act of 1792, ch. 11, § 2, 1, Stat. 243, 244 (1792).

97. *Id.*

98. *Id.* § 4, 1 Stat. at 244.

99. *Id.*

100. As an editorial in the *National Gazette* on April 12, 1792 noted:

Our poor, starving invalids have at length some provision made for them by Congress; and as the distresses of many of them are urgent in the extreme, it is to be hoped that not a moment’s delay will be made by the public officers who are directed to settle their accounts; for although men who are accustomed to plentiful tables do not perhaps know it, it is nevertheless a melancholy truth that a few days fasting would kill not only a feeble, war-worn veteran, but even a hearty well-fed member of Congress or head of a department. If through unavoidable delay any of those unfortunate men should starve before their pittance is paid, then it is to be hoped their widows and orphans will on the very first application receive it, that they may at least have something to purchase coffins for the deceased.

National Gazette, Apr. 12, 1792, reprinted in C. WARREN, *supra* note 69, at 70 n.1.

101. Chief Justice Jay, Justice Cushing, and District Judge Duane, sitting in the Circuit Court for the New York District, wrote to the President on April 10, 1792. Justice Wilson, Justice Blair, and District Judge Peters, holding the Circuit Court for the Pennsylvania District, wrote to President Washington on April 18, 1792. One week earlier these judges had curtly turned away their first petitioner, William Hayburn. And Justice Iredell and District Judge Sitgreaves, holding the Circuit for the North Carolina District, expressed their concerns to the President on June 8, 1792. The letters are reprinted in 1 *AMERICAN STATE PAPERS, MISCELLANEOUS* 49-53 (1834) (Nos. 30-32) and in *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 410-14 n.1 (1792). Future references to these letters will cite only the *AMERICAN STATE PAPERS*. As requested by the judges, President Washington passed all these communications on to Congress. 1 *MESSAGES AND PAPERS OF THE PRESIDENT* 123, 133 (J. Richardson ed. 1896).

It is interesting to observe the judges’ reluctance to communicate directly with Congress. They apparently believed it was more appropriate to convey their thoughts indirectly through the President. Thus, Chief Justice Jay, Justice Cushing, and Judge Duane, in sending their views to President Washington, wrote:

Justice Johnson implicitly expressed his views when he and Judge Bee refused to process the applications of six veterans, ruling *cryptically* that the court could not "constitutionally take Cognizance of and determine on the said Petitions."¹⁰²

The Justices were principally concerned that their rulings on would-be pensioners' applications would be subject to revision by the executive and legislature and thus were not final. They unanimously agreed that such review of judicial opinions was constitutionally suspect. As Chief Justice Jay wrote:

That, by the constitution of the United States, the Government thereof is divided into *three* distinct and independent branches; and that it is the duty of each to abstain from and to oppose encroachments on either.

That neither the *legislative* nor the *executive* branch can constitutionally assign to the *judicial* any duties but such as are properly judicial, and to be performed in a judicial manner.

That the duties assigned to the circuit courts by this act are not of that description, and that the act itself does not appear to contemplate them as such, inasmuch as it subjects the decisions of these courts made pursuant to those duties, first to the consideration and suspension of the Secretary of War, and then to the revision of the Legislature; whereas, *by the constitution, neither the Secretary of War, nor any*

As we could not, in our opinion, convey the enclosed extracts from the minutes of the circuit court now sitting here to the Congress of the United States in so respectful and proper a manner as through the President, we take the liberty to transmit them to you, and to request the favor of you to communicate them to that honorable body.

1 Opinion of the Circuit Judges for N.Y. District (April 16, 1792), *reprinted in* 1 AMERICAN STATE PAPERS, MISCELLANEOUS 49 (1834) (No. 30); *see also id.* at 51 (No. 32) (Justices' complaint to Washington about the rigors of riding circuit); Letter from Edmond Randolph to George Washington, *supra* note 81 (Attorney General Randolph's use of letters to President Washington to communicate ultimately with Congress).

It is also interesting to observe the judges' apparent willingness to offer what seem to be advisory opinions. Iredell and Sitgreaves candidly admitted that they had received no application at the time of their letter. *See infra* note 111.

102. Ms. Mins. Circuit Ct. South Carolina Dist. 1790-1800, *sub.* Oct. 26, 1792 (Justice Johnson and Judge Bee presiding), Oct. 26, 1792, United States District Court at Charlestown, South Carolina (1790-1809), at 20-21, South Carolina Dept. of Archives and History, Columbia, S.C. and Mass. Hist. Soc'y, C.E. French Collection, 1788-1792 (rejecting the petitions of six veterans, Charles Barnes, Richard Richardson, George Mason, Michael Finney, James Meeks, David Witherspoon).

Most casebooks and treatises that discuss the *Hayburn Case* note the views of five of the Supreme Court Justices, but few are aware that the sixth, Justice Johnson, also expressed his views while on circuit. *See, e.g.,* United States v. Ferreira, 54 U.S. (13 How.) 40, 50 (1852) (every Justice of the Court, except Thomas Johnson whose opinion is not given, had formally expressed his opinion); H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 27-28 (no mention of Johnson); HART & WECHSLER, *supra* note 26, at 89-97 (no mention of Johnson); C. WARREN, *supra* note 69, at 70-71 (apparently unaware of Johnson's views); C. WRIGHT, THE LAW OF FEDERAL COURTS 57 (4th ed. 1983) (circuit courts to which petitions presented, on which five of the Supreme Court Justices sat, uniformly refused to entertain such petitions); Currie, *supra* note 80, at 822 (apparently unaware of Johnson's ruling); Farrand, *First Hayburn's Case*, 13 AM. HIST. REV. 281 (1908) (unaware of Johnson's ruling). *But see* J. GOEBEL, *supra* note 24, at 562-64 (recognizing Johnson's views).

*other executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.*¹⁰³

Although most courts and commentators emphasize this lack of finality and independence,¹⁰⁴ it may not have been the only feature of the Pension Act that troubled the Justices. Several also questioned whether the assigned tasks—deciding whether a veteran deserved a pension, how much was appropriate, and what amount of back-pay was “just”—were, in the words of Judges Jay, Cushing, and Duane, “properly judicial.”¹⁰⁵ As Judges Wilson, Blair, and Peters indicated, their concern was two-fold:

Upon due consideration, we have been unanimously of the opinion, that under this act the circuit court held for the Pennsylvania district could not proceed.

1. Because the business directed by this act is *not of a judicial nature*. It forms no part of the power vested by the constitution in the

103. Minutes from Circuit Court for New York District (April 10, 1792), reprinted in 1 AMERICAN STATE PAPERS, MISCELLANEOUS 49-50 (1834) (No.30) (Chief Justice Jay, Justice Cushing, and District Judge Duane); see also Letter from Justice Iredell and Judge Sitgreaves, Circuit Court for the District of North Carolina (June 8, 1792), reprinted in 1 AMERICAN STATE PAPERS, MISCELLANEOUS 51, 52-53 (1834) (No. 32) (courts cannot exercise any “power not in its nature *judicial*, or, if *judicial*, not provided for upon the terms the constitution requires”); Letter from Justice Wilson, Justice Blair, and Judge Peters, sitting on the Circuit Court for the Pennsylvania District (April 18, 1792), reprinted in 1 AMERICAN STATE PAPERS, MISCELLANEOUS 50 (1834) (No. 31) (revision and control by executive and legislature “radically inconsistent with the independence of that judicial power which is vested in the courts”). Years later, Judge Peters indicated his continuing belief in the impropriety of executive revision. In a letter he wrote in 1818 to Charles J. Ingersoll concerning a subsequent pension act, Judge Peters said: “Having been among the first Judges who resisted the danger of Executive control over the judgments of Courts when the first Invalid Law gave power to the Secretary of War to review such judgments, I am confirmed in the opinion I then held by the circumstances now occurring; tho, I do not now act as a Judge *in a Court*.” Letter from Judge Peters to Charles J. Ingersoll (June 23, 1818), reprinted in C. WARREN *supra* note 69, at 71 n.1.

104. See, e.g., United States v. Sioux Nation of Indians, 448 U.S. 371, 392 (1980) (subjecting decision of court to review by Secretary of War and Congress would “interfere with the independent functions of the Judiciary”); Glidden Co. v. Zdanok, 370 U.S. 530, 582 (1962) (jurisdictional statutes at issue subject the decisions from those courts to an extrajudicial revisory authority incompatible with the limitations upon judicial power the Court has drawn from article III); Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113-14 (1948) (judiciary cannot pass on awards of international air routes by the Civil Aeronautics Board since any decision ultimately subject to modification by President; citing *Hayburn* for the proposition that it has been the “firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action”); United States v. Ferreira, 54 U.S. (13 How.) 40, 50 (1852) (every judge of the *Hayburn* Court, except Johnson, indicated that when the decision was subject to the revisions of a Secretary and of Congress, “the duty imposed could not be executed by the court as a judicial power”); see also 3 ANNALS OF CONG. 556-57 (J. Gales ed. 1792) (indicating Congress’s belief that *Hayburn* Court thought the law unconstitutional because it tended to “render the Judiciary subject to the Legislative and Executive powers, which, from a regard for liberty and the Constitution, ought to be kept carefully distinct”).

105. In the words of Judges Jay, Cushing, and Duane, the task was neither “properly judicial,” nor “to be performed in a judicial manner.” 1 AMERICAN STATE PAPERS, MISCELLANEOUS 49, 50 (1834) (No. 30).

courts of the United States. The circuit court must, consequently, have proceeded *without* constitutional authority.

2. Because, if upon that business the court had proceeded, its *judgments* (for its *opinions* are its *judgments*) might, under the same act, have been revised and controlled by the Legislature and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts, and, consequently, with that important principle which is so strictly observed by the constitution of the United States.¹⁰⁶

Implicit in the concern that administration of the Act was not "of a judicial nature" is the idea that article III defines the judicial power of the United States as extending to "cases" and "controversies" but that this task seemed to be neither. The judges apparently believed that the task was more executive than judicial: the federal judges were being asked to administer Congress's pension program. Although a pensioner's application might turn into a case or controversy later, with the United States on the opposite side, the task was not a judicial function until it did.¹⁰⁷

106. 1 AMERICAN STATE PAPERS, MISCELLANEOUS 50, 51 (1834) (No. 31) (additional emphasis added). Judges Iredell and Sitgreaves revealed a similar concern: "[Article III] courts cannot be warranted . . . in exercising any power not in its nature *judicial*, or, if *judicial*, not provided for upon the terms the constitution requires." *Id.* at 52. They indicated further that, while there may be some doubt as to whether the task is "properly of a judicial nature," there is no doubt that "as the decision of the court is not final [it is subject to] a mode of revision which we consider to be unwarranted by the Constitution." *Id.* at 53.

107. See generally, HART & WECHSLER, *supra* note 26, at 93 (raising the question as to whether the lack of any party defendant may have been one of the reasons the judges thought the statute did not call for the exercise of "judicial power"); Currie, *supra* note 80, at 822-23 & n.27 (judges found law unconstitutional because court decision subject to revision by Secretary of War, but noting possible additional question of whether under article III there must be a defendant); see also Muskrat v. United States, 219 U.S. 346, 361 (1911) (article III courts can only decide "actual controversies arising between adverse litigants."); United States v. Ferreira, 54 U.S. (13 How.) 40, 46-48 (1851) (Supreme Court lacked jurisdiction over appeal from district court because power invested in district court "not judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States"; rather, task was one which could be assigned to claims commissioner).

This hypothesis is undermined to some extent by the fact that one of the other early tasks Congress assigned the federal judiciary—approving applications for naturalization—also involved applicants seeking governmental assistance and apparently was not thought to be an inappropriate judicial function, at least not in the first one hundred years of the federal judiciary. Eventually, the question of whether a petition for naturalization was a "case or controversy" finally did emerge in the twentieth century and was resolved in the affirmative in *Tutun v. United States*, 270 U.S. 568 (1926). The question in *Tutun* was whether a petition for naturalization was a "ease" within the meaning of the Circuit Court of Appeals Act, section 128(a) of the Judicial Code of 1925, ch. 229, 43 Stat. 936, and therefore properly appealable from the district court to the circuit court of appeals. There seemed to be no question of the propriety of the district court deciding it initially. In answering the proffered question in the affirmative, Justice Brandeis wrote for the Court:

The petitioner's claim [a statutory right to become a naturalized citizen if he met the qualifications] is one arising under the Constitution and laws of the United States. The claim is presented to the Court in such a form that the judicial power is capable of acting upon it.

It is impossible to be sure of the relative weights the various Justices attributed to these two related factors, but their conclusion was clear: the judges were not performing a “judicial function” in a sufficiently independent “judicial manner” and therefore the task Congress had assigned them could not be constitutionally administered by article III courts.¹⁰⁸

The responses of the judges, however, were not monolithic. Some judges, unwilling to turn away needy applicants, construed the Act as an invitation to serve as commissioners and not as judges.¹⁰⁹ Wishing “to respect the humanitarian goals of the Congress,” and to promote the “exceedingly benevolent” objective of the Act, several judges, including Justices Jay and Cushing, decided to accept the offer and execute the Act “in the capacity of commissioners.”¹¹⁰ Justice Iredell, while initially beset by “great doubts,”¹¹¹ ultimately decided, when confronted by a live applicant, that the statute could be construed to authorize him to sit as a

The proceeding is instituted and is conducted throughout according to the regular course of judicial procedure. The United States is always a possible adverse party.

Tutun, 270 U.S. at 577.

108. The Supreme Court recently cited *Hayburn* for the proposition that “executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution” and that “Art. III ‘Judicial Power’ does not extend to duties that are more properly performed by the Executive Branch.” *Morrison v. Olson*, 108 S. Ct. 2597, 2612 and n.15 (1988). See *infra* notes 253-55, 283-88 and accompanying text.

109. Thus, Chief Justice Jay, Justice Cushing, and Judge Duane, sitting as the Circuit Court for the New York District, wrote:

As, therefore, the business assigned to this court by the act is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes mentioned in it by *official* instead of *personal* description. That the judges of this court regard themselves as being the commissioners designated by this act, and therefore as being at liberty to accept or to decline that office.

Opinion of the Circuit Court Judges for the New York District (April 16, 1792), *reprinted in* 1 AMERICAN STATE PAPERS, MISCELLANEOUS 50, 51 (1834) (No. 31) (emphasis added).

110. *Id.*

111. Justice Iredell wrote, before any applicant had appeared:

The high respect we entertain for the Legislature, our feelings as men for persons whose situation requires the earliest as well as the most effectual relief, and our sincere desire to promote, whether officially or otherwise, the just and benevolent views of Congress so conspicuous on the present as well as on many occasions, have induced us to reflect whether we could be justified in acting under this act *personally in the character of commissioners during the session of a court*; and could we be satisfied that we had authority to do so, we would cheerfully devote such part of our time as might be necessary for the performance of the service. But we confess we have great doubts on this head. The power appears to be given to *the court only*, and not to the judges of it; and as the Secretary of War has not a discretion in all instances, but only in those where he has cause to suspect imposition or mistake, to withhold a person recommended by the court from being named on the pension list, it would be necessary for us to be well persuaded we possessed such an authority before we exercised a power which might be a means of drawing money out of the public treasury, as effectually as an express appropriation by law. We do not mean, however, to preclude ourselves from a very deliberate consideration whether we can be warranted in executing the purposes of the act in that manner, in case an application should be made.

Letter from James Iredell and John Sitgreaves to George Washington (June 8, 1792), *reprinted in* 1 AMERICAN STATE PAPERS, MISCELLANEOUS 52, 53 (1834) (emphasis added). Iredell and Sit-

commissioner and he agreed to do so.¹¹² Others, however, like Justices Wilson and Johnson, firmly refused to consider any veterans' applications.¹¹³

greaves distinguished Congress's explicit command that the circuit court remain open for five days so that veterans could make their applications:

The part of the act requiring the court to sit five days, for the purpose of receiving applications from such persons, we shall deem it our duty to comply with; for whether in our opinion such purpose can or cannot be answered, it is, as we conceive, our indispensable duty to keep open any court of which we have the honor to be judges, as long as Congress shall direct.

Id.

112. Justice Iredell justified his decision in a memorandum:

Before I act as Commissioner in this case, I think it proper to assign the reasons for my doing so. My resolution has not been made without mature reflection nor, I confess, but after considerable hesitation. My mind indeed until I came here was rather sharply inclined against the exercise of the power, not from an unwillingness to undertake the task however difficult but from very serious doubts as to such a construction of the Act as would justify it. I have felt the greater embarrassment as authorities for whom I have the highest respect have differed in the construction.

Reasons for acting as a Commissioner on the Invalid Act, (undated), CHARLES E. JOHNSON COLLECTION, North Carolina State Department of Archives and History. Iredell then gave a detailed explanation of how, notwithstanding some difficulty with the text of the statute, he could read it to authorize the judges to act individually, out of court as commissioners, to exercise the authority that could not constitutionally be exercised by the court. *Id.*

It is interesting that after a three-page effort to read the statute to permit judges to act as individuals, Iredell accepted the commission only after he concluded that doing so was in no "manner inconsistent with [his] Judicial Duty." *Id.*; see also *infra* text accompanying note 276 (discussion of *Mistretta v. United States*).

Notwithstanding the good intentions of these judges, their efforts came to naught. See *infra* notes 170-72.

113. See Letter from Judges Wilson, Blair, and Peters *supra* note 103; Circuit Court for District of South Carolina, *supra* note 102 (Judges Johnson and Bee). Justice Iredell wrote to his wife complaining of the burden the pension applications had become: "We have had a great deal of business to do here, particularly as I have reconciled myself to the propriety of doing the Invalid-business out of Court. Judge Wilson altogether declines it. . . . The Invalid-business has scarcely allowed me one moment's time, and now I am engaged in it by candle-light . . ." Letter from James Iredell to his wife, Hannah Iredell (Sept. 30, 1792), reprinted in G. MCCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 361-62 (1949).

The efforts of those willing to sit as commissioners did not go unappreciated. Referring to the Circuit Court for the District of Connecticut, sitting in September 1792, the *Pennsylvania Herald and York General Advertiser* announced:

We are . . . happy in mentioning to the public, that two of the Judges [Iredell and Law, (Wilson refused)] have, notwithstanding some objections, consented to act as commissioners in executing the pension law. Their candor and indulgence in proceeding to the laborious task of examining the claims of the numerous applicants for pensions, a task which, in their opinion, their duty does not require them to undertake, do great honor to their humanity and compassion. It is hoped and presumed that the crippled soldier, the war-worn veteran, will now obtain that justice, which he long ago ought to have obtained from his unfeeling countrymen.

Pa. Herald & York Gen. Advertiser, Oct. 10, 1792.

Many of the newspapers, while concerned with the welfare of the disabled veterans, were pleased to see the judiciary stand up to Congress. As the *General Advertiser* noted:

The decision of the judges against the constitutionality of an act in which the executive had concurred with the legislative department, is the first instance, in which that branch of the government has withstood the proceedings of the others; and being another resource ad-

B. *Hayburn's Application and the Attorney General's Attempt to Get the Supreme Court to Help*

William Hayburn had the misfortune to reside in a district in which the circuit court judges refused to sit as commissioners. When Mr. Hayburn presented his petition, the Circuit Court for the District of

mitted by the constitution for its own defense, and for the security of the rights it guarantees to the several states, and to individual citizens, it may be contemplated under some very pleasing aspects, without undertaking to decide on the merits of the particular question.

Gen. Advertiser, May 11, 1792, *reprinted in* 1 C. WARREN, *supra* note 69, at 75-76. Similarly, the National Gazette observed that the decision of the circuit court was a "matter of high gratification, to every republican and friend of liberty; since it assures the people of ample protection to their constitutional rights and privileges, against any attempt of Legislative or Executive oppression." The action, said the paper, provided "a just hope that, not only future encroachments will be prevented, but also that any existing law of Congress which may be supposed to trench upon the constitutional rights of individuals or States, will, at convenient seasons, undergo a revision." 1 C. WARREN, *supra* note 69, at 73.

Not everyone was so enthusiastic. Fisher Ames, writing to his friend Thomas Dwight, was frustrated by the court's action:

The decision of the Judges, on the validity of our pension law, is generally censured as indiscreet and erroneous. At best, our business is up hill, and with the aid of our law courts the authority of Congress is barely adequate to keep the machine moving; but when they condemn the law as invalid, they embolden the states and their courts to make many claims of power, which otherwise they would not have thought of.

1 WORKS OF FISHER AMES 116-17 (S. Ames ed. 1854). Many in Congress even spoke of impeachment:

Never was the word impeachment so hackneyed, as it has been since the spirited sentence passed by our judges on an unconstitutional law. The high-fliers, in and out of Congress, and the very humblest of their humble retainers, talk of nothing but impeachment! impeachment! as if forsooth Congress were wrapped up in the cloak of infallibility, which has been torn from the shoulders of the Pope & that was damnable heresy and sacrilege to doubt the constitutional orthodoxy of any decision of theirs, once written on calfskin. But if a Secretary of War can suspend or reverse the decision of the circuit judges, why may not a drill sergeant or a clack drummer reverse the decision of a jury!

Gen. Advertiser, Apr. 20, 1792, *reprinted in* C. WARREN, *supra* note 69, at 73-74.

Camden, critical of the judges, has been *hackneyed out* of Congress, it only indicates the sense of the public on the refusal of public servants to execute duties imposed on them by law; that the word has been *hackneyed* in Congress is not true; no individuals of that body, it is hoped, are so rash as to have committed themselves on a point without much deliberate reflection Although Congress pretend not to *infallibility*, yet it is not impossible perhaps even probable that there may be in that body some members as capable of judging what is constitutional or not, as some of the members of the circuit court; that there are some good Lawyers, no one will doubt. If the cloak of infallibility be torn from the shoulders of Congress, would it not have been more discreet if the Panegyrist to have reserved it for the shoulders of the *Supreme Court* than to have hastily bestowed it on one Circuit Court; as it cannot cover the shoulders of the three Circuit Courts, it may so happen that they may give different opinions, in which ease the other Circuit Courts may justly complain of partiality. . . . In my next I shall show, that there is nothing in the Constitution to which the law in question is opposed, and point out some of the serious and dangerous consequences which may result from a power in the Judges to refuse the performance of duties assigned to them by law.

Gen. Advertiser, Philadelphia, Apr. 21, 1792, *reprinted in* C. WARREN, *supra* note 69, at 74-75. The General Advertiser responded: "We do not mean to muffle up the judges any more than Congress in the cloak of infallibility; we wish to see both parties amply clad . . . with the garb of wisdom and right conscience." Gen. Advertiser, Apr. 25, 1792.

Pennsylvania ruled that the application "be not proceeded upon,"¹¹⁴ explaining its reasons more fully the following week in a letter to President Washington.¹¹⁵ Mr. Hayburn immediately went to the House of Representatives to seek help.¹¹⁶

Receiving no relief from Congress, Mr. Hayburn turned to the Attorney General. On the first day of the Supreme Court's next session, Attorney General Edmund Randolph informed the Court that on the following Wednesday he intended to move for a mandamus directed to the circuit court for the Pennsylvania district "to command the said Court to proceed on the petition of the said William Hayburn" who was applying to be put on the pension list of the United States as an invalid Pensioner.¹¹⁷ Before Randolph could proceed with his motion, however, the Justices questioned his authority to make the motion *ex officio*.¹¹⁸ Finally, after several days of debate, the Court announced that it was divided in its opinion as to the Attorney General's authority *ex officio* to move for a mandamus to the circuit court, and that therefore the writ could not issue.¹¹⁹

Undaunted and "resolved that the court should hear what [he] thought the truth,"¹²⁰ Randolph had Mr. Hayburn hire him as his pri-

114. Opinion of Circuit Court for the Pennsylvania District, Apr. 11, 1792 (on file in the Supreme Court Documentary History).

115. See *supra* note 101.

116. 2 ANNALS OF CONG., *supra* note 31, 556-57 (Aug. 13, 1792) (reporting Hayburn's petition to Congress and the appointment of a committee to inquire into Hayburn's allegations). One of the Representatives, Mr. Murray, suggested that Congress pass "a law to point out some regular mode in which the Judges of the Courts of the United States shall give official notice of their refusal to act under any law of Congress, on the ground of unconstitutionality." *Id.* at 557. But the House did little to help Hayburn. The committee report was tabled and never acted upon. J. GOEBEL, *supra* note 24, at 561-62; C. WARREN, *supra* note 69, at 71-72. The next action the Congress took on behalf of the veterans was to pass a new law on February 3, 1793. See *infra* note 163.

117. Minutes of Supreme Court (Feb. 4, 1793), reprinted in DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 75, at 157, 206. The description by the unofficial Supreme Court reporter, Alexander Dallas, differs somewhat from that in the Minutes. Dallas reported that Randolph made the motion "ex officio" without an application from any particular person, but with a view to procure the execution of an act of Congress." Hayburn's Case, 2 U.S. (2 Dall.) 8, 8 (1792).

This mandamus motion was the first effort by Attorney General Randolph to represent the United States in the Supreme Court. See J. REARDON, *supra* note 76, at 216.

118. Minutes of the Supreme Court (Aug. 8, 1792), reprinted in DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 75, at 169, 203.

119. *Id.* at 205. The exact nature of events has been described somewhat differently by the various participants. According to Randolph, he "refused to make the motion, until the official question was decided." Letter from Edmund Randolph to James Madison (Aug. 12, 1792), reprinted in 14 THE PAPERS OF JAMES MADISON 348, 349 (R. Rutland & T. Mason eds. 1983). According to Iredell: "The Court being divided, the motion was not allowed." G. MCCREE, *supra* note 113, at 358.

120. Letter from Edmund Randolph to James Madison (Aug. 12, 1792), *supra* note 119.

vate attorney.¹²¹ Thereafter, acting as Mr. Hayburn's attorney, Randolph was allowed to proceed with his motion for a writ of mandamus.¹²² The question of current significance is why the Court refused to permit Randolph to proceed *ex officio*.

To the modern lawyer, several potential hypotheses might explain the Court's refusal to allow the Attorney General to argue *ex officio*, but apparent willingness to allow him to argue as Mr. Hayburn's lawyer. Arguing *ex officio*, the Attorney General was representing the United States, and the Court might have been concerned whether (in current parlance) it was being asked to decide a genuine article III "case or controversy." The Court may have questioned whether there were two adverse parties before it since, with the United States Attorney General pitted against United States Circuit Court judges, the United States was in a sense suing itself.¹²³ The Court also may have questioned whether the United States (again, in today's term) had standing to object when its laws were not enforced. Since the Circuit Court's refusal to process these petitions saved money for the United States Treasury, one could question whether the United States was "injured" by the Circuit Court's refusal.¹²⁴

A related concern might have been whether section 35 of the Judiciary Act, which authorized the Attorney General "to prosecute and conduct all suits in the Supreme Court in which the United States shall be

121. As discussed in part II, the office of Attorney General was a part-time position until the mid-nineteenth century. See *supra* text accompanying note 21. Thus, for the Attorney General to have a private client was not unusual.

122. Unfortunately for Hayburn, Randolph never could get the Court to issue the writ. After Randolph argued on Hayburn's behalf on August 11, 1792, the Court decided to keep his motion under consideration until the next term. Minutes of Supreme Court, (Aug. 11, 1792), reprinted in DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 75, at 206; *The Minutes of the Supreme Court of the United States*, 5 AM. J. LEG. HIST. 166, 172 (1961). By the time the next term began, Congress was very close to agreeing on a new Pension Act that substantially modified the 1792 Act. In fact, a bill to revise the Act was reported to the floor of Congress one day before the Court's February 1793 term ended and it was passed several days thereafter. 1 SEN. LEG. J. 476 (1793). See *infra* note 163 and accompanying text (discussion of the revision). Apparently believing that it could and should wait to see what Congress did, the Court did not rule, either in that term or in later terms, on the motion Randolph had made on behalf of Hayburn. Thus, the Supreme Court avoided ruling on its first case that clearly presented the question of the constitutionality of an Act of Congress.

123. See HART & WECHSLER, *supra* note 26, at 93-94. As will be shown, the issue of whether there is a "case or controversy" when the United States appears to be on both sides of a case occasionally troubles the courts today. See, e.g., *United States v. Nixon*, 418 U.S. 683, 692 (1974); *United States v. I.C.C.*, 337 U.S. 426, 430 (1949).

124. While it is clear that the Court in the 1790s did not use the term "standing" or "case or controversy" as we use them today; nonetheless, some of the same concerns may have existed. See J. VINING, *supra* note 17, at 55.

concerned,"¹²⁵ permitted the Attorney General to petition the Court for relief under these circumstances. Was the Attorney General authorized to seek Supreme Court assistance without regard to whether the United States was a party in the lower court proceeding? Was the United States "concerned" when the Circuit Court refused to hear veterans' petitions for a pension?

Finally, the Court might have questioned its ability to issue a writ of mandamus in this particular type of case. Section 13 of the Judiciary Act of 1789 authorized the Supreme Court "to issue . . . writs of mandamus . . . in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."¹²⁶ While the requested writ of mandamus was clearly to be directed to a "court appointed under the authority of the United States," the Supreme Court might have questioned whether the writ sought by the Attorney General in these circumstances was "warranted by the principles and usages of law."¹²⁷ Perhaps the Court questioned whether the United States could seek such a writ when it was not a party below; or perhaps the Court anticipated the jurisdictional difficulties it would encounter a few years later in *Marbury v. Madison* and thus questioned the constitutionality of section 13.¹²⁸

Ascertaining the nature and extent of the Court's specific concerns in these early years is difficult. The Court had no official reporter¹²⁹ and

125. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

126. *Id.* § 13, 1 Stat. at 81.

127. Mandamus was appropriate where the applicant had no other "legal remedy." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (citing 3 W. BLACKSTONE, COMMENTARIES 110 (1783)). According to Blackstone: "A writ of mandamus is . . . a high prerogative writ [that] issues in all cases where the party hath a right to have any thing done, and hath no other specific means of compelling its performance." 3 W. BLACKSTONE *supra*, at 110. The Attorney General would appear to have had no other remedy; a writ of error was not available to him since he was not a party below. See *Judicial Discretion*, 1 Op. Att'y Gen. 55 (1795) (Attorney General indicates writ of error not available to review Judge Lawrence's refusal to issue arrest warrant and mandamus was only remedy available).

128. In *Marbury v. Madison*, the Court held that insofar as section 13 gave the Supreme Court original jurisdiction to issue a writ of mandamus to an executive official, it was unconstitutional. 5 U.S. (1 Cranch) 137, 176 (1803). While Randolph was seeking to invoke the appellate, not the original, jurisdiction of the Supreme Court, it is possible that the 1792 Court questioned the constitutionality of section 13 more generally. But this thesis is unlikely; as Professor Marcus and I have shown elsewhere, the constitutionality of section 13 was apparently never questioned at all in the 1790s. See Bloch & Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 Wisc. L. REV. 301, 328.

129. The Court did not officially appoint a reporter until 1817. Act of March 3, 1817, ch. 63, § 1, 3 Stat. 376, 376. For interesting accounts of the early history of Supreme Court Reporters, see Dunne, *The Early Court Reporters*, 1976 SUP. CT. HIST. SOC'Y Y.B. 61, 64; Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on the Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1347 (1985).

often did not even speak as a Court; the Justices usually announced their views individually from the bench.¹³⁰ Indeed, the only official records of the Court are the docket sheet and some skeletal minutes. All other information comes from more informal sources, such as newspaper accounts, notes, correspondence from the Justices and other observers, and selective reports from self-appointed reporter-entrepreneurs who wrote descriptions of some cases and sold the volumes privately.¹³¹

Information about the Court's concerns surrounding Randolph's motion is particularly scanty. The Supreme Court minutes and docket sheet suggest that the Court focused on the Attorney General's authority and not the justiciability of the controversy or the propriety of mandamus as a remedy.¹³² The report of the Court's first self-appointed reporter, Alexander Dallas, is similarly terse. Dallas' report confirms that it was the Attorney General's authority that was questioned, but it offers no indication of the basis for the concern or how the Court divided.¹³³

Fortunately, informal sources are more revealing. A letter from Randolph to James Madison discloses that it was Chief Justice Jay who began the questioning,¹³⁴ and that the Court's concern centered on whether the Attorney General was authorized to supervise the lower federal courts and then to seek assistance from the Supreme Court whenever he believed a lower court had failed to enforce the law properly.¹³⁵ As the Federal Gazette reported on August 18, 1792, the Court asked:

130. Davis, *Appendix to the Reports of the Decisions of the Supreme Court of the United States*, 131 U.S. xv-xvi app. (1888). The practice of having the Court officially speak as a Court is said to have started with Chief Justice John Marshall. Currie, *supra* note 80, at 831 n.78.

131. The first such self-appointed reporter was Alexander James Dallas and the first four volumes of the United States Reports bear his name. See Joyce, *supra* note 129, at 1295-96. It is not clear how these entrepreneurs decided which cases to write about. Goebel indicates that only about half the cases heard by the Supreme Court during the first decade were professionally reported. J. GOEBEL, *supra* note 24, at 665.

132. The Court's Minutes indicate that on August 8, 1792, "the Court doubted of the authority of the Attorney General to make this motion *ex officio*." Minutes of the Supreme Court (Aug. 1792), reprinted in DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 75, at 157, 203; *The Minutes of the Supreme Court of the United States*, *supra* note 122, at 170-71. Two days later, according to the Minutes, "[t]he Court proceeded to hear the Attorney General in relation to the powers and extent of his office." *Id.* Finally, we learn that on Saturday, August 11, the "Court being divided in their opinions on the subject of the Attorney Generals [sic] authority *ex officio* to move the Court for a mandamus to the circuit Court for the Pennsylvania district, to correct the error complained of in the case of William Haybern [sic], the writ prayed for cannot issue." *Id.*

133. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

134. "Mr. Jay asked me, if I held myself officially authorized to move for a mandamus. I assigned reasons in the affirmative, and refused to make the motion until the official question was decided." Letter from Edmund Randolph to James Madison, *supra* note 119, at 348-49.

135. This article uses the phrase "the Court's concerns," recognizing that it is really the concern of only some of the Justices. However, as will be seen, it is generally difficult to identify which Justices held particular views in this matter. Where it is possible to identify how many and which Justices held particular beliefs, that information will, of course, be provided.

"[Was it] part of the duty of Attorney General of the United States, to superintend the actions of the inferior courts, and if to him they appeared improper, to move the supreme court for a revision."¹³⁶

Informative handwritten notes by Justice Iredell, coupled with contemporaneous newspaper accounts, indicate that the Court's concern with the Attorney General's authority was twofold: the Justices wanted to be sure that the Attorney General had both congressional and presidential authorization for his actions.¹³⁷ First, the Justices asked whether Congress had authorized the Attorney General to bring such a suit—a question which modern Attorneys General have often confronted. Second, the Justices inquired whether the President had explicitly authorized the Attorney General's motion—a concern somewhat more surprising and less familiar to modern lawyers.¹³⁸

Randolph made a three-part argument in support of his power to make the motion as Attorney General. According to Iredell's notes, Randolph began by considering the statutory provision establishing the office of Attorney General. Section 35 of the Judiciary Act of 1789, Ran-

136. The *Federal Gazette*, Aug. 18, 1792. This broad question seems surprising given the description of Randolph's motion found in the Supreme Court Minutes. The Minutes indicate that Randolph said he intended to move for a mandamus directed to the Circuit Court for the Pennsylvania district to command the said Court to proceed on the petition of the said William Hayburn[sic]. Minutes of Supreme Court (Aug. 1792), reprinted in DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 75, at 201. But the newspaper's broad description is not surprising in light of other contemporaneous descriptions of the motion that suggest it was more embracing than the Minutes indicate. Thus, in a letter to Madison, Randolph indicated that he "pressed an examination of the conduct of the New-York and Penna. circuit courts on the pension law." Letter from Edmund Randolph to James Madison, *supra* note 119, at 348-49. Similarly, Dallas' Report indicates that Randolph pressed the motion "to procure the execution of an act of Congress, particularly interesting to a meritorious and unfortunate class of citizens," *Hayburn's Case*, 2 U.S. (2 Dall.) at 409, and the *Federal Gazette* reported that the "attorney general in his official capacity and of his own mere motion applied for a mandamus to the circuit courts of Pennsylvania to proceed under the pension law passed at the last session of Congress." *Fed. Gazette*, Aug. 18, 1792; see also *Nat'l Gazette*, Aug. 18, 1792, at 335, col. 3; Original Minutes: Bayard's Notes, reprinted in DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 75, at 357.

137. Justice James Iredell's papers contain notes he appears to have taken during the oral argument and memoranda he wrote concerning his thoughts. In the Charles E. Johnson Collection, there are three documents relevant to the Randolph motion: (1) Attorney General's Argument in Support of His Own Authority to Move for a Mandamus; in the Supreme Court, August 1792 [hereinafter Iredell Notes on Argument]; (2) In the Supreme Court of the United States, August 1792; Substance of My Observations on the Question Whether the Attorney General Had a Right *Ex Officio* to Move for a Mandamus to the Circuit Court of Pennsylvania [hereinafter Iredell Observations]; (3) Memorandum Concerning Attorney General Motion; In the Supreme Court August 1792 [hereinafter Iredell Memorandum]. Iredell's notes on the memorandum suggest that he used the memorandum to deliver his opinion, but that his opinion was delivered somewhat differently from the memorandum." Iredell Memorandum. These documents are not published but may be found in the Charles E. Johnson Collection in the North Carolina State Department of Archives and History.

138. See *infra* notes 198, 215 and accompanying text.

dolph asserted, authorized the Attorney General "to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned."¹³⁹ Randolph contended that the United States was clearly "concerned" when an inferior court refused to perform the duties imposed on it by a law duly passed by Congress and signed by the President.¹⁴⁰ Moreover, Randolph argued, being empowered "to prosecute and conduct" such suits in the Supreme Court meant that the Attorney General could initiate them.¹⁴¹

As to presidential authorization, Randolph contended that such authorization was implicit in the President's act of appointing the Attorney General; no more explicit authorization was required. Under the Constitution, the President is responsible for ensuring that the laws are faithfully executed. Since the Attorney General is the President's chief law officer, Randolph argued, the Attorney General is implicitly authorized to take the measures necessary to carry out that responsibility. He need not await explicit orders.¹⁴²

Finally, Randolph buttressed his arguments with analogies to the office of the English Attorney General. He argued that Congress used the English office as the model in establishing the American office, that

139. Iredell Notes on Argument, *supra* note 137. Both Iredell's notes and the newspaper accounts describe the same three-part argument, but the order of the points varies somewhat. Iredell's notes suggest that Randolph referred to analogous English practice at the end, not the beginning, of his argument. The newspapers suggest that the comparison with English practice came earlier. See, e.g., Fed. Gazette, Aug. 18, 1792 (Philadelphia); Gazette of the U. S., Aug. 25, 1792.

140. Iredell notes say, "Material inquiry—If United States are concerned. . . . Concerned means interested. Can the U.S. be more concerned than in the present question?" Iredell Notes on Argument, *supra* note 137.

141. *Id.*

142. *Id.* Randolph's argument concerning Executive authority was somewhat ambiguous. He appeared to invoke the President's constitutional duty to ensure that the laws are faithfully executed and argued that the attorney appointed by the President was thereby authorized to take the necessary measures required to perform this duty. If, by this argument, Randolph meant that the Constitution, by itself, authorized actions such as Randolph's petition to mandamus the circuit court, the implications would be potentially far-reaching indeed. Under such a reading, Congress would not only not have to authorize such judicial review, it might be precluded from limiting the President's use of such judicial actions. Any legislative attempt to restrict the executive's ability to seek such judicial review could be claimed to interfere unconstitutionally with the executive's constitutional mandate to ensure that the laws are faithfully executed.

However, one need not read Randolph's reliance on the Constitution so broadly or so independently of his first statutory argument. He may simply have meant that once Congress created the office of Attorney General, authorized that official to bring actions in the Supreme Court when the United States was concerned, and the individual was appointed Attorney General by the President, then, because the Constitution gave the executive responsibility for enforcing the laws, the appointed Attorney General implicitly had the President's authority to seek Supreme Court assistance when a law was not being duly enforced. Under this reading, congressional authorization for the Attorney General's action would still be necessary. It is not clear whether this ambiguity in Randolph's position bothered any of the Justices.

the English Attorney General would be empowered to seek a writ of mandamus under these circumstances, and that the American counterpart's power therefore should extend as far.¹⁴³

While no one formally opposed Randolph's motion, the newspapers indicate that there were contrary views, presumably articulated by the Justices.¹⁴⁴ The newspaper accounts, though unfortunately brief, nonetheless help to identify further concerns of the Court. Some Justices chafed at the potential implications of Randolph's broad reading of section 35 of the Judiciary Act. They worried that "the latitude given to the word 'concern' would tend to give [the Attorney General] a right, officially to interfere in any law controversy between citizen and citizen, as the United States were 'concerned' in seeing justice done in every case."¹⁴⁵ If the Attorney General could bring this action under section 35, they wondered, might he also be able to contend that the United States is "concerned" whenever a federal court arguably misinterprets federal law. Randolph's interpretation of section 35 might even allow the Attorney General to seek Supreme Court assistance in any case in which he thought an inferior federal court erred, even if no federal law were involved; arguably the United States might be "concerned" whenever a federal court errs, even in a matter of state law between private parties.

Some of the Justices also wanted clearer presidential authorization, at least to initiate actions such as this mandamus action. In the words of the *Gazette of the United States*, "as the Act of the Attorney General was not within his ordinary duty, it would require special authority from the supreme executive to establish its propriety."¹⁴⁶ This passage suggests that when the Attorney General undertook his "ordinary" duties

143. Iredell Notes on Argument, *supra* note 137. It is not surprising that Randolph believed that the Attorney General's powers should be extensive. He had found his position as the Attorney General for the Commonwealth of Virginia to be both powerful and demanding; indeed, in 1779 he felt obliged to resign as delegate to the Continental Congress because his position as Attorney General of Virginia required him to represent the state in all Virginia courts and left him insufficient time to be a delegate. Moreover, he came from a relatively long line of King's Attorneys General. Both his father, John Randolph, and uncle, Peyton Randolph, had been attorneys for the King; his uncle Peyton held the King's patent in 1753 when Edmund was born, surrendering the post to Edmund's father John in 1766. See generally H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 19.

144. The *National Gazette* of August 18, 1792 indicates:

[T]he attorney general was asked from the bench whether he conceived it to be an official right to offer such a motion, as he had intimated it to be. He answered, that he did conceive it to be an official right. Upon which several observations were made, and the debate continued from day to day until Saturday last.

National Gazette, Aug. 18, 1792, at 335, col. 3. To similar effect is the *Gazette of the United States's* description that the judges were divided on the issue. *Gazette of the United States*, Aug. 18, 1792 at 91, col. 2.

145. *Gazette of the United States*, Aug. 25, 1792, at 99, col. 1.

146. *Id.*

(whatever duties those were), special authority from the President might not be needed—that is, absent evidence of presidential disapproval, presidential authorization might be presumed. For actions outside his “ordinary” duties, however, clearer presidential authorization was required, at least in the view of some of the Justices.

Finally, the newspaper reports suggest that some of the Justices were uncomfortable with Randolph’s analogy to the powers of the English Attorney Generals. According to the *Gazette*, there was concern that “the analogy [between the English Attorney General and the United States Attorney General] was not sound, but rather dangerous.”¹⁴⁷ They may have been concerned by the mere invocation of English precedent, since its use in the 1790s was a sensitive and often controversial issue.¹⁴⁸ They also may have questioned the accuracy of the particular analogy. Although it was true that the English Attorney General had become the King’s principal attorney and had assumed significant powers,¹⁴⁹ it was

147. *Id.*

148. See L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 94 (1973) (noting that many Americans shared the sentiments of Thomas Paine who lamented that the courts had not yet become independent and still “hobble[d] along by the stilts and crutches of English and antiquated precedents” that were often not democratic but “tyrannical”) (quoting *COMPLETE WRITINGS OF THOMAS PAINE* 1003 (1945)); A. HOWARD, *THE ROAD FROM RUNNEMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 260 (1968) (discussing various American attitudes toward English common law); Pound, *The Place of Judge Story in the Making of American Law*, 48 *AM. L. REV.* 676, 681-82 (1914) (examining popular American hostility to English law); Waterman, *Thomas Jefferson and Blackstone’s Commentators*, in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* 451, 453 n.12 (D. Flaherty ed. 1969) (describing American hostility to English law).

Notwithstanding this sentiment, most American courts of this period closely followed English law. For example, when Attorney General Randolph asked the Supreme Court to announce what “system of practice” the attorneys and counsellors of the Court should follow, the Chief Justice responded that the “Court consider[s] the practice of the Courts of Kings Bench and of Chancery in England as affording outlines for the practice of this Court.” *Minutes of the Supreme Court* (Aug. 7-8, 1792), reprinted in *DOCUMENTARY HISTORY OF SUPREME COURT*, *supra* note 75, at 202-03.

149. By the beginning of the seventeenth century, the King’s Attorney had become the preeminent law officer of the Crown, ousting the King’s serjeants from what had been a position of equality. W. HOLDSWORTH, *6 A HISTORY OF ENGLISH LAW* 466-70 (1924). Unlike the King’s serjeant, who could only act if he were specifically instructed, the King’s attorney could proceed on his own motion by information in the Star Chamber. *Id.* at 470. As Holdsworth observed, “the attorney-general was the only person who could take the initiative in legal proceedings on behalf of the crown.” *Id.* Holdsworth attributes this ascendancy to the fact that by the sixteenth and seventeenth century, the King required lawyers who were versed not only in the law but also in the political problems of the day. Holdsworth stated:

The need for lawyers who had had a political as well as a legal training grew greater as the contests of jurisdiction between rival courts grew fiercer, and as the constitutional differences between king and Parliament became more bitter. . . . [S]erjeants, because they were pure common law lawyers, could not be trusted to see eye to eye with the king on many of these political questions. They were too well read in that medieval common law which taught that the law should be supreme in the state, and that Parliament had powers and privileges which could not be overridden.

Id. at 471. By the end of the seventeenth century, it became customary for the attorney general to be a member of the House of Commons. *Id.* at 466; see also, Bellot, *The Origin of the Attorney-General*,

not at all clear that either the constitutional framers or the drafters of section 35 of the Judiciary Act of 1789 had intended to imitate the English model. Indeed, the available indicia, while scant, suggest that the position of Attorney General for the United States was not to be very powerful.¹⁵⁰

As Dallas' report indicated, Randolph could convince only three Justices that the Attorney General had the authority *ex officio* to seek a writ of mandamus ordering the circuit court to hear Hayburn's petition. The newspaper accounts, as well as Randolph's letter to Madison,¹⁵¹ indicate that the three supporters were Justices Iredell, Blair, and Johnson. Justices Wilson, Jay and Cushing remained unconvinced.

Justice Iredell's notes indicate that he accepted all of Randolph's arguments. The Justice concluded that this motion fell within the Attorney General's statutory duty to "prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned."¹⁵² In his view, the United States was materially concerned with this suit:

They [the United States] have passed an Act for a most laudable and beneficial purpose, which the Circuit Court of Pennsylvania have refused altogether to execute for a reason to be sure the most just that can be, if well founded; that the Act is unconstitutional; but certainly the most awful that can probably arise in the whole compass of human affairs, and of which the United States have a right to the fullest discussion that the principles of law, and the construction of their own Courts, will admit.¹⁵³

Moreover, in Iredell's view, explicit presidential authorization was unnecessary: "[H]e is not called the Attorney General of *the President*, but Attorney General of *the United States*."¹⁵⁴ Since he is "expressly

25 L. Q. REV. 400 (1909) (describing the origin of the Attorney General); Hightower, *supra* note 5, at 405-06 (discussing the rise of the Attorney General); Meador, *supra* note 5, at 4 (first English Attorney General seated in House of Commons to advise on legal aspect of proposed laws). Like his American analogue, the English Attorney General worked only part-time and was permitted to have a private practice. *Id.* at 413. For an interesting account of the origins of public, as opposed to private, prosecutions in England, see Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313 (1973) (describing how justice of the peace became general public prosecutor for serious crimes).

150. *See supra* Part I.

151. *See* 14 THE PAPERS OF MADISON, *supra* note 119, at 349.

152. Iredell Memorandum, *supra* note 137, at 3.

153. Iredell Observations, *supra* note 137, at 1.

154. Iredell Memorandum, *supra* note 137, at 3. Iredell explained:

[W]hen an Attorney General acts on the part of the Government, it is his duty *ex officio* to make all such applications as in his opinion the *interest of the Government* shall require.

In most if *not* all the separate States the Executive is distinguished from the Legislative and the Judicial. But I believe it never has been contended that the Attorney General in any of the States could *not act without* a special *order* from the Executive.

I see no greater reason why the Attorney General of the United States should be considered as the mere Attorney of the President.

directed by Law to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned” and since this was such a case, the Attorney General “surely therefore may [proceed] without any orders from the President.”¹⁵⁵ Thus, Iredell concluded, “the Attorney General has a right *ex officio* to make the motion in question” on his own authority, without explicit orders from the President.¹⁵⁶

Unfortunately the views of the other Justices have not been as well documented. Like Iredell, it is probable that those voting with Randolph agreed with his conclusions regarding presidential and congressional authorization. It is much more difficult to discern the reasons behind those voting against Randolph because it is unclear whether they believed that Randolph was insufficiently authorized by statute, the President, or

He is not called Attorney General of the President, but Attorney General of the United States.

He is expressly directed by Law to prosecute and conduct all suits in the Supreme Court in the United States in which the United States shall be concerned. This surely therefore he may do without any orders from the President.

Id. at 2-3 (additional emphasis added).

155. *Id.* at 3. In the course of his reasoning, Iredell also noted that the Attorney General in England is the responsible Law Officer of the Crown who needed no special order from the Crown to represent the Crown in “business pertaining to his office.” Similarly, the Attorney General of the United States should have to show no special order from the executive. *Id.* at 2. Regarding his usage of the practice in England and the states, Iredell noted:

The office of Attorney General is not a new kind of office originally introduced by this Act. It is an office which for ages has subsisted in England, the source from which our Laws were originally derived, and it has long subsisted, I believe, in every state in the Union. In any doubtful case therefore concerning the manner of exercising a power belonging to this office, if the power itself is conveyed and the mode of executing is not particularly presented in the Act constituting its authority, it seems natural and proper to refer to the construction of similar powers [illegible] office as it subsisted before.

Iredell Observations, *supra* note 137, at 2.

156. *Id.* at 1. Iredell went on to observe that if the Attorney General had not made such a motion on his own authority and if “in the opinion of the President it was a proceeding [illegible] the interest of the United States, the President might have directed the Attorney General to pursue such a measure.” Iredell Memorandum, *supra* note 137, at 3. His reasoning was derived from the Constitution; in a passage that is difficult to decipher, Iredell explained:

The Constitution by saying “that the Executive Power shall be vested in a President of the United States” never could mean that the [illegible] exercise of Executive authority should not take place even in virtue of the Laws but by his express directions but that he should have the general superintendence over all which he constitutionally has.

He is directed, among other things, to see “that the laws are faithfully executed.” Whenever therefore any [illegible] he has authority to take measures, such as the case may dictate, to procure their faithful execution.

In the present instance, I conceive, the Attorney General may *ex officio* act on [or “of”] his own authority. But if he did not, & in the opinion of the President it was a proceeding [illegible] the interest of the United States, the President might have directed the Attorney General to pursue such a measure.

This is my idea of the respective duties of the President and the Attorney General, as involved in the present question.

Id. In other words, for Iredell, explicit presidential authorization and direction, while not essential, were permissible.

both.¹⁵⁷ Fortunately, examination of the Court's response to other suits by the Attorney General during the first decade helps fill in some of the details. As will be seen, such an examination reinforces the suggestion that clearer congressional authorization alone would not have been enough; a concern for presidential authorization remained a serious factor.

C. *Understanding the Court's Concerns in the Context of the Times*

The Supreme Court's concern with Randolph's authorization is not surprising. During the early years, the federal judiciary was very attentive to the authorization of attorneys, requiring all attorneys to provide a "warrant of attorney" to prove their authority to represent clients in par-

157. There are a number of possibilities that could account for a "no" vote. First, the "nay-sayers" might have believed that in order to bring the mandamus action, the Attorney General had to be authorized by both Congress and the President and that they found insufficient evidence of presidential authorization. Thus, they might have concluded that under section 35 Congress had authorized the Attorney General to bring such actions, but only if presidential authorization were more explicit than it was in this case. Explicit presidential authorization might have been a requirement applicable generally or a special requirement, surfacing only when the Attorney General engaged in "extraordinary activities." There was at least some precedent for the President's specifically ordering the Attorney General to participate in activities arguably at the limits of or outside the statutorily prescribed duties. President Washington, for example, ordered Randolph in 1792 to attend a trial at the circuit court at York. Letter from George Washington to Edmund Randolph (Oct. 1, 1792), *reprinted in* 32 GEORGE WASHINGTON, WRITINGS OF WASHINGTON 171, 171-72 (J. Fitzpatrick ed. 1939). Washington apparently believed such an order was both appropriate and necessary in that case, a situation arguably outside the normal scope of the duties defined in section 35. See *Office and Duties of Attorney General*, 6 Op. Att'y Gen. 326, 335 (1854) (citing Washington's order as an example of something beyond Attorney General's statutory duties but indicating that "President may undoubtedly, in the performance of his constitutional duty, instruct the Attorney General to give his direct personal attention to legal concerns of the United States elsewhere, [beyond the Supreme Court] when the interests of the Government seem to the President to require this"). Perhaps the dissenters put this mandamus action in that category and thus required an explicit presidential order. Alternatively, the dissenters on Randolph's motion might have thought Congress had simply not authorized such actions—that "concerned" could not have such a broad meaning but that if Congress had intended for the concern of the United States to be construed so broadly, they would have been satisfied with presumed or implied executive authorization. Third, some dissenters might have found that neither Congress nor the President had been sufficiently explicit for them to find the necessary authorization. Finally, the dissenters might have believed that the Attorney General could proceed if he was authorized by either the Congress or the President but that Randolph had not been properly authorized by either.

There appears to be no correlation between the votes of the Justices on Randolph's motion and their position on the propriety of sitting as commissioners. The four Justices willing to sit as commissioners divided in their vote on Randolph's motion, with Iredell and Blair voting to allow the motion and Jay and Cushing voting against. J. GOEBEL, *supra* note 24, at 564. Similarly, the two Justices unwilling to sit as commissioners, or unwilling to read the Pension Act to permit that option, also split—Johnson voted to allow the motion and Wilson voted against. Wilson's negative vote may have been influenced by the fact that he was being asked to mandamus himself. Blair, however, who also had been on the circuit court with Wilson, voted to hear Randolph's motion. *Id.*

ticular matters.¹⁵⁸ It was not until several years after Randolph's unsuccessful motion that the Supreme Court clearly announced that "warrants of attorney" were no longer required as a matter of course in federal courts; an attorney's authority would be presumed unless challenged.¹⁵⁹

Similarly, the Court's reluctance to read section 35 broadly is understandable in light of the apparent congressional ambivalence toward a strong federal judiciary and strong federal law enforcement. Congress had just refused to grant Randolph's request that the Attorney General be given the authority to supervise and participate in lower court proceedings *directly*.¹⁶⁰ Assuming that the Justices were aware of these congressional actions (as seems likely), it is not surprising that some might have been reluctant to construe section 35 to allow the Attorney General to use the Supreme Court to supervise the lower courts *indirectly*.¹⁶¹ Randolph's motion may well have been interpreted as an "end-run" around Congress.¹⁶²

But the Justices' desire for more explicit presidential direction, when there was no reason to suspect any lack, is more striking. While we are inclined today to presume presidential authorization, absent evidence to

158. A "warrant of attorney" was defined to be a "written authority, directed to any attorney or attorneys of any court of record, to appear for the party executing it, and receive a declaration for him in an action at the suit of a person named, and thereupon to confess the same, or to suffer judgment to pass by default." 2 BURRILL'S LAW DICTIONARY 612 (1867).

159. Chief Justice Marshall's opinion in 1824 in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 829-830 (1824), is generally cited as establishing the presumption that in the federal courts an attorney at law who appears on behalf of a litigant has the authority to do so. One who questions the authority bears the burden of proving the authority lacking. See also *Ritchie v. McMullen*, 159 U.S. 235, 241, (1895) (the statement "does not allege that the attorneys were not authorized to enter the defendant's appearance in that action, they must be taken to have been authorized by him to do so"); *Corporation of Washington v. Young*, 23 U.S. (10 Wheat.) 406, 409-10 (1825) ("the warrant of attorney need not be spread on the record, to enable counsel to appear for a corporation"); *Booth v. Fletcher*, 101 F.2d 676, 683 (1938) (a challenge to attorney's authority requires "substantial proof in the form of countervailing evidence that authority is lacking") (citations omitted), *cert. denied*, 307 U.S. 628 (1939); W. ANDERSON, *DICTIONARY OF LAW* 94 (1889) (after *Osborn* members of the bar could generally appear without first getting a warrant of attorney).

160. See *supra* notes 87-90 and accompanying text.

161. While we do not know for sure that the Justices knew of Randolph's request and Congress's rejection, it is likely that they did. Goebel asserts that they must have been aware, but that seems unduly certain. J. GOEBEL, *supra* note 24, at 564. There is no clear evidence to support such a firm statement. Nonetheless, the legislative effort was well publicized and occurred over a significant period, so that judicial awareness is likely.

162. Had the House resolution become law, Randolph could have appeared in the circuit court as Attorney General when Hayburn first encountered difficulty with the judges. Passage of the resolution would have ensured that Randolph would have been both aware of Hayburn's difficulties and empowered to appear in that lower court. The resolution, however, would not have given Randolph any additional authority to go to the Supreme Court if the circuit court continued to deny Hayburn's petition. Thus, even had the resolution become law, Randolph would still have had to rely on a broad reading of section 35. But at least he would have had the advantage of a recent show of support from Congress instead of the handicap of a recent rejection.

the contrary, several factors suggest that a lack of explicit presidential direction did in fact influence the Justices who would not allow Randolph to proceed with his 1792 motion.

The best evidence for this comes from the fact that when Randolph subsequently received explicit statutory authorization to sue, there was still dissent on the Court. Congress amended the Invalid Pensions Act in 1793 to specifically authorize (arguably order) the Attorney General and the Secretary of War "to take such measures as may be necessary to obtain an adjudication of the Supreme Court" on the validity of rights claimed by applicants under the 1792 Act.¹⁶³ Apparently viewing this directive as the requisite authorization, Randolph immediately complied. At the Supreme Court's next session in August 1793, he petitioned the Court for a writ of mandamus directing the Secretary of War to put onto the pension list an applicant who had been certified by the judges who sat as commissioners.¹⁶⁴

But some of the Justices were still concerned about the Attorney General's authority to make such a motion *ex officio*. According to Randolph's letter to Secretary of War Knox, two Justices "expressed their disinclination" to hear the motion from the Attorney General.¹⁶⁵ This time, Randolph decided not to pursue the matter: "I being unwilling to embarrass a great question with little intrusions, it seemed best to waive the motion until some of the invalids themselves should speak to counsel."¹⁶⁶ Unfortunately, Randolph could not do what he had done in the Hayburn matter and quickly find an available invalid who would hire him as private counsel. He wrote of this predicament to Knox: "It was very unlucky that, although one of the invalids was in court when I made the motion, and heard the difficulty, he omitted to notify himself to me,

163. Act of Feb. 28, 1793, ch. 17, § 3, 1 Stat. 324, 325 (entitled "An Act to Regulate the Claims to Invalid Pensions").

Congress did not make clear why it was modifying the statute. But circumstances indicate that it was doing so not so much in response to the judges' constitutional concerns, but rather as a reaction to judges who had responded too sympathetically to questionable applications. See Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 131-39.

164. Although there is no official record of this attempt either in the Supreme Court records or in Dallas' Reports, we know about Randolph's effort from a letter he wrote to Secretary of War Knox on August 9, 1793:

In consequence of our arrangement I moved the Supreme Court of the United States on Tuesday last for a *mandamus* to be directed to you, as Secretary of War, commanding you to put on the pension list one of those who had been approved by the judges acting in the character of commissioners. The decision of one case would have involved every other.

Letter from Edmund Randolph to Henry Knox (Aug. 9, 1793), reprinted in 1 AMERICAN STATE PAPERS, MISCELLANEOUS 78 (1834) (No. 47).

165. *Id.*

166. *Id.*

until the Court had risen and it was too late."¹⁶⁷ Thus, notwithstanding a clear order from Congress to seek a Supreme Court adjudication of this matter, several Justices remained unwilling to let the Attorney General proceed. This unwillingness suggests that, for at least a part of the Court, clear congressional authorization was still considered insufficient authorization for the Attorney General to bring this type of action.¹⁶⁸

There are several possible explanations for the negative response that Randolph's 1793 motion received. It is possible that the Justices kept denying Randolph's motions because they did not want to reach the difficult constitutional question raised by the Invalid Pensions Act. The early Court clearly appreciated the advantages of the "passive virtues."¹⁶⁹ It is also conceivable that the Justices that were unwilling to let Randolph proceed in 1793 were troubled by the new constitutional questions raised by Congress's ordering the Attorney General and Secretary of War to bring such suits on behalf of the United States. In today's parlance, the justices might have questioned first, whether there exists a justiciable controversy when the Attorney General sues the Secretary of War pursuant to an agreement reached under orders from Congress; second, whether the Supreme Court has original jurisdiction to issue a writ

167. *Id.*

168. Although we cannot know with certainty the identities of the two Justices who were "disinclined" to let Randolph proceed, it is probable that they were the same two Justices who had objected earlier—Wilson and Jay. The third Justice who had objected previously, Justice Cushing, was absent for this motion. We know that only five were in attendance in the August 1793 term—Justices Jay, Wilson, Blair, Iredell and Paterson. See Minutes of the Supreme Court (Aug. 1793), reprinted in DOCUMENTARY HISTORY OF SUPREME COURT, *supra* note 75, at 217-18. Paterson was new, having just been sworn in to replace Johnson who had resigned on January 16, 1793. *Id.* at 206 n.137. It is, of course, possible that Wilson or Jay was willing to let Randolph make this motion and that the dissenters included the newest member of the Court, Paterson, or one or two of the Justices who had believed Randolph had authorization in 1792 but now believed the 1793 motion was impermissible. Yet it is difficult to see what would have so dramatically changed all these minds.

169. In *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800), for example, the Court—in a one-paragraph unsigned opinion—took significant liberties with a statute to avoid holding it unconstitutional. In *Mossman*, the Court dismissed a suit by a British subject in which the citizenship of the defendants was not stated. Notwithstanding the fact that section 11 of the Judiciary Act gave the circuit court jurisdiction "where . . . an alien is a party," with no apparent concern for the citizenship of the defendant, the Court held that the statute "must receive a construction, consistent with the constitution," and therefore "the legislative power [of article III] conferring jurisdiction on the federal courts is, in this respect, confined to suits *between citizens and foreigners.*" *Id.* at 14. Thus, the Court dismissed the suit because it was not clear that the defendant was a citizen. There were also several cases that arguably anticipated the political question doctrine. See *e.g.*, *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 259 (1796) (Justice Iredell asserts that question of treaty abrogation is for Congress under war powers or for President and Senate under treaty power, not for judiciary at the request of individual); see generally Currie, *supra* note 80, at 865, 881-82. Both the political question doctrine and the technique of construing a statute to avoid finding it unconstitutional are techniques praised by Alexander Bickel as some of the "passive virtues" by which the judiciary can avoid ultimate confrontations with the other branches. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 183-198 (2d ed. 1986).

of mandamus to an executive official; and finally, whether Congress can order the Attorney General to initiate a particular lawsuit.

But there is no evidence that these concerns actually occurred to any of the Justices. On the contrary, all three theories are unlikely. Feigned and contrived suits were reasonably common in this period, and appear to have raised no red flags. Indeed, when Randolph's successor, William Bradford, brought an action, pursuant to this same 1793 congressional order to seek a Supreme Court adjudication of the rights claimed under the 1792 Pension Act, the Supreme Court showed no concern with Bradford's authority or its own jurisdiction. In *United States v. Yale Todd*, an unreported case, Attorney General Bradford sued the veteran Yale Todd for the return of the \$172.91 Todd had received in pensions from the United States.¹⁷⁰ The theory of that suit was that if the circuit judges had lawfully awarded the pension, then the judgment would be for Todd; if, on the other hand, the judges had not been properly authorized, the judgment would be for the United States.¹⁷¹ The Supreme Court adjudicated the *Todd* case despite the fact that Congress had not only ordered the Attorney General to bring the suit, but had contrived to establish it.¹⁷² Similarly, in *Hylton v. United States*, the Court decided a case challenging a congressional tax on carriages,

170. There is only one official entry dealing with this case—an entry in the Minutes of the Supreme Court. The entry states that “[the] Pleadings and agreement of the Attorney General of the United States and the Attorney for the defendant being read and filed; and the Case argued and the Court having also taken the same into Consideration are of opinion that Judgment be entered for the plaintiff in the above suit.” See Minutes of the Supreme Court (Feb. 17, 1794), reprinted in DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 75, at 228. The case is not otherwise officially reported. But our knowledge of the case is greatly amplified by the fact that, in 1852, Chief Justice Taney appended a copy of the papers filed in the *Yale Todd* action to the report of *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52 (1851), a case that raised questions concerning the constitutionality of extrajudicial activities. Todd had been awarded the pension money as a result of a favorable recommendation from the circuit judges, sitting as commissioners, on the Circuit Court for the District of Connecticut. For a description of the *Yale Todd* case, see Bloch & Marcus, *supra* note 128, at 308-310; Reitz, *United States v. Yale Todd*, 15 WASH. & LEE L. REV. 220 (1958).

171. In the final paragraph of the papers submitted to the Court, the Attorney General and counsel for Todd agreed:

If this Court shall be of the opinion that the said judges of said Circuit Court sitting as Commissioners and not as Circuit Court had power & authority of Said Act so to order and adjudge of and Concerning the premises that then judgment shall be given for the defendant—Otherwise for the United States for one hundred & seventy two dollars & ninety one Cents damages and Six Cents Cost.

See copy of papers submitted in *United States v. Yale Todd* appended to the file of *United States v. Ferreira*, RG 267, National Archives.

172. Since the *Yale Todd* Court issued no opinion, it is not clear whether the Court entered judgment for the United States because it believed that the judges lacked statutory authorization to sit as commissioners, or that they were constitutionally not permitted to process these applications in any capacity. For more extended discussion of this case, see Bloch & Marcus, *supra* note 128, at 308-10.

notwithstanding the presence of numerous facts that today would raise serious justiciability questions.¹⁷³ Moreover, in *United States v. Lawrence*, the Attorney General was allowed to seek a writ of mandamus against a lower court judge, indicating that the Court held no special concern when the Attorney General sued one of its officials or sought to mandamus a lower court.¹⁷⁴ Finally, as I have indicated elsewhere, it is extremely unlikely, notwithstanding the Supreme Court's position several years later in *Marbury v. Madison*, that the 1792 Court was concerned with the propriety of issuing a writ to an executive official in its original jurisdiction.¹⁷⁵

The most likely explanation is that the dissenting Justices wanted a clearer indication of presidential authorization; the explicit congressional order was insufficient. Examination of *United States v. Lawrence*,¹⁷⁶ the only other contemporaneous effort by the United States Attorney General to petition the Supreme Court to issue a writ of mandamus to a lower court in circumstances similar to Randolph's motion, supports this view. In *Lawrence*, the French Consul had tried to convince District Judge Lawrence to issue an arrest warrant, pursuant to article IX of the

173. 3 U.S. (3 Dall.) 171 (1796). In this case, the United States sued Hylton, the owner of 125 chariots, to collect the tax due under the Act of June 5, 1794, ch. 45, § 1, 1 Stat. 373, 373-74, repealed by Act of May 28, 1796, ch. 37, 1 Stat. 478, 478. Hylton challenged the constitutionality of the tax, claiming that it was a direct tax and therefore under the Constitution had to be apportioned among the states. The Court upheld the tax, finding that it was not a direct tax and therefore did not have to be apportioned. As Professor Currie has noted: "That the Court was willing to decide this case was extraordinary, for the controversy bristled with procedural obstacles." Currie, *supra* note 80, at 853. The stipulation that Hylton owned 125 chariots was "a transparent but clumsy effort to circumvent jurisdictional amount requirements." *Id.* at 853. Moreover, there was arguably no final judgment below. *Id.* at 854. Finally, the United States had apparently paid Hylton's attorneys, thereby arguably destroying the adversary relationship the Court has since found necessary for a case or controversy under article III. *Id.*; see also J. GOEBEL, *supra* note 24, at 779 & n.64; C. WARREN, *supra* note 69, at 147.

174. 3 U.S. (3 Dall.) 42 (1795). See also *Ex Parte United States*, 287 U.S. 241 (1932) (Supreme Court can issue writ of mandamus to district court ordering it to issue bench warrant); *Ex Parte Republic of Peru*, 318 U.S. 578 (1943) (Supreme Court can issue writ of prohibition or mandamus to district court to stop proceeding and declare foreign vessel immune).

175. See Bloch & Marcus, *supra* note 128, at 322-32. In *Marbury v. Madison*, decided in 1803, Chief Justice John Marshall concluded that section 13 of the Judiciary Act authorized the Supreme Court to exercise original jurisdiction over writs of mandamus directed to executive officials, but that section 13 so construed conflicted with article III of the Constitution and therefore could not be enforced. Given that holding—issued ten years after the events under discussion herein—it is possible that the 1793 Court had questions concerning the constitutionality of Randolph's effort to get the Supreme Court to issue a writ of mandamus to the Secretary of War. But that is highly unlikely. As Professor Marcus and I have shown elsewhere, it is Marshall's conclusion that is striking. During the 1790s, the Supreme Court showed no concern with efforts to get it to exercise original jurisdiction and issue writs to direct executive officials; it appeared to accept a broader view of congressional authority to enlarge the Supreme Court's original jurisdiction than Marshall was to find in *Marbury*. *Id.*

176. 3 U.S. (3 Dall.) 42 (1795).

United States-French Consular Convention,¹⁷⁷ against a Frenchmen accused of being a deserter. Judge Lawrence, however, concluded that the Consul had failed to provide the requisite evidence, and refused to order the arrest. The French apparently then sought the aid of President Washington and Secretary of State Randolph, whereupon Randolph ordered Attorney General Bradford to petition the Supreme Court for a writ of mandamus commanding Judge Lawrence to issue the warrant.¹⁷⁸ The Supreme Court concluded that mandamus was inappropriate because the district judge's ruling—that the evidence was not sufficient to authorize a warrant for apprehending Captain Barre—was made within his “judicial capacity”; the Supreme Court said it had “no power to compel a Judge to decide according to the dictates of any judgment, but his

177. Article 9 of the Consular Convention between the United States and France provided:

The Consuls and Vice-Consuls may cause to be arrested the Captains, Officers, Mariners, Sailors, and all other persons, being part of the crews of the vessels of their respective nations, who shall have deserted from the said vessels, in order to send them back and transport them out of the country. For which purpose, the said Consuls and Vice-Consuls shall address themselves to the Courts, Judges, and Officers competent, and shall demand the said deserters in writing, proving by an exhibition of the register of the vessel, or ship's roll, that those men were part of the said crew; and on this demand, so proved, (saving, where the contrary is proved) the delivery shall not be refused; and there shall be given all aid and assistance to the said Consuls and Vice-Consuls for the search, seizure, and arrest, of the said deserters, who shall even be detained and kept in the prisons of the country, at their request and expense, until they shall have found an opportunity of sending them back; but if they be not sent back within three months, to be counted from the day of their arrest, they shall be set at liberty, and shall be no more arrested for the same cause.

Id. at 43.

178. In his argument to the Court, Attorney General Bradford stated:

The Executive of the *United States* had no inclination to press upon the Court, any particular construction of the article on which his motion was founded: but as it is the wish of our government to preserve the purest faith with all nations, the President could not avoid paying the highest respect, and the promptest attention, to the representation of the minister of *France*, who conceived that the decision of the District Judge involved an infraction of the Conventional rights of his Republic.

Id. at 48 (Dallas' description of Bradford's argument). Bradford further explained why the President chose to present the matter to the courts:

In the present case, . . . from the nature of the subject, as well as from the spirit of our political Constitution, the Judiciary Department is called upon to decide; for it is essential to the independence of that department, that judicial mistakes should only be corrected by judicial authority. The President, therefore, introduces the question for the consideration of the court, in order to insure a punctual execution of the laws; and, at the same time, to manifest to the world, the solicitude of our government to preserve its faith, and to cultivate the friendship and respect of other nations.

Id. at 48-49. In a letter to Secretary of State Randolph, Attorney General Bradford revealed that his action in the Supreme Court had been taken pursuant to Randolph's order:

In conformity to the instructions contained in your letter of the 7th October last, I embraced the earliest opportunity of bringing before the Supreme Court of the United States the question which has arisen in consequence of the interpretation given by the district judge of New York to the ninth article of the convention between France and the United States.

Judicial Discretion, 1 Op. Att'y Gen. 55 (1795).

own.”¹⁷⁹ Thus, the Court denied the motion on the merits, but, significantly, it did not question Bradford’s authority to make the motion, even though, Bradford, like Randolph, was arguably using the Supreme Court to supervise a lower court proceeding in which the United States was not a party.

The Court’s acceptance of Bradford’s authority in the *Lawrence* case, while initially surprising in light of its concern over Randolph’s motions, is, upon reflection, understandable. Presidential involvement in Bradford’s motion was more clearly present than it had been in Randolph’s motions. In addition, the interests of the United States were more apparent in Bradford’s motion than they had been in Randolph’s. Bradford’s motion arose in the context of foreign affairs and admiralty—areas where the interests of the United States were well established and concerns for federalism were least threatened.¹⁸⁰ Concluding that, under section 35, the United States was “concerned” with such cases and that the Attorney General could seek the Supreme Court’s assistance in supervising such proceedings did not threaten to give the Attorney General undue power. By contrast, in the pension cases, Attorney General Randolph was arguably asserting the power to supervise any lower court proceeding in which federal law was disputed or unenforced. That some members of the Court believed this greater power to be beyond the reach of section 35 is understandable. While it is risky to read too much into the Court’s lack of concern in *Lawrence*, more explicit presidential authorization in the context of a readily identifiable interest of the United States at least allowed the Attorney General to overcome a previously impossible hurdle. Two years earlier, then Attorney General Randolph

179. *Lawrence*, 3 U.S. (3 Dall.) at 53. In his letter to Secretary of State Randolph, Attorney General Bradford explained that mandamus had been the only possible route to “obtain a revision” of Judge Lawrence’s decision: “As the refusal of the judge (founded on this interpretation) to issue a warrant against Henry Barre could not be re-examined on a writ of error, the only method in which it appeared possible to obtain a revision of it was by applying to the Supreme Court for a *mandamus*.” Letter from Attorney General Bradford to Secretary of State Randolph, 1 Op. Att’y Gen. 55, 55 (1795). After the Supreme Court determined that mandamus was inappropriate in this case, Bradford advised the Secretary of State that

until Congress shall authorize a revision of the proceedings of the district judges on this article, or shall declare the judges of the Supreme Court to be competent judges for the purposes expressed in it, I do not perceive any method in which a uniformity of decision on [the article] can be secured.

Id. at 56.

The case continued to be a controversial issue between France and the United States. See Letter from James Monroe to Minister of Foreign Affairs of France de la Croix (Mar. 15, 1796), reprinted in 1 AM. ST. PAPERS, FOREIGN REL. 732-34 (1796) (responding to de la Croix letter of complaint, Mar. 11, 1796).

180. See *supra* note 29.

had not even been allowed to present the merits of his motion.¹⁸¹

Thus, notwithstanding the absence of any requirement of explicit presidential authorization in the Judiciary Act, the *Hayburn* Court clearly seems to have been concerned with such authorization.¹⁸² While

181. It is, of course, also possible that the *Lawrence* Court did not question Bradford's authority because it was able to deny his motion on other grounds. Nonetheless, the Court's treatment of the two motions was quite different; Randolph never even got to argue the merits for the United States.

Arguably the clearer standing of the United States in seeking the return of its money may also help explain why Bradford's authority to sue Yale Todd was not questioned. See *supra* notes 170-72. The Supreme Court issued a judgment for the United States, without questioning the authority of the Attorney General to bring the action, notwithstanding the fact that both Attorney General Bradford and Attorney General Randolph were operating with the same authorization: the 1793 congressional order and the "arrangement" with the Secretary of War. See *supra* notes 163-72 and accompanying text. There were two potentially significant differences between Bradford's and Randolph's actions: (1) Bradford's was an action in assumpsit, not mandamus; and (2) the interest or "standing" of the United States was clearer in Bradford's action since it was seeking money allegedly paid out wrongfully. (The term "standing" is used advisedly here, recognizing, as noted *supra* note 124, that it is a modern term not used in the 1790s.) In light of the *Lawrence* case, the *Yale Todd* decision suggests that the more direct interest or standing of the United States, not the difference in remedy, allowed Bradford to succeed where Randolph had failed. In *Lawrence*, where the United States' interests were relatively clear, the Court had no difficulty with the Attorney General's seeking a writ of mandamus; the Court suggested it would have granted the writ if Judge Lawrence had not been acting within his discretion. Thus, a comparison of Randolph's unsuccessful mandamus motion with Bradford's assumpsit action against Yale Todd and Bradford's motion for mandamus against Judge Lawrence suggests that if the standing of the United States is clearer than it was in Randolph's motion, the Court showed little inclination to question presidential authorization. As will be noted *infra* note 198, that explanation also may account for the heightened concern some of the modern cases exhibit for more explicit congressional authorization in instances where the interest of the United States is more attenuated.

182. Marcus and Teir agree that the lack of clear presidential authorization was a key factor in the Court's refusal to permit Edmund Randolph to proceed. Marcus & Teir, *supra* note 16, at 536-41. They then argue that citing *Hayburn's Case* for the proposition that federal courts can decide only "cases or controversies" is therefore erroneous. *Id.* at 541. They suggest that such a citation refers to the Court's refusal to let Randolph proceed and is thus based on a mistaken belief that the Court refused because Randolph did not have a client:

If the Supreme Court really was insisting on a client, then its disposition in *Hayburn's Case* could stand for the proposition that in order to exercise jurisdiction, the Court requires that two competing parties be before it. . . . If the Court's concern actually was presidential authorization, however, the case would stand for no such thing. Allowing Randolph to proceed without a client, merely because he had permission from the President, is a far cry from the current "case or controversy" requirement.

. . . .

[After Randolph's first efforts were thwarted, he] never went to President Washington, but instead found Hayburn and brought him into court as a client. Since then, the case has stood for the need for a proper litigant before the federal courts can exercise jurisdiction. Assuming Justice Iredell's notes are correct, Randolph was only seeking to proceed without the President's authorization. If that is what the 1792 Court was refusing to allow (by a 3-3 vote), the Supreme Court, for almost 200 years, has construed the case wrongly. *Hayburn's Case* has become a symbol for judicial restraint, but a closer look at its background and facts reveals that the early Court may have had contrary principles in mind [that, so long as there was authorization from the President, the Attorney General might have been able to move the Court to act whenever the executive believed a legal error needed to be corrected.]

Id. at 540, 546.

the desire on the part of some of the Justices for more explicit presidential authorization is striking to the modern observer, more significant to today's debates is the fact that all the Justices appeared to believe that some presidential authorization was appropriate and necessary. Though the Justices differed in their willingness to presume such authorization, none found the issue irrelevant. Randolph had maintained that authorization could be presumed from the President's acknowledged duty to ensure that the laws be faithfully executed and his appointment of Randolph to assume that responsibility. But, significantly, Randolph never argued that presidential authorization was unnecessary. Similarly, Justice Iredell did not seem to consider such authorization irrelevant; he simply was more willing than some of his Brethren to presume its presence. In fact, Justice Iredell explicitly indicated that the President could have directed Randolph to bring the motion if Randolph had not done so on his own.¹⁸³

As will be noted in the following section, these concerns with congressional and presidential authorization continue to plague the modern

To the extent that Marcus and Teir are correct in their assumption that cases citing *Hayburn's Case* for the proposition that federal courts can decide only "cases or controversies" have in fact referred to Randolph's motion and have assumed that Randolph could not proceed because the Court did not see two competing parties before it, the citations are, as Marcus and Teir assert, erroneous. It is not clear, however, that Marcus and Teir are correct in assuming that cites to *Hayburn's Case* refer to Randolph's unsuccessful effort. It is at least as likely that the cases that Marcus and Tier refer to as citing *Hayburn's Case* for the "case or controversy" requirement refer not to Randolph's abortive efforts, but rather to one of the two infirmities the Justices, sitting as circuit courts, found in the Invalid Pensions Act. That is, these citations are referring to the view expressed by circuit judges that the task of processing an application from a single applicant seeking a government pension was not sufficiently judicial. See *supra* text accompanying notes 105-07. Because Dallas' Report of *Hayburn's Case* includes both the Supreme Court's disposition of Randolph's motion and the Justices' opinions as circuit judges on the Invalid Pensions Act, a citation to 2 U.S. (2 Dall.) 409 is inherently ambiguous. But it is beyond dispute that the other proposition for which *Hayburn's Case* is frequently cited—federal courts cannot issue advisory opinions that are revisable by the executive or legislative branches—refers to the Justices' opinion on the validity of the Invalid Pensions Act.

While the *Hayburn* Court's concern for presidential authorization seems clear, it is unclear whether this concern for presidential authorization derived from the Constitution or from the Judiciary Act. While the matter is not free from doubt, there is little to suggest reliance on any statutory requirement. As observed in Part I, Congress had not made presidential authorization an explicit statutory requirement. And although Congress never indicated that presidential authorization was irrelevant, nothing suggests that Congress worried about presidential control or authorization. It is more likely, though not certain, that the concern of the Justices rested on the President's constitutional duty to take care that the laws be faithfully executed. At least Randolph and Iredell relied on this provision of the Constitution to support their conclusion that presidential authorization could be presumed.

183. See *supra* note 156 and accompanying text. Similarly, as noted previously, President Washington had assumed it was both necessary and proper to instruct Attorney General Randolph to supervise proceedings in the circuit court of New York. See *supra* note 157.

Attorney General. The question is to what extent these early experiences can inform today's debate.

III. THE ROLE OF THE ATTORNEY GENERAL AND *HAYBURN'S CASE* TWO HUNDRED YEARS LATER

Some of the ambiguities and frustrations confronting the first Attorney General and first Supreme Court have been resolved in the two centuries since *Hayburn*. But many of the fundamental uncertainties remain. The principal lesson from experience is that the uncertainties revealed in the first decade well reflect the tensions inherent in our tripartite system; those tensions may mutate but they are unlikely to disappear.

Some of the difficulties Randolph confronted, including the particular question at issue in *Hayburn*—the Attorney General's power to supervise inferior courts and to make known to the courts the "interest of the United States"—have become less troublesome. After repeated complaints by many of Randolph's successors, Congress finally began, in the nineteenth century, to remedy some of the structural and logistical deficiencies that had frustrated Randolph.¹⁸⁴ After more than thirty years, the Attorney General received a clerk, government office space, and a

184. In 1819, Congress considered giving the Attorney General control over all criminal prosecutions and debt collections, but the proposal fizzled. 33 ANNALS OF CONG., *supra* note 31, at 176, 190 (1819). In 1829, President Jackson, concerned with the apparent inability of the Department of the Treasury to recover debts owed to the United States, urged Congress to put the Attorney General in charge of both all debt collection and all federal criminal proceedings, give him a department, and place him on the same footing as the heads of other departments. 2 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 453 (1897). Senator Daniel Webster opposed the idea, believing the proposal would make the Attorney General a "half accountant, a half lawyer, a half clerk—in fine, a half of everything and not much of anything." 6 ANNALS OF CONG., *supra* note 31, at 276 (1829). As a result, the proposal failed. Instead, Congress created a new legal position in the Treasury Department—the Solicitor of the Treasury—with the power to instruct the district attorneys, marshals, and clerks of the lower courts in all matters and proceedings in which the United States was interested. Act of May 29, 1830, ch. 153, § 1, 4 Stat. 414, 414. The Senate provided that the Attorney General was to "advise with and direct" the Solicitor of the Treasury, but the House added the words, "at the request of said Solicitor," and it was enacted in that form. *Id.* at 416; *see also* H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 145-47. Fifteen years later, on December 2, 1845, President Polk again recommended that Congress establish a law department. 4 J. RICHARDSON, *supra*, at 415. But a bill which would have established such a department and made it the duty of the Solicitor of the Treasury "to act in subordination to the Attorney General" was seen by some as a device to increase the salary and the positions available for Democrats, and so was not enacted. H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 148. Six years later (in 1851) another attempt also proved unsuccessful. *Id.* at 148-49. President Pierce's efforts, aided by the ambitions of his Attorney General Caleb Cushing, also failed to pass Congress. Pierce, however, did accomplish some centralization by means of an 1855 executive order. *Id.* at 149-53. *See generally* Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1052 (1978) (documenting complaints of President Jackson in 1829 and 1830, President Polk in 1846, and President Pierce in 1854).

five-hundred dollar fund for office supplies.¹⁸⁵ By 1853, the Attorney General had four clerks and, for the first time, received the same salary as the other cabinet officials; accordingly, the then incumbent, Caleb Cushing, decided it was no longer appropriate to augment his salary through private practice and became the first full-time Attorney General.¹⁸⁶ In 1861, Congress gave the Attorney General control over both the district attorneys and the marshals in all the districts.¹⁸⁷ And eighty-one years after its creation, the Attorney General was finally given a department; in 1870 Congress created the Department of Justice.¹⁸⁸ Thus,

185. Act of Mar. 3, 1819, ch. 54, 3 Stat. 496, 500. Obtaining even that had been tough. A bill authorizing the employment of a clerk had been defeated in 1817, in part because some believed "it could never have been intended that the Attorney-General should be a member of the Cabinet" or have a department, and they feared that this would be the beginning of a department of law. 30 ANNALS OF CONG., *supra* note 31, at 48, 60-62 (1817). Congress finally created the position of clerk to the Attorney General in its Act of April 20, 1818, ch. 87, § 6, 3 Stat. 445, 447, but did not fund it until 1819. Act of Mar. 3, 1819, ch. 54, 3 Stat. 496, 500; *see also* H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 81, 155-56.

186. H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 155; L. HUSTON, *supra* note 5, at 5-6. The salary was \$8000. H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 154 n.60. Not all Cushing's successors followed his practice of giving up private clients. For example, William Evarts, appointed by President Johnson, continued his private practice. *Id.* at 216.

187. Act of Aug. 2, 1861, ch. 37, § 1, 12 Stat. 285, 285. This was a continuation of a trend begun in 1851 when Congress, trying to cope with a multitude of land claims against public lands held by the United States, gave the Attorney General more responsibilities in the trial courts. Act of Mar. 3, 1851, ch. 41, 9 Stat. 631; Act of Aug. 31, 1852, ch. 108, § 12 10 Stat. 76, 99; *see also*, H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 120-28. But the 1861 legislation did not give the Attorney General as much control over the district attorneys as the statutes suggested; indeed the district attorneys were still unsure whether to report to the Attorney General or to the Solicitor of the Treasury. *See* H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 219-20. During this period, the various departments also continued to request and secure their own law officers including, for example, the Solicitor and Naval Judge Advocate, Solicitor of the War Department, Post Office Solicitor, Solicitor for the State Department, Solicitor of Internal Revenue. This was deemed preferable to the practice that had developed of hiring outside counsel on an ad hoc basis. *Id.* at 221. But it did nothing to centralize or coordinate the business of representing the interests of the United States.

188. Act of June 22, 1870, ch. 150, 16 Stat. 162. Section 1 of the Act provided:

There shall be, and is hereby, established an executive department of the government of the United States, to be called the Department of Justice, of which the Attorney General shall be the head. His duties, salary, and tenure of office shall remain as now fixed by law, except so far as they may be modified by this act.

Id. § 1, at 162.

Section 2 of the Act established the office of Solicitor General, in part to avoid the necessity of appointing special counsel to argue cases in the Supreme Court. H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 222-23. For a recent examination of the office, see L. CAPLAN, *THE TENTH JUSTICE* (1987). Section 3 provided that the law officers of the several departments "shall exercise their functions under the supervision and control of the head of the Department of Justice." Act of June 22, 1870, ch. 150, § 3, 16 Stat. 162. Section 5, the forerunner of today's 28 U.S.C. § 518(b) (1982), gave the Attorney General the power, "whenever he deems it for the interest of the United States, to conduct and argue any case in which the government is interested, in any court of the United States, or may require the solicitor-general or any officer of his Department to do so." *Id.* § 5, 16 Stat. at 163. And section 16 provided that "the Attorney General shall have supervision of the conduct and

by the end of the Civil War decade, the Attorney General had become a full time public official in charge of a staffed and funded Department of Justice, with control over the district attorneys—developments that no doubt would have pleased (and probably surprised) Randolph.¹⁸⁹

In addition to these structural improvements in the Office of the Attorney General, Congress also enacted several procedural provisions that make it unlikely that an Attorney General today will face the same frustrations that confronted Randolph in the pension cases. In 1937, Congress enacted the forerunner of 28 U.S.C. § 2403(a), under which a federal court must notify the Attorney General whenever the constitutionality of an “act of Congress affecting the public interest” is in question and must permit the United States to intervene in such cases with all the rights of a party.¹⁹⁰

Had this provision existed in 1792, Attorney General Randolph would have had a much easier time. As soon as the circuit court considering Hayburn’s petition realized that the constitutionality of the Invalid

proceedings of the various attorneys for the United States in the respective judicial districts.” *Id.* § 16, at 164.

While Congress finally gave the Attorney General a department of his own, it failed to provide him a home. The Act of 1870 simply stated that “the superintendent of the treasury building shall provide such suitable rooms in the treasury building as may be necessary to accommodate the officers and clerks of the said Department.” *Id.* § 13, at 164. This space was inadequate and the solicitors of the other departments, who in theory had been transferred to the Department of Justice, in fact remained housed in their former locations, a fact that complicated the Attorney General’s effort to centralize and coordinate law enforcement. H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 228. For the next half-century, the Attorney General had to make do with inadequate, temporary, leased quarters—to be a governmental nomad—until Congress finally had the present Department of Justice building constructed in 1934. See Excerpts from the Address by Attorney General Homer Cummings at the Dedication of the Department of Justice Building (Oct. 25, 1934), reprinted in H. CUMMINGS & C. MCFARLAND, *supra* note 5, at 488.

189. In creating the Department of Justice, Congress not only supported the Attorney General’s long-standing lawyering responsibilities—litigating on behalf of the United States and advising the President—it also officially recognized the significant nonlawyering, administrative functions that were becoming substantial burdens for the Attorney General. These administrative burdens were to grow and to make some of the future Attorney Generals and their Assistants suggest that Daniel Webster may have been correct when he objected that a Department of Law would ruin the position of Attorney General. See 6 ANNALS OF CONG., *supra* note 31, at 276, 276 (1829); D. MEADOR, *supra* note 5, at 43-49.

190. Act of Aug. 24, 1937, ch. 754, § 1, 50 Stat. 751, 751. Section one of the Act required that the Attorney General be notified and authorized to intervene as a party. Section two gave the United States the right to appeal directly to the Supreme Court whenever an Act of Congress was found to be unconstitutional. For discussion of the Act and the sufficiency of the United States’ interest in defending the constitutionality of a statute, see Note, *Federal Intervention in Private Actions Involving the Public Interest*, 65 HARV. L. REV. 319 (1951); Note, *The Judiciary Act of 1937*, 51 HARV. L. REV. 148 (1937).

The modern counterpart of section 1 is 28 U.S.C. § 2403(a) (1982). The modern counterpart of section 2 was 28 U.S.C. § 1252 (1982), until its repeal by Act of June 27, 1988, Pub. L. No. 100-325, 102 Stat. 662.

Pensions Act was in question, 28 U.S.C. § 2403(a)¹⁹¹ would have required the court to notify the Attorney General. Given Randolph's statements and actions in 1792, it seems reasonable to assume that he would have intervened. Had he done so, and had Judges Wilson, Blair, and Peters continued to decline to hear the case because they believed the 1792 Pension Act unconstitutional, Randolph then could have sought review in the Supreme Court, representing the United States, not Hayburn.

Thus, the particular questions perplexing Randolph and the early Supreme Court are unlikely to arise today. But many of the uncertainties revealed by Randolph's fruitless efforts remain unresolved. Attorneys General continue to encounter questions regarding their statutory authorization to sue. Occasionally Congress resolves the issue by explicitly authorizing the Attorney General to initiate or intervene in particular actions. As noted, 28 U.S.C. § 2403(a) would have significantly helped Randolph. Similarly, the Civil Rights Act of 1957 authorizes the Attorney General to institute civil actions in the name of the United States for preventative relief whenever there are reasonable grounds to believe someone is being deprived of the voting rights secured by the Act.¹⁹² Moreover, the Civil Rights Act of 1964 authorizes the United States to intervene in any action in federal court seeking relief from denial of equal protection deemed to be of "general public importance," and thereupon be "entitled to the same relief as if it had instituted the action."¹⁹³ In addition, the Civil Rights of Institutionalized Persons Act of 1980 provides that the Attorney General can institute a civil action in the name of the United States whenever the Attorney General has "reasonable cause to believe" that a state or local official is depriving an institutionalized person of his or her constitutional rights.¹⁹⁴ Even when Congress provides such explicit direction, however, there often remains uncertainty as

191. *Id.*

192. Civil Rights Act of 1957, Pub. L. No. 85-315, § 131, 71 Stat. 634, 637 (codified as amended at 42 U.S.C. § 1971 (1982 & Supp. V 1987)); *see also* United States v. Mississippi, 380 U.S. 128, 136 (1965) (Attorney General authorized by 42 U.S.C. § 1971, enacted under the authority of the fifteenth amendment, to institute proceedings against States to protect federally guaranteed right to vote).

193. Civil Rights Act of 1964, Pub. L. No. 88-352, § 902, 78 Stat. 241, 266-67 (codified as amended at 42 U.S.C. § 2000h-2 (1982)).

The provision has usefully prevented suits from being dismissed as moot when the original plaintiffs graduated from the defendant school system. *E.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 430-31 (1976).

194. Pub. L. No. 96-247, § 3, 94 Stat. 349, 350 (1980) (codified at 42 U.S.C. § 1997a (1982)). Congress enacted this statute after several Attorneys General were not allowed to sue on behalf of institutionalized persons. *See, e.g.*, United States v. Mattson, 600 F.2d 1295, 1297 (9th Cir. 1979) (United States may not bring suit to protect constitutional rights of mentally retarded without express statutory approval); United States v. Solomon, 563 F.2d 1121, 1125 (4th Cir. 1977) (Attorney

to whether a particular action falls within the statutory authorization and, if so, whether Congress is constitutionally empowered to give the Attorney General such authority.¹⁹⁵

When Congress has failed to provide explicit authority and the Attorney General must rely solely on the general empowering provisions for authorization, the modern issues are strikingly similar to those faced by Randolph. The general provision empowering the Attorney General today to represent the interests of the United States in the Supreme Court, 28 U.S.C. § 518(a), is a direct descendent of section 35 of the First Judiciary Act, the provision on which Randolph relied.¹⁹⁶ Similarly, the jurisdictional provision most useful to the Attorney General today, 28 U.S.C. § 1345, has its roots in the First Judiciary Act.¹⁹⁷ Thus, it is not

General has no right, without specific statutory authorization, to bring suit to enjoin certain practice and policies of mental health administration). For discussion of *Mattson*, see *infra* note 198.

195. Congress can authorize the Attorney General to sue on behalf of the United States only if the United States has standing. Thus, for example, 28 U.S.C. § 2403 (1982), which authorizes the Attorney General to intervene on behalf of the United States if the constitutionality of an act of Congress is in question, raises the issue of whether the United States is injured when a statute's constitutionality is questioned. Many members of Congress, in fact, raised this issue during floor debate, questioning whether, when an act of Congress is attacked, the government has an interest that it has a right to defend. 1937 CONG. REC. H3262-63 (1937). While some thought that it did not and that Congress constitutionally could not give it such an interest, the majority decided (in my view, appropriately) that Congress could do so. *Id.* Similarly, when the Attorney General sued in *United States v. Raines*, 362 U.S. 17 (1960), to enforce the Civil Rights Act of 1957, some questioned whether Congress constitutionally could authorize the Attorney General to bring an action in support of private constitutional rights. The Court concluded that Congress could:

[T]here is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights, and we think it perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief.

Id. at 27. The extent to which article III limits the interests Congress can create and then authorize the Attorney General to protect is beyond the scope of this article. For an interesting discussion of the issue, see Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 283-90 (1988) (pointing out that the Court is insufficiently sensitive to Congress's technique of conferring standing to obtain what appears to be an advisory opinion).

196. 28 U.S.C. § 518(a) (1982) provides:

Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the United States Claims Court or in the United States Court of Appeals for the Federal Circuit and in the Court of International Trade in which the United States is interested.

Id.

The statute is in its essential parts identical to that enacted in 1789. The only changes are (1) the term "interested" has been substituted for "concerned," a change that occurred in 1870 but seemed to signify no change in concept; (2) it has been amended to make it clear that the Solicitor General has the same authority as the Attorney General and that such authority may be delegated; and (3) several new courts have been added to the Attorney General's domain.

197. 28 U.S.C. § 1345 (1982) provides that district courts shall have jurisdiction, except as otherwise provided, in "all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." Section 9 of the First Judiciary Act gave the district courts jurisdiction, concurrent with the state courts, "of all suits at

surprising that modern Attorneys General frequently find it as difficult as Randolph did to convince a court that the general empowering statute authorizes a particular lawsuit.¹⁹⁸ In fact, echoes of the *Hayburn* Court's concern with the dangers of an uncontrolled Attorney General continue to reverberate today.¹⁹⁹

common law where the United States sue," subject to a jurisdictional amount requirement of \$100. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77. For a history of these provisions, see HART & WECHSLER, *supra* note 26, at 1080-81.

198. The question of statutory authorization today is much the same as it was in Randolph's day: "Is the United States 'concerned' or 'interested' in a particular suit?" This issue raises the dual questions of whether Congress intended to authorize the Attorney General to bring such a suit, and if so, whether Congress may constitutionally do so. Some of the Attorney General's powers to sue under these general provisions, without more explicit statutory authorization, have become well accepted. Thus, for example, there seems to be little question today concerning the Attorney General's power to enforce the property and contract rights of the United States without express statutory authorization. *See, e.g.,* United States v. California, 332 U.S. 19, 27-29 (1947) (Attorney General can sue for declaration of rights of United States against California in three-mile marginal belt off the California coast); *Sanitary Dist. v. United States*, 266 U.S. 405, 425-26 (1925) (Attorney General can sue to enjoin withdrawal of water from Lake Michigan in excess of withdrawal authorized by Secretary of War); *United States v. Gear*, 44 U.S. (3 How.) 120, 133 (1845) (injunction to restrain waste of public land); *United States v. Buford*, 28 U.S. (3 Pet.) 12, 29 (1830) (United States can sue to collect debt). Similarly, the Attorney General can sue to cancel a fraudulently obtained patent, *United States v. American Bell Tel. Co.*, 128 U.S. 315, 356-73 (1888). Further, in the case of *In re Debs*, 158 U.S. 564 (1895), the Court allowed the United States to sue to enjoin a strike that was threatening the mails, interstate transportation, and the public interest, without explicit statutory authorization. *Id.* at 570-72. The *Debs* Court spoke very broadly:

[W]hile it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts . . . [T]o interfere in such matters by injunction is one recognized from ancient times and by indubitable authority.

Id. at 599. But determining what is included within the *Debs* standard is difficult. *Compare* *United States v. Brand Jewelers, Inc.*, 318 F. Supp. 1293, 1295-99 (S.D.N.Y. 1970) (United States may seek to enjoin widespread use of "sewer process"—false returns and affidavits—because of the burden on interstate commerce and because of the government's authority to correct widespread deprivations of property without due process) and *United States v. Britain*, 319 F. Supp. 1058, 1060-61 (N.D. Ala. 1970) (United States may seek to enjoin state miscegenation law that had been invoked against military personnel) with *United States v. City of Philadelphia*, 644 F.2d 187 (3rd Cir. 1980) (Attorney General has no standing to seek declaratory relief against allegedly unconstitutional practices and policies of Philadelphia Police Department) and *United States v. Mattson*, 600 F.2d 1295, 1297 (9th Cir. 1979) (holding, prior to enactment of 42 U.S.C. § 1997, that United States may not sue to protect constitutional rights of mentally retarded in state hospitals) and *United States v. Solomon*, 563 F.2d 1121, 1123-24 (4th Cir. 1977) (same). *See also* *New York Times Co. v. United States*, 403 U.S. 713, 753-54 (1971) (Harlan, J., dissenting) (Attorney General brought suit on behalf of United States to enjoin *New York Times* from publishing classified material ("Pentagon Papers"), claiming it jeopardized national security; injunction denied on the merits, but Justice Harlan thought Court should have addressed question whether Attorney General was even authorized to bring suit). The foregoing cases suggest that as the interest of the United States becomes more attenuated, judicial reluctance to infer congressional authorization increases. *See supra* note 181.

199. In deciding whether the general authorizing statute empowered the Attorney General to bring suit on behalf of the United States to set aside a land patent allegedly obtained by fraud, the Court noted that it was "not insensible to the enormous power and its capacity for evil . . . reposed in

Concern with presidential authorization also continues today, but two modern realities—interbranch litigation²⁰⁰ and fears of an “imperial

the [Justice] department.” *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 278-80 (1888) (United States can sue to set aside land patent allegedly obtained fraudulently so long as suit is brought for benefit of United States and not for third party).

200. We have seen numerous lawsuits in which the executive branch disagrees with the legislative branch and the United States is, in a sense, on both sides of the litigation. *See, e.g.*, *United States House of Representatives v. Immigration and Naturalization Service (INS)*, and *United States Senate v. Immigration and Naturalization Service (INS)*, decided with *INS v. Chadha*, 462 U.S. 919 (1983) (House and Senate sought review of court of appeals decision holding one house veto unconstitutional; Attorney General, representing INS and believing veto unconstitutional, sought to defend court of appeals judgment); *Gravel v. United States*, 408 U.S. 606 (1972) (dispute between Executive Branch and Senator Gravel (and the Senate) growing out of the Pentagon Papers incident regarding scope of Speech and Debate Clause); *United States v. Lovett*, 328 U.S. 303 (1946) (Attorney General refused to defend constitutionality of statute, believing that it violated article I, section 9 of the Constitution); *Myers v. United States*, 272 U.S. 52 (1926) (constitutionality of provision requiring Senate participation in removal of postmaster challenged by President who was represented by Attorney General, with Senator George Wharton Pepper invited to represent views of Congress as amicus); *see also* *Bowsher v. Synar*, 478 U.S. 714 (1986) (President and both houses of Congress at odds regarding the constitutionality of the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the Gramm-Rudman-Hollings Act); *Okanogan Indians v. United States, The Pocket Veto Cases*, 279 U.S. 655 (1929) (in dispute regarding timing of President's pocket veto, Attorney General represented interests of the President, and House Judiciary Committee appeared as amicus to represent Congress's view); *cf.* *FCC v. League of Women Voters*, 468 U.S. 364 (1983) (under President Carter, Attorney General refused to defend constitutionality of statute prohibiting public broadcasters to editorialize but under President Reagan, Attorney General was willing to defend statute). There are also cases in which the Judiciary is at odds with the Executive Branch. *See, e.g.*, *Will v. United States*, 389 U.S. 90, 91-93 (1967) (contesting Judge's authority to order the United States to produce certain information in criminal prosecution).

Because of the frequency with which the Senate found it necessary to get its own counsel to represent its interests when the Attorney General was representing the conflicting views of the Executive Branch, the Senate decided in 1978 that it needed a permanent counsel of its own. In Title VII of the Ethics in Government Act of 1978, the Senate created the Office of Senate Legal Counsel. Pub. L. No. 95-521, § 701, 92 Stat. 1824, 1874-85 (codified in part at 2 U.S.C. § 288-288n (1982 & Supp. V 1987)). The Senate had voted to establish an Office of Congressional Legal Counsel to represent the Senate and the House jointly, but the House was not “prepared to agree” so the Senate decided to establish its own Office. H.R. CONF. REP. NO. 1756, 95th Cong., 2d Sess. 14, *reprinted in* 1978 U.S. CODE CONG. AND ADMIN. NEWS 4381, 4396. Unlike the President's Legal Counsel, a position created during the administration of Franklin Roosevelt that has important advisory duties but does not do any litigating, the Senate Legal Counsel has important litigation responsibilities, including conducting subpoena litigation, intervening or appearing as amicus in litigation where the powers and responsibilities of Congress are in issue, and defending Congress or its members in cases that challenge official action. 2 U.S.C. § 288c-88e (1982 & Supp. V 1987). To insure that Congress knows when its interests are in jeopardy, it has ordered the Attorney General to notify it of any litigation in which the Attorney General does not intend to defend the constitutionality of a statute so that Congress may step in if it so chooses. *See, e.g.*, 28 U.S.C. § 519 note (1982) (Attorney General to report to Congress in any case in which Attorney General considers statutory provision unconstitutional), Act of Nov. 9, 1978, Pub. L. No. 95-624, § 13(a)(2), 92 Stat. 3459, 3464 (Attorney General to report to Congress in any case in which Attorney General “determines that the Department of Justice will contest, or will refrain from defending, any provision of law enacted by the Congress”) Act of Nov. 30, 1979, Pub. L. No. 96-132, § 21(a), 93 Stat. 1040, 1049-50 (provision in appropriations act requiring Attorney General to notify both houses of Congress anytime Justice

presidency”²⁰¹—have modified the focus of inquiry since the 1790s. Rarely does the modern judiciary question the clarity of presidential authorization. Justice Iredell and Attorney General Randolph’s view, that absent evidence to the contrary one may presume such a charter, has prevailed. But the complexities of interbranch litigation, in which Congress and the President are adversaries, as well as congressional efforts to deal with the “imperial presidency” by limiting presidential control over the Attorney General and law enforcement generally, have resurrected in a new context the question first raised by Iredell: Is the Attorney General the attorney for the United States or for the President?

The Supreme Court confronted precisely this question recently in *United States v. Providence Journal Co.*²⁰² where it had to interpret the modern incarnation of section 35 of the Judiciary Act of 1789. The question was whether 28 U.S.C. § 518(a),²⁰³ which provides that “[e]xcept when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court . . . in which the United States is interested,” grants the Attorney General control over all suits in the Supreme Court in which the United States is interested or only those suits in which the Executive Branch is interested. In *Providence Journal*, a private attorney, appointed by a district court to be a special prosecutor to prosecute a contempt of court allegedly committed by the Providence Journal, had filed a petition for a writ of certiorari in the name of the United States.²⁰⁴ After the Court granted the writ, the Providence Journal argued that the case should be dismissed because the Attorney General had not authorized or participated in bringing the case to the Supreme Court. Under section 518(a), the Providence Journal argued, such authorization was essential. The Attorney General had in fact re-

Department is not enforcing a statute or is not defending it in court because Justice Department believes it unconstitutional).

201. A. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973); see also, L. HEREN, *THE NEW AMERICAN COMMONWEALTH* 9 (1968) (main difference between modern American President and medieval monarch is that there has been steady increase rather than diminution of his power: “In comparative historical terms the United States has been moving steadily backward.”); C. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 255-87 (1948) (criticizing presidency of Franklin Roosevelt as a “constitutional dictatorship”).

202. 485 U.S. 693 (1988).

203. See *supra* note 196.

204. The Supreme Court had just held in *Young v. United States ex rel. Vuitton et Fils* that the judiciary had the authority to appoint private attorneys to prosecute criminal contempt of court and did not have to be “at the mercy of another branch in deciding whether such proceedings should be initiated.” 481 U.S. 787, 796 (1987). In *Providence Journal*, the special prosecutor had convinced the district court that the newspaper was guilty of contempt, 630 F. Supp. 993 (1986), but the Court of Appeals for the First Circuit reversed. 820 F.2d 1342 (1986), *modified*, 820 F.2d 1354 (en banc) (1987). The special prosecutor sought review in the Supreme Court.

fused to authorize the writ, but believed the special prosecutor should be allowed to proceed nonetheless. The Attorney General argued that, under section 518, "interest of the United States" meant only the interest of the Executive Branch and that since the special prosecutor was representing the interest of the Judicial Branch, he should be allowed to proceed notwithstanding section 518.²⁰⁵

The majority of the Supreme Court found the Attorney General's reading of section 518 "startling" and emphatically rejected it.²⁰⁶ "This suggested interpretation of § 518(a) . . . presumes that there is more than one 'United States' that may appear before this Court, and that the United States is something other than 'the sovereign composed of the three branches.'" ²⁰⁷ "Congress is familiar enough with the language of separation of powers that we shall not assume it intended, without saying so, to exclude the Judicial Branch when it referred to the 'interest of the United States.'" ²⁰⁸ In the Court's view, because a criminal contempt prosecution brought to vindicate the authority of the Judiciary is clearly one "in which the United States is interested,"²⁰⁹ section 518 required the authorization of the Attorney General. Given that the petition had been filed without the requisite authorization, the Court dismissed the writ.²¹⁰

Thus, faced with the question first articulated by Justice Iredell in 1792, the Court in 1988 answered as Iredell had: the Attorney General represents the United States and not just the Executive Branch. This reading, while not surprising, was notably ignorant of and uninterested in history.²¹¹ The majority ignored the fact that section 518 had originated

205. Brief for the United States as Amicus Curiae in Response to Respondent's Motion to Dismiss the Writ of Certiorari, filed January 1988, at 6-17. Ironically, the issue only became salient after the Solicitor General suggested, somewhat gratuitously, that the special prosecutor should be allowed to proceed notwithstanding the Solicitor General's refusal to authorize the petition for certiorari. Brief for the United States as Amicus Curiae Supporting Petitioner, at 2 n.2, filed November 1987 in *United States v. Providence Journal Company*, 108 S. Ct. 1502 (1988).

206. *Providence Journal*, 108 S. Ct. at 1507.

207. *Id.* (quoting *United States v. Nixon*, 418 U.S. 683, 696 (1974)).

208. *Id.*

209. *Id.* at 1511.

210. The Court viewed the Attorney General's position as "startling" because it seemed to restrict his ability to centralize and coordinate litigation affecting the interests of the United States. Arguing for the existence of such a limitation was in tension with the frequent lament of many Attorneys General that they lack sufficient control over who represents the interests of the United States in litigation. See, e.g., Bell, *Office of Attorney General's Client Relationship*, 36 BUS. LAW. 791, 797 (1981) (suggesting that the President require that all government officials, faced with a substantial doubt as to a "controlling legal question," get a ruling from Office of Legal Counsel to make law more uniform, reduce conflicts among agencies, and make "the government look a good deal better.")

211. The majority's interpretation also failed to account for the modern reality of interbranch litigation; if the Attorney General controls access to the Supreme Court for all those who represent

in and was virtually identical to section 35 of the Judiciary Act of 1789. It argued that one reason the statute gives the Attorney General control over litigation in the Supreme Court is that the United States should speak with one voice in seeking writs of certiorari from the Supreme Court: "Without the centralization of the decision whether to seek certiorari, this Court might well be deluged with petitions from every federal prosecutor, agency, or instrumentality . . ." ²¹² Yet it seems incongruous to believe that the 1789 Congress worried about deluging the Court with petitions from a variety of agencies, or that it wanted to centralize the process of petitioning for certiorari. The concept of a deluge from a variety of agencies could not have been a serious concern in 1789, and the writ of certiorari as a discretionary device for seeking Supreme Court

the interests of the United States, it will be difficult for the judiciary and the legislature to bring their views to the Court in the event they disagree with the President's view. The majority attempted to deal with this problem by fiat, asserting in a footnote that "nothing in § 518(a) precludes members of Congress or the Judiciary from adding their views in litigation before this Court as intervenors or *amici curiae*, a practice we have long recognized . . . and which in some instances is directly authorized by statute." 108 S. Ct. at 1509-10 n.9 (citations omitted). But the majority never explains how section 518 can be read to permit this. One potential explanation is that the majority was reading section 518(a) very narrowly to refer only to initiating suits in the Supreme Court, giving the Attorney General control over access or entry to the Court but not over cases that somehow wind up in the Court by other means. But it is hard to find that narrow interpretation in the broad statutory language that says the Attorney General "shall conduct and argue suits and appeals in the Supreme Court . . . in which the United States is interested," not that he shall be the gatekeeper for appeals and petitions for certiorari in which the United States is interested. 28 U.S.C. § 518(a) (1982).

Equally indictable is the majority's failure to explain those cases in which one branch of the United States government has successfully petitioned for a writ of certiorari to review a judgment issued in favor of another governmental branch without anyone raising a question under section 518(a), notwithstanding the lack of any evidence suggesting that the Attorney General approved of these petitions. *See, e.g.*, cases cited in note 200 *supra*; *United States House of Representatives v. INS*, 462 U.S. 919, 923 (1983) and *United States Senate v. INS*, 462 U.S. 919, 923 (1983) (House and Senate successfully petitioned for certiorari to review judgment, supported by the Attorney General representing INS, that legislative veto was unconstitutional); *Gravel v. United States*, 408 U.S. 606 (1972) (Senator Gravel sought and was granted certiorari against the United States, challenging the court of appeals' limited reading of Speech and Debate Clause); *Will v. United States*, 389 U.S. 90 (1967) (District Judge Will sought and was granted certiorari to review court of appeals' writ of prohibition, prohibiting judge from ordering United States to produce certain information in criminal prosecution). One way to explain the difference between these cases and the petition in *Providence Journal* is that only the petition in *Providence Journal* was brought in the name of the United States. But the *Providence Journal* Court explicitly noted that its conclusion did not depend on the fact that the special prosecutor had petitioned in the name of the United States:

How a case is captioned is of no significance to our holding. As we have previously observed, "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." Thus, even if the case had not been recaptioned by the special prosecutor upon the filing of a petition in this Court to reflect the "adversary nature of the proceeding," we would have been required to determine whether this was a case "in which the United States is interested." A criminal contempt prosecution in federal court, however styled, is such a case.

108 S. Ct. at 1511 n.11 (citations omitted).

212. *Id.* at 1510.

review only became widespread in the twentieth century.²¹³ While an informed consideration of history would not necessarily have led the majority to a different conclusion, it certainly would have resulted in a more educated, sensible opinion.²¹⁴

213. The principle of discretionary review by certiorari was introduced by the Evarts Act, also known as the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826 (1891). HART & WECHSLER, *supra* note 26, at 38-39 ("The most important innovation of the Evarts Act was the introduction of the now familiar principle of discretionary review by certiorari."). Discretionary review came to dominate the Court's docket with the Act of February 13, 1925, ch. 229, 43 Stat. 936. *See generally* F. FRANKFURTER & J. LANDIS, *supra* note 69, at 255-94 (explaining the purpose and effect of the Judiciary Act of 1925); HART & WECHSLER, *supra* note 26, at 47.

214. The dissent, written by Justice Stevens and joined by Chief Justice Rehnquist, showed more appreciation for the origin of the statute and its history. But its reading of history was flawed. It started with the appropriate observation that it was unlikely that in drafting section 35 of the Judiciary Act of 1789, the forerunner of section 518(a), the First Congress anticipated interbranch litigation. 108 S. Ct. at 1511-12 (Stevens, J., dissenting). But it then inferred from an early incident that the original understanding of the Act indicated that the Attorney General generally was not expected to represent the interests of Congress. Relying on the fact that in 1818 Attorney General Wirt had been paid extra for defending a legislative officer being sued by someone who had been held in contempt of Congress, the dissent concluded that Congress did not expect the Attorney General to represent its interests. *Id.* at 1512. In 1818, the Sergeant-at-Arms of the House of Representatives was sued for assault, battery, and false imprisonment for his action in arresting and detaining an individual, John Anderson, found by the House to be in contempt of Congress. By a resolution of the House, the Speaker of the House was directed "to employ such counsel, as he may think proper, to defend the suit brought by Anderson against the said Thomas Dunne, and the expenses be defrayed out of the contingent fund of the House." 33 ANNALS OF CONG., *supra* note 31, at 433, 434 (1818). The Speaker retained Attorney General Wirt who defended the legislative officer and ultimately convinced the Supreme Court that the House had the inherent power to find someone in contempt of Congress. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 233-34 (1821) (landmark case establishing Congress's contempt powers and its limitations). For his efforts, Wirt was paid \$500 beyond his stated salary. 2 AMERICAN STATE PAPERS, MISCELLANEOUS 932 (1834) (statement of sums paid to Attorney General Wirt, beyond his salary, for services not required of him by law). The dissent in *Providence Journal* concluded from this supplemental payment that Congress must have understood that representing the interests of Congress was not part of the Attorney General's responsibilities: "[Had] Congress read 'in which the United States shall be concerned' to extend beyond the interests of the Executive Branch, the Attorney General would already have been obliged to 'prosecute' or 'conduct' the suit in the Supreme Court, and no separate retainer agreement would have been necessary." *Providence Journal*, 108 S. Ct. at 1512 (Stevens, J., dissenting). This "history" plus "common sense" made it clear, according to the dissent, "that Congress never intended to grant the Executive Branch exclusive authority to control all litigation before this Court in which a coequal branch of government maintains a substantial, justiciable interest." *Id.* Thus, suits in which the "United States was interested" were only suits in which the Executive Branch was interested, the Attorney General only had control over those suits, and suits in which the Judiciary or Congress were interested did not require authorization of the Attorney General. *Id.*

Common sense may justify this result but history does not. This result certainly does not follow from the Wirt incident; there are several weak spots in the dissent's syllogism. First, Attorney General Wirt generally was paid extra for representing the United States in the lower courts. The Attorney General was not expected to participate in, and was not paid for his participation in, suits other than in the Supreme Court. Thus, for example, Wirt was paid \$1500 for trying pirates in Baltimore and \$1000 for prosecuting mail robbers. 2 AMERICAN STATE PAPERS, MISCELLANEOUS 932 (1834) (No. 254) (Report of Register of Treasury on special sums paid to William Wirt, Mar. 20, 1822); *id.* at 931 (message of President Monroe of April 6, 1822). Second, it is not clear that defending an

Echoes of the questions and concerns of the 1790s also resound today as the modern Congress attempts to rein in what it perceives to be an "imperial presidency." The issue today is a permutation of the problem that troubled the *Hayburn* Court. Instead of questioning whether the President *has* sufficiently authorized the Attorney General to take a particular action, today the inquiry more likely turns on whether the President *can or should* order the Attorney General to take a particular action. During the Nixon Presidency, for example, many argued that the President had too much control over the Attorney General and law enforcement—that law enforcement was too "political." Under particularly close scrutiny was the propriety of President Nixon's alleged involvement with prosecutorial decisions in the ITT case and the Watergate investigation.²¹⁵ As former Attorney General Elliott Richardson observed, there is a fine line between the "proper role of the political process in the shaping of legal policies and the perversion of the legal process by political pressures."²¹⁶ Believing that this line should be better defined, respected, and protected, commentators in the 1970s proposed a variety of ways to restructure the Office to insulate the Attorney General from excessive presidential control.²¹⁷ The proposals all raised

analogous tort suit brought against an executive official would have been seen as part of the duty of the Attorney General. It would not be surprising to discover that tort actions against individual government officials, not considered suits against the United States, were also not suits in which the United States was concerned, no matter to which branch of government the officials belonged. Therefore, the fact that Wirt was paid extra does not tell us that suits in which the United States is concerned were only those in which the Executive Branch was concerned.

In reality, the historical evidence is essentially silent on the question of the role of the Attorney General in the event of interbranch dispute. There is evidence that Congress intended that the requirement "interests of the United States" was to be broadly interpreted. But there is nothing to suggest that interbranch litigation was contemplated in the 1790s, or that Congress had a view as to where the Attorney General's loyalties should lie in the event of such a conflict. The historical evidence does not tell us whether to agree with the majority or the dissent. But ambiguity is no excuse for either the majority's ignorance or the dissent's distortion.

215. President Nixon allegedly directed Attorney General Kleindienst to have Solicitor General Erwin Griswold drop the government's appeal of an antitrust suit against ITT. When Griswold threatened to resign, a compromise settlement was reached. Impropriety was charged when it was learned that ITT had contributed \$400,000 to finance the 1972 Republican Convention. See E. RICHARDSON, *THE CREATIVE BALANCE* 27 (1976) (Nixon's call to Kleindienst "indefensible" without regard to alleged connection to political contribution); Edwards, *The Integrity of Criminal Prosecutions—Watergate Echoes Beyond the Shores of the United States*, in *RESHAPING THE CRIMINAL LAW* 364, 367-70 (P. Glazebrook ed. 1978); Griffith, *Putting Politics in its Place at the Justice Department*, *FORTUNE*, Oct. 1973, at 160, 228; Note, *Removing Politics From The Justice Department: Constitutional Problems with Institutional Reform*, 50 *N.Y.U. L. REV.* 366, 367 n.5 (1975).

216. E. RICHARDSON, *supra* note 215, at 27.

217. There were extensive debates considering a variety of proposals: (1) making the Department of Justice an independent agency with the Attorney General appointed for a fixed term of six years, S. 2803, 93d Cong., 1st Sess. § 2(a) (1973), reprinted in *Removing Politics from the Administration of Justice: Hearing on S.2803 and S. 2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 233-47 (1974) [hereinafter *Senate Hearings on*

the difficult constitutional question, not whether Congress or the President can *authorize* the Attorney General to take particular actions, but rather, whether Congress can *require* him or her to do so without regard for the President's wishes. The critical issue in most of the proposals centered on the extent to which Congress can make activities of the Attorney General independent of presidential control without unconstitutionally intruding on the President's duty to see that the laws are faithfully executed.

Ultimately, Congress decided to deal only with the issue of suspected wrongdoings by high officials in the Executive Branch. In Title VI of the Ethics in Government Act of 1978, Congress imposed special obligations on the Attorney General to investigate and prosecute suspected wrongdoings by high executive officials through the appointment of special prosecutors.²¹⁸ Briefly, the Act requires that the Attorney

Removing Politics from the Administration of Justice]; Note, *supra* note 215, at 369-70; (2) providing that a special prosecutor be appointed by the courts or by a congressional committee, either ad hoc or permanently, for the exclusive purpose of investigating allegations of wrongdoing within the executive branch, see *Senate Hearings on Removing Politics from the Administration of Justice, supra*, at 233-47 (statement of Lloyd Cutler); and (3) leaving the structure intact but imposing a duty on the Attorney General to appoint a special prosecutor to investigate such allegations when they arise, S. REP. NO. 95-170, 95th Cong., 1st Sess. 34-36 (1977). See also *Public Officials Integrity Act of 1977: Blind Trusts Hearings on S. 555 Before the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. (1978) (committee heard testimony recommending adoption of S. 555, which would establish standards for monitoring practices of qualified blind trusts by federal officials in order to avoid conflict of interest); *Hearings on S. 495 and S. 2036 Before the Senate Comm. on Government Operations, Part 2*, 94th Cong., 1st & 2d Sess. (1975-76) (trying to correct imperfections of the government system revealed by Watergate by, for example, creating a permanent office of Public Attorney); Relyea, *Circumstances Surrounding the Creation of the Office of the Attorney General and the Justice Department* (1972) (Congressional Research Service Report), reprinted in *Senate Hearings on Removing Politics from the Administration of Justice, supra*, at 420.

For a thoughtful discussion of the intractable problems involved in trying to separate "law" from "politics" in law enforcement, see D. MEADOR, *supra* note 5, at 46-68, and the symposium he led involving Griffin Bell, Erwin Griswold, Edward Levi, Wade McCree, Louis Oberdorfer, Ted Sorensen, Harold Tyler, William Webster, and others. Not surprisingly, Meador concludes that the goal, while superficially appealing, is both unattainable and undesirable. Meador argues that politics or policymaking is an inherent attribute of the Attorney General's responsibility as chief law enforcer. *Id.* at 48. Meador discusses several possible places to draw a line between acceptable policymaking and unacceptable political interference. Ultimately, however, he concludes that all these lines are flawed and only an institutional restructuring would substantially relieve the Attorney General of undesirable political influences. *Id.* at 64. For a discussion of the constitutionality of independent agencies generally, see *infra* note 259 and accompanying text.

218. Pub. L. No. 95-521, 92 Stat. 1867. The Act was first enacted by Congress in 1978, after five years of intensive study. It had a five-year sunset provision, *id.* §§ 598, 601, 92 Stat. at 1873, and has been reenacted twice, with amendments. See Act of Jan. 31, 1983, Pub. L. No. 97-409, 96 Stat. 2039 (1983); Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (codified as amended at 28 U.S.C. §§ 591-99 (Supp. V 1987)). The current version of the statute states that, with certain exceptions, it "shall cease to be effective five years after the date of the enactment of the Independent Counsel Reauthorization Act of 1987." 28 U.S.C. § 599. The legislative history of the law through 1987 is traced in AMERICAN LAW DIVISION, LIBRARY OF CON-

General, upon learning of alleged criminal action by designated executive officials,²¹⁹ investigate and, if he finds “reasonable grounds” for further investigation, request that a special court created by the Act (the “Special Division”) appoint a special prosecutor (now known as an independent counsel).²²⁰ Upon receipt of the Attorney General’s application, the Special Division is required to appoint an independent counsel and to define the counsel’s prosecutorial jurisdiction.²²¹ With respect to all inat-

GRESS, LEGISLATIVE HISTORY AND PURPOSES OF ENACTMENT OF THE INDEPENDENT COUNSEL (SPECIAL PROSECUTOR) PROVISIONS OF THE ETHICS IN GOVERNMENT ACT OF 1978 (J. Maskell ed. Mar. 4, 1987).

The Act was only one of several congressional efforts in the 1970s to deal with the “Imperial Presidency.” There are several “framework statutes” enacted during the 1970s and early 1980s in which officers statutorily independent of presidential control are given power to check potential abuse in the executive branch. *See, e.g.*, Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, tit. X, 88 Stat. 297, 332 (codified as amended at 2 U.S.C. § 687 (Supp. V 1987) (authorizing the Comptroller General to sue to challenge executive impoundments); General Accounting Office Act of 1980, Pub. L. No. 96-226, 94 Stat. 311 (authorizing the Comptroller General to sue to obtain information from executive departments); Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, *amended by* Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, 101 Stat. 754, 786 (authorizes inspectors general to investigate waste and fraud in executive agencies).

219. Section 591(b) sets forth the individuals covered by the Act and includes the President, Vice President, cabinet level officials, certain high ranking officials in the Executive Office of the President and the Justice Department, the Director and Deputy Director of the Central Intelligence Agency, the Commissioner of Internal Revenue, and certain officials involved in the President’s national campaign. Pursuant to section 591(c), the Attorney General also may conduct a preliminary investigation of persons not named in section 591(b) if an investigation by the Attorney General or the Department of Justice official “may result in a personal, financial, or political conflict of interest.” Section 591(a) provides that the statute applies to “any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.” 28 U.S.C. § 591 (Supp. V 1987). In what some saw as a vindictive good-bye, Attorney General Edwin Meese III announced as he left office in August 1988 that henceforth alleged criminal actions by members of Congress would be investigated and prosecuted by special prosecutors. Shenon, *Meese Takes Parting Slap at His Foes*, N. Y. TIMES, Aug. 13, 1988, at A6, col. 1. Meese’s successor, Attorney General Richard Thornburgh, indicated shortly thereafter that he had ordered an internal review to “determine whether the order [Meese had signed on his final day] should be enforced.” Shenon, *Meese Order on Prosecutors Is Reviewed by Thornburgh*, N. Y. Times, Aug. 24, 1988, at A14, col. 1.

220. The Special Division is a “division of the United States Court of Appeals for the District of Columbia,” consisting of three Circuit Court Judges or Justices appointed by the Chief Justice of the United States for two-year terms. 28 U.S.C. § 49 (1982 & Supp. V 1987). One of the judges must be a judge of the United States Court of Appeals for the District of Columbia Circuit, and no two judges from the same court may be named to the Special Division. *Id.*

If the Attorney General determines that there is no reasonable ground to believe that further investigation is warranted, he must so inform the Special Division and the matter ends; there is no judicial review of his decision. If, within 90 days, the Attorney General cannot determine whether or not there are reasonable grounds, he must apply to the Special Division for the appointment of an independent counsel. *Id.* § 592 (Supp. V 1987).

The title “special prosecutor” was changed to “independent counsel” in 1982. Ethics in Government Act of 1982, Pub. L. No. 97-409, § 2, 96 Stat. 2039, 2039.

221. The Attorney General’s application to the court “shall contain sufficient information to assist the [court] in selecting an independent counsel and in defining that independent counsel’s

ters within the independent counsel's jurisdiction, the Act grants the counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice."²²² Concurrently, once a matter has been referred to an independent counsel, the Attorney General and Justice Department must suspend all investigations and proceedings regarding that matter.²²³ Two provisions govern the counsel's tenure. First, the Attorney General has the authority to remove the independent counsel, but only "for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance" of his duties.²²⁴ In addition, when the counsel's investigation is substantially complete, he can terminate his office himself or the Special Division may do so (on its own motion or that of the Attorney General).²²⁵

Thus, the path Congress chose, while avoiding some of the constitutional dilemmas posed by the most controversial proposals, nonetheless managed to resurrect many of the complex constitutional questions first confronted in the 1790s. In particular, the Act raised the following questions: (1) whether Congress can put law enforcement responsibilities into the hands of someone neither appointed by the President nor easily controlled or removed by him; (2) whether Congress can order the Attorney General to conduct particular investigations, to circumscribe their scope, and to request the appointment of independent prosecutors; and (3) whether, and to what extent, extra-judicial activities may constitutionally be assigned to article III judges. Although a full-scale discussion of these issues is beyond the scope of this Article, it is both appropriate and in-

prosecutorial discretion." 28 U.S.C. § 592(d) (Supp. V 1987). The law also provides for application by a majority of the House or Senate Judiciary Committees. *Id.* § 592(c).

222. *Id.* § 594(a). The functions of the independent counsel include conducting grand jury proceedings, initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, and handling all aspects of any case, in the name of the United States. *Id.* § 594(a)(1)-(9). The independent counsel shall, "except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." *Id.* § 594(f).

223. *Id.* § 597(a). The Attorney General retains "direction or control as to those matters that specifically require the Attorney General's personal action under 2516 of title 18." *Id.* § 594(a).

224. *Id.* § 596(a)(1). Any such removal must be explained in a report, *id.* § 596(a)(2), and is judicially reviewable by means of a civil action filed in the United States District Court for the District of Columbia. *Id.* § 596(a)(3).

225. *Id.* § 596(b). The Special Division has the authority, not to remove the counsel, but to terminate the counsel's office if it finds that "the investigation of all matters within the prosecutorial jurisdiction of the independent counsel . . . have been completed." *Id.* § 596(b)(2).

The Act also provides for congressional oversight of the activities of independent counsels. *Id.* § 595(a).

formative to explore how the early experiences can inform our consideration of these issues today.

History is easily misused, as Professors Kurland, Freund, Miller and numerous others have noted.²²⁶ And the history recounted herein is no exception. Opponents of the Ethics in Government Act can argue, for example, that the experiences with the invalid pension cases suggest that the early Supreme Court would have found these independent counsels constitutionally troubling. Randolph's unsuccessful endeavors suggest that the Court assumed presidential authorization of Attorney General actions was required, with the Justices only differing over whether or not to presume the existence of such authorization. Thus, one might argue that the early Court believed the Constitution required presidential control over law enforcement generally, and that because special prosecutors are neither appointed, authorized, nor controlled by the President, such creatures would have been found suspect by that Court.

But such an argument misreads history. The *Hayburn* Court's desire for presidential control was less well-defined than this argument admits. As discussed, it remains unclear to what extent the Court's reluctance to let Randolph proceed stemmed from a concern with presidential authorization. Moreover, to the extent the concern was with presidential authorization, it is unclear whether that concern was based

226. Professor Kurland's indictment of the Court's use of history is unequivocal:

[I]f the past decisions of the Court are any guide, the Justices, like the lawyers and law clerks on whom they primarily depend for their history, make terrible historians. They tend to use history the way they use precedents, selecting the bits and pieces that support their conclusions. The capacity to read into history what they want to read out of history is no better demonstrated than in the most catastrophic decision the Court ever rendered: *Dred Scott v. Sanford*.

Kurland, *supra* note 17, at 740. As Professor Freund observed: "Under the sheep's covering of history lies the lion's skin of philosophy." P. FREUND, *THE SUPREME COURT OF THE UNITED STATES, ITS BUSINESS, PURPOSES, AND PERFORMANCE* 77 (1961); *see also* P. FREUND, *ON LAW AND JUSTICE* 68 (1968) ("Of history it may be said briefly that its usefulness varies inversely with the weight of the demands made on it."); C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 4 (1969) ("History can provide a magnificent smoke screen for the 'real' reasons behind the Court's decisions."); R. SCHUYLER, *THE CONSTITUTION OF THE UNITED STATES: AN HISTORICAL SURVEY OF ITS FORMATION* 92 (1923) ("Unfortunately a knowledge of American history has not yet been made a prerequisite for admission to the Supreme Court."); M. TUSHNET, *RED, WHITE, AND BLUE* 32-35 (1988) (describing several potential problems with the Court's use of history: history is often ambiguous, it often involves inferences from limited evidence; and it does not take into account social change); Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 155-56 (criticizing the Court for succumbing to "law office" history and noting that the Court, "in performing its self-assumed role as constitutional historian, has been, if not a naked king, no better than a very ragged one."). *See generally*, Bicentennial Constitutional and Legal History Symposium, 24 CALIF. W. L. REV. 221 (1987-88). One of the cases most criticized for its misuse of history is *Myers v. United States*, discussed *infra* at note 242. For a critical discussion of the case, *see, e.g.*, C. MILLER, *supra*, at 52-70; Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 361 (1927) (discussing the Chief Justice's use of history in *Myers v. United States*). The Court's inadequate use of history in *Providence Journal* is discussed *supra* at note 214.

on a reading of the Judiciary Act or the Constitution.²²⁷ If the reluctance derived from a reading of section 35 of the Judiciary Act, and not from the President's constitutional duty to take care that the laws are faithfully executed, the case tells us little about that Court's likely reaction to congressional action imposing restrictions. Most significantly, even if the 1790s Court was concerned with protecting the President's constitutional duty to enforce the laws, the Court was not confronting a deliberate, carefully explained effort by Congress to limit presidential control. It is therefore difficult to predict from the 1790s Court's general unease what it would have thought of deliberate, explicit congressional efforts to limit presidential control.

Conversely, supporters of the independent counsel may try to use the early legislative history to undermine their opponents' claim that law enforcement is a core executive function that must be controlled by the President. The early legislators do not appear to have been concerned with centralized law enforcement or with strong presidential control over the Attorney General. Recall that the first Congress explicitly provided for the President to have control over the Secretaries of Foreign Affairs and War, but made no comparable provision for control over the Attorney General.²²⁸ Indeed, the Attorney General was almost created as a judicial office, to be appointed by the Supreme Court and not the President.²²⁹ Moreover, in contrast to its treatment of the offices of the Secretaries of Foreign Affairs and War, the First Congress did not explicitly indicate whether the President could remove the Attorney General. Thus, it is tempting to use this legislative history to argue that the First Congress, composed of many who had been actively involved in drafting and ratifying the Constitution, would necessarily have found independent counsels constitutionally acceptable.²³⁰

But that also distorts the history. The lack of a statutory provision giving the President power to remove the Attorney General is ambiguous. As noted in Part I, there are several reasons why Congress might have omitted such a provision.²³¹ Similarly, the failure of the early Con-

227. See *supra* note 182.

228. See *supra* text accompanying notes 33-48.

229. See *supra* notes 58-61 and accompanying text.

230. See, e.g., Tiefer, *supra* note 54, at 91-96 (arguing that "[h]istorically the function of going to court lacked the degree of centralized direction associated with classic 'political' functions such as diplomatic and military affairs"; Treasury Department, with no "injunction of obedience to the President" had some control over litigation and, therefore, it was unlikely that giving the power to prosecute to someone outside the control of President was constitutionally infirm); cf. Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787, 809-10 (1987) (suggesting a distinction between presidential and executive functions such that Congress can give executive functions, but not presidential functions, to agencies that are autonomous from the President).

231. See *supra* text accompanying notes 64-67.

gress to provide explicitly for close presidential control over the Attorney General does not tell us the extent to which they believed they could limit that control. The history does suggest that law enforcement was not as "core" a presidential function as foreign affairs and war were, but it does not indicate the extent to which Congress can impose express limitations such as those imposed by the Ethics Act. The early legislators did not explicitly require presidential control of the Attorney General, but neither did they limit it.²³²

Nonetheless, this early history, used judiciously, can guide and inform modern analysis.²³³ In particular, the experiences in establishing the principal offices of government, including that of the Attorney General, are important for what they suggest about constitutional interpretation. The drafters of the Constitution established the framework of the

232. There is nothing in the early history that gives us the framers' view of congressional efforts to limit presidential control. In particular, it is hard to find support for Tiefert's assertion that the "Framers probably included the 'faithful execution' clause in the Constitution to limit, not expand, the President's power." Tiefert, *supra* note 54, at 90.

233. As Professor Kurland observed after criticizing the Court's use of history: "Of course history can and ought to be an important element in reading the Constitution's meaning, but only when it is an honest search for what the authors were debating and resolving and not merely another tool of partisan advocacy. And it is to be remembered that, at best, history is no more scientific than is law." Kurland, *supra* note 17, at 740. Similarly, Professor Kelly observed, after criticizing the Court's misuse of history:

None of the foregoing is a plea for the abandonment of the use of history by the Court. The essential nature of the judicial process . . . is too close to that of history-writing for the Court ever to abandon entirely either the use of history or the writing of history. But a historian might observe that the historical evidence seems to indicate the Court's history to be most dubious in those instances in which an appeal to the past has been recruited for activist purposes of interventionist political implications. It is on those occasions that the worst kind of law-office history makes its appearance in the Court's opinions.

Kelly, *supra* note 226, at 157.

While attempts to comprehend the original understanding of the framers can and should inform constitutional decisionmaking, it cannot be the last word. As Justice Stevens has recently reminded us: "We must learn as much as we can about the original intent of our lawmakers, but we must also remember that the learning is merely the beginning, not the end, of a dispassionate attempt to understand any rule of law." Stevens, *A Judge's Use of History*, 1989 WISC. L. REV. 223, 235. Similarly, as Professor Powell has observed:

Responsible, intellectually respectable history in my opinion is an inextricable and essential element in our discussions of the Republic's fundamental law. . . . [T]he contribution of history to constitutional discourse is not limited to providing our conversation with additional interlocutors. Concern for the historical meaning of the Constitution is necessary, not because the history itself has authority (as the intentionalist would have it) but because the text does. . . . But constitutional discourse . . . has not been, and . . . cannot become, a form of legal divination, in which originalist interpreters decry contemporary constitutional commands in the enigmatic extratextual sources of the founders' thought. In the end, treating the founders as oracles, as some intentionalists would have us do, results not in fidelity to the founders' intentions, but in an inability to understand their achievement.

Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 695, 697 (1987). For a useful discussion of the original understanding of constitutional interpretation and original intent, see Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). See also Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981).

government and created the major institutions of President, Congress, and Supreme Court. But they left the implementing details to Congress. They anticipated that Congress would create departments and imposed some requirements, such as the methods of appointment, the standards for impeachment, and the duty to provide the President with written opinions,²³⁴ but, for the most part, the specifics were left for Congress. And the First Congress's exercise of that power is instructive. In particular, we can learn from the early legislators' approach toward the question of presidential control of the various offices they created, an approach that was distinctively functional and pragmatic. Although it is unlikely that anyone in the 1790s anticipated precisely the questions raised by modern-day interbranch disputes, the framers and early legislators were sensitive to the difficult issues of control and approached them without rigid rules or formulas, an approach from which we can profitably learn.²³⁵

The early interpreters of the Constitution understood that control was not a binary "on-off" switch and that the several offices they were establishing warranted different degrees of presidential control. Accordingly, they utilized a variety of control mechanisms, including the powers of appointment, removal, and direction of discretionary authority. Although the framers decided that the Constitution should vest the executive power in a single President—not a "plural executive"—none of the early interpreters seemed to believe that that constitutional decision dictated that the President have the same degree of control over all execu-

234. U.S. CONST. art. II, §§ 2, 4.

235. Learning from these early legislative experiences may seem incongruous given that the function of legislators is different from judges. But there is no incongruity. These early legislators approached their task with a sense of responsibility that should inspire today's Congress. They believed their interpretations of the Constitution would have lasting significance, and they appear to have analyzed the questions the same way they would have if they were judges. As Madison observed, the decisions made by the First Congress would "become the permanent exposition of the Constitution," on which "will depend the genius and character of the whole Government." ANNALS OF CONG., *supra* note 31, at 495. Thus, it is not surprising that the Court frequently pays deference to the interpretations of these early legislators, many of whom were actively involved in the drafting and ratifying of the Constitution. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986) (actions by members of First Congress provide "contemporaneous and weighty evidence" about meaning of Constitution); *Myers v. United States*, 272 U.S. 52, 136 (1926) (decision of First Congress on removal is significant, not because congressional conclusions on constitutional issues is necessarily dispositive, but because this was decision by First Congress, on an issue of primary importance in organization of the government that was made within two years after the Constitutional Convention by many who had been members of the Convention); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 433 (1819) (observing that bill incorporating Bank of United States was passed not by unknowing legislature, but by an aware, informed early legislature composed of many who had been involved in Constitutional Convention); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 351 (1816) (upholding section 25 of First Judiciary Act in part because enacted by First Congress, which included many previously involved in Constitutional Convention).

tive officers. To be an effective head of state, the President needed maximum control over the Secretaries of War and Foreign Affairs and, accordingly, was given the power to appoint and remove these officers and to direct their activities. However, with the Attorney General where centralized control was apparently not deemed essential, the President was explicitly given only the power to appoint; the power to remove and to direct were left unspecified.

The distinctions made by the First Congress are significant not simply because they were *made*, but because they were made *pragmatically*. Although there was textual support in the Constitution for distinguishing some of these functions, the legislators' approach was more practical than doctrinaire. The President was to have close control over the Secretary of Foreign Affairs not because the Constitution said so, but because it would be "unreasonable" not to give him that control:

If we do not permit the President to exercise this power, surely this [government] will be the most unreasonable thing in nature. . . The argument of convenience is strong in favor of the President; for this man is an arm or an eye to him; he sees and writes his secret dispatches, he is an instrument over which the President ought to have complete command.²³⁶

Representative Vining went on to include the Secretary of War in the same category: "The Departments of Foreign Affairs and War are peculiarly within the powers of the President, and he must be responsible for them."²³⁷ By contrast, close presidential control over the treasury was undesirable, but also for pragmatic, not textual, reasons—to give the President control over both the military and the treasury would be so dangerous that "we might bid a farewell to the liberties of America forever."²³⁸

The Supreme Court could profitably learn from this pragmatic, non-doctrinaire approach to constitutional interpretation. In recent years, its separation of powers opinions have been notably rigid and formalistic. For example, in *Immigration and Naturalization Service v. Chadha*, the Court struck down the legislative veto as a violation of the bicameralism and presentment clauses of the Constitution, writing the opinion as if the text of the Constitution left no alternative.²³⁹ The Court purported not to rely on policy considerations. Similarly, in *Bowsher v. Synar*,²⁴⁰ the Court, writing what Justice White characterized as another "distress-

236. ANNALS OF CONG., *supra* note 31, at 511 (statement of Vining).

237. *Id.* at 512.

238. *Id.* at 531-32.

239. 462 U.S. 919, 946-59 (1983).

240. 478 U.S. 714 (1986).

ingly formalistic" opinion "even more misguided" than *Chadha*,²⁴¹ struck down an Act of Congress for effecting what it deemed an undue intrusion on the Executive Branch, without any consideration of how the relevant institutions really functioned.²⁴²

Formalistic opinions have the advantage of simplicity and apparent legitimacy; the judges appear not to be making policy or expressing their preferences, but are simply reading and abiding by the Constitution. These seemingly simple opinions are, however, deceptive. As Professor Elliott has perceptively observed: "The Court's literal approach does not really exclude policy judgments . . . it only drives them underground, where it is more difficult to scrutinize and criticize them."²⁴³

241. *Id.* at 759 (White, J., dissenting).

242. 478 U.S. 714. See also *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (badly divided Court held that allocation of certain functions to bankruptcy judges who did not have life tenure violated article III). Formalistic separation of powers opinions are not new. *Myers v. United States*, 272 U.S. 52 (1926), is a classic example of the triumph of the formal belief in a clear distinction between lawmaking on the one hand, and execution of the laws on the other. It is also a classic example of the Court's difficulty in using history. See, e.g., C. MILLER, *supra* note 226, at 52-70 (history related by Court was "poor history"); Corwin, *supra* note 226, at 361 (Court's contentions about basis of appointment process not historically sound).

Not all of the Court's recent separation of powers cases have been formalistic. In a case similar to *Northern Pipeline* and issued on the same day as *Bowsher*, the Court wrote a more functional opinion. In *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), the Court considered whether article III allowed Congress to authorize an administrative agency to adjudicate state law counterclaims or whether instead such claims could be brought only before article III courts. In upholding the statute, the Court indicated that *Schor*, in contrast to *Bowsher*, raised "no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question . . . [was] simply whether Congress impermissibly undermined, without appreciable expansion of its own powers, the role of the Judicial Branch." The Court concluded that it had not. *Id.* at 856-57.

243. Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 145. Commentators have tried to justify or rationalize the different approaches in the two lines of cases. Morton Rosenberg, for example, suggests that the more formal line of cases involve direct confrontations between the key constitutional actors—the President, Congress, or the Judiciary—and raise questions of congressional aggrandizement of power at the expense of a coordinate branch. On the other hand, Rosenberg notes, the cases in which a more functional approach was taken involve the key actors only indirectly—through the administrative agencies by which the will of the political actors was exercised. *Congressional Control of Agency Decision and Decisionmakers: The Unitary Executive Theory and Separation of Powers: Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 54-55 (1987) (report submitted by Morton Rosenberg, Congressional Research Service) [hereinafter *Congressional Control*]; see also Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 491, 504 (1987) ("Formalism is poorly suited to allocating adjudicative functions between courts and agencies...."); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

But one cannot overlook the obvious possibility that the Court's choice of approach is result-oriented. When the Court wants to uphold an act of Congress, it generally uses a functional approach; when it wants to strike down an act, it tends to use a formalistic analysis. For interesting discussions of the formalistic and functional approaches, see Bruff *supra*, at 505 ("Because formalism employs syllogistic reasoning, there is no obvious terminus to its logic, as *Myers* illustrates. Its

Fortunately, the Court's recent encounter with the Ethics in Government Act suggests that the Court may at last be moving to a less doctrinaire approach. On the last day of the 1987 Term, the Court, in a seven-to-one opinion in *Morrison v. Olson*,²⁴⁴ exhibited a more flexible approach to constitutional interpretation than has been evident in recent cases involving executive-legislative confrontations. The challenge in *Morrison* grew out of a conflict between Congress and the President. The House Judiciary Committee, investigating Theodore Olson's role as Assistant Attorney General in advising the Administrator of the Environmental Protection Agency to withhold documents from Congress, concluded that Olson had given false and misleading testimony to Congress.²⁴⁵ Pursuant to 28 U.S.C. § 592(c), the Chairman of the Judiciary

predictability is low because the Court's underlying rationale is obscure."); *Congressional Control*, *supra*, at 233 (formalistic approach, marching inexorably from the words or spirit of the Constitution, thus diminishes sense that it is the judges themselves, rather than the law, that is responsible for the decision; thus the approach "encourages acceptance and discourages retaliation"); Sunstein, *Constitutionalism After The New Deal*, 101 HARV. L. REV. 421, 493-94 (1987) (recent "sharp rise" of constitutional formalism in separation of powers cases—premised on belief that text of Constitution and intent of drafters are controlling and sometimes dispositive—that changed circumstances are irrelevant to constitutional outcomes and broader policy concerns should not play role in legal decisions, wrongfully ignores fact that there have been many changes since founding and that framers' intent cannot be mechanically applied); Strauss, *Formal and Functional Approaches to Separation of Powers Question—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987) (arguing that formalistic theory of separation of powers is unworkable, but that respect for framers' intent can be shown under functionalist theory); see also Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125; Elliott, *Regulating the Deficit After Bowsher v. Synar*, 4 YALE J. ON REG. 317 (1987); Shane, *Conventionalism in Constitutional Interpretation and the Place of Administrative Agencies*, 36 AM. U.L. REV. 573 (1987); Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779. For more charitable views of the formalistic approach, see Carter, *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U.L. REV. 719; Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L. J. 821 (1985); Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 55-58; Scalia, *Historical Anomalies in Administrative Law*, 1985 YEARBOOK, SUPREME COURT HIST. SOC'Y. See generally Symposium, *The American Constitutional Tradition of Shared and Separated Powers*, 30 WILLIAM AND MARY L. REV. 209, 209-432 (1989).

244. 108 S. Ct. 2597 (1988).

245. *Id.* at 2599. This incident between Congress and the EPA Administrator, Anne Gorsuch Burford, raised another interesting question concerning congressional efforts to control the Attorney General and law enforcement. When Burford refused to turn over the documents the House had requested, the House cited her for contempt of Congress and, pursuant to 2 U.S.C. § 194 (1982), ordered the United States Attorney to prosecute her. H.R. Res. 632, 97th Cong., 2d Sess., 149 CONG. REC. H10,061. Notwithstanding the apparently mandatory nature of the statute, the U.S. Attorney refused. Instead, he and the Attorney General filed suit in the name of the United States against the House of Representatives, seeking a declaratory judgment that the documents were privileged. *United States v. House of Representatives*, 556 F. Supp. 150, 151 (D.D.C. 1983). But the district court, urging the parties to reach a compromise on their own, refused to reach the merits. *Id.* at 153. Subsequently, the House reached an agreement with the EPA and the documents were made available. Thus, the question of Congress's authority to order the U.S. Attorney to prosecute for contempt of Congress was left unresolved. For interesting discussions of the Burford incident,

Committee requested that the Attorney General seek the appointment of an independent counsel to investigate the allegations.²⁴⁶ Attorney General Meese performed the required investigation and requested that the Special Division appoint a special prosecutor.²⁴⁷ When Alexia Morrison was appointed and sought documents from Olson, Olson challenged the constitutionality of the Act under which she was appointed and *Morrison v. Olson* moved onto the Supreme Court's docket.²⁴⁸

The Court, in an opinion by Chief Justice Rehnquist, rejected all of Olson's objections.²⁴⁹ First, the Court found that Congress's vesting the power to appoint the special prosecutor in the judiciary did not violate the Appointments Clause.²⁵⁰ The Court found it unnecessary to decide exactly where the line between "inferior" and "principal" officers lies because the independent counsel clearly "falls on the 'inferior officer' side

see Brand & Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U.L. REV. 71 (1986); Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461 (1987); Comment, *supra* note 5, at 367; Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333.

246. Olson had testified before a House subcommittee on March 10, 1983. In 1985, the majority of members sitting on the Judiciary Committee published a lengthy report that suggested Olson had perjured himself. H.R. REP. NO. 435, 99th Cong., 1st Sess. 612-40 (1985).

247. REPORT OF ATTORNEY GENERAL PURSUANT TO 28 U.S.C. § 592(c)(1) REGARDING ALLEGATIONS AGAINST DEPARTMENT OF JUSTICE OFFICIALS in United States House Judiciary Committee Report 22 (Apr. 10, 1986), filed in No. 86-1 (C.A.D.C.) [hereinafter ATTORNEY GENERAL REPORT]. The Judiciary Committee also had requested the appointment of an independent counsel to investigate the allegation that the Deputy Attorney General, Edward Schmults, and the Assistant Attorney General for the Land and Natural Resources Division, Carol Dinkins, had wrongfully withheld documents from the Committee. But Attorney General Meese declined to request the appointment of an independent counsel to investigate those charges. ATTORNEY GENERAL REPORT at 45.

248. The Special Division initially appointed James McKay who shortly after his appointment resigned. See *Morrison v. Olson*, 108 S. Ct. 2597 (1988). Upon McKay's resignation, the Special Division appointed Alexia Morrison to investigate "whether the testimony of . . . Olson and his revision of such testimony . . . violated . . . federal law." *Id.* at 2606. When the grand jury subpoenaed Olson, Olson moved to quash, claiming *inter alia*, that the independent counsel provisions of the Act were unconstitutional. Two other Justice Department officials, Schmults and Dinkins, also were subpoenaed and moved with Olson to quash. *Id.* at 2607. The District Court denied the motion and upheld the Act. *In re Sealed Case*, 665 F. Supp. 56 (D.D.C. 1987), *rev'd*, 838 F.2d 476 (D.C. Cir. 1988). The Court of Appeals for the District of Columbia Circuit, voting two to one, held the Act unconstitutional and reversed. On February 22, 1988, the Supreme Court noted probable jurisdiction. 108 S. Ct. 1010 (1988).

249. *Morrison*, 108 S. Ct. at 2597.

250. U.S. CONST. art. II, § 2, cl. 2 ("[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointments of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

of that line.”²⁵¹ Therefore, an independent counsel does not have to be appointed by the President, with the advice and consent of the Senate, and instead may be appointed by a court.²⁵²

Second, the Court considered whether the various powers vested in the Special Division—including the power to appoint independent counsels, define their jurisdictions, and terminate their offices—violated the limits on judicial power contained in article III. Relying specifically on *Hayburn’s Case*, the Court noted that “[a]s a general rule, . . . executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution.”²⁵³ This limitation, said the Court, helped both to ensure the independence of the Judicial Branch and to prevent the Judiciary from encroaching into areas reserved for the other branches.²⁵⁴ Although somewhat troubled by the Special Division’s ability to terminate the counsel’s office on its own motion, the Court nevertheless concluded that the various functions given to the Special Division did not undermine the independence of the Judiciary or significantly encroach on areas reserved for the Executive Branch. Thus, the Court concluded, the duties assigned to the Special Division could constitutionally be assigned to an article III court.²⁵⁵

251. *Morrison*, 108 S. Ct. at 2608. In reaching this conclusion, the Court relied on the fact that the independent counsel is subject to removal by an executive branch official, the independent counsel’s role is essentially limited to investigation and prosecution and does not include formulation of government policy, and the independent counsel’s office is limited in both jurisdiction and tenure.

252. The Court held that there was nothing “incongruous” in allowing the judiciary to appoint these independent counsels and the interbranch appointment thus did not run afoul of the Appointments Clause. *Id.* at 2611.

253. *Id.* at 2612 (quoting *Buckley v. Valeo*, 424 U.S. 1, 123 (1975); citing *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1852) and *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792)).

254. 108 S. Ct. at 2612.

255. *Id.* Once it was established that article II permitted courts to appoint the independent counsel, there could be no article III objection to the court’s exercising such power. Similarly, the Court reasoned, the power to define the prosecutor’s jurisdiction was incidental to the article II appointment power, at least so long as the jurisdiction was demonstrably related to the factual circumstances that gave rise to the Attorney General’s request for the appointment. Most of the other functions assigned the Special Division were, in the Court’s view, essentially passive or ministerial in nature, analogous to the functions regularly performed by the judiciary, and thus not an encroachment on the executive power. *Id.* at 2613-14. The only factor the Court found troubling was the Division’s power to terminate the office of independent counsel. Olson had argued that the power to terminate, especially on its own motion, required the Division to monitor the prosecutor’s progress and to decide whether the job was “substantially completed” and that this was an “administrative” and not a judicial function. But the Court narrowly construed this provision as authorizing the Division to terminate the office only in the unusual circumstance where the duties of the counsel are truly completed but the counsel is unwilling to acknowledge the fact. *Id.* at 2614. Based on such a construction of the provision, the Court determined that the power to terminate did not pose a significant threat of judicial intrusion upon executive power or upon the prosecutorial discretion of the independent counsel. Moreover, since the Act gave the Division no power to review the actions of the independent counsel and prevented members of the Division from participating in any judicial proceeding concerning a matter involving the counsel, the Court concluded that the Act posed no

Finally, the Court addressed the broad separation of powers questions. First, the Court asked whether the Act, in restricting the Attorney General's power to remove the independent counsel only for "good cause," impermissibly interfered with the President's exercise of his constitutionally appointed functions. Second, the Court inquired whether the Act, taken as a whole, violated the separation of powers by reducing the President's ability to control the prosecutorial powers wielded by the independent counsel.

Looking initially only at the restrictions on removal, the Court acknowledged that the functions performed by the independent counsel are "executive" in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.²⁵⁶ But that alone did not render unconstitutional the limitations on the President's ability to remove the independent counsel. The "real question," said the Court, was "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."²⁵⁷ The Court concluded that they did not. The power to remove had not been usurped by Congress; it still remained in the hands of the Executive. In the Court's view, these restrictions on the President's removal power, deemed "essential"²⁵⁸ by Congress, did not impede the President's ability to perform his responsibilities:

Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President. . . . We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.²⁵⁹

threat to the "impartial and independent federal adjudication of claims within the judicial power of the United States.'" *Id.* at 2615 (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986)).

256. *Morrison*, 108 S. Ct. at 2619.

257. *Id.*

258. *Id.* at 2620.

259. *Id.* at 2619-20. In reaching this conclusion, the Court appeared to repudiate the view expressed in *Myers* and repeated in *Humphrey's Executor* that the question of whether Congress could impose a "for cause" restriction on the President's ability to remove an official depended on whether the official was "purely executive" as opposed to "quasi-legislative" or "quasi-judicial." Noting that drawing such lines is very difficult, the *Morrison* Court stated:

We undoubtedly did rely on the terms "quasi-legislative" and "quasi-judicial" to distinguish the officials involved in *Humphrey's Executor* and *Wiener* from those in *Myers*, but our present considered view is that the determination of whether the Constitution allows Congress to impose a "good-cause"-type restriction on the President's power cannot be made to turn on whether or not that official is classified as "purely executive." The analysis contained in our removal cases is designed not to define rigid categories of those officials

Finally, the Court found that the Act as a whole did not unduly interfere with the role of the Executive Branch. In the view of the Court, this was not an attempt by Congress to increase its own powers at the expense of the Executive Branch. Nor did the Act “work any *judicial* usurpation of properly executive functions.”²⁶⁰ Moreover, it did not “impermissibly undermine [] the powers of the Executive Branch” or “disrupt [] the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions.”²⁶¹ The Court acknowledged that the Act reduced the amount of control that the Attorney General and the President can exercise over the investigation and prosecution of a certain class of criminal activity. Nevertheless, since the Act gave the Attorney General some ability to supervise the prosecutorial powers wielded by the independent counsel,²⁶² the President had “some degree of control . . . sufficient” to “ensure that the President is able to perform his constitutionally assigned duties.”²⁶³

Chief Justice Rehnquist’s notably pragmatic opinion for the majority inspired a long, angry dissent by Justice Scalia. In Justice Scalia’s view, the Act was a flagrant violation of the fundamental principles of separation of powers, particularly the provision in article II that the “executive Power shall be vested in a President of the United States of America.”²⁶⁴ Justice Scalia’s syllogism was simple: article II by its terms invests the executive power in a unitary president. The majority had conceded both that the prosecution of federal criminal cases was part of the executive power and that the Act deprived the President of exclusive control over the exercise of that power. Therefore, according to the dissent, the Act must unconstitutionally invade powers that are reserved

who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President’s exercise of the “executive power” and his constitutional duty to “take care that the laws be faithfully executed” under Article II.

108 S. Ct. at 2618. Thus, the Court suggested, the constitutionality of “good cause” removal restrictions, frequently used by Congress with the so-called “independent agencies,” will be assessed by a functional approach. If Congress believes such a limitation is “essential” and it does not “impede the President’s ability to perform his constitutional duty,” the limitation is constitutional. *Id.* at 2619-20.

260. *Id.* at 2621.

261. *Id.* (quoting *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 856 (1986) and *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

262. The Attorney General can decide whether to request an appointment and his decision not to request one is unreviewable. Moreover, once an independent counsel is appointed, the Attorney General has the power to remove him or her for good cause. See *supra* notes 220-24 and accompanying text.

263. 108 S. Ct. at 2621-22.

264. U.S. CONST. art II, § 1.

for the President. There was no room for the functional balancing approach used by the majority:

[I]t is ultimately irrelevant *how much* the statute reduces presidential control. The case is over when the Court acknowledges . . . that . . . the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity. . . . It is not for us to determine . . . how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are.²⁶⁵

Once these clear lines are violated, the dissent argued, there is no logical stopping point to prevent Congress from totally subverting executive authority. Moreover, charged the dissent, the majority had not even tried to provide a standard to determine what would constitute impermissible interference.²⁶⁶

The opinions of the majority and the dissent dramatically illustrate two contrasting styles of constitutional analysis. Chief Justice Rehnquist's approach to the problem posed by the Ethics in Government Act is flexible and pragmatic, recognizing that there are degrees of control:

Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be ter-

265. 108 S. Ct. at 2628 (Scalia, J., dissenting).

266. Justice Scalia's attack was intense:

The most amazing feature of the Court's opinion is that it does not even purport to give an answer. It simply *announces*, with no analysis, that the ability to control the decision whether to investigate and prosecute the President's closest advisors, and indeed the President himself, is not 'so central to the functioning of the Executive Branch' as to be constitutionally required to be within the President's control.

Today's decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law. It extends into the very heart of our most significant constitutional function, the "totality of the circumstances" mode of analysis that this Court has in recent years become fond of. Taking all things into account, we conclude that the power taken away from the President here is not really *too* much. The next time executive power is assigned to someone other than the President we may conclude, taking all things into account, that it *is* too much. That opinion, like this one, will not be confined by any rule. We will describe, as we have today (though I hope more accurately) the effects of the provision in question, and will authoritatively announce: "The President's need to control the exercise of the [subject officer's] discretion *is* so central to the functioning of the Executive Branch as to require complete control." This is not analysis; it is ad hoc judgment. And it fails to explain why it is not true that—as the text of the Constitution seems to require, as the Founders seemed to expect, and as our past cases have uniformly assumed—all purely executive power must be under the control of the President.

Id. at 2629, 2641.

While Justice Scalia believed these separation of powers concerns were themselves sufficient to doom the statute, he also found the particular appointment and removal provisions constitutionally infirm. In his view, the independent counsel is not an "inferior" officer and thus must be appointed by the President with the advice and consent of the Senate. *Id.* at 2635. Moreover, Congress cannot constitutionally restrict the President's ability to remove a law enforcement officer. *Id.* at 2625-31.

minable at will by the President.²⁶⁷

The Act gives the President a “degree of control” that, according to the majority, is “sufficient.”²⁶⁸

Justice Scalia’s opinion, by contrast, is more formalistic and rigid. He attempts to ground his conclusion in what he claims to be the “plain language” of the Constitution and the “framers’ intent.” But, notwithstanding his impassioned rhetoric, the constitutional text and history are far less clear than Justice Scalia asserts. That the executive power is vested in a unitary executive does not require, despite Scalia’s repeated assertions to the contrary,²⁶⁹ that the President must have total control over all aspects of the work of all officers involved in executive functions. As the First Congress appreciated, different executive functions require different degrees of presidential control. Although one may legitimately criticize the *Morrison* majority for failing to establish normative standards and adequately justify its ultimate conclusions, the dissent is far too rigid and doctrinaire. Justice Scalia’s opinion avoids the critical flaw of many formalistic, text-based opinions that rely more on assertions than on logic and policy. He at least discusses the purposes behind the framers’ effort to separate the powers, but he oversimplifies the constitutional analysis and ignores the importance the framers attributed to checks and balances. It is true, as Justice Scalia observes, that the framers separated powers to avoid undue accumulation of power in one person or institution, but they did not want the airtight compartmentalization that Scalia advocates. Indeed, it is worth noting that the phrase “separation of powers,” with which Justice Scalia skewers this Act, appears nowhere in the Constitution.²⁷⁰ The drafters created a system of

267. *Id.* at 2619.

268. *Id.* at 2621-22.

269. The dissent quotes the provision in article II that vests the executive power in the President no fewer than five times. See *id.* at 2622, 2623, 2626, 2629, 2641 (Scalia, J., dissenting). Judge Silberman’s majority opinion for the D.C. Circuit, which struck down the law, was also notably formalistic. *In re Sealed Case*, 838 F.2d 476, 481 (D.C. Cir. 1988).

270. In fact, it may well be that it is the the lack of such a phrase that impels Justice Scalia to quote so often the statement that the executive power is vested in the President.

It is interesting to note that the attempt in 1789 to add an explicit “separation of powers” provision in 1789 failed. Responding to those concerned with the lack of a separation of powers provision in the Constitution, Madison proposed a new article VII to precede the existing article VII (which would then have been renumbered):

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

12 THE PAPERS OF JAMES MADISON 202 (1979). Although the House of Representatives agreed to this amendment, the Senate rejected the proposal. 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1123, 1150 (1971).

checks and balances—a concept that contemplates and embraces the overlap of powers and thus exists in tension with the idea of separation of powers. The dissent's preference for brightline boundaries and pigeon-holes underestimates this important aspect of the framers' scheme.

Justice Scalia's criticism of the majority's pragmatic approach fails to recognize its distinguished pedigree. As the First Congress recognized, the Constitution offers Congress more flexibility than would exist under the simplistic rigidity of a binary, all-or-none, model. The need for presidential control varies with different functions; it is necessary to look at the specifics of an office and its responsibilities to determine the appropriate "degree of control" the President must have. For some functions such as foreign affairs and defense, that need is unquestionable and makes it difficult to imagine a convincing reason Congress could offer for not providing the President with all the requisite mechanisms to control the officers in charge of such functions.²⁷¹ By contrast, with matters such as the budget and law enforcement, the need for presidential control is less paramount and congressional power is correspondingly greater. While our system is not as neat and simple as the model that Justice Scalia advocates, it has the virtues of flexibility and practicality, attributes that were not overlooked by the framers and should not be underestimated today.²⁷²

271. See *supra* notes 48, 236-38.

272. The dissent's assumption that the text is clear fails to appreciate what Madison observed even before the Constitution was ratified:

Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.

THE FEDERALIST NO. 37, at 179 (J. Madison) (M. Beloff ed. 1987). As discussed earlier, Madison knew that experience would and should play a vital role in constitutional interpretation. See *supra* text accompanying note 43; see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("The Constitution is a framework for government. . . . It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.")

As the majority appropriately notes, in criticizing Justice Scalia's belief that the text dictates his conclusion:

This rigid demarcation—a demarcation incapable of being altered by law in the slightest degree, and applicable to tens of thousands of holders of offices neither known nor foreseen by the framers—depends upon an extrapolation from general constitutional language which we think is more than the text will bear.

108 S. Ct. at 2618 n.29.

Professor Elliott has aptly criticized the "literalists" for their "slavish obeisance to the framers' intentions on the specifics of governmental organization and structures." Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 1989 G.W.L. REV. 500, 511. As he laments,

The courts in separation of powers cases are like a primitive tribal priesthood that still follows the forms of an ancient religion long after the true meaning of its rituals has been forgotten. In paying literal, even slavish, obeisance to the framers' intentions on the specif-

Whether the Court will continue with the more pragmatic, functional approach of the *Morrison* majority in the future is difficult to predict. The pressure to uphold the Ethics in Government Act was not inconsiderable. This was not a blunderbuss effort with Congress's running roughshod over constitutional concerns. Rather, as the majority understood, Congress had confronted a difficult problem and conscientiously tried to forge a narrow solution that minimized the threat to separation of powers.²⁷³ Moreover, the challenge to the Act arose in a politically charged atmosphere in which invalidation would have endangered several highly publicized, ongoing investigations. In a less charged atmosphere, the Court may be more sympathetic to claims that limitations on presidential power unconstitutionally invade the Executive Branch and be more formalistic and rigid in its approach. It is no accident that historically when the Court upholds Acts of Congress that are alleged to infringe on executive prerogatives, it generally uses a flexible, pragmatic approach, whereas in those instances when the Court strikes down such Acts, its analysis tends to be more formalistic.²⁷⁴ Nevertheless, there is room to hope that the Court will appreciate the distinguished pedigree and utility of the functional approach and will utilize it without regard to the particular outcome.²⁷⁵

Indeed, just recently the Supreme Court again used such an approach to decide a separation of powers issue remarkably similar to the constitutional question underlying the Invalid Pensions Act of 1792—that is, whether Congress can assign nonjudicial activities to article III judges. In *United States v. Mistretta*,²⁷⁶ the Court upheld the constitutionality of the Sentencing Reform Act of 1984.²⁷⁷ In that Act, Congress, seeking to reduce disparities in criminal sentencing, created the United States Sentencing Commission and authorized it to establish mandatory sentencing guidelines for defendants convicted of federal crimes. *Mistretta* and numerous other federal defendants challenged the

ics of governmental organization and structure, the courts violate the deeper, more fundamental spirit of the framers' vision that power should be divided and balanced creatively to prevent misuse.

Id.

273. Congress, acutely aware of constitutional concerns, had spent years devising a solution and deliberately incorporated a sunset provision to ensure that it return to reevaluate the scheme, and, in fact, did continue to fine-tune the procedures. See *supra* text accompanying notes 216-18.

274. See *supra* note 242.

275. *Morrison's* pragmatic test has already influenced the lower courts. See e.g., *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 682 (10th Cir. 1988) (relying on *Morrison* to conclude that the Security and Exchange Commission's power to commence civil enforcement actions in federal court does not violate separation of powers), *cert. denied*, 109 S. Ct. 1172 (1989).

276. 109 S. Ct. 647 (1989).

277. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 28 U.S.C. §§ 941-998 (Supp. V 1987), and in scattered sections of 18 U.S.C.).

constitutionality of the Commission, contending *inter alia* that the Commission could not constitutionally have both article III judges and nonjudges on it, and that it could not be placed in the Judicial Branch.²⁷⁸ In an eight-to-one opinion written by Justice Blackmun, the Court rejected Mistretta's arguments. The case undoubtedly will be significant for several reasons, but two of those reasons are particularly relevant here. In upholding Congress's creation, the Court continued the functional approach of *Morrison v. Olson* and made extensive, albeit again imperfect, use of history, including the 1792 Invalid Pensions Act and the litigation it had spawned.²⁷⁹

The Court began its analysis of Mistretta's contention that the Commission's composition and location in the Judicial Branch undermined the principle of separation of powers with an important declaration of principle: "When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should do so only for the most compelling constitutional reasons."²⁸⁰ Acknowledging that this Commission was a "peculiar institution" and that Mistretta's constitutional concerns were "serious," the Court nonetheless concluded that "upon close inspection"

278. After failing to convince the District Court for the Western District of Missouri that the guidelines were unconstitutional, *United States v. Johnson*, 682 F. Supp. 1033, 1035 (W.D. Mo. 1988), Mistretta appealed to the United States Court of Appeals for the Eighth Circuit. Because there were so many challenges to the Act and so many conflicting decisions nationwide, Mistretta and the United States were able to persuade the Supreme Court to grant the petition for certiorari before judgment in the Court of Appeals. *Mistretta*, 108 S. Ct. 2818 (1988).

279. One of the other interesting features of the case that will be important was the Court's emphatic rejection of Mistretta's argument that Congress had unconstitutionally delegated its legislative powers. Even Justice Scalia, an ardent believer that "the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system," acknowledged that it is not one that is readily enforceable by the judiciary:

Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree. As Chief Justice Taft expressed the point . . . the limits of delegation "must be fixed according to common sense and the inherent necessities of the governmental co-ordination." Since Congress is no less endowed with common sense than we are, and better equipped to inform itself of the "necessities" of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political, . . . it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law. . . . What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a "public interest" standard?

Mistretta, 109 S. Ct. at 677 (Scalia, J., dissenting, but concurring with the majority in rejecting Mistretta's nondelegation argument).

280. *Id.* at 661 (quoting Justice Stevens' concurring opinion in *Bowsher v. Synar*, 478 U.S. 714, 736 (1986)).

such concerns did not compel the Court to invalidate "Congress's considered scheme for resolving the seemingly intractable dilemma of excessive disparity in criminal sentencing."²⁸¹

In examining whether Congress's decision to locate the Commission in the Judicial Branch undermined the integrity of the judiciary, the Court clearly was influenced by the complexity of the problem and the careful consideration Congress had given to alternative solutions. Emphasizing the fact that sentencing judgments have historically been made by the Judicial Branch and that rulemaking by the judiciary in this arena is not inappropriate, the Court concluded that "Congress's considered decision to combine these functions in an independent Sentencing Commission and to locate that Commission within the Judicial Branch does not violate the principle of separation of powers."²⁸²

The Court's consideration of *Mistretta's* challenge to the composition of the Commission—whether Congress's requirement that article III judges share their authority on the Commission with nonjudges undermined the integrity of the Judicial Branch—was notably pragmatic and extensively informed by history. As the Court observed, the early experience with the Invalid Pensions Act of 1792 suggested that the early judges distinguished what they could do as individuals from their actions as members of a court. The eighteenth-century judges who were concerned with Congress's assigning to the circuit courts tasks that seemed more administrative than judicial were willing to construe the statute as an invitation to sit as commissioners.²⁸³ But the *Mistretta* Court's citation of *Yale Todd* as support for the proposition that Congress "may authorize a federal judge, in an individual capacity, to perform an executive function without violating the separation of powers"²⁸⁴ misreads that case. The *Yale Todd* Court decided that Todd had to repay the United States the pension he had been awarded by the judges sitting as commissioners. As discussed earlier, one cannot tell from this result whether this was a statutory or a constitutional conclusion—whether the judges had erred in construing the statute to invite them to sit as commissioners or whether they could not constitutionally perform such a task no matter what the statute said. But, under either interpretation, *Yale Todd* does not support the proposition for which the *Mistretta* Court cited it. To

281. *Id.*

282. *Id.* at 667.

283. *Id.* at 670. The *Mistretta* Court stated that it was only the New York circuit that so construed the Act and that the other two circuits had not expressed a "definitive view" on the matter. *Id.* But, as discussed earlier, see *supra* text accompanying note 111-12, Justice Iredell and Judge Sitgreaves, sitting on the Circuit Court for the District of North Carolina, also decided to process applications as commissioners. See *supra* text accompanying notes 111-12.

284. *Mistretta*, 109 S. Ct. at 671.

the extent *Yale Todd* was a statutory decision, it tells us very little about Congress's power to authorize a federal judge to perform an administrative function in his or her individual capacity. And if it was a constitutional decision, it suggests the opposite of what the *Mistretta* Court cited it for; if it was a constitutional decision, *Yale Todd* suggests that federal judges may not be able to perform administrative tasks.²⁸⁵

But notwithstanding this shortcoming in the Court's historical analysis, its approach to this history is otherwise commendable—a welcome advance from the historical illiteracy exhibited in the *Providence Journal* decision. In fact, the *Mistretta* Court could have made more of this history. As discussed in Part II, after struggling to construe the Pension Act to be an invitation to judges as individuals as opposed to a command to a court, Justice Iredell indicated that, notwithstanding the serious doubts he had previously expressed, he would accept the invitation because doing so was in no “manner inconsistent with [his] Judicial Duty.”²⁸⁶ In a strikingly similar passage that could have been strengthened by a reference to Iredell's memo, the *Mistretta* Court, after concluding that the Constitution does not absolutely bar Congress from giving federal judges nonjudicial tasks, cautioned:

This is not to suggest . . . that every kind of extrajudicial service under every circumstance necessarily accords with the Constitution. That the Constitution does not absolutely prohibit a federal judge from assuming extrajudicial duties does not mean that every extrajudicial service would be compatible with, or appropriate to, continuing service on the bench; nor does it mean that Congress may require a federal judge to assume extrajudicial duties as long as the judge is assigned those duties in an individual, not judicial, capacity. The ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch.²⁸⁷

The *Mistretta* Court, like Justice Iredell, then concluded, “not without difficulty,” that this particular assignment did not violate that norm:

[W]e conclude that the participation of federal judges on the Sentencing Commission does not threaten, either in fact or in appearance, the impartiality of the Judicial Branch. We are drawn to this conclusion by one paramount consideration: that the Sentencing Commission is devoted exclusively to the development of rules to rationalize a process that has been performed exclusively by the Judicial Branch. . . . [T]he Constitution does not prohibit Congress from enlisting federal judges to present a uniquely judicial view on the uniquely judicial subject of sentencing. In this case, at least, where the subject lies so close to the heart of the judicial function and where the purposes of the Commission are not inherently partisan, such enlistment is not coer-

285. See *supra* notes 170-72.

286. See *supra* notes 111-12 and accompanying text.

287. *Mistretta*, 109 S. Ct. at 671.

cion or co-optation, but merely assurance of judicial participation.²⁸⁸

Thus, notwithstanding another impassioned one-man dissent by Justice Scalia,²⁸⁹ eight members of the Court, in an approach reminiscent of the functional, nondoctrinaire approach of the early legislators and judges, as well as of the *Morrison* Court, clearly saw the Constitution not as a rigid document with fixed pigeonholes, but as a flexible, structured blueprint to guide Congress and the President in establishing workable but constrained institutions for governing. And the *Mistretta* Court, like the *Morrison* Court, was careful to write a narrow opinion that emphasized the intractability and complexity of the problem Congress was addressing, the sensitivity Congress had exhibited toward separation of powers concerns, and the care with which Congress had crafted a solution. Neither opinion necessarily signals a hands-off approach or unrestrained deference by the judiciary.²⁹⁰ The Constitution, and therefore the Court, gives Congress room to experiment, but only if Congress uses the freedom conscientiously.²⁹¹

288. *Id.* at 673.

289. The majority's pragmatic, flexible approach to the separation of powers objection once again angered Justice Scalia:

Today's decision follows the regrettable tendency of our recent separation-of-powers jurisprudence . . . to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is too much to be determined, case-by-case, by this Court. The Constitution is not that. Rather, as its name suggests, it is a prescribed structure, a framework, for the conduct of government. In designing that structure, the framers *themselves* considered how much commingling was, in the generality of things, acceptable, and set forth their conclusions in the document. . . . Consideration of the degree of commingling that a particular disposition produces may be appropriate at the margins, where the outline of the framework itself is not clear; but it seems to me far from a marginal question whether our constitutional structure allows for a body which is not the Congress, and yet exercises no governmental powers except the making of rules that have the effect of laws.

Id. at 682-83 (Scalia, J., dissenting) (citations omitted). What Justice Scalia means by his suggested willingness to consider some degree of commingling "at the margin" is unclear. While it might suggest tolerance of the majority's instrumentalist balancing approach in some cases "at the margin," it seems clear from Justice Scalia's tone that he is still generally opposed to the majority's approach.

290. For an argument in favor of a hands-off approach, see J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 263 (1980) ("Ultimate constitutional issues of whether executive action (or inaction) violates the prerogatives of Congress or whether legislative action (or inaction) transgresses the realm of the President should be held to be nonjusticiable, their final resolution to be remitted to the interplay of the national political process.").

291. It is noteworthy that with both the legislative veto and the automatic budget-cutting device of the Gramm-Rudman-Hollings Act, Congress exercised very little restraint and engaged in virtually none of the constitutional fine-tuning that is evident in both the Ethics in Government Act and the Sentencing Reform Act.

CONCLUSION

Perhaps the most striking aspects of the Supreme Court's recent encounters with the Office of Attorney General in the *Providence Journal* and *Morrison* cases are the antiquity of the issues addressed and the number of uncertainties left unresolved. Neither feature should surprise us. As this retrospective reveals, these uncertainties derive from inherent structural ambiguities apparent from the early days of the Republic. To the extent the frustrations encountered by the early Attorneys General were caused by fears along the vertical dimension of separation of powers—a reluctance to create a strong federal government with strong federal law enforcement that might threaten state autonomy—there has been a reduction in some of the frustration, if not the ambivalence. Today's Office of the Attorney General is far stronger than during Randolph's incumbency. Indeed, with a staff exceeding 7000, the Office has come a long way from the days of poor "clerkless" Randolph. But to the extent that early Attorneys General were frustrated by uncertainties along the horizontal dimension—questions concerning the appropriate role of the Attorney General vis-a-vis the President, the Congress, and the courts—the uncertainties persist.

Contrary to the view of many originalists, the answers to these structural questions have never been clear. It is not that we have lost our way; ambiguity and tension are built into the constitutional scheme. But we can learn from the early years. We can learn that the Constitution provides only the outline, not rigid pigeonholes, for our governmental structure and gives Congress and the President considerable latitude in filling in the details. And, as the early incumbents of those offices well understood, it is their constitutional responsibility to fill in those details, mindful of the principles of separating functions and avoiding undue concentrations of power. If Congress and the President exercise that responsibility conscientiously, there is little the judiciary should do. But when the elected bodies fail to exercise their considerable powers conscientiously, the judiciary can and should intervene. Such intervention, when appropriate, should come neither in the form of formalistic, rigid opinions that simply announce conclusions and obfuscate analysis nor in the guise of vague balancing language that also simply asserts conclusions and defies analysis. Rather, judicial intervention should come in the form of reasoned explorations of the existing institutions and their interactions. Justice Jackson's insightful concurrence in *Youngstown* expressed most eloquently the essence of governing within our constitutional structure:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches

based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.²⁹²

It is this practical, nondoctrinaire approach that best captures the fundamental pragmatism of the framers and should inform our interpretative efforts today.

292. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).