Interim United States Attorneys

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Introduction

At nine o'clock at night on Friday, June 19, 2020, Attorney General William Barr released a statement announcing the President's intention to "nominate Jay Clayton, currently the Chairman of the Securities and Exchange Commission ("SEC"), to serve as the next United States Attorney for the Southern District of New York."[1] As part of this announcement, Barr explained that Geoffrey Berman, the current U.S. Attorney, would be "stepping down after two-and-a-half years of service."[2] In the meantime, Craig Carpenito, the current U.S. Attorney for the District of New Jersey was appointed "to serve as Acting United States Attorney for the Southern District of New York, while the Senate is considering Jay Clayton's nomination."[3] The press release was fairly generic, praising Clayton's "extraordinar[y] success[]" as SEC Chairman and Berman's "tenacity and savvy . . . leading one of our nation's most significant U.S. Attorney's Offices."[4] There was only one problem—Berman had not actually resigned. Barr had visited Berman earlier that day and expressed the President's desire to appoint Clayton to the position, and the two men had discussed a potential promotion for Berman, but they did not reach a final agreement.[5]

An hour after Barr's announcement, Berman shocked the legal Twitterverse (at least those paying attention at ten o'clock on a Friday night) by releasing his own statement:

> I learned in a press release from the Attorney General tonight that I was "stepping down" as United States Attorney. I have not resigned, and have no intention of resigning, my

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1 Press Release, William P. Barr, Att'y Gen., U.S. Dep't of Just., Attorney General William P. Barr on the Nomination of Jay Clayton to Serve as U.S. Attorney for the Southern District of New York (June 9, 2020), https://perma.cc/9EQC-N357.

2 *Id.*

3 *Id.*

4 *Id.*

5 H. R. COMM. ON THE JUDICIARY, 116TH CONG., INTERVIEW OF GEOFFREY BERMAN 7–10 (July 9, 2020).

> position, to which I was appointed by the Judges of the United States District Court for the Southern District of New York. I will step down when a presidentially appointed nominee is confirmed by the Senate. Until then, our investigations will move forward without delay or interruption. I cherish every day that I work with the men and women of this Office to pursue justice without fear or favor—and intend to ensure that this Office's important cases continue unimpeded.[6]

The next day—a Saturday morning—Berman went to his office, telling reporters camped outside that he was "just [t]here to do [his] job."[7] As U.S. Attorney for the Southern District of New York, Berman oversaw the investigation of many of President Trump's associates, including Michael Cohen, Rudy Giuliani, Lev Parnas, and Igor Fruman.[8]

Unlike most U.S. Attorneys, Berman had not been appointed by the President with the advice and consent of the Senate. Shortly after President Trump's inauguration, he fired Berman's predecessor, Preet Bharara.[9] The President, however, did not nominate a permanent replacement. Pursuant to 28 U.S.C. § 546(a), Attorney General Jeff Sessions announced Berman as U.S. Attorney.[10] Under the law, he could do so unilaterally, but the appointment would expire after just 120 days.[11] Once it did, it fell to the U.S. District Court for the Southern District of New York to "appoint a United States attorney to serve until the vacancy is filled [by the President with Senate confirmation]."[12] On April 25, 2018, the court unanimously appointed Berman as U.S. Attorney.[13]

The standoff between the Attorney General and the nation's most important U.S. Attorney highlighted a number of important legal questions about this appointment mechanism. Was Berman the U.S. Attorney or *Acting* U.S. Attorney? Was he a principal or inferior officer for purposes of

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[6] U.S. Attorney SDNY (@SDNYnews), TWITTER (June 19, 2020, 11:14 PM), https://perma.cc/T6A6-8E4Z (photo attachment with "Statement of U.S. Attorney Geoffrey S. Berman on Announcement by Attorney General Barr").

[7] Erica Orden, Manu Raju, Evan Perez & Kara Scannell, *Geoffrey Berman Is Leaving Office Immediately After Standoff with Trump Administration*, CNN (June 20, 2020, 9:08 PM), https://perma.cc/3BDG-MTE6.

[8] *Id.*

[9] Alan Yuhas, *US Attorney Preet Bharara Fired After Refusing Jeff Sessions' Order to Resign*, THE GUARDIAN (Mar. 11, 2017, 2:42 PM), https://perma.cc/LU9P-ARPT.

[10] Press Release, U.S. Attorney's Office, S. Dist. Of N.Y., U.S. Dep't of Just., Attorney General Jeff Sessions Appoints Geoffrey S. Berman as Interim United States Attorney (Jan. 3, 2018), https://perma.cc/TPE9-GDES.

[11] 28 U.S.C. § 546(c)(2).

[12] *Id.* § 546(d).

[13] Press Release, U.S. Attorney's Office, S. Dist. of N.Y., U.S. Dep't of Just., Statement of U.S. Attorney Geoffrey S. Berman on Appointment by Chief Judge (Apr. 25, 2018), https://perma.cc/RG3E-8S7B; *see also* Benjamin Weiser, *With No Nomination From Trump, Judges Choose U.S. Attorney for Manhattan*, NEW YORK TIMES (Apr. 25, 2018), https://perma.cc/924A-BXXX.

the Appointments Clause? Was his appointment by the district court even constitutional, and what are the consequences if it was not? Did the President have the authority to remove him in the first place?

The feud between Barr and Berman intensified throughout the day. Saturday afternoon, Barr sent Berman a letter expressing his "surprise[] and . . . disappoint[ment]" in Berman's resistance to being ousted:

> When the Department of Justice advised the public of the President's intent to nominate your successor, I had understood that we were in ongoing discussions concerning the possibility of your remaining in the Department or Administration . . . . Unfortunately, with your statement of last night, you have chosen public spectacle over public service. Because you have declared that you have no intention of resigning, I have asked the President to remove you as of today, and he has done so.[14]

Nevertheless, Barr made a major concession. Rather than appointing Carpenito as Acting U.S. Attorney, he indicated that "[b]y operation of law, the Deputy United States Attorney, Audrey Strauss, will become the Acting United States Attorney, and I anticipate that she will serve in that capacity until a permanent successor is in place."[15] He further assured Berman that his removal would not impact pending cases: "[I]f any actions or decisions are taken that office supervisors conclude are improper interference with a case, that information should be provided immediately to Michael Horowitz, the Department of Justice's Inspector General, whom I am authorizing to review any such claim."[16]

An hour later, the situation took another bizarre turn when President Trump told reporters that—contrary to Barr's assertion—he was "not involved" with the firing of Berman, claiming that the decision was "all up to the attorney general."[17]

Nevertheless, Berman still capitulated—at least in part. In a statement released Saturday evening, he announced that "[i]n light of Attorney General Barr's decision to respect the normal operation of law and have Deputy U.S. Attorney Audrey Strauss become acting U.S. Attorney, I will be leaving the U.S. Attorney's Office for the Southern District of New York, effective immediately."[18] But while the standoff was over, the legal issues surrounding Berman's appointment and removal were not resolved. Even as he stepped down, Berman remained defiant. By announcing his

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[14] Letter from William P. Barr, Attorney Gen., U.S. Dep't of Just., to Geoffrey S. Berman, U.S. Attorney, S. Dist. of N.Y. (June 20, 2020), https://perma.cc/TRC7-6K2X.

[15] *Id.*

[16] *Id.*

[17] Sonam Sheth, *Trump Said He Was 'Not Involved' in US Attorney Geoffrey Berman's Ouster, Potentially Throwing a Wrench into AG Barr's Attempt to Get Rid of Berman*, BUS. INSIDER (June 20, 2020, 4:23 PM), https://perma.cc/UGD6-ENJB.

[18] Michael Riccardi & Jane Wester, *Geoffrey Berman Resigns as Manhattan US Attorney, Ending Standoff with William Barr*, N.Y. L.J. (June 20, 2020), https://perma.cc/W4W2-B522.

resignation in such fashion, he was implicitly reiterating that neither Barr nor the President had the authority to remove him. He was leaving on his own terms.

This Article will proceed as follows: First, this Article will briefly review the legal framework established by Congress for the appointment of U.S. Attorneys. Second, this Article will consider whether U.S. Attorneys appointed by Attorney Generals and U.S. District Courts such as Berman are actually U.S. Attorneys or merely *Acting* U.S. Attorneys. Third, this Article will investigate whether U.S. Attorneys are Officers of the United States for the purposes of the Appointments Clause and, if so, whether they are principle or inferior officers. This Article will then consider whether the appointment by the Attorney General or U.S. District Court was constitutional, and what the constitutional remedy should be if it is not. Finally, this Article will conclude by considering whether the Attorney General or the President had the constitutional authority to remove a U.S. Attorney appointed by a district court.

I. The Appointment of United States Attorneys

The office of U.S. Attorney was created by the first Congress as part of the Judiciary Act of 1789,[19] in response to the Constitution's mandate that it establish a judicial system. The Act directed the President to appoint in each federal district a "meet person learned in the law to act as an attorney for the United States."[20] Although the statute did not mention the need for the President to seek Senate confirmation, it appears that President Washington and his successors did not interpret the law as granting them unilateral authority to appoint these officials, as Washington, Adams, and Jefferson all sought the "Advice and Consent" of the Senate when making these appointments.[21] The appointment had no expiration and it appears that the appointed attorneys served indefinitely. In 1820, however, Congress limited the tenure of U.S. Attorneys to just four years.[22]

In 1966, Congress made the appointment mechanism for U.S. Attorneys explicit: "The President shall appoint, by and with the advice and

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19 Judiciary Act of 1789, 1 Stat. 73 § 35.

20 *Id.*

21 *See, e.g.*, Letter from John Adams, U.S. President, to the U.S. Senate (July 7, 1797), https://perma.cc/837V-C3BV (nominating Jeremiah Smith to be U.S. Attorney for the District of New Hampshire); Letter from Thomas Jefferson, U.S. President, to the U.S. Senate (Jan. 28, 1805), https://perma.cc/RB2K-NRJS (nominating Edward Scott to be the U.S. Attorney for the district of "East Tenissee"); Letter from George Washington, U.S. President, to the U.S. Senate (Sept. 24, 1789), https://perma.cc/E9BP-KR86) (appointing original U.S. Attorneys).

22 Tenure of Office Act of 1820, 3 Stat. 582 § 1.

consent of the Senate, a United States attorney for each judicial district."[23] The appointment would continue to be "for a term of four years," but Congress codified the expectation that "[o]n the expiration of his term, a United States attorney shall continue to perform the duties of his office until his successor is appointed and qualifies."[24] The statute also specified that "[e]ach United States attorney is subject to removal by the President."[25]

The same act initially granted "[t]he district court for the district in which the office of United States attorney is vacant" the authority to "appoint a United States attorney to serve until the vacancy is filled."[26] Subsequent congressional enactments, however, muddied the waters. Today, the Attorney General—subject to certain enumerated restrictions—is granted the authority to "appoint a United States attorney for the district in which the office of United States attorney is vacant."[27] The Attorney General's appointee, however, may only serve for a maximum of 120 days.[28] After that, "the district court for such district may appoint a United States attorney to serve until the vacancy is filled."[29]

The situation is further complicated by another piece of federal legislation—the Federal Vacancies Reform Act of 1998 ("VRA").[30] Subject to certain specified term limits and limitations, the VRA states:

> If an officer of an Executive agency . . . whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity.[31]

However, the VRA also authorizes "the President (and only the President) [to] direct an officer or employee [other than the first assistant] of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity" instead.[32]

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23 Act of Sept. 6, 1966, Pub. L. No. 89-554, § 4(c), 80 Stat. 617, 617 (codified at 28 U.S.C. § 541(a) (2018)).

24 *Id.* (codified at 28 U.S.C. § 541(b)).

25 *Id.* (codified at 28 U.S.C. § 541(c)).

26 *Id.* (codified as amended at 28 U.S.C. § 546(d)).

27 28 U.S.C. § 546(a) (2018). The Attorney General is, however, prohibited from "appoint[ing] as United States attorney a person to whose appointment by the President to that office the Senate refused to give advice and consent." *Id.* § 546(b).

28 *Id.* § 546(c)(2).

29 *Id.* § 546(d).

30 5 U.S.C. §§ 3345–49 (2018).

31 *Id.* § 3345(a).

32 *Id.* § 3345(a)(3); *see also id.* § 3345(a)(2).

On its face, the U.S. Code therefore appears to enumerate three distinct appointment mechanisms for the same office. A U.S. Attorney can be appointed by: (a) the President with the advice and consent of the Senate; (b) the Attorney General; *or* (c) the relevant district court. Or an "acting" U.S. Attorney can be appointed by the President alone.

II. An Interim U.S. Attorney is an "Officer of the United States"

Attorney General Jeff Sessions appointed Geoffrey Berman as interim U.S. Attorney for the Southern District of New York just six months before the Supreme Court resolved *Lucia v. SEC*,[33] the most significant Appointments Clause case in the last two decades. In *Lucia*, the Court was tasked with determining whether administrative law judges of the SEC were "'Officers of the United States' or simply employees of the Federal Government."[34] From an originalist perspective, the distinction between "officers" and "employees" is entirely anachronistic, but it has nonetheless been an important part of the Court's jurisprudence for at least 150 years.[35] As the Court explained in *Lucia*, if a federal appointee is a "mere employee[]" then "the Appointments Clause cares not a whit about who named them."[36] The majority opinion—penned by Justice Kagan—then laid out a two-part test for distinguishing between these two classes of federal officials:

> Two decisions set out this Court's basic framework for distinguishing between officers and employees. [*United States v.*] *Germaine* held that "civil surgeons" (doctors hired to perform various physical exams) were mere employees because their duties were "occasional or temporary" rather than "continuing and permanent." Stressing "ideas of tenure [and] duration," the Court there made clear that an individual must occupy a "continuing" position established by law to qualify as an officer. *Buckley* [*v. Valeo*] then set out another requirement, central to this case. It determined that members of a federal commission were officers only after finding that they "exercise[d] significant authority pursuant to the laws of the United States." The inquiry thus focused on the extent of power an individual wields in carrying out his assigned functions.[37]

In other words, before addressing the constitutionality of the various appointment mechanisms described above, it must be established that the distinction matters—namely that a U.S. Attorney appointed through each

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[33] 138 S. Ct. 2044 (2018).

[34] *Id.* at 2051 (internal quotation marks omitted).

[35] *See, e.g.*, Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 452–53, 465 (2018); James Heilpern, *A Corpus-Based Response to Justice Sotomayor's Comments in* Lucia v. SEC, ORIGINALISM BLOG (May 4, 2018, 6:08 AM), https://perma.cc/3GN9-2GG3 (arguing that "the word 'employee' is a French loan-word that . . . did not seem to enter into the American vernacular until sometime after the Civil War").

[36] *Lucia*, 138 S. Ct. at 2049, 2051.

[37] *Id.* at 2051 (citations omitted) (cleaned up).

mechanism is still considered an "officer" and not just an employee of the government. That may appear ridiculous—no one doubts that a U.S. Attorney is an "Officer of the United States." But scratching the surface even a little reveals that this is a more complicated question than it appears at first blush. In the following section, I will show that despite the plain language of the U.S. Code, a U.S. Attorney appointed by the President with the advice and consent of the Senate, a U.S. Attorney appointed by the Attorney General, and a U.S. Attorney appointed by the district court are actually three distinct offices. The subsequent sections will then apply the *Lucia* test to those offices.

A. *An Interim U.S. Attorney is a Separate, Distinct Position*

Before turning to *Lucia,* it must be determined what position Berman actually held. Was he *the* U.S. Attorney for the Southern District of New York? Or did he hold a separate and distinct position? That of interim or acting U.S. Attorney—similar to Matthew Whitaker's recent service as the Acting—but not actual—Attorney General?[38]

Title 28 of the U.S. Code states that "[t]he President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district."[39] However, when a vacancy arises in a district, the Attorney General—acting on his own accord—is authorized to "appoint a United States attorney for the district in which the office of United States attorney is vacant,"[40] so long as he does not appoint someone who the President has previously nominated and the Senate rejected.[41] The Attorney General's appointment power is limited in two ways. First, his appointee is to be displaced as soon as a "United States attorney for such district appointed by the President" is confirmed by the Senate.[42] Second, even without a presidential replacement, a U.S. Attorney appointed by the Attorney General may serve for only 120 days.[43] After that, "the district court for such district may appoint a United States attorney to serve until the vacancy is filled."[44]

This tripartite appointment mechanism is confusing. A careful reading of 28 U.S.C. § 546 suggests that a U.S. Attorney appointed by the Attorney General is still a "United States attorney," occupying the same

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38 *See* James A. Heilpern, *Acting Officers*, 27 GEO. MASON L. REV. 263, 266–69 (2019).

39 28 U.S.C. § 541(a).

40 *Id.* § 546(a).

41 *See id.* § 546(b).

42 *Id.* § 546(c)(1).

43 *Id.* § 546(c)(2).

44 *Id.* § 546(d).

office and exercising the same powers as one appointed by the President with the advice and consent of the Senate.[45] This is made clear by subsection (b), which prohibits the Attorney General from "appoint[ing] as United States attorney a person to whose appointment by the President *to that office* the Senate refused to give advice and consent."[46] If an Attorney General-appointed U.S. Attorney was intended to be a separate office entirely, this limitation would be meaningless, as the President could never appoint and the Senate never refuse to confirm someone to that distinct office.

But the plain language of the statute points in the opposite direction for a U.S. Attorney appointed by the district court: "If an appointment [made by the Attorney General] expires . . . the district court for such district may appoint a United States attorney to serve until the *vacancy* is filled."[47] If a U.S. Attorney appointed by the district court really occupied the *same* office as a U.S. Attorney appointed by the President and confirmed by the Senate, *this* provision would be meaningless as no vacancy would or could exist for the President to fill.

Nevertheless, the U.S. Code refers to all three positions by the same title: "United States attorney." And the Office of Legal Counsel has opined that "[w]hen the authority under section 546 is used, the person appointed by the Attorney General or the district court is a United States Attorney and is not just acting in the position."[48] The Ninth Circuit, too, has refused to "distinguish between United States Attorneys appointed pursuant to 28 U.S.C. § 541 and those appointed under § 546(d)," concluding that the latter are still "fully-empowered United States Attorneys."[49]

But from a constitutional perspective there is reason to conclude that Congress actually created three distinct offices. In *United States v. Germaine*,[50] the Supreme Court stressed that the term officer "embraces the ideas of tenure, duration, emolument, and duties."[51] It stands to reason, therefore, that by specifying different tenures, durations, emoluments, or sets of duties—especially when accompanied by different appointment mechanisms—Congress intended to create separate, distinct offices.

Here, the "duties" of President-appointed, Attorney General-appointed, and district court-appointed U.S. Attorneys are clearly the same:

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45 28 U.S.C. § 546(a).

46 *Id.* § 546(b) (emphasis added).

47 *Id.* § 546(d).

48 Temporary Filling of Vacancies in the Office of United States Attorney, 27 Op. O.L.C. 149, 149 (2003) (interpreting predecessor statute).

49 United States v. Gantt, 179 F.3d 782, 787, n.5 (9th Cir. 1999) (interpreting predecessor statute), *overruled on other grounds by* United States v. Grace, 526 F.3d 499 (9th Cir. 2008) (en banc).

50 99 U.S. 508 (1878).

51 *Id.* at 511.

they exercise the same authority, supervising all criminal and civil litigation involving the United States within their assigned judicial districts. But their "tenure" and "duration" differ greatly. U.S. Attorneys appointed by the President with the advice and consent of the Senate serve "for a term of four years."[52] By contrast, U.S. Attorneys appointed by the Attorney General serve for a maximum of just 120 days.[53] Meanwhile, U.S. Attorneys appointed by the district court appear to be able to serve indefinitely, until a president gets around to filling the vacancy.[54]

Furthermore, it is unclear whether there is a complete equality of "emoluments," in part because there is no agreed upon legal definition of the word. Although it appears three times in the Constitution, courts have never defined it.[55] Scholars have shown that at the time of the Founding, there were at least two competing definitions or senses of the word: (1) a narrow sense that encompassed only "the legally-authorized compensation or monetizable benefits from public office, employment, or service"[56]; and (2) "a broad, general sense that cover[ed] *any* profit, benefit, advantage, or gain one obtains, whether tangible or not, from any source."[57] Focusing just on the narrow sense, it does appear that the salaries of all U.S. attorneys are determined using the same pay scale based on experience, regardless of the underlying appointment mechanism.[58] But there are some intangible benefits that vary. For example, U.S. attorneys appointed by the President with the advice and consent of the Senate "should be addressed as 'The Honorable'" while "[a]ll others should be addressed as 'Mr.' or 'Ms.'"[59] Most scholars have assumed that the Attorney General and district court do not have the authority to appoint an actual U.S. Attorney, but instead to appoint an *interim* or *Acting* U.S. Attorney.[60]

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52 28 U.S.C. § 541(b) (2018).

53 *Id.* § 546(c)(2).

54 *See id.* § 546(d) (explaining "the district court . . . may appoint a United States attorney to serve until the vacancy is filled").

55 *In re* Trump, 958 F.3d 274, 286 (4th Cir. 2020) (en banc) ("Before this litigation commenced, no court had ruled on this question [i.e. how to define 'emoluments'] . . . . [W]e can hardly conclude that the President's preferred definition of this obscure word is clearly and indisputably correct.").

56 James C. Phillips & Sara White, *The Meaning of The Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English from 1760-1799,* 59 S. Tex. L. Rev. 181, 185 (2017).

57 *Id.*

58 *See* Offices of the United States Attorneys, *Salary Information*, https://perma.cc/WS6B-9UKR ("The Administratively Determined (AD) Plan is a component-specific compensation system for . . . United States Attorneys established under authority of 28 United States Code 548, Salaries, and approved by the Attorney General.").

59 Offices of the United States Attorneys, *U.S. Attorneys Listings*, https://perma.cc/72VZ-TMZ9.

60 *See, e.g.*, Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 725 (2020) ("For instance, the attorney general currently can choose an 'interim' U.S. attorney to serve for 120 days.").

But this remains an open constitutional question. On its face, the statute appears to give the President, the Attorney General, and the district court the authority to fill the same office—the office of "United States attorney" for each federal district—albeit under slightly different circumstances and caveats, something the Supreme Court has never specifically said is unconstitutional.

Nevertheless, for the remainder of this Article, assume that the three appointment mechanisms represent three separate and distinct offices. Those U.S. attorneys appointed by the President with the advice and consent of the Senate pursuant to 28 U.S.C. § 541, I will refer to as "U.S. Attorneys." Those appointed by the Attorney General pursuant to 28 U.S.C. § 546(a), I will refer to as "Acting U.S. Attorneys."[61] And those appointed by the district court pursuant to 28 U.S.C. § 546(d), I will refer to as "Interim U.S. Attorneys."

B. *An Interim U.S. Attorney is a "Continuous" Position*

Having concluded that U.S. Attorneys, Acting U.S. Attorneys appointed by the Attorney General, and Interim U.S. Attorneys appointed by the district court are three separate, distinct positions, it is time to turn back to the *Lucia* test to determine whether an Interim U.S. Attorney such as Berman is an "officer" under modern case law. It is tempting to conclude that an Interim U.S. Attorney fails *Lucia*'s continuity requirement[62]—after all, Berman was just pinch hitting. By statute, he would have been displaced and his position eliminated entirely as soon as the President nominated and the Senate confirmed someone permanent to fill the vacancy. This is especially the case for Interim U.S. Attorneys put in place by the Attorney General, whose appointment expires after just 120 days.[63] But this line of reasoning fails to account for phenomenon of "linguistic drift"—the fact that our "language usage and meaning shifts over time."[64] When one considers *Lucia*'s continuity requirement in its original historical context, it becomes clear that "even short-lived, temporary positions [such as Acting Attorneys General] can be continuous."[65]

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61 This is not to be confused with appointments made pursuant to the VRA. *See* 5 U.S.C. §§ 3345–49 (2018).

62 *See* Lucia v. SEC, 138 S. Ct. 2044, 2047 (2018) ("To qualify as an officer . . . an individual must occupy a 'continuing' position established by law.").

63 28 U.S.C. § 546(c)(2) (2018).

64 Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 265 (2019).

65 Heilpern, *supra* note 38, at 269; *see* James A. Heilpern, *Temporary Officers*, 26 GEO. MASON L. REV. 753, 754 (2019) (discussing *Lucia*'s continuity requirement).

According to Justice Kagan, the continuity requirement can be traced back to *United States v. Germaine*,[66] an 1879 case arising out of a federal statute that criminalized and set a maximum sentence for "officer[s] of the United States who [are] guilty of extortion under color of [their] office."[67] The defendant in *Germaine* was a surgeon who had been appointed by the Commissioner of Pensions to "make the periodical examination of pensioners" and "to examine applicants for pension" when the Commissioner deemed it necessary.[68] By statute, the surgeon's pay rate was to be "two dollars" per exam, which fees were to be paid for "out of any money appropriated for the payment of pensions."[69] The state of Maine prosecuted the defendant for "taking [additional] fees from pensioners to which he was not entitled."[70] The issue before the Court was whether the statute even applied to the surgeon, which hinged on whether he was considered an "Officer of the United States."

The Court concluded that he was not; opining in dicta that the term officer "embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary."[71] It is worth noting that the Court focused on duties—to be an officer, a position's *duties* had to be continuous, not its tenure or duration.[72] The surgeon was not an officer specifically because his duties were "*not* continuing and permanent" but were instead "occasional and intermittent": he only acted "when called on by the Commissioner of Pensions in some *special* case."[73] In light of this, it should not matter if the term of office is 120 days or 120 years, so long as the duties are continuous.[74]

The common law further elucidates this concept. As Dr. Edward Corwin has noted, at the time of the Founding, courts understood the word *office* to mean "an institution distinct from the person holding it."[75] An office was said to be "continuous" whenever it was "capable of persisting beyond [an individual's] incumbency."[76] This is perhaps best illustrated in

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66 *See Lucia*, 138 S. Ct. at 2051 (citing United States v. Germaine, 99 U.S. 508, 511–12 (1879)).

67 *Germaine*, 99 U.S. at 509 (quoting Act of 1825, 4 Stat. 118).

68 *Id.* at 508.

69 *Id.* at 508–09.

70 *Id.* at 509.

71 *Id.* at 511–12.

72 *Id.* at 512.

73 *Germaine*, 99 U.S. at 512 (second emphasis added).

74 *See id.*

75 EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 70 (4th rev. ed., N.Y. Univ. Press, Inc. 1957) (1940); *see also* Donaldson v. Beckett (1774) 1 Eng. Rep. 837, 840 (1774) ("An office is the work of civil policy, and being of positive institution.").

76 CORWIN, *supra* note 75, at 70.

United States v. Maurice,[77] an early district court case Chief Justice John Marshall wrote while riding Circuit. *Maurice* asked whether an "agent of fortifications" was an officer within the meaning of the Appointments Clause.[78] Like in *Germaine*, Chief Justice Marshall focused on the continuity of duties:

> An office is defined to be "a public charge or employment," and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States. Although an office is "an employment," it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, *if those duties continue, though the person be changed*; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer.[79]

Marshall's distinction between those whose duties were defined by the government and those whose duties were defined by private contract is helpful. As one scholar writing contemporaneously to Marshall put it, a "contract is a transaction in which each party comes under an obligation to the other, and each, reciprocally, acquires a right to what is promised by the other."[80] By definition, therefore, a contract is individually negotiated. If one party breaches or dies, the other cannot simply appoint another to carry out the contract in his stead: a new contract would need to be negotiated with the new party. It is not so when a legislature defines the duties and emoluments of an office by statute. In such a situation, there is not room for individual adaptation.

Under this theory, even a position with a limited tenure can be said to be "continuous," so long as it is "capable of persisting beyond [an individual's] incumbency."[81] History is flush with examples of presidents "[seeking] Senate confirmation" even when appointing individuals to short-term assignments.[82] Sometimes a vacancy arose due to death or resignation, even though the office existed for only a few months or for a single specific task, as demonstrated by the strange case of Admiral John Paul Jones and the Barbary Pirates.[83]

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77 26 F. Cas. 1211 (C.C.D. Va. 1823).

78 *Id.* at 1214.

79 *Id.* (emphasis added).

80 1 JOHN JOSEPH POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS vi–vii (1802).

81 EDWARD S. CORWIN, THE PRESIDENT: OFFICE & POWERS 1787-1984, at 86 (Randall W. Bland et al. eds., 5th rev. ed., N.Y. Univ. Press 1984) (1940).

82 Heilpern, *supra* note 65, at 756.

83 *See* Letter from Thomas Jefferson, U.S. Sec'y of State, to John Paul Jones, U.S. Consul at Algiers (June 1, 1792), https://perma.cc/EA67-6X5T (explaining the circumstances behind the appointment of John Paul Jones to Commissioner).

A few years before the Constitution was ratified, two commercial vessels flying the American flag were attacked off the coast of Portugal by privateers employed by the government of Algiers: twenty-one American citizens were taken hostage.[84] The Algerines demanded payment in exchange for the prisoners, but for almost a decade, the American government adopted a policy "to avoid the appearance of any purpose . . . ever to ransom our captives, and by semblance of neglect, to reduce the demands of the Algerines to such a price as might make it hereafter less their interest to pursue [American] citizens than any others."[85] But in 1792, President Washington resolved to rescue the hostages and negotiate treaties with the Barbary states of Algiers, Tripoli, and Morocco.[86] Pursuant to a recess appointment, he appointed Admiral John Paul Jones, who was then living in Paris, as "Commissioner for treating with the Dey and government of Algiers on the subjects of peace and ransom of our captives."[87] Not wanting an "injurious delay" in "the event of any accident to [Jones]," Washington arranged for a backup so that the mission would not be delayed "await[ing] new commissions from [the United States]."[88] He therefore instructed Thomas Pinckney, who was to carry Jones' commission across the Atlantic, to forward to Thomas Barclay "all papers addressed to Admiral Jones" should it be discovered that something had happened to the Admiral, along with a letter signed by the President "giving [Barclay] authority . . . to consider [the commission] as addressed to [him]" and to carry out the treaty negotiations in Jones's stead.[89]

Washington proved prescient—just not prescient enough. Jones died on July 18, 1792, before even receiving his commission.[90] Barclay, therefore, took up the gauntlet and proceeded to Portugal where he attempted to secure funds for the mission.[91] Unfortunately, Barclay, too, fell ill and passed away on January 19, 1793.[92] Without a backup for the backup, the

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84 *See id.*

85 *Id.*

86 *See id.* ("Since then no *ransom* is to take place without a *peace*, you will of course take up first the negociation [sic] of peace.").

87 *Id.*

88 Letter from George Washington, U.S. President, to Thomas Barclay, U.S. Consul at Morocco (June 11, 1792), https://perma.cc/YX4P-2DKA.

89 *Id.*

90 Gary E. Wilson, *American Hostages in Moslem Nations, 1784-1796: The Public Response*, 2 J. EARLY REPUBLIC 123, 129 (1982).

91 *See* Letter from Thomas Jefferson, U.S. Sec'y of State, to David Humphreys, U.S. Minister to Portugal (March 21, 1793), https://perma.cc/6MQS-58AW (explaining attempts to withdraw funds for the mission).

92 Wilson, *supra* note 90, at 129; *see also* FRANK LAMBERT, THE BARBARY WARS: AMERICAN INDEPENDENCE IN THE ATLANTIC WORLD 73 (2005) (explaining Barclay "died before undertaking the

mission suffered an "injurious delay" anyway.[93] It would take two years for news to cross back and forth across the Atlantic and for Washington to appoint another commissioner. In the end David Humphreys—Jones and Barclay's ultimate successor—prevailed in freeing the captives and negotiating treaties with the three states.[94]

If one-off diplomatic missions can "continue though the person be changed,"[95] interim offices created to temporarily fulfill important executive functions can as well. As recent scholarship demonstrates, there have been at least sixteen instances of back-to-back (and sometimes back-to-back-to-back) "Acting" Cabinet officials.[96] To cite just one example, between April 28, 1980, and May 8, 1980, President Jimmy Carter had five Acting Secretaries of State.[97] Though the office of Acting Secretary of State under Carter lasted for eleven days, it "persist[ed] beyond [five] incumbenc[ies]."[98]

The same is true for Interim U.S. Attorneys. For example, on July 8, 2016, Donald S. Boyce was appointed Acting U.S. Attorney of the Southern District of Illinois by Attorney General Loretta Lynch.[99] When his term expired 120 days later, the judges of the U.S. District Court for the Southern District of Illinois appointed him as Interim U.S. Attorney, a post he held until his resignation two years later. The vacancy of U.S. Attorney still persisting, the district court appointed a replacement, Steven Weinhoeft.

C. *An Interim U.S. Attorney Exercises "Significant Authority"*

By contrast, there should be no dispute that an Interim U.S. Attorney such as Berman exercises "significant authority pursuant to the laws of the

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assignment"); Patrick N. Teye, Barbary Pirates: Thomas Jefferson, William Eaton, and the Evolution of U.S. Diplomacy in the Mediterranean 43 (Aug. 2013) (M.A. thesis, East Tennessee State University), https://perma.cc/XBF3-Z9NM (stating Barclay was unable to assume the duties of the position before his death).

93 *Cf.* Teye, *supra* note 92, at 45 (stating Humphreys, successor to Barclay, also failed to negotiate a treaty, because "the Dey refused to receive the American envoy").

94 *See* Treaty of Peace and Friendship, Tripoli-U.S., Nov. 4, 1796, 8 Stat. 154; Treaty of Peace and Amity, Algiers-U.S., Sept. 5, 1795, 8 Stat. 133; *see also* Heilpern, *supra* note 65, at 766 ("The United States' previous treaty with Morocco—signed by the prior sultan back in 1783—was reconfirmed by Humphrey's [sic] agent James Simpson on August 18, 1795.").

95 Heilpern, *supra* note 65, at 771.

96 Heilpern, *supra* note 38, app. at 289–92.

97 *Id.* at 290.

98 *Id.* at 271.

99 Press Release, U.S. Attorney's Office, S. Dist. of Ill., U.S. Dep't of Just., U.S. Attorney Boyce Announces Resignation, Steven Weinhoeft Assumes Role of Acting U.S. Attorney (July 12, 2018), https://perma.cc/834L-CRJ5.

United States."[100] Although the Court has never provided an exact formula for determining whether a position has been delegated enough responsibilities or power to constitute "significant" authority, it has held that administrative law judges,[101] tax judges,[102] members of the Federal Election Commission,[103] the general counsel of for the National Labor Relations Board,[104] military judges,[105] law clerks,[106] and postmasters[107] are all sufficiently powerful enough to satisfy this requirement. As the Court explained in *Buckley,* "[i]f a postmaster first class and the clerk of a district court are inferior officers of the United States within the meaning of the Appointments Clause, as they are, surely," an Interim U.S. Attorney—with the authority to investigate and prosecute key advisers of the President—is "at the very least" an inferior officer as well.[108]

Berman's authority as interim U.S. attorney flowed from 28 U.S.C. §§ 546(a) and 546(d)—"laws of the United States"[109]—which authorized first the Attorney General and then the district court to appoint a U.S. Attorney when a vacancy arose in a federal district. "[T]he prosecutorial discretion of the U.S. Attorney is vast and unchecked by any formal, external constraints or regulatory mechanisms."[110] As one scholar has put it:

> U.S. Attorneys exercise the entire range of prosecutorial discretion literally on a daily basis. For example, on behalf of the United States, U.S. Attorneys routinely decide what crimes grand juries will investigate; what evidence and witnesses will be presented to the grand jury; whether to pursue an investigation, or to close one; what charges will be brought, against whom, and on how many counts; and whether charges will be dropped or reduced in exchange for a guilty plea and cooperation. Further, through the inevitable rationing of limited resources, U.S. Attorneys set the federal law enforcement agenda for their districts by determining which crimes are worth major investigative resources, which crimes are better left to the state criminal justice systems, when justice will be served by leniency, and what magnitude of fraud deserves to be prosecuted.[111]

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100 Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018) (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976)).

101 *Id.* at 2057.

102 *See* Freytag v. Comm'r, 501 U.S. 868, 881 (1991).

103 *See Buckley*, 424 U.S. at 126.

104 *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 947 (2017) (Thomas, J., concurring).

105 *See* Edmond v. United States, 520 U.S. 651, 662 (1997).

106 Ex parte Hennen, 38 U.S. (13 Pet.) 225, 258 (1839).

107 Myers v. United States, 272 U.S. 52, 158 (1926).

108 *Buckley*, 424 U.S. at 126.

109 Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018).

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

111 Ross E. Wiener, *Inter-branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN. L. REV. 363, 382–83 (2001).

Berman prosecuted CEOs,[112] former diplomats,[113] state court judges,[114] military officers,[115] and U.S. citizens aiding hostile states.[116] He oversaw the investigation and arrest of billionaire and alleged child sex trafficker, Jeffrey Epstein,[117] and was investigating the President's own legal advisor, former New York City mayor, Rudy Giuliani, at the time of his resignation.[118] To claim that such power does not qualify as "significant authority" would be to do violence to the English language.

III. Acting and Interim U.S. Attorneys are Likely Inferior Officers

Having concluded that Acting and Interim U.S. Attorneys are "Officers of the United States" within the meaning of the Appointments Clause, the question of whether the various appointment mechanisms prescribed by law are constitutional hinges on whether positions contemplated by Congress are principal or inferior officers. After all, although the default appointment mechanism for *all* federal officers is presidential nomination and Senate confirmation, Article II, section 2 of the U.S. Constitution specifically grants Congress the authority to vest by law the appointment of "inferior officers . . . in the President alone, in the Courts of Law, or in the Heads of Department."[119]

Unfortunately, the Supreme Court's Appointment Clause jurisprudence is underdeveloped, at least with respect to the dividing line between principal and inferior officers. The two cases directly on point—*Morrison*

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112 Press Release, U.S. Attorney's Office, S. Dist. of N.Y., U.S. Dep't of Just., Former Chief Executive Officer of Publicly Traded Brand Management Company Charged with Accounting Fraud and Obstruction of Justice (Dec. 5, 2019), https://perma.cc/WZH7-RNKR.

113 Press Release, U.S. Attorney's Office, S. Dist. of N.Y., U.S. Dep't of Just., Former Moroccan Diplomat and Two Others Charged in White Plains Federal Court with Visa Fraud Conspiracy (Dec. 12, 2019), https://perma.cc/QF3D-RFWF.

114 Press Release, U.S. Attorney's Office, S. Dist. of N.Y., U.S. Dep't of Just., Lewisboro Town Justice Pleads Guilty to Tax Evasion (Dec. 6, 2019), https://perma.cc/N4RM-9ADF.

115 Press Release, U.S. Attorney's Office, S. Dist. of N.Y., U.S. Dep't of Just., U.S. Attorney Announces Charges Against West Point Staff Sergeant for Distributing Child Pornography (Dec. 5, 2019), https://perma.cc/6GA4-GGP3.

116 Press Release, U.S. Attorney's Office, S. Dist. of N.Y., U.S. Dep't of Just., Manhattan U.S. Attorney Announces Arrest of United States Citizen for Assisting North Korea in Evading Sanctions (Nov. 29, 2019), https://perma.cc/2EMD-GG2Q.

117 Press Release, U.S. Attorney's Office, S. Dist. of N.Y., U.S. Dep't of Just., Jeffrey Epstein Charged in Manhattan Federal Court with Sex Trafficking of Minors (July 8, 2019), https://perma.cc/39JH-SXDW.

118 Chris Sommerfeldt, *Giuliani Suggests Trump May Have Fired Manhattan US Attorney Berman Due to Investigations*, DETROIT NEWS (June 20, 2020), https://perma.cc/P3MH-RMQD.

119 U.S. CONST. art. II, § 2.

v. Olson[120] and *Edmond v. United States*[121]—articulate slightly different tests for making the distinction. The following subsections will discuss both cases before applying them to U.S. Attorneys, Acting U.S. Attorneys, and Interim U.S. Attorneys.

A. *Morrison v. Olson*

Morrison v. Olson considered whether the Special Division of the D.C. Circuit's appointment of a special prosecutor—the independent counsel—pursuant to the Ethics and Government Act was constitutional.[122] The Court declined "to decide exactly where the line falls between the two types of officers,"[123] but it identified four factors that should be part of the equation: (1) whether the officer was "subject to removal by a higher Executive Branch official"; (2) whether the officer's authority consists of "only certain, limited duties"; (3) whether the "office is limited in jurisdiction"; and (4) whether the officer has "ongoing responsibilities that extend beyond the accomplishment of" a single mission or task.[124] Based on these factors, the Court concluded it was obvious that the independent counsel fell "on the 'inferior officer' side of [the] line": the Attorney General had the power to remove the independent counsel for good cause; the independent counsel's authority was restricted to investigating and prosecuting a narrow set of federal crimes; its jurisdiction was limited to only that "granted by the Special Division pursuant to a request by the Attorney General"; and it was "appointed essentially to accomplish a single task."[125]

Writing in dissent, Justice Scalia took issue with the Court's approach, arguing that it was "not clear from the Court's opinion why the factors it discusses . . . are determinative of the question of inferior officer status."[126] Instead, he argued that it would be preferable for the Court to "look to the text of the Constitution and the division of power that it establishes."[127]

> These demonstrate, I think, that the independent counsel is not an inferior officer because she is not *subordinate* to any officer in the Executive Branch (indeed, not even to the President). Dictionaries in use at the time of the Constitutional Convention gave the word "inferiour" two meanings which it still bears today: (1) "[l]ower in place . . . station . . . rank of life . . . value or excellency," and (2) "[s]ubordinate." In a document dealing with the structure (the constitution) of a government, one would naturally expect the word to bear

120 487 U.S. 654 (1988).

121 520 U.S. 651 (1997).

122 *See Morrison*, 487 U.S. at 659.

123 *Id.* at 671.

124 *Id.* at 671–72.

125 *Id.*

126 *Id.* at 719 (Scalia, J., dissenting).

127 *Id.*

> the latter meaning—indeed, in such a context it would be unpardonably careless to use the word *unless* a relationship of subordination was intended. If what was meant was merely "lower in station or rank," one would use instead a term such as "lesser officers."[128]

Justice Scalia acknowledged that like his colleagues in the majority, he had not articulated a complete test for distinguishing between principal and inferior officers.[129] By his own admission, his focus on subordination wasn't the full picture: "it is not a *sufficient* condition for 'inferior' officer status that one be subordinate to a principal officer," but it is "surely a *necessary* condition."[130]

B. *Edmond v. United States*

Nine years later—after a number of important changes to the composition of the Court—the justices returned their attention to the fuzzy line dividing principal officers and inferior officers. *Edmond v. United States* centered on the status of the judges of the Coast Guard Court of Criminal Appeals.[131] By statute, these judges were appointed by the Secretary of Transportation—an arrangement that would be clearly unconstitutional should those judges be deemed "principal officers."[132] Justice Scalia, this time commanding a majority, upheld the statute.[133] Picking up where he left off in *Morrison*, he articulated for the first time what appears to be a bright line rule for distinguishing between principal and inferior officers:

> Generally speaking, the term "inferior officer" connotes a relationship with some higher ranking officer or officers below the President: Whether one is an "inferior" officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase "lesser officer." Rather in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that "inferior officers" are officers *whose work is directed and supervised at some level by others who were appointed by Presidential nomination with advice and consent of the Senate.*[134]

Under this rule, the judges on the Coast Guard Court of Criminal Appeals were clearly inferior officers. Their work was "supervis[ed]" by both "the Judge Advocate General (who in the Coast Guard is subordinate to the Secretary of Transportation) and the Court of Appeals for the Armed

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128 *Morrison*, 487 U.S. at 719–20 (alterations in original) (citations omitted).

129 *Id.* at 720–21.

130 *Id.* at 722.

131 *See* Edmond v. United States, 520 U.S. 651, 653 (1997).

132 *Id.* at 660–61.

133 *Id.*

134 *Id.* at 662–63 (emphasis added).

Forces."[135] Among other things, this "supervision" included the task of "prescrib[ing] uniform rules of procedure for the court," as well as the authority to "remove a Court of Criminal Appeals judge from his judicial assignment without cause."[136]

But *Edmond* leaves many questions unanswered. In his dissent in *Morrison*, Justice Scalia noted specifically that subordination to a superior officer was "not a *sufficient* condition for 'inferior' officer status,"[137] yet he did not enumerate any additional criteria in *Edmond*. Nor is it clear what the status of the four *Morrison* factors is. *Edmond* does not explicitly overturn *Morrison*; in fact Justice Scalia cited it favorably while acknowledging that two of the *Morrison*-factors—narrow jurisdiction and limited tenure—cut against the Coast Guard judges being inferior officers.[138] The takeaway seems to be that an inferior officer is always subordinate to a superior, but a subordinate officer may still be deemed a "principal officer" after performing a balancing test of an unspecified set of other factors.

* * *

The Supreme Court has suggested in dicta that a U.S. Attorney was an "inferior officer."[139] But that was well before a number of statutory reforms to the office were passed by Congress, changing the nature of the office.[140] Two circuit courts of appeals and a handful of district courts around the country have addressed the issue more recently either with respect to U.S. Attorneys proper or interim U.S. Attorneys. Most have concluded that U.S. Attorneys are inferior officers,[141] although a few have dodged the

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135 *Id.* at 664.

136 *Id.* (internal quotation marks omitted).

137 Morrison v. Olson, 487 U.S. 654, 722 (1988) (Scalia, J., dissenting).

138 *See Edmond*, 520 U.S. at 661.

139 Myers v. United States, 272 U.S. 52, 159 (1926) ("Finally, Parsons' Case, where it was the point in judgment, conclusively establishes for this court that the legislative decision of 1789 applied to a United States attorney, an inferior officer.").

140 *Cf.* United States v. Hilario, 218 F.3d 19, 26 (1st Cir. 2000) ("Historically, the officers who held positions equivalent to the modern United States Attorney were quite independent" but noting that Congress had changed the position).

141 *See, e.g., id.* at 25 ("[W]e conclude that United States Attorneys are to be regarded as inferior officers if their work is 'directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate,' and, if not, might still be considered inferior officers if the nature of their work suggests sufficient limitations of responsibility and authority." (quoting *Edmond*, 520 U.S. at 663)); United States v. Gantt, 194 F.3d 987, 999 (9th Cir. 1999) ("In light of *Edmond*, we conclude that United States Attorneys are inferior officers."); United States v. Baker, 504 F. Supp. 2d 402, 414 (E.D. Ark. 2007) ("In light of *Edmond*, we conclude that United States Attorneys are inferior officers."); United States v. Sotomayor Vazquez, 69 F. Supp. 2d 286, 291 (D.P.R. 1999) ("[W]e find that United States Attorneys, including interim United States Attorneys, are

question.[142] Even still, courts have wrestled with the issue, admitting that while "United States Attorneys are clearly 'officers' of the United States . . . [w]hether they are principal or inferior officers is less obvious."[143]

The constitutional status of U.S. Attorneys is far from settled. Under the relevant case law surveyed above, it is unclear which side of the principal versus inferior officer divide U.S. Attorneys fall. It is certainly true that their "work is directed and supervised at some level by others who were appointed by Presidential nomination with advice and consent of the Senate."[144] As one judge on the United States District Court for the District of Columbia has noted, "U.S. Attorneys are subject to the Attorney General's 'direct[ion] . . . in the discharge of their [] duties," and must "make such reports as the Attorney General may direct."[145] Likewise, the Attorney General is empowered to determine the location of the U.S. Attorney's offices,[146] to fix his salary,[147] to authorize his office expenses,[148] and to approve staffing decisions.[149] In some respects, the Attorney General even has the authority to remove a U.S. Attorney from a case since

> [w]hen the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.[150]

'inferior' officers for Appointments Clause purposes."); United States v. Hernandez, No. 97-582-CR, 1998 WL 360116943, at *2 (S.D. Fla. May 5, 1998) ("In light of these statutory restrictions, this Court must conclude that an interim United States Attorney is an 'inferior' officer within the meaning of the Appointments Clause of the Constitution.").

142 *See* United States v. Baldwin, 541 F. Supp. 2d 1184, 1216 (D.N.M. 2008) ("The Court need not decide whether the United States Attorney is an inferior officer." (capitalization omitted)); United States v. Giangola, No. CR 07-706, 2008 WL 3992138, at *26 (D.N.M. May 12, 2008) ("Because *Giangola* does not contest that United States Attorneys are 'inferior' officers under the Appointments Clause, the Court need not, and should not, decide the constitutional issue.").

143 *Gantt*, 194 F.3d at 999; *see Baldwin*, 541 F. Supp. 2d at 1217 ("[T]he Court cannot say that there is no force to the argument that the President should appoint United States Attorneys [because they are principal officers]."); *cf.* Wiener, *supra* note 111, at 442–46 (arguing that United States Attorneys are principal officers who must be nominated by the President and confirmed by the Senate).

144 *Edmond*, 520 U.S. at 663.

145 *In re* Grand Jury Investigation, 315 F. Supp. 3d 602, 631 (D.D.C. 2018) (quoting 28 U.S.C. §§ 519, 547(5) (2018)) (considering the constitutionality of the appointment of the special prosecutor), *aff'd*, 916 F.3d 1047 (D.C. Cir. 2019).

146 28 U.S.C. § 545(b) (2018).

147 *Id.* § 548.

148 *Id.* § 549.

149 *Id.* § 550.

150 *Id.* § 518.

As a practical reality, however, U.S. Attorneys are incredibly independent and enjoy a great deal of discretion.[151] But, even assuming that U.S. Attorneys are subordinate to the Attorney General, the Supreme Court has suggested that it is a "necessary" but not "sufficient" condition.[152] As Justice Scalia noted in his dissent in *Morrison*, "[e]ven an officer who is subordinate to a department head can [still] be a principal officer."[153] We therefore must turn to *Morrison* to determine if any of the factors enumerated there are sufficiently weighty to push U.S. Attorneys over the line to principal officer territory, despite having a superior in the Attorney General. Here, three factors cut in favor of U.S. Attorneys being principal officers, while only one cuts against it.

First, unlike the independent counsel in *Morrison* and the Coast Guard Court of Criminal Appeals judges in *Edmond*, U.S. Attorneys are not "subject to removal by a higher Executive Branch official."[154] Only the President has that authority.[155]

Second, the authority of U.S. Attorneys cannot be said to be circumscribed to "only certain, limited duties."[156] Within his district, each U.S. Attorney has the responsibility to:

> (1) Prosecute for all offenses against the United States;
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> (2) Prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned;
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> (3) Appear on behalf of the defendants in all civil actions, suits, or proceedings pending in his district against collectors, or other officers of the revenue or customs for any act done

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151 *See, e.g.*, Email from Chief Judge Frank Whitney, U.S. Dist. Court for the W. Dist. of N.C. and former U.S. Attorney, E. Dist. of N.C., to Author (June 22, 2020) (on file with author) ("When I was US Attorney, I felt I had great discretion. As a matter of law (Title 28), I worked for the President, not the AG or the DAG.").

152 It should be noted that both the Ninth Circuit and the First Circuit have flipped this formula on its head and, in light of the Court's decision in *Morrison v. Olson*, "supervision by a superior officer is a sufficient but perhaps not a necessary condition to the status of inferior officer." United States v. Gantt, 194 F.3d 987, 999 n.6 (9th Cir. 1999); *see also* United States v. Hilario, 218 F.3d 19, 25 (1st Cir. 2000) ("We find this approach [from *Gantt*] persuasive."). While this effort to harmonize *Morrison* and *Edmond* is laudable, it appears at odds with the plain language of *Edmond*. *Compare* Edmond v. United States, 520 U.S. 651, 662 (1997) ("[T]he term "inferior officer" connotes a relationship with some higher ranking officer or officers below the President: Whether one is an "inferior" officer depends on whether he has a superior."), *with* Morrison v. Olson, 487 U.S. 654 (1988).

153 *Morrison*, 487 U.S. at 722 (Scalia, J., dissenting); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 627 (Max Farrand ed., rev. ed. 1966) ("It does not go far enough if it be necessary at all—*Superior Officers below Heads of Departments* ought in some cases to have the appointment of the lesser offices." (emphasis added)).

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

155 28 U.S.C. § 541(c) (2018) ("Each United States attorney is subject to removal by the President.").

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

> by them or for the recovery of any money exacted by or paid to these officers, and by them paid into the Treasury;
>
> (4) Institute and prosecute proceedings for the collection of fines, penalties, and forfeitures incurred for violation of any revenue law, unless satisfied on investigation that justice does not require the proceedings; and
>
> (5) Make such reports as the Attorney General may direct.[157]

That is an enormous grant of power touching every aspect of the federal judicial system, criminal and civil. He wields total prosecutorial discretion within his district.

Third, U.S. Attorneys are not "limited in tenure."[158] Although it is true that a U.S. Attorney's term is limited to "four years" by statute,[159] this is not the meaning of the phrase as used in *Morrison*. Instead, the Court asks whether the official has "ongoing responsibilities that extend beyond the accomplishment of" a single mission or task.[160] Unlike the independent prosecutor at issue in *Morrison*, U.S. Attorneys oversee thousands of cases simultaneously.

By contrast, it is true that the "jurisdiction" of a U.S. Attorney is limited by definition to the district over which he presides. In fact, with the exception of specifically enumerated U.S. Attorneys, all U.S. Attorneys are required to "reside in the district for which he is appointed."[161]

The answers to these questions do not change when one considers Acting U.S. Attorneys or Interim U.S. Attorneys as we have defined them. They have the same authority and carry out the same duties within the same jurisdictions as U.S. Attorneys nominated by the President with the advice and consent of the Senate. It could be argued that an Acting U.S. Attorney's "tenure" is more "limited" because it expires after just 120 days.[162] Likewise, it could be argued that an Interim U.S. Attorney's "tenure" is less "limited" than a U.S. Attorney proper because it has no specified term limit.[163] But both of these arguments fail because they rest on the same faulty understanding of *Morrison* we dismissed above. Both Acting and Interim U.S. Attorneys have "ongoing responsibilities that extend

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157 28 U.S.C. § 547 (2018).

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

159 28 U.S.C. § 541(b) (2018).

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

161 28 U.S.C. § 545(a) (2018).

162 *Id.* § 546(c)(2).

163 *See* United States v. Hilario, 218 F.3d 19, 23 (1st Cir. 2000) ("There is no limit on the duration of [an Interim U.S. Attorney's] service (other than the nomination and confirmation of a regular United States Attorney).").

beyond the accomplishment of" a single mission or task,[164] regardless of whether they hold their office for ten days or ten years.

The one possible exception is the first factor: whether the position is "subject to removal by a higher Executive Branch official."[165] As a general rule, "[t]he power to remove is, in the absence of statutory provision to the contrary, an incident to the power to appoint."[166] As a result, since Acting U.S. Attorneys are appointed by the Attorney General, it is reasonable to conclude that the Attorney General has the authority to remove one as well. This would *strengthen* the case that an Acting U.S. Attorney is an inferior officer. The same is not true, however, for Interim U.S. Attorneys where the "power to appoint" vests in the judges of the district court. The judges of the district court are, by definition, not "a higher *Executive Branch* official." Thus, even if they have the "power to remove," they would not shift this factor into the "inferior officer" column.[167]

So, where does that leave us? We are confronted with the inherent problem of multifactor tests.[168] We don't know. Of the five factors enumerated in the case law (*Edmond*'s subordination requirement plus the four *Morrison* factors), two weigh in favor of Acting U.S. Attorneys being principal officers[169] while three weigh against it.[170] The inverse is true for Interim U.S. Attorneys. We are thus left to "weigh incommensurable

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

165 *Id.* at 671.

166 Burnap v. United States, 252 U.S. 512, 515 (1920).

167 *See infra* Section V for a further discussion of removal in greater detail.

168 *See, e.g.*, Barton Beebe, *An Empirical Study of Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1601 (2006) ("A diverse body of empirical work supports the intuition that when confronted with complex decision tasks we seldom seek to consider all relevant information or reduce uncertainty to the maximum extent conceivable, even if we were capable of doing so. . . . Empirical studies of decision making generally, and of judicial decision making in particular, consistently show that decision makers, even when making complex decisions, reach their stopping threshold and make a decision after considering a remarkably low number of decision-relevant factors." (footnotes omitted)); Carlos E. Gonzalez, *Trumps, Inversions, Balancing, Presumptions, Institution Prompting, and Interpretive Canons: New Ways for Adjudicating Conflicts Between Legal Norms*, 45 SANTA CLARA L. REV. 233, 286 (2005) ("As is usually the case with multi-factor analysis, the list of factors would serve as a guide rather than a narrowly constraining command. While courts would be obliged to consider the entire list of factors, no specific formula or method for applying the factors would exist. The norm judged to possess greater democratic legitimacy would be preserved and the norm judged to be of less democratic legitimacy would be nullified.").

169 The factors that weigh in favor of Acting U.S. Attorneys being principal officers are duties and tenure, with subordination, removal, and jurisdiction weighing against.

170 The factors that weigh in favor of Interim U.S. Attorneys being principal officers are removal, duties, and tenure, with subordination and jurisdiction weighing against.

values"[171] and decide whether "three apples are better than six tangerines"[172] or "whether a particular line is longer than a particular rock is heavy."[173] The enormous scope of a U.S. Attorney's authority, in particular, seems difficult to compare with his technical subordination to the Attorney General.[174] Justice Souter has suggested that "the Solicitor General of the United States . . . may well be a principal officer, despite his statutory 'inferiority' to the Attorney General."[175] Could the same be true for U.S. Attorneys?

It seems unlikely that courts will conclude as much. In *Lucia v. SEC*—a case dealing with the constitutionality of the appointment of administrative law judges of the SEC—the Supreme Court reaffirmed that "the appropriate remedy for an adjudication tainted with an appointments violation is a new hearing before a properly appointed official."[176] It stands to reason then that the appropriate remedy to an adjudication brought by an improperly appointed prosecutor would be a new hearing prosecuted by a properly appointed official. Given these enormous ramifications—including an enormous tax on judicial resources—should courts decide Acting and Interim U.S. Attorneys are principal officers and therefore unconstitutionally appointed,[177] it seems most likely that lower courts will continue to hold that Acting and Interim U.S. Attorneys are inferior

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171 John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 448 n.234 (2010) (citing Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 360 (2008) (Scalia, J., concurring in part)).

172 *Davis*, 553 U.S. at 360 (Scalia, J., concurring in part).

173 Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).

174 Indeed, according to one scholar,

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

Wiener, *supra* note 111, at 416. Wiener does not distinguish between U.S. Attorneys and Acting or Interim U.S. Attorneys.

175 Edmond v. United States, 520 U.S. 651, 668 (1997) (Souter, J., concurring in part).

176 Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018) (quoting Ryder v. United States, 515 U.S. 177, 183, 188 (1995)) (internal quotation marks omitted).

177 *Cf. id.* at 2055 (holding that the remedy for someone sentenced by an unconstitutionally appointed ALJ is a new hearing).

officers or dodge the issue.[178] The remainder of this Article will assume as much, even though it remains an open constitutional question.[179]

IV. The Appointment Mechanisms Enumerated in 28 U.S.C. § 546 are Constitutional

Assuming that Acting U.S. Attorneys and Interim U.S. Attorneys are both inferior officers, their appointment by the Attorney General and the judges of the district court, respectively, raise no constitutional problems. As mentioned above, the Constitution gives Congress the authority to "vest" the appointment of "such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[180] There is no dispute that the Attorney General is a "Head[] of Department[]." Nor is there any question that a federal district court is a "Court[] of Law."

That said, some have taken issue with the practice of judges appointing executive officials such as prosecutors on separation of powers grounds.[181] Most famously, in his dissent in *Morrison*, Justice Scalia contended:

> Article II, § 1, cl. 1, of the Constitution provides: "The executive Power shall be vested in a President of the United States." . . . It seems to me, therefore, that the decision of the Court of Appeals invalidating the [independent prosecutor's appointment] must be upheld on fundamental separation-of-powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control of that power?[182]

The majority in *Morrison* dismissed these concerns: "[T]he language of th[e] 'excepting clause' admits of no limitations on interbranch

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178 Lower courts often seek the path of least resistance. Because of this, the author predicts that no circuit split will ever develop for the Supreme Court to resolve.

179 This does not mean that I agree with First and Ninth Circuits' conclusion in *Hilario* and *Gantt*. From a constitutional perspective, U.S. Attorneys and Interim U.S. Attorneys should be considered principal officers. It's a closer question for Acting U.S. Attorneys. *See generally* United States v. Hilario, 218 F.3d 19 (1st Cir. 2000); United States v. Gantt, 194 F.3d 987 (9th Cir. 1999).

180 U.S. CONST. art. II, § 2, cl. 2.

181 *See, e.g.*, Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 805 (1999) ("[A] court of law may be vested with power to appoint its law clerks, magistrates, bailiffs, masters, and the like, but not prosecutors or diplomats or colonels whom it does not (and cannot in the nature of things) oversee and whose decisions it cannot overturn."); Jennifer L. Mascott, *Constitutionally Conforming Agency Adjudication*, 2 LOY. J. REG. COMPLIANCE 22, 30 (2017) ("[T]here are reasons to think, based on the text in conjunction with the structure of Article II, that the Framers would have intended Article III courts of law to appoint only their own subordinates officers such as court clerks—not inferior officers within the Executive Branch.").

182 Morrison v. Olson, 487 U.S. 654, 705 (Scalia, J., dissenting).

appointments. Indeed, the inclusion of 'as they think proper' seems clearly to give Congress significant discretion to determine whether it is 'proper' to vest the appointment of, for example, executive officials in the 'courts of Law.'"[183]

Indeed, it seems odd for Justice Scalia to object to interbranch appointments when he and his colleagues all obtained their own offices through interbranch appointments. The President, after all, is charged with "nominat[ing], and by the Advice and Consent of the Senate, appoint[ing] . . . Judges of the Supreme Court."[184] Why is it offensive to separation of powers to have a "Court of Law" appoint an executive officer, but not to have the President appoint the entire judiciary? After all, Article III's opening line parallels that of Article II: "The judicial Power of the United States, *shall be vested* in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[185] Yet, no one would argue that having these judges appointed by the President deprives the courts of the "judicial Power."

We often overlook this obvious interbranch appointment mechanism because we mistakenly think of the appointment power as an inherently executive function. But even a cursory survey of foreign constitutions reveals that executive appointment of the judiciary is *not* the norm. In Italy, France, and Germany, for example, judicial appointments are handled internally within the judiciary, with more senior judges selecting newer ones.[186] Unlike in the United States, most judges are career civil servants rather than political appointees.[187]

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183 *Id.* at 673 (majority opinion); *see also* Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 802 (2013) ("Permitting a 'Court[] of Law' to appoint ALJs, who are at most 'inferior Officers' within the executive branch, comports with the text of the Appointments Clause and Supreme Court case law. . . . In short, courts should deem an interbranch appointment appropriate when (1) Congress has a significant justification for turning to its interbranch-appointment power, (2) the power to appoint (and an incidental power to remove) does not impede the appoint branch's central functioning under the U.S. Constitution, and (3) the lack of appointment (and removal) power does not, likewise, impede the competing branch's central functioning." (alterations in original)).

184 U.S. CONST. art. II, § 2, cl. 2.

185 U.S. CONST. art. III, § 1, cl. 1 (emphasis added).

186 Nuno Garoupa & Tom Ginsburg, *The Comparative Law and Economics Judicial Councils*, 27 BERKLEY J. INT'L L. 53, 57, 59, 73–77 (2009).

187 *Id.* at 67, 69. Constitutional Courts, because of their obvious political role, tend to be the exception that proves the rule and *are* generally appointed by a political actor. *Id.* at 69. But even then, the appointment is not necessarily vested in the executive. In Germany, for example, half of the justices on the Constitutional Court are appointed by a committee in the *Bundestag* (the "lower chamber" of Parliament) and the other half by the *Bundesrat* (the "upper chamber"). Anne Sanders & Luc von Danwitz, *Selecting Judges in Poland and Germany: Challenges to the Rule of Law in Europe and Propositions for a New Approach to Judicial Legitimacy*, 19 GERMAN L.J. 769, 795, 797 (2018). The *Bundesregierung* (the executive cabinet) plays no role at all. *Id.* at 797.

But ignoring these interbranch appointments specifically enumerated in the Constitution, there is evidence to suggest that the Founders were more comfortable with interbranch appointments than is generally appreciated. Unlike the Department of Foreign Affairs, the Department of War, and the Department of the Navy, the Treasury Department was not considered an "executive department" by the first Congress.[188] Despite serving in the President's cabinet, the Secretary of the Treasury was viewed as an officer of the legislature—the branch that held the "power of the purse."[189] Yet once again it was the *President*—the executive—who made the appointment.

But even taking Justice Scalia's questions seriously, his argument still fails. Disagreeing with Justice Scalia, scholars have noted that from an originalist perspective, criminal prosecution was *not* "the exercise of purely executive power."[190] Rather,

> [s]eventeenth and eighteenth century English common law viewed a crime as a wrong inflicted upon the victim, not as an act against the state. An aggrieved victim, or interested party, would initiate prosecution. After investigation and approval by a justice of the peace and grand jury, a private individual would conduct the prosecution, sometimes with assistance of counsel. While American colonial statutes appear to have vested public "prosecutors" with more prosecutorial responsibility than their English ancestors, recent studies focusing on prosecutorial practice show the persistence of a primarily private system of colonial prosecution. . . . Private parties retained ultimate control, often settling even after grand juries returned indictments.[191]

Furthermore, "prosecutors" were often thought to be part of the judicial branch rather than the executive. Five of the original thirteen colonies

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188 *Compare*, Act of Sept. 2, 1789, ch. 12, 1 Stat. 65, 65 ("Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be a Department of the Treasury . . . ."), *with* Act of Apr. 30, 1798, ch. 35, 1 Stat. 553, 553 ("Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be an *executive* department under the denomination of the Department of the Navy . . . ." (emphasis added)), *and* Act of Aug. 7, 1789, ch. 7, 1 Stat. 49, 49–50 ("Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That there shall be an *executive* department to be denominated the Department of War . . . ." (emphasis added)), *and* Act of July 27, 1789, ch. 4, 1 Stat. 28, 28–29 ("Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be an *Executive* department, to be denominated the Department of Foreign Affairs . . . ." (emphasis added)). The parallel structure of the acts and dates of enactment make it seem unlikely that the omission of the word "executive" in the enabling statute of the Treasury Department was accidental.

189 Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1789, 1798, 1811 (2006) (explaining that Treasury officials' authorities were largely subject to congressional review).

190 *Morrison*, 487 U.S. at 705–06 (Scalia, J., dissenting).

191 Stephanie A.J. Dangel, *Is Prosecution a Core Executive Function?* Morrison v. Olson *and the Framers' Intent*, 99 YALE L.J. 1069, 1071–72 (1990); *see also* J.H. Baker, *Criminal Courts and Procedure at Common Law 1500-1800*, *in* 3 CRIME IN ENGLAND 1550-1800, at 15–17, 19–20 (J.S. Cockburn ed., 1977); J. J. TOBIAS, CRIME AND POLICE IN ENGLAND 1700-1900, at 117–18, 128, 130–31 (1979).

listed the office of "attorney general" in the article about the judiciary.[192] Likewise, the federal office of Attorney General was established as part of "[a]n Act to establish the Judicial Courts of the United States."[193] Even today, all lawyers—including U.S. Attorneys—are said to be "officers of the court."[194] Thus, from an originalist perspective, having the President appoint U.S. Attorneys (rather than the courts) contemplated an interbranch appointment, not the other way around.

V. Removal Questions

The Berman standoff also shines a light on an even more complicated set of issues, namely, who has the authority to *remove* an Acting or Interim U.S. Attorney. Attorney General Barr's June 19th announcement that Berman was stepping down before Berman had actually agreed to tender his resignation,[195] and his later assertion that the President was removing Berman despite the President claiming he was "not involved,"[196] appears to be an attempt by the Attorney General to remove Berman on his own.

The following section will first discuss the Supreme Court's removal jurisprudence generally, before turning specifically to the removal of U.S. Attorneys, Acting U.S. Attorneys, and Interim U.S. Attorneys.

A. *Removal Generally*

In contrast to the Appointments Clause, the Constitution is almost completely silent on the subject of removal of federal officers—outside of impeachment, no removal mechanism is specified. Nevertheless, the First Congress debated this "interesting constitutional question" at length as they were creating the Departments of War and Foreign Affairs, trying to

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192 JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 22 (1980); *see also* GA. CONST. of 1777, art XL; MD. CONST. of 1776, cl. 40; MASS. CONST. of 1780, ch. II, § 1, art. IX; N.J. CONST. of 1776, art. XII; VA. CONST. of 1776, art. XIV.

193 Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. It should also be noted that the enabling language creating the office of Attorney General stands in stark contrast with that used to create the Secretary of the Foreign Affairs, the Secretary of War, and the Secretary of the Navy. *Compare id.* at 93 ("And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States . . . ."), *with* 28 U.S.C. § 545(b). This suggests that, like the Secretary of the Treasury, although the Attorney General was considered part of the President's cabinet, he was not considered part of the executive department.

194 Gentile v. State Bar of Nev., 501 U.S. 1030, 1074–75 (1991).

195 Orden, et al., *supra* note 7.

196 *Id.*

determine "by what authority removals from office were to be made."[197] In a letter to Thomas Jefferson, James Madison explained that Congress concluded that because "the Constitution [was] silent on the point, it was left to construction."[198] Four distinct opinions arose throughout the course of the debate:

(1) "That no removal could be made but by way of impeachment."[199]

(2) "That it devolved on the Legislature, to be disposed of as might be proper."[200]

(3) "That it was incident to the power of appointment, and therefore belonged to the President and Senate."[201]

(4) "That the Executive power being generally vested in the President, and the Executive function of removal not expressly taken away, it remained with the President."[202]

In the end, "[a]fter very long debates the 4th opinion prevailed, as most consonant to the text of the Constitution, to the policy of mixing the Legislative and Executive Departments as little as possible, and to the requisite responsibility and harmony in the Executive Department."[203] This so-called "Decision of 1789" has been an important consideration in many of the Supreme Court's most important removal cases, creating the presumption that the President has unilateral authority to remove executive branch officials, subject to certain limitations and exceptions. But the Court has vacillated over how many and how big these exemptions should be.

197 Letter from James Madison, Member, House of Representatives, to Thomas Jefferson, U.S. Minister to France (June 30, 1789), https://perma.cc/7TX7-LLYY.

198 *Id.*

199 *Id.*

200 *Id.*

201 *Id.*

202 *Id.*

203 Letter from James Madison, *supra* note 197.

1. Myers v. United States

The Supreme Court did not directly address the issue of the removal of federal officers until 1926 in *Myers v. United States*,[204] nearly 140 years after the Constitution was ratified. The case arose out of the President's removal of a postmaster in Portland, Oregon, before the expiration of his term.[205] The 1876 statute at issue provided that "[p]ostmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law."[206]

Woodrow Wilson appointed Myers in July 1917, but he demanded his resignation less than three years later.[207] When Myers refused, he was "removed from office by order of the Postmaster General, acting by direction of the President."[208] Contrary to the enabling statute, President Wilson acted without the consent of the Senate. Myers sued, seeking backpay for the remainder of his term.[209]

Chief Justice (and former President) William Howard Taft, writing for the majority, held that the Senate's consent was unnecessary for the President to remove Myers as postmaster and that the requirement was unconstitutional to begin with:

> Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that Article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent; that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication; that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate's power of checking appointments; and finally that to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed.[210]

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204 272 U.S. 52 (1926).

205 *Id.* at 57.

206 Act of July 12, 1876, ch. 179, 19 Stat. 80 § 6.

207 *Myers*, 272 U.S. at 57.

208 *Id.* at 106.

209 *See id.* at 107–08.

210 *Id.* at 163–64.

In other words, Chief Justice Taft explicitly endorsed the "Decision of 1789." But in doing so, he also repeatedly emphasized that "[t]he power of removal is incident to the power of appointment,"[211] which the Court has since interpreted to mean that when Congress exercises its authority to vest the appointment of inferior officers "in heads of departments . . . it is ordinarily the department head, rather than the President, who enjoys the power of removal."[212]

2. Humphrey's Executor

After *Myers*, it appeared that the President's authority to remove executive officers was almost unlimited, limited only when Congress adopted an alternative appointment mechanism for an inferior officer. But this unlimited authority was not to last. Less than ten years after *Myers*, the Supreme Court carved out a massive exception to the President's removal power in *Humphrey's Executor v. United States*[213]: independent agencies.[214]

In 1925, President Calvin Coolidge appointed William Humphrey to be a member of the Federal Trade Commission ("FTC").[215] Congress created the FTC in 1914 to regulate interstate trade.[216] By statute, the Commission was composed of five members, each to be appointed by the President with the advice and consent of the Senate.[217]

> Not more than three of the[se] commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner who he shall succeed. . . . Any commissioner may be removed by the President for *inefficiency, neglect of duty, or malfeasance in office*.[218]

In 1931, President Herbert Hoover nominated Humphrey for a second term, and he was subsequently reconfirmed by the Senate.[219]

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211 *Id.* at 122; *see id.* at 153, 187.

212 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 493 (2010).

213 295 U.S. 602 (1935).

214 *Id. at* 628 (finding the "[FTC] is an administrative body created by Congress to carry into effect legislative policies" and as such "cannot be in any proper sense be characterized as an arm or an eye of the executive").

215 Daniel A. Crane, *Debunking* Humphrey's Executor, 83 GEO. WASH. L. REV. 1835, 1841 (2015).

216 Act of Sept. 26, 1914, ch. 311, 38 Stat. 717 (codified at 15 U.S.C. § 41).

217 *Id.* at 717–18.

218 *Id.* at 718 (emphasis added).

219 *Humphrey's Ex'r*, 295 U.S. at 618.

After Franklin D. Roosevelt was elected the following year, he requested that Humphrey resign, convinced that the Commissioner was insufficiently committed to the New Deal.[220] Humphrey refused. Twice. Therefore, on October 7, 1933, President Roosevelt fired him, explaining in writing: "Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission."[221] President Roosevelt did not allege that Humphrey was guilty of "inefficiency, neglect of duty, or malfeasance in office."[222] It was clear that the motivation behind the removal was political. Humphrey refused to back down. He continued to report to work, insisting that he was "entitled to perform [the] duties [of Commissioner] and receive the compensation provided by law" and eventually sued.[223]

The Supreme Court agreed with Humphrey, distinguishing *Myers* and dismissing many of its more sweeping statements about the scope of the President's removal power as mere dicta:

> [T]he narrow point actually decided [in *Myers*] was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention [that the President's removal power was unlimitable], but these are beyond the point involved, and therefore do not come within the rule of *stare decisis*. . . . The office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* case cannot be accepted as controlling our decision here.[224]

The Court found the fact that the FTC exercised "*quasi*-judicial and *quasi*-legislative" authority determinative.[225] Whereas a postmaster first class "is an executive officer restricted to the performance of executive functions," the FTC could not be characterized "in any proper sense . . . as an arm or an eye of the executive."[226] On the contrary, "[it] is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or judicial aid."[227] Because the Commissioners exercised quasi-judicial and

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220 *Id.*

221 *Id.* at 619.

222 Act of Sept. 26, 1914, ch. 311, 38 Stat. 718.

223 *Humphrey's Ex'r*, 295 U.S. at 619. Unfortunately, Humphrey died before the case made it to the Supreme Court. Hence the case is called Humphrey's "Executor" rather than just *Humphrey v. United States.*

224 *Id.* at 626–27.

225 *Id.* at 611 (emphasis added).

226 *Id.* at 627–28.

227 *Id.* at 628.

quasi-legislative authority, the principle of separation of powers *required* that the President's removal authority be limited:

> We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating *quasi*-legislative or *quasi*-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted, and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.[228]

3. Morrison v. Olson

The Supreme Court continued to fiddle with its removal calculations in *Morrison v. Olson*.[229] As explained above, *Morrison* concerned the office of independent counsel, a prosecutor appointed by the Special Division of the D.C. Circuit at the request of the Attorney General.[230] By statute, once appointed, the independent counsel could "be removed from office, other than by impeachment and conviction, only by personal action of the Attorney General and only for good cause, physical or mental disability . . . or any other condition that substantially impairs the performance of such independent counsel's duties."[231] In addition to the Appointments Clause issue discussed above, the Court was called upon to decide "whether the provision of the Act restricting the Attorney General's power to remove the independent counsel to only those instances in which he can show 'good cause,' taken by itself, impermissibly interferes with the President's exercise of his constitutionally appointed functions."[232] The Supreme Court concluded that it did not:

> [W]e cannot say that the imposition of a "good cause" standard for removal by itself unduly trammels on executive authority. There is no real dispute 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. As we noted above, however, the independent counsel is an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority. Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or 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. Nor do we think that

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228 *Id.* at 629 (emphasis added).

229 Morrison v. Olson, 487 U.S. 654, 659–60 (1988).

230 *See supra* note 122–130, and accompanying text.

231 28 U.S.C. § 596(a)(1).

232 *Morrison*, 487 U.S. at 685.

> the "good cause" removal provision at issue here impermissibly burdens the President's power to control or supervise the independent counsel, as an executive official, in the execution of his or her duties under the Act. This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the "faithful execution" of the laws. Rather, because the independent counsel may be terminated for "good cause," the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act.[233]

It is important to note that the Court walked back some of the importance of the quasi-judicial and quasi-legislative distinction in *Humphrey's Executor*. Although it made clear that the distinction was still a valid reason for Congress to curtail the President's removal power, the Court also made clear "that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'"[234] Instead, the Court asserted that rather than "defin[ing] rigid categories of those officials who may or may not be removed at will by the President," its removal cases aimed rather "to ensure that Congress d[id] not interfere with the President's exercise of 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II."[235] As such, it was significant that the removal authority was vested in the *Attorney General*, an executive official who answers to the President. Elsewhere in the opinion, the Court noted that it was significant that the Special Division's authority was limited to appointment, and it was not "supervisory or administrative" in nature, suggesting that the Court may have come out the other way if the Special Division—rather than the Attorney General—had retained the power of removal.[236]

4. Free Enterprise and Seila Law

Since *Morrison*, however, the Court has been more reluctant to place further limitations on the President's authority to remove federal officers, and it has acted to limit the scope of exemptions in *Humphrey's Executor* and *Morrison*. For example, although in *Free Enterprise Fund v. Public Co. Accounting Board*[237] the Court reaffirmed that "Congress can, under certain circumstances, create independent agencies run by principal officers

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233 *Id.* at 691–92 (internal footnotes omitted).

234 *Id.* at 689.

235 *Id.* at 690–91.

236 *Id.* at 695.

237 561 U.S. 477 (2010).

appointed by the President, whom the President may not remove at will but only for good cause," as well as "similar restrictions on the power of principal executive officers—themselves responsible to the President—to remove their own inferiors," the Court refused to allow "these separate layers of protections [to] be combined."[238]

Free Enterprise arose out of a dispute concerning the Public Company Accounting Oversight Board ("PCAOB"), a government entity created by Congress to regulate the accounting industry.[239] The PCAOB was "composed of five members, appointed to staggered five year terms by the Securities and Exchange Commission."[240] The Commission, however, could only remove a member of the Board "for good cause shown," after jumping through a series of procedural hoops.[241] Meanwhile, like the FTC Commissioners in *Humphrey's Executor*, the Commissioners of the SEC could only be removed by the President for "inefficiency, neglect of duty, or malfeasance in office."[242] As a result, Board members were not only protected "from removal except for good cause," but the President was cut out of "any decision on whether good cause exists."[243]

The Court found that "[t]he added layer of tenure protection makes a difference."[244]

> A second level of tenure protection changes the nature of the President's review. Now the Commission cannot remove a Board member at will. The President therefore cannot hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does. . . . This novel structure does not merely add to the Board's independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired. That arrangement is contrary to Article II's vesting of executive power in the President.[245]

In other words, although the Court preserved both the independent agency and inferior officer exceptions, it also weakened them. No longer were they considered *de facto* exceptions to the President's removal authority. They had to be justified in light of the Take Care Clause.[246]

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238 *Id.* at 483; *see id.* at 483–84.

239 *Id.* at 484; *see also* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

240 *Free Enter. Fund*, 561 U.S. at 484.

241 *Id.* at 486.

242 *Id.* at 487.

243 *Id.* at 495.

244 *Id.*

245 *Id.* at 496.

246 U.S. CONST., art. II, § 3.

Then just last term in *Seila Law LLC v. Consumer Financial Protection Bureau*,[247] the Court drastically narrowed the scope of the independent agency exemption. *Seila Law* concerned the constitutionality of the Consumer Financial Protection Bureau ("CFPB"), an independent agency created to regulate the financial sector and protect consumers in the aftermath of the Great Recession.[248] Its director, appointed by the President with the advice and consent of the Senate, was to "serve[] for a term of five years, during which the President [could] remove [her] from office only for 'inefficiency, neglect of duty, or malfeasance in office.'"[249]

At first blush, this removal mechanism appeared to fall squarely within the contours of *Humphrey's Executor*—after all, Congress used the exact same magic words when drafting both statutes. But the Court recharacterized the holding of *Humphrey's Executor*, effectively limiting it to the facts of the case. While less than a decade before in *Free Enterprise*, the Court had described *Humphrey's Executor* as standing for the broad proposition that "Congress [could] ... create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause,"[250] the Court now added a series of caveats, claiming that *Humphrey's Executor* merely permitted Congress "to give for-cause removal protections to [] *multimember bod[ies] of experts*, balanced along partisan lines, that performed legislative and judicial functions and w[ere] said not to exercise any executive power."[251] Under this framework, *Humphrey's Executor* was not squarely on point: the CFPB was headed by a single director, not a multimember body of experts, and as such could not be balanced along partisan lines. Likewise, it wielded executive power, not quasi-legislative or quasi-judicial authority. Accordingly, the Court held that "[t]he CFPB Director's insulation from removal by an accountable President is enough to render the agency's structure unconstitutional."[252]

> The CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one. The Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. The Director does not even depend on Congress for annual appropriations. Yet the Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director

247 140 S. Ct. 2183 (2020).

248 *Id.* at 2191.

249 *Id.* at 2193.

250 *Free Enter. Fund*, 561 U.S. at 483.

251 *Seila Law*, 140 S. Ct. at 2199 (emphasis added).

252 *Id.* at 2204.

> may dictate and enforce policy for a vital segment of the economy affecting millions of Americans.[253]

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Viewed collectively, it is clear that the Court has been inconsistent in its removal jurisprudence. The Court has vacillated between its desire to preserve the unitary executive and its desire to insulate independent actors within the government from the President's control. But this survey of cases from *Myers* to *Seila Law* reveals a number of important principles:

(1) The power to remove is generally incident to the power to appoint, although Congress can legislate around this as they did in *Morrison*.

(2) This power to remove is broad, but can be limited by one level of for cause tenure protection in certain circumstances.

(3) Limitations on removal are unconstitutional when they impede the President's ability to take care that the laws are faithfully executed.

It should also be noted that the current Court is trending towards an expansive view of the Chief Executive's removal power and away from exceptions. The Roberts Court appears committed to the principle of *stare decisis* in theory, but it is also willing to recharacterize and cabin the holdings of prior cases that it disagrees with.[254]

B. *Removal of U.S. Attorneys*

With these principles in mind, we turn now to the removal of Acting and Interim U.S. Attorneys. Title 28, section 541(c) of the U.S. Code states that "[e]ach United States attorney is subject to removal by the President." As mentioned above, a careful textual analysis reveals that the various sections of the Code use the term "United States attorney" to refer to three distinct offices, what we have referred to as U.S. Attorneys, Acting U.S. Attorneys, and Interim U.S. Attorneys.[255] There is no dispute that the President has the authority to remove at will a U.S. Attorney that he has

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253 *Id.* at 2203–04 (citations omitted).

254 *See* William D. Araiza, *Playing Well With Others—But Still Winning: Chief Justice Roberts, Precedent, and the Possibilities of a Multi-Member Court*, 46 GA. L. REV. 1059, 1082 (2012).

255 *See supra* Part II.A.

appointed with the advice and consent of the Senate, but things are less clear for those appointed by the Attorney General or district court, especially since the statute vesting the appointment of Acting and Interim U.S. Attorneys was passed *after* section 541(c).[256] There is certainly a nonfrivolous argument that the President does not have the authority to fire an Acting U.S. Attorney and that neither the President nor the Attorney General have the authority to fire an Interim U.S. Attorney. Berman certainly thought so.

An obvious first question is whether it is even constitutional for Congress to vest the removal of Acting and Interim U.S. Attorneys in the President. After all, even assuming that section 541(c) applies to all three offices, the "power of removal is incident to the power of appointment,"[257] and Congress specifically vested the appointment of these inferior officers in someone other than the President.[258] The answer to this question is almost certainly yes. In *Morrison*, the Court vested the appointment of the independent counsel in a "Court[] of Law"—the Special Division of the D.C. Circuit—yet vested the removal of the same position in the Attorney General.[259] The Court not only approved of this arrangement, but it cited it as one reason that the appointment mechanism was constitutional to begin with.[260] If Congress can grant the Attorney General authority to remove officers he did not appoint, it stands to reason that it can do the same for the President, especially in light of the Court's recent emphasis on the need of the President to supervise his subordinates and ensure the "faithful execution" of the laws.

But what if section 541(c) does not extend to Acting and Interim U.S. Attorneys? Who then has that power to remove these officials? For Acting U.S. Attorneys, the answer is obvious. The Attorney General appoints them; therefore, the Attorney General may remove them. There is nothing controversial about that.

But the answer for Interim U.S. Attorneys is more complicated. If "the power to remove is incident to the power to appoint," that would mean that Congress has vested the authority to remove in the relevant district court. That would mean that Berman could be removed from office only by the judges of the U.S. District Court for the Southern District of New York. But this arrangement would prevent the President from exercising any meaningful supervision of an Interim U.S. Attorney. It would mean

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256 *See Can Trump Fire and Replace US Attorney for SDNY?*, CNN (June 20, 2020), https://perma.cc/N6EL-TWV8.

257 Myers v. United States, 272 U.S. 52, 122 (1926).

258 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 494 (2010); *see also Myers*, 272 U.S. at 164.

259 Morrison v. Olson, 487 U.S. 654, 695–96 (1988).

260 *See id.* at 695–97.

that Interim U.S. Attorneys, like the Director of the CFPB, would be "neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is."[261] Appointment of executive officers by courts is rare, but removal of executive officers by the courts is all but unheard of. The Court has never had the opportunity to consider such an arrangement, and in light of its most recent removal cases, it seems likely that the Court would again "decline[] to extend Congress's authority to limit the President's removal power to [this] new situation."[262]

But such a conclusion is far from certain. An Interim U.S. Attorney is hardly analogous to the members of the PCAOB or Director of the CFPB. While the latter two are principal officers, the prior is (likely) an inferior one. More importantly, the President is *not* prevented from replacing an Interim U.S. Attorney. He is not only allowed to do so (for any reason he wants) but is *required* to do so by statute.[263] After all, an Interim U.S. Attorney is *immediately* displaced once a presidential nominee is confirmed by the Senate.[264]

Furthermore, the Court has stated repeatedly that limitations on the President's removal authority are frowned upon because they impede his ability to "take Care that the Laws be faithfully executed."[265] It is rather awkward to claim that the President's authority to "faithfully execute[]" the laws of the United States is impeded by his inability to remove someone from an office that only exists because he has refused to "faithfully execute" one of those laws. After all, Title 28, section 541(a) states that "[t]he President *shall* appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district."[266] The district court is only allowed to appoint an Interim U.S. Attorney after the President has shirked this statutory duty for at least "120 days."[267]

The Constitution's system of checks and balances also cuts against the President being able to remove an Interim U.S. Attorney. The Court has often quoted James Madison's observation made on the floor of the First Congress that "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the

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261 Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2203 (2020).

262 *Id.* at 2211.

263 *See* 28 U.S.C. § 541(a) ("The President *shall* appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district." (emphasis added)).

264 28 U.S.C. § 546 (2018).

265 U.S. CONST., art. II, § 3; *see also Seila Law*, 140 S. Ct. at 2191–92; Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483–84 (2010); Myers v. United States, 272 U.S. 52, 229 (1926).

266 28 U.S.C. § 541(a) (2018).

267 *Id.* § 546(d).

laws."[268] Doubtless this is true. But it is equally true that if any power whatsoever is in its nature *legislative*, it is the power of creating federal offices through laws and, in the case of inferior officers, selecting the appropriate appointment mechanism. After all, the Appointments Clause of the U.S. Constitution indicates that federal offices must be "established by Law," and leaves to Congress decide "as they think Proper" whether the appointment of inferior officers should be vested in the President with the advice and consent of the Senate, "in the President alone, in the Courts of Law, or in the Heads of Department."[269]

Allowing the President to fire an Interim U.S. Attorney at will is tantamount to allowing the President to usurp the legislature's prerogative of selecting the appointment mechanism for inferior officers. It grants the President a de facto workaround of the congressional decision to make U.S. Attorneys subject to Senate confirmation. Rather than nominating a U.S. Attorney as he is required by law to do, a President could simply order the Attorney General to appoint his preferred candidate, perhaps because he knows that his preferred candidate would be blue slipped or otherwise fail to be confirmed by the Senate. If at the end of 120 days, the district court appoints someone not to the President's liking (or *anyone* other than his preferred candidate), he could fire them and order the Attorney General to once again fill the vacancy[270] to his liking. By doing so ad nauseum, the President could effectively sidestep the appointment mechanism *Congress* thought proper.[271] In light of this, stripping the President of removal power over Interim U.S. Attorneys appears to be a prudent check on the President's appointment power, an incentive to motivate him to "faithfully execute" a law he has neglected, respect the separation of powers, and utilize the proper appointment mechanism.

Conclusion

In short, the statute creating the office of U.S. Attorney is a mess.

On its face, it appears to provide alternative appointment mechanisms for the same office. A careful textual reading, however, demonstrates that Congress has actually created three distinct offices, what we

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268 *Seila Law*, 140 S. Ct. at 2197 (quoting 1 Annals of Cong. 463 (1789) to demonstrate accountability of lesser officers to the President); *Free Enter. Fund*, 561 U.S. at 492 (same).

269 U.S. CONST., art. II, § 2.

270 As I point out above, a close reading of 28 U.S.C. § 546(a) calls into question the Attorney General's authority to appoint an Acting U.S. Attorney after an Interim U.S. Attorney has been fired. *See supra* notes 27, 45–46, and accompanying text.

271 It might be argued that the President is *not* usurping Congressional prerogatives because Congress has provided for alternative appointment mechanisms for U.S. Attorneys. To the extent that it has actually done so, it should be considered an unconstitutional delegation of legislative authority.

have called U.S. Attorneys, Acting U.S. Attorneys, and Interim U.S. Attorneys. It is an open question whether these offices are principal or inferior offices, but it seems probable that lower courts will continue to either dodge the question or conclude that they are all inferior offices. Assuming this prediction is correct, the various appointment mechanisms established by Congress are likely to be upheld as constitutional.

Removal is a trickier issue. The statute appears to allow the President to remove *all* U.S. Attorneys—including Acting and Interim U.S. Attorneys—at will, but there are non-frivolous textual arguments to suggest that this authority is limited to U.S. Attorneys proper, those that have been nominated by the President and confirmed by the Senate. And there are strong constitutional arguments to suggest that allowing the President to fire an Interim U.S. Attorney would violate the separation of powers.

But all of these questions remain unanswered. Berman's decision to resign as Interim U.S. Attorney for the Southern District of New York spared the country from a prolonged legal battle over these issues—for now. Congress should act swiftly to clarify the text of Title 28.