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## ON THE DANGER OF WEARING TWO HATS: *MISTRETTA* AND *MORRISON* REVISITED

RONALD J. KROTOSZYNSKI, JR.\*

[T]he Constitution, at least as a *per se* matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time.<sup>1</sup>

More than any other separation of powers/delegation doctrine decisions, *Mistretta v. United States*<sup>2</sup> and *Morrison v. Olson*<sup>3</sup> broadly endorsed the functionalist vision<sup>4</sup> of the modern admin-

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1. *Mistretta v. United States*, 488 U.S. 361, 404 (1989).

2. 488 U.S. 361 (1989).

3. 487 U.S. 654 (1988).

4. Functionalism and formalism are the two principal competing theories of the separation of powers doctrine. Functionalism focuses on the substantive policy goals that a particular assignment of responsibilities seeks to achieve or advance and provides that as long as a given scheme does not reassign one of the core functions of a coordinate branch, the arrangement should be permitted. See Cass R. Sunstein,

istrative state. In both *Mistretta* and *Morrison*, the Supreme Court assumed that the service of federal judges in quasi-legislative (*Mistretta*)<sup>5</sup> and quasi-executive (*Morrison*)<sup>6</sup> roles would not undermine the integrity of the Article III courts. Subsequent developments suggest that the Supreme Court significantly underestimated the corrosive impact of permitting federal judges to discharge consecutively (if not concurrently) judicial, legislative, and executive functions.

Operational difficulties associated with the independent counsel provisions of the Ethics in Government Act<sup>7</sup> and the Sen-

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*Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 495-96 (1987). Congress and the federal courts have erected the modern administrative state on a functionalist basis. See CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 4-5 (1990). *Mistretta* and *Morrison* provide excellent examples of functionalist reasoning in action. See *Mistretta*, 488 U.S. at 371-412; *Morrison*, 487 U.S. at 677-85. Formalism emphasizes the structural separation of powers reflected in the division of legislative, executive, and judicial power in Articles I, II, and III of the Constitution. See Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory, 41 DUKE L.J. 449, 455 n.34 (1991). Formalists believe that the text of the Constitution and the intent of the Framers concerning the proper relationship of the branches (to the extent that their intent can be determined) should control separation of powers analyses. See Sunstein, *supra*, at 493; see also Redish & Cisar, *supra*, at 449-56. *INS v. Chadha*, 462 U.S. 919, 944-59 (1983), exemplifies formalist reasoning.

Professor Sunstein offers a third model for analyzing separation of powers questions, the Holmesian view, under which each branch of government must defend its own institutional prerogatives. See Sunstein, *supra*, at 494-95. Under this approach, the federal courts would not play a significant role in resolving executive/legislative interbranch disputes; rather, the courts would use various decision-avoidance techniques, i.e., the political question doctrine, and permit the political branches to resolve their own differences. See *id.* at 495. For additional views on the formalism/functionalist dichotomy, see *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1453-57 (1995), which describes various theories of the separation of powers and asserts that the separation of powers precludes both Congress and administrative agencies from altering by statute federal courts' final judgments; Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1254-55 (1988), which describes generally the functionalist/formalist debate; and Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492-96 (1987), which describes and discusses formalism and functionalism and argues in favor of functionalism.

5. See *Mistretta*, 488 U.S. at 395-96.

6. See *Morrison*, 487 U.S. at 695.

7. 28 U.S.C. §§ 591-599 (1994).

tencing Reform Act (SRA)<sup>8</sup> have disproved crucial assumptions that underlie the Court's decisions in *Mistretta* and *Morrison*. In the case of the United States Sentencing Commission ("Sentencing Commission"), federal judges serving as Sentencing Commissioners have refused to recuse themselves both in cases challenging the legality of particular guidelines and in cases challenging the entire system of sentencing guidelines.<sup>9</sup>

John Locke observed that nothing is more fundamentally unfair than a person serving as a judge in his own case.<sup>10</sup> Wearing the hat of "Sentencing Commissioner," federal judges serve as legislators, drafting sentencing rules.<sup>11</sup> Afterwards, wearing the hat of "Article III judge," they pass upon the legality of their own work product.<sup>12</sup> In reality, judges who serve as Sentencing Commissioners are refusing to recuse themselves in cases involving their own work product<sup>13</sup>—Locke's objection notwithstanding. Although it is doubtful that the *Mistretta* decision anticipated such a state of affairs, its real-world effects are to the contrary.

Similarly, recent events have cast serious doubts on the validity of *Morrison's* assumption that federal judges could appoint independent counsels without compromising the political independence—and hence credibility—of the Article III courts. Judges serving on the Special Division, which is charged with appointing independent counsels, have become deeply embroiled in what are essentially political disputes.<sup>14</sup> This is an incredible

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8. Id. §§ 991-998.

9. See, e.g., *United States v. McLellan*, 28 F.3d 117 (11th Cir. 1994) (unpublished opinion) (vacating an inmate's sentence because the sentencing judge was a member of United States Sentencing Commission); see also *United States v. Wright*, 873 F.2d 437, 445-47 (1st Cir. 1989) (Breyer, J., writing separately) (discussing his decision not to recuse himself despite being a member of the Sentencing Commission).

10. See John Locke, *The Second Treatise of Government* §§ 13, 87-91, 125, in *TWO TREATISES OF GOVERNMENT* 293-94, 341-44, 369 (P. Laslett ed., 1960). Indeed, Locke posited that individuals leave the state of nature, forming a commonwealth, inter alia, precisely to avoid having individuals serve as judges in cases in which they are interested. See *id.* § 88, at 342-43.

11. See 28 U.S.C. § 991.

12. See *Wright*, 873 F.2d at 445-47 (Breyer, J., writing separately).

13. See *id.* (Breyer, J., writing separately).

14. See, e.g., *Judges Err on Whitewater*, N.Y. TIMES, Nov. 9, 1994, at A26; Susan Schmidt, *Former ABA Presidents Criticize Panel That Chose Starr*, WASH. POST,

turn of events, given the bulwark Article III erects to protect federal judges from such influences.<sup>15</sup> Indeed, most federal judges abandon all partisan activity upon being named to the bench.<sup>16</sup>

Against this backdrop, the decision made by a judge of the United States Court of Appeals for the District of Columbia to meet with two highly partisan Republican senators, apparently to discuss (among other things) the appointment of an independent counsel in the Whitewater affair,<sup>17</sup> simply is inappropriate. When outraged members of the public filed formal ethics

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Sept. 27, 1994, at A9; Howard Schneider, *Judge Met Sen. Faircloth Before Fiske Was Ousted*, WASH. POST, Aug. 12, 1994, at A21. Moreover, the political controversy associated with the appointment of Ken Starr as the Whitewater independent counsel has not proven to be an isolated event. See *In re Charge of Judicial Misconduct or Disability*, 85 F.3d 701 (D.C. Cir. Judicial Council 1996) (describing and dismissing citizen complaints regarding a senator's alleged attempt to influence the selection of the independent counsel appointed to investigate now-deceased Commerce Secretary Ron Brown by lobbying the Chief Judge of the Special Division).

15. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1. The Framers provided federal judges with life tenure and constitutionalized the sanctity of their paychecks precisely to protect the independence of the federal judiciary. See *Chisom v. Roemer*, 501 U.S. 380, 400 (1991). Indeed, independence and its resulting impartiality help to secure the public's trust in the work product of the federal judiciary; i.e., they facilitate public acceptance of its decisions. If Congress may direct federal judges to participate in a process that necessarily involves conducting ex parte meetings with highly ideological legislators in the Senate dining room, then Article III's protections will do little to preserve the public's perception of the integrity of Article III judges. Cf. *In re Charge of Judicial Misconduct or Disability*, 39 F.3d 374, 379 (D.C. Cir. Judicial Council) (holding that Special Division judge's ex parte communications with two United States Senators while the Special Division was considering the appointment of an independent counsel to investigate the Whitewater affair did not constitute "prejudicial effect on the administration of the business of the courts"), *aff'd*, Nos. 94-8 & 94-9 (D.C. Cir. Dec. 30, 1994).

16. In fact, some judges even cease to vote. Justice John Marshall Harlan, for example, refused to vote or participate in any electoral activities whatsoever because he believed that such activities undermined the public's confidence in the impartiality of Article III judges. See Nathan Lewin, *John Marshall Harlan*; in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES*, 1798-1993, at 445 (C. Cushman ed., 1993). For similar reasons, Justice Harlan also refused to attend the President's annual State of the Union Address. See *id.* To this day, the Justices attending the State of Union Address neither stand nor applaud during the President's speech. See, e.g., *The State of the Union Address* (NBC television broadcast, Feb. 4, 1997).

17. See *Charge of Judicial Misconduct*, 39 F.3d at 375; Schneider, *supra* note 14, at A21.

complaints protesting the judge's behavior, however, the Chief Judge of the D.C. Circuit not only defended his colleague's behavior, but embraced it openly.<sup>18</sup> The Chief Judge's decision later was affirmed by the Judicial Council of the District of Columbia Circuit by a vote of eight to two.<sup>19</sup> If service on the Special Division means that Article III judges must participate in essentially political disputes, then, *Morrison* notwithstanding, the independent counsel provisions of the Ethics in Government Act cannot be constitutional.

The Supreme Court has failed to appreciate the fragility of the Article III courts in our system of democratic government by rushing to show its openness to the new administrative state, in which the blending of executive, legislative, and judicial functions is to be appreciated as a necessary, if not tasty, constitutional jambalaya.<sup>20</sup> A fundamental difference exists between congressional schemes that redistribute the division of political power between the politically-accountable executive and legislative branches and programs that attempt to place such power in the hands of electorally unaccountable federal judges.<sup>21</sup>

Simply put, a scheme that vests unelected judges with powers and responsibilities that the Constitution delegates to the executive or legislative branches will create a corresponding public demand for political accountability in the exercise of these delegated functions. The net effect of such arrangements is not difficult to predict: the public's confidence in the nonpartisan nature of the Article III courts will be undermined and ultimately destroyed; independent, nonpartisan, "neutral" judges are essential

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18. See *Charge of Judicial Misconduct*, 39 F.3d at 382 (suggesting the necessity of such communication); *infra* notes 206-22 and accompanying text.

19. See *Charge of Judicial Misconduct*, Nos. 94-8 & 94-9; see also *Charge of Judicial Misconduct*, 85 F.3d 701 (endorsing the application of Judge Edwards's identical reasoning in a subsequent case raising similar issues).

20. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-33 (1962) (discussing the countermajoritarian difficulty arising when the Court overrules legislative acts); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4-9, 41, 44-72 (1980) (warning that the Court should not attempt to impose its own views and values on society through its decisions lest it lose its popular legitimacy); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 2-10 (1959) (calling for the adoption of consistent and principled decision making by the Court).

21. See *infra* Part IV.C.

to the legitimacy of the Article III courts.<sup>22</sup>

Part I of this Article discusses the Supreme Court's opinion in *Mistretta* and its aftermath in the lower courts. Part I gives particular attention to the failure of Sentencing Commissioners/judges to recuse themselves in cases involving direct challenges to the legality of the United States Sentencing Commission's work product. Part II reviews the *Morrison* opinion and describes the real-world effects of requiring federal judges to undertake an essentially political task. Part III examines historical counterexamples of judges undertaking extrajudicial service in the executive branch of government. Finally, Part IV offers an agenda for positive reform and takes up the broader policy concerns that necessitate reform. Significantly, Part IV argues that an element of formalism should be deemed essential in all separation of powers analyses that involve delegations of political authority to either Article III courts or Article III judges.

The exigencies of the modern administrative state cannot be permitted to justify radical departures from the Framers' liberty-enhancing scheme of separated and divided powers. If formalism truly is dead (Justice Scalia's protestations notwithstanding),<sup>23</sup> Congress is free to task Article III judges with extrajudicial (i.e., nonjudicial) duties. The Supreme Court, however, must require Congress to structure these delegations in a manner that avoids doing violence to the credibility and legitimacy of the judicial branch. Unlike the executive and legislative branches of the federal government, the judiciary is not politically accountable to the electorate.<sup>24</sup> Accordingly, the federal courts should treat novel power sharing arrangements that involve transfers of executive or legislative responsibilities to the judiciary with greater skepticism than they treat delegations of authority between the politically accountable branches.<sup>25</sup> Because *Mistretta* and *Morrison* have failed to protect adequately the institutional integrity of the Article III courts, the Supreme Court must adopt

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22. See *infra* Part IV.C and text accompanying notes 175-82.

23. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 650-56 (1990) (describing Justice Scalia's formalism).

24. See *infra* text accompanying note 341.

25. See *infra* text accompanying notes 336-45.

more detailed rules to govern the participation of judges in extrajudicial undertakings. If federal judges are to wear two hats (or more), these new accoutrements must not clash with their old wardrobes.

## I. MISTRETTA: WHO WILL JUDGE THE JUDGES?

### A. A Brief Review of the *Mistretta* Holding

In 1984, Congress created the United States Sentencing Commission under the auspices of the SRA.<sup>26</sup> The SRA established the Sentencing Commission to oversee the reform of federal sentencing policy; its objective was to "review and revise" federal sentencing policy.<sup>27</sup> Incident to this duty, the Sentencing Commission would consult with authorities on the federal sentencing system.<sup>28</sup> Ultimately, Congress charged the Sentencing Commission with developing and maintaining a comprehensive system of guidelines that would govern federal district judges' sentencing decisions.<sup>29</sup> *Mistretta* presented a facial challenge to the constitutionality of the United States Sentencing Commission.<sup>30</sup>

The Sentencing Commission was itself somewhat unique; unlike most independent federal commissions, Congress placed the Sentencing Commission "[with]in the judicial branch of the United States."<sup>31</sup> Notwithstanding Congress's placement of the

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26. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3586 (1994) & 28 U.S.C. §§ 991-998 (1994)). For a brief historical account of the reasons why Congress passed the Sentencing Reform Act, see Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1, 8-12 (1991).

27. See 28 U.S.C. § 994(o).

28. See *id.*

29. See *id.* § 994(a).

30. *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

31. 28 U.S.C. § 991(a) For reasons that are unclear at best, the Supreme Court acquiesced in this characterization. See *Mistretta*, 488 U.S. at 384-97. Regardless of the constitutionality of having active federal judges serve as lawgivers, it takes a great leap of constitutional logic to locate an independent commission within Article III. Perhaps such an institution could be located within the executive branch, as a kind of executive department. See U.S. CONST. art. II, § 2, cl. 1. By way of contrast, Article III speaks only to "courts": "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." *Id.* art. III, § 1.



Sentencing Commission within the judicial branch, it vested the President with the power to appoint each of the Commission's seven members.<sup>32</sup> The SRA also required that no fewer than three of the Sentencing Commissioners be federal judges selected from a nomination list consisting of six judges submitted by the Judicial Conference of the United States.<sup>33</sup>

The facts of *Mistretta* were fairly simple. John M. Mistretta had pled guilty to a single count of conspiracy related to the sale and distribution of cocaine.<sup>34</sup> At his sentencing, after rejecting arguments regarding the legality of the sentencing guidelines,<sup>35</sup> the district court applied these guidelines and sentenced Mistretta to eighteen months of imprisonment, to be followed by a three-year period of supervised release.<sup>36</sup>

Mistretta's challenge to the constitutionality of the Sentencing Commission eventually found its way to the Supreme Court.<sup>37</sup> Before the Court, Mistretta argued that the Sentencing Commission was unconstitutional because the SRA unlawfully delegated legislative authority to an independent commission.<sup>38</sup> Mistretta also argued that the composition of the Sentencing Commission violated separation of powers principles.<sup>39</sup> This separation of powers argument had three components. First, Mistretta argued that Congress could not locate the Sentencing Commission within the judicial branch of government;<sup>40</sup> second, Mistretta claimed that the composition of the Sentencing Commission, i.e., the inclusion of federal judges, was constitutionally problematic;<sup>41</sup> and, third and finally, Mistretta claimed that the President's authority to appoint and remove Sentencing Commissioners impermissibly vested control of a judicial entity within the executive branch.<sup>42</sup>

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32. See 28 U.S.C. § 991(a).

33. See *id.*

34. See *Mistretta*, 488 U.S. at 370.

35. See *id.* at 370-71.

36. See *id.* at 371.

37. See *id.*

38. See *id.*

39. See *id.* at 380.

40. See *id.* at 383-84.

41. See *id.* at 384, 397.

42. See *id.* at 384, 408-09.

Writing for an eight to one majority, Justice Blackmun rejected the delegation challenge, noting that "we harbor no doubt that Congress'[s] delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements."<sup>43</sup> The Court's treatment of the delegation question simply confirmed what administrative law scholars have suspected for quite some time: the delegation doctrine is dead.<sup>44</sup>

Turning to the separation of powers arguments, the Court identified two general kinds of separation of powers problems. First, neither Congress nor the President may assign to the judiciary duties that "more properly" could be accomplished by one of the other branches.<sup>45</sup> Second, the Court identified a corresponding principle that Article III judges cannot assume duties that threaten the "institutional integrity" of the judicial branch.<sup>46</sup> Acknowledging that the SRA's scheme for judicial participation in sentencing "give[s] rise to serious concerns about a disruption of the appropriate balance of governmental power among the coordinate branches,"<sup>47</sup> the Court nevertheless concluded that Mistretta's concerns were "more smoke than fire."<sup>48</sup>

Surprisingly, the Court expressly sanctioned Congress's decision to locate the Sentencing Commission within the judicial branch of government.<sup>49</sup> "In light of . . . precedent and practice,

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43. *Id.* at 374.

44. Leading administrative law scholars have been making this claim for almost 40 years. *See, e.g.*, KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* 75-76 (1st ed. 1958) (stating that the nondelegation doctrine is "without practical force"). This view continues to enjoy broad support both within the legal academy and among members of the federal judiciary. *See* PETER L. STRAUSS, *AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES* 20 (1989); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 *CORNELL L. REV.* 1, 5, 7-17 (1982); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 *MICH. L. REV.* 1223, 1233-34 (1985); J. Skelly Wright, *Beyond Discretionary Justice*, 81 *YALE L.J.* 575, 582 (1972). A number of proposals for reinvigorating the doctrine, however, also have been offered. *See, e.g.*, Aranson et al., *supra*, at 17, 63-67; Schoenbrod, *supra*, at 1236-37.

45. *See Mistretta*, 488 U.S. at 383 (quoting *Morrison v. Olson*, 487 U.S. 659, 680-81 (1988)).

46. *See id.* (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986)).

47. *Id.* at 384.

48. *Id.*

49. *See id.* at 384-85, 390.

we can discern no separation-of-powers impediment to the placement of the Sentencing Commission within the judicial branch."<sup>50</sup> Moreover, the Court noted that the:

'[P]ractical consequences' of locating the Commission within the Judicial Branch pose no threat of undermining the integrity of the Judicial Branch or of expanding the powers of the Judiciary beyond constitutional bounds by uniting within the Branch the political or quasi-legislative power of the Commission with the judicial power of the courts.<sup>51</sup>

The Court reasoned that because the Sentencing Commission does not purport to be a court, there is no separation of powers difficulty arising from its placement within the judicial branch.<sup>52</sup> It also emphasized the "nonpolitical" nature of the Commission's work.<sup>53</sup>

Although it may be possible to "locate" certain administrative functions annexed to the business of judging within Article III, it is difficult to fathom exactly how the determination of sentencing ranges is an appropriate Article III task any more than, for example, the determination of federal telecommunications policy would be. Could Congress locate the Federal Communications Commission within the Article III courts rather than within the executive branch? In a manner much like a recent college graduate moving into a new apartment and directing the placement of an old sofa, the *Mistretta* majority basically told the Congress to

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50. *Id.* at 390.

51. *Id.* at 393. See also THE FEDERALIST NO. 47, at 376 (James Madison) (John C. Hamilton ed., 1866) (describing the dangers of joining legislative and judicial power, and quoting Montesquieu); *id.* NO. 78, at 576 (Alexander Hamilton) (asserting that the liberty of the people is endangered when the judiciary ceases to be distinct from the legislature); Locke, *supra* note 10, § 13, at 293 (observing the fundamental unfairness of a person serving as judge in his own case).

52. See *Mistretta*, 488 U.S. at 393-94.

53. See *id.* at 396. Recent events suggest that this characterization may be grossly inaccurate. Certainly, the guidelines applicable to convictions for the sale of crack cocaine, which are appreciably more harsh than those applicable to the sale of powder cocaine, have given rise to substantial dissatisfaction on the part of many Americans. See Ari Armstrong, *Crack Cocaine: Make the Sentencing Fair*, WASH. POST, Aug. 15, 1995, at A17; *Cocaine Injustice*, N.Y. TIMES, May 31, 1994, at A16; *President Clinton and Crack*, WASH. POST, Nov. 2, 1995, at A30.

“put it anywhere.”<sup>54</sup>

The *Mistretta* decision also addressed whether the composition of the Sentencing Commission presented constitutional difficulties. Citing to historical examples of joint executive/judicial branch appointments,<sup>55</sup> the majority concluded that “the Founders themselves” believed that “the constitutional principle of separation of powers does not absolutely prohibit extrajudicial service.”<sup>56</sup> The Court overlooked, however, that all of these prior joint appointments were *executive* in nature; none of them involved performing duties of an essentially legislative nature.<sup>57</sup>

Nevertheless, the Court embraced the analogy to prior joint executive/judicial appointments stating: “Such power as these judges wield as Commissioners is not judicial power; it is administrative power derived from the enabling legislation.”<sup>58</sup> In any

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54. Some scholarly criticism of this part of the majority's holding has been particularly harsh. See, e.g., Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1138 (1994) (“The majority of the Court, idiotically concluding that the Commission was an Article III entity, allowed dual service in this instance.”).

55. The Court specifically cited John Jay's dual service as Chief Justice and as Ambassador to England, Oliver Ellsworth's joint service as Chief Justice and as minister to France, and John Marshall's joint service as Chief Justice and as Secretary of State. See *Mistretta*, 488 U.S. at 398-99. The Court failed to cite the more recent precedent set by Justice Abe Fortas, who attempted (unsuccessfully) to execute both the duties of Associate Justice and presidential advisor. See *infra* text accompanying notes 281-84.

56. *Mistretta*, 488 U.S. at 399. The majority failed to mention that such service was always highly controversial and tended to detract from the credibility of the Court. See *infra* Part III.B.1.

57. Indeed, if one characterizes the work of the Sentencing Commission as being “legislative” in nature, a joint appointment as a Sentencing Commissioner/judge runs up against the spirit, though not the letter, of the prohibition against legislators holding joint appointments in the executive or judicial branch. See U.S. CONST. art. I, § 6, cl. 2 (“[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”).

58. *Mistretta*, 488 U.S. at 404. Of course, if the power exercised by the Sentencing Commission is not judicial power, one might seriously question *how* the Commission can be “located” in the judicial branch of government. After all, Article III plainly states only that “[t]he judicial Power” is “vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1. As Justice Scalia noted in his dissent from *Mistretta*, if the Commission is exercising executive power, it is a creature of Article II; if legislative power, then a creature of Article I. See *Mistretta*, 488 U.S. at 422-23 (Scalia, J., dissenting). Justice Scalia's principal complaint, however, focused on the creation of a “junior varsity Congress” and the (in his view) illegitimate creation of an indepen-

event, the Court held that this judicial-but-not-*really*-judicial-service was constitutionally unobjectionable on its face.<sup>59</sup>

The Court cautioned, however, that if a particular extrajudicial assignment "undermines the integrity of the judicial branch," judicial personnel could not undertake such an assignment.<sup>60</sup> This caveat apparently did not apply to the Sentencing Commission: "[W]e cannot see how the service of federal judges on the Commission will have a constitutionally significant practical effect on the operation of the judicial branch."<sup>61</sup> Acknowledging that "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship," the Court concluded that service on the Sentencing Commission would not bring the judiciary into disrepute.<sup>62</sup> "That federal judges participate in the promulgation of guidelines does not affect their or other judges' ability impartially to adjudicate sentencing issues."<sup>63</sup>

The Court did not consider, and therefore did not address, whether Sentencing Commissioners would consider the legality of their own work product. Such a course of action would conflate legislative power with the judiciary's power of review, denying the litigant before the reviewing (or sentencing) court the benefit of the separation of powers.<sup>64</sup> Perhaps the majority simply assumed that Sentencing Commissioners would recuse themselves in cases involving challenges to the guidelines.<sup>65</sup> In

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dent, administrative "fourth branch" of the federal government, rather than on the propriety of judicial service in such a fourth branch. *See id.* at 427 (Scalia, J., dissenting).

59. *See id.* at 374.

60. *See id.* at 404 & n.27.

61. *Id.* at 406.

62. *Id.* at 407.

63. *Id.* at 406-07.

64. *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991) (asserting that the separation of powers represents a counter-majoritarian protection of an individual's rights against unfair treatment by the government).

65. The Court noted that it saw "no reason why service on the Commission should result in widespread judicial recusals." *See Mistretta*, 488 U.S. at 406. This suggests that the Court did foresee a need for isolated judicial recusals, i.e., that individual Sentencing Commissioners might have to recuse themselves in a nontrivial number of sentencing disputes. Although the common law rule of necessity might require the Supreme Court to pass on the ultimate merits of a challenge to the Federal Rules of

any event, the practice of Sentencing Commissioners/judges suggests that the Court needed to address this issue with greater clarity.

*B. The Aftermath: Failing To Observe Locke's Admonition That No Man Should Be a Judge in His Own Case*

In his *Two Treatises of Government*, John Locke posited that one of the principal reasons that people leave the state of nature, forming political societies, is to avoid the evils of having individuals serve as judges in their own cases.<sup>66</sup> He explained that:

I desire to know what kind of government that is, and how much better it is than the State of Nature, where one Man commanding a multitude, has the Liberty to be Judge in his own Case, and may do to all his Subjects whatever he pleases, without the least liberty to any one to question or controle those who Execute his Pleasure? And in whatsoever he doth, whether led by Reason, Mistake, or Passion, must be submitted to? Much better it is in the State of Nature wherein Men are not bound to submit to the unjust will of another: And if he that judges, judges amiss in his own, or any other Case, he is answerable for it to the rest of Mankind.<sup>67</sup>

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Evidence or the Federal Rules of Civil Procedure, no such necessity exists for the participation of Sentencing Commissioners from the lower federal courts. *Cf.* *United States v. Will*, 449 U.S. 200, 217 (1980) (ruling that the public interest would not be served by requiring that all judges disqualify themselves from hearing cases challenging the validity of a statute freezing judicial compensation on conflict of interest grounds if such disqualification would deny litigants a proper forum); *see also* *Mississippi Publ'g Corp. v. Murphree*, 326 U.S. 438, 445 (1946) (holding that the federal courts could undertake principal responsibility for drafting and maintaining the Federal Rules of Civil Procedure even if such rules have "incidental" effects on litigants' substantive rights).

66. Locke, *supra* note 10, § 13, at 293.

67. *Id.* John Locke's influence on the founding generation was both profound and pervasive. *See* BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 26-30 (1967). It is therefore particularly appropriate to rely upon Locke to develop an understanding of the theoretical foundations of the separation of powers doctrine. *See generally* Letter from Thomas Jefferson to John Trumbull (Feb. 15, 1798), in *THE PORTABLE THOMAS JEFFERSON* 434-35 (Merrill D. Peterson ed., 1975) ("I will put off till my return from America [the purchase of certain busts and portraits] except Bacon, Locke and Newton . . . as I consider them as the three greatest men that have ever lived, without any exception . . .").

Thus, according to Locke, living under a government without independent and impartial judges actually is worse than living in the state of nature.<sup>68</sup>

In Locke's view, any system of government that does not provide for a neutral adjudicator to resolve disputes leaves the nominal citizens in the state of nature.<sup>69</sup> An independent and impartial judiciary is essential to the creation and maintenance of a civil society because impartial judges provide a necessary check on the unrestrained exercise of power by executive or legislative officers.<sup>70</sup> Thus, it is imperative for civil governments to provide the citizenry with "known and indifferent" judges who possess the "[a]uthority to determine all differences according to the established Law."<sup>71</sup>

The idea that no person should be both lawmaker and judge also constitutes a component of "natural justice," which to this day remains an element of Anglo-American law.<sup>72</sup> At a theoretical level, the separation of powers doctrine both reflects and implements this basic principle.<sup>73</sup>

Locke's theoretical justification for the separation of powers and practical concerns about the neutrality of judges remain quite relevant today.<sup>74</sup> The American public expects federal judges to be neutral: capable of deciding matters that come before them free of financial interest or political or ideological prejudgments.<sup>75</sup> Locke's theories help to explain more concrete-

68. See Locke, *supra* note 10, § 87, at 341-42. Locke goes on to explain that the protection of property requires individuals to form civil societies, one of the chief benefits of which will be the rule of law. See *id.*

69. See *id.* § 90, at 344.

70. See *id.* § 91, at 344-45.

71. *Id.* § 125, at 369 (emphasis omitted); see also *id.* § 131, at 371 (calling for the provision of "indifferent and upright Judges").

72. See STRAUSS, *supra* note 44, at 14.

73. See *id.*; see also Brown, *supra* note 64, at 1531-40 (discussing the relationship between the concept of ordered liberty and separation of powers theory); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 622 (1984) (discussing the role of considerations of individual fairness in separation of powers theory).

74. See generally STRAUSS, *supra* note 44, at 17-18 (suggesting that recent challenges to congressional grants of executive and judicial powers to legislative agents reflected "a continued vitality for separation of powers ideas"); see, e.g., Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983).

75. See 28 U.S.C. § 455(a), (b) (1988). As one federal judge has explained:

ly why the citizenry holds these baseline assumptions; his theories also predict the consequences if the judiciary should fail to meet them—a fundamental lack of faith in the civil government.<sup>76</sup>

Ultimately, one should not find the American public's expectation that judges will be independent and nonpartisan particularly surprising, given that the United States maintains an adversarial system of justice in which attorneys do their best to press their clients' cases successfully before both juries and judges.<sup>77</sup> In this system, judges serve as the umpires, and routinely are called upon to decide myriad procedural and substantive questions. A system of adversarial justice cannot function without public confidence in judges' abilities and fairness any more than one could play baseball without an umpire or basketball without a referee.<sup>78</sup>

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[T]he public's confidence in the integrity of the judiciary rests in large part on a widespread understanding and acceptance of the strict (sometimes frustrating and inhibiting) rules of conduct under which we operate. It is that confidence in our integrity which provides the moral legitimacy upon which the power of an appointed judiciary rests.

*In re Charge of Judicial Misconduct or Disability*, Nos. 94-8 & 94-9, slip op. at 8 (D.C. Cir. Dec. 30, 1994) (Kessler, J., writing separately); see also *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988) (holding that a judge who served as trustee of a university should have known of the university's interest in the case and therefore should have recused himself from the case); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 98 (3d Cir. 1992) (stating that "the right to trial by an impartial judge [was] 'a basic requirement of due process'" (citations omitted)). Whether federal judges actually possess these attributes is a matter that some academics have seriously questioned. See MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 46-60*, 111-46 (1988); Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 33-41 (1984). Interestingly, criticism of the neutrality of judges comes not only from the left, but also from the right. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* 15-18, 69-74, 129-32 (1990) (suggesting that judicial activism reflects broad-based, transformational social changes and thus follows no single political trajectory).

76. See Suri Rathapala, *John Locke's Doctrine of the Separation of Powers: A Reevaluation*, 38 AM. J. JURIS. 189, 207-08 (1993).

77. See generally Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1062-65, 1071-75, 1080-89 (1976) (discussing the role of the lawyer in the adversarial system).

78. See, e.g., *Burdett v. Miller*, 957 F.2d 1375, 1380 (7th Cir. 1992) ("[Judges] want to do justice as well as merely umpire disputes . . . ."); see also Stephen Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 715 (1983) ("Adversary theory . . . suggests that neutrality and passivity



The need for impartiality is accentuated in the federal courts, which for the past four decades have enjoyed principal responsibility for overseeing the recognition and application of a variety of textual and nontextual constitutional rights, including the guarantees set forth in the Bill of Rights and the Fourteenth Amendment.<sup>79</sup> Federal judges, called upon to decide particularly thorny issues of social policy,<sup>80</sup> must both appear to be and act as honest brokers among countless interest groups.

### 1. *Judicial Behavior Under the SRA Does Not Measure Up*

Viewed in light of Locke's proposition that no person should be a judge in his own case, the SRA appears to suffer from some rather serious structural defects.<sup>81</sup> Because the SRA vests judges with law-making power, the potential exists for a collapse of the separation of powers: the SRA vests the same federal judges with law-making power, to be exercised while they retain their law-interpreting powers over their own work product.<sup>82</sup> Accordingly, one would assume that Sentencing Commissioners/judges

[of a judge] are essential . . . to convince society that the judicial system is trustworthy."); William H. Rehnquist, Address, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 8 (stating that the imperatives of the adversarial system require judges to referee disputes rather than "actively manage their resolution from beginning to end"); Simon H. Rifkind, *The Lawyer's Role and Responsibility in Modern Society*, 30 REC. 534, 535-45 (1975) (commenting on a lawyer's role in the adversarial system). *But cf.* MARVIN E. FRANKEL, *PARTISAN JUSTICE* 11-19 (1980) (suggesting that despite idealized conceptions of justice, the skills of attorneys still will carry the outcome in an adversarial system).

79. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 473 (1974) (declining to require exhaustion of state judicial remedies, and "recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights").

80. *See, e.g.*, *Quill v. Vacco*, 80 F.3d 716 (2d Cir.) (holding that physician-assisted suicide is a fundamental right protected by the Equal Protection Clause of the Fourteenth Amendment), *cert. granted*, 117 S. Ct. 36 (1996); *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir.) (holding that the substantive aspect of the Due Process Clause protects a patient's right to seek physician-assisted suicide in some circumstances), *cert. granted*, 117 S. Ct. 37 (1996).

81. *See* 28 U.S.C. §§ 991-998 (1994); *see generally* Lewis J. Liman, *The Constitutional Infirmities of the United States Sentencing Commission*, 96 YALE L.J. 1363, 1387 (1987) ("The type of legislative rulemaking that the Sentencing Commission will engage in . . . breaks with the separation of powers in allowing the [judges] who promulgated rules to also apply them.").

82. *See* Liman, *supra* note 81, at 1387.

would recuse themselves from cases involving direct challenges to the validity of the Sentencing Commission's work product. Such a course of action would comport with *Mistretta's* apparent assumption that judges serving as Sentencing Commissioners would *not* sit in judgment in cases challenging the legality of their own work product.<sup>83</sup>

In the seven years following the Supreme Court's decision in *Mistretta*, three circuits have addressed whether a Sentencing Commissioner must recuse himself in cases involving the application of the guidelines.<sup>84</sup> In two of the cases, federal circuit judges refused to recuse themselves;<sup>85</sup> in the third, a panel of the Eleventh Circuit required a district judge serving as a Sentencing Commissioner to recuse herself after she herself failed to do so.<sup>86</sup>

Then-Judge Stephen Breyer was the first federal judge to address whether Sentencing Commissioners routinely should recuse themselves in cases involving the application of the guidelines.<sup>87</sup> Given the potential conflict between Judge Breyer's service as a Sentencing Commissioner and a federal appellate judge, he thought "it seem[ed] desirable to consider the question of recusal systematically and in writing."<sup>88</sup>

Judge Breyer asked both the local United States Attorney and

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83. See *Mistretta v. United States*, 488 U.S. 361, 406-07 (1989) ("That federal judges participate in the promulgation of guidelines does not affect their or other judges' ability to impartially adjudicate sentencing issues."); *id.* at 407 ("While the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy.")

84. See *United States v. McLellan*, 28 F.3d 117 (11th Cir. 1994) (unpublished per curiam opinion); *United States v. Glick*, 946 F.2d 335 (4th Cir. 1991); *United States v. Wright*, 873 F.2d 437 (1st Cir. 1989).

85. See *Glick*, 946 F.2d at 336-37; *Wright*, 873 F.2d at 445-47 (Breyer, J., writing separately).

86. See *In re United States*, 60 F.3d 729, 730-31 (11th Cir.) (describing the holding of *McLellan*), *cert. denied*, 116 S. Ct. 828 (1995). Significantly, Judge Julie Carnes, the district court judge in question, declined to recuse herself, notwithstanding her dual service as a Sentencing Commissioner/judge. See *id.* Evidently, following Justice Blackmun's advice, see *Mistretta*, 488 U.S. at 404, Judge Carnes was prepared to put away her Sentencing Commissioner hat and review the Commission's work product while wearing her federal district judge hat.

87. See *Wright*, 873 F.2d at 445-47 (Breyer, J., writing separately).

88. *Id.* at 446 (Breyer, J., writing separately).

the public defender assigned to the case to provide advice on the recusal issue.<sup>89</sup> They provided six reasons why Sentencing Commissioners should not recuse themselves routinely from cases involving the application of the guidelines:

(1) A Sentencing Commissioner's work is "essentially neutral."<sup>90</sup>

(2) The legislative history of the SRA suggests that Congress did not believe Sentencing Commissioners routinely would recuse themselves from cases involving the guidelines.<sup>91</sup>

(3) Sentencing Commissioners would have particular expertise with the guidelines; this expertise would be lost if they routinely recused themselves from guidelines cases.<sup>92</sup>

(4) Judges serving on federal rules committees do not routinely recuse themselves from cases involving the application of those rules.<sup>93</sup>

(5) State court judges serving on state Sentencing Commissions do not routinely recuse themselves from cases requiring them to apply their work product.<sup>94</sup>

(6) Routine recusal unfairly would increase the workload of judges who were not Sentencing Commissioners.<sup>95</sup>

Thus, both the government and defense counsel agreed that recusal as a matter of course was not warranted.<sup>96</sup>

In its amicus brief, however, the Department of Justice suggested two narrow exceptions in which a federal judge who also had served, or who was serving currently, as a Sentencing Commissioner should recuse himself: first, when "there is a substantial challenge" to the existence of the guidelines system;<sup>97</sup> and second, "where a judge/Commissioner has previously expressed

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89. *See id.* (Breyer, J., writing separately).

90. *Id.* (Breyer, J., writing separately).

91. *See id.* (Breyer, J., writing separately).

92. *See id.* (Breyer, J., writing separately).

93. *See id.* (Breyer, J., writing separately).

94. *See id.* (Breyer, J., writing separately).

95. *See id.* (Breyer, J., writing separately).

96. *See id.* at 447 (Breyer, J., writing separately).

97. *Id.* (Breyer, J., writing separately).

views on the merits of the particular case that is being considered by his court.<sup>98</sup> These exceptions "are narrow."<sup>99</sup> The first exception would apply only when the challenge would "jeopardize the continued existence of the Guidelines system."<sup>100</sup> The second would apply only when a particular commissioner has commented on the merits of a specific case, and "does not include instances where a judge/Commissioner has expressed general views on sentencing policy."<sup>101</sup>

Based on the parties' submissions, Judge Breyer concluded that recusal was not warranted in the case at hand, which involved only the routine application of the guidelines to a particular defendant.<sup>102</sup> He stated that:

In light of these considerations, I shall not recuse myself in this case, where no special circumstances are present, nor shall I *automatically* recuse myself in *typical* Guidelines cases, unless they involve a serious legal challenge to the Guidelines themselves.<sup>103</sup>

He nevertheless intended to "entertain any motion for recusal that is made."<sup>104</sup>

Following Judge Breyer's approach in *Wright* requires recusal only when a defendant attacks the very existence of the guidelines system.<sup>105</sup> If a defendant merely objects to Judge Breyer passing on the meaning, or even the legality, of a particular guideline, it would appear that Judge Breyer would deny the motion for recusal.<sup>106</sup> Accordingly, in at least some cases, Judge Breyer would sit in judgment over the legality of his own work product; he would serve as a judge in his own case.<sup>107</sup>

In *United States v. Glick*,<sup>108</sup> a second Sentencing Commis-

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98. *Id.* (Breyer, J., writing separately).

99. *Id.* (Breyer, J., writing separately).

100. *Id.* (Breyer, J., writing separately).

101. *Id.* (Breyer, J., writing separately).

102. *See id.* (Breyer, J., writing separately).

103. *Id.* (Breyer, J., writing separately).

104. *Id.* (Breyer, J., writing separately).

105. *See supra* text accompanying note 102.

106. *See Wright*, 873 F.2d at 446 (Breyer, J., writing separately).

107. *See id.* (Breyer, J., writing separately); *cf. Locke, supra* note 10, §§ 87-91, at 341-45 (explaining that in a state of nature everyone is his own judge).

108. 946 F.2d 335 (4th Cir. 1991).

sioner/judge faced the recusal issue; Judge William W. Wilkins of the Fourth Circuit followed Judge Breyer's lead in *Wright*.<sup>109</sup> Facing a motion to recuse himself based on his service as a Sentencing Commissioner, Judge Wilkins noted that "[a] judge must recuse himself from a 'proceeding in which his impartiality might reasonably be questioned'. . . . When there is no reasonable basis for questioning a judge's impartiality, however, it would be improper for the judge to recuse himself."<sup>110</sup> Judge Wilkins concluded that, "[b]ecause no special circumstances that would cause a reasonable person to question my impartiality are presented by this appeal, I shall not recuse myself."<sup>111</sup> As in *Wright*, *Glick* involved a routine application of the guidelines; in neither case did the defendant challenge the legality of a particular guideline or the guidelines system as a whole.<sup>112</sup>

Finally, in *United States v. McLellan*,<sup>113</sup> the defendant, Louis Curtis McLellan, objected to District Judge Julie Carnes's ruling on his claim that the Sentencing Commission was unconstitutional.<sup>114</sup> Judge Carnes declined to recuse herself, notwithstanding her service as a Sentencing Commissioner.<sup>115</sup> On appeal, a panel of the Eleventh Circuit reversed, holding that Judge Carnes's dual service as a Sentencing Commissioner/judge gave rise to an appearance of impropriety.<sup>116</sup>

The *McLellan* panel, however, did not publish its decision, and a subsequent panel of the court refused to embrace the *McLellan* panel's reasoning.<sup>117</sup> In *In re United States*, an Eleventh Circuit panel declared that it "emphatically disavow[ed] . . . any

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109. See *id.* at 336-37; *Wright*, 873 F.2d at 437; *supra* notes 87-104 and accompanying text.

110. *Glick*, 946 F.2d at 336-37 (quoting 28 U.S.C.A. § 455(a) (West Supp. 1991)).

111. *Id.* at 337. Judge Wilkins stated: "Indeed, because recusal is not required, I am obligated to participate." *Id.*

112. See *id.*; *Wright*, 873 F.2d at 437.

113. 28 F.3d 117 (11th Cir. 1994) (unpublished per curiam opinion).

114. See *id.*; see also *In re United States*, 60 F.3d 729, 730-31 (11th Cir.) (discussing the unpublished opinion of the court in *McLellan*), *cert. denied*, 116 S. Ct. 828 (1995).

115. See *In re United States*, 60 F.3d at 730 (discussing the unpublished opinion of the court in *McLellan*).

116. See *McLellan*, 28 F.3d 117; see also *In re United States*, 60 F.3d at 730-31 (describing the holding of the unpublished opinion of the court in *McLellan*); see also 28 U.S.C. § 455(a), (b)(4) (1994) (delineating when a judge should disqualify himself).

117. See *In re United States*, 60 F.3d at 731 n.2.

intention to adopt in this published opinion the prior *McLellan* opinion's holding on the recusal issue."<sup>118</sup> Because the *McLellan* panel's decision was not published, "its holding on the recusal issue is not the law of this circuit and will not be binding on any future panel in a case involving a different defendant."<sup>119</sup> As a technical matter, the *In re United States* panel "express[ed] no view on the recusal issue."<sup>120</sup> The tone of the opinion, however, strongly suggests that the subsequent panel disagreed with the *McClellan* panel's reasoning.

## *2. Toward Fashioning a Practicable Standard To Govern the Recusal of Judges Who Also Serve As Sentencing Commissioners*

In the wake of cases like *Wright* and *In re United States*, a criminal defendant faced with the prospect of being sentenced, or having his appeal heard, by a judge who serves as a Sentencing Commissioner has little cause for optimism regarding the prospects of obtaining that judge's voluntary recusal.<sup>121</sup> It would be wrong, however, to conclude that a recusal motion in such circumstances automatically would prove to be a wasted effort. Both *Glick* and *McClellan* suggest that some courts would be receptive to such a motion on the proper facts.<sup>122</sup>

Of the four cases decided to date, *Glick* provides the best standard by which to govern the recusal of Sentencing Commissioners/judges, and clearly is the least problematic decision of the group.<sup>123</sup> Judge Wilkins determined that his participation in hearing *Glick*'s appeal could not give rise to a reasonable inference of an appearance of impropriety.<sup>124</sup> Because *Glick* in-

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118. *Id.*

119. *Id.*

120. *Id.*

121. *See* *United States v. Wright*, 873 F.2d 437 (1st Cir. 1989); *In re United States*, 60 F.3d at 729.

122. *See* *United States v. Glick*, 946 F.2d 335 (4th Cir. 1991); *United States v. McLellan*, 28 F.3d 117 (11th Cir. 1994) (unpublished per curiam opinion).

123. *See Glick*, 946 U.S. at 336-37.

124. *See id.*; *see also* 28 U.S.C. § 455(a) (1994) (requiring that "any . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned").

volved the routine application of the guidelines,<sup>125</sup> this conclusion appears sound. Moreover, the analytical framework set forth by Judge Wilkins *would* require recusal in cases in which a judge's participation created the appearance of impropriety, presumably including cases in which he was called upon to determine the legality of his own work product.<sup>126</sup>

The First Circuit correctly decided *Wright* on its own facts, but the framework that the opinion established appears to permit judges to determine the legality of their own work product.<sup>127</sup> Then-Judge Breyer's approach requires recusal *only* in cases involving a defendant's challenge to the entire guidelines system.<sup>128</sup> Nevertheless, if a defendant raises a legal challenge to a single guideline, a Sentencing Commissioner/judge who worked on creating that particular guideline should recuse himself.<sup>129</sup> The *Wright* standard, however, plainly would not compel such a result.<sup>130</sup>

Indeed, *Wright* appears to permit a Sentencing Commissioner to effectively wear two hats with respect to a particular defendant: the Sentencing Commissioner/judge serves both as the lawgiver and as the judge charged with determining the law's legality.<sup>131</sup> Such a combination of law making and adjudication deprives an affected defendant of the structural protection of our Constitution's system of checks and balances.<sup>132</sup> Accordingly, *Wright* must be rejected in favor of a stricter standard for recusal.

Finally, the Eleventh Circuit appears to have reached the

125. See *Glick*, 946 U.S. at 337.

126. See *id.*

127. See *United States v. Wright*, 873 F.2d 437, 445-47 (1st Cir. 1989) (Breyer, J., writing separately).

128. See *id.* at 447 (Breyer, J., writing separately).

129. See CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES Canon 5(G) (1974) ("A judge should not . . . accept such an appointment if the judge's governmental duties would interfere with the performance of judicial duties or tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary . . .").

130. See *Wright*, 873 F.2d at 447 (Breyer, J., writing separately).

131. See *id.* (Breyer, J., writing separately).

132. See *Brown*, *supra* note 64, at 1514-16, 1531-40; see also Redish & Cisar, *supra* note 4, at 474-78 (discussing the need for pragmatic formalism to insure against "the accretion of even potentially abusive power").

right result in *McLellan*: a Sentencing Commissioner/district court judge cannot adjudicate, alone, a challenge to the legality of the guidelines.<sup>133</sup> The *In re United States* panel, however, expressly disavowed any intention of following *McLellan*.<sup>134</sup> In consequence, it is difficult to determine the standard that the Eleventh Circuit would apply to such cases. Presumably, however, at least three judges of the court (the *McLellan* panel) do not think that it is appropriate for a judge to serve as both a lawgiver and as an adjudicator.<sup>135</sup> Even if the Eleventh Circuit were to embrace formally the result in *McLellan*, the *McLellan* court's standard for evaluating recusal motions<sup>136</sup> does not address more routine cases that merely involve the application of a particular guideline (rather than a challenge to the guidelines system itself).

A criminal defendant challenging the legality of a particular sentencing guideline may reasonably expect that the author of the guideline will not sit in judgment over the challenge,<sup>137</sup> because persons with a professional and personal interest in the outcome of a dispute should not be deemed competent to sit in judgment.<sup>138</sup> The lower court decisions addressing the propri-

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133. See *In re United States*, 60 F.3d 729, 730-31 (11th Cir.) (discussing the unpublished per curiam opinion of *United States v. McLellan*, 28 F.3d 117 (11th Cir. 1994)), cert. denied, 116 S. Ct. 828 (1995). On these facts, even Justice Breyer would recuse himself. Cf. *Wright*, 873 F.2d at 447 (stating that a recusal may be appropriate in cases involving "a serious legal challenge to the Guidelines themselves") (Breyer, J., writing separately).

134. See *In re United States*, 60 F.3d at 731 n.2.

135. *United States v. McLellan*, 28 F.3d 117 (11th Cir. 1994) (unpublished per curiam decision).

136. See *id.*

137. Cf. STRAUSS, *supra* note 44, at 622 ("Wherever she is located in government, a judge ought not be connected with the controversy or the parties . . ."). For example, imagine a district court judge serving on the appellate panel and reviewing the correctness of her own decision as a district court judge. Plainly, a district court judge cannot hear an appeal of her own decision. The situation is no different when a Sentencing Commissioner is called upon to decide the legality of a particular guideline. Likewise, district judges construe the meaning of their prior decisions on a daily basis; there is no prohibition on a district judge's application of decisional rules that she fashioned in prior opinions. So too, a Sentencing Commissioner/judge should be free to apply the guidelines in routine cases, because the act of applying the guidelines does not put into question the impartiality of the judge. Simply put, there is no reason to believe that a judge who crafts a particular decisional principle will be incapable of applying that principle fairly.

138. See *Locke*, *supra* note 10; see also 28 U.S.C. § 455(a), (b) (1994) (discussing



ety of such behavior in the context of the sentencing guidelines—particularly *Wright*—suggest, however, that the propriety of this behavior is unclear to some members of the federal judiciary. It is, of course, possible that these courts correctly read *Mistretta* to mean that judges can pass on the legality of their own work product; if that is indeed a proper reading, then *Mistretta* was decided wrongly.

## II. *MORRISON*: SMOKE GETS IN YOUR EYES

### A. *A Review of the Morrison Holding*

*Morrison v. Olson*<sup>139</sup> involved a challenge to the constitutionality of the independent counsel provisions of the Ethics in Government Act.<sup>140</sup> Under these provisions, the Attorney General may investigate alleged wrongdoing within the executive branch and, if “good cause” exists to believe that wrongdoing might have occurred, recommend the appointment of an “independent counsel” to investigate the matter further and prosecute any criminal wrongdoing.<sup>141</sup> If the Attorney General concludes that “good cause” exists for the appointment of an independent counsel, she must file a request for the appointment of an independent counsel with the “Special Division,” a court created to consider the Attorney General’s recommendations.<sup>142</sup> After receiving a request from the Attorney General for the appointment of an independent counsel, the Special Division must then appoint an independent counsel and “define that independent counsel’s prosecutorial jurisdiction.”<sup>143</sup>

In 1982 and 1983, Congress and the Justice Department of

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disqualification of justices, judges, or magistrates).

139. 487 U.S. 654 (1988).

140. See 28 U.S.C. §§ 591-599.

141. See *id.* § 591.

142. See *id.* §§ 592-593.

143. *Id.* § 593(b)(1). The Special Division also receives the Attorney General’s recommendations *not* to appoint an independent counsel. See *id.* § 592(b)(1). The Special Division, however, cannot appoint an independent counsel over the Attorney General’s negative recommendation. See *id.* For a discussion of the events that led Congress to enact the independent counsel provisions of the Ethics in Government Act, see *In re Olson*, 818 F.2d 34, 39-46 (D.C. Cir. 1987).

the Reagan Administration became embroiled in a controversy over the administration's commitment (or lack thereof) to enforcing the Superfund provisions of CERCLA.<sup>144</sup> Pursuant to its oversight authority, Congress asked the Environmental Protection Agency (EPA) and the Justice Department to produce certain documents relevant to the enforcement of the Superfund provisions.<sup>145</sup> Invoking executive privilege, the EPA and Justice Department refused to produce a number of documents requested by Congress.<sup>146</sup>

Following resolution of its investigation of the administration's enforcement of CERCLA, the House Judiciary Committee began an investigation into the Justice Department's conduct during the controversy.<sup>147</sup> The committee produced a report that concluded, among other things, that Theodore Olson, Assistant Attorney General for the Office of Legal Counsel, had made false and misleading statements to Congress, and that Edward C. Schmults, Deputy Attorney General, and Carol E. Dinkins, Assistant Attorney General for the Land and Natural Resources Division, unlawfully had withheld certain information from the committee during the pendency of its investigation.<sup>148</sup> Based on this report, the chairman of the House Judiciary Committee asked that the Attorney General request the appointment of an independent counsel to prosecute any criminal wrongdoing related to the withholding of the information.<sup>149</sup>

The Attorney General petitioned the Special Division to appoint an independent counsel.<sup>150</sup> In April 1986, the Special Division appointed James C. McKay as independent counsel,<sup>151</sup> charging him with the task of investigating whether criminal charges should be brought based on Olson's alleged false and

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144. See *In re Olson*, 818 F.2d at 35; 42 U.S.C. §§ 9601-9675 (1994).

145. See *Morrison v. Olson*, 487 U.S. 654, 665-67 (1988).

146. See *id.* at 665.

147. See *id.* at 665-66.

148. See *id.*; H.R. REP. NO. 99-435, at 640-55 (1985); Ruth Marcus, *Ex-Officials' Testimony Not "Designed to Conceal"*, WASH. POST, Mar. 21, 1989, at A4 (discussing decision not to prosecute former Justice Department official Theodore B. Olson).

149. See *Morrison*, 487 U.S. at 666-67.

150. See *id.*

151. See *id.* at 667.

misleading statements to the Committee.<sup>152</sup> McKay resigned during the pendency of his investigation, and the Special Division appointed Alexia Morrison to replace him.<sup>153</sup>

Morrison subsequently sought and obtained subpoenas to take the depositions of Olson, Schmults, and Dinkins.<sup>154</sup> Olson, Schmults, and Dinkins responded to the subpoenas by challenging the constitutionality of the independent counsel provisions.<sup>155</sup> They argued that the provisions violated the Appointments Clause<sup>156</sup> by vesting appointment of executive officers in the courts and violated the separation of powers doctrine by unduly limiting presidential control over an executive function, prosecutions, and by transferring executive power to the judicial branch.<sup>157</sup>

The Supreme Court rejected each of these challenges.<sup>158</sup> First, it found that an independent counsel constituted an "inferior" officer for purposes of applying the Appointments Clause.<sup>159</sup> As a result, Congress could vest the power to appoint independent counsel within the federal courts.<sup>160</sup> Second, the Court rejected the claim that the Ethics in Government Act required judges to assume an executive function<sup>161</sup> stating, that "[t]he Act simply does not give the Division the power to 'supervise' the independent counsel in the exercise of his or her investigative or prosecutorial authority."<sup>162</sup>

Although the Court was "more doubtful" about the Special

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152. *See id.*

153. *See id.*

154. *See id.* at 668.

155. *See id.*

156. *See* U.S. CONST. art. II, § 2, cl. 2.

157. *See Morrison*, 487 U.S. at 668-69; *see also In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988) (holding that the independent counsel provisions of the Ethics in Government Act were unconstitutional on separation of powers grounds), *rev'd sub nom. Morrison v. Olson*, 487 U.S. 654 (1988).

158. *See Morrison*, 487 U.S. at 670-97.

159. *See id.* at 670-77.

160. *See id.* For a distinctly different point of view on these questions, see Judge Silberman's opinion for the D.C. Circuit panel that initially decided *Morrison*. *In re Sealed Case*, 838 F.2d at 478-518.

161. *See Morrison*, 487 U.S. at 680-81.

162. *Id.* at 681.

Division's ability to terminate an independent counsel,<sup>163</sup> it avoided finding any constitutional infirmity in this arrangement by strictly limiting the Special Division's authority: "As we see it, 'termination' may occur only when the duties of the counsel are truly 'completed' or 'so substantially completed' that there remains no need for any continuing action by the independent counsel."<sup>164</sup> Under this limiting construction, "the Special Division's power to terminate does not pose a sufficient threat of judicial intrusion into matters that are more properly within the Executive's authority to require that the Act be invalidated."<sup>165</sup>

Finally, the Court turned aside separation of powers challenges based on the President's circumscribed ability to remove or oversee the independent counsel.<sup>166</sup> Applying a functionalist analysis, the majority found that the removal provisions did not "impermissibly undermine[ ]' the powers of the Executive Branch . . . or 'disrupt[ ] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions."<sup>167</sup>

In an impassioned dissent, Justice Scalia argued that the independent counsel provisions of the Ethics in Government Act impermissibly stripped the executive branch of one of its constitutional functions.<sup>168</sup> Justice Scalia argued that "[i]t is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President."<sup>169</sup> This is so because "[t]he Constitution prescribes that they *all* are."<sup>170</sup>

Neither Chief Justice Rehnquist, writing for the eight-Justice majority, nor Justice Scalia, in dissent, focused on the effects that service by Article III judges on the Special Division would

163. *See id.* at 682.

164. *Id.* at 682-83.

165. *Id.* at 683.

166. *See id.* at 695-96.

167. *Id.* at 695 (alterations in original) (citations omitted).

168. *See id.* at 697-99, 703-15 (Scalia, J., dissenting).

169. *Id.* at 709 (Scalia, J., dissenting).

170. *Id.* (Scalia, J., dissenting); *see also* Brian C. Murchison, *The Concept of Independence in Public Law*, 41 EMORY L.J. 961, 1010-11 (1992) (arguing that Justice Scalia's concerns in *Morrison* stem from a belief that the appointments process under the independent counsel law is not really independent at all).

have on the public's perception of the Article III judiciary. Both the majority and Justice Scalia implicitly assumed that appointing independent counsel would not impede or interfere with the exercise of core Article III powers.<sup>171</sup>

Certainly, such an assumption is not unreasonable. Judges routinely appoint clerks, secretaries, and other court personnel. They appoint special masters and trustees. They even appoint counsel in certain cases involving indigent parties. None of these functions is thought to undermine the ability of the Article III courts to decide fairly and impartially the cases or controversies that come before them.<sup>172</sup>

None of these duties, however, embroil the federal courts directly in partisan interbranch disputes. Neither the majority nor Justice Scalia considered whether service on the Special Division was problematic because it might place judges in a role that would "interfere with the performance of judicial duties or tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary."<sup>173</sup> Subsequent events have

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171. See *Morrison*, 487 U.S. at 677-85, 697 n.16; *id.* at 697-734 (Scalia, J., dissenting). In a 37-page dissent, Justice Scalia never addressed the possible effects of judicial selection of independent counsel on the Article III courts.

172. Moreover, the Appointments Clause plainly gives Congress the ability to vest the appointment of some "executive" officers with the Courts: "[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the heads of Departments." U.S. CONST. art. II, § 2, cl. 2. Although this language could be construed to permit courts to appoint only judicial support staff, the weight of authority supports a broader construction. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1529, at 385-86 (Leonard W. Levy ed., 1970); Letters from The Federal Farmer (Jan. 17, 1788), in 2 THE COMPLETE ANTI-FEDERALIST 307-09 (Herbert J. Storing ed., 1981); Donald J. Simon, *The Constitutionality of the Special Prosecutor Law*, 16 U. MICH. J.L. REFORM 45, 63-69 (1982); see also *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352-53 (1931) (recognizing that the United States commissioners appointed by the district courts are inferior officers); *Rice v. Ames*, 180 U.S. 371, 378 (1901) (discussing Congress's right to invest the district courts with the power of appointment duties for certain inferior officers); *Ex parte Siebold*, 100 U.S. 371, 397-98 (1879) (holding that the Appointments Clause gives Congress, at its discretion, the power to vest certain appointments with either the President or the federal courts); *Hobson v. Hansen*, 265 F. Supp. 902 (D.D.C. 1967) (addressing the constitutionality of a statute allowing United States district court judges to appoint the members of the District of Columbia's board of education); *United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963) (addressing the constitutionality of district court judges appointing, pursuant to a statute, United States attorneys).

173. *Mistretta v. United States*, 488 U.S. 361, 404 n.27 (1989) (citing CODE OF JU-

demonstrated that service on the Special Division will, from time to time, place judicial personnel at the very heart of highly partisan interbranch disputes in nonjudicial roles.<sup>174</sup> This state of affairs is problematic for many reasons, not the least of which is the negative effect on the public's overall confidence in the impartiality and fairness of the federal judiciary that results from permitting judges to act as partisan agents.

For better or worse, the citizenry expects that federal judges will not serve as partisan agents.<sup>175</sup> The reason for this expectation is relatively simple: the courts are the ultimate arbiters of many divisive social issues. Matters that the Congress or state legislatures cannot or will not address often wind up before the federal judiciary.<sup>176</sup> In consequence, the citizenry is acutely aware of the importance of judicial appointments; for example, a wide variety of organizations and interest groups closely monitor the appointment and confirmation of federal judges.<sup>177</sup>

The public's confidence in the judiciary's ability to decide these issues rests in no small part on the presumption that substantive and procedural norms of a nonpolitical (or apolitical) nature govern judicial behavior.<sup>178</sup> Indeed, the popular mythol-

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DICIAL CONDUCT FOR UNITED STATES JUDGES Canon 5(G) (1974).

174. See *infra* text accompanying notes 186-236.

175. Cf. Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 969 (1996) (noting that the desire for the public to view courts as "rendering judgments untainted by partisan concerns or by public pressure" motivated the Framers' decision to grant judges life tenure).

176. See Frank M. Johnson, Jr., *The Alabama Punting Syndrome*, JUDGES' J., Spring 1979, at 4-17, 53; Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28 EMORY L.J. 901, 906-09 (1979); see also *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding that the separate but equal doctrine as applied to public schools denied blacks equal protection of the law); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *affd in part sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977) (finding that conditions of confinement in the Alabama penal system constituted cruel and unusual punishment); *Wyatt v. Stickney*, 344 F. Supp. 373 and 344 F. Supp. 387 (M.D. Ala. 1972), *affd in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (holding that the Constitution guarantees civilly committed persons a right to treatment and that granting relief did not intrude upon any decision-making area reserved for the state legislature).

177. See STEPHEN L. CARTER, *THE CONFIRMATION MESS* 3-22, 90-96 (1994); see generally BORK, *supra* note 75, at 278-93 (discussing the scrutiny that accompanied his nomination to the Supreme Court).

178. See Wechsler, *supra* note 20, at 2-10.

ogy of the federal judiciary includes liberal reliance on a supposed law-making/law-interpreting dichotomy that ostensibly cabins judicial policy-making power.<sup>179</sup> Put simplistically, judges are meant merely to interpret existing law; they do not create it out of whole cloth.<sup>180</sup> Whether justified or not, the public's confidence in the detached nonpartisan character of the federal judiciary is essential to its continued effectiveness (if not its legitimacy). Federal judges therefore must avoid undertaking tasks that place them in overtly political roles, because if judges are really only another subset of politicians, then their special claim to expertise in "say[ing] what the law is"<sup>181</sup> must ring hollow.<sup>182</sup>

Because the Special Division has appointed prosecutors in politically charged interbranch disputes (and is expected to do so again in the future), it is essential that the members of the Special Division take care to ensure that, in discharging their duties under the Ethics in Government Act, they do not undermine their ability to function as Article III judges. The Supreme Court emphasized in *Mistretta* that even if the Constitution does not strictly prohibit federal judges from assuming extrajudicial duties, not "every extrajudicial service would be compatible with, or appropriate to, continuing service on the bench; nor does it mean that Congress may require a federal judge to assume extrajudicial duties as long as the judge is assigned those duties in an individual, not judicial, capacity."<sup>183</sup> The "ultimate inquiry" is "whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch."<sup>184</sup> Events subsequent to

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179. See generally BORK, *supra* note 75, at 110-26 (describing the tendency of some judges to deny elected representatives right to base laws on morality); cf. TUSHNET, *supra* note 75, at 108-46 (discussing the Court's reliance on moral philosophy as a theory of judicial review).

180. Cf. BORK, *supra* note 75, at 15-18 (noting that judicial activism has generated much public controversy).

181. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also BRUCE ACKERMAN, *WE THE PEOPLE* 192-99 (1991) (noting the inherent weaknesses in the Court's ability to abuse its power to interpret the Constitution).

182. See generally Richard Delgado, *Playing Favorites*, 74 TEX. L. REV. 1223, 1223-26 (1996) (arguing that federal judges are inherently political actors and citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), in support of this position).

183. *Mistretta v. United States*, 488 U.S. 361, 404 (1988).

184. *Id.* It bears noting that the Code of Conduct for United States Judges prohib-

the *Morrison* decision have demonstrated that *Morrison* failed to provide sufficiently clear guidance to the lower courts regarding the avoidance of activities that tend to “undermine[] the integrity of the Judicial Branch.”<sup>185</sup>

### B. Of Judges, Politicians, and Senate Cafeterias

In January 1994, Attorney General Janet Reno appointed former Judge Robert B. Fiske, Jr. to serve as a “special” prosecutor, and charged him with investigating certain Arkansas real estate transactions related to a development on the Whitewater River.<sup>186</sup> While he was Governor of Arkansas, President Bill Clinton and First Lady Hillary Rodham Clinton had invested in the development at the behest of James McDougal, an Arkansas banker. Several prominent Arkansas Republicans subsequently alleged that the Clintons had faced no real financial risk in the deal and had received undeserved dividends.<sup>187</sup> The bank that

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its a judge from undertaking an assignment that would tend to compromise the public's confidence in his ability to serve as a neutral adjudicator. The Code provides that:

A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice, unless appointment of a judge is required by Act of Congress. A judge should not, in any event, accept such an appointment if the judge's governmental duties would interfere with the performance of judicial duties or tend to undermine the integrity, impartiality, or independence of the judiciary.

CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES Canon 5(G) (1974).

This clause suggests that federal judges must refuse service either as a Sentencing Commissioner or as a member of the Special Division if such service would tend to undermine the public's faith in their ability to discharge their Article III duties. See generally *In re Charge of Judicial Misconduct or Disability*, Nos. 94-8 & 94-9, slip op. at 4-5 (D.C. Cir. Dec. 30, 1994) (Tatel, J. writing separately) (citing Canon 5(G) in support of the position that service on the Special Division cannot encompass duties that threaten a federal judge's appearance of propriety).

185. *Mistretta*, 488 U.S. at 393.

186. See David Johnston, *Counsel Granted a Broad Mandate in Clinton Inquiry*, N.Y. TIMES, Jan. 21, 1994, at A1; Stephen Labaton, *Reno Is Said To Choose New Yorker as Counsel*, N.Y. TIMES, Jan. 20, 1994, at A12; see also *In re Charge of Judicial Misconduct or Disability*, 39 F.3d 374, 376 (D.C. Cir. Judicial Council), *aff'd*, Nos. 94-8 & 94-9 (D.C. Cir. Dec. 30, 1994) (discussing events leading to the appointment of independent counsel); cf. 28 U.S.C. § 543 (1994) (authorizing the Attorney General to appoint special prosecutors to assist United States attorneys).

187. See Johnston, *supra* note 186, at A1; Labaton, *supra* note 186, at A12. For a



had provided the project's financing, Madison Guaranty Savings & Loan Association, ultimately failed, necessitating a bailout of the thrift institution using taxpayer funds.<sup>188</sup> Essentially, the GOP critics charged that the Whitewater investment was a means of channelling financial gifts to then-Governor Clinton and Hillary Rodham Clinton.<sup>189</sup>

At the time of the Fiske appointment, the independent counsel provisions of the Ethics in Government Act had expired.<sup>190</sup> After the appointment, Congress reenacted the independent counsel provisions of the Act.<sup>191</sup> Attorney General Reno petitioned the Special Division to appoint Fiske, then serving as "special counsel," to serve as the independent counsel.<sup>192</sup>

Rather than simply giving the independent counsel appointment to Fiske, who, by this time, had made substantial progress in his investigation, the Special Division instead fired Fiske and appointed Kenneth W. Starr to serve as independent counsel.<sup>193</sup> Starr's appointment proved controversial because of his strong partisan ties to the Republican party. Starr had held a number of prominent government jobs, including a post as an assistant attorney general in the Reagan Justice Department, judge on the D.C. Circuit, and Solicitor General of the United States during the Bush Administration.<sup>194</sup> Following President Bush's electoral defeat in 1992, Starr became a partner in the law firm of Kirkland & Ellis.<sup>195</sup>

After leaving public office, Starr remained quite active in Re-

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full chronology of the Whitewater matter, see *The Unfolding of Whitewater*, WASH. POST, Jan. 21, 1994, at A20.

188. See *The Unfolding of Whitewater*, *supra* note 187, at A20.

189. See Michael Isikoff, *Whitewater Special Counsel Promises 'Thorough' Probe*, WASH. POST, Jan. 21, 1994, at A20.

190. See *Charge of Judicial Misconduct*, 39 F.3d at 376.

191. See Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591-599.

192. See *Charge of Judicial Misconduct*, 39 F.3d at 376-77.

193. See generally David Johnston, *Three Judges Spurn Protest on Whitewater Prosecutor*, N.Y. TIMES, Aug. 19, 1994, at A16 (discussing Kenneth W. Starr's appointment as Independent Counsel).

194. See Jason DeParle, *Verdict on a Counsel: Conservative but Not Rigid*, N.Y. TIMES, Aug. 22, 1994, at A9; Ruth Marcus, *Republican Draws Criticism, Praise*, WASH. POST, Aug. 6, 1994, at A1; Susan Schmidt, *Judges Say They Lack Power To Oust or Review Whitewater Counsel*, WASH. POST, Aug. 19, 1994, at A12.

195. See Schneider, *supra* note 14, at A24.

publican politics. He was a frequent and critical commentator on President Clinton's performance in office.<sup>196</sup> Party officials also touted Starr as a possible senatorial candidate in Virginia.<sup>197</sup> In sum, Kenneth Starr was (and is) a man with a definite political agenda.

Notwithstanding Starr's highly partisan activities, the Special Division, headed by Judge David Sentelle,<sup>198</sup> appointed Starr to replace Fiske on August 5, 1994.<sup>199</sup> The appointment generated a firestorm of controversy, based largely on the perception that Starr was incapable of conducting the Whitewater investigation impartially.<sup>200</sup>

Later, the *Washington Post* reported that Judge Sentelle had lunched with North Carolina Republican Senators Jesse Helms and Lauch Faircloth in the Senate cafeteria prior to firing Fiske and replacing him with Starr.<sup>201</sup> This meeting led to speculation—denied by Judge Sentelle—that Senators Helms and Faircloth had lobbied Judge Sentelle to replace Fiske.<sup>202</sup> In ad-

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196. See DeParle, *supra* note 194, at A9; Marcus, *supra* note 194, at A1.

197. See Marcus, *supra* note 194, at A1; Schmidt, *supra* note 194, at A12.

198. Judge Sentelle is a conservative Republican who gained his seat on the D.C. Circuit in part through the efforts of North Carolina Senator Jesse Helms. See Toni Locy, *Judges' Politics Examined in Appointment of Starr To Direct Probe*, WASH. POST, Aug. 7, 1994, at A6; see also *Appeals Judge for D.C. Named*, WASH. POST, Feb. 3, 1987, at A7 (reporting on Judge Sentelle's nomination and noting that he is "a strong supporter of Jesse Helms . . . and a longtime activist in the Republican party"); Ruth Marcus, *North Carolina Judge Is Seen as Choice for Appellate Vacancy Here*, WASH. POST, Sept. 27, 1986, at A15 (discussing Judge Sentelle's close relationship with Senator Helms).

199. See *In re Charge of Judicial Misconduct or Disability*, 39 F.3d 374, 377 (D.C. Cir. Judicial Council), *aff'd*, Nos. 94-8 & 94-9 (D.C. Cir. Dec. 30, 1994); Stephen Labaton, *The Whitewater Inquiry: The Decision; Judges Appoint New Prosecutor for Whitewater*, N.Y. TIMES, Aug. 6, 1994, at A1; Susan Schmidt, *Judges Replace Fiske As Whitewater Counsel*, WASH. POST, Aug. 6, 1994, at A1.

200. See Charles Fried, *Messing with the Constitution*, WASH. POST, Aug. 26, 1994, at A25 (noting the "cries of politics raised by Democrats" following Starr's appointment); Johnston, *supra* note 186, at A1 (describing the "smoldering controversy" surrounding Starr's appointment); Schmidt, *supra* note 14, at A9 (expressing doubt by former ABA presidents as to Starr's impartiality in light of his Republican ties).

201. See Toni Locy & Marilyn W. Thompson, *Lunch Among 'Old Friends' Causes Latest Whitewater Ripple*, WASH. POST, Aug. 24, 1994, at A3; Schneider, *supra* note 14, at A21. This news only added to the general outrage that followed the Special Division's sacking of Mr. Fiske. See, e.g., *Mr. Starr's Duty To Resign*, N.Y. TIMES, Aug. 18, 1994, at A22 (urging Starr to resign his position as independent counsel in light of Judge Sentelle's ex parte contacts with Senators Helms and Faircloth).

202. See *Charge of Judicial Misconduct*, 39 F.3d at 382-83; Johnston, *supra* note

dition, Judge Sentelle received a number of ex parte communications from the senators regarding the appointment of a Whitewater independent counsel.<sup>203</sup>

The D.C. Circuit Judicial Council received three separate complaints arising from the lunch between Judge Sentelle and Senators Helms and Faircloth and the ex parte letters.<sup>204</sup> The complaints alleged that the lunch was improper and that Judge Sentelle had an obligation to disclose certain correspondence from these senators regarding the appointment of Whitewater independent counsel, arguing that both types of ex parte contacts gave rise to an appearance of impropriety.<sup>205</sup>

In a rather remarkable opinion, Chief Judge Harry T. Edwards, writing for the D.C. Circuit Judicial Council, dismissed the ethics complaints against Judge Sentelle.<sup>206</sup> Judge Edwards's opinion began with the assertion that "[t]hese complaints are misguided in their assumptions about the applicable legal and ethical principles at issue."<sup>207</sup> According to Judge Edwards, "[c]ommon sense dictates and history confirms that prudent exercise of the appointment power under Article II necessitates consultation by those making appointments."<sup>208</sup> After de-

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186, at A1; *Judges Err on Whitewater*, *supra* note 14, at A26; Locy, *supra* note 198, at A6. The fact that Senators Helms and Faircloth are among the most partisan and ideologically conservative members of Congress only added fuel to the fire. See MICHAEL BARONE & GRANT UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS 1996*, at xiv-xvi, 991-93 (1996) (describing empirically Senator Helms's and Senator Faircloth's extremist voting records in the Senate).

203. Schneider, *supra* note 14, at A21.

204. See *Charge of Judicial Misconduct*, 39 F.3d at 375; Toni Locy, *Citizen Complaint Filed Over Starr Appointment*, WASH. POST, Sept. 3, 1994, at A4; Toni Locy, *2nd Complaint Filed Against Sentelle*, WASH. POST, Sept. 14, 1994, at A7.

205. See *Charge of Judicial Misconduct*, 39 F.3d at 375.

206. See *id.* at 382-83; Stephen Labaton, *Judge Rules Fiske Removal Was Ethical*, N.Y. TIMES, Nov. 3, 1994, at A24. Like the Special Division's initial decision to fire Mr. Fiske, Judge Edwards's decision exonerating Judge Sentelle sparked harsh criticism from both the bar and the national press. See, e.g., *Judges Err on Whitewater*, *supra* note 14, at A26 (describing Judge Edwards's justifications for Judge Sentelle's behavior as "appalling"); Toni Locy, *Former ABA Leaders Express Surprise at Response to Complaints About Judge*, WASH. POST, Nov. 3, 1994, at A9 (expressing "surprise" at Judge Edwards's indifference to the "appearance of impropriety" associated with Judge Sentelle's behavior).

207. *Charge of Judicial Misconduct*, 39 F.3d at 375-76.

208. *Id.* at 376.

termining that the D.C. Circuit Judicial Council had jurisdiction over the three complaints,<sup>209</sup> Judge Edwards turned his considerable analytical talents to a vigorous defense of substantial discretion in the kind and nature of ex parte contacts permitted members of the Special Division incident to the appointment of an independent counsel.<sup>210</sup>

Judge Edwards embarked on his analysis of the complainants' claims by questioning their appreciation of the Special Division's role: "Complainants' allegations, broadly referring to the 'appearance of impropriety,' and citing ethical strictures purportedly applicable to the judge's conduct, are grounded in a fundamental misunderstanding of the nature of the Special Division's authority."<sup>211</sup> In short, the three individuals who challenged the propriety of the lunch meeting and the ex parte letters simply lacked the sophistication necessary to appreciate the fundamentally political nature of appointing an independent counsel. Judge Edwards then went on to explain the true nature of the appointments function.<sup>212</sup>

Judge Edwards noted that in formal Article III judicial proceedings, a judge's impartiality is expected: "A judge in a judicial proceeding who reaches outside of the record to decide a case defiles the process."<sup>213</sup> The appointment of an independent counsel is not an "adversarial proceeding" in which judicial impartiality is essential.<sup>214</sup> Accordingly, "[i]t makes little sense to think that an authority acting pursuant to the Appointments Clause of Article II might be forbidden from consulting with others regarding candidates for appointment."<sup>215</sup>

Indeed, Judge Edwards found it "hard to imagine how anyone would go about that task without seeking advice."<sup>216</sup> Analogizing to the President's appointment powers, Judge Edwards observed that "unfettered outside consultation is deemed

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209. *See id.* at 377-78.

210. *See id.* at 378-83.

211. *Id.* at 379.

212. *See id.* at 380.

213. *Id.*

214. *See id.*

215. *Id.*

216. *Id.*

so important that it may enjoy Constitutional protection.”<sup>217</sup> Because the appointment of an independent counsel is not a formal “judicial proceeding,” judges are not bound to observe the same standards of conduct that govern the discharge of their formal, Article III duties.<sup>218</sup>

Turning to the legislative history of the independent counsel provisions of the Ethics in Government Act, Judge Edwards found no support for the proposition that Congress intended members of the Special Division to limit their *ex parte* contacts.<sup>219</sup> “Congress has never expressed an intention to make the appointment process itself independent of all ‘nonjudicial’ influences outside of the Executive Branch.”<sup>220</sup> Finally, according to Judge Edwards, history endorses the practice of broad consultation: “Division members have routinely relied on consultations with and recommendations from judicial colleagues, former professional associates, and other members of the so-called ‘old-boy network’.”<sup>221</sup>

Judge Edwards rested his defense of Judge Sentelle’s conduct by suggesting that the complainants lacked political savvy:

Whether or not the conduct of a judge of the Special Division can ever have sufficient direct or indirect prejudicial effect on the administration of the business of the courts to warrant the exercise of the circuit’s disciplinary authority, it is clear that no such conduct occurred in this case. There may be some members of society who would question the actions of the accused judge, for they have a pristine (albeit arguably naive) view of the appointment process. But this is irrelevant. The simple point here is that, even accepting the complaints as true for purposes of this analysis, the judge who has been accused in this case would have violated no provision of law or ethical Canon. There is no basis whatsoever for proceedings against this judge.<sup>222</sup>

Considering the nature of the questioned conduct, this statement

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217. *Id.*

218. *See id.*

219. *See id.* at 381-82.

220. *Id.* at 382.

221. *Id.*

222. *Id.* at 382-83.

is extraordinary. It would appear that, from time to time, service on the Special Division may require active Article III judges to become mired in some of the most divisive political questions of the day, but the public is to disregard this activity when evaluating a judge's ability to decide cases impartially.<sup>223</sup> At best, this approach reflects a gross misunderstanding of the standard of conduct that one reasonably should expect of an Article III judge; at worst, it helps to confirm the cynical view held by some within the academy that judging is little more than an exercise in politics.<sup>224</sup>

The full Judicial Council subsequently reviewed Judge Edwards's opinion and affirmed it in an unpublished opinion.<sup>225</sup> Moreover, in a subsequent case, the Judicial Council embraced in a published decision Judge Edwards's reasoning regarding a judge's broad consultative powers when exercising the power of appointment under Article II.<sup>226</sup> Thus, Judge Edwards's views are hardly idiosyncratic and appear to reflect the considered judgment of both the trial and appellate judges of the United States Court of Appeals for the District of Columbia Circuit.<sup>227</sup> One could argue that rather than resolving the question dispositively, however, these decisions merely com-

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223. Without doubt, Whitewater has become a political issue. See Francis X. Clines, *Whitewater Nuance Yields to Politics*, N.Y. TIMES, Dec. 21, 1995, at B19 (likening Whitewater to Watergate); Jerry Gray, *Democrats Pull Plug on Senate Panel, for Now*, N.Y. TIMES, Mar. 1, 1996, at A25 (describing the Whitewater inquiry as a "political witch hunt"); Howard Kurtz, *Raging Al*, WASH. POST MAG., May 22, 1994, at W10 (describing Whitewater as Senator D'Amato's "one-man media offensive against President Clinton"); Frank Rich, *Cut to the Chase*, N.Y. TIMES, Jan. 17, 1996, at A19 (speculating as to Whitewater's potential effects on the 1996 presidential election).

224. See Gabel & Kennedy, *supra* note 75, at 33-36; Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1526-39 (1991); cf. Wechsler, *supra* note 20, at 19 (stressing that courts are obliged to be "entirely principled" in reviewing the actions of the other branches).

225. See *In re Charge of Judicial Misconduct or Disability*, Nos. 94-8 & 94-9 (D.C. Cir. Dec. 30, 1994).

226. See *In re Charge of Judicial Misconduct or Disability*, 85 F.3d 701 (D.C. Cir. Judicial Council 1996).

227. Judicial councils, rather than district or circuit courts, adjudicate charges of judicial misconduct or disability, see 28 U.S.C. § 372(c) (1994), and consist of judges from both the trial and appellate courts. See *id.* § 332. The full Judicial Council reviews the initial decisions of the Chief Judge of the particular circuit. See *id.* § 372(c).

pounded the difficulties.

The Judicial Council's affirmance of Judge Edwards's opinion reflects a gross insensitivity to a rather obvious appearance of impropriety on the part of Judge Sentelle (assuming, as did Judge Edwards and the Judicial Council, that the allegations were true). This fact was not lost on two judges serving on the Judicial Council; both Judges Tatel and Kessler dissented on this point.<sup>228</sup> Judges Tatel and Kessler opined that, assuming the charges to be true, Judge Sentelle's behavior raised a serious ethical question. Moreover, if Judge Sentelle's meeting with Senators Helms and Faircloth was an unavoidable consequence of appointing independent counsels under the Ethics in Government Act, "it would raise fresh questions regarding the constitutionality of the Independent Counsel provisions of the Ethics in Government Act."<sup>229</sup> With all due respect to Judge Edwards and his colleagues on the Judicial Council, Judges Tatel and Kessler appear to have the better argument.

Republican senators—including Senators Helms and Faircloth—have used the Whitewater investigation as a potential means of discrediting, and perhaps disgracing, President and Mrs. Clinton.<sup>230</sup> It is difficult to understand how one can justify the presence of an Article III judge at the center of this distinctively partisan maelstrom.<sup>231</sup>

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228. See *Charge of Judicial Misconduct*, Nos. 94-8 & 94-9, slip op. at 4-9 (Tatel & Kessler, JJ., each writing separately). Both judges also disagreed with Judge Edwards's holding that the Judicial Council for the District of Columbia Circuit had jurisdiction over the complaints. See *id.* (Tatel & Kessler, JJ., each writing separately). However, they also reached the merits of the legal question of whether *ex parte* meetings with members of Congress threatened to impede the execution of core Article III duties. See *id.* (Tatel & Kessler, JJ., each writing separately).

229. *Id.* at 4 (Tatel, J., writing separately).

230. See Paul Richter, *Armed Cites "Politics" of Whitewater*, L.A. TIMES, Apr. 19, 1996, at A9 (quoting House Majority Leader Dick Armey as describing the Whitewater hearings as part and parcel of the "bloodsport" of politics and as a justified response to a "very mean" Democratic Party); see also Locy & Thompson, *supra* note 201, at A3 (citing Senator Faircloth's belief that all of the facts regarding President Clinton's involvement in the Whitewater scandal had not yet come out); Schneider, *supra* note 14, at A21 (describing the partisan fight over the removal of special counsel Robert Fiske).

231. As Judge Kessler noted in his separate statement accompanying the full Judicial Council's affirmance of Judge Edwards's opinion, judges "cannot stand impartially above the fray as we adjudicate and squarely in the midst of the fray as we

If, as Judge Edwards argued and a majority of his colleagues on the Judicial Council agreed, service on the Special Division requires Article III judges to play an overtly political role, it is time to reconsider the constitutionality of permitting Article III judges to serve on the Special Division. Litigants appearing before Judge Sentelle have good cause to question his impartiality, particularly in cases involving disputes between the legislative and executive branches.

Perhaps, as Judge Edwards suggested, the general public is politically "naive,"<sup>232</sup> and should not expect those serving as Article III judges to maintain both the reality and appearance of impartiality and nonpartisanship. Be that as it may, the legitimacy of the third branch rests in no small part on the public's acceptance of Article III judges as neutral adjudicators, rather than political players.<sup>233</sup> Because Judge Sentelle's actions have undermined public confidence in the institutional integrity of Article III courts, they should not be tolerated.<sup>234</sup>

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carry out our non-adjudicatory Article II functions." *Charge of Judicial Misconduct*, Nos. 94-8 & 94-9, slip op. at 8 (Kessler, J., writing separately) (arguing that the broad consultative powers embraced by the majority incident to the appointment of an independent counsel threaten the impartiality and independence of Article III personnel).

232. See *In re Charge of Judicial Misconduct or Disability*, 39 F.3d 374, 382 (D.C. Cir. Judicial Council), *aff'd*, Nos. 94-8 & 94-9 (D.C. Cir. Dec. 30, 1994).

233. See Wechsler, *supra* note 20, at 5-8 (arguing that courts should decide every case based only on the facts before them and the Constitution); see also BICKEL, *supra* note 20, at 16-34 (discussing the judiciary's countermajoritarian role); cf. TUSHNET, *supra* note 75, at 4-5, 51-69 (arguing that constitutional adjudication is an inherently political task involving rather naked forms of policy-making and positing that attempts to legitimize judicial review through grand theories are doomed to failure).

234. Professor Stephen Carter has argued persuasively that the public's perception of the legitimacy of the Constitution's allocation of powers among the three branches of government—and hence the very structure of the government itself—plays a significant role in maintaining the legitimacy of the current arrangements. See Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357, 366-71 (1990). Moreover, the views of the public matter *even if* they are unsophisticated or partially erroneous, "for legitimacy in a democratic polity begins with the ruler's recognition that the people need not be smart in order to matter." *Id.* at 371. Thus, in the context of constitutional interpretation, Carter argues that a reading of the structural separation of powers provisions that "disregards [the] popular constitutional hermeneutic expectation [regarding the meaning of these clauses] lacks legitimacy in a liberal democratic polity." *Id.* at 367. Under this theory of the separation of powers, Judge Edwards



Whether or not Judge Sentelle's "power lunch" and other ex parte contacts were consistent with his duties imposed by the independent counsel provisions of the Ethics in Government Act,<sup>235</sup> they plainly diminished Judge Sentelle's credibility, and hence his effectiveness as an Article III judge. Furthermore, the Judicial Council's attempt to whitewash this partisan behavior reflects an obliviousness to such behavior's effect on the public's perception of Judge Sentelle—not to mention the effect of Judge Edwards's opinion on the public's perception of the D.C. Circuit.<sup>236</sup> If *Morrison* means that our federal judges are free to sip martinis with members of Congress incident to the exercise of the appointments power, then *Morrison* must be abandoned.

### III. AN ARGUMENT FOR JUDICIAL INDEPENDENCE

#### A. *Textual Justifications for Judicial Independence*

The Constitution speaks, albeit indirectly, to the question of

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and his colleagues missed the point in suggesting that those who object to judges exercising political power in a political way—through an "old-boy network," for example—are simply wrong in their thinking. It is not for the judges, but rather it is for the public, to decide and define the parameters of acceptable judicial behavior. Derogations from the citizenry's expectations of the federal judiciary's proper constitutional role will come at the price of the Third Branch's institutional legitimacy. *See id.* at 366-71.

235. 28 U.S.C. §§ 591-599 (1994).

236. *See Judges Err on Whitewater*, *supra* note 14, at A26 (noting that Judge Edwards's opinion tends to diminish the public's confidence in the judiciary); *Locy*, *supra* note 206, at A9 (accusing Judge Edwards of disregarding the public's perception); *see also Carter*, *supra* note 234, at 364-84 (suggesting that courts should engage in a "dialogue" with the public rather than isolate themselves from public reaction). A colleague has suggested that Judge Edwards's opinion could be construed as a clever argument in favor of abolishing the Special Division, i.e., if participation on the Special Division requires the political entanglement of Article III judges, then the public will demand that federal judges not serve on the Special Division. This is certainly a plausible interpretation of the opinion. If this were, in fact, Judge Edwards's intention, I am quite sympathetic to his project. Neither the general public nor the organized bar, however, took this message from the decision. *See Locy*, *supra* note 206, at A9. Instead, both the public and the bar expressed shock and disappointment regarding a decision that seems largely indifferent to extrajudicial participation in blatantly partisan activities. *See id.* Moreover, the opinion did not even once directly criticize Congress's decision to mandate judicial participation on the Special Division. *Cf. United States v. Then*, 56 F.3d 464, 466-67 & n.1 (2d Cir. 1995) (Calabresi, J., concurring) (arguing that the federal courts should engage in a dialogue with Congress regarding the protection of constitutional liberties).

judicial independence. Article III provides that "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."<sup>237</sup> The reason the Framers included such a clause seems obvious: they intended for federal judges to remain free from the rough-and-tumble of political life.<sup>238</sup>

Life tenure, coupled with a salary that cannot be decreased during active service, ensures that judicial personnel can undertake their duties without fear of demotion or financial hardship. Of course, the ability of presidents to dangle promotions before district and circuit judges, and the possibility of facing a Senate confirmation vote constitute possible sources of partisan consciousness. Nevertheless, the Article III protections provide significant insulation for federal judges; they need not worry about being directly responsive to political agents, whether from the executive or legislative branches of government.<sup>239</sup> Significantly, this interpretation of the Tenure and Compensation Clauses finds strong support in both the debates at the Federal Convention of 1787 and in the Federalist Papers.

### 1. *The Debates at the Federal Convention of 1787*

The debates at the Federal Convention of 1787 strongly support the link between judicial independence and Article III's Tenure and Compensation Clauses. On two separate occasions, the delegates took up the question of judicial independence. Both debates demonstrate that the Framers held a strong conviction that federal judges had to maintain their independence from both "political" branches.

On Wednesday, July 18, 1787, the Convention considered the method of appointing judges and the means by which to secure their independence from the other two branches of the federal

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237. U.S. CONST. art. III, § 1.

238. See generally Murchison, *supra* note 170, at 998-1000 (noting that justices were intended to be "statesmen" who were "above politics").

239. See Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 845; Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 612-13 (1985); see also *infra* note 302 and accompanying text (discussing judicial independence).

government.<sup>240</sup> Initially, the Article III Compensation Clause provided that federal judges' salaries would neither decrease *nor* increase.<sup>241</sup> Gouverneur Morris of Pennsylvania moved to strike the words "or increase" from the draft, because "the Legislature ought to be at liberty to increase salaries as circumstances might require, and that this would not create any improper dependence in the Judges."<sup>242</sup>

Although several members of the Convention, including Benjamin Franklin, favored the motion, James Madison opposed it.<sup>243</sup> Madison argued that "[t]he dependence will be less if the *increase* alone should be permitted, but it will be improper even so far to permit a dependence."<sup>244</sup> Because Congress would hold the power to grant raises, "an undue complaisance in the former [the judiciary] may be felt towards the latter [the Congress]."<sup>245</sup> Notwithstanding Madison's objections, the motion carried by a vote of six to two.<sup>246</sup> Madison still believed, however, that judicial salaries should be fixed at the time of appointment.<sup>247</sup>

On Monday, August 27, 1787, the Convention again took up the question of protecting the independence of the federal judiciary.<sup>248</sup> The delegates considered and rejected a motion by John Dickinson of Delaware to add the words "provided that they may be removed by the Executive on the application by the Senate and House of Representatives" after the words "good behavior."<sup>249</sup> Elbridge Gerry of Massachusetts seconded the

240. See 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 37-38, 42-45 (2d ed. 1937); 2 JAMES MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 274-78 (Gaillard Hunt & James Brown Scott eds., 1987) (1787).

241. See 2 MADISON, *supra* note 240, at 277.

242. *Id.*

243. *Id.* at 277-78.

244. *Id.* at 278 (emphasis added); cf. William Terrel Hodges, *Gerald Bard Tjoflat: A Trial Judge at Heart*, 44 DUKE L.J. 995, 995 (1995) (reporting that in the 1970s, Congress refused to grant the federal judiciary any meaningful salary increases "despite spiraling inflation").

245. 2 MADISON, *supra* note 240, at 278.

246. See *id.*

247. See *infra* text accompanying note 256.

248. See 2 MADISON, *supra* note 240, at 474.

249. *Id.*; 2 FARRAND, *supra* note 240, at 428.

motion.<sup>250</sup> Gouverneur Morris opposed the proposal because "it was fundamentally wrong to subject Judges to so arbitrary an authority."<sup>251</sup> Edmund Randolph of Virginia concurred in this view, arguing that the proposal "weaken[ed] too much the independence of the Judges."<sup>252</sup> The proposal failed on a vote of one to seven.<sup>253</sup>

Immediately after protecting the federal judiciary from removal outside of the impeachment process, James Madison moved to reinstate the words "increased or" before the word "diminished" in the Compensation Clause.<sup>254</sup> After a very brief debate, the Convention rejected the proposal by a vote of one to five.<sup>255</sup>

The 1787 Federal Convention debates regarding the Compensation Clause plainly indicate that the Framers considered the institutional independence of the federal judiciary to be critically important. Indeed, Madison felt so strongly about this issue that, out of an abundance of caution, he would have precluded any increase in federal judges' remuneration. Moreover, the delegates rejected a provision that would have permitted the President and Congress to remove troublesome federal judges without requiring resort to the formal impeachment process. Together, these actions demonstrate the Framers' commitment to maintaining the independence, and hence the integrity, of the judicial branch.

## 2. *The Federalist Papers*

The *Federalist Papers* also consider the question of judicial independence and speak to the question of partisan judging more directly. Three *Federalist* essays (*Federalist* Nos. 37, 78, and 79) demonstrate that the Framers intended to safeguard zealously the independence of the federal judiciary.

In *Federalist* No. 37, Madison defended the Constitution's conferral of life tenure under the Good Behaviour Clause. Citing

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250. See 2 MADISON, *supra* note 240, at 473.

251. *Id.*

252. *Id.* at 474.

253. See *id.*

254. See *id.*

255. See *id.*

Montesquieu, Madison argued that "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*."<sup>256</sup>

In *Federalist* No. 78, Alexander Hamilton elaborated upon this theme.<sup>257</sup> Taking up where Madison left off, Hamilton argued that independence is essential to the proper functioning of the judiciary: the judiciary is to serve as a check on legislative and executive caprice; it cannot perform this role if its personnel are beholden to either of these branches.<sup>258</sup> "[I]t is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws."<sup>259</sup> Hamilton emphasized that "[t]he complete independence of the courts of justice is peculiarly essential in a limited constitution."<sup>260</sup>

Indeed, under Hamilton's view constitutionalism itself requires the existence of an independent and impartial judiciary to safeguard constitutional guarantees in practice; "[w]ithout this, all the reservations of particular rights or privileges would amount to nothing."<sup>261</sup> Tenure in office, with the resulting independence of mind and spirit, is essential to securing an independent and impartial judiciary.<sup>262</sup>

In *Federalist* No. 79, Hamilton continued his exposition on the necessity of an independent and impartial judiciary, this time turning his attention to the Compensation Clause. "Next to per

256. THE FEDERALIST NO. 37, at 373, 376 (James Madison) (John Hamilton ed., 1866); see also BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 151-52 (Thomas Nungent trans., Hafner Publ'g Co. 1966) (1748).

257. See THE FEDERALIST NO. 78, *supra* note 51.

258. Hamilton wrote that:

The standard of good behaviour for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince: in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body.

*Id.* at 575.

259. *Id.*

260. *Id.* at 576.

261. *Id.* at 577.

262. See *id.* at 576-82.

manency in office, nothing can contribute more to the independence of the judges, than a fixed provision for their support."<sup>263</sup> According to Hamilton, "[i]n the general course of human nature, a power over a man's subsistence amounts to a power over his will."<sup>264</sup> Judges dependent upon the good graces of Congress for their pay could not act independently of Congress. Accordingly, it was necessary constitutionally to protect the judges' remuneration. Hamilton explained that:

This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the states, in regard to their own judges.<sup>265</sup>

In this phrase, Hamilton made explicit what was only implicit in Article III: the Good Behaviour and Compensation Clauses exist to ensure that federal judges may execute their duties free and clear of untoward political entanglements with either the President or the Congress.

### 3. *Implementing the Framers' Model*

Given the textual mandate for an impartial and independent judiciary and the Framers' understanding of this mandate, it is plain that federal judges have an obligation to avoid entanglements that would compromise their independence or impartiality. However, events leading to the appointment of Kenneth Starr as the Whitewater independent counsel and the apparent willingness of federal Sentencing Commissioners/judges to sit in judgment over the legality of their own legislative work product seem inconsistent with the Framers' designs for a neutral and impartial federal judiciary.

If the judges of the lower federal courts are either unwilling or unable to maintain the appearance of nonpartisan impartiality,

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263. *Id.* No. 79, at 583.

264. *Id.*

265. *Id.* at 585.

then the Supreme Court must curtail their participation in activities that diminish *both* the credibility of individual jurists (i.e., Judge Sentelle) and the entire third branch. Article III should be construed to prohibit the embrace of a loose form of functionalism—a kind of functionalism that permits federal judges to undertake duties that compromise their impartiality and independence; a kind of functionalism that requires judicial personnel to be directly politically accountable to the public for their actions.<sup>266</sup>

### *B. History, Prudence, and Judicial Independence*

Notwithstanding Madison's and Hamilton's insistence on an impartial and politically independent federal judiciary, early justices demonstrated a willingness—if not an eagerness—to play an active role within the political branches of government. There are a number of rather (in)famous examples of justices serving in such dual capacities.<sup>267</sup> However, there also has been a clear historical trend against federal judges undertaking extrajudicial duties. As will be demonstrated below, on balance, the historical counterexamples do not present a compelling case against the argument in favor of prohibiting judicial personnel from undertaking tasks traditionally associated with the executive and legislative branches.

#### *1. A Brief Overview of Federal Judges' Participation in Extrajudicial Roles*

Since the earliest days of the Republic, presidents and the Congress have attempted to enlist the aid of federal judges in executing their constitutional duties. For example, Chief Justices Jay and Ellsworth held diplomatic posts in the Adams Administration,<sup>268</sup> and John Marshall served as both Secretary of

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266. See generally Carter, *supra* note 234, at 366-71 (discussing the need for constitutional interpreters to recognize that popular consent to judicial decision making occurs because of a public belief in structural continuity); Redish & Cisar, *supra* note 4, at 449-56, 474-78 (discussing the dangers posed by a functional analysis in the separation of powers context and advocating a "pragmatic formalism" approach).

267. See *infra* text accompanying notes 272-88.

268. See Calabresi & Larsen, *supra* note 54, at 1131-32.

State and Chief Justice from January 27, 1801 to March 4, 1801.<sup>269</sup> "The early Congresses and Administrations also indicated their approval of simultaneous executive posts for judges by statutorily assigning potentially controversial executive functions to the Chief Justice."<sup>270</sup>

These dual postings were not accepted universally, and, in fact, were denounced by some. Thomas Jefferson, for example, believed that the practice of dual appointments precluded the federal judiciary from carrying out its duties in an impartial and independent manner.<sup>271</sup>

Nevertheless, judicial personnel continued to accept executive branch commissions well into the nineteenth century. "[I]nstances of extrajudicial service in executive office continued, but, with one notorious exception, the service was in significantly less controversial and important posts."<sup>272</sup> The infamous Hayes-Tilden Commission, comprised of five sitting justices, pro-

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269. See *id.* at 1131 n.423. As Calabresi and Larsen point out, Chief Justice Marshall signed, but failed to deliver, William Marbury's commission to serve as a justice of the peace in the District of Columbia. See *id.* This commission formed the basis of the dispute in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

270. Calabresi & Larsen, *supra* note 54, at 1133. This practice of dual service in more than one branch was not particularly novel. Modeled on Great Britain's parliamentary system, pre-Revolutionary, colonial governments often lacked a separation of powers among the executive, legislative, and judicial functions. For example, in colonial Virginia, the Council of State served as the Royal Governor's cabinet, the second (upper) house of the legislature, and the highest colonial court. See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1787), reprinted in THE PORTABLE THOMAS JEFFERSON 161 (Merrill D. Peterson ed., 1975); BAILYN, *supra* note 67, at 175-98; see also ACKERMAN, *supra* note 181, at 67-76 (discussing the evolving roles of the executive, legislative, and judicial branches over time). On the one hand, post-Revolutionary state constitutions generally separated executive, legislative, and judicial functions, see JEFFERSON, *supra*, at 226-27, 229, although the notion of holding dual judicial/executive or judicial/legislative appointments was not completely foreign to the Framers' generation. On the other hand, it is more difficult to divine *why* early federal judges sought out (or at least did not decline) dual postings. Perhaps, as with the relatively contemporary case of Associate Justice Abe Fortas, it was simply boredom with judicial duties. See BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 187, 191-93 (1988).

271. See Calabresi & Larsen, *supra* note 54, at 1134. Jefferson believed that the executive's practice of bestowing offices on federal judges made them "auxiliary to the Executive in all it views, instead of forming a balance between that [branch] and the Legislature." *Id.*; 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 167 (1922).

272. Calabresi & Larsen, *supra* note 54, at 1135.



vides the "notorious" exception to the general trend of relatively noncontroversial extrajudicial service.<sup>273</sup> Other joint appointments during this period were less noxious. For example, Justice Samuel Nelson represented the United States in an arbitration proceeding involving the British government.<sup>274</sup> Justices also served on a number of panels and arbitrations, often involving border disputes.<sup>275</sup>

In the twentieth century, Justice Robert Jackson served as the United States' prosecutor at Nuremburg.<sup>276</sup> This service was controversial not only because a sitting justice assumed an executive branch post, but also because it caused substantial practical difficulties for the Supreme Court; the Justices divided four to four in a number of cases and Justice Jackson's vote was needed to resolve these deadlocks.<sup>277</sup>

In 1963, Chief Justice Earl Warren agreed to serve as the head of the commission charged with investigating the assassination of President Kennedy.<sup>278</sup> Although Chief Justice Warren initially declined the assignment, he ultimately agreed to serve, notwithstanding his serious misgivings about doing so.<sup>279</sup> Chief

273. *See id.* at 1135-36. This Commission approved a political arrangement whereby Rutherford B. Hayes would become President in return for the end of congressional Reconstruction in the South. *See id.*

274. *See* Jane A. Restani & Ira Bloom, *The Quick Solution to Complex Problems: The Article III Judge*, 18 *FORDHAM INT'L L.J.* 1668, 1669 (1995).

275. *See id.* at 1670; Calabresi & Larsen, *supra* note 54, at 1136 n.449.

276. *See* Restani & Bloom, *supra* note 274, at 1669; Alpheus Thomas Mason, *Extra-Judicial Work for Judges: The Views of Chief Justice Stone*, 67 *HARV. L. REV.* 193, 209-14 (1954).

277. *See* Mason, *supra* note 276, at 212-13. Some of these cases were "of such importance as to raise the question whether they should be heard with an eight-judge court." *Id.* at 212 n.58. One case, *Atkins v. Atkins*, 326 U.S. 683 (1945), presented the specter of the Supreme Court overruling one of its prior precedents, *Williams v. North Carolina*, 325 U.S. 226 (1945), by an equally divided vote affirming a conflicting opinion by the court of appeals. *See* Mason, *supra* note 276, at 212-13.

278. *See* CHIEF JUSTICE EARL WARREN, *THE MEMOIRS OF EARL WARREN* 356-58 (1977).

279. In his autobiography, Chief Justice Warren explained his misgivings this way:

First, it is not in the spirit of constitutional separation of powers to have a member of the Supreme Court serve on a presidential commission; second, it would distract a Justice from the work of the Court, which had a heavy docket; and, third, it was impossible to foresee what litigation such a commission might spawn, with resulting disqualification of the Justice from sitting in such cases. I then told them that, historically,

Justice Warren's acceptance of the appointment, however, did not allay or assuage his constitutional and prudential concerns about undertaking this extrajudicial assignment.<sup>280</sup>

Finally, former Justice Abe Fortas's excessive entanglement with the Johnson Administration provides the most recent example of broad-based judicial participation in executive branch policy making. Justice Fortas, while a sitting justice, assisted President Johnson in a number of ways, including drafting speeches and legislation.<sup>281</sup> Fortas also advised the President on the Vietnam War, an issue that came before the Court in a variety of contexts.<sup>282</sup> As with many of the earlier historical antecedents of such behavior by a sitting Justice, no good came of this arrangement.<sup>283</sup> In fact, the entire federal judiciary unquestionably suffered a collective black eye as a result of Justice Fortas's extrajudicial escapades within the executive branch.

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the acceptance of diplomatic posts by Chief Justices Jay and Ellsworth, had not contributed to the welfare of the Court, that the service of five Justices on the Hayes-Tilden Commission had demeaned it, that the appointment of Justice Roberts as chairman to investigate the Pearl Harbor disaster had served no good purpose, and that the action of Justice Robert Jackson in leaving Court for a year to become chief prosecutor at Nürnberg after World War II had resulted in divisiveness and internal bitterness on the Court.

*Id.* at 356.

Notwithstanding these prudential and institutional objections, Chief Justice Warren accepted the appointment after President Johnson made repeated (and successful) appeals to the Chief Justice's sense of duty and patriotism—simply put, LBJ used emotionally powerful arguments to overcome the Chief Justice's reluctance to accept the posting. *See id.* at 356-58; *see also* LYNDON B. JOHNSON, *THE VANTAGE POINT* 26-27 (1971) (discussing the meeting at which Chief Justice Warren agreed to chair the commission).

280. *See* Calabresi & Larsen, *supra* note 54, at 1137.

281. *See* LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* 293-320, 351 (1990) (describing the unusually close relationship between Justice Fortas and President Johnson); MURPHY, *supra* note 270, at 234-68, 378-406, 487-89 (discussing the Fortas-Johnson relationship); ROBERT SHOGAN, *A QUESTION OF JUDGMENT: THE FORTAS CASE AND THE STRUGGLE FOR THE SUPREME COURT* 118-42 (1972) (examining issues related to the same relationship).

282. *See generally* KALMAN, *supra* note 281, at 282-90 (describing the inconsistencies in Justice Fortas's civil rights opinions and his later opinions on free speech and the Vietnam War).

283. *See generally* MURPHY, *supra* note 270, at 378-440 (describing in complete detail the spectacle of the first nominee for Chief Justice to be questioned in person by the Senate Judiciary Committee).

Ultimately, his service as an advisor to President Johnson, in conjunction with some ethically suspect consulting arrangements, led to Justice Fortas's forced resignation from the Court.<sup>284</sup> Justice Fortas's story serves as a strong warning against judicial participation in executive or legislative policy-making roles.

## 2. *The Limited Lessons of History*

The historical examples set forth above might lead one to conclude that extrajudicial service has the sanction of history, if not of the Constitution's text or of the Framers' intent. For the reasons set forth below, this conclusion should be rejected. Notwithstanding the sporadic historical practice of federal judges serving in executive capacities, the practice never has been universally accepted. Far from it: "Whatever the reason for the silence of the constitutional text on this subject, Americans have, from the beginning, debated the wisdom of the simultaneous holding of judicial and executive offices."<sup>285</sup> Although the federal courts have attempted to draw a distinction between the "personal" activities of Article III judges and their "official" Article III duties, the public never has embraced such a view.<sup>286</sup>

Moreover, for almost two hundred years, concurrent service as both an Article III judge and as a member of the President's cabinet, subcabinet, or the ambassadorial ranks has not been constitutionally tolerable as a matter of practice and tradition.<sup>287</sup> As Professor Stephen Calabresi has observed, "it is fair to say that a tradition has evolved that very nearly replicates the situation that would exist if [the Constitution contained] a judicial-executive incompatibility clause."<sup>288</sup>

Members of the Supreme Court also have voiced strong objections to interbranch entanglements, including service in the executive branch. For example, former Chief Justice Harlan Fiske

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284. See KALMAN, *supra* note 281, at 370-76.

285. Calabresi & Larsen, *supra* note 54, at 1131.

286. See *id.* at 1132 & nn.430-31, 1141-46, 1143 n.493. The views of the public on this question are far from irrelevant. See Carter, *supra* note 234, at 367-69.

287. See Calabresi & Larsen, *supra* note 54, at 1139.

288. *Id.*

Stone repeatedly declined invitations to participate in executive branch policy-making functions.<sup>289</sup> In rejecting a proposed presidential appointment to become "Rubber Czar"<sup>290</sup> in 1942, Chief Justice Stone emphasized "the generally recognized consideration that it is highly undesirable for a judge to engage actively in public or private undertakings other than the performance of his judicial functions."<sup>291</sup> Public reaction to this refusal was strongly favorable.<sup>292</sup>

Refusing yet another proffered executive posting, that of War Ballot Commissioner,<sup>293</sup> Chief Justice Stone reiterated that "I regard the performance of such a function as incompatible with obligations which I assumed with the office of Chief Justice and as likely to injure my usefulness in that office."<sup>294</sup> He explained that "action taken by the Chief Justice in connection with the administration of the proposed legislation might become subject to review in the Court over which he presides and that it might have political implications and political consequences which should be wholly dissociated from the duties of the judicial office."<sup>295</sup>

Thus, as a prudential matter, Chief Justice Stone avoided any direct involvement in an executive function that might have nontrivial policy-making implications. Such a role was, in his view, inimical to the execution of his duties as an Article III

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289. See Mason, *supra* note 276, at 200-01.

290. Rubber was a scarce commodity during World War II, and it was therefore necessary to have a government official charged with ensuring the maintenance of an adequate supply. Because of the civilian uses for rubber-based products (i.e., automobile tires), the allocation of this commodity was particularly important. See DAVID NOVICK ET AL., WARTIME PRODUCTION CONTROLS 225-26 (1949).

291. Mason, *supra* note 276, at 203 (quoting Letter from Chief Justice Harlan F. Stone to President Franklin Delano Roosevelt (July 20, 1942)).

292. See *id.* at 205. Editorial writers praised the Chief Justice's "blunt" refusal, emphasizing that such action was consistent with maintaining the "honor" of the Supreme Court and that it avoided "detract[ing] from the dignity of the Court." *Id.*

293. The War Ballot Commissioner was to supervise overseas soldiers' participation in the balloting for federal offices in the 1944 elections. See Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 880 (1993).

294. Mason, *supra* note 276, at 208 (quoting letter from Chief Justice Harlan F. Stone to Senator Arthur H. Vandenberg (Nov. 22, 1943)).

295. *Id.*; cf. MURPHY, *supra* note 270, at 234-68 (describing Associate Justice Abe Fortas's close ties with the Johnson White House).

judge. The judicial role required neutrality with respect to both the particular subject matter at hand and the particular litigant before the court. Executive branch postings potentially compromised a judge in both respects: it could give the judge an interest in the outcome of the dispute and/or create the appearance of a connection between the executive branch and the judge. For Chief Justice Stone, avoidance of dual postings constituted a kind of prophylactic safeguard that preserved his ability to serve as a neutral adjudicator.<sup>296</sup>

In sum, it would be too facile to assert that history endorses Article III judges undertaking responsibilities traditionally associated with either the legislative or executive branch. Instead, the clear rule, with only occasional exceptions, has been careful separation of the judicial function from the political branches, in order to protect the independence and neutrality—and hence the legitimacy—of both Article III decisionmakers and their decisions.<sup>297</sup>

#### IV. THE COMPELLING NEED FOR GOOD FENCES: A LIMITED DEFENSE OF FORMALISM IN SEPARATION OF POWERS ANALYSES

##### A. *Defining the Judicial Role*

Robert Frost wrote that “good fences make good neighbors.”<sup>298</sup> It should also be said that good fences make for good

296. See Mason, *supra* note 276, at 208.

297. Cf. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (discussing the factors that the Court uses to determine when a congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens judicial branch integrity). Of course, politicians look to judges to resolve difficult problems precisely because the public perceives them to be neutral, honest brokers. This course of behavior is paradoxical, however. On the one hand, judicial service in novel roles can be helpful because the citizenry perceives federal judges to be “neutral.” On the other hand, placing judges in extrajudicial roles allows the political branches to threaten to destroy the very neutrality that led them to look to the judiciary in the first place.

298. The verse is as follows:

My apple trees will never get across

And eat the cones under his pines, I tell him.

He only says, “Good fences make good neighbors.”

Robert Frost, *The Mending Wall* (1914), reprinted in *THE TREASURY OF AMERICAN POETRY* 342 (Nancy Sullivan ed., 1978); see also *Plaut v. Spendthrift Farm, Inc.*, 115

judges; the legitimacy of Article III courts depends, to a great extent, on the willingness of the citizenry to acquiesce in the decisions of the unelected judges who staff the federal courts.<sup>299</sup> Such acquiescence will occur only if the Article III courts are perceived as honest brokers between the myriad groups and interests that come before them.<sup>300</sup> If the public ceases to perceive Article III judges as honest brokers, the game is lost.<sup>301</sup>

Judge Irving Kaufman, who served as Chief Judge of the United States Court of Appeals for the Second Circuit, wrote an

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S. Ct. 1447, 1463 (1995) (citing and applying this principle).

299. See BICKEL, *supra* note 20, at 16-33; Wechsler, *supra* note 20, at 2-20; see also Carter, *supra* note 234, at 364-71 (arguing that the public's perception of the legitimacy of the Constitution's allocation of powers among the branches is significant in maintaining the current arrangement); see generally *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986) (arguing that the federal courts cannot undertake tasks beyond the scope of their institutional, and constitutional, competence without losing their popular legitimacy).

300. Cf. MODEL CODE OF JUDICIAL CONDUCT Canon 4(c)(2) (1990) (prohibiting judges from accepting any governmental position except one relating to the law, the legal system, or the administration of justice). Notwithstanding this provision, as noted *supra* Part II.B, Judge Edwards sanctioned *ex parte* contacts between a member of the Special Division and members of the Senate regarding the appointment of an independent counsel. Regardless of the constitutional niceties, one reasonably could argue that, as an ethical matter, federal judges should not serve as Sentencing Commissioners or as members of the Special Division if such service will, of necessity, interfere with their credibility as Article III judges. See *In re Charge of Judicial Misconduct or Disability*, Nos. 94-8 & 94-9, slip op. at 6 (D.C. Cir. Dec. 30, 1994) (Tatel, J., writing separately) (arguing that if service on the Special Division threatens the public's confidence in the impartiality of federal judges, such service cannot be deemed constitutional).

301. See Wechsler, *supra* note 20, at 9-10, 14-23 (arguing that principled, "neutral" judicial decisions are essential if the federal courts are to plausibly deny claims of bias); see also BICKEL, *supra* note 20, at 16-34 (discussing the countermajoritarian difficulty faced by the Supreme Court and the importance of principled decision making to successful judicial review); ELY, *supra* note 20, at 41, 44-72 (arguing that theories of constitutional review based on natural law, neutral principles, reason, tradition, and consensus are simply methods of allowing judges to use their own values in enforcing the Constitution and are, therefore, irreconcilable with the basic democratic theory of American government). But see Delgado, *supra* note 182, at 1223-25 (discussing *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and the Supreme Court's subsequent retreat from *Brown's* principles in *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989)). Delgado argues that both cases demonstrate the Supreme Court's ability to anticipate successfully and incorporate in its decisions prevailing social trends and values. *Id.*

insightful article about the practical justifications for judicial independence.<sup>302</sup> In large part, the article argued against the adoption of legislation that would authorize the removal of federal judges from active service through a process other than impeachment.<sup>303</sup> Judge Kaufman's larger project, however, explains and defends an independent federal judiciary. After conducting an historical examination of the independence of judges in Britain and the United States,<sup>304</sup> Judge Kaufman turned to the role of judicial independence in the Framers' scheme of separation of powers.<sup>305</sup> According to Judge Kaufman, "[t]he essence of judicial independence . . . is the preservation of a separate institution of government that can adjudicate cases or controversies with impartiality."<sup>306</sup>

Although Article III's Tenure and Compensation Clauses provide textual support for the independence of federal judges, "[A]rticle III's protection of judicial independence extends beyond the specific prohibitions of the salary and tenure provisions to embrace all significant intrusions upon the exercise of the judicial power."<sup>307</sup> Thus, the specific textual guarantees speak to a larger purpose: the maintenance of an impartial and independent judicial branch of government.

Because the federal judiciary sometimes must decide inter-branch disputes between the executive and legislative branches,

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302. See Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980). Three years later, Judge Kaufman accepted the chairmanship of the President's Commission on Organized Crime. See Exec. Order No. 12,435, 48 Fed. Reg. 34, 723 (1983), *revoked by* 52 Fed. Reg. 36,901 (1987). This service led to litigation over the Commission's ability to subpoena documents. The Courts of Appeals for both the Third and the Eleventh Circuits greatly criticized the participation of federal judges in this enterprise. See *In re President's Comm'n of Organized Crime Subpoena of Scarfo*, 783 F.2d 370, 377-79 (3d Cir. 1986); *In re President's Comm'n on Organized Crime Subpoena of Scaduto*, 763 F.2d 1191, 1197-98 (11th Cir. 1985). It is ironic that Judge Kaufman, after writing passionately about the need for judges to avoid the hurly-burly of politics, would accept such a position from the President.

303. See Kaufman, *supra* note 302, at 671-72; see also U.S. CONST. art. I, § 2, cl. 5; § 3, cl. 6 (giving the House of Representatives the power to impeach and the Senate the power to try the impeachment).

304. See Kaufman, *supra* note 302, at 672-87 (tracing the historical evolution of judicial independence).

305. See *id.* at 687-700.

306. *Id.* at 688.

307. *Id.*

it has a special obligation to avoid the appearance of aligning itself with one branch or the other. It must be an honest broker between Congress and the President.<sup>308</sup>

A federal judge also must be generally disinterested in the disputes that come before her.

[A] statute that gives the judge, even unintentionally, a personal stake in the controversy before [her] would not only implicate the personal rights of the disadvantaged party, but would also run afoul of the constitutional command that the ultimate power of decision, the judicial power of the United States, remain in the third branch.<sup>309</sup>

Simply put, neither Congress nor the President can act "to compromise the impartiality of the judge."<sup>310</sup>

Judge Kaufman concluded by arguing that these two policy considerations mandate the adoption of a prophylactic rule against placing judges in roles in which they must "take sides" or in which they will have a direct interest in the outcome of a dispute that they must decide.<sup>311</sup> "Even relatively minor and remote threats to impartial decision making should not survive constitutional objection if they do not enhance substantial government interests."<sup>312</sup> Furthermore, "if alternative means of achieving the same ends without compromising the judiciary are available, the 'necessity' of the challenged policy is open to serious question."<sup>313</sup> Thus, if it is possible to avoid compromising the impartiality of judges, the political branches of government should not be permitted to establish an administrative scheme that arguably endangers that impartiality and, hence, the independence and legitimacy of Article III judges.<sup>314</sup>

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308. *See id.*

309. *Id.* at 693.

310. *Id.*

311. *See id.* at 697.

312. *Id.*

313. *Id.*

314. The recent controversy over District Judge Harold Baer's ruling to suppress 80 pounds of cocaine and heroin—a ruling that he later reversed—illustrates the fragility of the Article III courts and the effects of giving a judge a personal or professional stake in a decision. *See United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y.), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996); *see also* Nat Hentoff, *Judges in the Dock*, WASH. POST, Apr. 13, 1996, at A21 (discussing the implications for judicial indepen-



*B. A Neo-Formalist Response to Functional Problems with Delegations of Nonjudicial Duties to Article III Judges*

Applying Judge Kaufman's analytical framework, the behavior of federal judges in the aftermath of both *Mistretta*<sup>315</sup> and *Morrison*<sup>316</sup> is highly problematic.<sup>317</sup> Turning first to *Mistretta*, the failure of federal Sentencing Commissioners/judges to recuse themselves from deciding the legality of their own work product<sup>318</sup> plainly runs afoul of Judge Kaufman's admonition.<sup>319</sup> As the architect of a particular rule, a Sentencing Commissioner has a personal stake in the outcome of a challenge to that rule or to the system as a whole. If the SRA calls for judges to pass judgment on their own work product, then it cannot be constitutional.<sup>320</sup> Of course, the difficulty could be resolved easily by requiring the recusal of Sentencing Commissioners in any guidelines case that requires more than routine application of the rules. In any case involving a challenge to the validity or legality of a particular rule, a Sentencing Commissioner should be ineligible to sit.

With respect to *Morrison* and Judge Edwards's opinion in *In re Charge of Judicial Misconduct or Disability*,<sup>321</sup> it is clear that, as interpreted, the independent counsel provisions of the Ethics in Government Act compromise the appearance of federal

dence based on the presidential candidates' extreme reactions to the Baer controversy); Don Van Natta, Jr., *Judges Defend a Colleague from Attacks*, N.Y. TIMES, Mar. 29, 1996, at B1 (discussing the statement issued by four judges of the U.S. Court of Appeals for the Second Circuit that criticized attacks on Judge Baer because of the threat that these political attacks posed to judicial independence).

315. *Mistretta v. United States*, 488 U.S. 361 (1989).

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

317. Indeed, several prominent legal academics strongly criticized *Mistretta* and *Morrison*—even before the lower federal courts began to apply those decisions in novel ways. See, e.g., Carter, *supra* note 234, at 358-64. The subsequent behavior of the lower federal courts amply demonstrates that the concerns of these commentators were justified. See Redish & Cisar, *supra* note 4, at 475-78, 490.

318. See *Mistretta*, 488 U.S. at 406.

319. See *supra* notes 302-13 and accompanying text.

320. Cf. Kaufmann, *supra* note 302, at 697 (suggesting that even minor threats to impartial decision making should be considered to be unconstitutional if "they do not enhance a substantial government interest").

321. 39 F.3d 374 (D.C. Cir. Judicial Council), *aff'd*, Nos. 94-8 & 94-9 (D.C. Cir. Dec. 30, 1994).

judges' impartiality. According to the Judicial Council of the District of Columbia Circuit, service on the Special Division practically *compels* Article III judges to become embroiled in highly political matters of the day.<sup>322</sup>

Consistent with Judge Kaufman's approach, federal judges simply cannot accept such a role, because alternative means of achieving the same objective are readily available.<sup>323</sup> For example, the appointment of a special prosecutor by the Justice Department, coupled with Congress's power of impeachment, provides an ample means of securing independent and politically unbiased prosecutors to investigate misconduct within the executive branch.<sup>324</sup> Even if one posits the need for "independent

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322. See generally *Charge of Judicial Misconduct*, 39 F.3d at 380-81 (stating that Special Division appointees fall under U.S. CONST. art. II, § 2, the power of appointment, and therefore may consult with political figures); *In re Charge of Judicial Misconduct or Disability*, 85 F.3d 701 (D.C. Cir. Judicial Council 1996) (holding that possible contacts between a United States Senator and a member of the Special Division regarding the appointment of an independent counsel to investigate former Commerce Secretary Ron Brown were not impermissible).

323. See Kaufman, *supra* note 302, at 697.

324. Indeed, fallout from the Watergate experience confirms, rather than refutes, this assertion. When President Nixon ordered the firing of Special Prosecutor Archibald Cox, the so-called "Saturday Night Massacre," public and congressional reaction was swift and negative. See Frank Tuerkheimer, *Watergate As History*, 1990 WIS. L. REV. 1323, 1326-27 (describing Watergate's history and reviewing STANLEY I. KUTLER, *THE WARS OF WATERGATE* (1990)). Politically, a President cannot discharge a special prosecutor, nor can he appoint a political crony, given the increasingly exacting nature of congressional oversight of such matters. Thus, there is really no functional need for the appointment of "independent counsel" by a panel of federal judges. See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 90-95 (1995) (arguing that the Ethics in Government Act unnecessarily politicizes the investigative process and is not needed to ensure impartial investigations of wrongdoing in the Executive Branch); see also *Morrison v. Olson*, 487 U.S. 654, 697, 705-07 (1988) (Scalia, J., dissenting) (stating that the independent counsel provisions of the Ethics in Government Act practically require the Attorney General to appoint an independent counsel when requested by Congress, thus contravening the executive power). *But cf.* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 14-22 (1994) (arguing that executive power is not the exclusive domain of presidential power because there was no original hierarchical department of legal affairs, no general or central body for federal prosecution, and no rule that prosecution be conducted by the President or those answerable to him); Carl Levin, *The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance*, 16 HOFSTRA L. REV. 11, 17-22 (1987) (arguing that the independent counsel provisions of the Ethics in Government Act comport with the Constitution and further the principle of checks and balances).

counsels" (or simply defers to Congress's judgment that such a need in fact exists), federal judges need not go to the Senate cafeteria for lunch and cigars in order to discharge this duty.

Judges participating on the Special Division could solicit wide comment on appropriate persons for appointment as independent counsel without resorting to *ex parte* meetings. An open record, containing letters from all interested parties, would permit judges to consult widely within the civic, political, and legal communities without compromising the dignity of their office.

If direct meetings are necessary, they should be held in open court. If senators wish to lobby the Special Division, they should do so in the light of day, not behind closed doors.<sup>325</sup> There is nothing inherent in the consultative process that requires *ex parte* meetings. Even if Judge Edwards is correct in positing that wide consultation is a necessary incident of the exercise of the appointments power,<sup>326</sup> such consultation must occur through a process that does not impair the ability of the members of the Special Division to go about their Article III duties.

Because it is possible for the Special Division to achieve Congress's objectives without damaging the credibility of Article III judges, the Special Division should structure its operation in ways that minimize the adverse impact of judges selecting prosecutors in highly political disputes between the President and Congress. Perhaps this view is naïve and reflects a misunderstanding of the intricacies of the ways of Washington.<sup>327</sup> It is, however, fundamentally consistent with the Framers' structural protections of Article III judges and with Judge Kaufman's pru-

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Certainly, the proliferation of independent counsels over the last two decades has exacted an enormous cost—both personal and financial—on the subjects of independent counsels' investigations. See Judy Bachrach, *They Who Serve and Suffer*, VANITY FAIR, Dec. 1996, at 128.

325. See the provision of the Administrative Procedure Act (APA), known as the "Government in the Sunshine Act," 5 U.S.C. § 552(b) (1994), which generally requires that the public's business be conducted in public. See H.R. REP. NO. 94-880, pt. 1, at 3-4 (1975), reprinted in 1976 U.S.C.C.A.N. 2183, 2184.

326. See *Charge of Judicial Misconduct*, 39 F.3d at 380.

327. See *Charge of Judicial Misconduct*, 39 F.3d at 382 (stating that political consultation is permissible and customary). *But cf.* Carter, *supra* note 234, at 365-71 (suggesting that the consent of the people to judicial supremacy may rest on reliance on a meaningful separation of powers).

dential concerns about preserving the impartiality and independence of the Article III courts.<sup>328</sup>

To the extent that Article II expressly sanctions judicial participation in the appointment of "inferior" executive branch officers,<sup>329</sup> the exercise of delegated appointments power should not impede the execution of core Article III duties. Because Judge Edwards's exposition of the appointments power seems to sanction, if not celebrate, the political aspects of the appointments power,<sup>330</sup> Judge Edwards's view, which the full Judicial Council affirmed, must be rejected as fundamentally inconsistent with maintaining the dignity of Article III courts.

### *C. Separation of Powers Doctrine and Formalism: Defending the Institutional Legitimacy of Article III Courts*

Formalism has had a difficult time of it in recent years. The Supreme Court openly has embraced functionalism to the exclusion of formalism in a variety of contexts.<sup>331</sup> Moreover, many prominent academics have rejected formalism as being too rigid

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328. See Kaufman, *supra* note 302, at 696-97.

329. U.S. CONST. art. II, § 2, cl. 2.

330. See *Charge of Judicial Misconduct*, 39 F.3d at 380-83. One should note, however, that two members of the Judicial Council rejected the argument that the exercise of Article II appointments powers may require behavior that would not be tolerated incident to the exercise of Article III judicial power. See *In re Charge of Judicial Misconduct or Disability*, Nos. 94-8 & 94-9, slip op. at 4-9 (D.C. Cir. Dec. 30, 1994) (Tatel & Kessler, JJ., each writing separately). Given that the Judicial Council revisited the question of the scope of the Article II appointments power in another case and once again endorsed Judge Edwards's reasoning regarding the scope of permissible *ex parte* consultations, see *In re Charge of Judicial Misconduct or Disability*, 85 F.3d 701 (D.C. Cir. Judicial Council 1996), it seems clear that Judge Edwards's views enjoy the broad support of his colleagues—notwithstanding the concerns of Judges Tatel and Kessler.

331. See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989) (using a functionalist approach to a series of separation of powers issues to sustain the legislation creating the United States Sentencing Commission); *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the independent counsel provisions of the Ethics in Government Act over separation of powers objections, relying on functionalist reasoning to justify this result); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (rejecting a formalist argument that Article III of the Constitution requires that all state law claims heard in a federal forum be adjudicated by Article III judges, and embracing a functionalist approach in order to permit the Commodity Futures Trading Commission to entertain such claims).

to accommodate the post-New Deal administrative state.<sup>332</sup> For example, Professor Christopher Edley has argued quite persuasively that “[i]t is too late in the day to protest the interment of separation of powers formalism, at least in the context of multifunction administrative agencies.”<sup>333</sup>

Nevertheless, one reasonably can argue that too much of the literature in this area of administrative law treats separation of powers questions as implicating only executive branch/legislative branch relations. *Mistretta* and *Morrison* demonstrate conclusively that separation of powers doctrine also must address attempts by Congress and the President to delegate non-Article III duties to the federal courts.

It may well be the case that the modern administrative state requires the abandonment of formalism in separation of powers analyses, at least insofar as executive/legislative power-sharing arrangements are concerned.<sup>334</sup> Both federal courts and legal scholars need to acknowledge, however, the fundamental difference between novel power-sharing arrangements between the two political branches and attempts to include Article III judges in such arrangements. The former usually should be deemed constitutionally unobjectionable, provided that none of the core functions of the executive and/or legislative branch are transferred.<sup>335</sup> The latter, however, cannot be countenanced—unless

332. See, e.g., EDLEY, *supra* note 4, at 4-7, 72-74 (arguing that “extreme deference” to agency expertise constitutes “an abdication of judicial responsibility for the quality of administrative government”); STRAUSS, *supra* note 73, at 596-97, 639-40, 667-69 (stating that only at the apex of the political hierarchy does the separation of powers need to be maintained); SUNSTEIN, *supra* note 4, at 424, 491-96 (stating that reliance on literal interpretation of the Constitution is “unhelpful” in light of historical changes in the government); see also STEPHEN L. CARTER, *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 BYU L. REV. 719, 787-811 (arguing that some separation of powers questions can and should be resolved by the political branches themselves); KRENT, *supra* note 4, at 1257, 1276-87 (suggesting that legislative measures that meet the bicameralism and presentment requirements ought to be viewed with less scrutiny by the courts). *But see* REDISH & CISAR, *supra* note 4, at 453-56, 474-78 (defending the use of “pragmatic formalism” in separation of powers analysis).

333. EDLEY, *supra* note 4, at 5.

334. See SUNSTEIN, *supra* note 4, at 491-96.

335. See STRAUSS, *supra* note 4, at 492-96; STRAUSS, *supra* note 73, at 667-69; cf. REDISH & CISAR, *supra* note 4, at 474-78, 486-87, 490-505 (arguing that functionalism must be rejected in favor of a pragmatic formalist model in separation of powers

we are prepared to devise ways of making Article III judges more directly accountable to the citizenry.

For example, whether an administrative agency or Congress decides if exposure to a certain substance poses a sufficient health risk to justify a prohibition on workplace exposures is a question that either the executive branch or the legislative branch can answer quite competently.<sup>336</sup> If Congress wishes to delegate primary responsibility for setting particular standards to an executive branch agency, then the federal courts should permit Congress to delegate this legislative function to the President, to a presidentially controlled department or agency, or to an independent commission.<sup>337</sup> Regardless of whether Congress or the President sets a particular standard, both are politically accountable to the electorate; institutional responsibility can be enforced.<sup>338</sup>

The matter should be viewed somewhat more critically when delegations of executive or legislative power to Article III judges are at issue. Applying a critical eye to such a situation is necessary because Article III judges are *not* politically accountable.<sup>339</sup> Article III judges cannot *legitimately* exercise either executive or legislative power without answering to the people; yet, judges' ability to engage in their Article III duties would in-

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analyses).

336. See *Industrial Union Dep't. v. American Petroleum Inst.*, 448 U.S. 607 (1980) (holding that Congress lawfully delegated the power to set certain worker health and safety standards to the Occupational Health and Safety Administration (OSHA), notwithstanding the sweeping breadth of the delegation of power and meager congressional limitations on OSHA's exercise of it).

337. See *id.*

338. Of course, formalists would (and do) insist that Congress, and Congress alone, can exercise legislative power. See *id.* at 671, 672-76, 685-88 (Rehnquist, J., concurring).

339. Perennial Republican presidential candidate Pat Buchanan has suggested that the decisions of the federal courts should be subject to popular referenda. See Anthony Lewis, *Voice of America?*, N.Y. TIMES, Feb. 26, 1996, at A13. This device would, of course, make Article III courts politically accountable. That said, it would be difficult to imagine a proposal that would undermine the rule of law more effectively than does Mr. Buchanan's novel idea. The rule of law is a function of our independent judiciary; strip the judiciary of its independence, and the concept of the rule of law is left naked in the cold. See WILLIAM VAN ALSTYNE, *INTERPRETATIONS OF THE FIRST AMENDMENT 3-19* (1984) (providing historical background of the Constitution and arguing for both fealty to text and the Supreme Court's prior interpretations of the text).

evitably suffer if they were made to answer to the people.

Another approach posits that individual judges could carefully divide and compartmentalize their judicial and extrajudicial responsibilities. This proposed solution also fails: Even if Article III judges could possibly compartmentalize their various judicial and nonjudicial duties—carefully separating one task and one mind-set from another—it is highly doubtful that the citizenry ever would embrace this empty dualism.<sup>340</sup>

Unlike Congress or the President, the institutional legitimacy of the Article III courts rests on the apolitical nature of those courts.<sup>341</sup> The decisions of the federal courts, particularly those of constitutional dimension, have the ability to command the public's loyalty and obedience precisely because the decisions are usually thought to be above politics; the Supreme Court speaks

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340. Judge Edwards's attempt to distinguish Article III and non-Article III duties did not persuade even distinguished members of the bar; it seems doubtful that it would be materially more persuasive to members of the lay public, notwithstanding the fact that his colleagues on the D.C. Circuit Judicial Council embraced this reasoning. See *Judges Err on Whitewater*, *supra* note 14, at A26; *Locy*, *supra* note 206, at A9; *Schmidt*, *supra* note 14, at A9; see also *Carter*, *supra* note 234, at 366-72 (discussing judicial and popular views of the structural clauses of the Constitution).

341. This state of affairs also makes it virtually impossible for legislative or executive branch personnel to exercise Article III judicial power legitimately. Suppose that the federal courts attempted to delegate to Congress or the President the obligation to decide Article III "cases or controversies." Would decisions from either of the political branches achieve broad public acceptance? I suggest that they would not, largely because decisions emanating from either political branch of government will be assumed to reflect and incorporate partisan interest as much as dispassionate reason. See generally *VAN ALSTYNE*, *supra* note 339, at 11-13 (explaining why the role of judicial review is both antidemocratic and fundamentally fair, if one takes seriously the supremacy of the Constitution). The public accepts the legitimacy of administrative adjudications and licensing proceedings—which essentially are quasi-judicial proceedings undertaken by executive branch personnel—only because the APA provides significant procedural safeguards to the litigants, notably including provisions that provide for impartial decision-making personnel (i.e., ALJs). See *Federal Administrative Procedure Act of 1946*, 5 U.S.C. §§ 551-559, 701-706 (1994). Furthermore, the public's confidence in such proceedings is fortified considerably by APA provisions that ensure the availability of broad judicial review of administrative adjudications by Article III judges. See *id.* §§ 701-706. Conversely, the public does not (indeed cannot) maintain much confidence in the independence and impartiality of judges selected through partisan elections—a manner of selection that apparently results in sitting judges actively soliciting campaign contributions from lawyers who regularly appear before their bench. See *Peter Applebome, Texas Court Fight Puts Focus on Elected Judges*, N.Y. TIMES, Jan. 22, 1988, at B4; *Saundra Torry, Study Cites Lawyers' Campaign Contributions*, WASH. POST, Sept. 13, 1994, at D3.

to enduring constitutional values, not to the latest polling data.<sup>342</sup> Power-sharing arrangements that require judicial personnel to participate actively in political life are certain to cause the public to experience cognitive dissonance. Both citizens and the press undoubtedly will question how an Article III judge's work product plausibly can be deemed nonpolitical if the judge writing the opinion is a blatantly political agent.

Fuzzy balancing tests of the sort used in *Mistretta* and *Morrison* inevitably will result in judges venturing into places where they do not belong and undertaking roles for which they are institutionally ill suited. In such cases, the federal courts must resolve to protect their institutional interests against attempts by the President or Congress to contract or expand the federal judiciary's duties.

Unlike the federal courts, both the President and Congress have ample tools at their disposal to prevent encroachments on their institutional prerogatives and attempts to fob off tasks that belong more properly to another coordinate branch. Moreover, executive and legislative roles are both thoroughly political; undertaking partisan or policy-oriented tasks harms neither the President nor Congress. Accordingly, one could argue that there is little need for the Supreme Court to play umpire between the two political branches.<sup>343</sup>

Nevertheless, the Supreme Court's decisions in *Bowsher v. Synar*<sup>344</sup> and *INS v. Chadha*<sup>345</sup> incorporate a formalist conception of the separation of "legislative" and "executive" functions, striking down (respectively) legislative oversight of the

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342. See generally ACKERMAN, *supra* note 181, at 261-65 (suggesting that the Court has done a good job of interpreting the constitutional principles set forth by the Framers). *But cf.* *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996) (involving a search and seizure rehearing after substantial political and public outrage resulted over the initial decision).

343. See *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting); see also JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 275 (1980) (arguing that interbranch conflict restrains each branch from overstepping its boundaries). For a critical rejoinder to this argument, see Redish & Cisar, *supra* note 4, at 491-94.

344. 478 U.S. 714 (1986).

345. 462 U.S. 919 (1983).



execution of the budget<sup>346</sup> and the legislative veto.<sup>347</sup> It is more than a little ironic that the Supreme Court has deployed formalist reasoning to strike down novel power-sharing arrangements between Congress and the President,<sup>348</sup> but has relied on functional reasoning to permit the transfer of legislative and executive duties to Article III personnel.<sup>349</sup> The Court has it precisely backwards: provided that essentially political duties remain vested within a political branch of government, accountability is not lost; voters can assess blame or credit as the circumstances warrant.<sup>350</sup> Conversely, when legislative or executive functions end up in the hands of federal judges, the citizenry is left without effective recourse.

Not only has the Supreme Court's separation of powers jurisprudence failed to draw a clear distinction between delegations involving the political branches and delegations involving the judicial branch, but, on occasion, it even has embraced a looser form of functionalism when analyzing the delegation of judicial duties to executive branch institutions. For example, in *Commodity Futures Trading Corp. v. Schor*,<sup>351</sup> the Supreme Court embraced an exceedingly amorphous balancing test to determine

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346. See *Bowsher*, 478 U.S. at 732-34.

347. See *Chadha*, 462 U.S. at 944-59.

348. See *Bowsher*, 478 U.S. 714; *Chadha*, 462 U.S. 919.

349. See *Mistretta v. United States*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *supra* Parts I.A, II.A.

350. Moreover, the separation of powers difficulties at issue in *Bowsher* and *Chadha* could have been resolved through unilateral self-help by the President. This claim is a rather bold one, a claim that requires some proof. Most obviously, in both instances, the President could veto the offensive legislation; in both *Bowsher* and *Chadha*, however, the President elected not to interpose a veto. One could respond reasonably that a sitting President should not be permitted to bind forever his (or her) successors. Some further suggestions therefore are in order. In the case of *Bowsher*, the President simply could have vetoed bills containing spending authorizations in excess of the Gramm-Rudman targets or, in the alternative, ordered recessions prior to the preparation of mandatory recessions by the Comptroller General. See Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. §§ 681-688 (1994); cf. *Kennedy v. Mathews*, 413 F. Supp. 1240, 1245 (D.D.C. 1976) (requiring the executive branch to spend all appropriated funds for a legislative program absent express congressional authorization to do otherwise). With respect to *Chadha*, the President simply could have elected not to prosecute or to deport an alien whose refugee status Congress, strictly speaking, "vetoed;" the legislative veto at issue in *Chadha* would not have required the President to deport anyone.

351. 478 U.S. 833 (1986).

whether Congress could delegate to the Commodity Futures Trading Commission the power to decide state law counter-claims (subject to an appeal heard by an Article III court):

[I]n reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary. . . . Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.<sup>352</sup>

This loose sort of balancing test insufficiently protects the Article III courts, and fails to appreciate the virtues associated with providing litigants with Article III decisionmakers. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, a decision cast in formalist terms, provided a much better benchmark for assessing the propriety of delegating Article III tasks to non-Article III personnel.<sup>353</sup>

Although the Supreme Court is perfectly entitled to continue refereeing interbranch disputes between the President and Congress, it should articulate and apply consistently a stricter standard of review to interbranch power-sharing arrangements that either expand or contract the duties of Article III courts or their personnel. Formalism, or some form of neo-Formalism, is necessary to protect the judiciary from attempts to shift duties that

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352. *Id.* at 851 (citations omitted); *cf.* *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58-59 (1982) ("The inexorable command of [Article III] is clear and definite: The judicial power of the United States must be exercised by courts having attributes prescribed in Art. III.").

353. *See Marathon*, 458 U.S. at 57-63, 73-74. *Marathon* remains good law, notwithstanding the Court's functionalist analytical backsliding in *Schor*. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52-56 (1989) (applying *Marathon* and stating that Congress can assign only "public rights" violations to non-Article III courts); *Coit Indep. Joint Venture v. FSLIC*, 489 U.S. 561, 578-79 (1989) (citing and applying *Marathon*).

will require Article III judges to be held publicly accountable for their decisions. Drafting sentencing guidelines and appointing prosecutors are duties that usually, if not always, will require some form of political accountability. Accordingly, they should not be undertaken by Article III judges in the absence of strong measures to protect the independence—the nonaccountability—of Article III judges.

Several commentators have argued that the Supreme Court wrongly decided *Mistretta* and *Morrison* on separation of powers grounds.<sup>354</sup> Prohibiting these sorts of delegations completely is certainly preferable to the current state of affairs. Having stumbled upon the merely good, one should not abandon the quest for the best. A theory of the separation of powers that prohibits absolutely the delegations at issue in *Mistretta* and *Morrison* exaggerates the scope of the difficulties associated with interbranch delegations involving the judicial branch and underestimates the ability of the courts to cure these difficulties through procedural protections that restrict the ability of federal judges to execute delegated functions in political ways.

Although the Supreme Court failed to appreciate fully the inherent dangers of permitting Article III judges to undertake legislative<sup>355</sup> or executive<sup>356</sup> duties, such service should not be

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354. See, e.g., Carter, *supra* note 234, at 358-64; Murchison, *supra* note 170, at 1035-39; Redish & Cisar, *supra* note 4, at 490; Wright, *supra* note 26, at 30-34; Jordan Fried, Note, *The Constitutionality of the U.S. Sentencing Commission: An Analysis of the Role of the Judiciary*, 57 GEO. WASH. L. REV. 704, 727-30 (1989); Kristin L. Timm, Note, *"The Judge Would Then Be the Legislator": Dismantling Separation of Powers in the Name of Sentencing Reform*, 65 WASH. L. REV. 249, 263-65 (1990).

355. See *Mistretta v. United States*, 488 U.S. 361, 371-79 (1989). Determining appropriate punishments is quintessentially a legislative task. Indeed, federal executive agencies generally are prohibited from creating criminal punishments incident to their delegated authority. See *In re Kollock*, 165 U.S. 526 (1897) (permitting the Commissioner of Internal Revenue to define particular marks and brands that violated legislative statutes but noting that the Commissioner could not create administrative crimes out of whole cloth); *United States v. Eaton*, 144 U.S. 677, 687-88 (1892) (prohibiting the Secretary of the Treasury from making the failure to keep oleomargarine records punishable by law in the absence of a clear legislative command requiring the keeping of such records); see also Mark D. Alexander, Note, *Increased Judicial Scrutiny for the Administrative Crime*, 77 CORNELL L. REV. 612 (1992) (discussing the history of administrative agencies' attempts to expand criminal liability for violations of regulations). Judges do retain substantial "legislative" authority under the common law; in most states the local Supreme Court is free to determine the substantive

deemed constitutionally impermissible in all circumstances. Provided that the federal courts demand adequate procedural safeguards to preserve the independence and impartiality of Article III judges, Congress should not be barred absolutely from placing Article III judges in roles traditionally associated with the legislative and executive branches of government.<sup>357</sup>

Make no mistake, however: more than a modicum of pragmatism is needed in deciding cases like *Mistretta* and *Morrison*. To the extent that functionalism purports to be a pragmatic approach to separation of powers issues, federal courts also must be realistic about the effects, real and perceived, of augmenting the duties of Article III judges with essentially legislative or executive tasks.<sup>358</sup> The alternative—acquiescence in the transfor-

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content of the law of torts, property, and contract, subject to the acquiescence of the legislature. See STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM (Mary Comelia Porter & G. Alan Tarr eds., 1982); Craig E. Emmert & Carol Ann Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 JUST. SYS. J. 37 (1992); see also Mark C. Miller, *A Legal Perspective on the Ohio, Massachusetts, and Federal Courts*, 56 OHIO ST. L.J. 235, 240-57 (1995) (comparing federal and state courts and their respective policy-making influences).

356. See *Morrison v. Olson*, 487 U.S. 654, 688-99 (1988). The appointment of prosecutors is an executive function. Just as the President enjoys the power to appoint cabinet officers, military officers, ambassadors, and federal judges, subject in some cases to the advice and consent of the Senate, see U.S. CONST. art. II, § 2, cl. 2, the President possesses the authority to appoint federal prosecutors. Furthermore, the prosecution of crimes is an executive function. See *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); Calabresi, *supra* note 325, at 90-95. *But cf.* Lessig & Sunstein, *supra* note 324, at 14-22 (arguing that the Framers did not place prosecution within the exclusive domain of the President); Levin, *supra* note 324, at 14-17 (stating that independent counsel should seek to promote public confidence in government).

357. In some cases, however, no amount of procedural safeguards would suffice to avoid compromising the independence and impartiality of Article III courts. Suppose Congress attempted to delegate the power to declare war to a special panel of federal judges. Upon a petition from a member of Congress, these judges would determine whether a particular presidential deployment of troops required as a prerequisite a congressional declaration of war. Such an arrangement would require judges to make purely political decisions and would put judicial personnel at the heart of a classic interbranch dispute between the President and Congress—not as judges, but rather as public policy mavens. Under no circumstances could such a scheme be countenanced; indeed, even a hard-core functionalist would be hard-pressed to defend such a novel approach to interbranch power sharing.

358. Moreover, from a practical perspective, it seems doubtful that the Supreme Court will abandon its functionalist jurisprudence anytime soon. See *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989) (applying functionalist reasoning

mation of federal judges into political actors—would destroy the credibility of Article III courts.<sup>359</sup> Thus, an intellectually defensible functionalist conception of the separation of powers must incorporate some formalism in its approach to delegations to and from Article III courts.

A proper balance could be struck by relying on a form of soft-core formalism when evaluating attempts by Congress and the President to delegate executive or legislative tasks to the federal judiciary. To borrow a phrase coined by Professor Martin Redish, this must be a “pragmatic formalism”<sup>360</sup>—in this case, a kind of formalism that views with greater skepticism attempts by either Congress or the President to draw the judiciary into essentially political matters. Congress and the President should be held to a higher standard of justification when delegations of political power to and delegations of judicial power from Article III courts and their personnel are at issue.<sup>361</sup>

The Supreme Court already has established that it will jealously protect the constitutional obligation of Article III courts to decide cases and controversies arising at law.<sup>362</sup> A corollary of this principle must be that the federal judiciary generally should not undertake duties that would, of necessity, require it to be directly involved in policy decisions of a legislative or executive nature. Derogations from this principle, such as the delegations at issue in *Mistretta* and *Morrison*, should be permitted only if the exercise of the delegated powers can be depoliticized through the adoption of process-based protections.

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to conclude that the president may consult with a committee of the ABA regarding potential judicial nominees); *cf.* *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995) (relying upon more formalist reasoning to vacate SEC regulations that purported to require the reopening of certain final judicial actions because the SEC regulations violated the separation of powers doctrine); *Freytag v. Commissioner*, 501 U.S. 868 (1991) (parsing carefully the text of the Constitution's Appointments Clause to determine whether the Chief Judge of the United States Tax Court, an Article I tribunal, could appoint magistrate-like “special judges”).

359. In fact, the loose functionalism of *Mistretta* and *Morrison* already has caused nontrivial damage to the reputation of Article III courts.

360. Redish & Cisar, *supra* note 4, at 452-56.

361. See generally Kaufman, *supra* note 302, at 688-97 (discussing the independence of the three branches).

362. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

## V. CONCLUSION

Hindsight is 20/20: The Supreme Court failed to establish sufficient safeguards in *Mistretta* and *Morrison* to protect the federal judiciary from untoward entanglements with the executive and legislative branches of government. Judge J. Skelley Wright once observed that "public confidence in the judiciary is indispensable to the operation of the law; yet this quality is placed in risk whenever judges step outside the courtroom into the vortex of political activity."<sup>363</sup> Accordingly, "[j]udges should be saved 'from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties.'"<sup>364</sup>

As implemented in the lower federal courts, *Mistretta* and *Morrison* create a nontrivial risk of entangling the judiciary in matters likely to arouse "partisan suspicions," thereby detracting from the effectiveness of Article III judges as a class. *Mistretta* and *Morrison* therefore must be reconstructed to provide a stronger bulwark against the appearance of partisanship, and to maintain the independence and integrity of Article III courts. If some judges are to wear two hats, their executive (or legislative) garb must not leave them ill-suited in the public's eye to return to the plainer, basic black that is the essence of the Article III judge's wardrobe.

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363. *Hobson v. Hansen*, 265 F. Supp. 902, 923 (D.D.C. 1967) (Wright, J., dissenting).

364. *Id.* (Wright, J., dissenting) (citations omitted).

