

UNITED STATES ATTORNEYS—WHOM SHALL THEY SERVE?

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The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. *As such, he is in a peculiar and very definite sense the servant of the law*, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935) (Sutherland, J.) (emphasis added).

The President shall appoint, by and with the advice and consent of the Senate, a United States attorney of each judicial district. . . .

Each United States attorney is subject to removal by the President.

28 U.S.C. § 541(a), (c) (1994).

No man can serve two masters; for either he will hate the one, and love the other; or else he will hold to the one and despise the other.

Matthew 6:24.

I

INTRODUCTION

The law and the President may not quite be analogous to God and mammon, not to mention the converse, but the principle expressed in the Gospel of Matthew is often generalized and raises an important question. By law, U.S. Attorneys serve the President at his or her pleasure.¹ That concept is easy to

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1. Other relevant requirements are:

28 U.S.C. § 544. Oath of office

Each United States attorney, assistant United States attorney, and attorney appointed under section 543 of this title, before taking office, shall take an oath to execute faithfully his duties.

Id. § 547. Duties

Except as otherwise provided by law, each United States attorney, within his district, shall

understand, at least some 210 years and a few Supreme Court interpretations later. But what does it mean to be a servant of the law? Of course, every elected official must abide by the law, and every presidential appointee must attempt to execute it faithfully, but Justice Sutherland in *Berger v. United States*² is suggesting a “peculiar and very definite sense” of fidelity and servitude. Whatever the Justice meant, his quotation has become ubiquitous on publications produced by and about U.S. Attorneys. More importantly, many suggest that servitude to the law requires political independence in order to be faithful to the law. The concept is put dramatically by Francis Biddle, Franklin Roosevelt’s Solicitor General: “He is responsible neither to the man who appointed him nor to his immediate superior in the hierarchy of administration. The total responsibility is his, and his guide is only the ethic of his own profession framed in the ambiance of his experience and judgment.”³ Biddle was referring to the Solicitor General, but often this perspective, to one degree or another, is held about the entire Department of Justice. In addition to the Bible, perhaps the epigraph to this article should have included a little Shakespeare: “To thine ownself be true.”⁴

Can U.S. Attorneys serve two masters—that is, the President and the law? Or do U.S. Attorneys have no real masters, and in fact serve only themselves and their own interests? The fidelity issue for government lawyers has not been widely addressed, but to the extent that it has, it usually has been in the context of the Solicitor General, the Attorney General, independent prosecutors, or independent agencies.⁵ The issue, however, also applies to U.S. Attorneys. Indeed, the issue may be even more important at the level at which most

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

Id. § 542. Assistant United States attorneys

- (a) The Attorney General may appoint one or more assistant United States attorneys in any district when the public interest so requires.
- (b) Each assistant United States attorney is subject to removal by the Attorney General.

2. 295 U.S. 78, 88 (1935).

3. FRANCIS BIDDLE, IN BRIEF AUTHORITY 97 (1962).

4. WILLIAM SHAKESPEARE, *HAMLET*, act I, sc. 4.

5. See, e.g., LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987); CORNELL CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* (1992); REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* (1992); Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255 (1994); Louis Fisher, *Is the Solicitor General an Executive or Judicial Agent? Caplan’s TENTH JUSTICE*, 15 L. & SOC. INQUIRY 305 (1990); Todd Lochner, *The Relationship Between the Office of Solicitor General and the Independent Agencies: A Reevaluation*, 79 VA. L. REV. 549, 549 n.2 (1993).

prosecutorial decisions are made. The purpose of this essay is to begin to examine these questions and to offer a different way to think about the fidelity issue. Concomitantly, it will suggest that there are ways to think about U.S. Attorneys more generally, theoretically, and systematically, rather than simply resorting to explanations by anecdotes, personalities, and the characteristics of individual districts. U.S. Attorneys play a very powerful and important role in our society, and they deserve more scholarly attention.⁶

II

SERVING THE PRESIDENT OR THE LAW: POLITICAL RESPONSIVENESS VERSUS FIDELITY TO THE LAW

Watergate inspired calls for the Justice Department to become “non-political.”⁷ What is generally meant by that call is that the Department should not be accountable to the President. Although arguments for a truly “independent” Justice Department peaked after Watergate, the concept of the apolitical government lawyer remains an often expressed ideal. There is usually some caveat acknowledging the need for some political responsiveness, but generally the implication is that it should be very limited. The experiences of the last decade with Independent Counsels, however, raise questions about the desirability of “unaccountable” prosecutors. Moreover, given the nature of what attorneys for the United States do, they could never be nonpolitical. By definition, the Department’s mission is political—both in the grand sense, but also in terms of responsiveness. The whole concept of responsible government requires that whom we elect matters and that bureaucracy respond accordingly. Though there is rarely such a thing as a mandate—claims by politicians and the fixation of some journalists notwithstanding—whom we elect *should* make a difference. By constitutional design we have made departments part of the Executive Branch; as such, they should serve a President’s agenda and are primarily responsive through him or her.⁸ Of course, there are subtleties. It is always the case that when serving the President, one has one’s own ethical standards and must sometimes decide whether to serve or resign. And in any executive department, there is some pull between careerists and presidential

6. The author is involved in a larger study of the Department of Justice, one component of which is to understand better the roles and perceptions of U.S. Attorneys. This essay reflects some evidence from interviews with U.S. Attorneys and Assistant U.S. Attorneys, but at this stage the evidence is only anecdotal and suggestive. The seminal study on U.S. Attorneys is JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS (1978). Much of what I have learned to date comports with Eisenstein’s findings, though the purpose of my larger study differs from his focus.

7. See *Removing Politics from the Administration of Justice: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong. 2 (1974).

8. The extent to which executive agencies have responsibility to the President versus the Congress is, of course, a classic debate in American constitutionalism and in constitutional law. See, e.g., LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT (1997); LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW (1990); see also Fisher, *supra* note 5.

appointees.⁹ Nevertheless, democratic theory calls for responsiveness, and the American version of separation of powers places the Department of Justice under the President. Therefore one might conclude that the Department of Justice is just like any other executive department and basically should act like one. The way, then, to understand proper behavior at Justice—normatively and empirically—is simply to understand separation of powers, the role of the Executive Branch, and government bureaucracy. Well, not exactly.

First, it is a difficult normative dilemma to sort out the appropriate interaction of partisanship and impartial administration in any department. Responsiveness sits on one hand; on the other hand sits our whole concept of a civil service system, which suggests some need for autonomy from political direction. In our gut and our rhetoric, if not in our theory, we know that there is something about the administration of law that makes political responsiveness even more problematic. Surely enforcing the law is different from administering agricultural policies, or even foreign relations. We expect the Department of Justice to be different. Even the most ardent defenders of the need for Justice to be more faithful to the Executive rather than to the Judicial Branch or to the lawyer's own interpretation of the law expect Justice to be less responsive and partisan than other executive agencies.¹⁰ Taking some liberty with Justice Stewart's famous quote, we may not know precisely how to define inappropriate hard-core political intrusion into Justice, but we know it when we see it.¹¹ Unlike pornography, however, no one would argue that there is no such thing as obscene intrusion. And, unlike pornography, our standards are higher than simply wishing to ban hard-core intrusion. Of course, one person's intrusion is another's responsible governing, but compared to other departments, our tolerance for political influence is low.

9. See HUGH HECLLO, *A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICS IN WASHINGTON* (1977).

10. Charles Fried is probably the most dramatic example of a Solicitor General who thought that that office had become beholden to pleasing the Justices rather than arguing for the President's agenda. Indeed, the Reagan Justice Department generally was known to be an exponent of this view, particularly William Bradford Reynolds. That said, even Fried understood that the law governed him in ways that forced him to observe it contrary to political forces within the Administration. See CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION: A FIRSTHAND ACCOUNT*, 173-205 (1991).

It is often argued that the Solicitor General's independence is not really independence at all, it is simply strategic. The argument goes that it is in the interest of the administration to have counsel that has the profound respect of (and at times deference to) the Court. Therefore the Solicitor General is serving the President. No doubt this is true to some degree and everyone understands this, including the President. But there is something else going on. I have interviewed many attorneys in the Office of the Solicitor General including six Solicitors General themselves, and I was struck by how much deference and allegiance they felt toward the Court rather than the President. Indeed, it was that phenomenon that inspired my larger study of the Justice Department of which this article is a part. Granted, it is in the administration's best interest to have counsel that is well respected by the Court, but persons in that office talk a lot about dual fidelity.

11. With all apologies, of course, to the late Justice Stewart: I may not know how to define hard-core pornography, "[b]ut I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

One might argue that it is the responsibility of the judiciary, not an executive department, to be primarily responsible for sorting out the problems of the interaction of law and politics. However, judicial checks are insufficient given the potentially dramatic implications for a person simply to be accused by the United States and the necessity of enforcing the law without always repairing to the courts. One might argue that a dichotomy between political responsibility and fidelity to the law is a false one, and she or he would be right at some level. Different individuals, however, might find it false for very different and contradictory reasons. Some may argue that no one, not even the President, is free to disobey the law. Political responsiveness can never be contrary to the law. Law is the master, and even the President is its servant, as are his or her underlings. Well, yes, but prosecutorial discretion is legal. It can be employed to admit the most rank form of offensive partisanship, effectively making the law a sham. Moreover, even with the most upright and non-partisan of prosecutors, laws are subject to interpretation. Presidents and Attorneys General often have very strong feelings about the “proper” interpretation, which may be one that most observers would find hard to accept as a proper execution of the law, legal or not. A completely different way to claim that the dichotomy is false is to argue that all law is a construct and means nothing in and of itself and therefore cannot be a real master. It has no meaning except as it is defined and used by those with power. Well, yes, but the person who argues this will be the first to complain bitterly at the next Watergate about the *illegal* abuse of power, or the shameful partisanship that constitutes a dereliction of duty by the Attorney General or the U.S. Attorney. In short, despite academic understandings that “law” as we often use it is a myth, and that the “rule of law” is, at base, a nonsensical concept—people, not laws rule—no one really wants to live in a society that does not subscribe to the myth and where those who wield power act as if “the law” is not meaningfully constraining. Alas, at some level it may be true that posing the law and political responsiveness as opposites sets up a straw man; nonetheless, it is a real dilemma because U.S. Attorneys, and to some degree we all, choose to subscribe to the myth of the rule of law. Law is something that controls U.S. Attorneys in a way that is independent of a President or his or her surrogates. As such, for a U.S. Attorney the law is his or her master, as is his or her President.

This need to serve different masters, one of which is “the law,” has been thought about more extensively in another context—the judiciary—and frankly, the core issue is really not that different. The disciplines of law, history, sociology, and political science—especially political science—have always wrestled with trying to understand the political nature of judicial decisionmaking. Though there are fierce debates over how, and how much, politics should and does influence judicial decisionmaking, after the advent of legal realism or the behavioral revolution in the social sciences, few scholars today would subscribe to the myth that impartial judges find the correct answer in the law. The

relevant question has become: How do law and politics interact?¹² And even though the idea of responsiveness is different for the judiciary than for the Executive Branch, it is still there. The counter-majoritarian dilemma is about this and, perhaps ironically, part of the resolution to that dilemma is that responsiveness is supposed to enter in through presidential appointment.¹³

The question is not whether one can solve the politics-versus-law point normatively. The normative debate will and should continue, but as with the judiciary, it will not be resolved. Indeed, I have argued elsewhere that it should not be resolved.¹⁴ We want the Justice Department to try to serve both masters, even though such a desire often is ultimately contradictory. One's position at any given time will probably depend on what one thinks about a particular President's or U.S. Attorney's agenda. That the normative question remains, however, does not mean that thinking about U.S. Attorneys must be atheoretical and anecdotal. Theory can help us better understand how and why U.S. Attorneys behave as they do, when they will serve which master, and when they will serve themselves.

III

PRINCIPALS, PRINCIPLES, AND AGENTS

Political scientists have returned their attention to the study of institutional relationships and, by borrowing and modifying theoretical concepts developed by economists, have developed a vocabulary for talking about and analyzing hierarchical relationships.¹⁵ Many political institutions can be looked at as collections of hierarchical relationships in which the subordinate is given responsibility to carry out certain tasks defined by the superior. These are called principal/agent relationships. Rather than thinking in terms of masters and servants, or fidelity to the law or to the President, it may be more helpful to think in terms of principals and agents. Why would we want to try to understand U.S. Attorneys in the context of a theoretical construct such as principal/agent theory? The nature of the academic enterprise is always to aspire toward theory-driven understandings of phenomena. Because if, for example,

12. The literature in political science has been consumed by this debate. For an example that sees the law as having no meaningful constraint, see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993), who argue that interpretation is simply a ruse or *ex post* rationalization for a Justice's attitudes. For an example of a decision model for Justices that sees law as a meaningful constraint but acknowledges its indeterminacy, see H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991).

13. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS*, 16-18 (1962); see also Jonathan D. Casper, *The Supreme Court and National Policy-Making*, 70 AM. POL. SCI. REV. 50-63 (March 1976); Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795 (Sept. 1975).

14. See PERRY, *supra* note 12, at 214-15.

15. I owe special thanks to Joe Smith for his help on this section specifically and for constant education and intellectual stimulation more generally. I also am indebted to Brian Roberts for his help. They are both excellent teachers about economics and political science; my selective use of concepts should not reflect upon their sophistication.

principal/agent theory were indeed applicable to U.S. Attorneys, it would open the door to very sophisticated tools for analyzing and predicting their behavior. Those tools are not fully exploited here, but any well-developed theory offers them. At the very least, some aspects of principal/agent theory provide a helpful way to think more generally, systematically, and theoretically about U.S. Attorneys.

Formally, a principal/agent relationship is characterized by the delegation of authority to take action from the individual or individuals in whom it was originally endowed—the principal—to one or more agents.¹⁶ Economic and contractual relationships easily fit under this concept, but it can be used more widely. For example, congressional committees are in some sense servants of their chambers. The chamber has given committee members the job of closely examining proposed legislation and the authority to modify or kill proposed laws.

U.S. Attorneys can be thought of as agents. The obvious question becomes: Who is the principal? Is it the President? The Attorney General? The Justice Department official responsible for approving the U.S. Attorney's action?¹⁷ The law? Can a principle (the law) be a principal? The preceding section has been an argument that it can. As long as one feels that a law has independent meaning, that one is bound to carry out its meaning, and that there is some enforcement and sanction for not doing so, then in principle, a principle can be a principal for whom the U.S. Attorney is its agent. Enforcement and sanctions for not serving the law can come from many places, not the least of which is a judge. Can there be multiple principals, and, depending upon the situation, can the principals change? Yes, though admittedly as one admits multiple principals and stretches the concept of a principal to a thing such as the law, one begins to lose the elegance and parsimony of the theory.

Returning to the theory of principal/agent relationships, the first issue is why they exist at all. In keeping with the economic roots of the theoretical construct, the answer given is that the relationship exists because it serves the interests of both parties.¹⁸ Principals gain because, through the efforts of their agents, more of their goals are accomplished. For example, by splitting itself into committees, Congress can examine far more legislation in far greater detail than it could if it met only as a Committee of the Whole. The Department of Justice could not begin to handle effectively the legal work of the United States from Washington. Much of the work done by the Department of Justice is done by U.S. Attorneys. Operating at a local level is not simply a logistics issue, however. As any lawyer knows, one can usually be more effective when one understands, and is seen as a part of, the local legal culture. U.S. Attorneys

16. See D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* 24 (1991).

17. Often in this essay I generally refer to the President as the principal assuming that the Attorney General is his or her surrogate. Of course, the Attorney General can be thought of as an entirely separate principal. See *infra* Part IV.A.

18. See KIEWIET & MCCUBBINS, *supra* note 16, at 24.

have and develop local expertise. Principal/agent theory posits that by delegating authority to agents who have more time or expertise, principals accomplish their goals more fully. As Kiewiet and McCubbins note, "tremendous gains accrue when tasks are delegated to those with the talent, training and inclination to do them well."¹⁹ Agents gain through these relationships because they are compensated by the principal. Theorists typically assume that no agent would enter into such a relationship if the rewards were not greater than the agent's opportunity costs.²⁰ In purely economic relationships, such as between an employee and an employer, the agent is compensated by being paid. In other types of relationships, the agent may gain stature from being appointed to a prominent position. Returning to the Congress example, members of congressional committees gain the right to wield disproportionate influence over a certain policy area, which may help them with reelection. For U.S. Attorneys, they too, are allowed to wield a disproportionate influence which may further their own political careers.

Agents have goals other than faithfully carrying out the wishes of their principals.²¹ We shall consider more fully below some of the goals for U.S. Attorneys. A classic example of an agent's goal diverging from the principal's is when the agent desires higher compensation. This leads the agent to misrepresent his true characteristics in order to enter into a more rewarding relationship.²² For example, a moderately industrious job applicant may present himself as extremely industrious in order to get a high-paying job. An applicant for a political job may present herself as enthusiastically supporting the principal's agenda, even if she does not sincerely support it. The problem of agents systematically misrepresenting their characteristics, and principals therefore contracting with agents whose characteristics are less than ideal, is known as adverse selection.²³ Once an agent has been selected, it is likely that the principal will still not achieve perfect implementation of her goals, even allowing for adverse selection. Any deviation from efficient implementation of the principal's goals due to the principal/agent relationship is known as agency loss. Agency losses can be divided into two categories. First, the principal suffers agency losses when the agent puts personal goals ahead of the principal's goals. Second, the principal suffers agency costs for any effort she has to expend to monitor and control the agent. If the agency losses outweigh the gains from delegation, the principal will not enter into the relationship.²⁴ Neither of these problems can be completely eliminated, so all solutions are less than ideal.

19. *Id.*

20. *See id.* at 25.

21. *See id.* at 24-25. For general discussions of principal/agent theory, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976), and Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739 (1984).

22. *See* KIEWIET & MCCUBBINS, *supra* note 18, at 25.

23. *See id.*

24. *See id.*

However, by carefully designing the incentive structure, principals can reduce agency losses to tolerable levels.²⁵

Although principals try to screen candidates carefully to select agents most likely to carry out their wishes, principals must always assume that agents are self-interested and will try to achieve their own goals. Agents often have private information about the details of their jobs which the principal can only discover with difficulty.²⁶ In order to eliminate this, principals can design monitoring schemes that will make the agent's activities more transparent. One way to do this is to require agents to make regular reports on their activities and accomplishments. Another way is to rely on third parties with personal interests in the agent's activities to monitor the agent and inform the principal if the agent is not faithfully doing her job.²⁷ Beyond merely knowing whether the agent is acting faithfully, the principal must have some means of changing the agent's incentive structure.²⁸ If the principal does discover that the agent is deviating from her wishes, the principal must have some sanction to apply against the agent. This might involve terminating the relationship and seeking a new agent or punishing the agent for the failure to carry out her responsibilities.

IV

PRINCIPALS AND POWER AT JUSTICE

A. Multiple Principals and Power

In many instances, it is easy to determine who is the principal and who is the agent. For political institutions, it is more difficult because the hierarchies are more complex. For U.S. Attorneys and the Department of Justice, the hierarchical situation is extremely complex. This is true even if we ignore the concept of "the law" as a principal.

There are multiple principals for U.S. Attorneys in the hierarchy at Justice. The U.S. Attorney is officially accountable to the Attorney General, but only the President can fire the U.S. Attorney. If the Attorney General were simply a surrogate for the President, then the two would have identical goals. But the Attorney General is actually the President's agent; their goals are not always the same. Moreover, at different times one might think of several different principals at different levels within the Department of Justice for whom the U.S. Attorney is the agent: the Division heads (Civil, Criminal, Antitrust, etc.), the heads of the appellate sections of each Division, the Solicitor General, and on and on. For example, if one considers ultimately prevailing in a case as a goal, then the Solicitor General retains far more power than the head of a Division or even the President or the Attorney General. Authorizing an appeal is

25. See *id.* at 28.

26. See *id.* at 25.

27. See Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

28. See KIEWIT & MCCUBBINS, *supra* note 16, at 29.

the Solicitor General's decision, even when it goes against the desires of the Attorney General or the President.²⁹ On the other hand, if the concern is the authority to bring a case in the first instance, then the Solicitor General is unimportant. Different principals, then, will have varying degrees of power depending on the situation. The idea of multiple principals requires analyzing U.S. Attorney behavior by identifying precisely who the principal is in each situation.

Technically, the Attorney General sets the priorities for the Department. The official reports by U.S. Attorneys inevitably wax eloquent about how they are fulfilling the administration's priorities, but a close examination of the activity of individual districts shows that there is substantial variance in local priorities because of the discretion that lies with each individual local U.S. Attorney. Drug enforcement may be the priority of the Attorney General, but if civil rights enforcement is the U.S. Attorney's priority, there is little that can be done. There are potentially huge incentives to depart from the administration's agenda. This headquarters/field disparity phenomenon is not unique to the Justice Department, but the ability to control it may be. As presidential appointees, the Attorney General cannot fire the U.S. Attorneys, and for a President to do so over a disagreement over priorities is unlikely.

The power of U.S. Attorneys is far greater than an organizational chart would imply. While Justice Department organizational charts are careful not to spell out hierarchy too clearly, one might conclude from looking at manuals and procedures that U.S. Attorneys are near the bottom. But that does not begin to describe reality. Granted, many of the decisions of U.S. Attorneys require approval from "Main Justice,"³⁰ at least in theory. For example, civil settlements over a certain dollar amount require Main Justice approval. Often the person who actually does the approving is a civil servant, even if the signature of a higher official is required, so there are several layers of Justice Department officials "under" the Attorney General and "over" the U.S. Attorney. But few presidential appointees see themselves as subservient to civil servants, no matter what organizational charts or standard operating procedures may dictate. Some U.S. Attorneys even question where they fit in the hierarchy *vis-à-vis* other presidential appointees at Main Justice. Many U.S. Attorneys see themselves as really subordinate only to the Attorney General, and even that relationship is complex. It is not simply an issue of how U.S. Attorneys see themselves; there is a political reality that adds to their power. U.S. Attorneys are presidential appointees plus: Not only is a U.S. Attorney a presidential appointee, but his or her prime sponsor is usually a U.S. Senator. Therefore, a U.S. Attorney's political strength at times can cause headaches for the Attorney General—not to mention the Deputy, Associate, or Assistant who tries to

29. Technically, the President or Attorney General could overrule the Solicitor General, but this rarely happens. As far as the U.S. Attorney is concerned, the Solicitor General is the final decision-maker on appeals.

30. "Main Justice" is commonly used to refer to the offices and people located in the principal Justice Department building in Washington.

rein him or her in.³¹ This is not to say that all or even many U.S. Attorneys are power-hungry, or rampant questioners of authority structures, or that they are frequently out of sync with Main Justice. It does suggest that looking at an organizational chart of the Justice Department or reading the *U.S. Attorneys Manual*, with all of its requirements for coordination and approval by Main Justice, will do little to help one understand the true power of U.S. Attorneys. Moreover, any student of bureaucracy or political institutions knows that such a structure encourages a special type of turf war. Even if one observes what is generally a good relationship between Main Justice and U.S. Attorneys, it may be anticipated reactions that make it so.

In short, it is difficult to know exactly where power lies. For example, the *Attorney Deskbook* for the Civil Division in the Bush Administration states quite emphatically and tersely who is the boss:

Upon receipt of a new matter, the Director of each branch or his/her designee will make the initial decision on whether the case should be personally handled within the Civil Division, jointly handled with the United States Attorney for the district where the case is or will be brought, sent to the U.S. Attorney with the Division retaining supervisory jurisdiction, or delegated to the U.S. Attorney. . . . Civil Division attorneys work closely with the U.S. Attorneys' Offices. As previously noted, the Division determines³² who will bear primary responsibility for defending the Government in the litigation.

However, a later section seems to assure U.S. Attorneys that decisions affecting them are not coming from someone less important than they: "typically all correspondence with the U.S. Attorney, of Assistant U.S. Attorneys is by letter addressed to the U.S. Attorney and signed on behalf of the [Associate Attorney General] by a Director. . . . Correspondence addressed to U.S. Attorneys must always include 'Honorable' in their title."³³ Somehow one gets the impression that this is not simply a tutorial in proper forms of address. And the Civil Division is the most highly centralized and hierarchical Division in Justice. On criminal matters, U.S. Attorneys have far greater discretion. The Criminal Division may have official authority over U.S. Attorneys, but in reality, decisions are usually made at the local level. In many ways, of course, this difference between the Civil and Criminal Divisions makes sense given the nature of the two areas, but the explanation is not simply good bureaucratic organization. It is crime that most U.S. Attorneys really care about. Not only does criminal work account for most of the time spent in U.S. Attorney offices, it is also usually the highest profile area. Prosecuting crime is especially important for those U.S. Attorneys with political ambitions, for reasons easily imaginable. There is one instance at the prosecutorial level in which Main Justice

31. The history of the relationship between the Justice Department and U.S. Attorneys has been a long and complicated one. Originally, U.S. Attorneys did not even report to the Attorney General. That they do so now is unambiguous. That came about as a result of the general efforts of the Department of Justice to gain control of all government litigation. Of crucial importance, however, is that the Attorney General cannot fire a U.S. Attorney; only the President can.

32. See CIVIL DIVISION, DEPARTMENT OF JUSTICE, ATTORNEY DESKBOOK 7, 13 (non-public publication during the Bush Administration).

33. See *id.* at 13.

pulls rank: special task forces from Washington to prosecute certain types of crimes. While members of the task forces are expected to coordinate with U.S. Attorneys, as are all Main Justice officials, they tend to be significantly more independent. Whatever the official hierarchy, "Main Justice," like all "headquarters," is largely dependent upon the "field" U.S. Attorneys to carry out their mission.³⁴ And hell hath no greater fury than a U.S. Attorney scorned when it comes to a case that he or she really cares about.

Decisions about appeals are also areas of possible contention, though the lines of authority are more respected. Here, U.S. Attorneys face what everyone in government faces. Whenever the United States loses a case, the Solicitor General must approve the appeal. While it is generally known and accepted that the Solicitor General controls appeals to the U.S. Supreme Court, he or she also must approve intermediate appeals. In the last several years, Solicitors General have become more involved in the decisions at this stage. Indeed, Solicitor General Kenneth Starr personally argued cases in Courts of Appeals from time to time to demonstrate the importance his office placed on the first appeal. That the Solicitor General makes the decision thwarting a U.S. Attorney's preferences does not mitigate all power struggles, but the power of the Solicitor General is generally more accepted; of course, any given decision not to appeal can cause quite a row.

U.S. Attorneys are not without protection from "meddling" outsiders, be they task forces or other Main Justice officials. Courts are often bounded organizations that include a judge, prosecutors, and defense lawyers; times can be made hard for interlopers. There are stories of judges giving the Washington folks a tough time for ignoring the local U.S. Attorney. Even if these are not conscious decisions to teach the outsiders a lesson, the local U.S. Attorney simply knows the local judges and the community in ways that can often aid those who come into the jurisdiction. And of course, the ultimate trump for U.S. Attorneys is to bring politicians into the bureaucratic fray. It is not a rarity for a U.S. Senator to take an interest in a particular case, and it rarely has to do with the Senator's abiding interest in the evolution of criminal law doctrine. However, political appointees who owe much to Senatorial courtesy do understand that they can go to that well only so many times.

In sum, understanding the real power of a U.S. Attorney is very difficult, and power will vary greatly among U.S. Attorneys. That said, all U.S. Attorneys are powerful, and much of their power derives from the fact that they are agents in a hierarchical relationship where much power and discretion has been delegated to them, and that power is increased by the fact that there are multiple principals. There is another major source of power for U.S. Attorneys, and we turn to it now.

34. The situation that may be the most comparable would be the way that U.S. Ambassadors fit within the bureaucracy of the State Department; however, they generally do not have the patron Senator in the way that federal district judges and U.S. Attorneys do. Moreover, the making and controlling of foreign policy is generally far more centralized in Washington than is the prosecution of crimes or engaging in litigation.

B. Power from Success

U.S. Attorneys are powerful simply because of what they do. We rarely stop to think about the sheer magnitude of power involved in bringing to bear the power and resources of the United States against an individual. An important additional source of power is success. Make no mistake, U.S. Attorneys are extremely successful at what they do. Much has been written on the Solicitor General's success rates. Not only is the Solicitor General extraordinarily successful in getting cases into the Supreme Court and keeping others out, but the Solicitor General is also extraordinarily successful at winning cases.³⁵ What may be news to some is how successful U.S. Attorneys are. Their records rival—indeed often beat—that of the Solicitor General.³⁶

Approximately ninety-five percent of criminal cases prosecuted by the Department of Justice are handled by U.S. Attorneys. While the civil caseload is larger numerically, about seventy percent of U.S. Attorneys' offices personnel are devoted to criminal work. In a typical year, eighty-nine percent of all attorney work-hours spent in U.S. District Court were devoted to criminal prosecutions. On average about twelve percent of all criminal cases are disposed of by trial. In Fiscal Year ("FY") 1994, U.S. Attorneys filed 33,307 criminal cases against 51,264 defendants. They terminated 32,231 cases against 49,792 defendants. The defendants either pled guilty or were found guilty in 85.3% of the cases. The guilty rates in previous years were similar: FY 1993: 85.4%; FY 1992: 84.7%; FY 1991: 84.1%. The criminal appellate record was equally impressive. Of 7,920 appeals terminated, the U.S. Courts of Appeals ruled in favor of the United States in eighty-one percent of the cases, against the United States in eight percent, and in favor of United States at least in part in an additional eleven percent. For civil cases in 1994, 86,710 cases were terminated. Courts issued judgments in 18,484 cases, and eighty-three percent of the judgments were in favor of the United States.³⁷ Of course, determining "success" in civil cases is somewhat more difficult because true success is often determined by settlement and compromise. But even for criminal cases, one never knows how many "got away" or were handled badly; doctors may bury their mistakes, and prosecutors have their own version by not bringing charges. That said, by almost any measure the success rate of U.S. Attorneys is enviable. Labeling bureaucrats as bumbling, inefficient, and ineffective is probably wrong-headed about most government agencies, and it certainly cannot describe the Depart-

35. For an early discussion of this topic, see William Edward Brigman, *The Office of Solicitor General of the United States* (1996) (unpublished Ph.D. dissertation, University of North Carolina, Chapel Hill) (on file with author). See also SALOKAR, *supra* note 5. For a recent discussion, see Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505 (1998).

36. The following data comes primarily from calculations from data in UNITED STATES DEPARTMENT OF JUSTICE, *STATISTICAL REPORT: UNITED STATES ATTORNEYS' OFFICES: FISCAL YEAR 1994* (1995). 1994 was the last year for which I could obtain data, but as can be seen, there is little variance among years.

37. Of the civil cases filed, 17% were on behalf of the United States, 55% defended the United States, and 28% were where the United States was otherwise designated (for example, bankruptcy creditor or third party litigant). See *id.* at 49, tbl. 4.

ment of Justice generally or U.S. Attorneys specifically. The figures speak for themselves.

Whether this high success rate is normatively desirable is, of course, another question. Should such power reside in someone who is not elected and can so easily resist control by superiors? Few others have such power with such little accountability. The quick, but ultimately ungratifying, response is that that is why we have a judiciary. The normative question aside, the empirical reality is that in politics, success magnifies power. There can be no doubt that U.S. Attorneys are powerful and that their success makes them extraordinarily important players in the Department of Justice and strengthens their hand as agents. In addition to power, however, a crucial element of principal/agent theory is that agents have goals that may not serve the interests of the principal.

V

PREDICTING AND CONTROLLING THE BEHAVIOR OF U.S. ATTORNEYS

Recall that principal/agent theory suggests that agents have some goals other than carrying out the wishes of their principals. To avoid the problems of agency loss and adverse selection, the President or the Attorney General must pay attention to what the goals of a potential or existing U.S. Attorney are, not only to his or her ideology or competence.

A. U.S. Attorney Goals

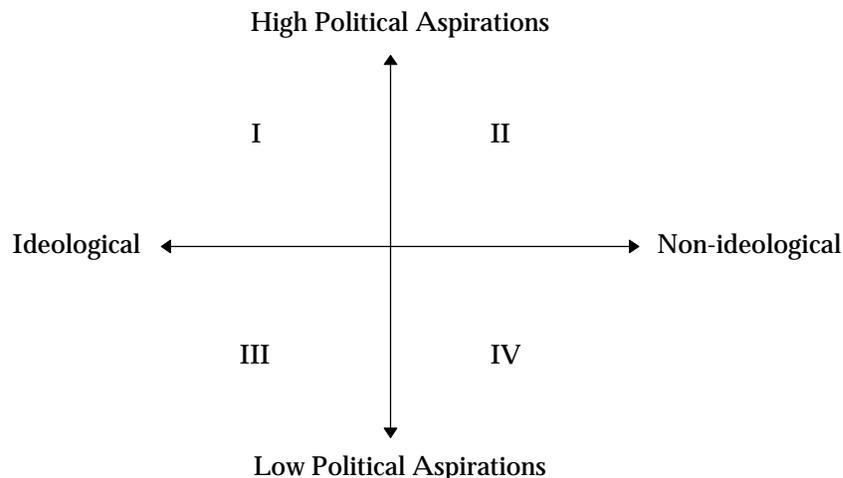
U.S. Attorneys are a varied lot. They can range from a flamboyant, overt politician who litigates high profile issues in a high profile district, such as the Southern District of New York, to an *eminence grise* who is known only to elites within his or her own district and where much of the work is local in nature. Incidentally, such factors are not necessarily correlated. Flamboyant U.S. Attorneys are sometimes found in districts that are, relatively speaking, low-profile. Some U.S. Attorneys expect to pursue elected political office after their stint as a U.S. Attorney and campaign throughout their tenure, while others aspire to the federal bench, requiring a different sort of campaigning. Some return to private practice. All, however, are political.

When people refer to U.S. Attorneys as “political,” they often mean that they are seeking higher office. But politics can be expressed in many ways. Some U.S. Attorneys seek no office but are very ideological and see their job as an opportunity to further their political ideology. The ideology can be partisan, or it can be personal predispositions about crime, law, and justice. Other U.S. Attorneys are consummate bureaucrats. Although they have ideas about crime and justice, they measure their performance by efficient case processing and win/loss records, or another such accomplishment. Whatever the goals and workstyles, all U.S. Attorneys are about the “authoritative allocation of values,” perhaps the most famous definition of politics. The values they choose to allocate are determined by their own goals and how they understand their own authority. In short, U.S. Attorneys come in all political shapes and sizes with

all sorts of different goals. To be sure, all U.S. Attorneys are to some degree bureaucratic, ideological, partisan, self-interested, supportive of their President, and believers in the rule of law, but they vary in the proportions of the mix. One could determine systematically what the various goals of U.S. Attorneys are and determine how the goals vary across many variables; those are answerable, empirical questions. The purpose of this essay, however, is largely theoretical and speculative and instead proposes hypotheses for further empirical study.

B. Goals and Behavior

One might array the goals of U.S. Attorneys along two axes, creating a four-quadrant typology. The first axis is whether the U.S. Attorney has future political aspirations; the second is the extent to which the U.S. Attorney is ideological. This scheme might help predict how these priorities will effect the U.S. Attorney's behavior in office.



Type I U.S. Attorneys act in ways that would bring them to the attention of relevant publics—either the electorate or those who can nominate and support them for a federal judgeship. One way is to seek high profile, ideological cases.³⁸ If the President is the principal, the U.S. Attorney's personal goals should not be problematic, so long as the President chose a U.S. Attorney of the same ideology. If, however, the Attorney General or the Justice Department is the principal, choosing high profile cases or engaging in publicity-seeking behavior may be troublesome.³⁹ The Department might exert control

38. What constitutes a high profile case that would gain political favor might vary depending upon the higher office sought. For purposes here, however, these aspirations to various higher positions have been combined.

39. In discussing the remaining types of U.S. Attorneys, distinctions between the President and other principals within the Justice Department are generally not made; the focus is on the President

by forbidding appeals or by taking them over, but the appellate process is a costly way of controlling the problems of publicity-seeking behavior by U.S. Attorneys. Furthermore, when U.S. Attorneys are not allowed to appeal cases they have lost, especially high profile cases, they often throw fits. If one thinks of "law" as the principal, Type I U.S. Attorneys might be less desirable. A person who is seeking high profile cases and is particularly ideological might be more tempted to use the power of the office for partisan reasons. High profile cases do not necessarily equal partisan cases, but where the U.S. Attorney has high political aspirations and is particularly ideological, there seems to be a greater chance for more partisan justice.

Type IV U.S. Attorneys would be those most different from Type I. Type IV U.S. Attorneys would be those most likely to be bureaucratic. They would run an office that would reward high efficiency. Since the U.S. Attorney is neither ideological nor possessed of political aspirations, he or she would gain satisfaction from processing workloads and would seek to maximize winning all types of cases. If the President is the principal, he may or may not want such a U.S. Attorney, especially if he wanted to further his ideology through the law. If, instead, the President values bureaucratic performance and efficiency and does not see the Justice Department as the appropriate place to further his agenda, then a Type IV attorney may be fine. For example, President Reagan and Edwin Meese would have valued Type I U.S. Attorneys, whereas President Carter and Griffin Bell would have valued Type IV U.S. Attorneys. On the other hand, if law is the principal, a Type IV attorney is the prototype of a good agent. He or she is likely to pursue an impartial administration of justice free from the political pressure and ideology that may stretch the law beyond its intent.

Type III U.S. Attorneys are potentially problematic. Low political aspirations with high ideology can cut different ways. Such U.S. Attorneys are free to pursue their agendas with little restraint from political forces within or outside the Justice Department. This could further the President's agenda in a dramatic fashion because of the indifference to personal political consequences. The same indifference, however, might allow the U.S. Attorney to feel free to ignore the President. Interestingly, this balance of risks does not change when law is the principal. The person is willing to enforce the law irrespective of consequences, but his or her ideology could also lead to zealotry without political restraint.

Finally, Type II U.S. Attorneys would seek high profile cases and public recognition because of their political ambitions, but the types of cases that they pursue might not be in accord with the priorities of the President or the Department of Justice. That may or may not serve a President well in the long run, but it is not an agent that is particularly controllable by the principal. Unlike Types III and IV, Type II U.S. Attorneys are subject to the influence of

versus the law. Nevertheless, to exploit fully the theory and to develop fully the types, it would be crucial to identify all the principals.

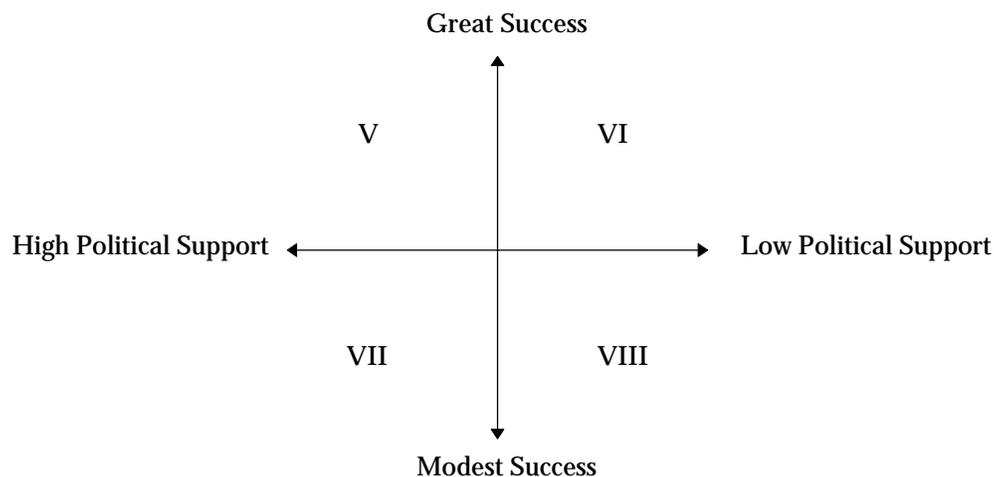
political forces generally, including seeking the President's favor. However, what pleases the local electorate may not be what pleases the President. If the goal is a future elective local office, the President may not be able to assert much control over the U.S. Attorney. On the other hand, Type II U.S. Attorneys are more consonant with conventional notions of "serving the law" but, unlike Type IV situations, the driving force for Type II U.S. Attorneys is serving their own political futures.

With proper operationalization and specification, the validity of this typology to predict and explain behavior can be tested. There are undoubtedly other ways to think of arraying the goals of U.S. Attorneys to predict agency loss. The main point, however, is that one can generalize about U.S. Attorneys in meaningful ways, and that we are not limited to discussing only the idiosyncrasies of individual U.S. Attorneys or their districts.

C. Support, Success, and Independence

There are indicators other than the agent's goals, such as performance and external support, that also might predict the independence—or rogue behavior—of U.S. Attorneys. Such variables are not particularly helpful at the selection stage, but they might help explain behavior in a way that is based less on personality or political ambitions. Though highly political U.S. Attorneys may engage in political grandstanding and seem very independent, their ability to be *successfully* independent is something else.

Again we create two axes. The political support axis measures outside political support, such as U.S. Senators, though it could refer to political support from important people anywhere. The success axis refers not necessarily to win/loss records, but rather to whether the U.S. Attorney is successful at achieving outcomes that reflect well upon Main Justice.



U.S. Attorneys classified as Type V would be the most truly independent. Though they may irritate some people at Main Justice, they win and they are politically powerful. When they wish to do something against the desires of Main Justice, they are the U.S. Attorneys that are most likely to prevail. In practice, actual confrontations are probably rare because of anticipated reactions; the U.S. Attorney will rarely need to call on his or her outside support.

Type VIII U.S. Attorneys, of course, have the least degrees of freedom. Though they may appear independent and actual confrontations may be rare, they are nonetheless the ones most easily controlled by Main Justice.

Type VI U.S. Attorneys might often be left to their own devices because of their success; however, Main Justice can rein them in without fear of trouble from the outside. Unlike Type VIII, though, if Main Justice uses too heavy a hand, they risk alienating a very successful U.S. Attorney, which is a significant cost. An agent often has more and different information than the principal, so some slippage in control is often in the principal's best interest, particularly if the U.S. Attorney is successful.

Type VII U.S. Attorneys will receive more control from Main Justice: To the extent that they are only modestly successful, there is an incentive to stay on top of them. However, from time to time Type VII U.S. Attorneys may be able to assert extraordinary independence, but it will generally require the active solicitation of their political support or the anticipated reaction by Main Justice that they will do so.

Again, this typology is only a hypothesis about general tendencies. Perhaps things do not work this way. Principal/agent theory suggests that they might, and with proper operationalization, these hypotheses are testable. Anecdotes from my interviews lend support to these theories. One might imagine different factors that would better predict and explain behavior. Indeed, to predict behavior successfully would require a multivariate analysis for which these hypotheses are the first steps. The main point, however, is that U.S. Attorneys are agents and, as such, one can think about the power of U.S. Attorneys in ways that are generalizable and systematic.

VI

CONCLUSION

Principals can try to control agents, at first by selection. Given senatorial courtesy, this is not as straightforward as it seems; but Presidents have been increasingly attuned to appointing lower court judges who match their philosophy despite senatorial courtesy. The difficulty of controlling U.S. Attorneys once appointed means that a President is well advised to avoid adverse selections as much as possible. A President should probably first consider the ideology of the appointee; other motivations are difficult to detect and control. The President and his or her advisers would also be well advised to try to under-

stand the political aspirations of a potential appointee, including whether those aspirations are toward elective office or the federal bench. To the extent that they are the former, the President will have a more difficult time controlling the U.S. Attorney. The President is in a far more powerful position if the aspiration is to the bench assuming that he or she will do the appointing. The Attorney General as principal would want to know the political aspirations of a potential U.S. Attorney, but he or she would also want to know the extent of outside political support that that person might have. The law as principal, of course, cannot be so anthropomorphized that it can be involved in the selection process. Its hope lies more in efforts at control.

With regard to controlling agency loss, principal/agent theory suggests the need to monitor agents' activities and to be willing to terminate the relationship. Firing a U.S. Attorney is a dramatic action that could have all sorts of political ramifications. Nevertheless, Presidents could undoubtedly control U.S. Attorneys better if they were willing to fire a few, particularly if done at the recommendation of the Attorney General. Putting aside the normative question of making U.S. Attorneys too politically responsive, more active firing policies would undoubtedly reduce agency loss. One could, of course, make a distinction between firing U.S. Attorneys for politically unpopular stands and firing them because they are too interested in furthering their own political careers. The argument is not that more control is desirable, just that it would work. At the very least, a candidate for Attorney General might want to get the President's assurance that when she or he recommends that a U.S. Attorney be fired, it will happen. Less dramatic than termination, the Attorney General or others can make it more difficult for the U.S. Attorney to achieve his or her goals. For example, the Attorney General could deny authorization to pursue a case, or could refuse to appeal a case that would be highly advantageous to the U.S. Attorney's political career or ideology.

Monitoring and controlling people so far from Washington is inherently difficult. Even with all the requirements of approval and report writing, Washington often learns of developments too late to make a difference. The Department has installed computerized case management systems to make it easier to monitor field offices. Another way to monitor behavior is to rely on third parties with interests in the agents' activities to monitor the agents and inform the principal. With litigating authority centralized in the Justice Department, agency lawyers and others within the Department monitor the activities of the U.S. Attorney. My interviews to date, however, suggest that Main Justice circles the wagons when the criticism comes from other government agencies. Judges are more potent monitors. The way judges serve law as principal is obvious. They also can serve the Executive Branch by being a third party monitor. Few things would get the Department's attention quicker than to have a judge, in the many ways that he or she can, inform the Department of a U.S. Attorney's activities. At some point, we face a separation of powers issue. When a monitoring judge serves the law it is not problematic, but when an action is simply an effort to control the behavior of someone in another branch, it

becomes potentially troublesome. Nevertheless, judges are a potential information source to the principal, and could be encouraged to do more.

Finally, the idea that U.S. Attorneys can be agents simultaneously of more than one principal causes some problems for the economic theory of principals and agents. For political theory, it is an old story. Political theorists talk about the dilemma of serving two masters when they discuss the Burkean dilemma; that is, should a representative do what she thinks the people of her district want, or should she do what she perceives to be in the greater interest? Most citizens believe in both as a normative proposition. Moreover, we know that most representatives act in both ways, and they generally see no inherent contradiction. Representatives rarely feel as if they face this dilemma, but when they do, they usually try to avoid the decision or minimize the cognitive dissonance however they can.⁴⁰ U.S. Attorneys are no different—usually, the U.S. Attorney does not see a difference in what her political principals want, what the law requires, and her own goals. In sum, most people in politics must face the dilemma of serving two masters, but unlike the Biblical injunction, there is no need to grow to hate one or the other; rather they can lie beside one another like a lion and a lamb, so long as we understand what motivates their behavior.

40. See PERRY, *supra* note 12, at 282-84.