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Self-Love and the Judicial Power to Appoint a Special Prosecutor Symposium on Special Prosecutions and the Role of the Independent Counsel

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SELF-LOVE AND THE JUDICIAL POWER TO APPOINT A SPECIAL PROSECUTOR

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Judicial appointment of private attorneys as special prosecutors has occurred and is permitted to occur in a variety of contexts other than when the executive branch is faced with a potential or actual conflict of interest. Until recently, the Second Circuit Court of Appeals and, of course, district courts within the Second Circuit, have interpreted Rule 42(b) of the Federal Rules of Criminal Procedure to permit judicial appointment of a private attorney to prosecute conduct allegedly violative of a court order as criminal contempt.[1]

Courts have been most active in appointing private attorneys as special prosecutors in cases involving counterfeit trademark products. The scenario starts with a civil suit alleging trademark infringement, such as the manufacture or selling of counterfeit trademarked items.[2] Typically, the lawsuit is resolved by an injunction prohibiting future counterfeiting activities. However, because counterfeiting certain trademarked products is profitable, there is a strong temptation to continue despite the court's prohibition.[3] In addition, it was not until November 12, 1984, that trafficking in counterfeit trademarked products became a criminal offense.[4] For these

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1. Musidor, B.V. v. Great American Screen, 658 F.2d 60 (2d Cir. 1981), *cert. denied*, 455 U.S. 944 (1982); United States *ex rel* Vuitton et Fils S.A. v. Klayminc, 780 F.2d 179 (2d Cir. 1985), *rev'd sub nom.* Young v. United States *ex rel* Vuitton et Fils, S.A., 107 S. Ct. 2124 (1987).

2. Trademark Act of 1946 (Lanham Act), 15 U.S.C. §§ 1051-1127 (1982).

3. *See generally* Mason, *How High Tech Foils Counterfeiters*, BUS. WK., May 20, 1985, at 119 (claiming companies will spend as much as $50 million this year to buy high-tech equipment to authenticate products unobtrusively); *Putting Teeth in the Trademark Laws*, BUS. WK., Oct. 8, 1984, at 75 (showing that American businesses lost $16-18 billion in 1983, compared to $3 billion in 1978); Rehfeld, *The Crass Menagerie*, N.Y. MAG., Oct. 15, 1986, at 50 (giving examples of losses attributable to fake products, and manufacturers' efforts to strike back); *The Counterfeit Trade*, BUS. WK., Dec. 16, 1985, at 64 (discussing estimated $60 billion international trade in counterfeit goods and its consequences to unsuspecting purchasers).

4. Trademark Counterfeiting Act of 1984, Pub. L. No. 98-473, §§ 1501-1503, 98 Stat.

reasons and others, it was not unusual for the defendant to continue in the counterfeit business. If caught a second time, there were few practical solutions for the trademark holder. Assets, if any, were difficult to trace and even if traced, proving damages tended to be difficult. In a search for more effective sanctions, criminal contempt was identified as a possible solution.[5]

The attorney for the plaintiffs in the underlying civil trademark action brought the criminal contempt charge with an order to show cause, and also requested appointment as a special prosecutor pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure. Once the order to show cause was signed, the criminal contempt case proceeded in the same manner as any other criminal case except for the absence of a member of the United States Attorney's office as prosecutor. These are the basic facts of *Young v. U.S. ex rel. Vuitton et Fils*,[6] a case recently decided by the United States Supreme Court.[7]

Although there is no federal statute or rule authorizing judicial appointment of private attorneys as criminal prosecutors,[8] the court held that "courts possess inherent authority to initiate contempt proceedings for disobedience to their orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt."[9] Relying on notions of "inherent authority" and "necessity," eight justices agreed that courts have the power to appoint a private attorney to prosecute conduct constituting a violation of a court order as criminal contempt.[10] The Court reversed petitioners'

2178 (codified at 18 U.S.C. § 2320 (Supp. III 1985)). Maximum penalties for first offenders are 5 years imprisonment and $250,000 fine; non-individuals, $1,000,000 fine. Maximum penalties for subsequent offenses are 15 years, imprisonment and $1,000,000; non-individuals, $5,000,000 fine.

5. Civil contempt is considered remedial. Its purpose is to restore the offended party to the status quo. Criminal contempt, however, is prosecuted to vindicate the authority of the court and its purpose is punitive. *See generally* Note, *Civil and Criminal Contempt of Court*, 46 YALE L.J. 326 (1936).

6. 107 S. Ct. 2124 (1987).

7. The author represented one petitioner in the district court and the United States Court of Appeals for the Second Circuit, and was lead counsel in the United States Supreme Court.

8. The *Young* Court held that Rule 42(b) of the Federal Rules of Criminal Procedure did not authorize court appointment of a private attorney for the prosecution of an alleged violation of a court order. 107 S. Ct. at 2130.

9. *Id.*

10. Justice Scalia's concurrence took a narrower view of the contempt power and of judicial power as used in article III of the United States Constitution. 107 S. Ct. at 2142 (Scalia, J., concurring). Justice White shared the Court's view, but also believed Rule 42(b) authorized the appointment of a private attorney. *Id.* at 2148 (White, J., dissenting).

convictions because the particular attorney appointed to investigate and prosecute the contempt was *interested*, that is, he was also the attorney for the party on whose behalf the court order was secured.[11]

For the purposes of this symposium, the significance of the decision lies in the Court's conception of judicial power and its place within the doctrine of separation of powers. The Court concluded that without the power to appoint a private attorney as prosecutor of criminal contempts the doctrine of separation of powers would be violated because the judiciary would have to depend upon the executive branch for enforcement of its orders.[12]

> Courts cannot be at the mercy of another branch in deciding whether such proceedings should be initiated. The ability to appoint a private attorney to prosecute a contempt action satisfies the need for an independent means of self-protection, without which courts would be "mere boards of arbitration whose judgments and decrees would be only advisory."[13]

Justice Scalia concurred in the judgment stating that the judicial power, the source of the judicial branch's authority, does not include the power to appoint a private attorney to prosecute for criminal contempt, except when necessary to protect the court's ability to function.[14] Only those violations of court orders which interfere with proceedings before the court are included within the judicial power and, thus, the court's contempt power. Without the power to prosecute, there is, of course, no need for the power to appoint a private attorney as prosecutor.

The principle of separation of powers is a cornerstone to our system of government. The Constitution mandates a tripartite division of the Federal Government's powers.[15] The framers intended the

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11. 107 S. Ct. at 2138-41. Justice White, while preferring appointment of an impartial attorney, found no legal impediment to the appointment of an interested attorney. *Id.* at 2148 (White, J., dissenting).

12. To be sure, the Court required a procedure designed to reduce the number of occasions in which court appointment of a private prosecutor would occur. Such appointment could occur only after a matter had first been referred to the executive branch and only if the executive branch declined to prosecute. *Id.* at 2134.

13. *Id.* at 2131-32 (quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911)).

14. *Young*, 107 S. Ct. at 2141-47 (Scalia, J., concurring). Justice Scalia was careful to point out that there was no appointment clause, art. II, § 2, cl. 2, question. Whether or not Congress could authorize the judicial appointment of a private attorney as a criminal contempt prosecutor because Congress has in fact not done so in this case. *See* U. S. CONST. art. III, §§ 1, 2.

15. Bowsher v. Synar, 106 S. Ct. 3181, 3186 (1986); INS v. Chadha, 462 U.S. 919, 951

three branches of government to be "largely separate from one another."[16] However, the concept is not inflexible. The Constitution did not create three watertight compartments because the "hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."[17] In the words of Justice Jackson, the Constitution "contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[18] The Court has recommended a "pragmatic, flexile approach" to the resolution of disputes among the branches.[19]

This discussion will focus on three major areas of disagreement between the Court and Justice Scalia: (1) the scope of the contempt power, (2) the role of the judge in contempt proceedings, and (3) the Court's justification for its holding. At its core, the disagreement stems from the definition of judicial power embodied in article III of the Constitution.

For Justice Scalia, the role of the prosecutor is inconsistent with the judge's role as a neutral adjudicator. He believes neutrality is the essence of the judicial function and, thus, judicial power. "The judicial power is the power to decide, in accordance with law, who should prevail in a case or controversy."[20] This includes the power to act as a "neutral adjudicator" but does not include the power to prosecute.[21]

In support of this position Justice Scalia cites one of the most famous passages from The Federalist:

> [T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them . . . . The judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will but merely judgment; *and must ultimately depend upon the aid of the executive arm even for the efficacy of*

(1983).

16. Buckley v. Valeo, 424 U.S. 1, 120 (1976).

17. *Id.* at 121.

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

19. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 442 (1977).

20. *Young*, 107 S. Ct. at 2142.

21. *Id.*

its judgments.[22]

Justice Scalia demonstrates what he considers to be the defect in the Court's position by extending its analysis. He asks what the Court will do if the executive not only refuses to prosecute but refuses to incarcerate one found guilty of criminal contempt after prosecution by a private attorney and sentenced to jail.[23] Will the court's notion of inherent authority and necessity extend to the power to incarcerate?

In answer to the majority's claim that it offends the doctrine of separation of powers for a court to be left at the mercy of the executive for enforcement of its orders, Justice Scalia says that such an arrangement is a "carefully designed and critical element of our system of government."[24] One of the central themes of our governmental structure is that the dispersion of power and the functioning of each branch is dependent, in varying degrees, on cooperation by the other branches. For example, the executive cannot enforce the law if Congress refuses to appropriate funds nor can Congress on its own enforce laws it enacts in the face of an executive refusal to do so.

There has been controversy about the scope of the contempt power for many years.[25] In the early part of this century, courts had authority to punish any conduct which had the "direct tendency to prevent and obstruct the discharge of judicial duty" as criminal contempt.[26] Prior to 1941, the contempt power was held sufficiently

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22. 107 S. Ct. at 2143 (citing THE FEDERALIST No. 78, at 522-23 (A. Hamilton) (J. Cooke ed. 1961) (emphasis original)).

23. Even Justice Scalia's position is flawed by this problem. A contempt conviction arising from in-court conduct or, under his view, out-of-court conduct which interferes with court proceedings, could result in a jail sentence. If the executive refuses housing, will he seek to enforce his own order or, perhaps, hold the executive official in contempt?

24. *Young*, 107 S. Ct. at 2143.

25. *See generally* N. DORSEN & L. FRIEDMAN, DISORDER IN THE COURT (1973); J. FOX, THE HISTORY OF CONTEMPT IN COURT (1972); C. THOMAS, PROBLEMS OF CONTEMPT OF COURT (1934); Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924); Nelles, *The Summary Power to Punish for Contempt*, 31 COLUM. L. REV. 956, 958-59 (1931); Note, *Private Prosecutors In Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure*, 54 FORDHAM L. REV. 1141, 1143 (1986); Note, *The Story of a Notion in the Law of Criminal Contempt*, 41 HARV. L. REV. 51 (1927); Note, *Civil and Criminal Contempt of Court*, 46 YALE L.J. 326, 328-29 (1936).

26. Toledo Newspaper v. United States, 247 U.S. 402, 419 (1918) (interpreting the scope of Judicial Code § 268, 36 Stat. 1163 (1831), which empowered courts to punish contempts). The court stated that the statute "conferred no power not already granted and imposed no limitations not already existing . . . it served but to plainly mark the boundaries of the existing authority resulting from and controlled by the grants which the Constitution made

broad to include such parties as a newspaper editor in contempt for publishing an article critical of the judge.[27] It was not until *Nye v. United States*[28] that the Court limited the summary contempt power to "misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business."[29]

The second objection is also rooted in principles of separation of powers. Under the Court's view, a judge may issue an order, e.g., an injunction; initiate prosecution of an alleged violation of the order; appoint the prosecutor; adjudicate the merits of the prosecution and determine punishment.[30] This scenario is in sharp contrast to the typical criminal case where a statute criminalizing certain conduct has been passed by Congress; the executive prosecutes and the court adjudicates. The Court's rule essentially eliminates the legislative and executive branches. The justification commonly given for this apparent violation of separation of powers is that "contempt is different."[31] "[T]here is no liberty if the power of judging be not separated from the legislative and executive powers."[32]

James Madison explained why the judicial power must be care-

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and the limitations it imposed." *Id.* at 418.

27. *See* Craig v. Hecht, 263 U.S. 255, 277 (1923) (finding a letter published in a newspaper criticizing a district court judge to be contemptuous) (citing *Toledo Newspaper*, 247 U.S. 402 (1918)).

28. 313 U.S. 33 (1941). *See* Bridges v. California, 314 U.S. 252 (1941) (barring punishment for broad categories of out-of-court conduct when it breaches the prohibitions of the first amendment).

29. 313 U.S. at 52.

30. *Young*, at 2130-31.

31. During most of the Constitution's history, criminal contempt was regarded as sui generis; it was neither a civil nor criminal proceeding. Myers v. United States, 264 U.S. 95, 104-05 (1924). Not until 1968, was it established definitively that "[c]riminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both." Bloom v. Illinois, 391 U.S. 194, 201 (1968) (giving criminal contempt defendants the same constitutional protections which apply to any other serious criminal defendant).

In 1948, the Court recognized that the alleged contemnor is entitled to a public trial. *In re* Oliver, 333 U.S. 257, 271-72 (1948). The right to an impartial tribunal also was extended to criminal contempts. *See In re* Murchison, 349 U.S. 133, 139 (1955); Offutt v. United States, 348 U.S. 11, 17-18 (1954). The right to counsel was extended to indigent criminal defendants, Gideon v. Wainwright, 372 U.S. 335 (1963), and, in 1968, sixth amendment right to trial by jury was applied to defendants in non-petty criminal contempt proceedings. *Bloom*, 391 U.S. at 211.

Thus, the present-day understanding of criminal contempts differs slightly from the understanding of contempts that was prevalent in the early twentieth century.

32. 1 MONTESQUIEU, SPIRIT OF THE LAWS 181, *quoted in* THE FEDERALIST No. 78, at 523 (A.Hamilton) (J. Cooke ed. 1961).

fully controlled:

> Were 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.*[33]

Furthermore, Madison strongly advocated a system of checks and balances in the form of divided offices and functions to assure that "each [branch] may be a check on the other."[34]

The third problem with the Court's position is the absence of authority for its holding that the court has the power to *appoint* a private attorney to *prosecute* a criminal contempt[35] as opposed to the power to *initiate* and *punish* conduct which amounts to criminal contempt.[36] There is a vast difference between the power to appoint and prosecute and the power to initiate or punish. None of the authorities cited by the Court directly support its conclusion that there exists a judicial power to prosecute contemnors.

The Court refers to its decisions in *Michaelson v. United States ex rel. Chicago*[37] for the proposition that "[t]he power to punish for contempts is inherent in all courts,"[38] and *Gompers v. Buck's Stove & Range Co.*,[39] for the proposition that "the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law."[40]

As noted, none of these authorities, even the portions referred to in the Court's opinion, deal with the power to appoint a private attorney to prosecute a criminal contempt as distinct from the power

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33. THE FEDERALIST No. 47, at 299 (J. Madison) (G.P. Putnam's Sons ed. 1908), *quoted in* Buckley v. Valeo, 424 U.S. 1, 120 (1976) (emphasis in original).

34. THE FEDERALIST No. 51, AT 323-24 (J. Madison) (G.P. Putnam's Sons ed. 1908), *quoted in Buckley*, 424 U.S. at 123.

35. *Young*, 107 S. Ct. at 2146 (Scalia, J., concurring).

36. *Id.* at 2134.

37. 266 U.S. 42 (1924).

38. *Young*, 107 S. Ct. at 2131 (quoting Michaelson v. United States *ex rel.* Chicago, 266 U.S. 42, 65-66 (1924)).

39. 221 U.S. 418 (1911).

40. *Young*, 107 S. Ct. at 2131 n.7 (citing Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911)). *See also* J. FOX, THE HISTORY OF CONTEMPT OF COURT 1 (1927)(cited in *Young* for the fact that contempt of court has been recognized in English law since the 12th Century); R. GOLDFARB, THE CONTEMPT POWER 9 (1971); 1 J. KENT, COMMENTARIES ON AMERICAN LAW 300 (14th ed. 1896). The Court cites to these sources as references for the proposition that contempt of court has been recognized since the early days of England.

to punish one found guilty of criminal contempt. Although not made explicit, the Court is clearly deriving the authority to appoint and prosecute from its authority to initiate and punish conduct constituting contempt. The power to punish violators of court orders can be said to have its genesis in principles of separation of powers since, without it, the judiciary would have no "means to vindicate its own authority without complete dependence on other branches."[41]

> If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery.[42]

The court need not rely only on "inherent authority" and "necessity" for the power to *punish* as criminal contempt violations of court orders. Such power is provided by statute. Title 18 of the United States Code, section 401 empowers a court to punish any "disobedience or resistance to its lawful writ, process, order, rule, decree, or command," but does not specify what conduct constitutes contempt.[43] When the statutory power to punish is combined with the court's power to appoint a private attorney and placed amidst the reality of modern complex litigation; the reach of the *Young* decision is enormous.[44] Neither the statute nor the court's language in *Young* make any distinction among the many different kinds of court orders. In an attempt to find—or make—a distinction, Justice Scalia challenges the Court's claim "that the initiation of contempt proceedings to punish disobedience to court orders is a part of the judicial function."[45] In *Anderson v. Dunn*,[46] the court first pronounced the power to require obedience to court orders.

> Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful *mandates*, and, as a corollary to this proposition, to preserve themselves and

41. *Young*, 107 S. Ct. at 2131.

42. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911). The Court's heavy reliance on *Gompers* is demonstrated by twice citing this quotation, once in the text, *Young*, 107 S. Ct. at 2131, and once in a footnote, *id.* at 2132 n.8.

43. 18 U.S.C. § 401(3) (1982).

44. *See supra* notes 6-14 and accompanying text.

45. *Young*, 107 S. Ct. at 2143 (Scalia, J., concurring).

46. 19 U.S. (6 Wheat.) 204 (1821).

their officers from the approach and insults of pollution.[47]

Justice Scalia believes the word "mandates," read in the context of *Anderson,* refers to orders necessary to the conduct of the litigation.[48] He claims that the authority is weak for the principle that court orders can be enforced by means of the contempt power. The Court has, however, in several opinions not discussed by Justice Scalia, reiterated its view that the contempt power included all court orders, not just those which, if disobeyed, would result in the disruption of court proceedings.[49] Of course, 18 U.S.C. section 401(3) also refers to all court orders.

The major limitation imposed by Justice Scalia is that the power can only be exercised if the violation of the court order interferes with proceedings before the court.[50] However, if the conduct occurs out-of-court, who will act as prosecutor? This question is not addressed. It can be inferred, however, that Justice Scalia would argue that since the court's authority or power to act arises from the interference with on-going proceedings before the court, any process which would be cumbersome and time consuming would be unworkable. Thus, it is unlikely that Justice Scalia has in mind judicial appointment of a private attorney for out-of-court conduct interfering with the business before the court. Indeed, it would seem that Justice Scalia's view of judicial power requires that the contempt power be limited to something very close to summary power at least in the sense that it would be unnecessary to have a separate person act as prosecutor. For example, failure to respond to a court issued subpoena would occur out-of-court but could have the very real effect of preventing a fair adjudication of the merits of the litigation. It would be possible, although very inconvenient and impractical, to refer the matter to the executive. Putting aside an obvious resource issue, the delays necessarily resulting from such a referal would be too great a burden on a justice system already overburdened by delays.

The summary contempt power is limited to what the judge "saw

47. *Anderson,* 19 U.S. (6 Wheat.) at 227 (emphasis added).

48. *Young,* 107 S. Ct. at 2144 (Scalia, J., concurring).

49. Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 450 (1911); Bessette v. W. B. Conkey Co., 194 U.S. 324, 326 (1904); *Ex Parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873).

50. *Young,* 107 S. Ct. at 2145 (Scalia, J., concurring). Justice Scalia believes the Court took too broad an approach in its opinion. Contempt power is necessary to protect the functioning of the judiciary but Justice Scalia states that this "would at most require that courts be empowered to prosecute for contempt those who interfere with the orderly conduct of their business or disobey orders necessary to the conduct of that business (such as subpoenas)." *Id.*

or heard."[51] There has never been any doubt about the court's power to punish conduct which disrupts court proceedings. A court always has the power to "initiate" a criminal contempt prosecution if the conduct occurred in its presence.[52] Such power is summary, that is the judge initiates, prosecutes, adjudicates and punishes. The justifications for such power are that the court actually witnesses the conduct, thus ensuring reliability, and that without this power, the court cannot effectively function. Surely no one would seriously argue that disruptions in the court should be referred to the executive branch or to a special prosecutor.

With respect to out-of-court conduct, the judge is not by definition, a witness; arguably, therefore, the principal justification for summary power is absent. But there is no reason why a judge cannot "initiate" a contempt proceeding based upon out-of-court conduct without a prosecutor. Indeed, Rule 42(b)[53] specifically provides for such a procedure. The difference, however, according to Justice Scalia, is that the use of such power must be limited to contempts which interfere with the ability of the court to function.

Certainly, it can be said in the context of summary contempt that the court possesses a certain prosecutorial power. The real problem with such power is when criminal contempt is applied to court orders disobedience of which will not disrupt the functioning of the court. A major flaw in the Court's analysis is that it does not address separately disobedience of court orders which do not interfere with court proceedings. Instead, the issue is one of power.

However, the difficulty, even conceptually, involved in the use of the contempt power and a private prosecutor to enforce a court ordered subpoena pale, for example, when one contemplates the complexity of modern court orders. Certain kinds of court orders are far reaching and substantive; noncompliance with which will have the clear and immediate result of interfering with the ability of the court to function. Courts are increasingly involved in ongoing monitoring of their orders. Judgments may become "final" in the sense that an appeal can be taken, but compliance is often a continuous, complex problem. One answer is to "require" executive involvement once judgment is "final." In addition to the again obvious resource problems, executive involvement is a problem if the executive is a

51. FED. R. CRIM. P. 42(a).
52. *Id.*
53. FED. R. CRIM. P. 42(b).

party to the suit.[54]

There are a number of other problems which exist—actually or potentially—in every case in which a private attorney is appointed to prosecute a criminal case. Since most will be dwelt upon by others participating in this symposium, I will only mention them briefly. When a court appoints a private attorney as prosecutor, there is no guarantee that the individual will be adequately trained. Perhaps more important, when a judge appoints a private attorney in a contempt case there is no way to provide supervision and no one to whom the private attorney is accountable in an institutional sense.[55]

The separation of powers problem in the *Young* case is particularly interesting because the majority has declared itself in possession of powers, which, to be effective, ultimately require the cooperation of the executive branch. Even Justice Scalia's narrower view of the judicial power requires executive assistance to provide housing for one convicted of conduct which interferes with the functioning of the court. Therefore, in the final analysis, the judiciary possesses only the power of the pen, not the power of the sword. Courts by their very nature have only the power of persuasion, not force, and therefore, they must always depend upon the executive for "self-protection."

54. Such a case is to be argued before the United States Supreme Court this term. In United States v. Providence Journal Co., 108 S. Ct. 690 (1988) (Granting Solicitor General motion to file Amicus brief, the district court issued a temporary restraining order prohibiting publication of logs and memoranda regarding certain wiretapped conversations. The newspaper violated that order and since the United States was a party to the lawsuit from which the order arose, the court appointed a private attorney as special prosecutor.

55. The judge cannot be involved as a supervisor since that would make the judge an integral part of the prosecution and render him or her unable to then act as judge.