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Caging the Wolf: Seeking a Constitutional Home for the Independent Counsel

Rebecca L. Brown†

Justice Scalia was still wrong in *Morrison v. Olson*.[1] Professor Kelley has shown us that there may be some empirical force in Justice Scalia's belief that there is no such thing as "a little" executive power. He has confirmed for us the absolutely lupine nature of the "wolf" who, true to Justice Scalia's insight, comes, after all, as a wolf.[2] But to draw from this a conclusion that *any* restriction on the President's power to control the executive branch is unconstitutional—as both Professor Kelley and Justice Scalia would do—in my view goes too far. The right analysis will depend on what structures have been put in place to compensate for that diminution in presidential control. It is necessary to consider the independent counsel under structural constitutional principles that have prevailed in the Supreme Court's jurisprudence for decades. Neither Professor Kelley nor Justice Scalia has attempted to do so.

Our government was designed to survive irrespective of which individuals might happen to hold the various official positions at any moment in history. The constitutional government would not depend for its continued viability on the good faith, good judgment, or good heart of any actor. Instead, the framers assumed the worst and set up a system in which ambition would counteract ambition.[3] The engine of constitutional government would run on the fuel of human frailty as well as strength. It would do so by a careful design of institutional

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1. 487 U.S. 654 (1988).

2. *See id.* at 699 (Scalia, J., dissenting) ("Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing .... But this wolf comes as a wolf.").

3. THE FEDERALIST NO. 51, at 266 (James Madison) (William R. Brock ed., 1992).

structures and process.[4] What Professor Kelley's enlightening illustrations demonstrate implicitly is that the majority of the Court in *Morrison* lost sight of this deep-rooted constitutional tenet in its apparent confidence that good judgment would prevail despite a shaky structural blueprint for the independent counsel edifice. That mistake was not only factually unsupported, but it was out of step with the driving vision underlying the constitutional structure: the framers knew, and it took only ten years for the Supreme Court to find out in spades, that any political structure that relies on self-restraint of political actors is a threat to the bedrock values of constitutionalism—including the protection of individual rights through procedural limitation on power.

Professor Kelley's paper very informatively demonstrates, using the most compelling of examples from current history, how badly the Court anticipated the way that this statute would corrode executive branch decisionmaking. These examples, indeed, lend support to a suggestion that perhaps the Supreme Court should be more reluctant to resolve facial constitutional attacks without a well-developed record demonstrating the actual impact of the statute in question—a suggestion squarely at odds with Justice Scalia's formalist approach, which needs no empirical embellishment on its starkly theoretical conclusions. Had the Supreme Court waited to decide the case until it had a full record showing the effect of the independent counsel statute on the actual litigation and law-execution decisions described in Professor Kelley's paper, it would have been hard-pressed to conclude, as it in fact did conclude in *Morrison v. Olson* under its functional inquiry, that the "Act give[s] the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties."[5] But even that approach, although less formalistic than Justice Scalia's, asks the wrong question. Both fail to ask whether the values generally served by the observance of structural norms—principal among which is individual liberty—are protected in some other

4. *See* Bowsher v. Synar, 478 U.S. 714, 730 (1986) ("The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.").

5. 487 U.S. at 696; *see also* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) ("[T]he proper inquiry focuses on the extent to which [the challenged action] prevents the Executive Branch from accomplishing its constitutionally assigned functions.").

way such that deviation from those norms can be tolerated consistent with constitutional principle.[6]

A better question for the Court to have pondered is how a concept like the independent counsel scheme can be understood within the constitutional framework that we have. Here, reasoning by analogy is both appropriate and helpful, because the Court has considered variations on the theme of legislative limitations on executive control in other contexts in which the underlying concerns were (arguably) similar.[7] Two existing models in particular provide analogical insight into an intelligible classification for the independent counsel statute or some similar scheme within the constitutional structure: the model of the legislative office and the model of the independent agency.

I. THE ANALOGY OF THE LEGISLATIVE OFFICE

The first analogy looks at a different legislative construct, the congressional support agency. By this I mean some sort of administrative body established by Congress to assist it in the exercise of its own constitutional functions.[8] The General Accounting Office may be understood to follow this model, as the court recognized in *Bowsher v. Synar*,[9] and so may the Congressional Research Service.[10]

These agencies have been assumed to be constitutional for a few interrelated reasons. First, their heads are not "Officers of the United States"—either superior or inferior—within the meaning of the Appointments Clause,[11] and therefore members of Congress are free to appoint them.[12] Second, they possess no

6. *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991) (advocating explicit consideration of consequences for individual rights in separation of powers controversies).

7. For a theoretical exploration and defense of the approach, see Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

8. *See* MICHAEL FOLEY & JOHN E. OWENS, CONGRESS AND THE PRESIDENCY: INSTITUTIONAL POLITICS IN A SEPARATED SYSTEM 391 (1996) (describing the General Accounting Office, Congressional Research Service, Congressional Budget Office, and Office of Technology Assessment, all within the legislative branch).

9. 478 U.S. 714, 728-31 (1986).

10. *See* 2 U.S.C. § 166 (1994) (establishing the Congressional Research Service to respond to congressional research requests).

11. U.S. CONST. art. II, § 2, cl. 2.

12. *Cf.* Buckley v. Valeo, 424 U.S. 1, 118-19 (1976) (stating that Congress may not appoint "Officers of the United States").

power to "alter[ ] the legal rights, duties, and relations of persons . . . outside the Legislative Branch"; Congress may not delegate such power to a subset of itself.[13] Third, they possess no power to execute the laws of the United States.[14] As long as these limitations are observed, congressional agencies can function to assist the Congress in carrying out its own constitutionally assigned duties.

Viewed through this lens, an independent counsel statute could, in effect, create an administrative body, headed by an independent counsel, to carry into effect the congressional power of impeachment under the Necessary and Proper Clause.[15] It is clear, of course, that the current independent counsel statute does not fit within this model. As currently drafted, it fails in several material respects to meet the structural limitations necessary to constrain it. There is no constitutional prohibition, however, against Congress's establishment of such an office, provided that the constitutional strictures applicable to those offices are complied with.

As an initial matter, the funding for such an office must come from Congress's budget, not from the executive branch budget.[16] The current independent counsel statute provides for virtually unlimited funding out of the Justice Department budget.[17] This alone destroys any claim that the office does not possess executive affiliation and is merely an arm of Congress. There is more than merely technical value in such a limitation. The need to fund—that is, both to internalize costs with their inevitable policy tradeoffs and to account publicly for their payment—is an important check on use and abuse of power in a democracy. Congress well knows that if it spends too much on its internal support, questions will be raised in the political arena about the justifications for such expenditures. There-

13. INS v. Chadha, 462 U.S. 919, 952 (1983).

14. *See* Bowsher v. Synar, 478 U.S. at 726.

15. U.S. CONST. art. I., § 8, cl. 18; *see* McGrain v. Daugherty, 273 U.S. 135, 177-78 (1927) (recognizing the validity of congressional investigation in aid of legislative power).

16. *See* Bowsher v. Synar, 478 U.S. at 727-32 (examining various facets of the office of the Comptroller General as provided by statute, discussed in congressional documents, and described in opinions of the Comptroller General). Although the opinion in *Bowsher* does not explicitly mention the funding of the office, it is quite clear by implication that any feature of an office which had an effect on its functions, including funding, would be a factor in identifying which branch should be understood as housing that particular office.

17. 28 U.S.C. § 594(d)(2) (1994).

fore, an impeachment-based agency located in the legislative branch would place the costs for such services where they belong, that is in the branch seeking a basis to exercise its power to impeach and justifying that quest to its constituency.[18] The principle of accountability, as well as that of incentive structures, is assisted tremendously by a rule that places the costs of an activity in the branch that seeks the benefits of that activity.

A second limitation on any independent counsel office housed in the legislative branch is that, consistent with *Bowsher v. Synar*, it could not execute criminal laws. Its sole sphere of authority would be to investigate possible bases for impeachment, but solely in the political, rather than the criminal (i.e. executive), arena.[19] Its sole means of punishment would be to recommend removal of the target of its scrutiny from office. Thus, concerns over the protection of individual rights, particularly acute in matters of criminal law enforcement, are automatically mitigated to some degree.[20]

The agency also would face the limitations imposed on congressional committees and subcommittees. This agency could investigate for the purpose of contributing to a congressional inquiry, including exercising the power to issue the types of subpoenas that the Congress itself has the power to is-

18. Of course, Congress theoretically sets the policy objectives for the executive branch as well in its exercise of the power of the purse. But accountability lies in the spending as well as in the appropriating of funds. *See* FOLEY & OWENS, *supra* note 8, at 388-89. The Foley & Owens book discusses the debate in the 1970s between advocates of a new formulation of executive hegemony—which placed responsibility for policy administration squarely within the executive—and the proponents of congressional control of the program, who pushed through various measures designed to control policymaking in spending, including the Budget and Impoundment Control Act of 1974.

19. *Cf.* United States v. Rumely, 345 U.S. 41, 47-48 (1953) (holding that authorizing resolution for congressional committee's investigation limits scope of committee's powers, but perhaps influenced by the fact that the case involved conduct arguably protected by the First Amendment); *see also* Barenblatt v. United States, 360 U.S. 109, 127 (1959) (stating that the committee must act with valid "legislative purpose" in its investigative activities); Watkins v. United States, 354 U.S. 178 (1957).

20. *Cf. Watkins*, 354 U.S. at 208-09 (holding that due process protections and principles of fundamental fairness apply to witnesses subpoenaed by a congressional committee); *see also* Yellin v. United States, 374 U.S. 109, 123-24 (1963) (congressional committee must follow its own published rules when they affect private persons); Gojack v. United States, 384 U.S. 702, 708 (1966) (same).

sue, but would remain subject to the checks that the Supreme Court has established to protect the due process and other constitutional interests of witnesses called to present evidence before congressional committees and subjected to the threat of statutory contempt proceedings against them for failure to comply. The Supreme Court has made clear that targets of action by congressional committees are entitled to due process protections, including fundamental fairness, notice, entitlement to rely on the committee's adherence to its own published rules, and the protection of certain common-law privileges.[21] Presumably any institutional limitations imposed on a committee or subcommittee of Congress would also apply to an office established for the support of Congress within the legislative branch—because in both cases the delegate of power is acting as an agent of Congress without the full-blown procedural obligations that attend the bicameral passage of law.[22]

It is apparent that if Congress's principal motivation in passing an independent counsel law is to assist itself in its oversight of the executive branch with an eye toward possible impeachments, it has a constitutionally viable way to carry this into effect. The nature of the office would naturally curb somewhat the risk of aggrandizement of power generally and violations of individual rights specifically, because of the definitional limitations that must exist (under existing precedent) once one understands the actor as an agent of the legislative branch. Thus, an understanding of the functional home of this government actor clarifies the limits that must constrain him or her in the exercise of the delegated power, in this case the power to facilitate an impeachment, and thereby ensures the preservation of structural values.

In sum, the separation of powers demands that this legislative agent not also employ the vast enforcement powers that are available to employees of the executive branch, particularly in criminal matters. The combination of legislative power with enforcement power constitutes a very grave affront to the separation of powers, and if carried out in the prosecution of a criminal case, presents the even stronger constitutional objection of threatening individual liberty under procedures that themselves are in contravention of constitutional norms. Obvi-

21. *See* JAMES HAMILTON, THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS 241-50 (1976) (citing cases).

22. *Cf.* INS v. Chadha, 462 U.S. 919, 959 (1983).

ously, therefore, the institution established this way could not serve as a basis for a power to convene grand juries, issue indictments, enter into plea bargains, or prosecute federal crimes. These not only flout the *Bowsher v. Synar* proscription of a legislative agent's exercise of executive power but also violate the requirement that congressional investigations rest on a "valid legislative purpose,"[23] which of course does not include prosecution of statutory crimes.

II. THE ANALOGY OF THE INDEPENDENT AGENCY

A second way to understand a possible independent counsel scheme uses the model of the independent agency. Indeed, the independent counsel statute invites a comparison to the independent agency in various ways, including the motivation behind enactment of the law. Like the independent counsel law, the independent agency originated as an effort to remove certain types of execution of law from the political control of the President. In the case of agencies, the goal of placing certain policy initiatives outside the direct control of the President was to provide expertise and judgment on important policy matters.[24] In the case of the independent counsel statute, the goal of insulating the counsel from presidential control in investigations involving high-level executive branch officials was to alleviate conflict of interest.[25] Unlike the relatively new independent counsel structure, however, the independent agency has been the subject of over a half-century of academic debate, judicial scrutiny and constitutional discourse. That debate can be useful in helping to place the independent counsel into an intelligible framework for analogical constitutional analysis.

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23. *See Watkins*, 354 U.S. at 187. According to *Watkins*, the investigative power:

> encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

Id.

24. *See* Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 547 (1998) (discussing purposes of early agencies).

25. *See* H.R. CONF. REP. NO. 100-452, at 37 (1987) (stating that the good cause removal provision "protect[s] the independent counsel's ability to act independently of the President's direct control").

The courts have long recognized, both explicitly and implicitly, that independent agencies stand on shaky constitutional ground.[26] That is not to say that they are unconstitutional, but just that they are clearly a structural departure from the norms established in the Constitution, and consequently give rise to serious questions about their legitimacy and a need for caution in their oversight.[27] The Supreme Court has greeted these concerns with some important responses.

The overarching theme of the Court's jurisprudence on the subject of independent agencies is the continued vigilance to ensure that departures from *structural* constitutional norms are compensated for by the addition of supplementary *procedural* protections for individual rights.[28] Knowing that an overriding purpose of the system of separated powers was the protection of individual liberties,[29] the Court has at times shown a willingness to tolerate innovations in structure when it could be assured that those innovations would not result in a threat to the interests generally protected under the rubric of the Due Process Clause. Reverting to elementary administrative law principles, we see that the price of delegating power outside of the conventional tripartite structure of the federal government has consistently been the assurance of heightened concern for the consequences to affected individuals.

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26. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 412-13 (1928) (upholding statute delegating legislative power on the theory that the Congress is better suited to know when it needs to rely on the executive branch than the Court is, and this was a minor delegation); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 58-67 (discussing constitutional attacks on independent agencies); *cf.* United States v. L. Cohen Grocery Co., 255 U.S. 81, 87, 92 (1921) (striking down criminal statute on ground that it delegated legislative power in contravention of the separation of powers).

27. *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 99-134 (1993) (discussing constitutional and policy problems of delegation).

28. *See, e.g.*, Withrow v. Larkin, 421 U.S. 35, 46 (1975) (stating that agency's commingling of functions may not interfere with the right to a "fair trial in a fair tribunal"); 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 3.15, at 208 (2d ed. 1978) (stating that nondelegation doctrine should be designed "to protect private parties against injustice on account of unnecessary and uncontrolled discretionary power"); Brown, *supra* note 6, at 1554-56 (discussing correlation between delegation issues and due process concerns).

29. *See* Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 SOC. PHIL. & POL'Y 196, 205 (1991) (suggesting that government arrangements should be examined to determine effect on personal liberties).

To begin with, the existence of judicial review of an independent agency's exercise of delegated power has always been critical to its legitimacy.[30] Although there has been no express holding to the effect that judicial review is constitutionally compelled with regard to administrative power, "[a] key feature in many modern discussions about administrative law and judicial review is the claim, sometimes tacit and other times express, that judicial review is a constitutional imperative."[31] A source for this argument is *Crowell v. Benson*, in which the Court, in effect, offered the quid pro quo of de novo review by Article III courts in exchange for participation of agencies in important private rights cases.[32] But even more important than the quid pro quo argument is the rationale that a delegation of power implies some limit; that the availability of judicial review is a necessary tool for the enforcement of any such limit; and generally that judicial review is an important guard against arbitrary action.[33]

When Congress delegates authority to agencies, courts must guard against the evils of "unlimited power,"[34] "unfettered discretion,"[35] and, particularly, "the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions."[36] To this end, in reviewing delegations of legislative power, the Court has required that Congress provide "an intelligible principle" to which the delegate is directed to conform.[37]

30. *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965).

31. Daniel B. Rodriguez, *Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory*, 72 CHI.-KENT L. REV. 1159, 1170 (1997).

32. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 925 (1988).

33. *See* JAFFE, *supra* note 30, at 321; Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part) (1963):

> The principle that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution. . . . *Second*, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.

34. Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933).

35. Panama Ref. Co. v. Ryan, 293 U.S. 388, 431 (1935).

36. Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 353 (1974) (Marshall, J., concurring and dissenting) (quoting United States v. Robel, 389 U.S. 258, 272 (1967) (Brennan, J., concurring)).

37. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928);

This requirement has served—or failed to serve, in the view of some[38]—the constitutional values, otherwise endangered or lost in the process of delegation, of democratic accountability and protection of liberty.[39]

Procedural due process has been a related outgrowth of the Court's jurisprudence regarding independent agencies. Agencies with the power to harm important interests of individuals must conform to minimal procedural requirements to ensure both accuracy and fairness in this meting out of government power. Procedural protections are especially important in the arena of delegated power because the institutional procedures applicable to the three branches of government when they are acting in their pure capacities, neither giving nor receiving delegations of power, are unavailable to check the exercise of delegated authority. For example, when Congress acts legislatively in a manner that affects people generally, any procedural entitlements that may be due an affected individual have been satisfied by the compliance with standard legislative procedures.[40] When an agency acts in its place, however, individuals affected by the measure have been accorded greater rights of participation and judicial review.

It is clear—and I believe uncontroversial—from this line of cases that, if a delegation of power is valid at all, it must carry accompanying assurances that the delegated power will be exercised within constraints subject to enforcement. So far, I have been talking only about delegations of legislative power by Congress to an independent agency. Delegations of judicial and executive power carry similar restrictions.[41] For example,

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see Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218 (1989) ("[S]o long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed,' no delegation of legislative authority trenching on the principle of separation of powers has occurred.").

38. *See* SCHOENBROD, *supra* note 27, at 158.

39. *See id.*; Yakus v. United States, 321 U.S. 414, 424-26 (1944).

40. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915).

41. *See* Mistretta v. United States, 488 U.S. 361, 410-11 (1989) (holding that the President's limited removal authority over Article III judges serving on a sentencing commission is not a violation of *separation of powers* because it does not threaten the judges' function of deciding cases *fairly* and *impartially*); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 84-87 (1982) (deciding that the possibility of congressional control over bankruptcy judges, empowered to adjudicate private rights but not afforded the independence provided Article III judges, rendered the Bankruptcy Act of

agencies (even when acting in a prosecutorial or adjudicatory, rather than regulatory, capacity) may not enforce their own money awards or their own subpoenas, and may not exercise contempt power.[42] In addition, out of concern for the constitutional rights of a criminally accused, agencies may not exercise criminal jurisdiction in promulgating or enforcing criminal penalties.[43]

The independent counsel statute can be seen as nothing more than a delegation of power. Granted, it is not a delegation of Congress's own power by Congress, but rather is a delegation of executive power by Congress to an individual not a full-fledged member of the executive branch, in a manner designed to limit the President's participation in certain executive matters. One could argue, as Justice Scalia and others have done, that that is all one needs to know to conclude that such an effort is simply, flatly, patently unconstitutional for reasons having to do with a unitary theory of executive power.[44] But for me, such flat-out generalities about the formal requirements of the Constitution do not answer the question—particularly since they also result in striking down delegations to independent agencies and thus require overruling sixty years of Supreme Court precedent.[45] The more useful question is whether, given that it is not *necessarily* unconstitutional for Congress to limit the President's control over the exercise of

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1978 unconstitutional).

42. *See* BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 2.24 (2d ed. 1983).

43. *See id.* § 2.22.

44. *See* Morrison v. Olson, 487 U.S. 654, 733-34 (1988) (Scalia, J., dissenting). Justice Scalia demands, rhetorically and sardonically:

> Is it conceivable that if Congress passed a statute depriving itself of less than full and entire control over some insignificant area of legislation, we would inquire whether the matter was "so central to the functioning of the Legislative Branch" as really to require complete control, or whether the statute gives Congress "sufficient control over the surrogate legislator to ensure that Congress is able to perform its constitutionally assigned duties"? Of course we would have none of that.

Id. at 709-10. I believe he answers his own question incorrectly: that is very close to what the Court does when it applies the so-called "nondelegation doctrine."

45. *See* Bowsher v. Synar, 478 U.S. 714, 725 n.4 (1986) (taking pains to deny "that an affirmance in this case requires casting doubt on the status of 'independent' agencies because no issues involving such agencies are presented here"). It is clear, however, that had the Court struck down the statute on the theory that all exercises of executive power must be under the control of the President—the unitary executive theory—such an affirmance would indeed undermine the constitutional status of the independent agencies.

executive power in certain circumstances, Congress has adhered closely enough *in this case* to general principles of delegation to survive constitutional attack.[46] More specifically, has Congress in this delegation paid enough attention to the protection of individual rights and avoidance of unfettered discretion? I think that question is quite easily answered "no," for several reasons.

Congress has not provided this independent body with an "intelligible principle" that would guide and limit its discretion so as to avoid the risk of unfettered authority. Even if it is not the case that presidential control over executive officers is required as a matter of *Article II* jurisprudence, as the unitary executive theorists contend, it is still the case that delegated power must have some structural limits. If not the accountability provided in Article II, then at least the intelligible principle applicable to independent agencies. To be fair, Congress seemed intuitively to recognize this when it provided in the Act that "[a]n independent counsel shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws."[47] In *Morrison v. Olson*, the Supreme Court relied on this provision as one means to ensure that the independent counsel would not undermine the powers of the executive branch.[48] Although, in my view, the Court asked the wrong question by inquiring about encroachment into executive branch function for its own sake instead of looking for structural threats to individual rights, it still correctly noted the importance of limitation on the discretion of the independent counsel.

When viewed as the "intelligible principle" required for constitutional reasons as a price for investing actors outside the tripartite structure with significant government power,

46. If anything, the Court is showing a new willingness to be critical of delegations. In *Clinton v. City of New York*, 118 S. Ct. 2091 (1998), the majority struck down the Line Item Veto Act as an unconstitutional authority for the President to "repeal" legislation, rejecting the dissenters' characterization of the Act as a delegation to the President of "a contingent power to deny effect to certain statutory language." The dissent invoked the "intelligible principle" test in arguing that the delegation was valid. *Id.* at 2125-28 (Breyer, J., with O'Connor and Scalia, JJ., dissenting). Whether the victory of the majority in that case signals a new hostility to delegations in general remains to be seen.

47. 28 U.S.C. § 594(f) (1994).

48. 487 U.S. at 696.

however, this statutory provision falls short. First, it contains its own escape clause, "except where not possible." Second, it is not enforceable in court, which is the essential mechanism for enforcing the intelligible principle requirement. Without judicial review, the intelligible principle (if any) must rely on voluntary compliance for effect—hardly a forceful structural guarantee. Predictably, the Office of the Independent Counsel has taken the position that it is not, in fact, bound by Justice Department guidelines because no one can force the issue. Third, it is not clear that prosecutorial guidelines provide enough limitation on discretion anyway because they are developed for another purpose, in the context of providing guidance, rather than restraint, to a prosecutorial department that is constructed very differently and with very different sets of motivations and structural limitations. It may be that another set of criteria would be needed to avoid the uncontrolled exercise of government power in this case.

A related way in which the independent counsel scheme falls short of constitutional standards for delegation concerns the lack of any meaningful judicial review as a means of directly protecting individual rights. An ordinary target of criminal law enforcement scrutiny has protections that the targets of the independent counsel scheme do not have, such as the political accountability of the people bringing the charges against them, arguments to be made before a judge alleging prosecutorial vindictiveness, and protection against selective prosecution. As a practical matter the types of officials who are potential targets of independent counsel scrutiny are unable for political reasons to rely on many of the standard protections that the more anonymous criminal suspect may use, such as the Fifth Amendment and other privileges. The problem with the statute as it is written is that it does not define the limits of prosecutorial behavior, and thus leaves no opportunity for a target or a court to conclude that appropriate bounds have been transgressed. (Of course, this is just what it means to lack an intelligible principle here.) Even when the bounds are constitutional in nature, the highly-charged atmosphere in independent counsel investigations may mean that important institutional interests cannot or will not be asserted by the affected individuals. However, because this issue involves the full panoply of criminal powers and potential punishments, there is no reason to believe that basic civil liberties can be

dispensed with simply because the targets are a statutorily limited class of high-level government officials.

In sum, the statute lacks any meaningful intelligible principle, and the consequences are felt directly on individual rights. Although the Court has not rigidly policed the intelligible principle requirement, it has required something. Moreover, it has sought to compensate for any substantive weaknesses by requiring stringent procedural protections. Thus, the body of law governing agency behavior provides an important basic insight: if the structure of an institution is constitutionally weak, look to procedural protections to compensate for that weakness. This effort may not succeed in overcoming structural defects in all cases, of course, but it is at least the minimum effort that must be made. No such effort is evident in the independent counsel statute. Targets of independent counsel investigations are not even mentioned in the statute except to identify who they may be. All procedural provisions in the statute relate to the rights of the independent counsel, the Attorney General or the Special Division. A statute that would pass constitutional scrutiny must at a minimum provide the types of protections for individuals affected by agency action provided in the Administrative Procedure Act.[49] Of course, since this is by definition a criminal, rather than a civil arena, even those protections may be constitutionally inadequate.

III. THE GREATEST DANGER OF ALL

So far the discussion has limited itself to the independent counsel as seen through either of two alternative lenses: either as an agent of Congress or as an independent agency exercising executive functions. Either of these modes of analogy seems adequate for consideration of the various constitutional issues that arise, and either could, in theory, provide a model for the development of a constitutional independent counsel scheme, assuming that the mandatory features of either model would not render the scheme useless or otherwise politically undesirable or infeasible. The essence of the argument is that the features of the scheme determine its constitutional "home" and that that "home," in turn, determines the constitutional limitations on the powers conferred.

The worst case, however, arises when the two models, absolutely separate as a matter of constitutional theory, are

49. 5 U.S.C. § 554 (1994).

blended into one. Thus, for example, Congress might attempt to retain the control and flexibility that the legislative agency model offers, and combine that with the vast set of prosecutorial and investigative powers that are afforded executive or independent agencies. This may be tempting to a legislature that sees itself as some sort of enforcer of moral or legal constraints on members of other branches, but it is clearly inconsistent with the separation of powers. Congress, like any other constitutional actor, must accept the limitations that constrain each model. Thus, there could be no congressionally controlled impeachment office whose job it is to prosecute criminal laws under the direction of and for the benefit of Congress. It would be a violation of the separation of powers for Congress to create an independent agency exercising executive powers and then use it as its own agent for impeachment purposes. This would subvert the essential checks on Congress as lawmaker, which prevent it from also being a law enforcer, by clothing an agent in executive garb. Otherwise all the protections that the Supreme Court has insisted upon in *Chadha*, *Bowsher* and the agency cases could be circumvented.

Anyone familiar with the current independent counsel scheme, and the uses to which it has been put as the papers in this Symposium go to press, must necessarily pause to wonder or perhaps worry that these lines of structural protection may indeed have been transgressed. As Professor Kelley suggests in a footnote,[50] there is a non-trivial issue presented by the statute whether its requirement that the executive officer, the independent counsel, provide the House with the fruits of law-enforcement activity for use in impeachment proceedings is consistent with the constitutional separation of powers. Far more than the question whether the statute takes away too much executive power from the President, far more than the question whether there is any amount of executive power that is not too much, this question, in my view, raises extremely serious questions of constitutional validity. Have the structural limitations on the two branches—including, but not limited to, the President's control of the execution of laws—been compromised such that the values of individual liberty are threatened? Certainly Professor Kelley's work establishes the portion of the inquiry involving the President's control and the

50. *See* William K. Kelley, *The Constitutional Dilemma of Litigation Under the Independent Counsel System*, 83 MINN. L. REV. 1197, 1267 n.298 (1999).

integrity of the executive branch as a whole. A similar insider's perspective on the effects on the targets of independent counsel inquiries over the past twenty years would, I trust, be equally damning to the individual rights component of the analysis.[51]

In short, there is no jurisprudential reason for the Court to have relegated the nation to the wheel of fortune in hoping that the occupants of the Office of the Independent Counsel and the judges who supposedly supervise them would operate in good faith, exercise self-restraint, and check the temptations that power and partisanship inevitably dangle before them. It instead could have thought about this statutory creature under either of two existing models. These models could illuminate the relevant considerations and provide guidance in understanding the statute, despite its novel attributes. Indeed, because these two models are at their core efforts to acknowledge the relationship between structural integrity and individual rights, they are responsive to the very concerns that underlie the constitutional issues that the independent counsel scheme raises.

51. Even the facts known about the ordeal of Theodore Olson, the target of the probe that launched the *Morrison* case, should have given the Supreme Court pause to worry about this tremendously important aspect of the analysis. *See Case Dropped, Theodore B. Olson*, TIME, Sept. 5, 1988, at 84 (detailing a 28-month-long ordeal culminating in the unexplained dropping of charges against Theodore Olson).