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# The Court Upholds the Constitutional Validity of the Independent Counsel Statute (Morrison v. Olsen)

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**THE COURT UPHOLDS THE CONSTITUTIONAL VALIDITY OF THE INDEPENDENT COUNSEL STATUTE-*Morrison v. Olson***-Human rights commentaries often discuss depressing topics such as persecution, homelessness, exploitation, and brutality. Although many of these topics play an essential role in exposing the unfortunate plight of the victims, their approach increasingly tends to be one of disaster description instead of disaster prevention. This paper discusses not an unfortunate "ends" of a system gone awry, but rather the "system" itself. *Morrison v. Olson*<sup>1</sup> is a case which illustrates how the constitutional system of the United States can work to improve the accountability of our leaders through the enactment of the independent counsel statute<sup>2</sup> (Act).

The Supreme Court, on the last day of the 1987 term, upheld the validity of the Act.<sup>3</sup> The seven to one decision<sup>4</sup> was touted as the "major constitutional clash of the year."<sup>5</sup> It rejected claims that the legislation authorizing court-appointed special prosecutors infringed the president's constitutional authority to wield the executive power by depriving him of the power to prosecute.<sup>6</sup>

Enacted in the aftermath of Watergate and subsequently amended by Congress,<sup>7</sup> the independent counsel provisions of the Act provide for the appointment of special prosecutors from the executive branch to investigate presidential subordinates.<sup>8</sup> These provisions require the

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1. 108 S. Ct. 2597 (1988), *enforced sub. nom. In re Sealed Case*, 857 F.2d 801 (D.C. Cir. 1988).

2. Ethics in Government Act, 28 U.S.C. §§ 49, 591-599 (1982 & Supp. 1987).

3. *Morrison*, 108 S. Ct. at 2622.

4. Justice Scalia was the lone dissenter. *Id.* at 2622-41 (Scalia, J., dissenting). *See infra* text accompanying notes 155-198.

5. Stewart & Nelson, *Separation of Powers*, A.B.A. J., Sept. 1, 1988, at 40.

6. *Morrison*, 108 S. Ct. at 2621-22.

7. The Act was first enacted by Congress in 1978. Pub. L. No. 95-521, 1978 U.S. CODE CONG. & ADMIN. NEWS (92 Stat.) 1867, *as amended by* Pub. L. No. 97-409, 1982 U.S. CODE CONG. & ADMIN. NEWS (96 Stat.) 2039; Pub. L. No. 100-191, 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 1293.

8. Ethics in Government Act, 28 U.S.C. §§ 49, 591-599 (1982 & Supp. 1987).

Attorney General to apply to a special division of the United States Court of Appeals for the District of Columbia Circuit (Special Division) for the appointment of an independent counsel within ninety days after commencement of an internal preliminary investigation, or upon receiving a request to do so from Congress, unless he determines within that period that "there are no reasonable grounds to believe that further investigation or prosecution is warranted."<sup>9</sup>

The litigation in *Morrison* arose when the House Judiciary Committee began an investigation into the Justice Department's role in a controversy between the House and the Environmental Protection Agency (EPA).<sup>10</sup> The Committee eventually requested the Attorney General, pursuant to the Act, to appoint an independent counsel to investigate allegations that Theodore Olson, an official of the Attorney General's Office, had given false testimony during an earlier EPA investigation.<sup>11</sup>

The Attorney General decided that further investigation was warranted and applied to the special division.<sup>12</sup> However, a dispute arose between the litigants over the special counsel's jurisdiction as set forth by the Attorney General; subsequently, the alleged wrongdoers attacked the Act's constitutionality.<sup>13</sup> The district court upheld the constitutionality of the Act.<sup>14</sup> A divided court of appeals, however, reversed the district court's decision.<sup>15</sup> The majority found that the method of appointing the independent counsel "[sapped] the political vitality of the

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9. *Id.* § 592.

10. H.R. REP. NO. 435, 99th Cong., 1st Sess., pt. 4, at 5 (1985).

11. See *In re Sealed Case*, 838 F.2d 476, 480 (D.C. Cir. 1988). Two other officials, Edward Schmults, the deputy attorney general, and Carol Dinkins, the assistant Attorney General for the Land and Natural Resource Division, were also investigated on allegations of illegally withholding documents. *Id.*

12. *Morrison v. Olson*, 108 S. Ct. 2597, 2606 n.11 (1988) (citing United States House Judiciary Committee Report 22, 45 (Apr. 10, 1986), filed in No. 86-1 (C.A.D.C.) (Attorney General Report)).

13. *In re Sealed Case*, 665 F. Supp. 56 (D.D.C. 1987).

14. *Id.*

15. *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988).

President,<sup>16</sup> and also violated the appointments clause of the U.S. Constitution.<sup>17</sup>

As an increasing number of former Reagan officials fell within the Act's reach, constitutional challenges became prevalent.<sup>18</sup> In response to these increasing challenges, the Supreme Court decided it needed to address the issue of the Act's constitutionality.<sup>19</sup> Utilizing what appears to have been a functional and deferential approach,<sup>20</sup> the *Morrison* Court upheld the constitutional validity of the Act.<sup>21</sup>

This comment will explain the the impetus behind the Act,<sup>22</sup> its statutory requirements,<sup>23</sup> the Court of Appeals' decision interpreting the Act,<sup>24</sup> and the Supreme Court decision.<sup>25</sup> An attempt to put *Morrison's* political and legal significance into perspective will also be included.<sup>26</sup> The separation of powers doctrine is an elusive, abstract area of

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16. *Id.* at 508.

17. U.S. CONST. art. II, § 2, cl. 2 provides "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* (emphasis added).

18. *See, e.g., In re Sealed Case* (North), 829 F.2d 50 (D.C. Cir. 1987) (Oliver North).

19. *Morrison v. Olson*, 108 S. Ct. 2595, 2602-07 (1988).

20. For a general discussion of formal versus functional methods of analyzing separation of powers controversies, *see* Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 491 (1987). *See also*, Carter, *The Confirmation Mess*, 102 HARV. L. REV. 1185 (1988), where the article classifies the Supreme Court's jurisprudence on separation of powers as a mixture of two traditions: the first, entitled the evolutionary tradition, holds that as the needs of the nation change over time, the Congress may guide the evolution of fresh institutional forms to meet these changing needs. *Id.* at 1218. The second, entitled the de-evolutionary tradition, holds that the constitutional scheme of balanced and separated powers should be used as a brake on efforts to alter the form of government that the Framers envisioned. *Id.* at 1208.

21. *Morrison v. Olson*, 108 S. Ct. 2597 (1988).

22. *See infra text accompanying notes 29-40.*

23. *See infra text accompanying notes 41-78.*

24. *See infra text accompanying notes 79-90.*

25. *See infra text accompanying notes 91-198.*

26. *See infra text accompanying notes 199-218.*

constitutional law.<sup>27</sup> The special prosecutor law "[b]ecame a surrogate for this debate, a symbol of the current round in the age-old struggle for dominance between Congress and the White House."<sup>28</sup>

### I. IMPETUS BEHIND THE INDEPENDENT COUNSEL STATUTE

Scandal in the upper echelons of our federal government has been a recurring problem throughout history.<sup>29</sup> The Act, by creating a special prosecutor independent of any influence, "responds to a structural feature of the executive branch that hampers prosecution of high-level misconduct."<sup>30</sup> The problem, as one commentator noted, lies in the dual nature of the attorney general's role:

On the one hand, he [the attorney general] is the nation's chief law enforcement officer, expected to investigate and prosecute federal crimes dispassionately. On the other, as the administration's highest ranking legal adviser, he is ordinarily a political and personal confidant of the President and his circle, providing advice on both law and policy. Therefore, allegations of misconduct in high places often cast the Attorney General in the deeply troubling role of investigating close political and personal associates.<sup>31</sup>

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27. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 122 (3rd ed. 1986).

28. Greenhouse, *Fetters on the Executive*, N.Y. Times, June 30, 1988, at A19, col. 2 [hereinafter Greenhouse].

29. See, e.g., R. WOODWARD & C. BERNSTEIN, *ALL THE PRESIDENTS MEN* (1974); B. NOGGLE, *TEAPOT DOME: OIL AND POLITICS IN THE 1920's* (1962); L. COOLIDGE, *THE LIFE OF ULYSSES S. GRANT* (1922) ("The Whiskey Ring Affair").

30. Bruff, *Independent Counsel and the Constitution*, 24 WILLAMETTE L. REV. 539, 541-42 (1988) [hereinafter Bruff].

31. *Id.* at 541-42.

Perhaps the best illustration of this inherent dilemma occurred during the Nixon Administration's famous "Saturday night massacre."<sup>32</sup> The Attorney General and his Deputy resigned rather than execute the President's order to discharge Watergate Special Prosecutor Archibald Cox for his investigation of the President.<sup>33</sup> In the aftermath of public outrage, Congress began to deliberate on what became the independent counsel statute.<sup>34</sup>

Legislative history suggests that Congress thought these inherent conflicts within the Attorney General's office should be dealt with in the same manner in which the private bar addresses such conflicts of interest.<sup>35</sup> For example, when private attorneys are involved with a conflict of interest, the American Bar Association suggests that attorneys recuse themselves.<sup>36</sup> Congress reasoned that the government should strive, as do private attorneys, to avoid even the appearance of impropriety, because such a perception may undermine the public's confidence in the Department of Justice and damage the legitimacy of the executive branch.<sup>37</sup>

While the Act's purposes may be laudable, statutory special prosecutors present constitutional difficulties. The practical significance of appointing these prosecutors is to redistribute prosecutorial power.<sup>38</sup> As Chief Justice Rehnquist explained in the Court's opinion in *Morrison*:

Congress . . . was concerned when it

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32. See L. JAWORSKY, *THE RIGHT AND THE POWER* 2 (1976).

33. See *id.* See also *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973).

34. S. REP. NO. 170, 95th Cong., 2d Sess. 4, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4216, 4218 [hereinafter S. REP. NO. 170].

35. S. REP. NO. 170, *supra* note 34, at 7, 1978 U.S. CODE CONG. & ADMIN. NEWS at 4222.

36. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 comment (1983) which states "[a] lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion." *Id.*

37. S. REP. NO. 170, *supra* note 34, at 7, 1978 U.S. CODE CONG. & ADMIN. NEWS at 4222.

38. See *Morrison v. Olson*, 108 S. Ct. 2597, 2611 (1988).

created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers. If it were to remove the appointing authority from the Executive Branch, the most logical place to put it was in the Judicial Branch.<sup>39</sup>

To overcome the separation of powers hurdle, Congress created an independent counsel who possessed considerable autonomy, yet retained some relation to the executive branch.<sup>40</sup>

### *The Independent Counsel Statute*

The independent counsel statute<sup>41</sup> requires that the Attorney General must conduct a preliminary investigation of the matter upon receipt of information that he determines is "[s]ufficient to constitute grounds to investigate whether any person [covered by the Act] may have violated any Federal criminal law."<sup>42</sup> When the attorney general has completed this investigation,<sup>43</sup> or after 90 days has elapsed,<sup>44</sup> he is required to report to a special three member court<sup>45</sup> created by the Act "for the purpose of appointing independent counsels."<sup>46</sup>

If the Attorney General determines that "there are no reasonable grounds to believe that further investigation is warranted,"<sup>47</sup> then he must notify the special division of this

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39. *Id.*

40. S. REP. NO. 170, *supra* note 34, at 7, 1978 U.S. CODE CONG. & ADMIN. NEWS at 4221.

41. Ethics in Government Act, 28 U.S.C. §§ 49, 591-599 (1982 & Supp. 1987).

42. *Id.* § 591(a).

43. *Id.* § 592(c)(1)(A).

44. *Id.* § 592(a)(1).

45. *Id.*

46. *Id.* § 49(a).

47. *Id.* § 592(b)(1).

result.<sup>48</sup> In such a case "the division of the court shall have no power to appoint an independent counsel."<sup>49</sup> However, if the Attorney General has determined that there are "reasonable grounds to believe that further investigation is warranted,"<sup>50</sup> then he is required to "apply to the division of the court for the appointment of an independent counsel."<sup>51</sup>

In conducting preliminary investigations, the Attorney General does not have authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas.<sup>52</sup> A further limitation on his power is that he cannot base a determination that there are "no reasonable grounds to investigate or prosecute"<sup>53</sup> due to the fact that the person lacked the state of mind required to violate the law, unless there is clear and convincing evidence indicating otherwise.<sup>54</sup>

The Act grants the counsel full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Attorney General or any other officer or employee of the Department of Justice.<sup>55</sup> Persons under the jurisdiction of the counsel may include: the President, the Vice President, any person working in the executive office of the President who is paid at a level II rate<sup>56</sup> or above, anyone in the Justice Department who is paid at a level III rate<sup>57</sup> or above, the Director and Deputy Director of Central Intelligence, the Commissioner of Internal Revenue, and the chairman or treasurer of a national presidential campaign committee.<sup>58</sup>

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48. *Id.*

49. *Id.*

50. *Id.* § 592(c)(1)(A).

51. *Id.* § 592(c)(1).

52. *Id.* § 592(a)(2)(A).

53. *Id.* § 592(a)(2)(B)(i).

54. *Id.* § 592(a)(2)(B)(ii).

55. *Id.* § 594(a).

56. *Id.* § 591(b)(3).

57. *Id.*

58. *Id.* § 591(b)(5).



The functions of the independent counsel include conducting grand jury proceedings and other investigations, participating in civil and criminal court proceedings and litigation, and appealing decisions in which the counsel participates in an official capacity.<sup>59</sup> The Act states that an independent counsel "[s]hall, except where not possible, comply with written or other established policies of the Department of Justice respecting enforcement of criminal laws."<sup>60</sup> In addition, whenever a matter has been referred to an independent counsel under the Act, the Attorney General and Justice Department are required to suspend all investigations and proceedings regarding the matter.<sup>61</sup>

An independent counsel appointed pursuant to the Act can only be *removed* from office by the Attorney General, unless the removal is by impeachment and conviction.<sup>62</sup> Also, an appointed independent counsel can only be removed for *good cause*, physical disability, mental incapacity, or any other condition that substantially impairs the performance of counsel's duties.<sup>63</sup> If the independent counsel is removed, the Attorney General is required to submit a report to both the special division and the Judiciary Committees of the Senate and House "specifying the facts found and the ultimate grounds for such removal."<sup>64</sup> Additionally, the independent counsel may seek judicial review of the removal in a civil action commenced in the United States District Court for the District of Columbia.<sup>65</sup> As of the 1987 amendments, however, the special division may not hear or determine any such civil action or any appeal of a decision in such a civil action.<sup>66</sup> However, the independent counsel may be reinstated or

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59. *Id.* § 594(a)(1)-(3).

60. *Id.* § 594(f).

61. *Id.* § 597(a).

62. *Id.* § 596(a)(1) (emphasis added).

63. *Id.* (emphasis added).

64. *Id.* § 596(a)(2).

65. *Id.* § 596 (a)(3).

66. *Id.*

granted other appropriate relief by order of the court.<sup>67</sup>

The office of independent counsel terminates when he notifies the Attorney General that he has completed or substantially completed any investigation or prosecutions undertaken pursuant to the Act.<sup>68</sup> In addition, the special division, acting either on its own or on the suggestion of the Attorney General, may terminate the office of an independent counsel at any time if it finds that "[t]he investigation of all matters within the prosecutorial jurisdiction of the counsel have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions."<sup>69</sup>

The Act provides for congressional oversight of the activities of the counsel.<sup>70</sup> If requested, an independent counsel must periodically send to Congress statements or reports on his activities.<sup>71</sup> The "appropriate committees of Congress"<sup>72</sup> are given oversight jurisdiction in regard to the conduct of an independent counsel, and the counsel is required by the Act to cooperate with Congress in the exercise of this jurisdiction.<sup>73</sup> Furthermore, the counsel is required to inform the House of "[s]ubstantial and credible information which [the counsel] receives . . . that may constitute grounds for impeachment [of high level executive officials]."<sup>74</sup>

Finally, the Act gives certain Congressional committee members the power to "[r]equest in writing that the Attorney General apply for the appointment of an independent counsel."<sup>75</sup> The Attorney General is required to respond to

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67. *Id.*

68. *Id.* § 596(b)(1).

69. *Id.* § 596(b)(2).

70. *Id.* § 595.

71. *Id.* § 595(a)(2).

72. *Id.* § 595(a)(1).

73. *Id.* § 595(a)(1).

74. *Id.* § 595(c).

75. *Id.* § 592(g)(1).

this request within a specified time,<sup>76</sup> but is not required to accede to the request.<sup>77</sup>

The creation of the independent prosecutor for the investigation and prosecution of high level misconduct raises serious constitutional issues, and involves both the integrity and the effectiveness of our government. The Act is a careful attempt to balance competing considerations.<sup>78</sup>

## II. THE COURT OF APPEALS' DECISION

Writing for the 2-1 majority,<sup>79</sup> Judge Silberman stated it was significant that the law "[w]as passed in the midst of a period when one political party tended to control the Presidency and the other enjoyed dominance in the legislative branch."<sup>80</sup> Reversing the district court opinion,<sup>81</sup> Judge Silberman opined that the appointment of a special prosecutor "[s]urely saps the political vitality of the Presidency and thereby renders the President a less effective political force juxtaposed against Congress."<sup>82</sup> Accordingly, the Court of Appeals found the Act unconstitutional as an impermissible interference upon executive branch power.<sup>83</sup>

The Silberman decision held first that an independent counsel is not an "inferior officer" of the United States, but rather a "principal" one for the purposes of the Appointments Clause<sup>84</sup> due to the nature of her duties, and that therefore,

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76. *Id.* § 592(g)(2).

77. *Id.* § 592(b).

78. Bruff, *supra* note 30, at 541.

79. *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988).

80. *Id.* at 506 (citing *Myers v. United States*, 272 U.S. 52, 164-67, 175 (1926)); *See also* *Greenhouse*, *supra* note 28, at A19, col. 3.

81. *In re Sealed Case*, 665 F. Supp. 56 (D.D.C. 1987) (Chief Judge Aubrey Robinson held the Act to be constitutional in that it represented Congress' measured response to the recurrent question of how to enforce laws when they are violated by high ranking officials in matters where the Department of Justice has apparent conflicts of interest. *Id.*).

82. *In re Sealed Case*, 838 F.2d 476, 508 (D.C. Cir. 1988).

83. *Id.* at 496-519.

84. U.S. CONST. art. II, § 2, cl. 2. *See supra* note 17.

the Act is invalid because it does not provide for the counsel to be appointed by the President and confirmed by the Senate.<sup>85</sup>

In addition, the opinion believed that the statute violated the concept of separation of powers embodied in the Constitution.<sup>86</sup> According to the majority,

[C]ourt appointment of prosecutors presents a more fundamental incongruity with our constitutional scheme than virtually any other type of inter-branch appointment, because it blurs that cherished separation of prosecutor and judge which is a crucial aspect of the Constitution's protection of individual liberty.<sup>87</sup>

The majority also criticized the statute's functional restrictions on the executive removal power.<sup>88</sup> It noted that the Act placed further restrictions on the President's removal and supervisory powers, including an extraordinarily broad provision authorizing the judiciary to review removal decisions of the Attorney General and explicit limitations on the Attorney General's authority to supervise the independent counsel.<sup>89</sup> "Good cause" restrictions and judicial review of core executive branch powers to remove its officers, according to the majority, unconstitutionally precluded the power of the president to exercise any influence over the independent counsel and hence also removed political accountability.<sup>90</sup>

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85. *In re Sealed Case*, 838 F.2d at 484-89.

86. *Id.* at 496.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 488-89.

## III. THE SUPREME COURT DECISION

## A. Majority Opinion

Chief Justice Rehnquist's 7 to 1 opinion<sup>91</sup> reversed the court of appeals' decision<sup>92</sup> and upheld the Act's statutory provisions.<sup>93</sup> The Chief Justice reversed the lower court by stating that the appointment of a special prosecutor by the courts was valid under the Constitution's provision that "the Congress by Law may vest the Appointment of such inferior Officers, as they think proper."<sup>94</sup> In support of this proposition, Chief Justice Rehnquist cited *U.S. v. Germaine*<sup>95</sup> where the Court held:

The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specifically mentioned, Congress might by law vest their appointment in the President alone, in the Courts of law, or in the heads of departments.<sup>96</sup>

He rejected arguments that the special prosecutors' powers were so broad that they were not inferior officers.<sup>97</sup>

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91. *Morrison v. Olson*, 108 S. Ct. 2597 (1988).

92. *Id.* at 2622.

93. *Id.*

94. *Id.* at 2609-10 (quoting U.S. CONST. ART. II, § 2, cl. 2).

95. *Id.* at 2608 (citing *United States v. Germaine*, 99 U.S. (9 Otto) 508 (1879)).

96. *Germaine*, 9 U.S. at 509-10.

97. *Morrison*, 108 S. Ct. at 2608.

The Court found four attributes of the independent counsel which made this position "inferior": first, the Court found persuasive the fact that the Act authorizes the independent counsel's removal by the Attorney General, making the counsel, to some degree, "inferior" in rank and authority;<sup>98</sup> second, because the counsel is empowered to perform only certain limited duties, restricted primarily to investigation and, if appropriate, prosecution, his office is inferior;<sup>99</sup> third, his jurisdiction is inferior because it is limited to that which has been granted by the Special Division pursuant to a request by the Attorney General;<sup>100</sup> and finally, because the counsel's office is temporary in the sense that he is appointed essentially to accomplish a single task, and when that task is over the office is terminated.<sup>101</sup> Accordingly, appointment by the court, instead of by the President with the advice and consent of the Senate, was proper.<sup>102</sup>

The Court found no merit to the argument that even if the independent counsel is an inferior officer, the appointments clause does not empower Congress to place the appointment of such an officer outside the Executive Branch.<sup>103</sup> The Court reasoned that as long as such appointments were not incongruous to the general tripartite scheme, then inter-branch appointments were constitutional.<sup>104</sup>

The Appointment Clause's reference to inferior officers, according to the opinion, admits of no limitation on interbranch appointments.<sup>105</sup> It gives Congress ample discretion to determine whether it is proper to vest the

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98. *Id.*

99. *Id.*

100. *Id.* at 2609.

101. *Id.* at 2608-09.

102. *Id.* at 2608-13.

103. *Id.* at 2608-09. *See also Ex parte Siebold*, 100 U.S. 371 (1879), where the Court rejected an argument that federal judges could not appoint commissioners to serve on an election board which would oversee certain elections. *Id.* at 397-98; *U.S. v. Solomon*, 216 F. Supp. 836 (S.D.N.Y. 1963).

104. *Morrison*, 108 S. Ct. at 2608-09.

105. *Id.* at 2611.

appointment of executive officers in the courts of law.<sup>106</sup> When Congress created the office of independent counsel, it was concerned with the conflicts of interest that could arise in situations where the executive branch is called upon to investigate its own high ranking officers.<sup>107</sup> The most logical place for Congress to put the appointing authority, the Court held, was in the judicial branch.<sup>108</sup> The majority did not believe this exercise of power was an abuse of Congressional discretion.<sup>109</sup>

The second major prong of Chief Justice Rehnquist's opinion was that the limited legal powers given to the special three-judge division to choose a special prosecutor, and to exercise limited supervision, did not involve judges in matters inconsistent with their duties under Article III<sup>110</sup> of the Constitution.<sup>111</sup> Although the Chief Justice admitted that the express provision of Article III limited the judicial power of the United States to "Cases and Controversies,"<sup>112</sup> he reminded the challengers that the Appointments Clause<sup>113</sup> is a source of

106. *Id.* However, the Court did not mean to imply that there are not other limitations to interbranch appointments. See, e.g., *Ex parte Siebold*, 100 U.S. 371, 398 (1879).

107. S. REP. NO. 170, *supra* note 34, at 7, 1978 U.S. CODE CONG. & ADMIN. NEWS at 4244.

108. *Morrison*, 108 S. Ct. at 2611.

109. *Id.*

110. U.S. CONST. art. III, § 2, cl. 1.

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under the Authority; - to all cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a party; - to Controversies between two or more states; - between a State and Citizens of another state; - between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or subjects.

*Id.*

111. *Morrison*, 108 S. Ct. at 2615. Chief Justice Rehnquist stated "[w]e think both the special court and its judges are sufficiently isolated by these statutory provisions from the review of the activities of the independent counsel so as to avoid any of the independence of the judiciary such as would render the Act invalid under Article III." *Id.*

112. U.S. CONST. art. III, § 2, cl. 1. See *supra* note 110.

113. See *supra* note 17.

authority for judicial action that is independent of Article III.<sup>114</sup> Moreover, the Chief Justice asserted that the special division's appointments clause powers encompass the power to define the independent counsel's jurisdiction.<sup>115</sup> The Court reasoned that when Congress creates a temporary office, the nature of which will vary with the factual circumstances giving rise to the need for an appointment, it may vest the powers to define the office's scope in the court as incident to the appointment of the counsel pursuant to the Appointments Clause.<sup>116</sup>

Additionally, the Chief Justice noted that Article III does not absolutely bar Congress from vesting certain miscellaneous powers in the Special Division under the Act.<sup>117</sup> Here, the special division's miscellaneous powers, such as the passive powers to receive but not to act on or specifically approve various reports from the special counsel or the Attorney General, do not encroach upon Executive Branch authority.<sup>118</sup> The Court pointed out that these miscellaneous powers are "directly analogous to functions federal judges perform in other contexts."<sup>119</sup>

The majority was more doubtful about the Special Division's power to terminate the office of independent counsel because such power ordinarily would not be considered judicial.<sup>120</sup> However, the Court did not view this power to be a "significant judicial encroachment upon the

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114. *Morrison*, 108 S. Ct. at 2612.

115. *Id.* at 2613.

116. *Id.* at 2612-13. The Court, however, did not think that Congressional power was unlimited. *See id.* at 2613. ("In order for the Division's definition of the counsel's jurisdiction to be truly 'incidental' to its power to appoint, the jurisdiction that the court decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case." *Id.*).

117. *Id.*

118. *Id.* at 2613.

119. *Id.* at 2614. For example, deciding whether to allow disclosure of information before a grand jury, *see* FED. R. CRIM. P. 6(e), to extend a grand jury investigation, *see* FED. R. CRIM. P. 6(g), or to award attorney's fees, *see, e.g.*, 42 U.S.C. § 1988 (1988).

120. *Morrison*, 108 S. Ct. at 2614.



executive power or upon the prosecutorial discretion of the independent counsel."<sup>121</sup> In support of its rationale, the Court noted that the Act's termination provisions do not give the special division the power to remove the counsel while an investigation or court proceeding is still underway;<sup>122</sup> rather, this type of power is only vested in the Attorney General.<sup>123</sup> Furthermore, because the Act gives the special division no power to review any of the counsel's or Attorney General's actions, there is no risk of partisan or bias adjudication of claims regarding the independent counsel which would invalidate the Act.<sup>124</sup>

The third major prong of the holding stated that the law's limitation on the Attorney General's power to remove special prosecutors did not violate the constitutional principle of separation of powers.<sup>125</sup> The Court held that "[n]otwithstanding the fact that the counsel is to some degree 'independent' and free from Executive Branch supervision to a greater extent than other federal prosecutors . . . 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."<sup>126</sup> Also, the Court noted that while the doctrine of separation of powers is entrenched in constitutional law, it has *never* held that the "Constitution requires that the three Branches of Government 'operate with absolute independence'."<sup>127</sup>

The Court broke its separation of powers analysis into two issues: first, "[w]hether the provision of the Act restricting the Attorney General's power to remove the independent counsel to only those instances in which he can show good

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121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 2615. The Court noted that advisory opinions and special orders are outside both the Act and the Constitution, and are contrary to judicial power under Article III. *Id.*

125. *Id.* at 2620-22.

126. *Id.* at 2622.

127. *Id.* at 2620 (quoting *United States v. Nixon*, 418 U.S. 684, 707 (1974)).

cause,<sup>128</sup> taken by itself, impermissibly interferes with the President's exercise of his constitutionally appointed functions";<sup>129</sup> and second, whether "[t]aken as a whole, the Act violates the separation of powers by reducing the President's ability to control the prosecutorial powers wielded by the independent counsel."<sup>130</sup>

The majority resolved issue one by finding no impermissible interference.<sup>131</sup> The fact that Congress did not attempt to retain any role in removal was significant in their analysis.<sup>132</sup> Unlike past unconstitutional forays into Executive removal power,<sup>133</sup> Congress legislated the independent counsel statute with more foresight, by allowing for removal "[o]nly by the personal action of the Attorney General, and only for good cause."<sup>134</sup> Notwithstanding, the practical limits that a good cause standard thrusts upon the Executive, the Court found the restriction essential to its continued independence. Furthermore, the Court did not believe that the "[p]resident's need to control the exercise of such discretion was central to the functioning of the Executive Branch to require as a matter of constitutional law that the counsel be terminable at will by the President."<sup>135</sup> The majority found that such diminished control did not interfere with his duty to "take care that the laws be faithfully executed,"<sup>136</sup> and dispensed with any notion that because prosecution may be labelled as a purely executive

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128. *Id.* at 2616; *See also* 28 U.S.C. § 596(a)(1) (1982 & Supp. 1987).

129. *Morrison*, 108 S. Ct. at 2616.

130. *Id.*

131. *Id.* at 2620.

132. *Id.*

133. *See, e.g., Bowsher v. Synar*, 478 U.S. 714 (1986); *Myers v. United States*, 272 U.S. 52 (1926).

134. 28 U.S.C. § 596(a)(1) (1982 & Supp. 1987).

135. *Morrison*, 108 S. Ct. at 2619.

136. U.S. CONST. art. II § B.

power any limit on that power would be forbidden.<sup>137</sup>

Taken as a whole, the Court found the statute did not violate the separation of powers.<sup>138</sup> Neither the Congress nor the Judiciary was found to have been given usurped Executive power through the Act.<sup>139</sup> Although the Act does empower certain members of Congress to request the Attorney General to apply for an appointment, the Attorney General has no duty to comply with such a request.<sup>140</sup> His only restriction is that he must respond within a certain time limit.<sup>141</sup> Congress' only other involvement is to conduct its regular oversight functions.<sup>142</sup>

The Special Division of the Court of Appeals for the District of Columbia Circuit may only become involved at the request of the Attorney General<sup>143</sup> whose decision not to pursue the route of independent counsel is not reviewable in any Court.<sup>144</sup> In addition, once the court has appointed a

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137. *Morrison*, 108 S. Ct. at 2618. The *Morrison* Court, by no longer relying on such terms as "quasi-legislative" and "quasi-judicial," suggested a departure from previous modes of separation of powers analysis. *Id.* See generally *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) ("[w]hether Congress can condition the President's power of removal . . . will depend upon the character of the office and rest[s] upon the distinction between purely executive, and quasi-legislative or quasi-judicial power." *Id.*). See also *Bowsher v. Synar*, 478 U.S. 714 (1986). *Bowsher* was the last separation of powers case to be addressed by the Court before *Morrison*. The case involved an unconstitutional attempt by Congress to gain a role in the removal of the Comptroller General empowered to recommend budget cuts in accordance with the "Gramm-Rudman-Hollings Act," 2 U.S.C. §§ 901-922 (1982 & Supp. 1986). The Court found that the official's functions were executive in nature, in that he was required to exercise judgment concerning facts that affect the application of the Act, and must interpret the provisions of the Act to determine precisely what budgetary calculations are required. *Bowsher*, 478 U.S. at 722. The *Bowsher* court did not base its decision on purely executive versus quasi-legislative or quasi-judicial analysis, but rather relied upon a formal restriction that Congress may not administer its own laws. *Id.*

*Morrison* is distinguished because Congress has no power over the administration of the independent counsel statute. *Morrison*, 108 S. Ct. at 2621. Similar to any other law, Congress wrote the restrictions to the statute's application, but the Executive Branch is the only one charged with its enforcement subject to Judicial review. *Id.*

138. *Morrison*, 108 S. Ct. at 2620-22.

139. *Id.*

140. *Id.* at 2621.

141. *Id.* at 2605. See also 28 U.S.C. § 592(g) (1982 & Supp. 1987).

142. *Morrison*, 108 S. Ct. at 2605; 28 U.S.C. § 595(a) (1982 & Supp. 1987).

143. 28 U.S.C. § 592(a)(1) (1982 & Supp. 1987).

144. 28 U.S.C. § 592(f) (1982 & Supp. 1987).

counsel and defined the jurisdiction, it has no power to supervise or control the activities of the counsel.<sup>145</sup> As for the removal check on the Attorney General, the Court reasoned that even though "[t]he Act does give a federal court the power to review the Attorney General's decision to remove an independent counsel, . . . in our view this is a function well within the traditional power of the judiciary."<sup>146</sup>

Finally, the Court found that although the Act does not allow the Attorney General to appoint the individual of his choice,<sup>147</sup> or to determine the counsel's jurisdiction,<sup>148</sup> and it limits his power of removal,<sup>149</sup> "[t]he Act does give the Attorney General several means of supervising and controlling the prosecutorial powers that may be wielded by an independent counsel."<sup>150</sup> Because powers of initiation,<sup>151</sup> fact gathering,<sup>152</sup> and removal<sup>153</sup> were still retained by the Executive, the Court found it unnecessary to strike down the statute.<sup>154</sup>

### *B. Dissenting Opinion*

Standing alone, Justice Scalia believed the Act was violative of the separation of powers doctrine and hence, unconstitutional.<sup>155</sup> Espousing a theoretical underpinning which viewed the coordinate branches as discrete and non-blending, except where otherwise expressly provided in the constitution, Justice Scalia believed the Act departs from the

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145. *See, e.g.*, 28 U.S.C. §§ 593(b)(3), 594(a), 594(h)(i) (1982 & Supp. 1987).

146. *Morrison*, 108 S. Ct. at 2621.

147. *Id.* *See, e.g.*, 28 U.S.C. §§ 591(c), 592(c)(1) (1982 & Supp. 1987).

148. *Morrison*, 108 S. Ct. at 2621; 28 U.S.C. § 593(b) (1982 & Supp. 1987).

149. *Morrison*, 108 S. Ct. at 2621; 28 U.S.C. § 596 (1982 & Supp. 1987).

150. *Morrison*, 108 S. Ct. at 2621.

151. *Morrison*, 108 S. Ct. at 2621; 28 U.S.C. § 592(c)(1) (1982 & Supp. 1987).

152. *Morrison*, 108 S. Ct. at 2621; 28 U.S.C. § 592(a)(1) (1982 & Supp. 1987).

153. *Morrison*, 108 S. Ct. at 2621; 28 U.S.C. § 596(a)(1) (1982 & Supp. 1987).

154. *Morrison*, 108 S. Ct. at 2621-22; 28 U.S.C. § 594(f) (1982 & Supp. 1987).

155. *Morrison*, 108 S. Ct. at 2631 (Scalia, J., dissenting).

founding fathers intent:

The Court devotes most of its attention to such relatively technical details as the Appointments Clause and the removal power, addressing briefly, and only at the end of its opinion the separation of powers doctrine . . . . I think that [order] has it backwards. Thus, while I will subsequently discuss why our appointments and removal jurisprudence does not support today's holding, I begin with a consideration of the fountainhead of that jurisprudence, the separation and equilibrium of powers.<sup>156</sup>

To illustrate this point, Justice Scalia noted that the doctrine is repeatedly expressed in the first section of each of the first three articles of the Constitution.<sup>157</sup> In particular, Justice Scalia cites the relevant section of Article II which says, "[t]he executive Powers shall be vested in a President of the United States."<sup>158</sup> From this quotation, Justice Scalia argued that, "this does not mean *some* of the executive power, but *all* of the executive power."<sup>159</sup> Justice Scalia seems to take a more simplistic view of the separation of powers doctrine. He confines his analysis to two fundamental questions: "[i]s the conduct of a criminal prosecution (and investigation to decide whether to prosecute) the exercise of purely executive power?"<sup>160</sup> and "[d]oes the statute deprive the President of exclusive control over the exercise of that power?"<sup>161</sup> Justice Scalia believed that the majority appeared to answer both questions in the affirmative, yet sought to avoid the inevitable

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156. *Id.* at 2625.

157. *Id.* at 2622.

158. *Id.* at 2626 (citing U.S. CONST. art. II, § 1, cl. 1.).

159. *Id.* at 2626 (emphasis in original text).

160. *Id.*

161. *Id.*

conclusion that because the statute vests some purely executive power in a person who is not the President, it is therefore void.<sup>162</sup>

The dissent opined that the majority's decision effects a revolution in constitutional jurisprudence. The decision allows the Court, once it has determined that purely executive functions are at issue, and that those functions have been given to a person whose actions are not fully within the supervision and control of the President, to nonetheless proceed further and determine whether the President's need to control the exercise of the person's discretion is "so central to the functioning of the Executive Branch as to require complete control."<sup>163</sup> Justice Scalia writes:

[w]hether 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" . . . is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. *The Constitution prescribes that they all are.*<sup>164</sup>

Justice Scalia refuted the legislature's conflict of interest rationale<sup>165</sup> by asserting that "[w]hile the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty."<sup>166</sup> He believed

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162. *Id.*

163. *Id.* at 2628.

164. *Id.* at 2628 (quoting majority opinion at 2621) (emphasis added).

165. *See supra* text accompanying notes 35-40.

166. *Morrison*, 108 S. Ct. at 2629. ("Is it unthinkable that the President should have exclusive power, even when alleged crimes by him or his close associates are at issue? No more so than that Congress should have the exclusive power of legislation, even when what is at issue is its own exemption from the burdens of certain laws. No more so than that this Court should have the exclusive power to pronounce the final decision on justiciable cases and controversies, even those pertaining to the constitutionality of a statute reducing the salaries

that both the impeachment power of Congress and the voting booth were the means by which the Framers had intended to check any executive abuses.<sup>167</sup> Also, he believed that the majority effectively replaced a clear constitutional prescription that the executive power belongs to the President with what he termed to be a balancing test.<sup>168</sup> Justice Scalia believed that such a balancing test is beyond the constitutional mandate, and that a case-by-case analysis of the type used by the majority would lead to the blurring of lines between the three branches.<sup>169</sup>

Justice Scalia also believed that it was important to note the events leading up to the *Morrison* litigation.<sup>170</sup> The case began when the Legislative and Executive Branches became "embroiled in a dispute concerning the scope of congressional investigatory power."<sup>171</sup> Olson and others were charged by the House Judiciary Committee for not cooperating with Congressional oversight hearings with regard to various internal Environmental Protection Agency documents which he was accused of improperly withholding.<sup>172</sup> The Committee conducted a two and one-half year investigation of the Justice Department's role in the controversy and issued a 3,000 page report.<sup>173</sup> The Committee then made a formal request for the appointment of an independent counsel.<sup>174</sup> As a practical matter, Justice Scalia believed, the Attorney General had little choice but to seek

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of the Justices." *Id.*).

167. *Id.*

168. *Id.*

169. *Id.* at 2630.

170. *Id.* at 2623-24.

171. *Id.* at 2623 (quoting *United States v. House of Representatives*, 556 F. Supp. 150, 152 (D.D.C. 1983)).

172. *See id.* at 2624 (citing *United States v. House of Representatives*, 556 F. Supp. 150, 152 (D.D.C. 1983)). *See supra* note 11 and accompanying text.

173. *Morrison*, 108 S. Ct. at 2624 (citing *United States v. House of Representatives*, 556 F. Supp. 150, 152 (D.D.C. 1983)).

174. *See id.* (citing *United States v. House of Representatives*, 556 F. Supp. 150, 152 (D.D.C. 1983)).

appointment given the "no reasonable grounds to believe standard."<sup>175</sup> The statute compels certain action from the Attorney General which in essence "deprive[s] the President of substantial control over the prosecutory functions performed by the independent counsel, and does substantially affect the balance of powers."<sup>176</sup>

The power to decide when to prosecute, Scalia reasoned, was one of the "natural advantages the Constitution gave to the Presidency, just as it gave Members of Congress" legislative immunity.<sup>177</sup> To disturb this planned balance, as Scalia perceived it, through the enactment of the statute, was unconstitutional.<sup>178</sup> According to Scalia, the impact of this change would be that:

[B]esides weakening the Presidency by reducing the zeal of his staff, it must also be obvious that the institution of the independent counsel enfeebles him more directly in his constant confrontations with Congress, by eroding his public support. Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrong-headed, naive, [and] ineffective, but, in all probability, crooks.<sup>179</sup>

The dissenting opinion also argued that the Act should be invalidated because the independent counsel is not an inferior officer, and hence requires "advice and consent" appointment as a principle officer.<sup>180</sup> Justice Scalia criticized the majority's reasoning for ruling the counsel inferior by

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175. *See id.* at 2624 (quoting 28 U.S.C. § 592(b)(1) (1982 & Supp. 1987)).

176. *Id.* at 2631.

177. *Id.* at 2630.

178. *Id.*

179. *Id.*

180. *Id.* at 2635.



raising three points: first, removability by the executive branch is not significant where there are good cause restrictions on the Attorney General.<sup>181</sup> In this regard, Justice Scalia notes that "[m]ost [if not all] *principal* officers in the Executive Branch may be removed by the President *at will*."<sup>182</sup> He could see no reason "how the fact that [the independent counsel] is more difficult to remove than most principal officers helps to establish that she is an inferior officer."<sup>183</sup>

Second, Justice Scalia argued that the Court mischaracterized the extent of the counsel's power by labeling them as "limited."<sup>184</sup> Rather, Scalia believed that where the "[a]ct delegates . . . 'full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice',"<sup>185</sup> the independent counsel's powers are not truly "limited."<sup>186</sup> Finally, Justice Scalia noted that there is nothing unusual about the counsel's tenure which makes the position "inferior."<sup>187</sup> He pointed out that the independent counsel continues as long as there is work to complete, and that they often serve longer terms than many cabinet members.<sup>188</sup> In summation to this argument, Justice Scalia wrote, "[b]ecause appellant is not subordinate to another officer, she is not an 'inferior' officer and her appointment other than by the President with the advice and consent of the Senate is unconstitutional."<sup>189</sup>

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181. *Id.* at 2632.

182. *Id.* (emphasis in original text).

183. *Id.*

184. *Id.*

185. *Id.* (quoting majority opinion at 2632).

186. *Id.*

187. *Id.* at 2633.

188. *Id.*

189. *Id.* at 2635. (citing *DICTIONARY OF THE ENGLISH LANGUAGE* (S. Johnson 6th ed. 1785) which was used at the time of the Constitutional Convention to determine what the framers intended by the word "inferior." Justice Scalia found "subordinate" as the definition of "inferior" inside the pages of the dictionary. *Id.*)

The dissent also attacked the majority's new "present considered view" standard.<sup>190</sup> Justice Scalia believed that what the Court is essentially saying to the President with this new standard is, "trust us, we will make sure that you are able to accomplish your constitutional role."<sup>191</sup> Justice Scalia felt that the Constitution gives the President more protection.<sup>192</sup>

As a final point, Justice Scalia believed that the Act removes such investigations and prosecutions from political accountability.<sup>193</sup> "Under our system of government,"<sup>194</sup> he argued, "the primary check against prosecutorial abuse is a political one."<sup>195</sup> He found it significant that the power to appoint and define jurisdiction was removed from the President and transferred to an unelected panel of judges with inevitable political prejudices.<sup>196</sup> Justice Scalia concluded his dissenting opinion by stating:

[T]oday's decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law. It extends into the very heart of our most significant constitutional function the 'totality of circumstances' mode of analysis that this Court has in recent years become fond of the ad hoc approach to constitutional adjudication is guaranteed to produce a result, [based on] what the majority thinks, taking all things into account, it *ought* to be. I prefer to rely upon the judgment of the wise men who constructed our system, and of the people who approved it, and

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190. *Id.* at 2636-37 (quoting majority opinion at 2618).

191. *Id.* at 2637.

192. *Id.*

193. *Id.* at 2637-40.

194. *Id.*

195. *Id.*

196. *Id.* at 2639.

of two centuries of history that have shown it to be sound.<sup>197</sup>

#### IV. CONCLUSION

The Supreme Court's decision upholding the law on independent prosecutors will probably be looked upon as a "[f]ootnote to history, ratifying one of the major legacies of the Watergate experience."<sup>198</sup> As one commentator has remarked, "[T]he Court removed all lingering doubt about the constitutionality of the steps Congress took to spare the country the trauma of a repetition of the Saturday Night massacre in which President Nixon ordered the dismissal of the Watergate special prosecutor."<sup>199</sup>

Notwithstanding the abstract persuasiveness and cogency of Justice Scalia's dissent, the Court appears to have reached the correct result. At stake in this decision was "[t]he status of a key structural change in the functioning of government regarding investigatory and prosecutory powers."<sup>200</sup> The structural change implemented however, clearly appears to be constitutional.<sup>201</sup> Although the Act has the practical effect of removing power from the President and the Executive Branch, this change in structure is nonetheless acceptable because that power was only "diluted" and not destroyed.<sup>202</sup> Also, any attempt at expansion of the office in a manner inconsistent with its present form may subject the Act to successful attacks.<sup>203</sup>

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197. *Id.* at 2641 (emphasis in original text).

198. Greenhouse, *supra* note 28, at A1, col. 4.

199. *Id.*

200. *Id.*

201. See *supra* text accompanying notes 94-109.

202. *Morrison v. Olson*, 108 S. Ct. 2597, 2621-22 (1988) (Chief Justice Rehnquist stating that "[n]otwithstanding the fact that counsel is to some degree 'independent' and free from Executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." *Id.*).

203. *Id.* at 2615.

The validity of the Act is also strengthened by the fact that no single other branch, particularly Congress,<sup>204</sup> is the sole recipient of this power.<sup>205</sup> Moreover, even though the role of the judicial branch was undoubtedly increased by the Act, the Court found ample support in past precedent which permitted this increased role.<sup>206</sup>

The *Morrison* decision was considered "a stinging political and philosophical blow"<sup>207</sup> to both formalists<sup>208</sup> and executive supremacists.<sup>209</sup> Notwithstanding their concerns, it is important to remember that the core executive functions of initiation and removal of the independent counsel still remain with the Executive Branch.<sup>210</sup> Moreover, despite rather stringent restrictions over Executive control of the counsel, its office is truly limited in nature and subject to scrutiny.<sup>211</sup> Baseless allegations will be checked just as they presently are by the Judiciary. The importance of the Act is that it provides the mechanism with which to trigger a needed investigation where the claims of foul play are not baseless.

Despite an inevitable erosion of executive discretion over "in-house" prosecutorial power,<sup>212</sup> the Act is a limited and cautious response to the growing charges of impropriety which have plagued the upper echelons of the federal government.<sup>213</sup> The independent counsel statute is both an ethical and democratic response to the perceived need to "clean up" national politics. When a society is governed by rules of law, rather than by rules of "men," public officials are also expected

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204. *Id.* ("Unlike *Bowsher* and *Myers* [whose statutes were struck down], this case does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction." *Id.*).

205. See *supra* text accompanying notes 138-42.

206. *Morrison*, 108 S. Ct. at 2620-21.

207. Greenhouse, *supra* note 28, at A1, col. 5.

208. See *supra* note 20.

209. Greenhouse, *supra* note 28, at A1, col. 5.

210. See *supra* notes 151-54.

211. See *supra* notes 99-102.

212. See *supra* text accompanying notes 125-27.

213. See, e.g., *In re Sealed Case* (North), 829 F.2d 50 (D.C. Cir. 1987) (Oliver North).

to act according to the command of these rules.<sup>214</sup> The independent counsel is an effective vehicle with which to ensure such compliance with minimal impediments upon established doctrines of constitutional law.

James Madison, one of the foremost authorities on original intent, pointed out that a fundamental goal of the Constitution was to "control abuse of government."<sup>215</sup> In a pignnant statement on the countervailing effects of power, Madison wrote: "[a]mbition must be made to counteract ambition . . . . If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."<sup>216</sup> Knowing that certain checks must be instilled in any system of government to curtail political abuse, it can be said that Madison would have endorsed the independent counsel as a constitutionally viable, and perhaps necessary, means of obtaining this end.<sup>217</sup>

Human rights begin at home. The executive branch must be held to the same degree of accountability over the laws as the rest of the American people. By legislating the Act, Congress maintained a consistency with both the legislative intent of the framers and the greater good of the country. Upholding the validity of the Act was a sound decision by the Court.

*J. Andrew Kinsey*

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214. See THE FEDERALIST No. 51, at 322 (C. Rossiter ed. 1961).

215. THE FEDERALIST No. 51, at 322 (J. Madison) (C. Rossiter ed. 1961).

216. *Id.*

217. THE FEDERALIST No. 10, at 79 (J. Madison) (C. Rossiter ed. 1961) ("No man is allowed to be judge in his own cause, because his interest would certainly bias his judgment, and not improbably, corrupt his integrity." *Id.*).