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THE SEPARATION OF POWERS AND ABUSES IN PROSECUTORIAL DISCRETION

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

I. INTRODUCTION

In *Morrison v. Olson*,¹ the United States Supreme Court upheld the constitutionality of the independent counsel provision of the Ethics in Government Act.² The Court held that the appointment and removal procedures of the provision did not violate articles II³ and III⁴ of the United States Constitution, nor did the independent counsel mechanism as a whole violate the constitutional principle of a separation of governmental powers. This Note summarizes both the majority's opinion in *Morrison*, as well as the dissent offered by Justice Scalia. This Note then analyzes the majority's conclusions in light of the precedent established in recent separation of powers cases and the potential for prosecutorial abuse engendered by the placement of the criminal law enforcement function in an office independent of the Executive Branch. This Note concludes that because there is little accountability in the office of independent counsel, and such counsel's decisions are made unconstrained by the institutional considerations that serve as a check on the overzealous enforcement of law, abuses in the exercise of prosecutorial discretion are inevitable under the Ethics in Government Act. Furthermore, this Note argues that the independent counsel mechanism is susceptible to subversion for purely political ends which bear little resemblance to the original legislative intentions behind the creation of the office.

II. THE ETHICS IN GOVERNMENT ACT

The Ethics in Government Act was enacted "to preserve and

¹ 108 S. Ct. 2597 (1988).

² 28 U.S.C.A. §§ 591-599 (West Supp. 1988). Congress originally enacted the Act in 1978, Pub. L. 95-521, 92 Stat. 1867. It has been reenacted with minor amendments twice since 1978. See Pub. L. 97-409, 96 Stat. 2039; Pub. L. 100-191, 101 Stat. 1293.

³ See *infra* notes 70, 76.

⁴ See *infra* note 81.

promote the accountability and integrity of public officials and of the institutions of the Federal Government and to invigorate the constitutional separation of powers between the three branches of government.”⁵ The Act is premised on the belief that the Executive Branch of the federal government cannot be trusted to carry out investigations of alleged misconduct by its own members in a vigorous and impartial manner.⁶ This doubt stems from the dual nature of the role of Attorney General, who must act as both the nation’s chief law enforcement officer and the Executive Branch’s highest ranking counsel on legal matters. Moreover, the legislators were concerned with bias on the part of the Attorney General, who is often a long-time friend of or confidante to the President.⁷ When allegations arise of illegal actions on the part of Executive Branch officials, these interests compete and, it was believed, may prevent a dispassionate and thorough investigation by the Department of Justice.

The abuses of the Nixon Administration in the Watergate scandal demonstrated the veracity of this thesis and provided Congress with the political support necessary to legislate preventive measures.⁸ Yet remedial legislation was not passed until five years after

⁵ S. REP. NO. 170, 95th Cong., 1st Sess. 1 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4216-17 [hereinafter S. REP. 170].

⁶ *See generally id.* The Senate report states:

A study by the Congressional Research Service . . . identified a number of instances over the last twenty years where, due to a serious conflict on the part of the Attorney General or the President, an investigation handled outside the Justice Department would have been appropriate. Such incidents involved allegations of wrongdoing against a top assistant to a President, criminal conduct by a close associate and employee of a President prior to the time the President took office, and the investigation and prosecution of a sitting Vice President.

Id. at 4219-20.

⁷ Taylor, “Meese Fits Attorney General Mold: Close Ties to the Chief,” *L.A. Daily J.*, Jan 31, 1984, at 4, col. 3 (The selection by Presidents of personal, business, or political associates as Attorneys General is common.)

⁸ Although on several occasions in American history, special prosecutors had been appointed to investigate alleged criminal misconduct by high-level Federal Government officials (e.g., the “whiskey ring” scandal of the Grant Administration and the “Teapot Dome” scandal of the Harding Administration), the most substantial interest in the creation of a permanent mechanism arose in the wake of the “Watergate” scandal.

The public first became aware of the Watergate scandal in late 1972. In the Spring of 1973, the Senate Judiciary Committee explored the need for a special prosecutor to investigate scattered reports of illegal actions by members of President Nixon’s Administration. In response, President Nixon made a commitment to appoint such an investigator, and, on May 25, 1973, Attorney General Elliot Richardson chose Archibald Cox to perform this task. S. Rep. 170, *supra* note 5, at 2-3.

When in the course of his investigation, Mr. Cox insisted that the President release accounts of presidential conversations, the President ordered him removed, in what later became known as the “Saturday Night Massacre.” After this firing, President Nixon argued that the investigation could be handled by the Department of Justice. But

the scandal, a time period in which Congress held extensive hearings and considered a plethora of proposed solutions.⁹ This lengthy period of deliberation was necessary in part because of the constitutional problems presented by the creation of a law enforcement mechanism independent of the Executive Branch.¹⁰ In October of 1978, the Act was passed.¹¹

As codified, the independent counsel provision, Title VI of the Act, applies only to senior officials of the executive branch, including the president, vice-president, and the cabinet.¹² It requires the attorney general to conduct a preliminary investigation upon receipt of information suggesting that an included executive official has committed a serious federal crime.¹³

Only information "sufficient to constitute grounds to investi-

the Judiciary Committees of the Senate and the House of Representatives held extensive hearings on legislation to require the appointment of a temporary special prosecutor. Faced with an enormous public outcry over the Cox firing and the rising probability of congressional action demanding such an appointment, President Nixon appointed Leon Jaworski as special prosecutor. *Id.*

In the spring of 1974, the Subcommittee on Separation of Powers of the Senate Judiciary Committee held hearings on proposed ways of removing political considerations from the administration of justice. Among the major conclusions drawn by the Subcommittee from these initial hearings was that, "No one who has watched 'Watergate' unfold can doubt that the Justice Department has difficulty investigating and prosecuting high officials, or that an independent prosecutor is freer to act according to politically neutral principles of fairness and justice." WATERGATE SPECIAL PROSECUTION FORCE FINAL REPORT, at 137-38 (1977). *See generally*, S. Rep. 170, *supra* note 5, at 2-3, reprinted in 1978 U.S. Code & Cong. & Ad. News at 4218-19.

⁹ Fifty-seven bills providing for a special prosecutor were introduced in the 93rd Congress alone. Cong. Index (CCH) 222 (1974). In the 94th and 95th Congresses, twenty-five special prosecutor bills were introduced. *See* Brief for Appellants at Addendum A, *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984).

Many legal scholars, members of the bar, present and former high officials, and other interested parties provided testimony before the congressional committees formulating special prosecutor legislation. *See, e.g., Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973); *Hearings Before the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. (1975); *Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977).

¹⁰ Congressional committees considering legislation were "confronted with sharply conflicting testimony regarding the constitutionality of a special prosecutor whose appointment and removal were totally separated from the executive branch." S. REP. NO. 273, 95th Cong., Sess. 2 (1977), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4376, 4377. *See also* Bruff, *Independent Counsel and the Constitution*, 24 WILLAMETTE L. REV. 539, 540 (1988) ("The constitutionality of insulating prosecution from presidential control has been uncertain from the Act's inception.").

¹¹ *See supra* note 2.

¹² 28 U.S.C. § 591(b) (West Supp. 1988).

¹³ *Id.* at § 591(a). This section states: "The Attorney General shall conduct a preliminary investigation . . . whenever the Attorney General receives information sufficient to constitute grounds to investigate whether any person described in subsection (b) may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction." *Id.*

gate” is required to warrant the appointment of an independent counsel.¹⁴ In determining whether such grounds exist, “the Attorney General shall consider only the specificity of the information received;¹⁵ and the credibility of the source of the information.”¹⁶ If, after preliminary investigation, the Attorney General determines that “there are reasonable grounds to believe that further investigation is warranted,” he or she must apply to a Special Division of the Court of Appeals for the District of Columbia Circuit for the appointment of an independent counsel.¹⁷ Conversely, if the Attorney General concludes that there are “no reasonable grounds” to warrant further investigation, the case is terminated.¹⁸

Although a decision not to continue the investigation is not subject to judicial review,¹⁹ the Attorney General is required upon such a determination to present the Special Division with “a summary of the information received and a summary of the results of the preliminary investigation.”²⁰ An appointment of an independent counsel may also be requested by members of Congress. The Attorney General must then determine whether such an appointment is necessary and if not, he must “submit a report . . . stating the reasons why such an application was not made, addressing each matter with respect to which the congressional request was made.”²¹

The Ethics in Government Act directs the Special Division of the Court of Appeals to appoint the independent counsel and to define the scope of his or her jurisdiction to include subjects speci-

¹⁴ *Id.*

¹⁵ *Id.* at § 591 (d)(1)(A).

¹⁶ *Id.* at § 591 (d)(1)(B).

¹⁷ *Id.* at § 592 (c)(1)(A). Also, under § 592(c)(1)(B), the Attorney General shall apply for such an appointment if the three month time period generally allotted for the preliminary investigation passes and the Attorney General “has not filed notification with the division of the court” that further investigation is not warranted. *See Id.* § 592(b)(1).

¹⁸ *Id.* at § 592(b)(1). This section states: “The Attorney General shall notify the Special Division of this decision,” *id.* and “such notification shall contain a summary of the information received and a summary of the results of the preliminary investigation.” *Id.* at § 592(b)(2).

¹⁹ The non-review section of the statute states: “The Attorney General’s determination under this chapter to apply to the division of the court for the appointment of an independent counsel shall not be reviewable in any court.” *Id.* at § 592(f). Although from the language of the statute it is not clear that this includes a determination by the Attorney General not to apply for the appointment of an independent counsel, the *Morrison* majority interpreted it as such: “the courts are specifically prevented from reviewing the Attorney General’s decision not to seek appointment. § 592(f),” *Morrison*, 108 S. Ct. at 2621. Justice Scalia reached a similar conclusion in his dissent, although his was based on a different rationale. *See id.* at 2625 n.1. (Scalia, J., dissenting).

²⁰ 28 U.S.C. § 592(b)(2) (West Supp. 1988).

²¹ *Id.* at § 592(g)(3).

fied in the Attorney General's application, as well as related matters.²² This jurisdiction may be expanded upon request by the Attorney General,²³ either on his own initiative or in response to an evaluation of information discovered and submitted by the independent counsel.²⁴ Upon appointment, the independent counsel receives the full investigative and prosecutorial powers of the Department of Justice,²⁵ whose policies respecting enforcement of the criminal laws he or she must follow "except where not possible."²⁶ In addition to this broad endowment of prosecutorial power, further specific powers are conferred upon the independent counsel by the Act.²⁷

The Attorney General's decision to remove the counsel "for good cause"²⁸ is subject to judicial review.²⁹ The Special Division

²² *Id.* at § 593(b)(1-3).

²³ *Id.* at § 593(c)(1).

²⁴ *Id.* at § 593(c)(2)(A)-(C), § 594(e). In evaluating whether information discovered by the independent counsel warrants an expansion of his or her jurisdiction, the Attorney General shall "accord[] great weight to the recommendations of the independent counsel." *Id.* at § 594(e).

²⁵ *Id.* at § 594(a).

²⁶ *Id.* at § 594(f).

²⁷ *Id.* at § 594(a)(1)-(10). These powers include:

Such investigative and prosecutorial functions and powers shall include-

- (1) conducting proceedings before grand juries and other investigations;
- (2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such independent counsel considers necessary;
- (3) appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity;
- (4) reviewing all documentary evidence available from any source;
- (5) determining whether to contest the assertion of any testimonial privilege;
- (6) receiving appropriate national security clearances and, if necessary, contesting in court . . . any claim of privilege or attempt to withhold evidence on grounds of national security;
- (7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;
- (8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1986 and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General;
- (9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case, in the name of the United States; and
- (10) consulting with the United States attorney for the district in which any violation of law with respect to which the independent counsel is appointed was alleged to have occurred.

Id.

²⁸ *Id.* at § 596(a)(1). Besides good cause, the Attorney General may remove for reasons of "physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." *Id.*

may terminate the office on grounds that the investigation has been "substantially completed,"³⁰ and the counsel him or herself may terminate his or her office on the same grounds.³¹

Congress retains "oversight jurisdiction with respect to the official conduct of any independent counsel . . . , and such independent counsel [has] the duty to cooperate with the exercise of such oversight jurisdiction."³² The independent counsel must advise the House of Representatives of any "substantial and credible information" he or she receives which may constitute grounds for an impeachment of an Executive officer.³³ Congress also retains supervisory authority over the conduct of the Attorney General, who must provide upon congressional request information regarding any case arising under the independent counsel provision.³⁴

III. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In September 1982, two subcommittees of the House of Representatives requested the Environmental Protection Agency ("EPA") to provide them with internal agency documents relating to the efforts of the EPA and the Land and Natural Resources Division of the Department of Justice ("DOJ") to clean up hazardous waste sites as required by the "Superfund Law."³⁵ Under direction from the DOJ, the EPA complied partially with the subcommittee request, but withheld certain documents, claiming that congressional access to such sensitive materials would interfere with law enforcement efforts.³⁶

²⁹ *Id.* at § 596(a)(3). "An independent counsel removed from office may obtain judicial review of the removal in a civil action. . . . The independent counsel may be reinstated or granted other appropriate relief by order of the court." *Id.*

³⁰ *Id.* at § 596(b)(2).

³¹ *Id.* at § 596(b)(1)(A).

³² *Id.* at § 595(a)(1).

³³ *Id.* at § 595(c).

³⁴ *Id.* at § 595(b). The Attorney General must provide Congress with the following information:

(1) When the information about the case was received.

(2) Whether a preliminary investigation is being conducted, and if so, the date it began.

(3) Whether an application for the appointment of an independent counsel or a notification that further investigation is not warranted has been filed with the division of the court, and if so, the date of such filing.

Id.

³⁵ *Morrison v. Olson*, 108 S. Ct. 2597, 2605 (1988); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767; 42 U.S.C. § 9601. A primary motivation for the request was the concern of House members that the Reagan Administration was expending funds in order to aid Republican candidates for Senate in the 1982 elections. *In re Sealed Case*, 838 F.2d 476, 478 (D.C. Cir. 1987).

³⁶ *In re Sealed Case*, 838 F.2d at 478.

After attempts for a negotiated compromise between the two branches failed, the House subcommittees issued subpoenas to the EPA Administrator, ordering compliance with the earlier request.³⁷

At that time, appellee Theodore B. Olson was the Assistant Attorney General for the Office of Legal Counsel; appellee Edward C. Schmults was Deputy Attorney General; and appellee Carol E. Dinkins was the Assistant Attorney General for the Land and Natural Resources Division.³⁸

Acting on the advice of the DOJ, the President ordered the Administrator of the EPA to invoke executive privilege and refuse to comply with the subpoenas.³⁹ The House of Representatives responded by citing the Administrator for contempt, after which the Administrator and the United States together filed a lawsuit against the House.⁴⁰ In March of 1983, the conflict abated as the Administrator and the two subcommittees reached an agreement providing limited access to the documents.⁴¹

Concurrent to this series of events, a subcommittee of the House Judiciary Committee had begun an investigation into the involvement of DOJ in the EPA document controversy.⁴² As part of that investigation, Assistant Attorney General Olson testified before the subcommittee on March 10, 1983.⁴³ Both before and after that testimony, DOJ complied with several requests from this subcommittee to produce certain documents related to the EPA dispute.⁴⁴ At the completion of the investigation, the House Judiciary Committee issued a lengthy report, over the vigorous dissent of its minority party members.⁴⁵ The report criticized various DOJ officials for their actions in the EPA executive privilege dispute.⁴⁶ It suggested that appellee Olson had given false and misleading testimony in his appearance of March 10, 1983, and that appellees Dinkins and Schmults had wrongfully withheld certain documents from the

³⁷ *Morrison*, 108 S. Ct. at 2605. For a more detailed account of the facts underlying the records request, see Brand & Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U.L. REV. 71 (1986).

³⁸ *Morrison*, 108 S. Ct. at 2605.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 2606. See *Report on Investigation of the Role of the Department Of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982-83*, H.R. REP. No. 435, 99th Congr., 1st Sess. (1985).

⁴⁶ *Morrison*, 108 S. Ct. at 2606.

Committee, thus obstructing its investigation.⁴⁷ The Committee Chairman forwarded a copy of the report to the Attorney General with a request, pursuant to the Ethics in Government Act's independent counsel provision,⁴⁸ that an independent counsel be appointed to investigate the allegations.⁴⁹

The Attorney General directed the Public Integrity Section of the Criminal Division to conduct a preliminary investigation.⁵⁰ The Section's report concluded that the appointment of an independent counsel was warranted to investigate all three appellees.⁵¹ After consulting with other DOJ officials, the Attorney General chose to apply to the Special Division for the appointment of an independent counsel with respect to Olson only.⁵² On April 10, 1986, the Attorney General asked the Special Court to appoint an independent counsel to investigate

[w]hether the conduct of former Assistant Attorney General Theodore Olson in giving testimony at a hearing of the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee on March 10, 1983, and later revising that testimony, regarding the completeness of the Office of Legal Counsel's response to the Judiciary Committee's request for OLC documents, and regarding his knowledge of EPA's willingness to turn over certain disputed documents to Congress, violated 18 U.S.C. § 1505 § 1001, or any other provision of federal criminal law.⁵³

The Attorney General also requested that the independent counsel have authority to investigate "any other matter related to that investigation."⁵⁴

On May 29, 1986, the Special Court appointed appellant Alexia Morrison as independent counsel.⁵⁵ Morrison's jurisdiction covered an investigation into "whether the testimony of . . . Olson and his revision of such testimony on March 10, 1983, violated either 18

⁴⁷ *Id.*

⁴⁸ 28 U.S.C. § 592(c) (West Supp. 1988).

⁴⁹ *Morrison*, 108 S. Ct. at 2606.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* The Attorney General concluded that appellees Schmults and Dinkins lacked the requisite "criminal intent" to impede upon the Committee's investigation. *Id.*

⁵³ *Id.* (quoting *Report of the Attorney General Pursuant to 28 U.S.C. § 592(c)(1) Regarding Allegations Against Department of Justice Officials in United States House Judiciary Committee Report*, at 2-3 (footnote omitted) [hereinafter *Report of the Attorney General*]).

⁵⁴ *Morrison*, 108 S. Ct. at 2606 (quoting *Report of the Attorney General*, *supra* note 53, at 11).

⁵⁵ *Morrison*, 108 S. Ct. at 2606. Originally, on April 23, 1986, James C. McKay had been appointed as independent counsel but he resigned shortly after because of a conflict of interest. Morrison was appointed to replace him. *Id.*

U.S.C. § 1505 or § 1001, or any other provision of federal law.’”⁵⁶ The Special Court also ordered that the independent counsel shall have jurisdiction to investigate any other allegation of evidence of violation of any Federal criminal law by Theodore Olson, developed during investigations, by the Independent Counsel, referred to above, and connected with or arising out of that investigation, and Independent Counsel shall have jurisdiction to prosecute for any such violation.⁵⁷

In November of 1986, Morrison applied to the Attorney General for expanded jurisdiction to probe as “related matters” the Judiciary Committee’s allegations against Schmults and Dinkins.⁵⁸ In particular, Morrison wanted to investigate “whether Mr. Olson’s testimony was part of a larger, concerted plan, including Mr. Schmults, Ms. Dinkins, or others, to obstruct or impede the Committee’s investigation . . . possibly in violation of federal criminal law.”⁵⁹ The Attorney General refused the application because his initial investigation of the Committee’s allegations had “‘found no reasonable grounds to believe that further investigation of the Committee’s allegations is warranted,’” specifically including any criminal conspiracy among the appellees.⁶⁰ Morrison then appealed to the Special Court to order that her jurisdiction be expanded.⁶¹ On April 2, 1987, the Division ruled that the Attorney General’s initial decision not to seek appointment of an independent counsel with regard to Schmults and Dinkins was final and unreviewable, and thus the Special Court had no authority to grant the appellant’s request.⁶² The court ruled, however, that “authority to investigate allegations and evidence that Theodore Olson was engaged in an unlawful conspiracy with others” was implicit in its original grant of jurisdiction, so that inquiry into the allegations against Schmults and Dinkins was permissible.⁶³

After this ruling, in May and June of 1987, the independent

⁵⁶ *Id.* (quoting *Order*, Div. No. 86-1 (CADC Special Division, April 23, 1986)). 18 U.S.C. § 1505 and 8 U.S.C. § 1001 criminalize the obstruction of proceedings before congressional committees.

⁵⁷ *Morrison*, 108 S. Ct. at 2606 (quoting *Order*, Div. No. 86-1).

⁵⁸ *Id.* at 2606. Morrison’s request for expanded jurisdiction was made pursuant to 28 U.S.C. § 594(e), “Referral of Other Matters to an Independent Counsel.” See *supra* note 24.

⁵⁹ *In re Sealed Case*, 838 F.2d at 479-480 (quoting Letter from Alexia Morrison to Edwin Meese III 3 (Nov. 14, 1986)).

⁶⁰ *In re Sealed Case*, 838 F.2d at 480 (quoting Letter from Arnold I. Burns, Deputy Attorney General, to Alexia Morrison 2 (Dec. 17, 1986)).

⁶¹ *Morrison*, 108 S. Ct. at 2606.

⁶² *In re Sealed Case*, 838 F.2d at 480. The Court based its decision of non-reviewability on 28 U.S.C. § 592(b)(1) (West Supp. 1988). See *supra* notes 18-19.

⁶³ *In re Sealed Case*, 838 F.2d at 480.

counsel caused a grand jury to issue subpoenas on the appellees.⁶⁴ All three appellees moved to quash the subpoenas on the ground that the independent counsel provisions of the Ethics in Government Act were unconstitutional.⁶⁵ On July 20, 1987, the district court upheld the constitutionality of the Act.⁶⁶ In order to pursue their challenge to the Act on appeal, the appellees refused to comply with the subpoenas, and were held in contempt of the district court.⁶⁷ The court, however, stayed the effect of its contempt orders pending an expedited appeal.⁶⁸

A panel of the Court of Appeals for the District of Columbia Circuit voted two to one to reverse.⁶⁹ The court held that an independent counsel is not an "inferior Officer" of the United States in the context of the "Appointments Clause"⁷⁰ of the Constitution:

[W]e think the independent counsel's authority is so broad as to compel the conclusion that she is a principal officer and therefore her appointment by the Special Court is unconstitutional. After all, the independent counsel's authority is—at least with respect to any matter within her jurisdiction—broader even than the Attorney General's . . . [T]he independent counsel has authority unchecked by the President himself to decide that an investigation shall continue and that a prosecution shall be initiated.⁷¹

Therefore, the court of appeals ruled that the Act was unconstitutional because it does not provide for the independent counsel to be nominated by the President and confirmed by the Senate, as is required by the clause⁷² for the appointment of "principal" officers.⁷³

The court further stated that, even if it is assumed *arguendo* that the independent counsel is an inferior officer, the Act is uncon-

⁶⁴ *Morrison*, 108 S. Ct. at 2607.

⁶⁵ *Id.*

⁶⁶ *In re Sealed Case*, 665 F. Supp. 56 (D.C. 1987).

⁶⁷ *Morrison*, 108 S. Ct. at 2607.

⁶⁸ *Id.*

⁶⁹ *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988).

⁷⁰ U.S. CONST. art. II, § 2, cl. 2 states:

[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.

That part of this clause that provides for the appointment of inferior officers is called the "excepting clause."

⁷¹ *In re Sealed Case*, 838 F.2d at 486.

⁷² *See supra* note 70.

⁷³ *In re Sealed Case*, 838 F.2d at 484. The court stated that "under the [appointments] clause, only if she is an inferior officer can she be appointed without action by the President and without the advice and consent of the Senate." *Id.*

stitutional on four other grounds.⁷⁴ First, according to the court, the Act also violates the appointments clause by empowering a court of law to appoint an inferior officer who performs “core” executive functions: “A statute that vests the appointment of an officer who prosecutes the criminal law in some branch other than the executive obstructs the President’s ability to execute the law—a duty the President can practically carry out only through appointed officials.”⁷⁵

Second, the court of appeals said, the Act violates the President’s constitutional duty to ensure that the laws are “faithfully executed”⁷⁶ by imposing a “good cause” limitation on the independent counsel’s removal,⁷⁷ delegating to a “Special Court” the authority to review the dismissal of an independent counsel by the Attorney General,⁷⁸ and empowering the Special Court to appoint an interim independent counsel and to reinstate a dismissed independent counsel.⁷⁹

Third, the court concluded that, notwithstanding Morrison’s contention that history demonstrates that Presidents cannot be trusted to ensure that their senior appointed officials obey the criminal laws, “the Act viewed as a whole, taking into account its appointment, removal, and supervisory provisions, so deeply invades the President’s executive prerogatives and responsibilities and so jeopardizes individual liberty as to be unconstitutional.”⁸⁰

Finally, the court held that the Act violates the separation of powers by delegating to the Special Division executive powers that are not permitted it under article III⁸¹ of the Constitution.⁸² The case or controversy requirement of article III, section 2,⁸³ said the

⁷⁴ *Id.*

⁷⁵ *Id.* at 490.

⁷⁶ U.S. CONST. art. II, § 3 provides that “[t]he President shall take Care that the Laws be faithfully executed.”

⁷⁷ *In re Sealed Case*, 838 F.2d at 497-501.

⁷⁸ *Id.* at 501-503.

⁷⁹ *Id.* at 503.

⁸⁰ *Id.* at 511.

⁸¹ U.S. CONST. art. III, § 2 reads, in part:

“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 their 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 States claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”

⁸² *Id.*

⁸³ See *Muskrat v. United States*, 219 U.S. 346 (1911)(under the Constitution of the United States, the exercise of judicial power is limited to cases and controversies).

court, "preserves an independent and neutral judiciary, relatively removed from decisions and activities of the other two branches."⁸⁴ The Ethics in Government Act involves the Special Division not only in the appointment process but in the non-article III function of monitoring the day-to-day activities of an Executive Branch official as well.⁸⁵ Thus, the court held the provision unconstitutional.⁸⁶

The United States Supreme Court granted certiorari to consider whether the independent counsel provision of the Ethics in Government Act violates the appointments clause of the Constitution,⁸⁷ exceeds the article III limitations on judicial power,⁸⁸ or impermissibly interferes with the President's executive authority as granted by article II⁸⁹ so as to violate the constitutional principle of separation of powers.⁹⁰

IV. THE MAJORITY OPINION

The Supreme Court reversed the appellate court's decisions and held that the independent counsel provisions of the Ethics in Government Act are constitutional.⁹¹ Chief Justice Rehnquist delivered the majority opinion.⁹²

Chief Justice Rehnquist stated that central to the determination of the Act's constitutionality was the position of the independent counsel within the executive branch hierarchy as either a principal or an inferior officer.⁹³ The principal/inferior delineation was cru-

⁸⁴ *In re Sealed Case*, 838 F.2d at 512.

⁸⁵ *See supra* notes 18-20, 29.

⁸⁶ *In re Sealed Case*, 838 F.2d at 511-17.

⁸⁷ *See supra* note 70.

⁸⁸ *See supra* note 81.

⁸⁹ *See supra* note 76.

⁹⁰ *Morrison*, 108 S. Ct. at 2602.

⁹¹ *Id.* at 2607.

⁹² *Id.* Chief Justice Rehnquist was joined by Justices Brennan, White, Marshall, Blackmun, Stevens, and O'Connor. Justice Scalia filed a dissenting opinion. Justice Kennedy took no part in the consideration or decision of the case.

⁹³ *Id.* at 2608. The Constitution "for purposes of appointments . . . divides all its officers into two classes," namely principal and inferior. *United States v. Germaine*, 99 U.S. (Otto) 508, 509 (1879) (an abbreviated appointment process for non-officer agents of the government does not violate article II, section 2.) A process involving the executive and legislature is necessary to fill each principal office. *Buckley v. Valeo*, 424 U.S. 1, 132 (1976). *See infra* notes 234-42 and accompanying text for an extensive discussion of *Buckley*. With regard to inferior officers, however, a more expeditious process is available:

foreseeing that when offices became numerous, and sudden removals necessary, this mode [involving both the President and Congress] might be inconvenient, [the Constitution] 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.

cial to the appellate court's invalidation of the Act.⁹⁴ The Ethics in Government Act allows for appointment of the independent counsel through the shortened process available for inferior officers.⁹⁵ Thus, Chief Justice Rehnquist stated, "[t]he initial question is . . . whether appellant is an 'inferior' or a 'principal' officer. If she is the latter . . . then the Act is in violation of the Appointments Clause."⁹⁶

The majority found sufficient statutory limitations on the office of independent counsel to qualify it as an inferior officer.⁹⁷ Despite a certain degree of independence from the President and Attorney General, the Court noted that the Attorney General retains the power to remove the counsel.⁹⁸ Also, the Court found that the limited tenure, jurisdiction, and duties of the independent counsel indicated its inferior status.⁹⁹ Consequently, under *United States v. Germaine*,¹⁰⁰ which considered the "ideas of tenure, duration, . . . and duties" as determinative of whether the officer is a principal or an inferior, the Court concluded that the independent counsel is an inferior official.¹⁰¹

The Court went on to address Olson's alternative contention that, even assuming that the independent counsel is an inferior officer, the appointments clause does not empower Congress to create an interbranch appointment scheme. Olson had argued that the vesting of the power to choose the inferior officer in a body outside the Executive Branch, such as the Special Division, is unconstitutional as contravening the meaning of the appointments clause.¹⁰² The Court rejected this argument on three grounds.¹⁰³

First, according to the Court, the language of the excepting provision in the appointments clause indicated no limitation on interbranch appointments in the manner for which Olson argued.¹⁰⁴ Rather, the Court said that the language seemed to allow Congress

Germaine, 99 U.S.(Otto) at 510.

⁹⁴ See *supra* notes 70-73 and accompanying text.

⁹⁵ See *supra* note 17 and accompanying text.

⁹⁶ *Morrison*, 108 S. Ct. at 2608.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 2608-09.

¹⁰⁰ 99 U.S.(Otto) 508 (1879).

¹⁰¹ *Id.* at 2609 (citing *Germaine*, 99 U.S. (Otto) at 511). As further authority for this conclusion, the Court cited *United States v. Eaton*, 169 U.S. 331, 343 (1898) ("vice counsel" appointed in the interim of the absence of the consul, a principal officer, is not himself a principal officer because he "is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions.").

¹⁰² *Morrison*, 108 S. Ct. at 2609-10.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2610.

significant discretion in the vesting of appointment power.¹⁰⁵ Second, the Court found nothing in the intent of the Framers to imply such a prohibition not found in the Clause's express language.¹⁰⁶ Third, Chief Justice Rehnquist found that the appointment process of the independent counsel provision conformed with the limits the Court had previously set on interbranch appointments.¹⁰⁷ The Court cited the test for the propriety of an interbranch appointment of inferior officers it had established in *Ex parte Siebold*,¹⁰⁸ in which it rejected a strict separation of powers.¹⁰⁹ The *Siebold* Court stated that without evidence of "incongruity" between the constitutionally mandated duties of the branch and the additional duty to appoint imposed upon it, an interbranch appointment process was valid.¹¹⁰ Similarly, the *Morrison* Court did not find any inherent incongruity in a specially created federal court having the power to appoint prosecutorial officers.¹¹¹ The majority cited as precedent *Young v. United States ex rel. Vuitton et Fils S.A.*,¹¹² and *Go-Bart Importing Co. v. United States*,¹¹³ which had already validated the judicial appointment of prosecutors in special circumstances.¹¹⁴

Furthermore, the Court noted, the office of independent counsel arose precisely because Congress believed and events demonstrated that the Executive Branch could not be wholly entrusted with the duty of investigating itself. Thus, if for no other reason than by a process of elimination (as Congressional appointment of the independent counsel would be clear self-aggrandizement), the duty was vested in the judiciary.¹¹⁵

The Court then went on to examine the Ethics in Government

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* The only recorded comment regarding the excepting clause was by James Madison, who believed that Congress should be allowed to vest appointment powers in "Superior Officers below Heads of Departments" and therefore the clause did not go far enough. *Id.* at 2610-11 (quoting RECORDS OF THE FEDERAL CONVENTION OF 1787 627-28 (M. Farrand ed. 1966)).

¹⁰⁷ *Id.* at 2611.

¹⁰⁸ 100 U.S. (10 Otto.) 371 (1880). In *Siebold*, the Court upheld a statute placing appointment of federal election supervisors in the courts. The Court in that case reasoned, "[t]he duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is *no such incongruity* in the duty required as to excuse the court from its performance, or to render their acts void." *Id.* at 398 (emphasis added).

¹⁰⁹ *Morrison*, 108 S. Ct. at 2609.

¹¹⁰ *Siebold*, 100 U.S. at 398.

¹¹¹ *Morrison*, 108 S. Ct. at 2610-11.

¹¹² 107 S. Ct. 2124 (1987). For a discussion of this case, see *infra* note 263.

¹¹³ 282 U.S. 344 (1931)(courts may appoint federal commissioners who possess certain limited prosecutorial powers).

¹¹⁴ *Morrison*, 108 S. Ct. at 2611.

¹¹⁵ *Id.*

Act with regard to article III¹¹⁶ of the Constitution delimiting the responsibilities of the judiciary.¹¹⁷ The Court had refined this delimitation in *Buckley v. Valeo*,¹¹⁸ and Chief Justice Rehnquist noted the proposition from that case that “‘executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution.’”¹¹⁹ But, the Court reasoned, because the power to appoint an independent counsel derives from the appointments clause of article II, an objection based on article III would not be persuasive.¹²⁰ That is, the source of the authority by which the Special Division becomes involved in the executive function of law enforcement, reasoned the Court, is separate and independent of article III, precluding any article III arguments against the validity of this Special Division power.¹²¹ Because the Court had already decided earlier in the opinion on the validity of the Ethics in Government Act under the appointments clause, the Court concluded that the Act was immune to this article III attack.¹²² The duty of definition of the scope of investigation was, in turn, clearly incidental to the appointment power, said the Court, and thus it too withstood appellees’ characterization as an invalid vesting of authority.¹²³

Regarding the various administrative duties granted to the Special Division which were not incidental to the duty of appointment, the Court replied, “[w]e do not think that Article III absolutely prevents Congress from vesting these other miscellaneous powers in the Special Division pursuant to the Act.”¹²⁴ The Court said that a primary purpose of the separation of executive and administrative functions from the courts is to prevent the judicial assumption of duties that either the Executive or the Legislature could accomplish more properly.¹²⁵ Consequently, the Court saw no real encroachment on the proper functions of the other two branches because

¹¹⁶ See *supra* note 81.

¹¹⁷ *Morrison*, 108 S. Ct. at 2611.

¹¹⁸ 424 U.S. 1 (1976).

¹¹⁹ *Morrison*, 108 S. Ct. at 2612 (quoting *Buckley*, 424 U.S. at 123).

¹²⁰ *Id.* at 2612.

¹²¹ *Id.* at 2612-13.

¹²² *Id.* Chief Justice Rehnquist flatly stated, “[c]learly, once it is accepted that the Appointments Clause gives Congress the power to vest the appointment of officers such as the independent counsel in the ‘courts of Law’, there can be no Article III objection to the Special Division’s exercise of that power.” *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 2613.

¹²⁵ *Id.*

many of the Special Division's powers were passive,¹²⁶ or analogous to the established functions of federal judges in other contexts¹²⁷ and not inherently "core" executive functions.¹²⁸

Commenting on the Special Division's power to remove the independent counsel under section 596(b)(2) of the Ethics in Government Act, the Court admitted that this authority was atypical of usual judicial responsibilities and tended more towards the category of administrative duties.¹²⁹ Yet, it once more found no significant encroachment upon Executive power or the independent counsel's prosecutorial discretion.¹³⁰ Construing Section 596(b)(2) narrowly, the Court stated:

The termination provisions of the Act do not give the Special Division anything approaching the power to *remove* the counsel while an investigation or court proceeding is still underway—this power is vested solely in the Attorney General. As we see it, "termination" may occur only when the duties of the counsel are truly "completed" or "so substantially completed" that there remains no need for any continuing action by the independent counsel.¹³¹

The Court found the exercise of this power valid in the rare situation in which an independent counsel obstinately and without authority attempted to continue her investigation beyond the completion of her original function.¹³²

Finally, the Court rejected the article III contentions of appellees that the Special Division's involvement in the early stages of an investigation under the Ethics Act threatened the fair and impartial adjudication of any claims brought later by the independent counsel.¹³³ The Court said that the Act sufficiently isolates the Special Division by giving it no power to review any actions of the counsel or the Attorney General with regard to the counsel, as well as providing a general prohibition on any of its judges from participating in any judicial proceeding involving an independent counsel.¹³⁴

After this discussion of article III issues, the majority concluded

¹²⁶ *Id.* The Court provided as an example the receipt of reports from the Attorney General and the independent counsel but no power to act upon them. *Id.*

¹²⁷ *Id.* at 2614. The Court provided as an example a court's decision to extend a grand jury investigation. *See* FED. R. CRIM. P. 6(e).

¹²⁸ *Morrison*, 108 S. Ct. at 2614.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* (emphasis in original)(footnote omitted).

¹³² *Id.* at 2614-15.

¹³³ *Id.* at 2615.

¹³⁴ *Id.* The Act, the Court noted, prohibits members of the Special Division from participating in "any judicial proceeding concerning a matter which involves such independent counsel while such independent counsel is serving in that office of which involves the exercise of such independent counsel's official duties, regardless of whether

its opinion by examining the validity of the Act in light of the constitutionally implied principle of a separation of governmental powers.¹³⁵ The Court inquired as to whether the good cause restriction on the power of removal by the Attorney General, or more generally, the Act as a whole, impermissibly interfered with the President's duty to control prosecution by the federal government.¹³⁶

The Court said that the Act was not an attempt by Congress to gain for itself more power at the expense of power lost by the President.¹³⁷ The Act did not provide a greater ability for Congress to remove executive officers, said the Court, because Congress can do so only through its constitutional endowment of the power to impeach and convict.¹³⁸ Instead, the Court ruled, the removal of the independent counsel is vested primarily in the Executive Branch itself, in the office of Attorney General.¹³⁹ In this way, the Court reasoned, the independent counsel process of the Act was clearly distinguishable from the earlier approaches struck down in *Myers v. United States*¹⁴⁰ and *Bowsher v. Synar*.¹⁴¹ Unlike the situations of those cases, the *Morrison* Court found that no power of removal devolved onto Congress under the Ethics in Government Act.¹⁴² Rather, said the Court, "the Act puts the removal power squarely in the hands of the Executive Branch" and no congressional approval is necessary.¹⁴³

The Court considered the propriety of the Act's placement of a

such independent counsel is still serving in that office." 28 U.S.C. § 49(f) (West Supp. 1988).

¹³⁵ *Morrison*, 108 S. Ct. at 2616.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ 272 U.S. 52 (1926). At issue in *Myers* was a statute providing that certain postmasters could be removed only "by and with the advice and consent of the Senate." The President had removed one such postmaster without Senate approval, and the Senate challenged this action in court. The Supreme Court held the statute unconstitutional because it permitted Congress to "draw to itself . . . the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of the [appointments clause] and to infringe the constitutional principle of the separation of governmental powers." *Id.* at 161.

¹⁴¹ 478 U.S. 714 (1986). Six decades after *Myers*, the *Bowsher* Court based its invalidation of the Gramm-Rudman-Hollings Act on that decision. The later situation similarly involved the statutory authorization of a government official, the Comptroller General, who was removable only by Congress, to participate in the "executive powers" of budget implementation. There, the Court ruled that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." *Bowsher*, 478 U.S. at 726. See *infra* notes 249-52 and accompanying text for further discussion of *Bowsher*.

¹⁴² *Morrison*, 108 S. Ct. at 2616.

¹⁴³ *Id.*

“good cause” requirement on the Attorney General, instead of allowing for removal at will.¹⁴⁴ The Court stated that the validity of such a requirement is not based on whether the Court classifies the official in question (here, the independent counsel) as a “purely executive” functionary.¹⁴⁵ Such a basis, said the Court, would require the Court to define rigid classes of officials removable and not removable at will.¹⁴⁶ Rather, according to the Court, the intent in the analysis of removal cases is to ensure that the Legislative Branch does not unduly intrude on the Executive’s discharge of his constitutionally-appointed duties.¹⁴⁷ The majority relied upon the characterization of certain governmental duties as “quasi-judicial” and “quasi-legislative,” as shown in *Humphrey’s Executor v. United States*¹⁴⁸ and *Wiener v. United States*.¹⁴⁹ The *Morrison* Court stated:

[This] characterization of the agencies in *Humphrey’s Executor* and *Wiener* . . . in large part reflected our judgement that it was not essential to the President’s proper execution of his Article II powers that those agencies be headed up by individuals who were removable at will. We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty and the functions of

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 2618.

¹⁴⁶ *Id.* at 2618-19. “[T]he real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty and the functions of the officials in question must be analyzed in that light.” *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ 295 U.S. 602 (1935). In *Humphrey’s Executor*, the Court considered the constitutionality of a statute limiting the President’s power to remove commissioners of the Federal Trade Commission to situations of “inefficiency, neglect of duty, or malfeasance in office.” *Id.* at 619. The Court held that the President did not have illimitable removal power over officials whose functions were not purely executive because such functioning required a degree of freedom from executive interference: “For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will.” *Id.* at 629. Thus, because the FTC’s duties included primarily quasi-legislative and quasi-judicial functions, the commissioner was not “purely executive” and executive removal of such an officer could be limited. Those whose functions are “purely executive” are “merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid [he or she] is.” *Id.* In short, *Humphrey’s Executor* established the following test: “Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by . . . precluding a removal except for cause will depend upon the character of the office.” *Id.* at 631.

¹⁴⁹ 357 U.S. 349 (1958). The *Humphrey’s Executor* test was applied in *Wiener*. The issue was whether the President had unlimited discretion in the removal of a member of the War Claims Commission, created by the War Claims Act, 62 Stat. 1240 (1948). There the Court also found “quasi-legislative” and “quasi-judicial” powers possessed by the official and thus the President’s removal authority was susceptible to restriction. *Wiener*, 357 U.S. at 354-55.

the official in question must be analyzed in that light.¹⁵⁰

Given the limitations on the office of independent counsel, the President's need to control such an officer to maintain the functioning of the Executive Branch, said the Court, did not extend to the ability to terminate the counsel at will.¹⁵¹ The majority found that the removal limitation ensured the necessary degree of independence without impermissibly intruding on presidential duties.¹⁵²

The majority's final consideration was "whether the Act, taken as a whole, violates the principle of separation of powers by unduly interfering with the role of the Executive Branch."¹⁵³ The Court balanced the value of a separation of powers, emphasized in *Buckley* as " 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other,' " ¹⁵⁴ against the pragmatic view espoused by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*:¹⁵⁵ "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."¹⁵⁶ The Court found the latter approach appropriate in evaluating the Ethics in Government Act.¹⁵⁷

The Court stated that, unlike the *Bowsher* situation, the Act attempts no legislative usurpation of executive functions because Congress' role under the Act is limited.¹⁵⁸ Although its members may request the Attorney General to apply to the Special Division for appointment of an independent counsel, the Court said that the Attorney General is not required to comply under the language of the Act.¹⁵⁹ Beyond this power to request, said the Court, the Act grants to Congress the power to oversee the counsel's activities¹⁶⁰ and to receive reports generated by the investigation from the counsel.¹⁶¹ The Court found that such functions were "recognized

¹⁵⁰ *Morrison*, 108 S. Ct. at 2619.

¹⁵¹ *Id.*

¹⁵² *Id.* at 2619-20.

¹⁵³ *Id.* at 2620.

¹⁵⁴ *Id.* (quoting *Buckley*, 424 U.S. at 122).

¹⁵⁵ 343 U.S. 579 (1952)(presidential order for seizure of private steel mills to avert strike is not authorized under the Constitution).

¹⁵⁶ *Morrison*, 108 S. Ct. at 2620 (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 635).

¹⁵⁷ *Morrison*, 108 S. Ct. at 2620-21.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* The Court was referring to 28 U.S.C. §§ 595(a)(1), 595(c). See *supra* notes 32-33 and accompanying text.

¹⁶¹ *Id.* The Court was referring to 28 U.S.C. § 595(a)(2) (West Supp. 1988).

generally as being incidental” to Congress’ legislative function.¹⁶² Similarly, the Act did not empower the Judiciary at the expense of the Executive because the Special Division must rely on the initiative of the Attorney General to become involved in the execution of the Act.¹⁶³ Finally, the Court found no impermissible undermining or blockage of the exercise of executive duties.¹⁶⁴ Although recognizing that “[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity,” the Court noted that the Act also gave the Attorney General several means of controlling an investigation by an independent counsel.¹⁶⁵ Most important of these means are the powers of appointment application and good cause removal.¹⁶⁶ Consequently, the Court voted to uphold the constitutionality of the independent counsel provision.¹⁶⁷

V. JUSTICE SCALIA’S DISSENT

Justice Scalia viewed the majority’s opinion as incomplete and overly reliant on a technical interpretation of the independent counsel provision.¹⁶⁸ The incompleteness of the majority’s approach was due, he argued, to the insufficient attention it gave to the separation of powers issue: “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 . . . I think that has it backwards.”¹⁶⁹ Justice Scalia argued that the separation of powers issue dominates the case because it arose out of a direct confrontation between the President and the Congress.¹⁷⁰ The struggle for political power is its fundamental theme, said Justice Scalia: “That is what this suit is about. Power.”¹⁷¹ Justice Scalia noted that a concentration of power in the legislative branch had been foreseen by the Framers,

¹⁶² *Morrison*, 108 S. Ct. at 2621. For further authority for this conclusion, the Court cited *McGrain v. Daugherty*, 272 U.S. 135 (1927)(each house of Congress has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it to exercise efficiently a legislative function belonging to it under the Constitution).

¹⁶³ *Morrison*, 108 S. Ct. at 2621.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 2621-22.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 2625 (Scalia, J., dissenting).

¹⁶⁹ *Id.* (Scalia, J., dissenting).

¹⁷⁰ *Id.* at 2623 (Scalia, J., dissenting).

¹⁷¹ *Id.* (Scalia, J., dissenting).

and they subsequently took measures to guard against such an imbalance:

But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconvenience is to divide the legislature into different branches. . . . As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified.¹⁷²

Justice Scalia concluded that these measures must be reinforced.¹⁷³ Such fortification was accomplished in part by the creation of a single, unitary President in whom, as Justice Scalia described, *all* executive power was vested.¹⁷⁴

Justice Scalia began his dissent with the assertion that, under Article II, section 1, clause 1 of the Constitution, all of the executive power shall be vested in the President.¹⁷⁵ Because “[g]overnmental investigation and prosecution of crimes is a quintessentially executive function,”¹⁷⁶ and the Ethics in Government Act deprives the President of exclusive control over the exercise of that power by creating a prosecutor over whom he has little supervision, the Act impermissibly blurs the separation of powers.¹⁷⁷

Justice Scalia argued that the independent counsel is not susceptible to the normal considerations that govern the execution of prosecutorial power. Rather, Justice Scalia said, the counsel is focused solely on the prosecution of the object of her investigation.¹⁷⁸ The danger of this untempered single-mindedness, Justice Scalia stated, was illustrated by the decision of the independent counsel in a different investigation to subpoena the Ambassador of Canada, an act that caused considerable strain in American relations with that country.¹⁷⁹ Such an attempt to breach diplomatic immunity, if un-

¹⁷² *Id.* (Scalia, J., dissenting) (quoting FEDERALIST No. 51, at 321-22 (J. Madison)(C. Rossiter ed. 1961)).

¹⁷³ *Id.* at 2623 (Scalia, J., dissenting).

¹⁷⁴ *Id.* (Scalia, J., dissenting).

¹⁷⁵ *Id.* at 2626 (Scalia, J., dissenting).

¹⁷⁶ *Id.* at 2626-27 (Scalia, J., dissenting).

¹⁷⁷ *Id.* at 2627 (Scalia, J., dissenting).

¹⁷⁸ *Id.* (Scalia, J., dissenting).

¹⁷⁹ *Id.* at 2627 (Scalia, J., dissenting). In the Spring of 1987, Whitney North Seymour, the independent counsel investigating former White House staff member Michael Deaver, served a subpoena on Canada's Ambassador to the United States. A federal court quashed the subpoena. *United States v. Deaver*, No. 87-096 (D.D.C. June 22, 1987). Seymour then sent a letter to the Ambassador in which he made implicit threats that a failure to cooperate might have adverse repercussions for Canada. See *Seymour v. North America*, Wall St. J., Oct. 16, 1987, at 30, col. 1; *Independent Counsel Is No Diplomat*, Wall St. J., Oct. 16, 1987, at 30, col. 3. Seymour's actions seriously angered the Cana-

dertaken by the Department of Justice, would have been squelched in light of the President's article II, section 2 foreign policy responsibilities, said Justice Scalia.¹⁸⁰ As a consequence of the unique, single-focus aspect of the independent counsel, Justice Scalia argued, "the balancing of various legal, practical, and political considerations . . . [which] is the very essence of prosecutorial discretion" is not carried out:¹⁸¹ "To take this away is to remove the core of the prosecutorial function, and not merely 'some' presidential control."¹⁸²

Justice Scalia's construction of the actual extent of the Attorney General's powers under the Act diverged sharply from that of the majority. Regarding the Attorney General's discretion in applying for the appointment of an independent counsel after a request to do so, Justice Scalia stated:

As a practical matter, it would be surprising if the Attorney General had any choice . . . but to seek appointment of an independent counsel to pursue the charges against the principal object of the congressional request. . . . Merely the political consequences (to him and the President) of seeming to break the law by refusing to do so would have been substantial. How could it not be, the public would ask, that a 3,000-page indictment drawn by our representatives over 2 1/2 years does not even establish "reasonable grounds to believe" that further investigation or prosecution is warranted with respect to at least the principal alleged culprit?¹⁸³

Similarly, though there is no judicial review of the Attorney General's refusal to seek appointment, Congress may review it, also narrowing the Attorney General's discretion: "the context of this statute is acrid with the smell of threatened impeachment."¹⁸⁴

Justice Scalia assailed the majority for endorsing a balancing test to make separation of powers determinations, rather than the "clear constitutional prescription" that the executive power belongs exclusively to the President.¹⁸⁵ In doing so, the majority gave no criteria for deciding when a curtailing of executive power by a statute produces an imbalance that renders it unconstitutional:

The most amazing feature of the Court's opinion is that . . . [i]t simply announces, with no analysis, that the ability to control the decision

dian Government and it demanded that the State Department intervene. The Department of Justice was forced to seek relief in court. *Seymour v. North America*, *supra*, at 30, col. 1; *Independent Counsel Is No Diplomat*, *supra*, at 30, col. 3.

¹⁸⁰ *Morrison*, 108 S. Ct. at 2628 (Scalia, J., dissenting).

¹⁸¹ *Id.* (Scalia, J., dissenting).

¹⁸² *Id.* (Scalia, J., dissenting).

¹⁸³ *Id.* at 2624 (Scalia, J., dissenting).

¹⁸⁴ *Id.* at 2625 (Scalia, J., dissenting).

¹⁸⁵ *Id.* at 2629 (Scalia, J., dissenting).

whether to investigate and prosecute the President's closest advisors, and indeed the President himself, is not "so central to the functioning of the Executive Branch" as to be constitutionally required to be within the President's control. Apparently that is so because we say it is so.¹⁸⁶

By not devising "a *substitute* criterion—a 'justiciable standard' " for measuring the permissibility of statutory intrusions into the power of the President, Justice Scalia argued that the majority makes inevitable an "ad hoc approach to constitutional adjudication" in which such potentially intrusive legislation will be drawn with little precedential restriction.¹⁸⁷

Accordingly, Justice Scalia stated, the political limitations of the Attorney General's powers under the Act means that the functions of the Executive Branch will be impaired by an erosion of leverage to implement its policies.¹⁸⁸ Regarding "the President's high-level assistants, who typically have no political base of support," Scalia stated, "it is . . . utterly unrealistic to think that they will not be intimidated by this prospect [of prosecution by an independent counsel], and that their advice to him and their advocacy of his interests before a hostile Congress will not be affected."¹⁸⁹ Furthermore, Justice Scalia asserted:

Besides 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 associate are not merely wrong-headed, naive, ineffective, but, in all probability, "crooks." And nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better prosecution.¹⁹⁰

Thus, he stated, the Act indirectly produces an imbalance of political power tilting in favor of the Legislative Branch.¹⁹¹

Justice Scalia faulted the majority for not attempting "to 'decide exactly' what established the line between principal and 'inferior' officers."¹⁹² Justice Scalia blasted its conclusion that the independent counsel is an inferior officer based on the statement cited from *Germaine* that "the term [officer] embraces the ideas of tenure, dura-

¹⁸⁶ *Id.* (Scalia, J., dissenting) (emphasis in original).

¹⁸⁷ *Id.* (Scalia, J., dissenting) (emphasis in original).

¹⁸⁸ *Id.* at 2630-2631 (Scalia, J., dissenting).

¹⁸⁹ *Id.* at 2630 (Scalia, J., dissenting).

¹⁹⁰ *Id.* (Scalia, J., dissenting).

¹⁹¹ *Id.* at 2631 (Scalia, J., dissenting).

¹⁹² *Id.* at 2632 (Scalia, J., dissenting).

tion, emolument, and duties.”¹⁹³ Although she may be removed for “good cause” by the Attorney General, Justice Scalia said, “most (if not all) *principal* officers in the Executive Branch may be removed by the President *at will*.”¹⁹⁴ Thus, removal of the independent counsel is more difficult than removal of most principal officers, which would indicate a non-inferior status.¹⁹⁵ The majority mischaracterized the independent counsel’s authority as “limited,” he said.¹⁹⁶ Rather, Justice Scalia argued, the Act delegates to the appellant the “full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice,” as well as a range of specific powers.¹⁹⁷

Finally, Justice Scalia remained unpersuaded by the majority’s contention that the nature of the tenure and jurisdiction of the independent counsel made her an inferior officer.¹⁹⁸ Regarding tenure, he said, “[U]nlike most high-ranking Executive Branch officials, [the independent counsel] continues to serve until she (or the Special Division) decides that her work is substantially completed.”¹⁹⁹ The appellant, he noted, had already served two years, not an insubstantial time period.²⁰⁰ The fact that appellant’s investigation was focused did not make it insignificant, according to Justice Scalia.²⁰¹ Evidence of this is the enormous amount of attention focused on the *Morrison* case, as well as the other independent counsel investigations.²⁰²

Justice Scalia argued that a better basis for deciding the status of an Executive officer than that provided by the *Germaine* dictum is the division of powers as established by the Constitution.²⁰³ A review of the meaning of the word “inferior” as it was understood at the time of the Framers,²⁰⁴ the legislative history behind the except-

¹⁹³ *Id.* at 2633 (Scalia, J., dissenting) (quoting *United States v. Germaine*, 99 U.S. (Otto) 508, 511 (1879)).

¹⁹⁴ *Morrison*, 108 S. Ct. at 2632 (Scalia, J., dissenting) (emphasis in original).

¹⁹⁵ *Id.* (Scalia, J., dissenting).

¹⁹⁶ *Id.* (Scalia, J., dissenting).

¹⁹⁷ *Id.* (Scalia, J., dissenting) (citing 28 U.S.C. § 594(a)).

¹⁹⁸ *Id.* at 2633 (Scalia, J., dissenting).

¹⁹⁹ *Id.* (Scalia, J., dissenting).

²⁰⁰ *Id.* (Scalia, J., dissenting).

²⁰¹ *Id.* (Scalia, J., dissenting).

²⁰² *Id.* (Scalia, J., dissenting).

²⁰³ *Id.* at 2633-34 (Scalia, J., dissenting).

²⁰⁴ “Dictionaries in use at the time of the Constitutional Convention gave the word ‘inferior’ two meanings which it still bears today: (1) ‘[I]ower in place, . . . station, . . . rank of life, . . . value or excellency,’ and (2) ‘[s]ubordinate.’ . . . In a document dealing with the structure (the constitution) of a government, one would naturally expect the word to bear the latter meaning.” *Id.* (Scalia, J., dissenting) (quoting S. JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE* (6th ed. 1785)).

ing clause,²⁰⁵ and the "admittedly sketchy precedent in this area"²⁰⁶ led Justice Scalia to the conclusion that although not the sole sufficient reason, "it is surely a *necessary* condition for inferior officer status that the officer be subordinate to another officer."²⁰⁷ The independent counsel is not, however, subordinate to another officer; as the majority admits, Justice Scalia noted, "[a]ppellant may not be 'subordinate' to the Attorney General (and the President) insofar as she possesses a degree of independent discretion to exercise the powers delegated to her under the Act."²⁰⁸ When operating within the confines of her statutory powers, the independent counsel is subordinate to no one, "not even . . . the President."²⁰⁹ Therefore, Justice Scalia stated, the appellant is not an inferior officer, and her appointment as provided for in the Act, which does not involve the President and Senate, is unconstitutional.²¹⁰

Justice Scalia predicted an effective eradication of precedent by the majority's decision regarding the removal of executive officers.²¹¹ Before *Morrison*, said Justice Scalia, precedent established that the President's power to remove principal officers who performed purely executive duties could not be limited.²¹² His power to remove inferior officers who perform purely executive duties and whose appointment Congress had removed from the appointment clause process of presidential nomination and Senate approval and consent could be restricted, said Justice Scalia, at least when an Executive officer made the appointment.²¹³ With its decision in *Morrison*, Justice Scalia argued, the Court extended this rule to allow

²⁰⁵ Scalia stated:

It is perfectly obvious . . . from the relative brevity of the discussion [at the Constitutional Convention that the addition of the excepting provision to the appointments clause] received, that it was intended merely to make clear . . . that those officers appointed by the President with Senate approval could on their own appoint their subordinate, who would, of course, by chain of command still be under the direct control of the President."

Id. (Scalia, J., dissenting).

²⁰⁶ *Id.* at 2633-35 (Scalia, J., dissenting).

²⁰⁷ *Id.* at 2635 (Scalia, J., dissenting) (emphasis in original).

²⁰⁸ *Id.* at 2608-09. (Scalia, J., dissenting).

²⁰⁹ *Id.* (Scalia, J., dissenting).

²¹⁰ *Id.* (Scalia, J., dissenting).

²¹¹ *Id.* Justice Scalia also referred the reader to the opinion of Judge Silberman for the D.C. Court of Appeals in *In re Sealed Case*, 828 F.2d 476 (D.C. 1987), for a discussion of the violation of established precedent by the removal limitation prescribed by the Act. *Morrison*, 108 S. Ct. at 2635 (Scalia, J., dissenting).

²¹² *Id.* (citing *Myers v. United States*, 272 U.S. 52, 127 (1926)).

²¹³ *Id.* at 2636 (Scalia, J., dissenting). Justice Scalia also cited *United States v. Perkins*, 116 U.S. 483, 485 (1886) (when Congress by law vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest).

restrictions on the President's power to remove inferior officers appointed by the judiciary.²¹⁴ The sole consideration for doing so, stated Justice Scalia, is that Congress does not "interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to take care that the laws be faithfully executed."²¹⁵ With this extension, Justice Scalia argued, the Court "swept into the dustbin of repudiated constitutional principles" the standard of *Humphrey's Executor* which evaluated the inferior official's duties as "purely executive," "quasi-legislative," or "quasi-judicial."²¹⁶ Although Justice Scalia readily admitted that such distinctions are not "clear nor even . . . rational . . . at least [they] permitted the identification of certain officers and certain agencies, whose functions were entirely within the control of the President."²¹⁷

According to Justice Scalia, the *Morrison* holding will allow the restriction of the removal of any Executive officer, provided that the President remains "able to accomplish his constitutional role."²¹⁸ This vague and expansive standard is "an open invitation" for Congress to intrude upon the President's duties.²¹⁹ Although the Court retains the ultimate authority to evaluate the permissibility of such intrusions, Justice Scalia stated that the President should be able to protect his own branch and the inability to do so creates a severe imbalance between the branches.²²⁰ The test illustrated perfectly Justice Scalia's primary contention in his dissent that the majority failed to understand the operation of the hydraulic pressures of a separation of powers, in which "[a]mbition . . . counteract[s] ambition."²²¹

Justice Scalia concluded his dissent with an examination of the fairness of the prosecutorial process created by the Act upon those executive officials who become the targets of an investigation. The dangerous potential of the unfettered prosecutor was described by Justice Robert Jackson, whom Justice Scalia quoted at length, when he was Attorney General under President Franklin Roosevelt, in a speech to United States Attorneys:

With the law books filled with a great assortment of crimes, a prosecu-

²¹⁴ *Morrison*, 108 S. Ct. at 2617-2618 (Scalia, J., dissenting).

²¹⁵ *Id.*

²¹⁶ *Id.* at 2636 (Scalia, J., dissenting) (citing *Humphrey's Executor v. United States*, 295 U.S. 602, 631 (1935)).

²¹⁷ *Morrison*, 108 S. Ct. at 2637 (Scalia, J., dissenting).

²¹⁸ *Id.* at 2637 (Scalia, J., dissenting) (quoting *id.* at 2618 (majority opinion)).

²¹⁹ *Id.* at 2637 (Scalia, J., dissenting).

²²⁰ *Id.* (Scalia, J., dissenting).

²²¹ *Id.* (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 51, at 332 (J. Madison) (C. Rossiter ed. 1961)).

tor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.²²²

The main guard against this potential for abuse, Justice Scalia argued, is the political accountability of the President, who appoints and removes federal prosecutors: “when crimes are not investigated and prosecuted fairly, nonselectively, with a reasonable sense of proportion, the President pays the cost in political damage to his administration.”²²³ According to Justice Scalia, however, the position of independent counsel was designed to operate largely independent and uninfluenced by the President, so this check is not present: “even if it were entirely evident that unfairness was in fact the result [of an independent counsel’s investigation]. . . . *there would be no one accountable to the public for whom the blame could be assigned.*”²²⁴ This independence and singularity of focus, Justice Scalia stated, may distort the perspective of the prosecutor: “what would normally be regarded as a technical violation . . . may in [the] small world [of the independent counsel] assume the proportions of an indictable offense.”²²⁵ Thus, Justice Scalia warned, the person under investigation is faced with the “frightening” possibility of a lengthy, ceaseless investigation that may grow to encompass matters which a normal prosecutor would consider “picayune” and insufficient to warrant an indictment.²²⁶ For these reasons, Justice Scalia dissented from the majority’s holding.

²²² *Morrison*, 108 S. Ct. at 2638 (Scalia, J., dissenting) (quoting R. Jackson, *The Federal Prosecutor*, Address Delivered at the Second Annual Conference of the United States Attorneys (April 1, 1940)).

²²³ *Morrison*, 108 S. Ct. at 2638 (Scalia, J., dissenting).

²²⁴ *Id.* at 2639 (Scalia, J., dissenting) (emphasis in original).

²²⁵ *Id.* at 2640 (Scalia, J., dissenting).

²²⁶ *Id.* (Scalia, J., dissenting).

V. ANALYSIS

A. THE SEPARATION OF POWERS AND THE INTEREST OF THE INDIVIDUAL

Justice Scalia recognized that “[t]he purpose of the separation and equilibrium of powers, in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom.”²²⁷ This freedom is not waived upon the assumption of one of the Executive Branch offices covered by the Ethics in Government Act, and those officials are entitled to the same fair treatment under the law as is accorded those not subject to the Act.²²⁸ By dividing the primary functions of government among several distinct branches, the Framers sought to avoid a concentration of power through which a democratic republic might become ripe for tyrannical rule.²²⁹

The Court recognized this intent in *Buckley v. Valeo*: “The men who met in Philadelphia in the summer of 1787 were practical statesmen, who viewed the principal of separation of powers as a vital check against tyranny.”²³⁰ Similarly, in *Bowsher v. Synar*, the Court stated:

Even a cursory examination of the Constitution reveals the influence of Montesquieu’s thesis that checks and balances were the foundation of a structure of government that would protect liberty. The Framers provided a vigorous legislative branch and a separate and wholly independent executive branch, with each branch responsible ultimately to the people.²³¹

Although it would be premature to argue that in upholding the validity of the independent counsel, the *Morrison* majority placed the federal government on a slippery slope toward tyranny,²³² it is true that the absence of an institutional framework of checks and balances within which prosecutorial discretion is normally exercised encourages abuses of the rights of individuals subject to Ethics in

²²⁷ *Morrison*, 108 S. Ct. at 2637 (Scalia, J., dissenting).

²²⁸ *Id.* (Scalia, J., dissenting).

²²⁹ See generally, THE FEDERALIST NO. 47 & 48 (J. Madison) (C. Rossiter ed. 1961).

²³⁰ *Buckley*, 424 U.S. at 121.

²³¹ *Bowsher*, 478 U.S. at 720.

²³² But see, Troutt & McGuigan, *Morrison Case: The Court’s Blunder*, Legal Times, July 18, 1988, at 14, col. 1, which states:

Thus, the Republic enters a new phase. Congress has created, and the Court here sanctioned, a mechanism through which the losers of intramural policy debates will increasingly find themselves facing not merely political reprisal, nor even career ending or retarding retribution, but criminal investigation. Congress and the Court have created a monstrous tool for tyranny. From the vantage point of decades hence, *Morrison* will be viewed as the decision in this decade most destructive of liberty and the rule of law.

Government Act investigations.²³³ Lost in the placement of the criminal prosecution function outside of the Executive Branch is the element of accountability, which serves as a check on the exercise of this function.

B. DIVERGENCE FROM THE RECENT SEPARATION OF POWERS DECISIONS

Morrison diverged from the decisions rendered by the Court in three recent landmark cases centered on the separation of powers issue. In *Buckley v. Valeo*,²³⁴ the Court refused to allow Congress to appoint what it deemed to be executive officers.²³⁵ In 1974, Congress had amended the Federal Campaign Act to create an eight-member Federal Election Commission ("FEC").²³⁶ Two members were to be appointed by the President pro tempore of the Senate, two were to be appointed by the Speaker of the House, two were to be appointed by the President, and the Secretary of the Senate and Clerk of the House filled the last two positions as ex officio, non-voting members.²³⁷ The FEC exercised, inter alia, wide-ranging enforcement powers, which represented "the performance of a significant governmental duty . . . pursuant to a public law."²³⁸ The Court held that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the appointments clause]."²³⁹ The FEC's powers were not merely "of an

²³³ Even in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), which validated the authorization of the Commodity Futures Trading Commission to adjudicate state law counterclaims as not violating article III, *id.* at 839, the Court recognized the significance of protecting individual rights when making a separation of powers inquiry. Writing for the majority, Justice O'Connor stated:

Article III, § 1 serves both to protect "the role of the independent judiciary within the constitutional scheme of tripartite government" . . . and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government." . . . Although our cases have provided us with little occasion to discuss the nature or significance of this latter safeguard, our prior discussions of Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of the United States intimated that this guarantee serves to protect primarily personal, rather than structural, interests.

Id. at 837 (citations omitted). By analogy, this concern for individuals should at least have been a factor in the Court's determination of the validity of the independent prosecutor provision of the Ethics in Government Act. Yet the Court makes only four vague references to *Schor*, *Morrison*, 108 S. Ct. at 2614, 2615, 2620, and 2621, and at no point addresses the issue of the individual's interest.

²³⁴ 424 U.S. 1 (1976).

²³⁵ 424 U.S. at 121.

²³⁶ 2 U.S.C. §§ 431-456 (Supp. IV 1970).

²³⁷ *Id.* at § 437(c).

²³⁸ *Buckley*, 424 U.S. at 141.

²³⁹ *Id.* at 126.

investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees."²⁴⁰ Rather, the Commission had the authority to enforce the law: "A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress that the Constitution entrusts [this] responsibility."²⁴¹ Thus, Congress could not create a process under which it retained full oversight of the appointment of four members of the FEC.²⁴²

In *INS v. Chadha*,²⁴³ the Court invalidated the legislative veto, by which Congress had sought to override executive action through means less formal than legislation.²⁴⁴ In that case, the Attorney General had suspended an order of deportation under the Immigration and Nationality Act.²⁴⁵ A provision of that legislation allowed either House of Congress to pass a resolution blocking such suspension,²⁴⁶ which the House of Representatives did against Chadha. The Court found the provision unconstitutional because it violated the presentment clause of article I,²⁴⁷ which requires a bill to pass both houses and be presented to the President for his signature or veto before it becomes law.²⁴⁸

In *Bowsher v. Synar*,²⁴⁹ the Court prohibited an officer removable by Congress from performing an executive function.²⁵⁰ Under the Gramm-Rudman-Hollings Act,²⁵¹ the Comptroller General was given the authority to make certain final decisions regarding the reductions required to balance the federal budget. Because the Comptroller General was subject to removal by Congress at any time, the Act was held to be unconstitutional.²⁵²

²⁴⁰ *Id.* at 137.

²⁴¹ *Id.* at 138.

²⁴² *Id.* The Court did not decide whether FEC members were "principal" or "inferior" officers, stating that the Commission appointment process was violative under either definition.

²⁴³ 426 U.S. 919 (1983).

²⁴⁴ *Id.* at 959.

²⁴⁵ 8 U.S.C. § 1252 (1952).

²⁴⁶ 8 U.S.C. § 244(c)(2) (1952).

²⁴⁷ U.S. CONST. art. I, § 7.

²⁴⁸ *Chadha*, 426 U.S. at 946-947. The Court said, "[t]he decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed." *Id.*

²⁴⁹ 478 U.S. 714 (1986).

²⁵⁰ *Id.* at 736.

²⁵¹ 2 U.S.C.A. §§ 901-902 (1985).

²⁵² *Bowsher*, 478 U.S. at 726-727. The Court said, "[t]o permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in

In each case, the Court secured responsibility for the exercise of delegated statutory powers firmly within the Executive Branch. Prior to *Morrison*, these precedents suggested that the Court would interpret the independent counsel provision as a dilution of presidential supervision over an executive function.²⁵³ By upholding the constitutionality of the independent counsel law, however, the Court allowed for the placement of a significant, core executive function²⁵⁴ in an entity operating largely unsupervised by the executive branch.

The “individual freedom” purpose of the separation of powers, as described by Justice Scalia, was more explicit in *Morrison* than in the other three cases. That is, *Buckley*, *Chadha*, and *Bowsher* focused exclusively on the structural division of powers between ambitious and competing branches as a means of ensuring effective government.²⁵⁵ The protection of the individual from an overbearing government was not the immediate concern of the Court. In *Morrison*, the structural propriety of the independent prosecutor was considered and discussed at great length by the majority.²⁵⁶ However, the added aspect of the threatened rights of persons such as Olson was considered by only Justice Scalia.²⁵⁷ Because an individual is more directly and immediately threatened by an unchecked exercise of the power of criminal prosecution than by an unconstitutional appointment, legislative, or removal process, *Morrison* would seem to have

any fashion found to be unsatisfactory to Congress. This kind of congressional control over laws, *Chadha* makes clear, is constitutionally impermissible.” *Id.*

²⁵³ See, e.g., Carter, *Halt to the Chief?*, Legal Times, August 29, 1988, at 22, col. 1; Bruff, *Special Prosecutor Case a Balancing Act*, Legal Times, July 4, 1988, at 5, col. 1.

²⁵⁴ See *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (“a lawsuit is the ultimate remedy for the breach of law, and it is to the President, not to the Congress, that the Constitution entrusts the responsibility to ‘take Care that the Laws be faithfully executed.’ Art. II, § 3.”).

²⁵⁵ In *Buckley*, the Court was concerned that the appointment by Congress alone of officials performing significant governmental duties as prescribed by law would create an imbalance of power between the branches. See *supra* notes 234-42 and accompanying text. In *Chadha*, the Court sought to maintain the constitutional division of “delegated powers of the . . . federal government into three defined categories . . . to assure . . . that each Branch . . . would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.” *Chadha*, 462 U.S. at 919. Similarly, *Bowsher* cited this statement from *Chadha* in arriving at its holding that “once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.” *Bowsher*, 478 U.S. at 733-34 (citation omitted).

²⁵⁶ *Morrison*, 108 S. Ct. at 2608-22. For that discussion, see *supra* notes 91-167 and accompanying text.

²⁵⁷ *Id.* at 2637-40 (Scalia, J., dissenting). See *supra* notes 222-26 and accompanying text.

presented an even more compelling situation for securing the responsibilities of the Executive Branch than *Buckley*, *Chadha*, or *Bowsher*, the majority's meticulous validation of the Act's appointment and removal process notwithstanding.²⁵⁸ But the Court ignored the fact that prosecutorial abuses are kept in check by keeping prosecutorial power separate under the Executive Branch.²⁵⁹

C. THE INDEPENDENT COUNSEL AND PROSECUTORIAL ABUSE

The majority's opinion did not consider the potential for prosecutorial abuse under the Act, despite the fact that such abuses had been a major argument against the validity of the independent counsel.²⁶⁰ Those who supported the Act justified such incidents as the price that must be paid to ensure impartial investigations of the Executive Branch.²⁶¹ However, because the majority opinion barely mentioned the issue of the conflict of interest of an Attorney General which had necessitated creation of the independent counsel,²⁶² the gain for which this cost to an individual's rights is exchanged was not within the scope of its consideration. Thus, one of the difficult, fundamental determinations underlying the case—whether the assurance of impartial law enforcement envisioned by the Act is desirable in light of the unfairness to individuals that inevitably occurs because of the fervor of prosecution by an independent counsel—is left unreviewed by the majority's opinion.

Despite the *Morrison* Court's approach, the Court had recognized in a recent case that persons who become the targets of prolonged criminal investigations, even if ultimately exonerated, are subjected to extreme financial, emotional, and reputational burdens:²⁶³ "even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching

²⁵⁸ See *supra* notes 137-52 and accompanying text.

²⁵⁹ *Id.* (Scalia, J., dissenting). See *supra* notes 223-24 and accompanying text.

²⁶⁰ See Brief for Edward H. Levi, Griffin B. Bell, and William French Smith as Amicus Curiae in Support of Appellees, *Morrison*, 108 S. Ct. 2597 (No. 87-1279)[hereinafter Brief for Levi, Bell, and Smith]. See also Bertozzi, *Separating Politics from the Administration of Justice*, 67 JUDICATURE 486, 494-95 (1984)(potential for abuses by independent counsels was considered by a 1981 Senate Subcommittee reviewing the law).

²⁶¹ See, e.g., Bruff, *Independent Counsel and the Constitution*, 24 WILLAMETTE L. REV. 539, 540 n.4 (1988).

²⁶² *Morrison*, 108 S. Ct. at 2611. This is the only mention of the conflict of interest issue in the majority's opinion. See also Bruff, *Special Prosecutor Case a Balancing Act*, Legal Times, July 4, 1988, at 5, col. 3 ("[A]part from one brief mention of the problem of conflicts of interest, the majority blandly discussed generalities of separation of powers.").

²⁶³ *Young v. United States ex rel. Vuitton et Fils*, 107 S. Ct. 2124, 2141 (1987). The Court held that courts may appoint disinterested private attorneys to act as prosecutors for judicial contempt judgments.

disruption of everyday life.”²⁶⁴ Given that such disruption occurs in a normal criminal investigation, as was involved in that case, the experience is further enhanced by the intensity of an independent counsel’s focused investigation. As Justice Scalia observed, “[h]ow frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile—with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities.”²⁶⁵

The abuses which occur under the independent counsel law generally do not rise to the level of due process violations,²⁶⁶ which may occur once a criminal indictment has been obtained and a formal, judicial proceeding begun. Rather, such abuses have occurred before an independent counsel’s investigation has produced sufficient grounds to warrant an indictment.²⁶⁷ Although the courts have acknowledged authority to guard against abuses of the former type, a prosecutor still exercises wide discretion over a variety of matters which are not, and properly should not be, subject to judicial review.²⁶⁸ Yet these decisions have great impact on the person

²⁶⁴ *Id.* at 2141.

²⁶⁵ *Morrison*, 108 S. Ct. at 2640 (Scalia, J., dissenting).

²⁶⁶ Under the fifth and fourteenth amendments, “no person shall be . . . deprived of life, liberty, or property, without due process of law,” the former applying this requirement to the federal government, the latter to state governments. U.S. CONST. amend. V, XIV. The requirement protects the individual from overreaching by the government:

[T]he due process provision of the Fourteenth Amendment—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. . . . From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the ‘law of the land’ evolved the fundamental idea that no man’s life, liberty, or property be forfeited as criminal punishment for violation of that law until there has been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power. Thus, as assurance against ancient evils, our country, in order to preserve ‘the blessings of liberty,’ wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed.

Chambers v. Florida, 309 U.S. 227, 236-237 (1940)(footnotes omitted).

The due process requirement has led to prohibitions against, *inter alia*, overly vague criminal statutes, *Winters v. New York*, 333 U.S. 507 (1948), strict liability for common law offenses imposing severe penalties, *Morissette v. United States*, 342 U.S. 246 (1952), and criminal liability for an omission without proof that the defendant had knowledge of the law creating the duty to act, *Lambert v. California*, 355 U.S. 225 (1957).

²⁶⁷ See *infra* notes 276-81 and accompanying text.

²⁶⁸ See, e.g., *Wayte v. United States*, 470 U.S. 598 (1985). The Court in *Wayte* stated: In our criminal justice system, the Government retains “broad discretion” as to whom to prosecute . . . This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as

under investigation.²⁶⁹ At the pre-indictment stage of a criminal investigation, the individual is protected against unfair treatment primarily by the checks on prosecutorial discretion.²⁷⁰

The normal exercise of prosecutorial discretion occurs within a network of checks and balances.²⁷¹ Every federal prosecutor is accountable to a superior, with the President as the ultimate authority, who is in turn accountable to the people.²⁷² Furthermore, in the course of an investigation, a United States Attorney must consider the interests of other prosecutors, of law enforcement officials, and of officials outside of the Department of Justice.²⁷³ It was the complete absence of this system of institutional safeguards in the office of independent counsel which caused three former Attorneys General to submit an amicus curiae brief in support of the decision of the Court of Appeals:

[T]he checks and balances . . . guard against the dangers that are endemic in any government—not the dangers of corruption or gross abuse, which are rare, but the everyday danger that a prosecutor will become too close to a case and will lose perspective. The most admirable and dedicated prosecutor may exaggerate the importance of a case and underestimate its potential to interfere with other important government interests and with the lives of the individuals affected.²⁷⁴

the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.

Id. at 607-08. *Wayte* involved the prosecution of a young man eligible for the military draft who had written government officials stating that he had not registered with the Selective Service System and did not intend to do so. The Court held that the government's passive enforcement policy for draft avoiders, together with its efforts to persuade nonregistrants to comply, did not violate either the first or fifth amendments. *Id.*

²⁶⁹ As noted by ex-Attorneys General Levi, Bell, and Smith in their amicus curiae brief, "[F]or the individual whose privacy is invaded, whose affairs are disrupted, and who is subjected to extraordinary emotional distress, these [decisions by a federal prosecutor] are likely to be the most significant decisions that any government official ever makes." Brief for Levi, Bell, and Smith, *supra* note 260, at 5.

²⁷⁰ *Young*, 107 S. Ct. at 2137. The *Young* Court stated:

A prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigations, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they shall be established, and whether any individuals should be granted immunity. These decisions, critical to the conduct of a prosecution, are all made outside the supervision of the court."

Id.

²⁷¹ Brief for Levi, Bell, and Smith, *supra* note 260, at 8-9. See also *Morrison*, 108 S. Ct. at 2627-28 (Scalia, J., dissenting).

²⁷² Brief for Levi, Bell, and Smith, *supra* note 260, at 8-9.

²⁷³ *Id.*

²⁷⁴ *Id.* at 9-10.

Furthermore, because of the political implications of a possible discovery of unethical behavior in the executive branch, great publicity inevitably accompanies the appointment of an independent counsel: "Thus, the separation of the Independent Counsel from the Executive Branch necessarily casts aside one of the most decent traditions of our criminal law system—the tradition that allegations of wrongdoing are not made public until a grand jury has found probable cause to believe them true."²⁷⁵

Events subsequent to the *Morrison* decision have illustrated the potential for abuse of the subject of an independent counsel investigation. For example, in the Spring of 1988, Morrison informed Olson that she would seek a protective indictment unless he agreed to waive the five-year statute of limitations on the case, which was due to expire on March 10.²⁷⁶ In retrospect, as the investigation produced not even an indictment, such a motion would have clearly been improper and may have been merely a bluff on Morrison's part.²⁷⁷ Opponents of the independent counsel law argued that Olson had no real choice but to acquiesce in Morrison's proffered arrangement, because if he had refused, he would have lost the right to seek reimbursement of the over \$1 million in legal costs he had incurred in the course of the two year investigation.²⁷⁸

Justice Scalia warned that such abusive prosecutorial tactics would be possible.²⁷⁹ Similar questionable tactics have been employed by independent counsels in other investigations. These tactics can be argued to be the result of the absence of accountability. For example, Independent Counsel James C. McKay concluded in the final report on his fourteen month investigation of former Attor-

²⁷⁵ *Id.* at 16-17.

²⁷⁶ *Morrison v. Olson, Continued*, Legal Times, August 15, 1988, at 9, col. 2. A protective indictment, like other "protective" motions, secures the right to take an action, such as seeking an indictment, at a later date. Protective indictments are used infrequently and are generally appropriate only in time-sensitive cases, such as those involving a fugitive witness or complex foreign evidence. A motion for an indictment, protective or otherwise, is improper under the guidelines for federal prosecutors without a reasonable assurance for obtaining a conviction. *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* Pursuant to § 593(f)(1) of the Act, subjects of an independent counsel's probe are only eligible for reimbursement of legal fees if no indictment is filed against them: [U]pon the request of an individual who is the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, if no indictment is brought against such individual pursuant to that investigation, award reimbursement for those reasonable attorneys' fees incurred by that individual during that investigation which would not have been incurred but for the requirements of this chapter.

²⁷⁹ U.S.C.A. §§ 591-599 (Supp. 1988).

²⁷⁹ *Morrison*, 108 S. Ct. at 2638. (Scalia, J., dissenting). See *supra* note 222-26 and accompanying text.

ney General Edwin Meese that the Attorney General probably violated federal conflict-of-interest and tax laws, yet announced that he would not prosecute.²⁸⁰ This unusual action brought harsh criticism from prominent former prosecutors of various political sympathies, who argued that McKay's action overstepped the bounds of prosecutorial propriety.²⁸¹ "This underscores the vulnerability of independent prosecutors having to justify their actions," said Joseph diGenova, former United States Attorney for the District of Columbia under Meese.²⁸² "There is no question that this simply would not happen in any other federal criminal investigation where no one is charged."²⁸³ Similarly, Abbe Lowell, former special assistant to Democratic Attorney General Benjamin Civiletti, stated, "[McKay's statement] certainly goes against the practice of the Department of Justice in declining prosecutions and raises questions about whether independent counsels ought to be brought more into conformity."²⁸⁴

Furthermore, the potential for precisely this abusive maneuver had been recognized at the time the Ethics in Government Act was being formulated. In the final report of the Watergate Special Prosecution Force in 1975, Associate Special Prosecutor Henry Ruth wrote that it would be "irresponsible and unethical for a prosecutor to issue a report suggesting criminal conduct on the part of someone" who was not to be indicted.²⁸⁵ If accountable to an Executive Officer, Independent Counsel McKay would have been discouraged from making such a statement.²⁸⁶

It can be argued that the law is unfair because, by giving special prosecutors unlimited budgets and staffs, it encourages them to pursue an investigation when a normal prosecutor would not.²⁸⁷ A bal-

²⁸⁰ *McKay Remarks on Meese Guilt Draw Fire*, Legal Times, July 25, 1988, at 1, col. 2.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ Attorneys General Levi, Bell, and Smith demonstrated an awareness of the effect of the public statements of a federal prosecutor:

Especially in a case involving a high government official, the pressure to make [public] statements will be great. A prosecutor's public statements can have a profound impact on an individual's reputation. Moreover, the harm that an alleged suspect suffers from such publicity will often persist no matter how completely the individual is exonerated.

Brief for Levi, Bell, and Smith, *supra* note 260, at 5.

²⁸⁷ *Morrison*, 108 S. Ct. at 2631 (Scalia, J., dissenting). The Act specifies that the Department of Justice "shall," upon request, provide an independent counsel with "the resources and personnel necessary to perform such independent counsel's duties." 28 U.S.C. 594(d). As noted in the ex-Attorneys General amicus brief:

ancing of conflicting interests is not carried out by the independent counsel, opening the way for loss of prosecutorial perspective and for overzealous pursuit. For example, as early as November 14, 1986, Morrison wrote to then Attorney General Meese that “[s]tanding in isolation . . . Mr. Olson’s testimony of March 10, 1983, probably does not constitute a prosecutable violation, based on my present understanding of the evidence.”²⁸⁸ Yet, Morrison continued the investigation for two more years.²⁸⁹ Both the investigations of Olson and Meese were of long duration and the total fees and costs incurred by each side were considerable.²⁹⁰ This freedom from budgetary constraints has permitted many counsel to adopt a “scorched earth” approach, in which no evidence is too remote or too trivial to merit inquiry.²⁹¹ Furthermore, as the cost of an investigation mounts, an independent counsel may be caught in a “vicious circle” in which further investigation is pursued primarily in response to pressure to justify the undertaking of the probe in the first

Thus, the Independent Counsel can requisition a team of law enforcement officers who have no competing responsibilities. In all of these ways, the Independent Counsel essentially escapes the condition that shapes the environment of every other prosecutor—the need to determine and reassess priorities in a setting characterized by competing interests and demands.

Brief for Levi, Bell, and Smith, *supra* note 260, at 11.

²⁸⁸ *Morrison v. Olson, Continued*, Legal Times, August 15, 1988, at 9, col. 1.

²⁸⁹ In August 26, 1988, Independent Counsel Morrison declared that she would not seek criminal charges against Olson. Her one page written statement did not explain the reasons behind her decision. *Special Counsel Ends EPA Case With No Charge*, N. Y. Times, August 27, 1988, page 1, col.3.

²⁹⁰ The two year Morrison probe cost the government more than \$1.2 million and reportedly cost Olson more than \$1 million in legal fees, for which he may be reimbursed by the government: *No Prosecution in Pricey Investigation*, The Christian Science Monitor, August 29, 1988, at 2, col.2. The fourteen month McKay investigation incurred expenses of \$1.7 million while Meese reported legal fees of \$100,000-\$250,000. Also, an earlier five and one half month long investigation of Attorney General Meese had similarly failed to produce an indictment. The costs there were \$311,848.11 for the government and \$472,190 for the defense. *McKay Remarks on Meese Guilt Draw Fire*, Legal Times, July 25, 1988, at 10, col. 3.

The investigation of Oliver North, John Poindexter, and Albert Hakim by Independent Counsel Lawrence Walsh most clearly demonstrates the use of unlimited resources. A team of 29 lawyers, 73 administrative staff members, six agents from the Customs Department, eleven agents from the Internal Revenue Service, and 35 agents from the Federal Bureau of Investigation has been assembled to carry out the investigation. After less than one year of operation, Walsh and this staff had conducted over 1000 witness interviews. In that same time period, the investigation had spent more than \$4.7 million, not including the salaries of the agents of the Customs Department, IRS and FBI. By comparison to these investigations, the entire Public Integrity Section of DOJ, which investigates and prosecutes cases against federal officials nationwide, operates on an annual budget of \$2.35 million. Janis, *Prosecutors Without Restraint*, Legal Times, February 1, 1988, at 18, col. 1. See also *Morrison*, 108 S.Ct at 2631 (Scalia, J., dissenting).

²⁹¹ Janis, *Prosecutors Without Restraint*, Legal Times, February 1, 1988, at 18, col. 1.

place.²⁹² With normal budgetary concerns and policy priorities, a typical federal prosecutor might have declined to commit resources to such cases which failed to produce indictments.

In the most highly publicized independent counsel investigation, that of Oliver North, John Poindexter, and Albert Hakim by Lawrence Walsh, questions have been raised regarding the possible use of North's testimony before Congress against him in a judicial proceeding.²⁹³ The three defendants were compelled to testify before Congress regarding their roles in the Iran-Contra scandal.²⁹⁴ Defense lawyers in the case have argued that Walsh, his staff, and the grand jury which brought the charges may have been "tainted" by the evidence disclosed at the congressional hearings, so that, in effect, the government compelled North and others to testify against themselves, thereby violating their privilege against self-incrimination under the fifth amendment.²⁹⁵ Although a panel of the Court of Appeals for the District of Columbia recently ruled against North and his co-defendants' interlocutory motion to dismiss, it based its holding on the limitation of an appellate court's jurisdiction to final decisions of the district courts.²⁹⁶ Thus, the court allowed that the "[a]ppellants may ultimately be correct in their assertion that if the grand jury's probable cause determination was 'tainted' by the use of immunized testimony, dismissal of the indictment will be required to remedy the harm."²⁹⁷ In any event, Walsh's ability to pursue the case without violating the fifth amendment rights of the defendants is unresolved.

²⁹² Some criminal defense experts speculated that Morrison's threatened protective indictment of Olson was a way to obtain more time to explore all possible leads: "Having spent some \$1.3 million on the investigation so far, Morrison may be sensitive to . . . potential charges that after all this time and expense, she did not make the most thorough investigation possible." *Morrison v. Olson, Continued*, *Legal Times*, August 15, 1988, at 9, col. 2.

²⁹³ See, e.g., Ripston, "*The 5th*" is a Shield for All, *L. A. Times*, August 6, 1988, at 8, col. 3.

²⁹⁴ North, Hakim, and Poindexter received a limited form of protection called "use" immunity, which guaranteed that what they said in their congressional testimony could not later be used against them. Consequently, Independent Counsel Walsh has been forced to show that he has constructed his argument for conviction independent of the congressional testimony. *U.S. Appeals Court Refuses to Dismiss Iran-Contra Charges*, *Reuters*, September 30, 1988, AM cycle.

²⁹⁵ *Id.* The fifth amendment states, in relevant part, "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

²⁹⁶ *United States v. Poindexter*, No. 86-3057, at 6 (D.C. Cir. Sept. 30, 1988)(LEXIS, Genfed library, Dist file)(per curiam)(defendants' argument "that the [congressional 'use'] immunity affords them a right not to be prosecuted at all is ill-founded").

²⁹⁷ *Id.* at 7.

D. THE POLITICAL IMPLICATIONS OF THE INVESTIGATION OF EXECUTIVE BRANCH OFFICIALS

The necessary accountability to guard against such abuses is difficult to achieve under the Act as it now stands because of political implications not recognized by the majority. The majority's reliance on the powers of the Attorney General to request appointment and to remove an independent counsel indicates that these powers must be exercised by the Attorney General in order to restore a structural balance.²⁹⁸ For example, Morrison's successful attempt to extend the statute of limitations by threatening Olson with a protective indictment could have been interpreted by Attorney General Meese as "good cause" for removal.²⁹⁹ This would be permissible and perhaps even required under the Court's ruling.³⁰⁰ Similarly, after Independent Counsel Seymour's threats upon the Canadian Ambassador, his removal would have been justifiable as an action to ensure against impermissible interference with the President's constitutional duty to carry out foreign policy.³⁰¹ Perhaps future Attorneys General will be better able to effectuate such control. However, it is more probable that the realities of political cosmetics recognized by Justice Scalia will prove too daunting³⁰² and any discretion given to the Attorney General by the Act may be illusory, contrary to the majority's findings. A refusal to request an investigation by an independent counsel in the face of congressional accusations would only enhance the suspicion of a "cover up."³⁰³ It is

²⁹⁸ See *supra* notes 139-43, 159 and accompanying text.

²⁹⁹ Morrison's action may have violated § 594(f) of the independent counsel provision which requires an independent counsel to comply with "the established policies of the Department of Justice respecting enforcement of the criminal laws." 28 U.S.C. § 594(f). Such removal might be overruled upon review if the independent counsel could show that compliance with established policies was "not possible," as excepted by § 594(f). It would seem that this language is very permissive, to the point of making compliance entirely a matter of the independent counsel's discretion. Thus, an appropriate refinement of the Act would be to narrow this exception as to when compliance is "not possible."

³⁰⁰ The Court in *Morrison*, 108 S. Ct. at 2619-20, stated:

[B]ecause the independent counsel may be terminated for 'good cause', the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing her statutory responsibilities in a manner that comports with the provisions of the Act. Although we need not decide in this case exactly what is encompassed within the term "good cause" under the Act, the legislative history of the removal provision also makes clear that the Attorney General may remove an independent counsel for "misconduct."

³⁰¹ See *supra* note 179 and accompanying text.

³⁰² *Morrison*, 108 S. Ct. at 2624 (Scalia, J., dissenting). See *supra* note 183 and accompanying text.

³⁰³ In fact, many who support the independent counsel mechanism believe that the Attorney General should have a more limited role in triggering the independent counsel

this failure to recognize the hard political realities of conflict and interbranch struggle forming the backdrop to the *Morrison* case and, more generally, the Ethics in Government Act, that exposes the majority's opinion to the thrust of Justice Scalia's dissent, and, when the two opinions are compared, give the majority's a Panglossian quality.

The former Attorneys General understood the unique nature of a criminal investigation involving a high government official:

[S]uch cases can raise difficult questions about the distinction between violations of the law and legitimate governmental activity. And such cases can become focal points for intense political pressure.

The Department of Justice undoubtedly has more extensive experience in the prosecution of allegedly corrupt federal and local officials, in a politically charged atmosphere, than any other institution. The accumulated wisdom and experience of the Department of Justice is a unique asset to a prosecutor engaged in such an investigation.

An ad hoc institution like the Office of Independent Counsel will, by contrast, be confronting every one of these vexing issues for the first time, and it is likely to find itself at sea in dealing with them. It will not have developed institutionalized ways of dealing with political pressure from Congress and other sources. . . . It will not know how to assess an official's claim that what might appear to be criminal activity was in fact the vigorous performance of the duties of a public office.³⁰⁴

Such executive officials become casualties of a larger political struggle between branches.

Although an independent counsel does not choose the subject of her investigation, Congress may.³⁰⁵ Therein lies the greatest potential for abuse because, to paraphrase Justice Jackson, in the political arena, relationships between participants can become quite "personal" and the temptation may be great to prosecute those who are "unpopular with the predominant or governing group . . . [who are] attached to the wrong political views, or . . . [who are] personally obnoxious or in the way of" those who may initiate an Ethics in Government Act proceeding.³⁰⁶ In this way, those who request the

process because the current role gives him an opportunity to "cover up." See Mixer, *The Ethics in Government Act of 1978: Problems with the Attorney General's Discretion and Proposals for Reform*, 1985 DUKE L.J. 497, 521-22 (1985) ("In order to fully accomplish the stated purpose of the Ethics Act, Congress must amend it to provide for some sort of review of the Attorney General's decisions or remove these decisions from him entirely."). Of course, under the majority's opinion, the Attorney General's trigger role is essential to the constitutionality of the Act, as it involves the Executive Branch in the executive function of prosecution. But this does demonstrate the extent to which some would carry the powers of the mechanism.

³⁰⁴ Brief for Levi, Bell, and Smith, *supra* note 260, at 14.

³⁰⁵ 28 U.S.C. § 592(g) (Congress may request the Attorney General to apply for the appointment of an independent counsel.).

³⁰⁶ *Morrison*, 108 S. Ct. at 2638 (quoting R. Jackson, The Federal Prosecutor, Address

appointment of an independent counsel "pick[] the man" and the independent counsel acts as an unwitting surrogate "searching the lawbooks . . . to pin some offense on him."³⁰⁷ Thus, a de facto concentration of government power anathema to the system envisioned by the Framers is created.³⁰⁸ Furthermore, if the potential for subversion of the independent counsel mechanism by Congress for political ends is conceded, the Court should have decided *Morrison* as it did *Bowsher v. Synar*, *INS v. Chadha*, and *Buckley v. Valeo*, which each recognized the Framers' fear of self-aggrandizement by the legislative branch.³⁰⁹

In a sense, the original EPA document dispute in *Morrison* was resolved satisfactorily prior to the congressional request of an independent counsel. An attempt by the Executive Branch in the early stages of the dispute to involve the Judiciary, in which it filed a civil action asking the District Court to declare that the EPA Administrator had acted lawfully in withholding the documents, was properly resisted by the court, which encouraged Congress and the President to try "compromise and cooperation, rather than confrontation."³¹⁰ Eventually, such a compromise was reached when certain of the contested materials were turned over to the House subcommittees.³¹¹ The course of events up to this point illustrated

Delivered at the Second Annual Conference of the United States Attorneys (April 1, 1940).

³⁰⁷ *Id.* A recent proposal for refinement of the Act involves an extension of the coverage of the independent counsel process to the Legislative Branch. Eastland, *Independent Counsels for Congress*, Wall St. J., September 30, 1988, at 28, col. 3. On his last day in office, Attorney General Meese issued an order establishing procedures for such a system of independent counsels for members of Congress. *Id.* This move would give the Act a political symmetry which it does not now have by extending the intense scrutiny to which Executive Branch officials are subject to members of Congress. Currently, members of Congress are only subject to investigation by federal prosecutors as are other citizens. This extension of the coverage of the independent counsel would perhaps produce a counterbalance to its political utility, as members of Congress would be discouraged from requesting investigations in meritless cases by the threat of similar treatment by the Executive Branch. Thus, a system approximating that envisioned by the Framers, in which "ambition . . . counteracts ambition," see *supra* note 221 and accompanying text, would be created. Of course, it is also possible that once Congress has experienced the operation of the independent counsel law, it might reevaluate and do away with the law. Proponents of Meese's order have admitted that the demise of the law may be a probable and proper result. Eastland, *Independent Counsels for Congress*, *supra*, at 28, col. 3.

³⁰⁸ See *supra* note 172 and accompanying text. *Morrison*, 108 S. Ct. at 2623 (Scalia, J., dissenting).

³⁰⁹ *Buckley*, 424 U.S. at 129; *Bowsher*, 478 U.S. at 727; *Chadha*, 426 U.S. at 951. See *supra* notes 234-52 and accompanying text.

³¹⁰ *United States v. House of Representatives of the United States*, 556 F. Supp. 150, 153 (D.D.C. 1983). The court held that the exercise of jurisdiction over the DOJ's action for a declaratory judgment of executive privilege was improper.

³¹¹ See *supra* note 41 and accompanying text.

the necessary haggling, frictional process of dispute resolution in a government formed of ambitious, competing branches. However, Congress' persistence after the original matter in contention had been resolved showed the utility of the independent counsel mechanism as a wieldy tool for the harrassment of the Executive Branch.³¹²

In light of the abuses associated with the Act, its refinement seems essential.³¹³ Although an attack on the Act on constitutional grounds is, at this point, quixotic, alternatives for worthwhile amendments to the Act are possible.³¹⁴ For example, an appropriate refinement could be the deletion of the requirement of a filed report in situations in which the independent counsel concludes his or her investigation without an indictment. However, methods for achieving an increased accountability for independent counsels are more difficult to devise. The most effective method of guarding against prosecutorial abuses is through the political accountability of the unitary Executive, which is, of course, absent from the independent counsel process. Without the accountability that comes from the clear delineation of responsibility for the exercise of prosecutorial power, abuses will continue.

VI. CONCLUSION

In *Morrison v. Olson*,³¹⁵ the Supreme Court diverged from the separation of powers precedent established in *Buckley*, *Chadha*, and *Bowsher*. Although the balancing test adopted by the Court may not be as novel an approach as Justice Scalia suggested, certainly the recent trend in separation of powers cases was toward a more formal delineation of responsibilities among the branches of the federal government. After the *Morrison* decision, one can expect to see an *ad hoc* adjudicative approach by the Court as it struggles to determine what are permissible intrusions upon the Executive Branch

³¹² *Morrison*, 108 S. Ct. at 2625 (Scalia, J., dissenting). As Justice Scalia stated: "[B]y the application of this statute in the present case, Congress has effectively compelled a criminal investigation of a high-level appointee of the President in connection with his actions arising out of a bitter power dispute between the President and the Legislative Branch." *Id.* (Scalia, J., dissenting).

³¹³ As Justice Scalia noted, however, both the political cosmetics and utility of the independent counsel provision may cause Congress to leave the Act untouched:

[I]t is difficult to vote not to enact, and even more difficult to vote to repeal, a statute called . . . the Ethics in Government Act. If Congress is controlled by the party other than the one to which the President belongs, it has little incentive to repeal it; if it is controlled by the same party, it dare not.

Morrison, 108 S. Ct. at 2640 (Scalia, J., dissenting).

³¹⁴ See *supra* notes 299, 307.

³¹⁵ 108 S. Ct. 2597 (1988).

without the guidance of the *Humphrey's Executor*³¹⁶ standard.

A direct, bitter confrontation between the President and Congress formed the backdrop to the investigation of appellee Olson and the independent counsel mechanism must be viewed within the context of this interbranch struggle if a consideration of its constitutional validity is to be complete. There is irony in the fact that an Act originally intended to separate politics from the administration of justice instead has now been easily, albeit subtly, transformed into a means of initiating criminal prosecution for political purposes. Because the majority pretermitted this political content to the *Morrison* case, such a subversion of the independent counsel mechanism was not examined. The majority's opinion considered only the technical, formal aspects of the independent counsel provision in determining that it conformed with constitutional restrictions and did not upset the balance of power among the branches of government. However, as Justice Scalia recognized, and events have demonstrated, the actual implementation of the provision presents a substantial intrusion into the responsibilities of the President, as well as encouraging the use of questionable prosecutorial tactics.

The authority to undertake a criminal investigation in pursuit of an indictment carries the potential for abusive treatment of those individuals who become subject to such investigations, even if the authority is exercised in good faith. By placing responsibility for this function solely within the boundaries of the Executive Branch, accountability for its exercise is achieved because the head of that branch must be able to justify any excessive or uneven enforcement or pay the price in the loss of political esteem. Because, as Justice Scalia noted, an independent counsel is subordinate to no one when operating within the confines of his or her established jurisdiction, there is little to temper his or her pursuit of an indictment.³¹⁷ Although overly aggressive prosecution by a typical United States Attorney is not unheard of, under the Ethics in Government Act, the single-focus prosecutor, who possesses a natural susceptibility for overzealous investigation, is institutionalized. Thus, abuses in prosecutorial discretion will arise more regularly and more frequently. Although legislative refinement of the independent counsel provision may curb future prosecutorial excesses, the most

³¹⁶ 295 U.S. 602 (1935).

³¹⁷ *Morrison*, 108 S. Ct. at 2635 (Scalia, J., dissenting).

effective method would be to return full responsibility for the enforcement of criminal law to the Executive Branch.

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