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William K. Kelley

*Notre Dame Law School*, [william.k.kelley.24@nd.edu](mailto:william.k.kelley.24@nd.edu)

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# The Constitutional Dilemma of Litigation Under the Independent Counsel System

William K. Kelley†

In this Article, I examine the most prominent institutional outgrowth of the Watergate era and the decision in *United States v. Nixon*:<sup>1</sup> the independent counsel system as established by the Ethics in Government Act of 1978.<sup>2</sup> That system, which created the institution of the independent counsel, has produced a number of spectacles in American law. The principal example is the prominent role that Independent

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† Associate Professor of Law, University of Notre Dame. I have served as a consultant to Independent Counsel Kenneth W. Starr, including in some of the litigation discussed herein; the views reflected in this Article are, of course, only my own, and should not be taken as reflecting the views of the Office of Independent Counsel or any of its staff. I thank Rebecca Brown, John Manning, and Julie O'Sullivan for their gracious comments and collegial good cheer. I also thank John Nagle for very helpful comments on a prior draft, and Carrie Beers and Christopher Regan for excellent research assistance.

1. 418 U.S. 683 (1974).

2. Following Watergate, Congress passed the Ethics in Government Act of 1978, which included among its reforms the creation of a statutory special prosecutor. See Ethics in Government Act of 1978, Pub. L. No. 95-521, tit. VI, 92 Stat. 1824, 1867 (1978). The statute included a sunset provision, and it was reauthorized upon its expiration in 1983. See Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (1983). Congress again reauthorized the statute in 1987. See Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (1987). President Reagan signed the 1987 reauthorization into law, but issued a signing statement taking the position that the statute was unconstitutional (while his Justice Department was simultaneously taking the same position in court). See President's Statement on Signing H.R. 2939 into Law, 23 WEEKLY COMP. PRES. DOC. 1526 (Dec. 15, 1987). The statute lapsed again in 1992, and lay dormant until it was reauthorized in 1994. See Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732 (1994). The current version of the independent counsel statute, which I will sometimes refer to as the "Act," is codified at 28 U.S.C. §§ 591-599 (1994 & Supp. 1997). Its terms are substantially similar to the prior versions of the statute. For a thorough recent accounting of the history of the Act, see Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601 (1999).

Counsel Kenneth W. Starr, an inferior officer within the executive branch, played in triggering the proceedings that led to the impeachment and trial of the President of the United States.<sup>3</sup> But there are any number of other examples as well—from the President of the United States going on television and asserting both that Starr is out to get him and that he is powerless to do anything about it,<sup>4</sup> to another independent counsel also going on television and claiming that the Attorney General has obstructed an investigation into serious federal crimes,<sup>5</sup> to yet another independent counsel conducting a lengthy investigation which yielded no sustainable felony convictions and thereafter writing a book accusing the President of the United States, the Vice President of the United States, and a host of cabinet officers of engaging in a massive (yet unproved) criminal conspiracy to obstruct justice.<sup>6</sup>

In recent times, the weaknesses in the system Congress has constructed have been much noted, both in the popular media and the legal academic literature.<sup>7</sup> My purpose in this

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3. See 28 U.S.C. § 595(c).

4. See *The News Hour with Jim Lehrer: Newsmaker; President Clinton; Negative Politics and Whitewater* (PBS television broadcast, Sept. 23, 1996) (responding when asked whether Independent Counsel Kenneth W. Starr was "out to get him," "Isn't it obvious?"); President Clinton, Press Conference (Apr. 30, 1998) (responding when asked why he has not sought the dismissal of Starr that it would not be "appropriate" to do so).

5. See Interview with Independent Counsel Donald Smaltz, *Frontline* (May 1998) (claiming that Attorney General Reno refused to allow him to investigate alleged bribes paid to President Clinton when he was Governor of Arkansas). Independent Counsel Smaltz twice sought, over the opposition of the Department of Justice, court approval to expand his investigation; the three-judge panel supervising the scope of his investigation granted one of his requests, see *In re Espy*, 80 F.3d 501 (D.C. Cir. Spec. Div. 1996), and declined the other, see *In re Espy*, 145 F.3d 1365 (D.C. Cir. Spec. Div. 1998).

6. LAWRENCE E. WALSH, *FIREWALL: THE IRAN CONTRA CONSPIRACY AND COVER-UP* (1997).

7. For recent academic treatment of the problems related to the independent counsel system, see *The Independent Counsel Statute: A Symposium*, 49 *MERCER L. REV.* 427 (1998); Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 *AM. CRIM. L. REV.* 463 (1996); Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 *COLUM. L. REV.* 1103 (1998). For an extraordinarily interesting series of panel discussions on the independent counsel system, see Symposium, *The Independent Counsel Act: From Watergate to Whitewater and Beyond*, 86 *GEO. L.J.* 2011 (1998); Sixty-Seventh Judicial Conference of the Fourth Circuit, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, 54 *WASH. & LEE L. REV.* 1515 (1997). Recent controversy surrounding the investigation of President Clinton's relationship with Monica Lewinsky has given rise to an outpouring

Article is not to rehearse those criticisms as a policy matter (although I agree with many of them); nor is my purpose to rehearse past critiques of the constitutionality of the independent counsel structure (although I agree with many of them, too). My purpose instead is to examine a particularly anomalous feature of the independent counsel system: it casts different components of the executive branch into the position of litigating against one another.

The independent counsel system makes possible, and indeed approves of, litigation in Article III courts between the President of the United States in his official capacity and an independent counsel. It also makes possible litigation in which the Department of Justice is adverse to the independent counsel, both as *amicus curiae* and as counsel for a government party. In this Article, I conclude that such litigation is not only a bad idea, but that it gives rise to a serious constitutional dilemma: it either violates Article III, because there is insufficient adversity to support litigation between the parties; or it violates Article II, both because in practical terms it prevents the President and his subordinates from controlling central functions of the executive branch, and because it also places the independent counsel, an inferior officer, in a constitutionally superior position not only to the Attorney General but also to the President of the United States himself. Somewhat paradoxically, the system also intrudes on Article II values because it removes from the President the responsibility and accountability for how the laws are executed. Either by directly violating Article III's limitation of the judicial power to cases or controversies, or by impinging on the values and structure of Article II, the independent counsel system is deeply violative of the constitutional structure.

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of popular commentary critical of the system. For examples, see Akhil Reed Amar, *A Constitutional Nightmare*, WASH. POST, Sept. 20, 1998, at C1; *Shared Legacy: Presidency and Special Counsel Office Declining in Tandem*, HOUS. CHRON., Aug. 16, 1998, Outlook Sec., at 2; Benjamin Wittes, *A Kiss of Death for Independent Counsels*, WASH. POST, Aug. 11, 1998, at A21; David Dorsen, *Starr's Clinton Investigation May Be Unconstitutional*, THE HILL, July 29, 1998, at 34; Lawrence M. Solan, *Fault Lies Not Only in Starr but in Law*, NAT'L L.J., Apr. 20, 1998, at A19; John Ketcham, Editorial, *Attorney General Should Get Special 14-Year Term*, GREENSBORO NEWS & REC., Mar. 16, 1998, at A8; Paul Simon, *Too Close to the President*, ST. LOUIS POST-DISPATCH, Feb. 20, 1998, at B7; Dan Carney, *Political Winds Shift Independent Counsel Critics*, COMMERCIAL APPEAL, Nov. 23, 1997, at B3; Editorial, *Ed Meese's Revenge*, WASH. TIMES, Aug. 5, 1997, at A12.

In Part I, I set forth the real world circumstances in which this constitutional dilemma arises through examples of litigation in federal courts that bring into focus the reality of this constitutional dilemma. In Part II, I analyze the Article III implications of the legal structure, both decisional and statutory, that has brought us to this point and offer a critique of that structure. In Part III, I analyze the practical implications of dividing Article II authority between the President and his agents on one hand, and a series of independent counsels on the other. Although the scope of this paper does not permit a full consideration of the constitutional question, I suggest that the Court in *Morrison v. Olson*<sup>8</sup> underestimated the adverse consequences to the functioning of the Article II branch of approving the constitutionality of the independent counsel system.

## I. LITIGATION BETWEEN THE INDEPENDENT COUNSEL AND OTHER COMPONENTS OF THE EXECUTIVE BRANCH

### A. WATERGATE LITIGATION

Since Watergate there have been numerous instances of litigation between independent counsels and their colleagues in the executive branch.<sup>9</sup> The most notable, of course, was *United States v. Nixon*,<sup>10</sup> in which the Supreme Court held that President Nixon was required to comply with a trial subpoena issued by Special Prosecutor Leon Jaworski<sup>11</sup> for tape

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8. 487 U.S. 654 (1988).

9. Nobody disputes that the independent counsel is part of the executive branch, and indeed that his or her only charge is to aid in the execution of the laws. See *Morrison*, 487 U.S. at 691.

10. 418 U.S. 683 (1974).

11. During Watergate, the term "special prosecutor" was used to describe the executive officer who was charged with investigating and prosecuting certain crimes at the behest of the Attorney General. See *United States v. Nixon*, 418 U.S. at 694 n.8 (describing the appointment process and regulatory basis for the jurisdiction of the Watergate Special Prosecutor). That term continued to be used through the first iteration of the Ethics in Government Act, but was abandoned in favor of the term "independent counsel" upon the statute's first renewal. See Pub. L. No. 97-409, § 2, 96 Stat. 2039 (1983). At various times since 1978—particularly when the constitutionality of the Ethics in Government Act had not been judicially settled, and in periods when the law had lapsed—the Department of Justice provided by regulation for the appointment of independent counsels. See 28 C.F.R. §§ 600.1-600.5 (1997).

recordings of certain Oval Office conversations involving the President and his senior staff. The Court recognized (for the first time) the constitutional legitimacy of executive privilege, but held that the President's interest in confidential communications must give way to a demonstrated need for evidence in a criminal trial. I shall have much more to say about *Nixon* in Part II, so for present purposes I just pause to note that, although the subpoena in *Nixon* was issued to the President in his private capacity, the privilege he attempted to interpose was an official privilege that the President is entitled to invoke only as President and only in the official interest of the presidency.<sup>12</sup> *Nixon* thus was an example of the kind of controversy that I am concerned with in this Article—litigation between two members of the executive branch acting in their official capacities.

#### B. INTRA-BRANCH LITIGATION INVOLVING INDEPENDENT COUNSELS, 1974-1993

Between Watergate and the Clinton administration the instances of litigation between an independent counsel and any other component of the executive branch were few. Indeed, the only direct litigation was between Independent Counsel Lawrence Walsh and the Justice Department over the technicalities of administering the Classified Information Procedures Act (CIPA).<sup>13</sup> Under CIPA, when a criminal defendant seeks to introduce classified information into evidence, the United States is entitled to file an interlocutory appeal if a district court refuses its submission of substitution evidence.<sup>14</sup> In the CIPA litigation between Walsh and Attorney General Thornburgh, the Attorney General's substitution evidence had been rejected by the district courts involved, and the Attorney General sought to take an interlocutory appeal as CIPA entitles the United States to do.<sup>15</sup> Walsh claimed that the independent counsel statute gave him sole authority to prosecute appeals in the name of the United States in cases in which he was involved, and thus that the Attorney General

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12. Although the matter has not been squarely addressed in court, it is generally thought that invocations of executive privilege require the personal action of the President of the United States. See *In re Sealed Case*, 121 F.3d 729, 744 n.16 (D.C. Cir. 1997).

13. See 18 U.S.C. app. § 1 (1994).

14. See *id.* § 6.

15. See *id.* §§ 6-7(a).

had no authority to participate in the litigation. In two cases, courts agreed with Walsh, holding that the Attorney General lacked statutory authorization to appeal a district court's denial of the government's substitution evidence under CIPA.<sup>16</sup> Both cases concluded that the independent counsel's statutory authority independently to "appeal[ ] any decision of a court in any case or proceeding in which [the] independent counsel participates in an official capacity"<sup>17</sup> denies the Attorney General standing to prosecute appeals generally, and particularly under CIPA, notwithstanding that statute's provision to the United States a right to an interlocutory appeal in this context.<sup>18</sup>

The only other dispute between the Attorney General on behalf of the executive branch and independent counsels in the Reagan-Bush years was in the litigation over the constitutionality of the independent counsel statute, in which various independent counsels defended the law's constitutionality and the Justice Department attacked it. Those issues came to a head in *Morrison v. Olson*, in which the Department of Justice, purporting to represent the interests of the United States, filed an amicus curiae brief on the side of the subject of an independent counsel investigation who was

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16. See *United States v. Fernandez*, 887 F.2d 465, 471 (4th Cir. 1989); *United States v. North*, 713 F. Supp. 1441, 1441 (D.D.C. 1989). For a discussion of these events, see John Q. Barrett, *All or Nothing, or Maybe Cooperation: Attorney General Power, Conduct, and Judgment in Relation to the Work of an Independent Counsel*, 49 MERCER L. REV. 519, 535-37 (1998).

17. 28 U.S.C. § 594(a)(3) (1994).

18. See 18 U.S.C. app. § 7(a). Both courts noted, however, that the Attorney General retained the statutory right under section 6(e) of CIPA to file an affidavit obligating the defendant not to disclose the classified material. See *Fernandez*, 887 F.2d at 470-71; *North*, 713 F. Supp. at 1441. The district court decision denying the Attorney General standing was affirmed by unpublished order on appeal. See LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 111 (1993); see also Barrett, *supra* note 16, at 537 n.86. As Professor Barrett recounts, the Attorney General did invoke that statutory authority in some circumstances during the Iran-Contra investigation, with the result that two counts of Walsh's case against Oliver North were dismissed, as well as his entire indictment of Joseph Fernandez. See *id.* at 536-37. For general treatments of the problems raised by the intersection between CIPA and the independent counsel statute, see Sandra D. Jordan, *Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice After Iran-Contra*, 91 COLUM. L. REV. 1651 (1991); Ronald K. Noble, *The Independent Counsel Versus the Attorney General in a Classified Information Procedures Act-Independent Counsel Statute Case*, 33 B.C. L. REV. 539 (1992).

asserting that the statute was unconstitutional.<sup>19</sup> Of course, the Supreme Court upheld the statute over Justice Scalia's lone dissent. I shall have much more to say about *Morrison* in Part III, so I will pause only to note here that although that case did not involve litigation between the President (as represented by the Attorney General) and the independent counsel as parties squared off against one another, it did present the circumstance of two different views of the law being taken in the Article III courts by different components of the executive branch.

### C. INTRA-BRANCH LITIGATION INVOLVING INDEPENDENT COUNSELS, 1993-PRESENT

Since the Clinton Administration came to power in 1993, there have been many more instances of litigation between independent counsels and other components of the executive branch.

#### 1. Intra-Branch Litigation Involving Independent Counsel Donald Smaltz

In 1994, Donald Smaltz was appointed as Independent Counsel to investigate allegations that former Secretary of Agriculture Mike Espy violated various federal criminal laws in accepting certain favors and gratuities from persons or entities with business before his Department.<sup>20</sup> In the course of his investigation, Smaltz issued grand jury subpoenas for documents from the Office of White House Counsel<sup>21</sup> reflecting that Office's own investigation of Secretary Espy (directed toward whether the President should fire or otherwise discipline Espy). In response, the White House interposed a variety of privilege claims, among them executive privilege. The United States—represented by Smaltz<sup>22</sup>—thus litigated against the White House extremely serious and important questions of executive privilege, which ultimately ended up in a landmark decision from the D.C. Circuit that set the current

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19. 487 U.S. 654, 659 (1988).

20. *In re Espy*, 145 F.3d 1365, 1366 (D.C. Cir. 1998).

21. Throughout this paper I use the term "White House" as a shorthand for any component within the Office of the President under direct presidential supervision.

22. See 28 U.S.C. § 594(a)(9) (providing that the independent counsel shall conduct litigation "in the name of the United States").



governing standard for how claims of executive privilege are handled and resolved.<sup>23</sup> (On the merits, the D.C. Circuit held that some of the controverted documents needed to be produced, and remanded for the district court to apply a "need analysis" as to the rest.<sup>24</sup>)

At other points in his investigation, Smaltz twice concluded that he had evidence of criminal violations by Espy and others that were not specifically covered by his original grant of prosecutorial jurisdiction, and therefore sought approval to expand his investigation to cover those matters. Under the statute, it is up to the Attorney General to determine, after giving "great weight to any recommendations of the independent counsel," whether the circumstances warrant expansion of the independent counsel's prosecutorial authority.<sup>25</sup> The statute otherwise provides for the court supervising the independent counsel<sup>26</sup> to expand his or her jurisdiction if it determines that the new matters are "related to the independent counsel's prosecutorial jurisdiction."<sup>27</sup>

In the Espy matter, the Attorney General concluded in both instances that the evidence of criminal violations obtained by Smaltz was not sufficiently related to his original jurisdiction and therefore declined his request for an expansion of his authority. On both occasions, Smaltz then went to court to seek to have the Special Division expand his jurisdiction as a matter related to his existing jurisdiction; both times the Attorney General opposed the independent counsel's application. On one of the occasions, the Special Division sided with Smaltz,<sup>28</sup> and on the other occasion it sided with the Attorney General.<sup>29</sup> Thus, the Independent Counsel, an inferior officer to the Attorney General, was again in litigation

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23. See *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997). This case is undoubtedly the most significant executive privilege decision by any court since *United States v. Nixon* in 1974.

24. See *id.* at 762.

25. 28 U.S.C. § 593(c)(2).

26. That court, known as the "Special Division," is made up of three federal circuit judges, one of whom (and no more) must be sitting on the D.C. Circuit, who are selected for the assignment by the Chief Justice of the United States. See *id.* § 49(d).

27. *Id.* § 594(e).

28. See *in re Espy*, 80 F.3d 501 (D.C. Cir. 1996).

29. See *in re Espy*, 145 F.3d 1365 (D.C. Cir. 1998).

against the Attorney General, and both were acting in their official capacities.<sup>30</sup>

## 2. Intra-Branch Litigation Involving Independent Counsel Kenneth W. Starr

Similar litigation has occurred in the investigation run by Independent Counsel Kenneth W. Starr. In the last two years, executive branch officials—in their official capacity—have engaged in at least four pieces of litigation against the independent counsel.

### a. Eighth Circuit Government Attorney-Client Privilege

In 1997, the Office of Independent Counsel sought access to notes taken by White House lawyers in meetings with First Lady Hillary Rodham Clinton.<sup>31</sup> The White House resisted the grand jury subpoena for the notes, initially on the grounds of both executive privilege and government attorney-client privilege. After the independent counsel made clear that the matter would be litigated, the White House dropped the claim of executive privilege, but continued to press the claim of government attorney-client privilege.

The Eighth Circuit subsequently held that there was no government attorney-client privilege between White House lawyers and the First Lady, and that the White House was not entitled to withhold evidence sought by a federal prosecutor in a grand jury investigation.<sup>32</sup> There could be no legal adversity between the independent counsel and the White House in this context, the court noted, since the interest of the White House

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30. There is a good argument that the *Espy* cases described here were not “cases” at all, but were rather instances of the Special Division acting in its Article II capacity of appointing independent counsels. In fact, as a functional matter, that view seems quite persuasive. The Special Division, on the other hand, treated the disputes as litigation. The matters were briefed and decisions were issued, which were in turn reported in the Federal Reporter. In any event, the point remains that the Independent Counsel and the Attorney General disagreed over a legal question, which was controverted and conclusively resolved by a court—and not either the Attorney General or the President within the executive branch itself. The statute does not resolve whether the exercise of power in such circumstances by the Special Division is executive or judicial in nature; it merely provides the mechanism of seeking an expansion from the Special Division. See 28 U.S.C. § 594(c), (e).

31. Mrs. Clinton’s personal lawyers also attended the meetings in question.

32. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922-23 (8th Cir.), cert. denied, 117 S. Ct. 2482 (1997).

as a government institution was the same as the interest of the independent counsel—to ferret out and prosecute crime. Thus, although the First Lady in her individual capacity is entitled to have privileged communications with her private counsel, and although she assuredly has an interest as an individual in avoiding criminal prosecution, the White House lawyers have no legitimate interest in serving those private interests of Mrs. Clinton's. Thus, the Eighth Circuit held, the notes taken by White House lawyers had to be turned over to the prosecutors.<sup>33</sup>

The White House then sought certiorari and the Department of Justice supported the petition as *amicus curiae*;<sup>34</sup> the Supreme Court nonetheless denied review.<sup>35</sup> The uncomfortable Article III circumstances of the case are illustrated by the name of the case in the Supreme Court. When the White House filed its petition for certiorari, it pointedly captioned the case "Office of the President v. Office of Independent Counsel." The brief in opposition filed by the independent counsel objected to this captioning of the case, noting (correctly) that the Act provides explicitly that the independent counsel is to litigate "in the name of the United States,"<sup>36</sup> and that the respondent in the case was therefore required by law to be called the "United States" and not "Office of Independent Counsel."<sup>37</sup> Although the Court denied certiorari without commenting on the dispute, it is worth pausing over the lineup of the parties: the White House, representing the President of the United States, sought certiorari in a case against the independent counsel, the inferior officer designated by law to investigate the matters at hand and vindicate the prosecutorial interests of the United States; the Attorney General, who serves at the pleasure of the President, filed a brief supporting the President and opposing the full investigation of potential federal crimes, while also

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33. *See id.*

34. *See* Brief *Amicus Curiae* for the United States, Acting Through the Attorney General Supporting Certiorari, *Office of the President v. Office of Independent Counsel*, 117 S. Ct. 2482 (1997) (No. 96-1783).

35. *See* *Office of the President v. Office of Independent Counsel*, 117 S. Ct. 2482 (1997) (denying petition for a writ of certiorari).

36. 28 U.S.C. § 594(a)(9) (1994).

37. *See* Brief for the Federal Respondent in Opposition at 28-30, *Office of the President v. Office of Independent Counsel*, 117 S. Ct. 2482 (1997) (No. 96-1783).

representing the interests of the United States. In short, this litigation is a prime example of intra-branch litigation.

*b. Lewinsky Phase: Executive Privilege and Government Attorney-Client Privilege*

There has been still more litigation of this sort involving the executive branch and Independent Counsel Starr. In the course of the Monica Lewinsky phase of Starr's investigation, numerous additional privilege disputes arose. The first of these was over executive privilege.<sup>38</sup> Numerous grand jury witnesses invoked executive privilege to refuse to testify about matters related to President Clinton's relationship with Ms. Lewinsky and the White House's response to the investigation. In the first months of 1998, when the Lewinsky investigation was in its early stages, White House staff members who asserted executive privilege included Assistant to the President Sidney Blumenthal, Deputy Counsel to the President Bruce Lindsey, and Deputy Assistant to the President Nancy Hernreich.<sup>39</sup> Mr. Lindsey also claimed government attorney-client privilege, reflecting the White House's decision not to follow the Eighth Circuit's decision on the matter from less than a year before.<sup>40</sup> The independent counsel thereafter filed a motion to compel the testimony of these witnesses, which the district court granted. The White House filed a notice of appeal. Before the appeal could be heard, however, the independent counsel filed a petition for a writ of certiorari

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38. Although the term "executive privilege" can be given a broad meaning, in using that term in this Article, I mean it in its constitutional form, that of presidential communications. See *In re Sealed Case*, 121 F.3d 729, 744-45 (D.C. Cir. 1997). Although some of the executive privilege claims made by the White House in the Lewinsky investigation covered the non-constitutional deliberative process privilege, the distinction between these branches of executive privilege law is not relevant for purposes of this Article. See *id.* at 745-46 (detailing differences between branches of executive privilege).

39. See COMMUNICATION FROM KENNETH W. STARR, INDEPENDENT COUNSEL, H.R. DOC. NO. 105-310, at 207 (1998).

40. The Lewinsky grand jury before which Mr. Lindsey and the other witnesses were called was empaneled in the District of Columbia; hence, the Eighth Circuit law on government attorney-client privilege was not binding. Former Deputy White House Counsel Jane Sherburne commented, however, that she was "frankly stunned that, given that 8th Circuit decision out there, that the White House [Counsel's Office] would be involved" in dealing with the Lewinsky matter. Ruth Marcus, *White House Lawyer Role Faces Test; Does Staff Serve President or Office?*, WASH. POST, June 29, 1998, at A01.

before judgment,<sup>41</sup> seeking immediate Supreme Court review of both the executive privilege and government attorney-client privilege aspects of the case. When the White House filed its response to the independent counsel's petition, however, it dropped the executive privilege claims altogether, and relied solely on government attorney-client privilege as to Lindsey's testimony.<sup>42</sup> The Court thereafter denied certiorari before judgment, noting that it expected the court of appeals to resolve the matter expeditiously.<sup>43</sup>

In the court of appeals, the government attorney-client privilege litigation between the White House and independent counsel did indeed proceed expeditiously. The case was fully briefed and argued in just a little more than three weeks,<sup>44</sup> and a month later the court of appeals held, agreeing with the Eighth Circuit's decision from the year before, that the White House's government attorney-client argument was without merit.<sup>45</sup> On the contrary, the court held, it would be a "gross misuse of public assets" to permit government attorneys, including lawyers for the White House, to be used as a "shield against the production of information relevant to a federal criminal investigation."<sup>46</sup> The court of appeals thus affirmed the district court's decision granting the independent counsel's motion to compel Mr. Lindsey's testimony. Both the court of appeals and the Supreme Court declined to stay that ruling, and thus Mr. Lindsey and other members of the White House Counsel's office were required to testify before the grand jury investigating the Lewinsky matter.<sup>47</sup> Several months later, the

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41. See 28 U.S.C. § 1254.

42. See Peter Baker, *Clinton May Drop Appeal on Privilege; Strategy Could Avert Supreme Court Review*, WASH. POST, June 1, 1998, at A1; *Clinton to Limit Legal Appeal; Executive Privilege Claim to Be Dropped*, CHI. TRIB., June 1, 1998, at 1.

43. See *United States v. Clinton*, 118 S. Ct. 2079, 2080 (1998) (denying petition for certiorari before judgment) (noting that the Court "assumed that the Court of Appeals will proceed expeditiously to decide this case").

44. The Supreme Court denied certiorari before judgment on June 4, 1998, see *id.*, and the court of appeals heard argument on June 29, 1998. See *In re Lindsey*, 148 F.3d 1100 (D.C. Cir.), cert. denied, 119 S. Ct. 466 (1998).

45. See *Lindsey*, 148 F.3d at 1114.

46. *Id.* at 1110.

47. After their court losses in the Eighth Circuit and the D.C. Circuit, and while the White House's petition for certiorari was pending, the White House and its lawyers refused to acquiesce in the court rulings and continued to refuse to answer questions that they claimed were covered by the attorney-client privilege. The Supreme Court denied review months later, see Office of

Supreme Court denied the White House's petition for a writ of certiorari.<sup>48</sup>

In the wake of the Lindsey litigation, still more litigation ensued between the White House and the independent counsel over executive privilege and government attorney-client privilege. Subsequent White House witnesses in the grand jury continued not only to invoke attorney-client privilege to support their refusal to answer questions about the Lewinsky matter, the witnesses—including Bruce Lindsey himself, whose testimony had been the subject of the earlier withdrawn appeal as the independent counsel's petition for certiorari before judgment was pending—reasserted executive privilege. The events that followed, including Starr's referral of potentially impeachable matters to the House of Representatives, apparently overtook that litigation. But so far as the public record is concerned, Bruce Lindsey and other White House witnesses—including lawyers Cheryl Mills and Lanny Breuer—ultimately succeeded in avoiding testifying fully about the Lewinsky matter before the grand jury.

The final category of litigation between Starr's office and the White House is the litigation over Secret Service testimony. Early in the Lewinsky investigation, the independent counsel decided to seek information about President Clinton's relationship with Ms. Lewinsky from Secret Service officers who might have knowledge of the facts. The Secret Service strongly resisted providing information, and thus two executive branch entities—the Office of Independent Counsel and the United States Secret Service, which is part of the Department of Treasury<sup>49</sup>—embarked upon negotiations over the submission of evidence to a federal grand jury. A third executive branch entity, the Department of Justice, represented the Secret Service in the negotiations and the litigation that followed.<sup>50</sup>

The Secret Service claimed that its mission of protecting the President would inevitably be compromised if its officers

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the President v. Office of Independent Counsel, 119 S. Ct. 466 (1998).

48. *See id.*

49. *See* 18 U.S.C. § 3056 (1994).

50. *See* 28 U.S.C. §§ 516, 519 (1994) (general assignment of responsibility to Attorney General for representing in court the United States and its agencies); 28 C.F.R. § 0.45 (1997) (assignment to Civil Division of the Department of Justice to represent the United States and its agencies in litigation involving the government's legal rights and responsibilities).

were forced to disclose in any forum, including a federal grand jury, facts about what they observed in the course of discharging their protective function. Thus, the agency argued, with the support of the Justice Department, a new "protective function privilege" should be recognized under Federal Rule of Evidence 501.<sup>51</sup> The independent counsel's view was that Secret Service officers have a dual mission—not only to protect the President (and others), but also to fulfill their duties as sworn law enforcement officers.<sup>52</sup> There was no incompatibility, the independent counsel claimed, between the protective function of the Secret Service and its law enforcement function.<sup>53</sup> For its part, the Secret Service claimed (again, with the support and legal counsel of the Justice Department) that its protective function would be undermined—to the point of a likelihood that someday in the future a President of the United States would be assassinated—if its officers were forced to divulge information they learned in the course of their protective duties.<sup>54</sup>

After negotiations over the testimony broke down, the independent counsel filed a motion to compel the testimony. The district court ruled against the Secret Service,<sup>55</sup> and the Justice Department appealed to the D.C. Circuit. As that appeal was pending, the independent counsel again filed a petition for a writ of certiorari before judgment.<sup>56</sup> The Supreme Court denied that petition at the same time it denied

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51. See FED. R. EVID. 501 (authorizing the courts of the United States to recognize new evidentiary privileges in a common law manner in light of "reason and experience").

52. See 18 U.S.C. § 3056.

53. See Brief of Appellee United States, *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998) (No. 98-3069).

54. See Brief for the Appellant, *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998) (No. 98-3069).

55. See *In re Grand Jury Proceedings*, 1998 U.S. Dist. LEXIS 7734 (D.D.C. May 22, 1998), *aff'd*, *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998), *reh'g en banc denied*, 146 F.3d 1031 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 461 (1998).

56. In contrast to the lower court practice of generically captioning litigation arising out of grand jury proceedings, the practice in the Supreme Court is to name the parties to the dispute. Thus, the independent counsel's petition was captioned, "United States v. Robert Rubin, Secretary of the Treasury"; that caption reflected the fact that the independent counsel is charged with litigating in the name of the United States, see 28 U.S.C. § 594(a)(9), and Secretary Rubin's official action in asserting the would-be protective function privilege. See *In re Sealed Case*, 148 F.3d at 1074.

the government attorney-client privilege petition that the independent counsel had earlier filed.<sup>57</sup> Again proceeding expeditiously, the D.C. Circuit ordered briefing and argument to be completed in just over three weeks, and issued its decision rejecting the Secret Service and Justice Department's claims less than two weeks later.<sup>58</sup> The Justice Department sought rehearing en banc from the D.C. Circuit, which was denied without any judge calling for a vote;<sup>59</sup> the Justice Department then sought a stay, which the Chief Justice denied;<sup>60</sup> the full Court later denied the Justice Department's petition for a writ of certiorari.<sup>61</sup>

## II. ARTICLE III AND INTRA-BRANCH LITIGATION INVOLVING THE INDEPENDENT COUNSEL

Throughout the legal disputes that I have recounted thus far, the oddness of the alignment of the parties was little noted. With the notable exception of *United States v. Nixon*,<sup>62</sup> none of the cases so much as mentioned the potential Article III problems raised by the litigation.<sup>63</sup> The reason why that is so, of course, is that *Nixon* itself is taken to have resolved any doubts about the propriety under Article III of litigation between the independent counsel and other components of the executive branch. My purpose in this part is to unpack and analyze *Nixon's* holding on this point, as well as the surrounding Article III law. My argument here is that the provisions of law authorizing litigation between the independent counsel and other components of the executive branch are what save their disputes from lacking Article III

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57. See *United States v. Clinton*, 118 S. Ct. 2079 (1998) (denying independent counsel's petition for certiorari before judgment on both secret service and government attorney-client privilege claims).

58. See *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir.), cert. denied, 119 S. Ct. 461 (1998).

59. See *In re Sealed Case*, 146 F.3d 1031 (D.C. Cir.) (denying petition for rehearing en banc), cert. denied, 119 S. Ct. 466 (1998).

60. See *Rubin v. United States*, 119 S. Ct. 1 (1998) (opinion in chambers).

61. See *Office of the President v. Office of Independent Counsel*, 119 S. Ct. 461 (1998).

62. 418 U.S. 683 (1974).

63. In a separate opinion concurring in the denial of rehearing en banc in the secret service case, Judge Laurence Silberman argued forcefully that the Justice Department lacked standing to press the claim of privilege. See *In re Sealed Case*, 146 F.3d at 1031-32 (Silberman, J., concurring). I shall have more to say below about Judge Silberman's opinion.



adversity. In other words, it is the *law*—in the form of regulations issued by the Justice Department in *Nixon*, and in the form of the independent counsel statute with respect to subsequent events—that creates legal adversity between the independent counsel and, say, the White House or Attorney General. Although I don't believe that Article III adversity can be created merely by the issuance of a regulation, Congress *can* create adversity by statute. Thus, while the holding of *Nixon* is highly dubious, the Ethics in Government Act does constitutionally permit intra-executive litigation involving independent counsels. In Part III, my task will be to point out the tremendous costs to Article II values exacted by the law's purchase of Article III adversity.

#### A. LEGAL ADVERSITY WITHIN THE EXECUTIVE BRANCH

It is basic law, of course, that Article III requires legal adversity between the parties to a case or controversy. Thus, feigned or collusive cases,<sup>64</sup> test cases framed by Congress,<sup>65</sup> and other circumstances where the parties before the court are not legally adverse<sup>66</sup> are beyond the power of Article III courts to decide. The Supreme Court has not spoken expansively on what makes parties legally adverse, having resorted to generalizations that the dispute between them must be "concrete" and "legal" in nature.<sup>67</sup> As Justice Black noted, however, it is a truism that "no person may sue himself," because courts "do not engage in the academic pastime of rendering judgments in favor of persons against themselves."<sup>68</sup> That notion is deeply connected to the core Article III value prohibiting advisory opinions.<sup>69</sup>

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64. See, e.g., *United States v. Johnson*, 319 U.S. 302, 305 (1943) (per curiam). See generally ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.2 (2d ed. 1994).

65. See, e.g., *Muskrat v. United States*, 219 U.S. 346, 362-63 (1911).

66. See, e.g., *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792); see also CHEMERINSKY, *supra* note 64, at 47-51; RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM* 99-123 (4th ed. 1996).

67. See, e.g., *Baker v. Carr*, 369 U.S. 186, 204 (1962).

68. *United States v. ICC*, 337 U.S. 426, 430 (1949).

69. See, e.g., *Hayburn's Case*, 2 U.S. (2 Dall.) at 408; *Muskrat*, 219 U.S. at 346. The requirement of Article III adversariness makes it unconstitutional for a corporation to sue itself. See *South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300, 300-01 (1892):

[S]ince the decision in the Circuit Court the control of both of the

When, then, is it permissible for the government to litigate against itself?<sup>70</sup> I argue in this section that the proper analysis of whether litigation impermissibly involves the executive branch against itself<sup>71</sup> ordinarily depends on two features. The first is whether one or the other of the parties to the suit is *not* litigating in his or her official capacity. If both actors are acting in their official capacity, that very feature—again, recall that we are talking about an intra-executive dispute—raises serious questions about whether the parties can be legally adverse for purposes of Article III. But if one of the parties is litigating in his or her individual capacity—say, an employee suing his or her government employer for unlawful discrimination—then on its face such a suit is not intra-branch in nature and thus presents no problems of lack of legal adversity.<sup>72</sup> Second, even if both parties are litigating in their official capacities, the presence of legal adversity depends upon whether some source of law has removed from one of the parties, or from the President of the United States, the power conclusively to resolve the dispute.

The most prominent and extended judicial discussion of this question came in *United States v. ICC*,<sup>73</sup> in which the Court found justiciable a controversy between the United States and the Interstate Commerce Commission in which the United States challenged a Commission order made to it in its capacity as a shipper in interstate commerce. As others have noted,<sup>74</sup> that case, as well as most others raising this issue,<sup>75</sup> involved an order of an independent agency in which the real

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corporations, parties to this suit, had come into the hands of the same persons . . . the present managers and owners of the properties were anxious that the question should be decided . . . . We cannot, however, consent to determine a controversy in which the plaintiff in error has become the *dominus litis* on both sides . . . . [T]he litigation has ceased to be between adverse parties.

70. For a thorough and illuminating analysis of this question, see Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991).

71. For purposes of this Article, I take it for granted that interbranch litigation—say, between Congress and the President—poses minimal, if any, Article III difficulties. See *id.* at 910-14.

72. See *id.* at 961; see also *id.* at 922 n.105, 971 n.300; Lee A. Albert & Larry G. Simon, *Enforcing Subpoenas Against the President: The Question of Mr. Jaworski's Authority*, 74 COLUM. L. REV. 545, 546-47 (1974).

73. 337 U.S. 426 (1949).

74. See, e.g., HART & WECHSLER, *supra* note 66, at 104 n.5.

75. See, e.g., *United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953).

party in interest was not the agency but a third party outside the government. Thus, in *ICC*, the "basic question [was] whether railroads have illegally exacted sums of money from the United States."<sup>76</sup> The Court emphasized that if the parties to a dispute in substance were legally adverse, then the fact that *eo nomine* they might be within the same branch of the government did not preclude Article III jurisdiction.<sup>77</sup> But even if the real party in interest in such cases were another component of the executive branch, these cases are perfectly consistent with an Article III theory that judges the parties' legal adversity by reference to the *law* governing their relationship. Thus, the provisions of law making the ICC independent of the control of the "United States" as a shipper—which on the facts was the United States Army<sup>78</sup>—as well as from direct presidential control, indicate that Congress had created a legal regime in which the parties within the executive branch did not have the power conclusively to resolve their legal differences.<sup>79</sup> This theory of Article III adversity, then, depends on the provisions of law that take out of the disputants' hands the power conclusively to resolve their disputes. If Congress has the power to insulate from direct presidential control the manner in which the ICC executes the law—which is a conclusion that has of course been widely historically disputed, but which I assume to be true for purposes of this part of the Article—then there is no Article III problem with the courts hearing a case between the ICC and other components of the executive branch, including the United States Army.<sup>80</sup>

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76. 337 U.S. at 430; see *Secretary of Agric. v. United States*, 350 U.S. 162 (1956) (adjudicating dispute over validity of ICC regulations governing liability for eggs broken during railroad transit, without noting any potential problem of intra-executive dispute).

77. See *ICC*, 337 U.S. at 430.

78. See *id.* at 428-29.

79. See, e.g., Exec. Order No. 12,146, 3 C.F.R. § 409 (1979); Resolution of Legal Dispute Between the Department of Energy and the Tennessee Valley Authority, 11 Op. Off. Legal Counsel 70 (1987) (indicating the view that two executive agencies whose heads serve at the pleasure of the President must submit their legal disputes to the Attorney General for resolution); see also *Tennessee Valley Auth. v. United States*, 13 Cl. Ct. 692 (1987) (holding that the dispute was to be resolved administratively).

80. As I shall argue in Part III, this conclusion does not necessarily get the regime established by Congress out of the constitutional woods. The fact that the situation in *ICC* did not violate Article III does not mean that it did not violate Article II; indeed, the very act of creating Article III adversity

In light of these general principles, I now turn to the particular subject of my focus in this Article—disputes between the independent counsel (or special prosecutor) and the Attorney General or President over the conduct of a federal criminal investigation.

### B. NIXON AND ARTICLE III

*United States v. Nixon*<sup>81</sup> remains the Court's most extended discussion of the justiciability of intra-branch disputes over federal criminal law enforcement. The circumstances leading up to the case are well-known, of course, so there is no need for me to recount any more than the basics here; my focus is on the Article III aspects of the decision, not the case's substantive executive privilege holding. The litigation between Special Prosecutor Leon Jaworski and President Nixon made its way through the district court and into the court of appeals largely as a repeat of earlier litigation between the President and former Special Prosecutor Cox over the President's amenability to a grand jury subpoena.<sup>82</sup> The second litigation, however, contained a different twist—a claim by the President that the matter was non-justiciable because it was an intra-branch dispute that he alone had the power to resolve.<sup>83</sup>

As Professor Bobbitt has noted, "it [is] certainly arguable that no sufficient adversity could exist" between the President and another officer of the executive branch.<sup>84</sup> Yet the Court

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raises substantial Article II concerns.

81. 418 U.S. 683 (1974).

82. See *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (en banc). After the court of appeals ordered him to comply with a grand jury subpoena for certain tape recordings in *Sirica*, President Nixon decided not to appeal, but instead partially to comply while also ordering Cox not to seek any more such evidence in the future. It was the refusal of Cox to accept these directives that resulted in his firing and all that followed. See KATY J. HARRIGER, *INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS* 19 (1992).

83. See *UNITED STATES V. NIXON: THE PRESIDENT BEFORE THE SUPREME COURT* 337-50 (Leon Friedman ed., 1974) (reprinting President Nixon's brief in the Supreme Court).

84. PHILIP BOBBITT, *CONSTITUTIONAL FATE* 212-13 (1982). Professor Bobbitt also characterized the Court's opinion in *Nixon* (which reached a result with which he ultimately agreed) as being comprised of the "worst set of doctrinal arguments—the least convincing, the most easily refuted, brief but repetitious, bombastic but unmoving—one is likely to encounter in the recent volumes of the United States Reports." *Id.* at 212.

curtly rejected the President's argument, concluding that the intra-branch nature of the dispute posed no justiciability barrier. After first noting that the Court's practice has never been to treat the formal alignment of the parties as determinative of Article III justiciability,<sup>85</sup> the Court proceeded to analyze the sources of law which produced legal adversity between the parties.

Those sources included the statutory charge to the Attorney General to litigate criminal cases in the name of the United States,<sup>86</sup> and to appoint subordinates to aid him in the discharge of that duty.<sup>87</sup> Moreover, exercising that authority, the Attorney General had in fact issued regulations delegating to the Special Prosecutor his authority over the criminal investigation arising out of the Watergate break-in.<sup>88</sup> Those regulations, the Court emphasized, bound not only the executive branch, but also "the United States as the sovereign composed of the three branches."<sup>89</sup> Until those regulations were rescinded, the Special Prosecutor had the lawful authority to litigate privilege claims against the President, and the President himself was powerless to dictate otherwise.<sup>90</sup> Finally, the Court emphasized that there was concrete adversity between the President and the Special Prosecutor over the evidence in question and ultimately concluded "[i]n light of the uniqueness of the setting in which the conflict arises," the intra-branch nature of the dispute posed no barrier to its justiciability.<sup>91</sup>

Thus the Court identified a number of factors—both legal and practical—that created legal adversity between the President and the Special Prosecutor. Let us consider their impact on the Article III analysis.

### 1. Statutory Charge to the Attorney General

The first factor relied upon by the *Nixon* Court—the statutory charge to the Attorney General to execute the

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85. See *Nixon*, 418 U.S. at 693.

86. See 28 U.S.C. § 516 (1994).

87. See *id.* §§ 509-510, 515, 519.

88. See *Nixon*, 418 U.S. at 694-95 & nn.8-9. The regulations governing Justice Department appointment of special prosecutors (now, independent counsels) can be found at 28 C.F.R. §§ 600.1-600.5 (1997).

89. *Nixon*, 418 U.S. at 696.

90. See *id.* at 695-97.

91. *Id.* at 697.

criminal laws in the name of the United States—is an unpersuasive source for demonstrating legal adversity between the President and the Special Prosecutor because it proves too much. The Court's argument was essentially that the Special Prosecutor stood in the shoes of the Attorney General, who was the officer charged by law with determining what evidence would be sought in the course of a federal criminal investigation.<sup>92</sup> The Court's suggestion, then, was that the President would have been powerless to resist a subpoena even from the Attorney General.<sup>93</sup> There was a crucial distinction, of course, between the status of the Attorney General and the Special Prosecutor—the Attorney General served at the pleasure of the President. Thus, although as a technical matter the statutory authority granted to the Attorney General by Congress did not permit the President himself to prosecute crimes in the name of the United States, the President had substantial control simply by virtue of the fact that he was the Attorney General's boss.<sup>94</sup>

Some have argued that although the President might theoretically have control over the Attorney General's conduct, as a practical matter that control is nonexistent.<sup>95</sup> It is undoubtedly true that the President's control is indirect. For example, the President cannot himself appear in Court in the name of the United States, or dictate who will; Congress by law has given the Attorney General that power.<sup>96</sup> But the President has the power to direct the Attorney General's

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92. *See id.* at 694-95.

93. Others have agreed with this suggestion, noting that the Attorney General's power exists in law even though the President might effectively have the power to influence, to the point of insistence, how it is used. *See* Leonard G. Ratner, *Executive Privilege, Self Incrimination, and the Separation of Powers Illusion*, 22 UCLA L. REV. 92, 101-03 (1974).

94. Although the President surely has the power to dismiss the Attorney General for any reason or no reason, the power to direct the activities of cabinet officers does not extend so far as to allow the President to order the Attorney General to violate the law as set forth by Congress. *See* *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838). If there is a good faith basis for disagreement between the President and his or her subordinates, however, the President is generally entitled to insist that the cabinet officer defer on pain of dismissal.

95. *See, e.g.*, Herz, *supra* note 70, at 919-30; Ratner, *supra* note 93, at 102. As this article was in its final editing, a symposium on government lawyering was published, *see* Symposium, *Government Lawyering*, 61 LAW AND CONTEMP. PROBS. 1 (1998); some of the symposium contributions are on topics related to issues I discuss in this article.

96. *See* 28 U.S.C. §§ 515, 519 (1994).

conduct in his or her discharge of that statutory function. So, too, with the other statutory functions of the Attorney General; so long as that officer serves at the pleasure of the President, and I am unaware of any suggestion that he or she does not,<sup>97</sup> then the President ultimately has the power to control what the Attorney General does.<sup>98</sup> The President's ultimate power of control is rarely invoked, and properly so. But, as the Court has consistently maintained in its separation of powers jurisprudence, the power to remove is nonetheless the power to control.<sup>99</sup> Moreover, even if the President does not frequently need to invoke his removal authority, it is reasonable to expect the Attorney General to conduct herself in a way that will please him; in this way, the President has substantial control over the conduct of the Attorney General in discharging her statutory functions. In the case of the Attorney General the President has the power of removal, and therefore the power to control her conduct. That is simply not true of executive branch actors who have been granted tenure in office independent of the whim of the President; indeed, that is the whole point of insulating such actors from removal at the President's pleasure.

Professor Herz discounts this argument, arguing that the justiciability concerns are the same whether or not the parties before the court are executive agencies (i.e., agencies headed by

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97. See, e.g., *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922) (noting that the Attorney General serves at the pleasure of the President.).

98. It might well be that the power to direct the Attorney General's functions, on pain of removal, is limited. For example, it might constitute an obstruction of justice for the President to direct the course of a criminal investigation for private, rather than public, purposes. But even if the President engages in such misconduct—using his public office for private criminal purposes—it still seems clear that any action by him discharging an Attorney General for refusing to go along would be legally effective. Cf. *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973) (issuing declaratory judgment that the firing of Archibald Cox was illegal but granting no remedy).

99. See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986); *Buckley v. Valeo*, 424 U.S. 1 (1976). The decision in *Bowsher* provides particularly strong support for the notion that the statutory assignment of functions to the Attorney General doesn't create adversity between her and the President. In that case, the Court struck down the Gramm-Rudman-Hollings deficit reduction statute because it gave an executive role to the Comptroller General of the United States, who was otherwise removable for cause by a joint resolution of Congress. Even though that removal authority had lain dormant for 60 years, and even though it required the mustering of a veto-proof majority of Congress to invoke, the Court concluded that even that limited removal authority gave Congress impermissible control over the execution of the laws.

persons removable at will by the President) or independent agencies (i.e., agencies headed by persons removable only for cause).<sup>100</sup> He notes (and I have no quarrel with this) that the degree of presidential control of executive agencies is frequently less than is assumed, while the degree of control over independent agencies is frequently more.<sup>101</sup> But he goes on to say that this therefore establishes that “[a]s a practical matter, the President has identical control over litigation by independent and executive agencies,”<sup>102</sup> and thus that the Article III concerns when such agencies are involved in intra-branch litigation are the same. He urges that the question should be answered by reference to the substantive provisions of law that grant, or do not grant, the agencies sufficient freedom to litigate against an executive branch counterpart.<sup>103</sup>

This argument is overstated as both a practical and theoretical matter. First, it is not the case that the President has “identical control” over litigation involving executive and independent agencies. Two contrasting examples from the tenure of President George Bush suffice to make the point. In late 1991, a school desegregation case involving Mississippi’s treatment of its historically black colleges under federal law was pending in the Supreme Court. The United States, through Solicitor General Kenneth W. Starr, had taken the position that to remedy past discrimination in funding historically black colleges, the State was not required to provide extra funding to ensure the continued existence of the black colleges.<sup>104</sup> After a lobbying effort by civil rights groups, however, President Bush directed Starr to disavow the government’s position and instead argue that the State had a duty to remedy historic disparities in funding.<sup>105</sup> The Solicitor General, who was removable at will by the President, complied.<sup>106</sup> In another incident late in President Bush’s tenure, the Board of Governors of the U.S. Postal Service—

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100. See Herz, *supra* note 70, at 947-56.

101. See *id.* at 951-54; see also Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255 (1994).

102. Herz, *supra* note 70, at 954.

103. See *id.* at 955-56.

104. The case was *United States v. Fordice*, 505 U.S. 717 (1992).

105. See Linda Greenhouse, *Bush Reverses U.S. Stance Against Black College Aid*, N.Y. TIMES, Oct. 22, 1991, at B6.

106. See *id.*



officers who could be removed by the President only for cause—asserted the authority to litigate independently of the control of the Justice Department. After the Postal Service refused to back down, President Bush directly ordered the Governors to withdraw their litigating position and to cooperate with the Attorney General in the litigation in question; the President stated that if they failed to comply he would exercise his authority to remove them for cause.<sup>107</sup> Believing that Congress had granted the Postal Service independent litigating authority, the Board of Governors refused to comply with the President's direction.<sup>108</sup> Subsequently, the Governors succeeded in enjoining the President from removing them,<sup>109</sup> and in establishing as a matter of law their right to litigate contrary to Justice Department direction.<sup>110</sup>

These anecdotes illustrate the significant differences between the President's ability to control litigation by those whom he can remove at will and those whom he cannot. In the first instance, a simple telephone call sufficed to persuade the Solicitor General to take the extraordinary step of withdrawing a legal position on which he had personally signed off in the Supreme Court. In the other, multiple rounds of litigation, coupled with direct orders to the agency in question, resulted in the President failing to impose his will on an independent agency.

Contrary to Professor Herz's argument, then, these examples demonstrate that independence can make a practical difference in the real world. It seems reasonable to conclude at the very least that a determined President's ability to control the course of government litigation depends on the independence of the officers who have been charged by law

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107. See *Mackie v. Bush*, 809 F. Supp. 144 (D.D.C.), *vacated as moot*, 10 F.3d 13 (D.C. Cir. 1993). In this case, the Governors obtained an injunction against the President directing him not to exercise his removal authority until the pending primary injunction litigation was resolved. For an excellent discussion of these events, and of the legal and political complexities involved in executive branch control of agency litigation, see Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273 (1993).

108. This is a belief that they succeeded in establishing as law in the D.C. Circuit. See *Mail Order Ass'n v. U.S. Postal Service*, 986 F.2d 509 (D.C. Cir. 1993).

109. See *Mackie*, 809 F. Supp. at 144.

110. See *Mail Order Ass'n*, 986 F.2d at 509.

with conducting the litigation.<sup>111</sup> Although Professor Herz provides a powerful and nuanced account of the multiple ways in which independent agencies are not *truly* independent, and in which executive agencies as a practical matter *are*,<sup>112</sup> the absence of formal legal barriers to the President's accomplishing his goals in the latter situation counts for everything when the stakes are high enough for the President to insist on getting his way.

The theoretical objection to Professor Herz's position rests on its failure to come to terms with the significance of the Court's separation of powers jurisprudence. As I noted earlier,<sup>113</sup> the Supreme Court has taken a rigorously formal view of the significance of the removal power and the ability to control. Taking as a premise that Congress cannot control the execution of the laws, the Court in *Bowsher* insisted that the congressional power to remove the Comptroller General—which could only be exercised for specified reasons and only by passing a joint resolution—was an impermissible encroachment on the executive if the Comptroller had any role in executing the laws.<sup>114</sup> That was so even though no law gave the Congress *any* say in how the Comptroller discharged his executive functions; it was enough for the Court that the Comptroller was subject to congressional removal if he failed to please Congress in executing the laws.<sup>115</sup>

It follows from *Bowsher* that, as a matter of constitutional law, the President has the power to control the Attorney General's discharge of her statutory functions by virtue of his power to remove her if he is displeased with her

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111. It is a quite different point, and not one that undermines my argument in text, that the President rarely sees fit to exert whatever influence he has. I also should add that in the normal course of government business it might well be that the President exercises the same degree of control (which is to say little) over the litigating decisions of both executive and independent officers. But the test of the legal principles involves is in the hard case, where the stakes are high enough for the parties to take, or consider taking, their intra-executive disputes to an Article III court.

112. See Herz, *supra* note 70, at 951-54; see also 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.5 (3d ed. 1994); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 641-43 (1984).

113. See *supra* note 99 and accompanying text.

114. See *Bowsher v. Synar*, 478 U.S. 714 (1986); see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 11-12 (1994).

115. See Lessig & Sunstein, *supra* note 114, at 111.

performance.<sup>116</sup> Assuming that it would not constitute good cause for removal if the head of an agency refused to follow the President's directions as to how to execute the law,<sup>117</sup> the difference between executive and independent agencies thus seems to make all the difference. In the one instance it is hard to see why an Article III court should intervene if the President has the complete constitutional and legal authority to direct the result; in the other instance, the law, as passed by Congress, has removed that power from the President, and thus there is no party outside the Article III courts with the legal authority conclusively to resolve the dispute.

To bring the discussion back to *Nixon*, what this means is that the statutory creation of the office of Attorney General, and the charge to prosecute crimes in the name of the United States, do not in themselves create adversity between the President and Attorney General should they disagree over how to execute the federal criminal law. It is undoubtedly true that Congress, through its lawmaking power, substantially influences how the law is executed.<sup>118</sup> But that lawmaking power is tempered by the default rule—that Congress has not

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116. It might be argued that the Court is properly more attentive to the control that exists simply by virtue of the possibility of removal because of the inter-branch nature of the context in *Bowsher*. On reflection, however, it seems that feature ought more reasonably to cut the other way. In the situation of the Comptroller General, Congress's removal authority had not been used during the 60-year existence of the office prior to the passage of the Gramm-Rudman-Hollings Act that extended that officer's duties to include the execution of the law; it would have been quite surprising and jarring for Congress suddenly to interfere with how the Comptroller discharged his duties. In contrast, there is nothing at all unusual about the prospect of the President seeking to control the exercise of powers by those whom he has the power to remove. I would suppose he does that every day.

117. I recognize that this premise is highly disputable—and indeed seems at war with *Bowsher*. I will consider this question further in Part III. I note preliminarily, though, that the very purpose of the good cause removal provision in the Ethics in Government Act is to liberate from presidential direction any significant prosecutorial decision. See *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting); S. REP. NO. 97-496 (1982), reprinted in 1982 U.S.C.A.N. 3537, 3553 (noting that the good cause removal provision was to be invoked "in only extreme, necessary cases"). For an elaborate and illuminating argument as to why it *might* constitute good cause for removal if a subordinate officer disobeyed the President's directions regarding law enforcement decisions, see John F. Manning, *The Independent Counsel Statute: Reading Good Cause in Light of Article II*, 83 MINN. L. REV. 1285 (1999).

118. See Ratner, *supra* note 93, at 102.

seen fit to alter in this context—that the Attorney General serves at the pleasure of the President.<sup>119</sup>

## 2. Regulatory Delegation of Independence and Tenure to the Special Prosecutor

The second, and most significant, source for the Court's holding that there was legal adversity between President Nixon and Jaworski was the regulatory grant of independence and tenure in office to Jaworski.<sup>120</sup> The Court firmly concluded that those regulations had the "force of law" so long as they were on the books, and thus bound not only the President but the entire United States government.<sup>121</sup> Because the regulations as a matter of substance gave Jaworski the power to issue subpoenas even to the President, and as a matter of procedure gave up the Attorney General's power (and therefore the President's power) to remove Jaworski for anything but extraordinary cause, the Court held that there was legal adversity sufficient to satisfy Article III.<sup>122</sup>

To support that holding, the Court cited a number of cases which on first blush seem consistent with the finding of justiciability. For example, in *United States ex rel. Accardi v. Shaughnessy*,<sup>123</sup> the Attorney General sought to review an action by the Board of Immigration Appeals, a body to which

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119. The lack of any congressional action to limit the President's removal power over the Attorney General is what prevents there being Article III adversity between them. If Congress did see fit to impose limits, then the Article III problems would be greatly mitigated. That is not to say, of course, that there wouldn't be enormous Article II objections to such congressional action. See *Morrison*, 487 U.S. at 685-92; *Myers v. United States*, 272 U.S. 52 (1926); *Wiener v. United States*, 357 U.S. 349 (1958); see also Paul J. Mishkin, *Great Cases and Soft Law: A Comment on United States v. Nixon*, 22 UCLA L. REV. 76, 82-83 (1974); William Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 UCLA L. REV. 116, 132 (1974).

120. The regulations at issue in *Nixon* were issued by the Attorney General at the time of Jaworski's appointment to guarantee him the "greatest degree of independence" allowed by law and that he would not be removed "except for extraordinary improprieties on his part" and then only after the President garnered a consensus of Congressional leaders agreeing that he should be removed. See *United States v. Nixon*, 418 U.S. 683, 694 n.8 (1974) (citing 38 Fed. Reg. 30,739 (1973)). Similar regulations (though not including the necessity of garnering congressional approval for a dismissal) have consistently been issued by the Attorney General ever since. For the current version, see 28 C.F.R. §§ 600.1-600.5 (1997).

121. *Nixon*, 418 U.S. at 695-96.

122. See *id.* at 696-97.

123. 347 U.S. 260 (1954).

he had by regulation delegated the power to resolve the matter in dispute. Notwithstanding the discretionary nature of those regulations, and the undenied fact that the Attorney General could repeal those regulations any time he pleased, the Court held that the Attorney General had no power to act contrary to the regulations so long as they remained on the books. Other cases from the Supreme Court,<sup>124</sup> as well as the lower courts,<sup>125</sup> confirm the principle that agencies are bound to follow their own regulations.<sup>126</sup>

On analysis, however, the cases do not fully support the Court's holding in *Nixon*.<sup>127</sup> While it is indeed hornbook law that agencies are bound by their own regulations, the most common circumstance in which that question arises is when individuals, whether parties outside the government or government employees acting in their individual capacity, have interests at stake. Each case cited by the *Nixon* Court for the proposition that the Attorney General's regulations created legal adversity—*Service v. Dulles*,<sup>128</sup> *Vitarelli v. Seaton*,<sup>129</sup> and

124. See *Morton v. Ruiz*, 415 U.S. 199 (1974); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407 (1942); see also 1 DAVIS & PIERCE, JR., *supra* note 112, § 6.5; BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 4.9 (3d ed. 1991). But see *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (“[I]t is always within the discretion of a court or an administrative agency to relax or modify its own procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.”). For a general analysis of when agency regulations are considered binding, see Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own “Laws”*, 64 TEX. L. REV. 1 (1985).

125. See, e.g., *Ortiz v. Secretary of Defense*, 41 F.3d 738, 741 (2nd Cir. 1994) (Army); *Montilla v. INS*, 926 F.2d 162, 167 (2nd Cir. 1991) (Immigration and Naturalization Service); *American Petroleum Inst. v. EPA*, 787 F.2d 965, 977 (5th Cir. 1986) (Environmental Protection Agency); *Rose v. Secretary of the Dep't of Labor*, 800 F.2d 563, 566 (6th Cir. 1986) (Labor Department).

126. One court has held that the *Accardi* doctrine is dictated by due process. See *Wilkinson v. Legal Servs. Corp.*, 27 F. Supp. 2d 32, 35 (D.D.C. 1998) (“[T]he *Accardi* doctrine derives from the Due Process Clause's obligation that government agencies follow the law.”).

127. This point is more than an academic problem. Many anticipate that the Ethics in Government Act will not be renewed (or will be substantially modified) when it expires this year. See 28 U.S.C. § 599 (1994). If that occurs, and we return to the purely regulatory system of the Watergate and 1992-1994 years, these questions will likely become practically very important.

128. 354 U.S. 363 (1957).

129. 359 U.S. 535 (1959).

*Accardi*<sup>130</sup>—falls into these categories. *Service* and *Vitarelli* involved the question whether regulations setting the terms on which government employees could be discharged bound the government in the sense that a discharge in violation of them was unlawful; *Accardi* involved the question whether the Attorney General was bound not to interfere with the adjudication of disputes which he had delegated to the Board of Immigration Appeals the power to resolve. The Court held that the government was bound, and that the individuals involved had a cause of action.<sup>131</sup> In each instance, the government had bound itself to deal with an employee or individual in a prescribed way prior to taking certain actions against them, but only as *individuals*.<sup>132</sup>

The situation in *Nixon* was different. Jaworski was not litigating over the subpoena to the President in his individual capacity; on the contrary, he was exercising public authority that would have been the Attorney General's absent the regulations at issue. Under the *Nixon* holding, the regulations were akin to an act of Congress limiting the power of the President and Attorney General. And although Congress had authorized the Attorney General to delegate his power to subordinates,<sup>133</sup> it would be quite odd to treat that authorization as including with it the ability to create a legal controversy between two parties in their official capacities where one would not, and indeed could not, otherwise exist.<sup>134</sup>

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130. 347 U.S. 260 (1954).

131. See *Vitarelli*, 359 U.S. at 540-46; *Service*, 354 U.S. at 388-89; *Accardi*, 347 U.S. at 265-67.

132. The Court has adopted this rationale explicitly. See *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures."). The point is further amplified by the recent district court decision in *Wilkinson v. Legal Services Corp.*, where the court observed that "[i]n each case [of the *Accardi* line] the Court inquired into the purpose of the regulations that the agency allegedly violated, and found that the party relying on the *Accardi* doctrine was in the class of persons for whose benefit the regulations had been promulgated." 27 F. Supp. 2d. 32, 52 (D.D.C. 1998). The court relied on a variety of cases for that proposition. See *id.* (citing *Yellin v. United States*, 374 U.S. 109, 115 (1963); *Vitarelli*, 359 U.S. at 540; *Service*, 354 U.S. at 373; *Accardi*, 347 U.S. at 268; *Bridges v. Wixon*, 326 U.S. 135, 152 (1945); *Arizona Grocery v. Atchison, T. & S. F. Ry Co.*, 284 U.S. 370, 389 (1932); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 155-56 (1923)).

133. See 28 U.S.C. § 515, 519.

134. This point is made more clear by thinking of the normal situation in which subordinates of the Attorney General exercise delegated power. The Justice Department has a host of regulations on the books dividing up the

To put the point another way, *Nixon* seems to stand for the proposition that a collusive lawsuit is permissible so long as the agreement to collude is in the form of a regulation. The prior cases, however, do not stand for so much. Instead, they support the proposition that the government can bind itself—in something akin to a contract—in how it deals with individuals. If the Attorney General had fired Jaworski in violation of the regulations, then it seems clear that under *Accardi*, *Service*, and *Vitarelli* he would have had a claim in his individual capacity.<sup>135</sup> It is quite different to say that the regulations would allow the Attorney General and Special Prosecutor to litigate over the scope of Jaworski's authority as set by internal Justice Department regulations.

Here an analogy to the corporate law is illuminating. As Professor Herz has noted, the fact that a corporation cannot sue itself is not ordained in nature, but is instead a substantive component of what it means in law to be a corporation.<sup>136</sup> If the Chevrolet Division of General Motors Corporation seeks information from the Oldsmobile Division, and the latter resists, they are not entitled to litigate over the matter because there is an authority outside the courts with conclusive authority to resolve the dispute—the central management of General Motors.<sup>137</sup> In the same way, no matter how much the

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functions that have been statutorily granted to the Attorney General to perform. See, e.g., 28 C.F.R. §§ 600.1-600.5 (1997) (concerning duties delegated to the Independent Counsel). Nobody would suggest, however, that these regulatory delegations of power within the Department create Article III adversity between the Attorney General and the Solicitor General, for example; nor would anybody argue that Congress by allowing such delegations of authority meant also to allow different components of the Department to sue one another.

135. Judge Gerhard Gesell so concluded with respect to the firing of Archibald Cox under the prior version of the regulations. See *Nader v. Bork*, 366 F. Supp. 104, 108 (D.D.C. 1973).

136. See Herz, *supra* note 70, at 903-06.

137. See *id.* at 903. The Supreme Court in *South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300 (1892), faced an analogous situation. One corporation in litigation with another had acquired its opponent between the circuit court's decision and argument before the Supreme Court. The attorney representing the plaintiff filed the defendant corporation's circuit court briefs as well as his own. He explained that the corporate officers were "anxious" to have the question decided so the minority shareholders in the acquired corporation would "receive whatever, by the finding of the court, would be due to them." *Id.* at 301. The Court nonetheless dismissed the suit. See *id.*; see also *American Wood Paper Co. v. Heft*, 75 U.S. 333 (1869) (where the complaining company purchased the patents they were accused of infringing with stock in their own company,

President and the Attorney General might prefer to litigate against one another in their official capacities, or (in the absence of a statute saying otherwise) the President and the Special Prosecutor might want to, the settled understanding is that ordinarily they cannot do so, since they are able to resolve their disputes themselves. In the case of GM, the corporate law would not permit Chevrolet and Oldsmobile to litigate against one another simply by issuing an internal regulation which said that they could.<sup>138</sup> The same should be true for the President and those who are charged with aiding him in executing the criminal laws.

Again relying on the corporate law analogy, the proper way to look at *Accardi* and the other cases relied upon in *Nixon* is like the situation of an employment contract between GM and one of its employees. There is nothing problematic about litigating over such contracts because neither GM nor its employee has the power conclusively to resolve any disputes that might arise. So, too, with regulations governing how the government will treat its employees or other private individuals.<sup>139</sup>

Thus, like a hypothetical agreement between Chevrolet and Oldsmobile to litigate their differences, the situation in *Nixon* appears to be a paradigmatic collusive lawsuit. So weakened was President Nixon by his ill-advised dismissal of Archibald Cox that his Justice Department issued internal regulations agreeing not to dismiss Cox's successor absent the approval of the leaders in both Houses of Congress.<sup>140</sup> In the case of the Cox firing, however, the uproar was not over the existence of the power in the President to do what he did; it

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there was no longer any adversity between the parties).

138. One reason why a corporation cannot sue itself is to prevent it from exhausting the claims of shareholders who might later want to bring derivative actions. See *Kane v. Central Am. Mining & Oil*, 235 F. Supp. 559, 568 n.36 (1964).

139. Indeed, it is regularly the case that internal department regulations, while precatory, have no binding effect in court in the sense that an individual can claim harm if they are violated. See, e.g., U.S. ATTY MAN. § 1-1.100 (1997).

140. See *United States v. Nixon*, 418 U.S. at 693, 694 n.8 (quoting regulation providing that the President would not "exercise his Constitutional powers to effect the discharge" of Jaworski except for "extraordinary improprieties" and "without . . . first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is" that Jaworski should be fired).



was instead over the abusive nature of the President's exercise of his power.<sup>141</sup> By the time the situation with Jaworski came to a head, Nixon had learned that it was far less politically risky to litigate against his executive branch subordinate than to direct him to act in a certain way on pain of removal if he refused to comply.<sup>142</sup> Thus, in *Nixon* the President chose to litigate rather than exercise his Article II powers, a choice that was made legally possible by the issuance of a regulation essentially saying that the executive branch preferred to litigate against itself rather than resolve its differences internally.<sup>143</sup> The regulations worked, then, to give up power

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141. *Nader v. Bork*, the lawsuit over the firing of Cox, was a strange case. In the first place, Archibald Cox wasn't a plaintiff, and it is charitable to say that Judge Gesell merely stretched to conclude that the actual plaintiffs had standing to object to Cox's firing. 366 F. Supp. 104, 105-06 (D.D.C. 1973); cf. *Raines v. Byrd*, 117 S. Ct. 2312, 2318-22 (1997). Second, Judge Gesell did not grapple with the question whether Cox's refusal to obey the President's order not to subpoena further tapes constituted sufficient cause to fire him, preferring simply to declare a result. See *Nader*, 366 F. Supp. at 108. In the end, the case is the purest sort of advisory opinion; Judge Gesell's only order was to declare the firing of Cox to be illegal. See *id.* at 109-10. Nobody's legal status or obligations were an iota different the day after that decision than they were the day before.

142. Had the President followed such a course (as he did with respect to Mr. Jaworski's predecessor, Archibald Cox), he would undoubtedly have paid an enormous political cost—surely to the point of impeachment and likely conviction. But those political consequences would have had no bearing on the *legality* of the President's removal decision. Although such a removal might technically have been illegal—depending on whether it would have constituted an extraordinary impropriety to disregard a direct presidential order to withdraw the subpoena—there would, as a practical matter, have been no legal consequences of removing Mr. Jaworski, just as was the case with respect to the removal of Mr. Cox. Cf. *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973). And in any event no source of law prohibited the President from demanding that his Attorney General repeal the regulations guaranteeing Jaworski independence and tenure, and then having him fired. President Nixon could have accomplished that (assuming the presence of a willing Attorney General) literally in a moment. That course surely would have been within the President's power, though it would in all likelihood have led to his quick impeachment and removal from office.

143. It is important to remember here that *Congress* had done nothing to interfere with the President's constitutional authority to fire any of the executive branch actors involved—whether the Attorney General, or the Special Prosecutor through the Attorney General. Congress had of course exerted overwhelming oversight pressure to deter the President from repeating the Saturday Night Massacre. See *Nixon*, 418 U.S. at 695-96. But it had done nothing *legally* effective—that is, it had not passed a law addressing the issue—on the matter.

that Congress had lodged in the Attorney General, subject to the constitutional supervision of the President.

Apart from the cases relied upon in *Nixon* itself, the Supreme Court has rarely dealt with litigation between two executive branch agencies. As I discussed above, the leading case is *United States v. ICC*,<sup>144</sup> which involved an independent agency whose commissioners were beyond the direct control of the President litigating against another executive branch entity.<sup>145</sup> In addition, however, the Court has occasionally decided an intra-executive dispute without addressing, or even noting, the potential Article III problems in doing so. In *United States v. Connecticut National Bank*<sup>146</sup> and *United States v. Marine Bancorporation*,<sup>147</sup> the Court considered antitrust challenges by the United States to two separate bank mergers. Under the applicable regulatory scheme, the banks were required to seek the approval of the Comptroller of the Currency, an executive officer who served for a fixed term of five years but who was subject to removal by the President for any reason (provided that the President was required to communicate to the Senate the reason for the dismissal.)<sup>148</sup> In any court challenge to an approved merger, the statutory scheme gave the Comptroller the right to intervene and defend the merger.<sup>149</sup> In both *Connecticut National Bank* and *Marine Bancorporation*, the challenged mergers had both been approved by the Comptroller, and he had intervened to defend both.<sup>150</sup> In both cases, the Supreme Court decided the matter on the merits without mentioning the potential Article III problem in deciding a case in which the United States (as

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144. 337 U.S. 426 (1949).

145. As I discussed above, *see supra* text accompanying notes 73-80, the Court in *ICC* dealt with the justiciability challenge by emphasizing that the real party in interest against the United States Army was not the Interstate Commerce Commission, but were instead private railroads whose shipping charges were under challenge. The Court has decided other intra-branch disputes involving independent agencies which, while nominally parties, were similarly not the real parties in interest. *See FMB v. Isbrandtsen Co.*, 356 U.S. 481, 483 n.2 (1958); *Secretary of Agric. v. United States*, 347 U.S. 645, 647 (1954); *ICC v. Jersey City*, 322 U.S. 503, 524 (1944).

146. 418 U.S. 656 (1974).

147. 418 U.S. 602 (1974).

148. *See* 12 U.S.C. § 2 (1994).

149. *See id.* § 1828(c)(7)(D).

150. *See Marine Bancorporation*, 418 U.S. at 614 (noting intervention of Comptroller); *United States v. Connecticut National Bank*, 362 F. Supp. 240, 242 (D. Conn. 1973) (same), *vacated*, 418 U.S. 656 (1974).

represented by the Justice Department, which was headed by an officer removable at will by the President) was the plaintiff, and the Comptroller of the Currency (who also was removable essentially at will by the President) was an intervenor-defendant.

Although at first blush these circumstances seem troubling to my Article III theory—since they involved parties who were subject to the President's direction as to how to resolve their legal differences—upon analysis these cases are troubling neither as a matter of substance nor precedent. As to substance, the Court treated the cases just as it had the dispute in *United States v. ICC*; the real parties in interest were the United States (which was challenging the mergers) and the affected banks (which were seeking to merge). Indeed, the Court's opinion in neither *Connecticut National Bank* nor *Marine Bancorporation* gives any hint beyond describing what happened in the courts below that the Comptroller of the Currency had any interest or involvement at all. There was no decision on the merits that affected the rights of the United States in relation to the Comptroller and vice versa. Thus, just as the Interstate Commerce Commission was not a real party in interest in *United States v. ICC*, the Comptroller of the Currency was not in the subsequent cases.

The situation in the bank merger cases was different from *Nixon* in an additional critical respect. Whereas in *Nixon* the provision of law putatively creating adversity within the executive branch was an internal regulation that was subject to repeal at any time, the provision of law at issue in *Connecticut National Bank* and *Marine Bancorporation* was a statute passed by Congress which plainly authorized the lineup of the parties that occurred. Thus the parties in the bank case were litigating pursuant to specific congressional authorization rather than by their own agreement. Thus, if a court were not persuaded that the lack of genuine litigation between the Comptroller and the Attorney General mitigated any Article III concerns, it might well be that the statutory authorization of suits between the United States and the Comptroller of the Currency is not constitutionally permissible. In such circumstances, the proper course in a case raising the issue would be to invalidate the statute as applied.<sup>151</sup>

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151. The statute is questionable only as applied to suits involving the United States as the plaintiff challenging a merger. The language in the

Neither *Connecticut National Bank* nor *Marine Bancorporation*, however, can fairly be treated as precedent upholding Article III jurisdiction in these circumstances. The Court did not so much as advert to the problem in either case, much less analyze it and hold that it was permissible for the executive branch to litigate against itself. Since at least 1805, the Court has adhered to the rule that exercises of jurisdiction that are not challenged and do not result in a holding that jurisdiction actually exists are not precedential.<sup>152</sup> And it might well be that were the Court confronted with the issue it would hold that the statutory authorization of suit in these circumstances could not be sustained.

Thus it seems as though the Supreme Court's holding in *United States v. Nixon* is unique in holding that it is permissible under Article III to litigate in federal court a genuine dispute between two executive branch officials whose dispute was subject to final and authoritative resolution within the branch. That decision made practical sense in the context of dealing with the acute political crisis of Watergate. By forcing the public disclosure of highly incriminating tapes, the Court's decision led directly to the President's resignation, a resolution of the crisis that was surely quicker and less traumatic than would have been impeachment and a Senate trial. The system paid a cost, however, for resolving the dispute between Nixon and Jaworski in the courts rather than in the political arena. Allowing the President (through the Attorney General) to give up the power to resolve intra-executive disputes internally necessarily—indeed, by design—also allows the President to avoid the responsibility and accountability for how the law is executed.

Although it was surely convenient to all the parties in *Nixon* to resolve the matter judicially, that convenience was at odds with the Court's insistence, particularly in recent years,

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statute under which the Comptroller of the Currency intervened was general in nature, providing a right of intervention in "any action" brought to challenge certain mergers. 12 U.S.C. § 1828(c)(7)(D). In challenges involving non-governmental plaintiffs, of course, no issue of intra-branch litigation would be posed.

152. See, e.g., *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 38 (1952) (noting that the Court is not bound by a prior exercise of jurisdiction "where it was not questioned and it was passed sub silentio"); *United States v. More*, 7 U.S. (3 Cranch) 159, 172 (1805) (Marshall, C.J.) ("No question was made in that case as to the jurisdiction. It passed sub silentio, and the court does not consider itself as bound by that case.").

that the structural commands of the separation of powers cannot be compromised by agreement or for the convenience of the parties.<sup>153</sup> Unless Article III's demands are qualitatively different from the demands of the separation of powers in other contexts, the conclusion seems clear that the decision in *Nixon* erred in allowing the parties to resolve their differences through litigation instead of insisting that they do so among themselves. In short, where the political stakes could hardly have been higher, the President and Attorney General were able to avoid the difficult decision whether to direct Jaworski not to proceed by essentially asking the courts to decide for them. As Professor Gunther has argued, that court-centered resolution of the problem was not necessarily politically healthy for the Republic.<sup>154</sup> And as I will argue in more detail in Part III, the events during the course of the Lewinsky investigation are part of the wages of *Nixon's* court-centered decision relieving the political branches of primary responsibility for resolving such crises.

### 3. The "Unique Circumstances" of the Watergate Investigation and the True Adversity Between Nixon and Jaworski

The final factor relied upon by the *Nixon* Court was the extraordinary factual circumstances that produced the litigation. The President of the United States was under serious criminal investigation, and indeed had been named an unindicted co-conspirator in the very prosecution for which the tapes had been subpoenaed; the House Judiciary Committee was in the process of approving articles of impeachment.<sup>155</sup> The Court had granted certiorari before judgment to resolve the dispute over the tapes as quickly and finally as possible.<sup>156</sup> After assuring itself that the parties before the Court—the President and the Special Prosecutor—had real and concrete differences between them over a question of law,<sup>157</sup> the Court stated that "[i]n light of the uniqueness of the setting in which

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153. See, e.g., *New York v. United States*, 505 U.S. 144, 178-79 (1992); *Bowsher v. Synar*, 478 U.S. 714, 721-27 (1986); *INS v. Chadha*, 462 U.S. 919, 944-46 (1983); *Buckley v. Valeo*, 424 U.S. 1, 118-43 (1976) (per curiam).

154. See Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30 (1974).

155. See HARRIGER, *supra* note 82, at 17-20.

156. See *Nixon*, 418 U.S. at 686.

157. See *id.* at 696-97.

the conflict arises" the intra-branch nature of the dispute did not pose a barrier to its justiciability.<sup>158</sup>

It seems plain that concreteness and adversariness by themselves are insufficient to provide Article III adversity. As Professor Herz has noted, mere disagreement between two parties cannot be sufficient to create adversity; there must be "situational adversity."<sup>159</sup> Virtually all the Article III doctrines, from standing<sup>160</sup> to mootness,<sup>161</sup> insist that the disagreement between the parties be more than concrete and heartfelt; the law insists, as Professor Herz put it, that "judicial involvement" is restricted to "circumstances that require resolution by an outsider."<sup>162</sup>

What this means is that in order to determine whether two parties are legally adverse—no matter how dramatic the circumstances and how deep their disagreement—it is necessary to refer to the substantive law. To return to the corporate analogy, there is no reason why the law could not provide that one division of a corporation can sue another; as the law presently stands, however, that is not possible because the law lodges in senior officers of a corporation the responsibility for resolving intra-corporate disputes.<sup>163</sup> In the circumstances of *Nixon*, if the law is that the President had the authority, through the Attorney General, to accomplish the result he was seeking without going to court, that suggests strongly that the requisite legal adversity did not exist. The *Nixon* Court thought that the extant regulations posed a legal barrier to the President's lawfully accomplishing his objectives. Although there is a strong case to be made that the Court was wrong in that view, that ought not to obscure the fact that neither in *Nixon* nor anywhere else has the Court suggested that strong disagreement, standing alone without some basis in law, is enough to create an Article III case.

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158. *Id.* at 697.

159. Herz, *supra* note 70, at 902-06.

160. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992).

161. *See, e.g.*, *DeFunis v. Odegaard*, 416 U.S. 312, 316-20 (1974) (*per curiam*).

162. Herz, *supra* note 70, at 904.

163. *See South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300, 300-01 (1892).

#### 4. Summary

The more one unpacks the *Nixon* justiciability holding, the less confident one becomes of its correctness. The key to agreeing that the Court was right in finding the case to be justiciable is whether the Attorney General's regulations in fact posed a legal barrier to the dispute between Nixon and Jaworski being conclusively resolved without repairing to court. On the Court's account, the regulations—which guaranteed Jaworski independence and tenure—were legally binding. That account is difficult to square, however, with the fact that the Attorney General is generally given statutory authority to prosecute crimes and to delegate that authority to her subordinates, yet the President still retains control because he has the power to remove the Attorney General if he is dissatisfied with the way the law is being executed. It is odd for that Presidential control to be nullified by the unilateral action of his or her subordinate, and odder still for the Attorney General to create Article III adversity by the issuance of a regulation that she is entitled to repeal at any moment for any reason.

#### C. ARTICLE III AND THE INDEPENDENT COUNSEL

The previously identified problems in finding legal adversity in *Nixon* all depended on the intra-executive and discretionary nature of the sources of law that were said to create the adversity—that is, the regulations that the Attorney General issued of his own accord without any demand in law that he do so. In the wake of Watergate, however, Congress was not content to leave the problem of investigating and prosecuting possible crimes by high level officials entirely to the Justice Department's regulatory solution. Instead, Congress passed the Ethics in Government Act<sup>164</sup> to formalize and cement into law the institution of the special prosecutor (now known as the independent counsel). Much has been written about the Act and how it operates, and in the interest of avoiding repetition, I will keep a narrow focus here on the Article III implications of the Act. The fundamental question

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164. For the legislative events, see *supra* note 2. For helpful descriptions of the Act, see *The Independent Counsel Statute: A Symposium*, *supra* note 7; O'Sullivan, *supra* note 7; Katy J. Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 MERCER L. REV. 489 (1998).

is whether the Act cured any Article III problems inherent in the regulatory regime. I argue that it did.

### 1. The Ethics in Government Act's Creation of Legal Adversity

The Act transfers to the independent counsel virtually<sup>165</sup> complete control over “all investigative and prosecutorial functions and powers of the Department of Justice [and] the Attorney General”<sup>166</sup> of the matters within his or her jurisdiction. That broad grant of authority carries with it complete control over all aspects of investigating and prosecuting crimes “in the name of the United States.”<sup>167</sup> The statute specifically authorizes the independent counsel to “determin[e] whether to contest the assertion of any testimonial privilege.”<sup>168</sup> And it bars the Justice Department from taking any further investigative or prosecutorial action with respect to the matters under investigation.<sup>169</sup>

The statute places the independent counsel within the control of the Justice Department in two ways. The first, and less significant way,<sup>170</sup> is that it requires the independent counsel to “comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws,” subject to the proviso that the independent counsel is released from that obligation if meeting it would be inconsistent with the purposes of the Act.<sup>171</sup> Second, the Act provides that the Attorney General may remove an independent counsel only by her “personal action,” and only for “good cause” and other specified reasons relating to incapacity of the independent counsel.<sup>172</sup> The statute does not define what constitutes good cause.

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165. The qualifier is necessary because Congress continued to insist in the Act that the Attorney General be involved in the approval of certain wiretaps. See 28 U.S.C. § 594(a) (1994).

166. *Id.*

167. *Id.* § 594(a)(9).

168. *Id.* § 594(a)(5).

169. See *id.* § 597(a).

170. Less significant, I should say, for purposes of my argument here. In the real world functioning of an independent counsel investigation, the statutory command that the independent counsel follow (where possible) Justice Department policies undoubtedly has a substantial practical effect.

171. 28 U.S.C. § 594(f)(1).

172. *Id.* § 596(a)(1). In addition to the good cause removal provision, the statute provides that an independent counsel may also be removed if he or she



In light of these statutory provisions and the Watergate history that gave rise to them<sup>173</sup> it is not surprising that the question of legal adversity between independent counsels and other components of the executive branch—particularly the President and Attorney General—has not been questioned. It seems clear that the requisites of an Article III case were present in each instance of such litigation since the Ethics in Government Act was passed 20 years ago. In each circumstance there was genuine and concrete adversity over legal questions, and Congress by statute had removed the authority of the Attorney General or President to resolve the claim outside the courts. Under the Act, it is as though the corporate law of a state were amended to allow Chevrolet to sue Oldsmobile. On its face, the Act creates legal arrangements that provide Article III adversity.

## 2. Sources of Doubt About the Ethics in Government Act's Creation of Article III Diversity

There are, however, a couple of wrinkles to consider, one general and the other particular, which might call into question the apparently easy conclusion that the Act creates Article III adversity. The first wrinkle relates to the Attorney General's power to remove the independent counsel for good cause. Is it not true, as the Court has insisted,<sup>174</sup> that the power to remove is the power to control, and thus that the Attorney General (and therefore the President) in fact *does* have the power to direct the independent counsel in a manner that can avoid the necessity of resorting to an Article III forum? Although this point is troubling, it seems to me ultimately that Congress's action in making the independent counsel explicitly beyond presidential control and authorized to litigate such disputes in court is sufficient to create adversity in any event.

A strong view of the unitary executive might suggest that the refusal to obey an order from the President as to how to conduct an investigation—such as the order from Nixon to Cox not to subpoena any more tapes from the White House—would

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suffers from a physical or mental disability or other condition that substantially impairs his or her job performance. *See id.*

173. *See* HARRIGER, *supra* note 82, at 49-74.

174. *See* *Bowsher v. Synar*, 478 U.S. 714, 726 (1986); *Myers v. United States*, 272 U.S. 52, 134-35 (1926); *see also* *Wiener v. United States*, 357 U.S. 349, 352 (1958).

ipso facto constitute good cause for removal.<sup>175</sup> Under the theory of *Myers v. United States* and Justice Scalia's dissent in *Morrison*, Article II's grant of the executive power in the President requires him to be able to remove any officer whose role is exclusively to aid in the execution of the laws.<sup>176</sup> And

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175. See, e.g., Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41. For an argument suggesting that good cause removal provisions should, as a matter of statutory interpretation, be read as allowing the President a large measure of control over independent agencies (including the independent counsel), see Lessig & Sunstein, *supra* note 114, at 113-14. In the context of the Act, such an interpretation would surely be unfaithful to the understanding of those in Congress who drafted and passed the law.

Professor Manning has offered a creative and careful argument to the contrary. He argues that the Ethics in Government Act should be read to allow the President (through the Attorney General) to insist that an independent counsel follow his litigation orders, and to dismiss the independent counsel for good cause should his or her orders be defied. See generally Manning, *supra* note 117. Professor Manning argues that the statute will bear such a reading, and that such a reading will save the Court from having to decide the extraordinarily difficult constitutional question whether it would violate Article II to apply the statute to bar a President from dismissing an independent counsel who defies his or her litigation orders.

While Professor Manning's argument has much appeal, I don't believe that he ultimately offers a permissible interpretation of the statute. In the end it is hard to imagine—as his argument requires us to accept—that the Congress which enacted the Ethics in Government Act would have thought it conceivable that it remained lawful for the President (or Attorney General) to dismiss an independent counsel in circumstances identical to those that resulted in the firing of Archibald Cox. Recall that the disagreement between Cox and President Nixon was over the paradigm case that is the subject of Professor Manning's argument—i.e., a direct order from the President to an inferior officer regarding litigation and investigation strategy. Although I share Professor Manning's view that it is risky business to ascribe specific intentions to Congress when it uses general language, it seems that this is the rare instance in which we can be confident that there would have been virtual unanimity in Congress (and the political community generally) that the statutory language chosen would not have permitted the lawful firing of an independent counsel who defied the President in such circumstances.

Thus, if litigation circumstances raised the question, I do not believe that it would be proper for a court to interpret the statute in the manner Professor Manning suggests, even if doing so would avoid the difficult constitutional question whether it would violate Article II to limit the President's removal authority over an independent counsel who refused to follow the President's litigation orders. (In fact, such a court would not be avoiding deciding a constitutional question at all; on Professor Manning's theory the court would still have to determine whether Article III adversity existed between the President and the independent counsel, which is, of course, also a constitutional question.) Whether or not Article II would be violated in such circumstances, it remains true that Congress succeeded in the statute in creating Article III adversity.

176. See *Morrison v. Olson*, 487 U.S. 654, 723-27 (1988) (Scalia, J.,

there is no disputing that the investigation and prosecution of crimes is quintessentially the execution of the laws.<sup>177</sup> Under a strong view of the unitary executive, it follows that good cause removal provisions cannot constitutionally bar the President from directing the activities of an officer like the independent counsel.<sup>178</sup> As an original matter that might well be the best way to reconcile the demands of Article II with the law as enacted by Congress.<sup>179</sup>

The implications of this theory are significant, however, as they call into question the legitimacy of much of the administrative state.<sup>180</sup> More to the present point, this theory is also antithetical to the entire point of the Ethics in Government Act, which was to *prevent* the President (and the Attorney General) from having any control over the prosecutorial decisions of the independent counsel.<sup>181</sup> That

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dissenting); *Myers*, 272 U.S. at 127.

177. *Morrison*, 487 U.S. at 691; *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Buckley v. Valeo*, 424 U.S. 1, 140-41 (1976) (per curiam). The degree to which Article II requires that criminal law enforcement be entirely within the control of the President is a contested question. Compare Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 658-61 (1994), with Lessig & Sunstein, *supra* note 114, at 17-20. See also Harold J. Krent, *Executive Control over Criminal Law Enforcement*, 38 AM. U. L. REV. 275 (1989).

178. It is an understatement to say that the literature on the implications and demands of the Constitution's grant of executive power to a single President of the United States has been voluminous. For a helpful collection of sources, see Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1453-56 & nn.3-20 (1997).

179. See *id.*; see also Calabresi & Prakash, *supra* note 177; Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155 (1992); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225; Miller, *supra* note 175; Henry Paul Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993); Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991 (1993). For powerful criticisms of the notion of a strongly unitary executive, see Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Lessig & Sunstein, *supra* note 114; Cass R. Sunstein, *Article II Revisionism*, 92 MICH. L. REV. 131 (1993).

180. Again, there is a vast literature on these questions, and I am not prepared to offer a general treatment of the problem at this point. See *supra* note 160.

181. See HARRIGER, *supra* note 82, at 20; Carl Levin, *The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance*, 16 HOFSTRA L. REV. 11 (1987); Peter J. Rodino, Jr., *The Case for the Independent Counsel*, 19 SETON HALL LEGIS. J. 5 (1994); see also *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting).

purpose was generally understood to be the impetus for the Act in the first place; it is manifest on the face of the Act; it was the clear understanding of multiple Congresses;<sup>182</sup> and has been recognized as such by multiple courts.<sup>183</sup> In fact, in addition to insulating the independent counsel from removal by the President, the Act specifically contemplates that the independent counsel will litigate privilege disputes in federal court.<sup>184</sup> In light of the historical antecedents of the Act, and the fact that in all likelihood the only persons whom the independent counsel will be litigating against are government employees, Congress must have understood the statutory authorization of privilege litigation to include litigation against the President himself. Indeed, interpreting the Act otherwise would ascribe to Congress the intent to narrow the authority of the *statutory* special prosecutor in comparison to the power that the *regulatory* Watergate Special Prosecutor had wielded in the *Nixon* litigation itself.<sup>185</sup> Finally, in addition to being inconsistent with the Ethics in Government Act, the argument that it constitutes good cause for removal if an independent counsel refuses to obey a presidential order as to how to conduct an investigation is also inconsistent with the core of the Court's removal cases since at least the time of *Humphrey's Executor v. United States*.<sup>186</sup>

Consider *Morrison v. Olson* itself. In that case, the Court rejected the notion that Article II required the President to be able to direct the activities of all inferior officers who aid in the

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182. Or at least of the responsible Senate Committees. *See, e.g.*, S. REP. NO. 95-170, at 66 (1977), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4282 ("The whole purpose of [the Act] is defeated if a special prosecutor is not independent and does not have clear authority to conduct a criminal investigation and prosecution without interference, supervision or control by the Department of Justice."); S. REP. NO. 97-496, at 15-18 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3537, 3551-3554 (same).

183. *See, e.g., Morrison*, 487 U.S. at 695-96; *United States v. Wilson*, 26 F.3d 142, 150 (D.C. Cir. 1994); *In re Sealed Case*, 838 F.2d 476, 504-05 (D.C. Cir. 1988), *rev'd*, *Morrison v. Olson*, 487 U.S. 654 (1988).

184. *See* 28 U.S.C. § 594(a)(5) (1994).

185. Indeed, there is a strong argument that the combined effect of the Act's grant of complete control of litigation in the name of the United States and the Court's upholding that grant of authority as consistent with Article II in *Morrison* is to deny the Attorney General or any other government attorney standing even to contest the independent counsel's positions in court. *See In re Sealed Case*, 146 F.3d 1031 (D.C. Cir. 1998) (Silberman, J., concurring in the denial of rehearing en banc).

186. 295 U.S. 602 (1935).

execution of the law. Indeed, the Court was confronted with that argument by Justice Scalia, and specifically disavowed any belief that the Constitution required the President to be able to remove the independent counsel.<sup>187</sup> Article II was not violated, the Court said, so long as the statutory scheme established by Congress did not “interfere impermissibly with [the President’s] constitutional obligation to ensure the faithful execution of the laws.”<sup>188</sup> Although the doctrinal formulation of the analysis in *Morrison* was different from the Court’s past treatment of the removal problem,<sup>189</sup> the underlying idea was similar—that it is permissible for “Congress to regulate the removal by such laws as Congress may enact in relation to the officers . . . appointed” under law.<sup>190</sup> In short, the notion that the good cause removal provision permits the President to direct the activities of an independent counsel cannot be squared with the Ethics in Government Act, nor with the Court’s cases (particularly *Morrison*) allowing insulation of inferior officers from presidential control.

That does not mean, of course, that the Court is right. It does suggest, though, that the President’s remedy if he disagrees with a prosecutorial judgment by an independent counsel is to remove the latter for cause; that would lead, in all likelihood, to a court challenge resolving the open question what exactly does constitute good cause.<sup>191</sup> If the President does not choose to force that confrontation, the status quo thus would be that the laws enacted by Congress on their face create legal adversity sufficient to satisfy Article III.

And the Ethics in Government Act creates legal adversity in a way crucially different from how the Watergate regulations purported to do so. In order to get his way under the regulations governing his relationship with Cox and Jaworski, the President had the option of ordering the Attorney General to fire the Special Prosecutor for cause. The President had an additional option available to him as well. The President also could have ordered the Attorney General to

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187. See *Morrison*, 487 U.S. at 685-92.

188. *Id.* at 693; see also *United States v. Perkins*, 116 U.S. 483, 484 (1886).

189. See, e.g., *Wiener v. United States*, 357 U.S. 349, 356 (1958); *Humphrey’s Executor*, 295 U.S. at 629.

190. *Perkins*, 116 U.S. at 485 (quoting *Perkins v. United States*, 20 Ct. Cl. 438, 444 (1885)).

191. See *Morrison*, 487 U.S. at 692-93 (noting that the question of what constitutes good cause remains open).

repeal the regulations—something that could have been done with the stroke of a pen—and thereby remove any conceivable legal impediments to the President's accomplishing his objectives without going to court. Under the Act, by contrast, although the President might have the power to force a court fight over the constitutional validity of the good cause removal provision by dismissing an independent counsel who refuses to heed his demands,<sup>192</sup> neither the President nor the Attorney General has the power simply to repeal the good cause removal provision in the statute. There was nothing in law that required the Watergate regulations to be kept on the books; in contrast, the Ethics in Government Act *is* on the books, and the President is powerless to dictate otherwise.<sup>193</sup>

#### D. SUMMARY: THE LAW'S CREATION OF ARTICLE III ADVERSITY

In summing up the Article III aspects of the problem of legal disputes within the executive branch, it is useful to consider the way the system would work in the absence of legal provisions—whether statute or regulations—establishing an independent entity within the executive branch to investigate and prosecute crimes. Under normal circumstances even the suggestion that there would be adversity between the Justice Department and the White House would be viewed as silly. But first through the Watergate regulations and then through the Ethics in Government Act, the law has sought to create the requisite adversity to satisfy Article III. In this Part I have argued that the attempt to create adversity was unsuccessful with respect to regulations voluntarily issued by the Attorney General which are subject to repeal at any time. With respect to the Act, however, the claim of sufficient Article III adversity is sound. Whether that adversity is consistent with Article II is the question to which I turn next.

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192. It seems clear that the proper course for a court that concluded, in agreement with Justice Scalia, that the good cause removal provision violated Article II would be to say so, rather than interpret it to gut the entire point of the statute as a whole. See Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 177.

193. See U.S. CONST. art. I, § 7, cl. 2; see also *Clinton v. City of New York*, 118 S. Ct. 2091, 2093 (1998) (“[T]here is no constitutional authorization for the President to amend or repeal [laws].”).

### III. ARTICLE II AND INTRA-BRANCH LITIGATION INVOLVING THE INDEPENDENT COUNSEL

The Article III adversity that the Ethics in Government Act purchases does not come without a price. In this Part, I argue that the price extracted by the Act is paid by important Article II values. In creating the independence necessary to allow litigation in Article III courts, the Act strikes at the heart of Article II. At a minimum the developments over the course of the Lewinsky investigation suggest that the Court in *Morrison v. Olson* misjudged in answering the question “whether the [Act] impede[s] the President’s ability to perform his constitutional duty.”<sup>194</sup>

The Article II implications of the Ethics in Government Act—by which I mean its impact on the role of the President as Chief Executive—have been the subject of much comment. Of course, the Supreme Court upheld the Act, over the strong dissent of Justice Scalia, in *Morrison*; and the question whether the Act unconstitutionally intrudes upon the executive power has been taken to be legally settled ever since.<sup>195</sup> Rather than rehearse prior criticisms of the Act, I will make two points, using the recent litigation between independent counsels and other components of the executive branch to illustrate them. First, even taken on its own doctrinal terms,<sup>196</sup>

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194. *Morrison*, 487 U.S. at 691.

195. The position that the Act is unconstitutional has, however, attracted some prominent academic adherents, among them Professor Amar, see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 802-12 (1999), and Professor Tribe. Amar and Tribe engaged in a fascinating and illuminating colloquy on the constitutionality of the Act and the Court’s decision in *Morrison* in the online journal *Slate Magazine* ([www.slate.com](http://www.slate.com)) in September 1998. They agreed that the statute is unconstitutional; Professor Tribe’s position represents a change in his thinking since *Morrison*, in which he co-authored an amicus brief for the Independent Counsel Lawrence Walsh supporting the Act’s constitutionality. Moreover, the fact that the Act’s facial constitutionality against a separation of powers attack seems judicially settled does not mean that *Morrison*’s rejection of other attacks on the Act necessarily are still good law. Subsequent Appointments Clause decisions of the Court—most particularly, the recent decision in *Edmond v. United States*, 117 S. Ct. 1573 (1997)—have called into serious question *Morrison*’s Appointments Clause holding. See *Morrison*, 487 U.S. at 670-73. For a recent argument to that effect, see Amar, *supra*, at 802-12; Bravin, *supra* note 7; see also *Ryder v. United States*, 515 U.S. 177, 179-80 (1995); *Weiss v. United States*, 510 U.S. 163, 169-76 (1994).

196. Here I am taking as a given the controversial proposition that the separation of powers does not strictly require complete presidential control over the investigation and prosecution of federal crimes, and that the proper

the Court in *Morrison* seriously underestimated the degree to which the Act imposes on the functioning of the executive branch. Second, the Act fundamentally disrupts the constitutional structure by removing accountability from the President for how the laws are executed. Although these points might at first seem paradoxical, in fact they are related and mutually reinforcing.

#### A. THE ETHICS IN GOVERNMENT ACT'S PRACTICAL IMPOSITION ON THE EXECUTIVE BRANCH

The recent litigation between independent counsels and other components of the executive branch brings into stark relief the ways in which the Ethics in Government Act disrupts the normal functioning of the executive branch. The Court's opinion in *Morrison* discounted the disruption to the executive branch caused by the operation of the Act, as well as the argument that the Act was fatally inconsistent with the structure of government prescribed by the Constitution. In this Part, I do not want to rehearse the arguments over government structure that divided the Court in *Morrison*. Instead, I want to focus on the practical consequences of how the Act operates, and to analyze whether experience under the Act has justified the Court's confidence in its constitutionality.

##### 1. Government Attorney-Client Privilege

Consider the recent litigation over government attorney-client privilege. In two rounds of litigation—one in the Eighth Circuit and one in the D.C. Circuit—Independent Counsel Starr and the White House litigated the question whether White House lawyers could claim attorney-client privilege for advice they rendered to the President and First Lady, as well as other White House personnel.<sup>197</sup> In the Eighth Circuit

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analysis is, as was established by *Morrison*, whether the Act intrudes too much into the President's ability to fulfill his Article II functions. My argument thus goes to whether the practical effect of the litigation envisaged under the Act is intolerably intrusive into the functioning of the executive branch. See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1519 (1991); Lessig & Sunstein, *supra* note 114, at 114-16.

197. The White House also claimed that its lawyers' conversations with individuals and their lawyers *outside* the government were also covered by attorney-client privilege, on the theory that in these circumstances the White House as an institution shared common legal interests with private parties involved in a criminal investigation. Both the Eighth Circuit, *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert. denied*, 117 S. Ct.



litigation, the grand jury, at the behest of the independent counsel investigating in the name of the United States, issued a subpoena for notes taken by White House lawyers at meetings with the First Lady. The White House objected to the subpoena on grounds of attorney-client privilege. The case was litigated, and ultimately resulted in the Eighth Circuit holding that there was no privilege for government lawyers vis-à-vis other government lawyers conducting a grand jury investigation.<sup>198</sup> The White House, supported by a Justice Department amicus curiae brief filed "for the United States, acting through the Attorney General,"<sup>199</sup> unsuccessfully sought certiorari.<sup>200</sup>

A similar scenario played itself out in the Lewinsky phase of Starr's investigation. There, Deputy Counsel to the President Bruce Lindsey resisted testifying before the grand jury about any conversations between him and anyone else (including the President) relating to the Lewinsky situation. On his behalf, the White House claimed—at the direction of the President himself<sup>201</sup>—that Lindsey's conversations were shielded from disclosure to the grand jury by a government attorney-client privilege. As he had in the Eighth Circuit, Independent Counsel Starr refused to accept this argument, and filed a motion to compel Lindsey's testimony. Thus, the White House and the independent counsel again were in litigation over whether evidence held by a public employee in his or her official capacity was privileged from disclosure to the public authorities duly charged with the investigation and prosecution of crime. In the D.C. Circuit litigation the White House was again supported by an amicus curiae brief filed by the Attorney General.<sup>202</sup> In its decision, the D.C. Circuit

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2482 (1997), and the D.C. Circuit, *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 466 (1998), rejected that argument out of hand.

198. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 915-21.

199. Brief Amicus Curiae for the United States, Acting Through the Attorney General, Supporting Certiorari, Office of the President v. Office of Independent Counsel, 117 S. Ct. 2482 (1997) (No. 96-1783).

200. See *Office of the President v. Office of Independent Counsel*, 117 S. Ct. 2482 (1997).

201. See Declaration of Charles F.C. Ruff ¶ 56 (Mar. 17, 1998). Mr. Ruff, who serves as President Clinton's White House Counsel, filed this declaration as part of the district court litigation between the independent counsel and the White House over attorney-client privilege.

202. Brief Amicus Curiae For the United States Acting Through the Attorney General, *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998) (Nos. 98-3060, 98-3062, 98-3072). The Justice Department—that is, the Attorney General,

rejected both the Justice Department's and White House's positions, and agreed completely with the independent counsel's submission that no government attorney-client privilege of any sort existed in these circumstances.<sup>203</sup>

The government attorney-client privilege litigation in the Eighth and D.C. Circuits raised fundamental issues relating to the obligations and relationships of government lawyers and those whom they advise. And the result has been two court of appeals decisions firmly concluding that a government lawyer has no business withholding evidence of criminal wrongdoing by anybody—even the President of the United States. Regardless of whether one believes these decisions to be correct—as I do<sup>204</sup>—they are surely important. Given the ubiquity of attorney-client relationships within the government, it is striking that these issues had never been litigated. Despite efforts by both sides to analogize to litigation that had arisen in other circumstances, there had been virtually no reported cases in which federal government lawyers had resisted giving evidence acquired in the course of their official duties in response to the demands of a federal criminal investigation.

The reason why that is so is because until the independent counsel system appeared, these issues were resolved internally within the executive branch. And outside the context of an independent counsel investigation, it is today impossible for a government lawyer to litigate over whether he or she will be obliged to give evidence in a criminal investigation—that decision is entirely the Attorney General's to make after considering the prosecutorial and other interests of the United States.<sup>205</sup> According to the Justice Department, these decisions

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who was appointed by the President and serves at his pleasure—did not, however, fully agree with the broad position of the White House that its lawyers' conversations were absolutely privileged. *See id.* at 11. The two government attorney-client privilege cases were rare—perhaps unique—situations where the Attorney General, acting in her official capacity representing the United States, took a legal position contrary to that of the President of the United States, also acting in his official capacity.

203. *See In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998).

204. I played a role as a consultant to Independent Counsel Starr in the D.C. Circuit (and subsequent) litigation over both government attorney-client privilege and the Secret Service protective function privilege.

205. *See* Brief Amicus Curiae For the United States Acting Through the Attorney General at 11-12, *Lindsey* (Nos. 98-3060, 98-3062, 98-3072); *see also* 28 U.S.C. §§ 511-12, 516, 533, 547 (1994).

are made in a two-step process. First, the decision needs to be made to seek the information from the government lawyer in the first place, whether he or she is in the Justice Department itself or another agency within the executive branch. In deciding whether to seek that information internally, the Attorney General seeks to accommodate the prosecutorial interests of the United States with other interests of the government, including the interests of the involved agency to encourage full and candid legal representation in the course of its business.<sup>206</sup> The decision whether to seek the information in the first place is made by the Attorney General in consultation with the affected agencies.<sup>207</sup> According to the Attorney General, it would be "rare" for her not to seek from a government lawyer evidence "directly relating to the commission of a federal crime,"<sup>208</sup> and she would "often" subsequently decide to use such evidence in a court or grand jury proceeding notwithstanding its genesis in an attorney-client relationship.<sup>209</sup>

The Attorney General emphasizes the institutional memory, long term stability, and multitude of government interests that are brought to bear in making these decisions.<sup>210</sup> And once these decision are made—and absent presidential intervention these are the Attorney General's decisions to make—that is the end of the matter. There is no room for litigation about these intra-executive matters in normal circumstances; indeed, it is the position of the Department of Justice that such litigation is impossible because there would

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206. See Brief Amicus Curiae For the United States Acting Through the Attorney General at 11-13, *Lindsey* (Nos. 98-3060, 98-3062, 98-3072).

207. See *id.* at 12-13. Consistent with executive branch policy generally, see, e.g., Constitutionality of Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force, 13 Op. Off. Legal Counsel 131, 143 (1989), the Justice Department noted that an agency which is dissatisfied with the Attorney General's decision to seek information from its lawyers could seek to have the President of the United States resolve the matter. See Brief Amicus Curiae For the United States Acting Through the Attorney General at 13, *Lindsey* (Nos. 98-3060, 98-3062, 98-3072).

208. See Brief Amicus Curiae For the United States Acting Through the Attorney General at 13, *Lindsey* (Nos. 98-3060, 98-3062, 98-3072).

209. *Id.* The Attorney General's amicus brief identified no instance in which the Justice Department had decided *not* to seek evidence of federal crimes from a government lawyer on grounds of government attorney-client privilege, and no instance in which it decided *not* to introduce such evidence in a court or grand jury proceeding.

210. See *id.* at 13-14.

be no legal adversity between the two executive branch entities before the court.<sup>211</sup>

In an independent counsel investigation, however, the normal operations of the executive branch cannot work. The independent counsel's charge is to vindicate the investigative and prosecutorial interests of the United States,<sup>212</sup> and that task calls upon him or her to seek out relevant evidence wherever it may be. And although the independent counsel enjoys prosecutorial discretion to decide it is not worthwhile to pursue certain evidence, that officer lacks the broad institutional competence of the Attorney General in balancing prosecutorial and other interests of the United States, the motive to do so, and, most importantly, the statutory authorization to take account of those other broad interests.

The Ethics in Government Act seeks to place the independent counsel in the Attorney General's shoes. It might follow from that substitution of roles that the proper analysis of the attorney-client privilege situation was for the White House lawyers to be subject to the independent counsel's direction as to how to proceed (as they would be with respect to the Attorney General absent the presence of an independent counsel on the scene), with the right to seek the President's intervention should they and the independent counsel disagree over whether the evidence should be submitted (as would again be the case if it were the Attorney General and not an independent counsel involved).<sup>213</sup> This theory of how the Act operates, however, presents two problems, one practical and one legal.

The practical point is that the independent counsel simply lacks the institutional capacity to take account of all the relevant factors in discharging the Attorney General's role in this context. The independent counsel simply cannot completely take on the role of the Attorney General. In the

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211. See, e.g., 13 Op. Off. Legal Counsel at 138-43; Resolution of Legal Dispute Between the Department of Energy and the Tennessee Valley Authority, 11 Op. Off. Legal Counsel 70, 72 (1987); Proposed Tax Assessment Against the United States Postal Service, 1 Op. Off. Legal Counsel 79 (1977).

212. See 28 U.S.C. § 594(a) (1994).

213. Professor Paulsen makes a similar argument—that the privilege in this context belongs to the independent counsel and not the White House—on the basis of an analogy to the common law privilege held by corporations and not on the basis of the operation of the Ethics in Government Act. See Michael Stokes Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473 (1998).

related context of the Classified Information Procedure Act (CIPA), courts have held that, notwithstanding the general substitution of the independent counsel for the Attorney General, it remains the Attorney General's prerogative under section 6(e)<sup>214</sup> of that statute to file an affidavit barring national security information from being used in court.<sup>215</sup> That reading of CIPA is justified by the variety of governmental interests beyond the prosecutorial interests of the United States that must be considered in making that judgment. Indeed, CIPA itself is premised upon the recognition that it is sometimes appropriate for the government to compromise its interest in criminal law enforcement because of a more weighty public interest. An independent counsel, by contrast with the Attorney General, lacks not only the institutional resources to make those judgments, but also the legitimacy and accountability necessary to justify such decisions to the interested parties. As a practical matter, then, there are inevitably differences between the operation of an independent counsel's office and the Justice Department.

The legal objection to reading the Act to place the independent counsel in the Attorney General's shoes for purposes of invoking or waiving government attorney-client privilege is that it places the decision ultimately, but directly, in the President's hands. But the Ethics in Government Act's very reason for being is to relieve the independent counsel from having to follow presidential or Attorney General directives as to how to investigate, and to shield him or her from removal except for good cause. The Act thus creates an irreconcilable conflict between the ability of the executive branch to function—in the present circumstances, for the institutional judgments regarding when and how broadly to assert government attorney-client privilege—and the demand for independence in federal criminal investigations run by independent counsels.

The *Morrison* majority might scoff that this conflict does not rise to the level of significantly impeding the ability of the President to execute the laws, and thus does not present any

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214. 18 U.S.C. app. § 6(e) (1994).

215. See *United States v. Fernandez*, 887 F.2d 465, 471 (4th Cir. 1989); *United States v. North*, 713 F. Supp. 1441, 1442 (D.D.C. 1989); see also *Jordan*, *supra* note 18; *Noble*, *supra* note 18.

serious possibility of violating Article II.<sup>216</sup> But the tradition of resolving these matters within the executive branch had a salutary effect on the functioning of the legal system and of the executive branch. It is likely that questions of government attorney-client privilege did not arise much in the past, if only because the circumstances are rare in which government lawyers in their official capacities have evidence relevant to a federal criminal investigation. In this context, the absence of hard and fast legal rules—like the ones that came out of the Eighth Circuit and D.C. Circuit—allowed there to be greater flexibility and discretion in resolving these matters than now is the case. Moreover, there has been substantial (though, in my opinion, highly overstated) commentary on the deleterious effect that the litigation will have on the ability of government lawyers to provide effective and candid legal advice to their public clients.<sup>217</sup> Finally, the President himself, through his counsel, has taken the position that the absence of government attorney-client privilege will substantially affect his and other public officials' ability to do their jobs.<sup>218</sup>

In sum, the practical effect of government attorney-client litigation has been to intrude on the Attorney General's, and thus the President's, ability to execute the laws.<sup>219</sup> That is not to say that the Eighth Circuit and D.C. Circuit were wrong in concluding that there was no privilege in this context. On the

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216. See *Morrison v. Olson*, 487 U.S. 654, 685-93 (1988).

217. See Stephen Braun & Richard T. Cooper, *Sunday Report: Pathway to Peril: How Clinton and His Adversaries Endangered His Presidency*, L.A. TIMES, Jan. 31, 1999, at S4; Tom Teepen, *Starr Aims To Handcuff Clinton— and Others*, DAYTON DAILY NEWS, Feb. 4, 1998, at 6A; Editorial, *The Damage Lingers on*, STUART NEWS/PORT ST. LUCIE NEWS, Jan. 18, 1999, at A11.

218. See Petition for Certiorari at 19, *In Re Lindsey*, 148 F.3d 1100 (D.C. Cir.), cert. denied, 119 S. Ct. 466 (1998).

219. My argument here is not that there is a structural imperative that all aspects of federal criminal law enforcement be within the direct control of the President. See Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1319 (1988). That would render it inconsistent with the Constitution for federal crimes to be prosecuted in state court. See Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1925). The reasoning of the Court's recent decision in *Printz v. United States*, however, suggests that very possibility. 117 S. Ct. 2365, 2378 (1997) (stating that it impinges on the President's Article II authority to commandeer state officers to aid in the execution of federal laws). In any event, my point here is simply to emphasize the stark intrusion on the normal operations of the executive branch worked by the Act in the context of litigation between executive entities.

contrary, I think those decisions were correct.<sup>220</sup> My point here is that by removing these matters from the Attorney General's (and hence the President's) control—which as an historical matter was effectively not to recognize any privilege in federal criminal investigations—the Act diminishes the effective functioning of the executive branch and its accommodation of its law enforcement and other functions. The example of government attorney-client privilege is an example of the practical ways in which *Morrison* was misguided.

## 2. The Secret Service Protective Function Privilege

The litigation between Starr and the Treasury Department over whether Secret Service agents could be made to testify to facts they learned during the course of exercising their function of protecting the President further illustrates the mistake of *Morrison*.

The Secret Service strongly objected when the independent counsel sought to question agents as part of the Lewinsky investigation. For legal representation, the Secret Service turned to its regular counsel (as provided by statute<sup>221</sup>), the Department of Justice. A series of negotiations ensued between the Department of Justice and the independent counsel over the appropriate scope of questioning in light of a new, common law evidentiary privilege that the Department of Justice asserted protected the agents from having to testify. The argument was that the transcendent public good of protecting the life of the President justified the creation of a new protective function privilege under Federal Rule of Evidence 501.<sup>222</sup> The Secret Service claimed that, in its expert judgment, Presidents would inevitably (if unconsciously) push away their protectors at the cost of their own safety if they knew that the agents might be called upon to testify some day in connection with a criminal investigation.<sup>223</sup>

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220. My reasons for thinking so are beyond the scope of this paper. For academic takes on the matter, see, for example, Roger C. Cramton, *The Lawyer As Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291 (1991); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987); Paulsen, *supra* note 213. See also Douglas R. Cox, *Ken Starr, Not Hillary Clinton, Is the "Client" Here*, WALL ST. J., May 7, 1997, at A19.

221. See 28 U.S.C. §§ 512, 514, 516 (1994).

222. FED. R. EVID. 501 (authorizing the federal courts to recognize privileges by the common law method "in the light of reason and experience").

223. See *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir.), *reh'g en banc denied*,

The independent counsel objected that there was no basis for the creation of such a strange and new common law privilege; neither it nor any analogous privilege (say, for the protectors of state executives) had ever been recognized by any court or legislature in Anglo-American legal history.<sup>224</sup> Moreover, the independent counsel argued that the agents, as sworn law enforcement officers,<sup>225</sup> should welcome the opportunity to provide testimony about potential federal crimes. Finally, the independent counsel relied on 28 U.S.C. § 535(b), a federal statute that obligates any employee in the executive branch who has information relating to federal crimes to see that it is reported to the Attorney General.<sup>226</sup> These factors, the independent counsel argued, made it impossible to create any “protective function privilege.”<sup>227</sup>

As part of a series of attempts to compromise on the matter, a number of depositions with limited questioning of Secret Service agents took place, with the independent counsel questioning the agents and the Department of Justice representing them. Ultimately, the matter went to litigation. First the district court and then the D.C. Circuit (in an opinion that Chief Justice Rehnquist characterized as “cogent and correct”<sup>228</sup>) ruled for the independent counsel and ordered the agents to testify.<sup>229</sup> The Secret Service’s petition for a writ of certiorari, filed on its behalf by the Justice Department, was later denied.<sup>230</sup>

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146 F.3d 1031 (D.C. Cir.), *cert. denied*, 119 S. Ct. 466 (1998).

224. *See generally* Brief of Appellee United States, *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998) (No. 98-3069).

225. *See* 18 U.S.C. § 3056(c)(1)(C) (1994) (authorizing the Secret Service to arrest persons who commit, *inter alia*, “any offense against the United States”). Section 3056 establishes a dual role for the Secret Service; subsection (a) charges the Service with protecting the President and certain others; subsection (c) charges the Service also with traditional law enforcement functions.

226. In fact, subsection (b)(1) of that statute seems on its face to have obligated the agents, if they had any information, to report it directly to the independent counsel. *See* 28 U.S.C. § 535(b)(1) (qualifying the responsibility to report to the Attorney General if “the responsibility to perform an investigation . . . is specifically assigned otherwise by another provision of law”).

227. *See generally* Brief of Appellee United States, *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998).

228. *Rubin v. United States*, 119 S. Ct. 1, 2 (1998).

229. *See In re Sealed Case*, 148 F.3d 1073, 1079 (D.C. Cir.), *rehearing en banc denied*, 146 F.3d 1031 (D.C. Cir.), *cert. denied*, 119 S. Ct. 461 (1998).

230. *Rubin v. United States*, 119 S. Ct. 461 (1998).



The saga of the Secret Service's efforts to avoid having its agents testify, and of the Justice Department's decision that its client was correct and justified in its view, further illustrates the dilemma that the Ethics in Government Act creates. On the one hand, there was an extraordinarily strong national interest at stake which the Justice Department professed to be pursuing—seeking to avert the assassination of the President of the United States. Indeed, it would be an understatement to describe as merely dramatic the rhetoric employed by the Secret Service and the Justice Department in describing the stakes which they claimed to be fighting for.<sup>231</sup> On the other hand, not only did the Act remove from the Attorney General's control whether the evidence would be sought, the Act in all likelihood *prohibited* the Justice Department from representing the Secret Service in the litigation at all.

The Ethics in Government Act, as I have noted a number of times, deliberately sought to insulate from presidential and Attorney General control the prosecutorial decisions of the independent counsel. With respect to the role of the Justice Department in litigation, moreover, it goes even further than guaranteeing independence. First, it places the independent counsel squarely in the role of Attorney General for purposes of litigating matters within his or her jurisdiction, including whether to contest the assertion of testimonial privileges.<sup>232</sup> Second, the Act addresses the independent counsel's relationship with the Department of Justice by specifying that the Department must provide any assistance that the

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231. See Brief for the Department of Justice at 17, *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998) (“[T]he safety of the President poses national security concerns of the highest order.”); *id.* at 18 (“The success of the Secret Service is entirely dependent upon the ability of its personnel to maintain constant proximity to the President.”); *id.* at 19 (“[T]he Secret Service must be immediately at hand . . . when the sniper’s bullet is fired, the bomb explodes or the aircraft veers unexpectedly toward the White House grounds.”); see also Joint Appendix, Declaration of Lewis Merletti at 5, *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998) (“The assassination of the President of the United States is, quite literally, a cataclysmic event.”); *id.* at 23 (“Had [President Reagan] felt the need to push the protective envelope away by as little as a few feet, world history would have been irrevocably altered.”); *id.* at 25 (“[I]f [the protective function privilege was not recognized], it would have a catastrophic effect on the ability of the Secret Service to complete one of its most important statutory missions—the protection of the life and safety of foreign dignitaries.”).

232. See 28 U.S.C. § 594(a)(5) (1994).

independent counsel requests,<sup>233</sup> and must otherwise cease any investigation of the matters within the independent counsel's jurisdiction.<sup>234</sup> These provisions—the grant of authority to the independent counsel and the withdrawal of authority from the Justice Department—suggest that it is impermissible under the Act for the Department to litigate *against* an independent counsel. That inference is strongly supported, moreover, by 28 U.S.C. § 597(b), which provides that nothing in the statute *prevents* the Department from participating in litigation as *amicus curiae*. It is hard to see why that provision was necessary if the Justice Department were generally allowed to participate in litigation, even by representing a party, as it sees fit.<sup>235</sup>

The upshot of this, as Judge Silberman forcefully argued in concurring in the denial of rehearing en banc, is that the Justice Department had no business representing the Secret Service in the litigation.<sup>236</sup> So long as the diffusion of executive authority established by the Act and upheld in *Morrison* remains the law, he argued, it is up to the independent counsel to determine whether the Secret Service's claim of privilege should be recognized.<sup>237</sup>

There is much force in Judge Silberman's point. In particular, it is difficult to square the Attorney General's representation of the Secret Service with the combined effect of the Ethics in Government Act's mandate that the independent counsel will litigate in the name of the United States and the Supreme Court's rejection of the idea in *United States v. Providence Journal Co.*<sup>238</sup> that there could be more than one

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233. *See id.* § 594(d)(1).

234. *See id.* § 597(a). In addition to providing the assistance contemplated in section 594(d)(1), the Justice Department may also continue to play a role if the independent counsel agrees in writing to permit continued Department involvement. *See id.*

235. To be sure, the Justice Department is charged in general terms with representing federal agencies, including the Department of the Treasury and the Secret Service, in their litigation. *See id.* § 516. It would be strange, however, to construe a general provision such as section 516 as governing over the specific strictures of the Ethics in Government Act. *See, e.g.,* Mail Order Ass'n of Am. v. United States Postal Serv., 986 F.2d 509, 515-17 (D.C. Cir. 1993); *see also* United States v. Chase, 135 U.S. 255, 260 (1890).

236. *See In re Sealed Case*, 146 F.3d 1031 (D.C. Cir. 1998) (Silberman, J., concurring in the denial of rehearing en banc).

237. *See id.*

238. 485 U.S. 693 (1988).

litigating entity called the United States.<sup>239</sup> Moreover, it is hard to see how the Justice Department can be discharging its obligation to aid an independent counsel if it is representing an opposing party in litigation. On the contrary, it seems clear that the Act's allowance of amicus curiae participation by the Justice Department reflected a necessary expression of an exception from the statute's otherwise disabling of the Department from participating in litigation involving an independent counsel.

But the argument pressed by Judge Silberman that the Justice Department lacked standing—in the sense that it could not be a party to the litigation—both proves too much and is somewhat beside the point.<sup>240</sup> As a formal matter, the Justice Department was representing the Treasury Department and *not* the United States, while the independent counsel was representing the United States. Although that distinction might well seem entirely formal—after all, it is one government—in fact the distinction is one that has been consistently recognized in law. If it were otherwise, no intra-government litigation of any sort would be within the Article III powers of the federal courts; it would follow, for example, that litigation between the President and the statutory independent counsel over executive privilege or any other government privilege is impossible (contrary to *United States v. Nixon*<sup>241</sup> and *United States v. ICC*, to name just two cases.) It would also seem that the argument would deprive inter-branch disputes of their Article III character; after all, as the

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239. Although the *Providence Journal* Court indeed pronounced as “startling” the notion that the “United States” might consist of different litigating entities, *id.* at 701, the Court went on to recognize that Congress had effectively required something like that in the Ethics in Government Act, *see id.* at 705 n.9. The Court decided *Providence Journal* the same term as *Morrison v. Olson*.

240. It is worth noting that Judge Silberman's standing argument was based on that doctrine's prudential aspects, rather than on Article III itself. His argument was that Congress had removed standing on the Attorney General's part. *See In re Sealed Case*, 146 F.3d 1031 (D.C. Cir. 1998) (Silberman, J., concurring).

241. Although I have argued that *Nixon* got its justiciability holding wrong, I have not claimed that two government entities can *never* litigate over privileges; my argument was just that for purposes of Article III the law has to construct their legal relationships in a way that prevents one from ordering the other to relent.

Court stated in *Nixon*, in a certain sense, the "United States" is a single entity made up of all three branches of government.<sup>242</sup>

For Article III purposes, the better way to consider whether the parties could properly litigate against one another is again whether one of them, or an officer superior to them, has the authority in law to dictate the outcome without resorting to court. On that analysis, there surely was adversity between the independent counsel and the Secret Service, because the Act removes from the Attorney General's (and President's) control the decision whether the evidence would be sought.<sup>243</sup>

That is not to say, however, that the Act did not deprive the Attorney General of the power to *represent* the Secret Service. As I have argued, it is hard to construe the statute otherwise. It does not follow, however, that the Secret Service was bound simply to comply with the independent counsel's demands. On the contrary, the authority granted by the Act to the independent counsel is limited to investigating and prosecuting crimes (and the functions appurtenant to that); that authority does not reach so far as to include directing the policy decisions of the Secret Service regarding how to balance its protective and law enforcement functions.<sup>244</sup> In providing that an independent counsel is bound to follow Justice Department policy wherever possible, the Act indicates that the independent counsel's role, although it is assuredly quite broad, is not to make such important and broad policy decisions for the government.

Consider, then, the impact of the Act on the functioning of the executive branch in the context of the Secret Service controversy. The Act deprived the Attorney General of her

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242. *United States v. Nixon*, 418 U.S. 683, 696 (1974).

243. Of course, the President had the constitutional authority to order the Secret Service to testify, and nothing in any statute purported to say otherwise. But the fact that the President is able conclusively to resolve the dispute in one direction cannot deprive the case of its adversity.

244. Since the Justice Department was deprived of authority to litigate on the Secret Service's behalf, the proper course would have been for the Service to hire private counsel, which was the course that the White House followed in its litigation against the independent counsel. Indeed, if it was proper for the Justice Department to represent the Secret Service, then it would have been proper for it to represent the White House. There is no analytical distinction between the situations; the only difference is the possible perception that the Justice Department has a greater conflict of interest in representing the White House versus another cabinet agency.

authority to direct whether evidence would be sought in a criminal proceeding, in a context where her court statements indicated that she believed that the life of the President was literally on the line if the independent counsel got his way. What is more, the Act also deprived the Justice Department of its traditional authority, indeed responsibility, to represent its client agencies in court against the independent counsel.<sup>245</sup> Thus was the functioning of the executive branch impeded by the Act.

At a basic level, that imposition caused the Secret Service to believe that its mission of protecting the President had been severely undermined. The Secret Service claims that its agents were demoralized by being forced to "violate[ ] a code of confidentiality and trust" in a way that "adversely affected" its "morale and its ability to do its mission."<sup>246</sup> The stakes could hardly be higher, of course, than when the life of the President is endangered. But the Act removed *any* officer in the executive branch except the independent counsel himself from having *any* lawful influence over the determination whether the evidence would be sought.<sup>247</sup>

Although no one can say how the loose balancing analysis of *Morrison*—which inquires into whether the functioning of the independent counsel statute "impede[s] the President's ability to perform his constitutional duty"<sup>248</sup>—might apply in this context, there is a good argument that the arrangement violates Article II even under *Morrison*. It is entirely possible that the Court would agree that the practical insulation of the independent counsel, as well as his or her lack of institutional capacity to fully appreciate the factors at stake, result in a situation where the President's ability to execute the law is

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245. The same analysis would apply to the Justice Department's opposition in court to Independent Counsel Smaltz's attempts to expand his jurisdiction. See *In re Espy*, 145 F.3d 1365 (D.C. Cir. 1998); *In re Espy*, 80 F.3d 501 (D.C. Cir. 1996).

246. Letter from Deputy Attorney General Eric H. Holder, Jr. to Independent Counsel Kenneth Starr (Aug. 3, 1998), reprinted in H.R. DOC. NO. 105-311, Pt. 2, at 2441-42 (1998).

247. I don't mean to suggest either that the independent counsel made the wrong judgment, or that the courts were not correct in refusing to create the asserted privilege. On the contrary, I believe both those judgments were correct, and clearly so. That does not mean, however, that the structural and practical insulation of that decision from the executive branch is not a harmful thing. My objection is to the fact that the decision was Starr's alone, not to the way in which he made it.

248. *Morrison v. Olson*, 487 U.S. 654, 691 (1987).

unconstitutionally diminished. And that possibility is made more plausible by the nature of the potential consequences if the wrong judgments are made. But we can say at the very least that the practical impact of removing the Attorney General from the equation makes it substantially more difficult for the executive branch to discharge its functions.

In addition, the litigation over the Secret Service's attempts to establish a protective function privilege starkly illustrates the *Morrison* Court's perversion of the Appointments Clause.<sup>249</sup> The Appointments Clause requires that "Officers of the United States" be appointed by the President with the advice and consent of the Senate; but it also provides that for the category of "inferior Officers," Congress can lodge the appointment in "the President alone, in the Courts of Law, or in the Heads of Departments."<sup>250</sup> Since the Act lodges the appointment of the independent counsel in the Special Division, and thus bypasses both the President and the Senate in the process, its constitutionality under the Appointments Clause depended upon a finding that the independent counsel is an inferior officer.<sup>251</sup>

The Court in *Morrison* so held, concluding that the independent counsel is an inferior officer of the United States, and thus that it was within Congress's power to lodge her appointment in a court of law rather than in presidential appointment with the advice and consent of the Senate.<sup>252</sup> The Court relied upon a variety of factors to support that conclusion, including the limited scope of jurisdiction and functions, as well as tenure in office, of the independent counsel.<sup>253</sup> But the factor that I want to focus on here is the Court's conclusion that the good cause removal provision was sufficient to make the independent counsel inferior to the Attorney General.<sup>254</sup> The Court acknowledged that the independent counsel *functioned* independently of the Attorney

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249. U.S. CONST. art II, § 2, cl. 2.

250. *Id.*

251. See *Buckley v. Valeo*, 424 U.S. 1, 118-37 (1976) (per curiam) (holding that the Appointments Clause provides the exclusive method for appointing officers of the United States).

252. 487 U.S. at 670-73.

253. See *id.* at 671-72.

254. See *id.* at 671.

General, but claimed that the removal provision "indicates that she is to some degree 'inferior' in rank and authority."<sup>255</sup>

Justice Scalia objected to this analysis, claiming that inferiority in rank was insufficient to establish inferiority for purposes of the Appointments Clause.<sup>256</sup> As I noted above, the Court's subsequent cases provide a strong basis for thinking that *Morrison's* Appointments Clause analysis is no longer good law.<sup>257</sup> In particular, the Appointments Clause analysis of the Court in *Edmond v. United States*<sup>258</sup>—which was written by Justice Scalia and joined by seven other Justices<sup>259</sup>—concluded that certain military judges were inferior officers *because* their work was subject to supervision and direction by a principal officer.<sup>260</sup> Although the Court did not purport to call *Morrison* into question, its analysis plainly was inconsistent with the Court's treatment of the independent counsel:

It is not enough that other officers may be identified who formally maintain a higher rank or possess responsibilities of a greater magnitude. . . . Rather, in the context of a clause designed to preserve political accountability relative to important government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.<sup>261</sup>

However one describes the functioning of the independent counsel, it cannot be said that the independent counsel works at the direction and control of any principal officer. That reality is illustrated in concrete terms by the litigation between Starr's office and the Secret Service. As indicated by the Justice Department's representation of the Secret Service, it appears to be the Attorney General's policy that evidence in criminal proceedings will not be sought from Secret Service

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255. *Id.*

256. *See id.* at 715-23 (Scalia, J., dissenting).

257. *See* sources cited *supra* note 195.

258. 117 S. Ct. 1573 (1997).

259. *See id.* at 1582-83 (Souter, J., concurring in part and concurring in the judgment) (noting the tension between *Edmond* and the *Morrison* Court's treatment of the Appointments Clause).

260. For the appointment of the officers in question to be constitutional, it was necessary that they be inferior officers, since they had been appointed by the Secretary of Transportation, a "Head[] of Department[]" in Appointments Clause terms. U.S. CONST. art II, § 2, cl. 2.

261. *Edmond*, 117 S. Ct. at 1580-81.

agents.<sup>262</sup> Moreover, exercising authority granted to her by law,<sup>263</sup> the Attorney General exempted the Secret Service from the otherwise applicable statutory obligation to report evidence of crimes that they acquire in the course of their duties.<sup>264</sup> Thus, all officers of the executive branch—with the exception of the independent counsel—are directed as a matter of policy not to compel Secret Service agents to provide testimony about information they learned in the course of discharging their duty to protect the President.<sup>265</sup> By exempting the independent counsel from any supervision—the implications of which are illustrated by the Secret Service situation—the Ethics in Government Act effectively places the independent counsel in a superior position to the only principal officer who can arguably be said to supervise and direct his or her conduct.<sup>266</sup>

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262. See Brief for the Department of Justice at 25, *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998) (“[T]he President’s willingness to tolerate continuous proximity will be impaired by the knowledge that Secret Service personnel can be subject to grand jury subpoenas.”).

263. See 28 U.S.C. § 535(b)(2) (1994) (exempting agencies and departments from the statutory duty to report evidence of crimes acquired during the course of business if “the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint”).

264. See Brief for the Department of Justice at 35, *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998) (“[H]ere, the Attorney General has specifically determined that the privilege should be asserted.”).

265. The Attorney General never purported to direct Independent Counsel Starr not to seek evidence from the Secret Service, and thus the question whether he was bound by the Attorney General’s decision to invoke her section 535(b)(2) authority never arose.

If the Attorney General had purported to direct the independent counsel not to seek the evidence, the question would have become whether it would be “inconsistent with the purposes” of the Ethics in Government Act for the independent counsel to “comply with the . . . policies of the Department of Justice” with respect to the matter. 28 U.S.C. § 594(f)(1).

266. In an illuminating article, Professor Barrett noted the various ways in which, notwithstanding the statutory grant of autonomy to the independent counsel, the Justice Department effectively impedes the independent counsel’s ability to perform his or her assigned tasks. See Barrett, *supra* note 16, at 531-41. Professor Barrett views these sources of interference as impeding the goals of the Act; for example, the Attorney General’s refusal to allow certain classified information to be introduced under CIPA caused Independent Counsel Lawrence Walsh to dismiss one indictment entirely and parts of another. See *id.* at 536-37. To remedy this interference, Professor Barrett proposes a variety of measures to make clear the authority of the independent counsel over even the Attorney General in matters within his or her jurisdiction. See *id.* at 541-42. Whatever one thinks as a policy matter of Professor Barrett’s argument, adoption of the measures he suggests would make clearer still the insuperable Appointments Clause difficulties associated with an independent counsel who is superior in office even to the Attorney



### 3. Intra-branch Litigation in the Absence of the Ethics in Government Act

It is helpful in thinking about the impact of the Ethics in Government Act on the operations of the executive branch to consider how things would work if the statute did not exist. As discussed above, disputes within the executive branch over the investigation and prosecution of crimes are generally resolved conclusively by the Attorney General, subject to presidential review if the losing agency insists. The Justice Department recently represented in court that the normal practice is for these decisions to be made by the Attorney General in consultation with the affected agencies.<sup>267</sup> That method of resolving matters is reflected in applicable executive orders<sup>268</sup> and Office of Legal Counsel precedents,<sup>269</sup> which generally call upon executive agencies to submit their legal disputes to the Attorney General for her resolution.<sup>270</sup>

Notably, however, the applicable executive precedents treat differently disputes between agencies whose heads serve at the pleasure of the President and disputes involving independent agencies. Thus, if an independent agency is involved—which means that Congress has removed from the President (and thus the Attorney General) the power to direct the resolution of the dispute—the parties are *encouraged* to submit the matter to the Attorney General.<sup>271</sup> If, however, both disputants are subject to removal at the pleasure of the President, then the executive order *insists* that the Attorney General resolve the matter.<sup>272</sup>

What that means is that outside the independent counsel context, it is impossible for two executive agencies to litigate

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General and who is nonetheless appointed without the check provided by presidential appointment and senatorial advice and consent.

267. See generally Brief Amicus Curiae For the United States Acting Through the Attorney General, *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998) (Nos. 98-3060, 98-3062, 98-3072).

268. See Exec. Order No. 12146, 3 C.F.R. 409 (1979).

269. See, e.g., Constitutionality of Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force, 13 Op. Off. Legal Counsel 131, 138-43 (1989); Resolution of Legal Dispute Between the Department of Energy and the Tennessee Valley Authority, 11 Op. Off. Legal Counsel 70 (1987); Proposed Tax Assessment Against the United States Postal Service, 1 Op. Off. Legal Counsel 79 (1977).

270. See Exec. Order No. 12146, 3 C.F.R. 411 (1979).

271. See *id.*

272. See *id.*

against one another.<sup>273</sup> Because disputes are resolved within the executive branch, there is no occasion for such litigation legitimately to arise. And although litigation involving independent agencies has arisen with some frequency,<sup>274</sup> the Supreme Court has never decided a case between two executive agencies. The closest it has come to doing that is *United States v. Nixon*, a decision which I have argued above was mistaken.<sup>275</sup> Thus, outside the independent counsel context there are no reported instances of litigation between two components of the executive branch over executive privilege, or government attorney-client privilege, or certainly over a protective function privilege.

Of course, one might reasonably wonder how it could be otherwise. After all, the executive branch has no occasion to call on itself for evidence outside the context of criminal prosecutions; and under our current practice and long tradition criminal prosecutions are quintessentially within the control of the Attorney General. But not when an independent counsel is on the scene. Consider, for example, the multiple disputes between Independent Counsel Smaltz and the Attorney General about the scope of the Espy investigation.<sup>276</sup> On two occasions the courts were called upon to resolve who had the

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273. The Office of Legal Counsel has taken the broad position that inter-agency litigation is impermissible even with respect to independent agencies. See 13 Op. Off. Legal Counsel 131, 138-39 (1989); Resolution of Legal Dispute Between the Department of Energy and the Tennessee Valley Authority, 11 Op. Off. Legal Counsel 70 (1987). The applicable executive order, however, recognizes the distinction between executive and independent agencies in this context, see Exec. Order No. 12146, 3 C.F.R. 411 (1979); and the Supreme Court effectively has as well. See, e.g., *Secretary of Agric. v. United States*, 347 U.S. 645 (1954); *United States v. ICC*, 337 U.S. 426 (1949). And there has been a great deal of lower court litigation involving independent agencies. See, e.g., *Tennessee Valley Authority v. United States*, 13 Cl. Ct. 692, 699, 703 (1987) (dispute involving Tennessee Valley Authority and Department of Energy); *Dean v. Herrington*, 668 F. Supp. 646 (E.D. Tenn. 1987) (same); see also Herz, *supra* note 70, at 938-54 (describing examples of such litigation).

274. For examples of lower court litigation, see cases cited *supra* note 273. The Supreme Court has also on occasion considered litigation involving independent agencies. See, e.g., *United States ex rel. Chapman v. Federal Power Comm'n*, 345 U.S. 153 (1953); *United States v. ICC*, 337 U.S. 426 (1949).

275. Of course, *Nixon* is different from litigation involving purely executive agencies (say, between the Attorney General and the Secretary of Treasury, or the Attorney General and the President himself), in that *formal* independence from the President had been created by regulation.

276. See *supra* text accompanying notes 25-29.

authority to investigate and prosecute certain potential federal crimes.<sup>277</sup> The D.C. Circuit decided a case concluding that Starr in fact had jurisdiction to investigate and prosecute Webster Hubbell (and his wife, accountant and lawyer) for tax offenses, over the objections to such jurisdiction offered by the Attorney General by way of amicus curiae participation.<sup>278</sup> Such litigation between the Attorney General and other prosecutorial components of the United States (say a United States Attorney or a Division of the Justice Department) has never occurred; the Attorney General, who is charged by statute with representing the prosecutorial interests of the United States, simply resolves the matter. But the obviousness of that point is part of my argument—the impossibility of litigation over these matters in the normal case indicates how deeply the Ethics in Government Act strikes into the Article II structure.<sup>279</sup>

#### B. THE ETHICS IN GOVERNMENT ACT'S DIMINISHMENT OF ARTICLE II ACCOUNTABILITY

There has been a great deal of commentary regarding the harm that the Ethics in Government Act does to the interests of the executive, perhaps none more devastating than Justice Scalia's dissent in *Morrison*.<sup>280</sup> In this part, rather than rehearsing those points, I want to offer another, and quite different, criticism of the Act's effect on the executive.

The purpose of a unitary executive was not solely to provide efficiency and energy in the execution of the laws and to provide a counterweight to the legislature, although those surely were factors.<sup>281</sup> The purpose of Article II was also to

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277. See *In re Espy*, 145 F.3d 1365 (D.C. Cir. 1998); *In re Espy*, 80 F.3d 501 (D.C. Cir. 1996).

278. See *United States v. Hubbell*, 162 F.3d 552 (D.C. Cir. 1999).

279. Some have argued that the practical necessity of an independent counsel makes it justifiable for the courts to decide these matters in the place of the Attorney General. In fact, that is the position of the Department of Justice. See Brief Amicus Curiae For the United States Acting Through the Attorney General at 15, *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998) (Nos. 98-3060, 98-3062, 98-3072); see also Philip B. Kurland, *United States v. Nixon: Who Killed Cock Robin?*, 22 UCLA L. REV. 68, 72 (1974) (arguing that when there is a "break in the chain of command" in the executive branch, courts can intervene and decide the matter).

280. *Morrison v. Olson*, 487 U.S. 654, 697 (1987) (Scalia, J., dissenting).

281. See THE FEDERALIST NOS. 67-72 (Alexander Hamilton); CHARLES THACH, THE CREATION OF THE PRESIDENCY, 1775-1789 (1923); see also DAVID

ensure *accountability* for the execution of the laws.<sup>282</sup> Hamilton emphasized the importance of accountability, and the usefulness of a single executive in seeking to ensure that the people were able to hold leaders accountable both for their actions and their inaction.<sup>283</sup>

The complexities of political accountability, and the effects on accountability of government arrangements such as the creation of independent agencies, are beyond the scope of this Article.<sup>284</sup> My focus here is much more limited: given that ensuring effective means of accountability is a constitutional value in general,<sup>285</sup> and an Article II value in particular, how does the operation of the Ethics in Government Act serve that interest? Recent events, I suggest, provide strong support for the conclusion that the Act greatly enhances the President's incentives and means to avoid accountability for the execution of the laws.

A President who is inclined to exploit the independence of the independent counsel—for whatever reason—has ample means at his or her disposal. The Act permits the President to attack an independent counsel's investigation as abusive and even illegal while plausibly claiming lack of any power to do anything about it. As Professor O'Sullivan put it, "[t]he administration and its allies obviously have every incentive in appearing cooperative while attacking as biased or

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SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993); Prakash, *supra* note 179; Strauss, *supra* note 112, at 596-602. *But see* Abner S. Greene, *Discounting Accountability*, 65 *FORDHAM L. REV.* 1489, 1498-1504 (1997).

282. Thus even those who deny the theory that the Constitution established a unitary executive in the sense that the President has to have complete control over the execution of the laws agree that preserving the value of accountability is essential to Article II. *See* Lessig & Sunstein, *supra* note 114, at 94; *see also* Rebecca L. Brown, *Accountability, Liberty and the Constitution*, 98 *COLUM. L. REV.* 531 (1998).

283. *THE FEDERALIST NO. 70* (Alexander Hamilton); *see also* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 *ARK. L. REV.* 23, 42-45 (1995).

284. There is, of course, a vast literature on this subject. For an interesting discussion and a helpful collection of sources, *see* Brown, *supra* note 282; *see also* Greene, *supra* note 281; Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 *ARK. L. REV.* 161 (1995); Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 *YALE L. & POL'Y REV.* 361 (1993).

285. *See* *New York v. United States*, 505 U.S. 144 (1992); *see also* *Printz v. United States*, 117 S. Ct. 2365 (1997).

incompetent" an independent counsel whose investigation is posing difficulties for the President.<sup>286</sup>

This danger has been made reality in the investigation of Kenneth W. Starr. At the time he was appointed independent counsel for Whitewater matters, the *New York Times* initially responded to the appointment by characterizing it as "safe and nonpartisan," and by praising Starr's past public service and accomplishments.<sup>287</sup> Democrats quickly became critical of the appointment, however, due to Starr's past associations and the circumstances under which he was appointed to replace Robert Fiske, the prosecutor whom Attorney General Reno had earlier appointed pursuant to Justice Department regulations.<sup>288</sup> And while the White House publicly pledged to cooperate with the new independent counsel, aides privately expressed "bitterness" at the turn of events.<sup>289</sup>

As time and Starr's investigation wore on, the President and his staff took to criticizing openly the fairness of the investigation. Matters became acute when, in a pre-election television interview in 1996, the President claimed that it was "obvious" that Starr was "out to get him."<sup>290</sup> And they became

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286. O'Sullivan, *supra* note 7, at 474.

287. Editorial, *An Even More Independent Counsel*, N.Y. TIMES, Aug. 6, 1994, at A18. After the circumstances surrounding his appointment (specifically the infamous lunch between Senator Lauch Faircloth and Judge David B. Sentelle, at which, it is worth noting, both have denied discussing the Whitewater independent counsel's appointment) became known, the *Times* changed its view and called on Starr to resign so as to preserve the appearance of fairness and impartiality. See Editorial, *Mr. Starr's Duty to Resign*, N.Y. TIMES, Aug. 18, 1994, at A22.

288. See David Johnston, *Appointment in Whitewater Turns into a Partisan Battle*, N.Y. TIMES, Aug. 13, 1994, at A1; Stephen Labaton, *Democrats Build Pressure on New Prosecutor to Quit*, N.Y. TIMES, Aug. 9, 1994, at A14; see also PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW 182-85 (9th ed. 1995) (describing events surrounding replacement of Robert Fiske by Starr); Peter Applebome, *Judge in Whitewater Dispute Rewards Faith of His Patron*, N.Y. TIMES, Aug. 17, 1994, at A1.

289. Stephen Labaton, *New Counsel Is Being Urged Not to Start Inquiry Anew*, N.Y. TIMES, Aug. 8, 1994, at A8.

290. *The News Hour with Jim Lehrer: Newsmaker; President Clinton; Negative Politics and Whitewater* (PBS television broadcast, Sept. 23, 1996); Todd S. Purdum, *Clinton Implies He Is Subject of a Vendetta*, N.Y. TIMES, Sept. 24, 1996, at A18; see also Neil A. Lewis, *Utah Senator Scolds Critics of Prosecutor in Whitewater*, N.Y. TIMES, Nov. 16, 1996, at A12 (recounting public criticisms of Starr by President Clinton's staff). Both the *New York Times* and *Washington Post* criticized the President's comments. See Editorial, *Isn't It Obvious?*, WASH. POST, Sept. 27, 1996, at A24; Editorial, *Whitewater Sparring*, N.Y. TIMES, Sept. 26, 1996, at A26.

extreme when Starr obtained jurisdiction over the Lewinsky matter in January 1998; relations between the independent counsel and the White House only deteriorated over the year and a half of investigation accompanied by constant publicity that followed.

In short, the President and his supporters came to be in open “war,” or in the words of the First Lady, in “battle” against Starr and the “right wing” conspirators who were seeking to destroy the President solely for political gain.<sup>291</sup> For his part, it appeared to many that Starr too had adopted a battle mentality. Certainly the mainstream media concluded as much.<sup>292</sup>

For the President’s objections to Starr’s investigation to have credibility, he had to maintain an inability to control the prosecutor; after all, if the prosecutor were subject to his or the Attorney General’s direction, then it would be strange for the President to complain about conduct that is within his power to control. Conveniently for the President, “the whole object” of the Ethics in Government Act is to prevent the President from controlling the course of an independent counsel investigation.<sup>293</sup> The Act thus provides the mechanism for the President and his supporters to criticize the independent counsel while claiming an inability to do anything about it.<sup>294</sup>

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291. *Today Show*: Interview by Matt Lauer with Hillary Rodham Clinton, (NBC television broadcast, Jan. 27, 1998).

292. Early in the Lewinsky investigation a photograph of Starr appeared on the cover of *Time Magazine*, bearing the caption “Starr at War.” See *TIME*, Feb. 9, 1998.

293. *Morrison v. Olson*, 487 U.S. 654, 706 (1987) (Scalia, J., dissenting).

294. Of course, if the Attorney General believed that Starr’s investigation was based on political bias, or had taken seriously illegal turns, there would be a strong argument that she is *obliged* to dismiss him for cause. Certainly I hope that an Assistant United States Attorney would be fired if he or she actually engaged in abuses of power of even a fraction of the sort that the President and his supporters claim Starr has. Moreover, there is a strong argument that the President—if he truly believes what he and his supporters have been saying about Starr since January 1998—has a *duty* to order the Attorney General to dismiss Starr for cause. It is hard to see how the President is taking care that the laws be faithfully executed when he permits what he and his supporters believe is a rogue prosecutor to roam unchecked.

The conventional wisdom explaining why the President has not seen to the discharge of Starr attributes the President’s lack of action to political reality—the ghosts of the Saturday Night Massacre have made it simply unacceptable politically for the President to have an independent counsel discharged. Thus, at an April news conference, when asked why he didn’t have Starr fired if he believed that Starr had acted abusively and illegally, the

As events over the course of the Lewinsky investigation confirm, such a presidential strategy can be extraordinarily successful. Months passed with no substantive comment from the President coupled with a steady stream of criticism of the investigation as a political vendetta seeking to create facts that did not exist. Steadily the independent counsel became more unpopular, a fact that the President's supporters further exploited as demonstrating the illegitimacy of the investigation.<sup>295</sup> And the independent counsel, like all prosecutors, was impeded by tradition and law<sup>296</sup> from publicly defending himself and his investigation in any significant way.<sup>297</sup>

The upshot of all this is, paradoxically, that the Act's grant of independence to the independent counsel left him at the President's mercy once his administration made the decision to attack the legitimacy of the investigation. As President Nixon painfully learned, however, the situation would likely have been far different if the Act did not exist. An investigation of the President that is in control of the Attorney General has the potential—so long as the political system maintains its vigilance<sup>298</sup>—to be more effective. If the President had the

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President responded that it would not be "appropriate" for him to do so. President Clinton, Press Conference (Apr. 30, 1998).

As a colleague of Starr and his staff, I should note my bias on these points.

295. See Damian Whitworth & Martin Fletcher, *Report Dims Prosecutor's Star*, THE TIMES, Sept. 23, 1998, Overseas News Section ("Throughout recent months, Mr Starr's approval ratings have been as low as 18 per cent and peaked at 32 per cent."); Paul H.B. Shin, *Starr Brighter, but Case Isn't, 2 Polls Report*, NEW YORK DAILY NEWS, Nov. 21, 1998, at 7 ("A CBS News poll released yesterday showed an 8-point jump to 26% from 18% in Starr's approval rating after his 11 1/2-hour televised testimony.")

296. See FED. R. CRIM. P. 6(e)(2).

297. As the impeachment proceedings against the President advanced, Starr did have an opportunity to defend himself and the course of his investigation during his day-long appearance testifying before the House Judiciary Committee. By then, of course, the damage had been done—so much so that the media referred to Starr's appearance as his last chance to salvage any public reputation from the ruins of the Lewinsky investigation and the four years that preceded it. See, e.g., Carl M. Cannon & Kirk Victor, *Starr's Last Chance*, THE NATIONAL JOURNAL, Nov. 21, 1998 at 2762.

298. The Act also works to reduce the accountability of Congress. Rather than exercising its legitimate oversight role when there are potential conflicts of interest in federal criminal investigations, the Act permits Congress to sit back and let an independent counsel do its work. Contrast, for example, the strong congressional interest in the recent campaign finance investigation run by the Justice Department with the congressional willingness to stand by and

unquestioned power to fire the prosecutor investigating him, then he simply could not get away with attacking the investigation's legitimacy. Consider how different the Lewinsky situation would have been had the Attorney General been responsible for the investigation. As has been much noted,<sup>299</sup> one lesson of Watergate is that the system *can* hold the President accountable. And the Ethics in Government Act, by allowing the President plausibly to claim martyrdom, undermines that laudable goal.

#### IV. CONCLUSION

The investigation of possible crimes by the President or those close to him presents extraordinary challenges to the rule of law. The last generation's response to those challenges has been the institution of the independent counsel, which was created in the wake of Watergate and the perceived dangers of allowing the investigation and prosecution of such crimes to remain subject—even if only formally—to the direction and control of the Attorney General. Apart from general questions regarding the constitutionality and advisability of the independent counsel system, my subject has been the constitutional oddities raised by litigation occurring within that system.

During Watergate, the system was content to rely on a mechanism that gave a special prosecutor regulatory independence from the President and Attorney General. And that mechanism successfully brought to justice lawbreakers at the highest levels of the executive branch—including a former attorney general, and in a manner of speaking the President of the United States himself. The exigencies of the situation, however, led the *Nixon* Court astray in holding that the special prosecutor's regulatory independence—which was entirely voluntary and subject to repeal at the whim of the Attorney

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do nothing to investigate the Lewinsky matter so long as the independent counsel investigation was proceeding.

The Act also goes so far as to require the independent counsel to report to the House of Representatives if the prosecutor concludes that he or she has substantial and credible information that might constitute grounds for an impeachment of the President. 28 U.S.C. § 595(c) (1994). For a powerful critique of this provision, see Julie R. O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2193 (1998).

299. See, e.g., *In re Sealed Case*, 838 F.2d 476 (D.C. Cir.), *rev'd*, 487 U.S. 652 (1988); Calabresi, *supra* note 283, at 90-94. *But see* HARRIGER, *supra* note 82, at 40-72.



General—created Article III adversity between him and the President.

The post-Watergate passage of the Ethics in Government Act was sufficient to solve the Article III problem posed by the regulatory special prosecutor. But by creating legal adversity between the independent counsel and the President, as well as the rest of the executive branch, the Act intruded deeply into the functioning of the Article II branch. The constitutional dilemma of the independent counsel system is unavoidable—with the statutory action necessary to create Article III adversity comes prosecutorial independence to disrupt the functioning of the Article II branch.