The Institutionalized Wolf: An Analysis of the Unconstitutionality of the Independent Counsel Provisions of the Ethics in Government Act of 1978

I. Introduction

In Congressional testimony in 1973, then Solicitor General Robert Bork denounced the office of special prosecutor as "an office whose sole function is to attack the executive branch throughout its tenure. It is an institutionalized wolf hanging on the flank of the elk . . . ."[1] Since the enactment of the Ethics in Government Act in 1978,[2] the wolf has pounced at least twenty-three times, requiring the Attorney General to commence a preliminary investigation each time.[3] Of these, eleven cases have resulted in the appointment of an independent counsel[4] by a special division of federal court.[5]

Several attempts have been made to kill the wolf. Independent Counsel Lawrence Walsh is currently investigating former National Security Council staff member Lt. Col. Oliver North for his role in the Iran/Contra affair. In a civil suit against Mr. Walsh in February of 1987, Mr. North claimed that the Independent Counsel law was unconstitutional and demanded an injunction against the investigation. The District Court for the District of Columbia ruled that the case was "not ripe for adjudication" and denied the injunction.[6] As a response to this suit the Attorney General, in March, issued a "parallel appointment" to Walsh in the event the court appointment provided for in the statute was held unconstitutional.[7]

Mr. North's next legal challenge came in a motion to quash a grand jury subpoena because it was issued by the allegedly unconstitutional independent counsel. The district court did not pass on the merits of the claim and found Mr. North in contempt.[8] On appeal,

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[1]*Special Prosecutor and Watergate Grand Jury Legislation, Hearings before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess. 263 (1973).

[2]28 U.S.C. §§ 591-98 (1982 & Supp. IV 1986).

[3]S. Rep. No. 123, 100th Cong., 1st Sess. 2, 6-7 (1987).

[4]The name of the office was changed from "special prosecutor" to "independent counsel" in a 1983 amendment. Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (1983).

[5]S. Rep. No. 123, 100th Cong., 1st Sess. 7 (1987); *see infra* notes 49-50 and accompanying text.

[6]North v. Walsh, 656 F. Supp. 414 (D.D.C. 1987).

[7]Office of Independent Counsel: Iran/Contra, 28 C.F.R. §§ 600, 601 (1987).

[8]*In re* Sealed Case, 827 F.2d 776 (D.C. Cir. 1987).

the United States Court of Appeals for the District of Columbia Circuit vacated the contempt judgment and remanded to the district court for a decision on the merits.[9] The district court found that Walsh was authorized to prosecute Mr. North by virtue of the Attorney General's parallel appointment.[10] The appellate court this time affirmed the district court and specifically held that in light of the parallel appointment, Mr. North's challenge to the Ethics in Government Act was not ripe for adjudication.[11] The trial date for the Iran/Contra defendants, including Mr. North, has been continued beyond the 1988 Presidential elections in November.[12]

Former White House Deputy Chief of Staff Michael Deaver had also challenged the constitutionality of the law in a civil suit against Whitney Seymour, the Independent Counsel appointed to investigate perjury charges against Mr. Deaver. He met results similar to Mr. North's.[13] On December 16, 1987, Mr. Deaver was convicted[14] of perjury, thus claiming the rather dubious honor of being the first real victim of the independent counsel wolf.[15]

Former Presidential Assistant Lyn Nofziger also tried to postpone his trial for lobbying on behalf of Wedtech Corporation by filing a civil suit against his investigator. The scope of the Independent Counsel's jurisdiction was extended, even in the Justice Department's parallel appointment,[16] to include an investigation of Attorney General Edwin Meese.[17] Mr. Nofziger's suit was dismissed by the district court.[18] He became the wolf's second victim upon his conviction in February of 1988 for illegal lobbying.[19] Meanwhile, Attorney General Meese was cleared of any wrongdoing by the Independent Counsel.[20] Mr. Meese resigned on August 4, 1988—just two and one-half weeks after being cleared by the Independent Counsel.[21]

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[9] *Id.*

[10] *In re* Sealed Case, 666 F. Supp. 231 (D.D.C. 1987).

[11] *In re* Sealed Case, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 753 (1988).

[12] 46 Cong. Q. Weekly Rep., Aug. 6, 1988, at 2236.

[13] Deaver v. Seymour, 656 F. Supp. 900 (D.D.C.), *aff'd* 822 F.2d 66 (D.C. Cir.), *cert. denied*, 108 S.Ct. 99 (1987).

[14] Mr. Deaver was given a three-year suspended sentence and fined $100,000. 46 Cong. Q. Weekly Rep., Sept. 4, 1988, at 2681.

[15] 46 Cong. Q. Weekly Rep., Feb. 13, 1988, at 323.

[16] 28 C.F.R. § 602 (1988).

[17] *Id.*

[18] 45 Cong. Q. Weekly Rep., Oct. 24, 1987, at 2604.

[19] 46 Cong. Q. Weekly Rep., Feb. 13, 1988, at 323.

[20] 46 Cong. Q. Weekly Rep., July 23, 1988, at 2034.

[21] 46 Cong. Q. Weekly Rep., Aug. 6, 1988, at 2237.

In December of 1987, Congress passed the Independent Counsel Reauthorization Act of 1987[22] in order to breathe more life into the independent counsel wolf before its life statutorily expired in January of 1988.[23] The law extends the life of the wolf for five more years and makes some changes from the prior law.[24]

In spite of this extension, the relatively little known case of Theodore Olson nearly struck the wolf a fatal blow. In 1983, the House Judiciary Committee began an investigation into the Environmental Protection Agency. During the course of the hearings, Assistant Attorney General Mr. Olson testified.[25] The committee believed that Olson and others had deliberately withheld some documents from it and requested that the Attorney General conduct a preliminary investigation pursuant to the independent counsel law.[26] Alexia Morrison, who was eventually appointed as the independent counsel, moved that the appointing court expand her jurisdiction so that she could also prosecute two other Justice Department personnel.[27] The court refused, but allowed her to continue to question them concerning matters relevant to Mr. Olson's prosecution.[28] She then subpoenaed all three to appear before a grand jury.[29] They moved to quash the subpoenas on the ground that the independent counsel law is unconstitutional.[30] The district court disagreed but was reversed by the Court of Appeals for the District of Columbia, which held, for the first time, that the independent counsel law is unconstitutional.[31] The United States Supreme Court granted certiorari, heard argument, and reversed the Court of Appeals rather quickly—its opinion was handed down June 29, 1988, the final day of the October 1987 term, thereby resuscitating the wolf.[32]

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[22]Pub. L. No. 100-191, 101 Stat. 1293 (1987) (to be codified at 28 U.S.C. §§ 591-598).

[23]28 U.S.C.A. § 599 (West Supp. 1988).

[24]The Senate narrowly defeated an amendment offered by Sen. William L. Armstrong which would have subjected members of Congress to the reach of the Independent Counsel. 45 CONG. Q. WEEKLY REP., Nov. 7, 1987, at 2751. A similar effort was made in the House by Rep. E. Clay Shaw, Jr. It too was defeated. 45 CONG. Q. WEEKLY REP., Oct. 24, 1987, at 2604.

[25]*See generally* REPORT ON INVESTIGATION OF THE ROLE OF THE DEPARTMENT OF JUSTICE IN THE WITHHOLDING OF ENVIRONMENTAL PROTECTION AGENCY DOCUMENTS FROM CONGRESS IN 1982-83, H.R. REP. NO. 435, 99th Cong., 1st Sess. (1985).

[26]*In re* Olson, 818 F.2d 34 (D.C. Cir. 1987).

[27]*See infra* notes 54-57 and accompanying text.

[28]*Olson*, 818 F.2d at 34.

[29]*In re* Sealed Case, 838 F.2d 476 (D.C. Cir.), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988).

[30]*Id.*

[31]*Id.*

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

This Note explains why the Constitution should not be understood to allow this wolf to live. It begins with a brief history of the use of special prosecutors to investigate misconduct by federal government officials. Next, it explains how the independent counsel mechanism operates, highlights its more controversial provisions, and relates some relevant changes made by the 1987 Amendments. Then, it explains why the law unconstitutionally violates the separation of powers doctrine by: invading the executive's power of prosecution; vesting the power of appointment in the courts; restricting the removal power of the Executive; and reserving oversight jurisdiction in the court and the Congress.

II. History

The first use of a special prosecutor to investigate high-ranking officers of the federal government occurred during the scandal-plagued term of President Grant in 1875. A group of moonshiners, known as the Whiskey Ring, were able to bypass the revenue laws through bribery. A Federal District Attorney brought an indictment against Orville Babcock, Grant's personal secretary, for accepting bribes. Grant responded by quickly removing the District Attorney.[33] Grant then appointed a special prosecutor to finish the investigation and trial.[34]

The famed Teapot Dome affair of the early 1920's is another example of the use of a special prosecutor. In that case, Congress had passed a bill which appropriated money to the President to enable the commencement of criminal or civil suits against anyone who had profited from the cancellation of certain oil leases. President Harding then appointed a prosecutor and his investigation culminated in the conviction of his predecessor's Secretary of the Interior, Albert Fall.[35]

In the waning years of the Truman Administration, wide-spread corruption was discovered in the handling of tax evasion cases. Truman's Attorney General, McGrath, appointed a "special assistant" to look into other possible corruption in the government. This Special Assistant, Morris, declared that he was completely unaffiliated with the Department of Justice and would even investigate the Attorney General. However, when Morris asked for McGrath's files, he was

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[33]George F. Milton, The Use of Presidential Power, 1789-1943 148-49 (1945).

[34]S. Rep. No. 170, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. Code Cong. & Admin. News 4217, 4218.

[35]United States v. Fall, 10 F.2d 648 (D.C. Cir. 1925). *See generally* Sinclair v. United States, 279 U.S. 263 (1929); McGrain v. Daugherty, 273 U.S. 135 (1927); *In re* Olson, 818 F.2d 34 (D.C. Cir. 1987).

promptly fired. Truman then fired McGrath, but did not appoint a new prosecutor to take Morris's place.[36]

Watergate finally prompted Congress to provide a mechanism for investigating government officials. Attorney General Elliot Richardson created the office of Special Prosecutor to investigate the break-in at the Democratic party national election headquarters.[37] After appointing Archibald Cox to fill the position, Nixon, along with Richardson and Deputy Attorney General William Ruckelshaus, promised the Senate that Cox would not be removed. However, when Cox sought a court order to enforce a subpoena of the President's tapes,[38] Nixon sought to fire him. On October 20, 1973, in what became known as the Saturday Night Massacre, Richardson and Ruckelshaus refused to fire Cox and resigned.[39] Solicitor General Robert Bork then became the acting Attorney General and, because he had personally given no assurances to the Senate, removed Cox as the President requested.[40] Shortly thereafter, Bork reinstated the Special Prosecutor's office and Nixon appointed Leon Jaworski to the job.[41]

This history demonstrates that the executive branch can rarely be trusted to investigate itself.[42] Consequently, Congress, in the aftermath of Watergate, institutionalized the special prosecutor in the Ethics in Government Act of 1978.[43] The real question, however,—the question not addressed by the Supreme Court—[44] remains whether the Constitution permits Congress to allow anyone but the executive to investigate and prosecute abuses within the executive branch.

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[36]*Olson*, 818 F.2d at 40-41.

[37]*See* 38 Fed. Reg. 14,688, 18,877, 21,404 (1973).

[38]United States v. Nixon, 418 U.S. 683 (1974).

[39]*Special Prosecutor, Hearings Before the Senate Comm. on the Judiciary,* 93d Cong., 1st Sess. 237 (1973) (testimony of Elliot Richardson).

[40]*Id.* at 157 (statement of Robert Bork, Acting Attorney General). In this statement, issued at a press conference four days after the "Massacre," Bork defended his actions on the ground that he felt the President's decision to get rid of Cox was "final and irrevocable," and "that the President has the right to discharge any member of the Executive Branch he chooses to discharge." *Id.* He also felt that his actions would head off mass departures from the Justice Department, thus confining the carnage to the two top people in the Department.

[41]38 Fed. Reg. 30,738, 32,805 (1973). *See also Special Prosecutor and Watergate Grand Jury Legislation, Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 251 (1973) (testimony of Robert Bork).

[42]"That the President grossly abuses the power of removal is manifest, but it is the evil genius of Democracy to be the sport of factions." Myers v. United States, 272 U.S. 52, 149 (1926) (quoting 1 PRIVATE CORRESPONDENCE OF DANIEL WEBSTER 486 (F. Webster ed. 1903)).

[43]*See supra* notes 1-2 and accompanying text.

[44]Morrison v. Olson, 108 S. Ct. 2597, 2619 (1988).

III. The Operation of the Independent Counsel Provisions

The process of the independent counsel mechanism begins when "the Attorney General receives information sufficient to constitute grounds to investigate" that the President, Vice-President, member of cabinet, high-level executive officer, high-level Justice Department official, Director or Deputy Director of the CIA, Commissioner of the Internal Revenue, or the President's campaign chairman or treasurer has engaged in activity violating federal criminal law greater than a Class B misdemeanor.[45] A 1983 amendment included in this list anyone with whom the Attorney General or other officer of the Department of Justice may have a "personal, financial, or political conflict of interest."[46]

Once the Attorney General receives sufficient information,[47] he or she must begin a preliminary investigation, without the authority to "convene grand juries, plea bargain, grant immunity, or issue subpoenas."[48] If, after ninety days, the Attorney General finds no grounds for further investigation, he or she notifies a special division of court which is composed of three judges appointed by the Chief Justice of the United States Supreme Court for a two year term on the division.[49] The special division cannot then appoint an independent counsel.[50] If, on the other hand, the Attorney General decides that sufficient grounds exist to further investigate or prosecute, or if the ninety days expires without a determination not to pursue the matter, the Attorney General must apply to the court for the appointment of an independent counsel.[51]

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[45]28 U.S.C.A. § 591(a)-(b) (West Supp. 1988).

[46]*Id.* § 591(c). Because Oliver North did not hold an office specifically named in the Act, his apparent political conflict of interest with Attorney General Meese and the Reagan Administration was the sole ground for his falling under the Act. Without § 591(c), he could not have been investigated by an Independent Counsel. *In re* Olson, 818 F.2d 34, 42 (D.C. Cir. 1987).

[47]The code requires "information sufficient to constitute grounds to investigate that any of the persons described . . . has committed a violation of any Federal criminal law other than a violation constituting a Class B or C misdemeanor or an infraction." 28 U.S.C.A. § 591(a) (West Supp. 1988).

[48]28 U.S.C. § 592(a)(1)-(2) (1982). The Department of Justice has engaged in a practice of holding lengthy "threshold inquiries" to determine if a preliminary investigation is warranted. The Independent Counsel Reauthorization Act of 1987 limits such an inquiry to fifteen days and requires the Attorney General to report to the House or Senate Judiciary Committee whether a preliminary investigation is being conducted and whether he has applied to the special division for appointment of an independent counsel. Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (1987) (to be codified at 28 U.S.C. § 595 (b)).

[49]28 U.S.C. §§ 49, 592 (1982).

[50]28 U.S.C. § 592(b) (1982).

[51]*Id.* § 592(c).

The Attorney General's decision is not reviewable by any court.[52]

The recent case of *In re Olson*,[53] provides a good example of this process and the conclusiveness of the Attorney General's decision under the present law. In that case, the Attorney General conducted a preliminary investigation of two Assistant Attorney Generals, Olson and Dinkins, and a Deputy Attorney General, Schmults, regarding their role in withholding documents from two congressional committees investigating the EPA "Superfund" caper. The Attorney General thereafter applied to the special division for the appointment of an independent counsel to investigate Olson's actions but determined that further investigation of Dinkins and Schmults was unwarranted.[54] The counsel appointed to Olson's case, Alexia Morrison, later petitioned the special division to refer the investigation of Dinkins and Schmults to her, pursuant to the statute,[55] arguing that it was necessary for a proper investigation of Olson. The special division refused to do so because the Attorney General's determination that further investigation was unwarranted made the special division powerless to appoint an independent counsel. To refer their case to an existing counsel would destroy the effect of the Attorney General's determination.[56] As a response to *Olson*, the current Senate bill seeks to limit this discretion of the Attorney General by directing him "to give great weight to the recommendations" of the independent counsel for referrals.[57]

As a further limit on the Department of Justice, it may not investigate any matter which is the subject of an independent counsel investigation.[58] It must suspend any investigations that may have begun before the appointment of the independent counsel and turn over all relevant information on the matter of the investigation to the independent counsel.[59]

Following the Attorney General's application to the special division of court, the special division then appoints an independent counsel and defines his or her jurisdiction based upon the facts stated in the application.[60] The independent counsel then has the powers, within his

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[52] *Id.* § 592(f). A triad of Circuit Court decisions has upheld the non-reviewability of the Attorney General's decision. *See* Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986); Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984); Nathan v. Smith, 737 F.2d 1069 (D.C. Cir. 1984).

[53] 818 F.2d 34 (D.C. Cir. 1987).

[54] *Id.* at 36.

[55] 28 U.S.C. § 594(e) (1982).

[56] *Olson*, 818 F.2d at 48.

[57] S. Rep. No. 123, 100th Cong., 1st Sess. 24 (1987).

[58] 28 U.S.C. § 597(a) (1982).

[59] *Id.*

[60] *Id.* § 593.

or her jurisdiction, that any other United States Attorney has.[61] In addition, the independent counsel is required to report to Congress and to the special division of court on his or her progress and the reasons for not prosecuting any matter within his or her jurisdiction.[62]

Congress has also retained oversight jurisdiction by requiring that the independent counsel "shall have the duty to cooperate with the exercise of such oversight jurisdiction."[63] Congress may also request, through the Judiciary Committees, that the Attorney General apply to the special division for appointment of an independent counsel.[64] The Attorney General must, in turn, either apply for the independent counsel or explain to the Committees in writing his reasons for refusing to do so.[65]

Once the independent counsel begins an investigation, he or she is basically immune from removal. The independent counsel may be removed "only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."[66] The Attorney General must report to the special division and to Congressional Judiciary Committees specifying the grounds for any removal.[67] If removed, the independent counsel could have commenced a civil action before the special division to obtain a review of the Attorney General's decision.[68] However, the Independent Counsel Reauthorization Act of 1987 has changed this provision and now allows the independent counsel to seek review in the United States District Court for the District of Columbia and specifically forbids a member of the special division from hearing such

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[61] *Id.* § 594. *See also* S. Rep. No. 170, 95th Cong., 2d Sess. 6, *reprinted in* 1978 U.S. Code Cong. & Admin. News 4217, 4222.

[62] 28 U.S.C. § 595(b)(1)-(2) (1982). The Independent Counsel Reauthorization Act of 1987 requires only one report at the termination of the independent counsel's office in addition to an expense report every six months. Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (1987) (to be codified at 28 U.S.C. § 594(h)). The Senate would have required regular progress reports of the independent counsel every two months. S. Rep. No. 123, 100th Cong., 1st Sess. 25 (1987).

[63] 28 U.S.C.A. § 595(a)(1) (West Supp. 1988) (originally 28 U.S.C. § 595(d)).

[64] *Id.* § 592(g) (originally 28 U.S.C. § 595(e)). In *In re Olson*, 818 F.2d 34 (D.C. Cir. 1987), the initial information received by the Attorney General was a 3,000 page Committee Report accompanied by a letter from its Chairman as an "official request" to conduct the investigation. 818 F.2d at 54-57. *See supra* notes 46-49 and accompanying text.

[65] 28 U.S.C.A. § 592(g) (West Supp. 1988) (originally 28 U.S.C. § 595(e)).

[66] 28 U.S.C. § 596(a)(1) (1982 & Supp. IV 1986).

[67] *Id.* § 596(a)(2).

[68] *Id.* § 596(a)(3).

a case or an appeal in such a case.[69] Otherwise, the independent counsel's office ends when either the independent counsel or the special division determines that the investigation is complete and all prosecutions are finished or may properly be finished by the Department of Justice.[70]

Thus, the independent counsel provisions of the Ethics in Government Act are designed to remove all of the normal prosecutorial powers from the executive branch when it appears that one of its members or someone with whom the branch has a conflict of interest has committed some unsavory act. Part of that power is then placed in a court of law and another part is left to the Congress.

IV. Separation of Powers

The United States Supreme Court in the 1880 case of *Kilbourn v. Thompson*,[71] explained the separation of powers doctrine in these terms:

> It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government . . . are divided into three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.[72]

In *Kilbourn*, the doctrine was invoked to invalidate a contempt of Congress order issued from a committee investigating a bankrupt real estate partnership. The Court characterized the investigation as essentially judicial in nature and, therefore, "in excess of the power conferred on that body by the Constitution."[73]

More recently, the Court declared portions of the Graham-Rudman-Hollings Balanced Budget Act unconstitutional on separation of powers

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[69]Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (1987) (to be codified at 28 U.S.C. § 596(3)).

[70]28 U.S.C. § 596(b) (1982).

[71]103 U.S. 168 (1880).

[72]*Id.* at 190-91.

[73]*Id.* at 196. *See also* McGrain v. Daugherty, 273 U.S. 135 (1927).

grounds.[74] The Act purported to give the Comptroller General certain executive powers which the Court determined could not be exercised by that office because it is an office within the legislative branch.[75]

The Framers of the Constitution never intended that this separation be absolute,[76] however, and the courts have taken on the duty to draw the lines which separate the powers. "[T]he reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they are not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires."[77] The Court has, in recent times, viewed its power more expansively as typified by Justice Holmes: "[W]e do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments."[78]

The Constitution, therefore, allows some flow of power between the non-"watertight compartments" of the federal government. The independent counsel law has increased the flow of power from the executive compartment to the legislative and judicial compartments. Whether the law lets too much of the constitutional powers pass through is the question.

A. Prosecution: At the Core of the Executive Power

Dean Roger Cramton argued before the House Committee on the Judiciary in 1973 that "[e]ach of the three branches of the Government has a central core of functions upon which the other branches may not unduly encroach. . . . [T]he basic tasks of one branch cannot be removed from it and placed in either another branch or an independent

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[74]Bowsher v. Synar, 478 U.S. 714 (1986).

[75]The President appoints the Comptroller General to a fifteen year term, from a list of three individuals submitted to him from the Speaker of the House and the President Pro Tempore of the Senate. He may only be removed from that office by a joint resolution of Congress or by impeachment. 31 U.S.C. § 703 (1982).

[76]"[W]here the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted." THE FEDERALIST PAPERS No. 47, at 247 (J. Madison) (Max Beloff ed. 1948) (emphasis in original).

[77]Myers v. United States, 272 U.S. 52, 116 (1926). *Accord* Springer v. Philippine Islands, 277 U.S. 189 (1928); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.").

[78]Springer v. Philippine Islands, 277 U.S. 189, 211 (1928) (Holmes, J., dissenting). *Accord* Buckley v. Valeo, 424 U.S. 1, 121 (1976); United States v. Solomon, 216 F. Supp. 835, 840 (S.D.N.Y. 1963).

agency."[79] One of the core functions of the executive branch is prosecution. The Constitution states that the President "shall take care that the Laws be faithfully executed."[80] Therefore, an attempt to take any prosecutorial power from the hands of the executive must be carefully scrutinized.

As an indication that the prosecuting function belongs solely to the executive, the courts have continually refused to become involved in the prosecutor's decisions concerning a case.[81] In 1868, a statute provided for the condemnation of property used against the United States during the Civil War. The statute also provided that anyone could file an information with the district attorney and any proceeding instituted by the district attorney, pursuant to such information, would be for the benefit of both the United States and the informer in equal parts.[82] An informer used this statute in an attempt to compel the district attorney to commence a condemnation proceeding against some property. The Court refused to make such an order, holding: "Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney."[83] Thus, even though the informer would have a property right in the property if it were condemned, he had no interest sufficient to force the district attorney to begin the proceeding.

The courts have normally denied standing to a plaintiff who sues to force a prosecutor to commence a prosecution. In *Linda R. S. v. Richard D.*,[84] it was held that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."[85] In that case, a mother of an illegitimate child brought a class action suit seeking to force the district attorney to prosecute the fathers of such children under a Texas statute that declared it a misdemeanor not to support one's minor children. The Texas courts had construed the statute to apply only to legitimate children; thus, the district attorneys would not prosecute the fathers of illegitimate children.[86] The Supreme Court held that the plaintiff "must allege some threatened

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[79]*Special Prosecutor and Watergate Grand Jury Legislation, Hearings before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 339 (1973) (testimony of Roger Cramton, Dean of the Cornell Law School). *Cf.* Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953).

[80]U.S. Const. art. II, § 3.

[81]*See* United States v. Nixon, 418 U.S. 683, 693 (1974).

[82]Confiscation Cases, 74 U.S. (7 Wall.) 454, 455 (1869).

[83]*Id.* at 457.

[84]410 U.S. 614 (1973).

[85]*Linda R. S.*, 410 U.S. at 619. *Accord* Leeke v. Timmerman, 454 U.S. 83 (1981).

[86]*Linda R. S.*, 410 U.S. at 615.

or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.''[87] Many other courts have reached the same result; without a showing of injury, the judiciary will not cross the separation of powers line and compel the executive to prosecute.[88]

Occasionally defendants will attack the authority of a prosecuting attorney to bring charges against them.[89] In the 1920 case of *United States v. Thompson*,[90] a district attorney proposed a forty-seven count indictment to a grand jury, which returned an indictment on just seventeen of the counts. A special Assistant Attorney General was then appointed to aid in the case. The two prosecutors then brought an indictment before another grand jury containing the same thirty counts that the previous grand jury rejected. This time the grand jury returned an indictment on those thirty counts and the defendant's motion to quash the second indictment was granted.[91] The Supreme Court reversed on the ground that granting the motion effectively ''bar[red] the *absolute* right of the United States to prosecute by subjecting the exercise of that right . . . to a limitation resulting from the exercise of the judicial power.''[92] Thus, a judicial power may not be exercised in a manner

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[87]*Id.* at 617.

[88]*See* Leeke v. Timmerman, 454 U.S. 83 (1981) (a prison inmate petitioned the magistrate to arrest a guard for excess brutality in putting down a prison revolt; the State Solicitor petitioned him not to do so, and he did not do so); Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986) (a member of Congress sued to compel the Attorney General to investigate violations of the Neutrality Act by the President relating to certain activities in Nicaragua); Nathan v. Smith, 737 F.2d 1069 (D.C. Cir. 1984) (citizens sued to force the Attorney General to begin a preliminary investigation of a Ku Klux Klan attack on civil rights marchers in Greensboro, North Carolina); Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984) (plaintiff sought to compel the Attorney General to investigate certain allegations of wrongdoing during the 1980 Presidential election; as with the two previous cases, the plaintiff here wanted to invoke the independent counsel mechanism); Peek v. Mitchell, 419 F.2d 575 (6th Cir. 1970) (plaintiff sued to have United States Attorney prosecute alleged civil rights violations and to enjoin the Detroit Police Department from its previous method of handling civil rights investigations); Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966) (plaintiff sued to compel the Attorney General to force a prosecution for an alleged conspiracy that the Attorney General refused to prosecute).

[89]*See, e.g.*, Ball v. United States, 470 U.S. 856 (1985) (prosecutor has discretion to prosecute under one of two different statutes proscribing the same activity but providing different sentences); United States v. Batchelder, 442 U.S. 114 (1979) (this case dealt with the same statutes as *Ball*); Bordenkircher v. Hayes, 434 U.S. 357 (1978) (the court is powerless to enjoin the prosecutor from reindicting the defendant on a more serious recidivist statute); Ponzi v. Fessenden, 258 U.S. 254 (1922) (the Attorney General has absolute authority to turn a federal prisoner over to a state for trial there).

[90]251 U.S. 407 (1920).

[91]*Id.* at 409-10.

[92]*Id.* at 412 (emphasis added).

that in some way limits the prosecutorial function of the executive branch.

In a few rare instances, the courts have attempted to direct the hand of a prosecutor. In *United States v. Cox*,[93] a United States Attorney refused to sign an indictment requested by a grand jury. The district court judge ordered him to sign it; the United States Attorney refused and was adjudged in contempt.[94] The Court of Appeals for the Fifth Circuit reversed the contempt order, noting that, "[i]t follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."[95]

In a similar case, *United States v. Shaw*,[96] a prosecutor reduced a charge of assault with a deadly weapon to simple assault and then requested a continuance because the complaining witness was still in the hospital.[97] The trial court objected to this change in the charge, refused the continuance, and dismissed the case for lack of prosecution.[98] In reversing the dismissal, the District of Columbia Court of Appeals admonished the trial court to "remember that the District Attorney's office is not a branch of the court, subject to the court's supervision. It is a part of the executive department."[99]

The one notable exception to the general rule that all prosecutions are in the hands of the executive branch is that a court may appoint its own attorney to conduct a criminal contempt charge.[100] In the recent case of *Young v. United States ex rel. Vuitton et Fils S. A.*,[101] Young and others had violated a permanent injunction against them relating to the infringement of a patent owned by the French firm, Vuitton et Fils. The district court appointed Vuitton's attorney to prosecute the contempt charge. Although the Supreme Court upheld the lower court's "inherent authority to initiate contempt proceedings for disobedience to . . . [its] orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt,"[102] it reversed the conviction because the court appointed "as prosecutors counsel for

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[93]342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

[94]*Id.* at 170.

[95]*Id.* at 171.

[96]226 A.2d 366 (D.C. Ct. App. 1967).

[97]*Id.* at 367.

[98]*Id.*

[99]*Id.* at 368.

[100]*See Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821).

[101]107 S. Ct. 2124 (1987).

[102]*Id.* at 2130.

an interested party in the underlying civil litigation."[103] Justice Scalia concurred in the result but would have decided the case on the ground that the court has no inherent power to prosecute even contempt cases.[104] "Rather, since the prosecution of law violators is part of the implementation of the laws, it is . . . executive power, vested by the Constitution in the President."[105]

In any event, a court's appointment of an attorney to prosecute a contempt charge is distinguishable from its appointment of an independent counsel in that the former is "essential in ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other branches."[106] The appointment of an attorney to investigate and prosecute certain officials in the executive branch, on the other hand, is not remotely essential to the proper functioning of the judiciary.

In upholding the Independent Counsel Act, the Supreme Court conceded that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that *typically* have been undertaken by officials within the Executive Branch."[107] The question for the court was not, then, whether the independent counsel exercised purely executive power; rather, it was whether that exercise was so removed from the Executive as to be unconstitutional. The Court held it was due to the Attorney General's control and supervision over the independent counsel.[108]

The Ethics in Government Act purports to create another exception to executive control of prosecution. Yet it goes even further than the contempt of court exception upheld in *Young* because it affirmatively *denies* prosecutorial power to the executive,[109] whereas the contempt exception merely *allows* the court to exercise such power in the absence of executive action.[110] Such a transfer of executive authority is not within the contemplation of the Constitution. "The executive Power shall be vested in a President of the United States,"[111] not in the Congress or the courts.

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[103] *Id.* at 2135.

[104] *Id.* at 2141-42 (Scalia, J., concurring).

[105] *Id.* at 2142.

[106] *Id.* at 2131. *But see* The Federalist Papers No. 78, at 396 (A. Hamilton) (M. Beloff ed. 1948) (the judiciary "must ultimately depend upon the aid of the executive arm for the efficacious exercise even of [its own judgments]").

[107] Morrison v. Olson, 108 S. Ct. 2597, 2619 (1988) (emphasis added).

[108] *Id.* at 2621; *see infra* notes 174-75 and accompanying text.

[109] *See supra* notes 58-59 and accompanying text.

[110] *See Young*, 107 S. Ct. at 2134.

[111] U.S. Const. art. II, § 1. "[T]his does not mean *some of* the executive power,

B. Appointment: An Interpretation Problem

Congress claims that its authority to vest the appointment power of the independent counsel in the special division arises from the appointments clause of the Constitution. That clause provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, *in the Courts of Law*, or in the Heads of Departments.[112]

The independent counsel is probably an inferior officer because very few officers are considered superior officers; perhaps only cabinet members.[113] At first glance, it would appear that the authority to appoint any inferior officer may be exercised by the courts should Congress so provide. However, when the clause is read in light of the separation of powers doctrine, a much different scheme becomes apparent.

In the early case of *Ex parte Hennen*,[114] the district courts had been empowered to appoint their own clerks. Although the Supreme Court was primarily concerned with removal power, the Court noted that "[t]he appointing power here designated, in the latter part of the section [of the Constitution], was, no doubt, intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged."[115] Because the clerks of the court obviously belong in the judicial department, there was no problem in allowing the court to appoint them pursuant to the Congressional directive.[116]

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but *all of* the executive power." *Morrison*, 108 S. Ct. at 2626 (Scalia, J., dissenting) (emphasis in original).

[112]U.S. Const. art. II, § 2, cl. 2 (emphasis added).

[113]*See* Buckley v. Valeo, 424 U.S. 1, 126 (1976); United States v. Smith, 124 U.S. 525 (1888); United States v. Germaine, 99 U.S. 508 (1878); United States v. Hart, 838 F.2d 476, 73 U.S. (6 Wall.) 385 (1867). *Contra In re* Sealed Case 838 F.2d 476 (D.C. Cir. 1988) (specifically holding that due to the nature of the duties of the office, the independent counsel is not an inferior officer within the meaning of the appointments clause), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988).

[114]38 U.S. (13 Peters) 230 (1839).

[115]*Id.* at 257-58.

[116]28 U.S.C. § 751 (1982).

Later, in the 1879 case of *Ex parte Siebold*,[117] the courts were empowered to appoint federal election supervisors. The Court followed *Hennen* in so far as it was "usual and proper to vest the appointment power"[118] in the most appropriate branch. The Court added, however that "there is no absolute requirement to this effect in the Constitution."[119] The Court found that this granting of the appointment power to the district courts was not unconstitutional, even though the election officials were clearly executive branch officials. The Court held that courts may properly appoint officials whose duties are not judicial when "there is no such *incongruity* in the duty required as to excuse the courts from its performance, or to render their acts void."[120] Proponents of the independent counsel rest much of their argument on this case, especially noting that there is no "incongruity" in allowing the court to appoint a prosecutor, who is, after all, an officer of the court. Indeed, the argument goes, there is much "incongruity" in allowing a person to investigate himself or those close to him. Yet, the Court in *Siebold* did not fully explain its use of the term "incongruity" nor has the Supreme Court since then been confronted with a case where the term could be better explained.[121]

In the 1967 case of *Hobson v. Hansen*,[122] Congress' vesting of the power to appoint the members of the District of Columbia Board of Education in the District Court for the District of Columbia was challenged. The court had accepted this duty primarily because of Congress' plenary power over the District of Columbia.[123] Yet the court discussed the appointments clause and concluded that "[t]his was a deliberate decision by the Framers to enable Congress in its wisdom to authorize 'the courts of Law' to share with the executive the ap-

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[117]100 U.S. 371 (1879).

[118]*Id.* at 397.

[119]*Id.* This conclusion is based on a very superficial reading of the Constitution. Earlier in the opinion, the Court explained how it was reading the document:

> But if we take a plain view of the words of the Constitution, and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation.

Id. at 393. There are no penumbras for this Court.

[120]*Id.* at 398 (emphasis added).

[121]In Morrison v. Olson, 108 S. Ct. 2597 (1988), the Supreme Court was afforded the opportunity to illuminate the term. Instead, it chose not to by merely stating: "we do not think it impermissible for Congress to vest the power to appoint independent counsels in a specially created federal court." *Id.* at 2611. Justice Scalia, dissenting, noted that the standard is now "the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis." *Id.* at 2630.

[122]265 F. Supp. 902 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968).

[123]*Id.* at 909. *See infra* note 134.

pointing power of federal officers."[124] However, the exceptions clause was added just one day before the end of the Constitutional Convention by Gouverneur Morris.[125] Madison made the only objection; the exception should allow, in some cases, superior officials below the department head to appoint some inferior officers. Otherwise, in his view, the exception was not necessary at all.[126] Morris responded that that was not necessary because the department head could just issue a blank commission for the other officer to fill in the name of his desired appointee.[127] The amendment, on a second vote, passed unanimously.[128] Thus, there seems to be little evidence from the Constitutional Convention itself that the Framers entertained the intent that the *Hobsen* court attributes to them. Indeed, Judge Skelly Wright, in his dissent in *Hobsen*, wrote that the exceptions clause "very naturally admits the common-sense reading that courts of law and the other listed officers were meant to appoint only those officers 'inferior' to them."[129]

In *United States v. Solomon*,[130] a New York District Court held that it could properly exercise the power to appoint United States Attorneys when an unexpected vacancy in that office occurs as defined by statute.[131] The court noted, however, that this authority "in no wise equates to the *normal* appointive power. First, the judiciary's power is only of a temporary nature. . . . Second, the exercise of the appointive power by the judiciary in no wise binds the executive."[132] And third, the court was given no power of removal.[133] Yet, the judiciary's ap-

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[124]265 F. Supp. at 911.

[125]Documents Illustrative of the Formation of the Union of the American States, H.R. Doc. No. 398, 69th Cong., 1st Sess. 733 (1927) . *See also Special Prosecutor and Watergate Grand Jury Legislation, Hearings before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess. 263 (1973) (Memorandum prepared by Richard Ehlke, legislative attorney, American Law Division, Library of Congress).

[126]Documents Illustrative of the Formation of the Union of the American States, H.R. Doc. No. 398, 69th Cong., 1st Sess. 733 (1927).

[127]*Id.*

[128]*Id.*

[129]Hobson v. Hansen, 265 F. Supp. 902, 921 (D. D.C. 1967) (Wright, J., dissenting), *appeal dismissed*, 393 U.S. 801 (1968).

[130]216 F. Supp. 835 (S.D.N.Y. 1963).

[131]28 U.S.C. § 546 (1982).

[132]*Solomon*, 216 F. Supp. at 842 (emphasis added). *Accord In re* Farrow, 3 F. 112, 116 (C.C.N.D. Ga. 1880) ("It was not to enable the circuit justice to oust the power of the president to appoint, but to authorize him to fill the vacancy until the president should act, and no longer.").

[133]*Solomon*, 216 F. Supp. at 842. *See also* United States v. Eaton, 169 U.S. 331, 343 (1898) ("Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official.").

pointive power over the independent counsel is the "normal" appointive power. The court's appointee is not a temporary appointee; he or she acts until the particular case is completed. The court's appointment is also binding on the executive because the Department of Justice cannot commence a parallel investigation[134] and the executive cannot remove the appointee except for good cause.[135]

One method of construing the appointments clause is to determine what appointments Congress has traditionally given the courts. As Justice Frankfurter wrote, "the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them."[136] More specifically, Justice Scalia wrote that whether a function is executive or not can only be determined "by reference to what has always and everywhere—if conducted by Government at all—been conducted never by the legislature, never by the courts, and always by the executive."[137] Apart from the federal courts of the District of Columbia,[138] there have been only two circumstances in which Congress has vested the courts with the power to appoint non-judicial officers:[139] first, the election supervisors as in *Siebold*, which authority was repealed in 1894;[140] and second, the temporary United States Attorney as in *Solomon*, which authority was severely limited in 1986 when Congress provided that the Attorney General is to appoint a temporary United States Attorney in the event of a vacancy and the court may only make a temporary appointment if the President does not replace or affirm the Attorney General's appointee after 120 days.[141]

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[134]*See supra* notes 58-59 and accompanying text.

[135]*See supra* notes 66-70 and accompanying text.

[136]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952). *Accord* United States v. Midwest Oil Co., 236 U.S. 459, 472-73 (1915).

[137]Morrison v. Olson, 108 S. Ct. 2597, 2626 (1988) (Scalia, J., dissenting).

[138]Because of Congress' plenary power over the District, it may vest those courts with powers, relating to the District, which it could not give to other federal courts. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); District of Columbia v. Carter, 409 U.S. 418 (1973); Glidden Co. v. Zdanok, 370 U.S. 530 (1962); National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949); Keller v. Potomac Elec. Power Co., 261 U.S. 428 (1923); Hobson v. Hansen, 265 F. Supp. 902 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968).

[139]Some examples of judicial officers appointed by the courts are clerks, 28 U.S.C. § 751 (1982), and commissioners, 28 U.S.C. § 631 (1982). Attorneys appointed to prosecute contempt cases are likewise judicial officers because the courts authority to appoint them is inherent; not by congressional grant. *See* Young v. United States *ex rel.* Vuitton et Fils S. A., 107 S. Ct. 2124 (1987).

[140]Act of February 8, 1894, ch. 25, 28 Stat. 36.

[141]28 U.S.C. § 546 (1982).

In passing the 1987 amendments to the independent counsel law,[142] Congress may have unwittingly made the law unconstitutional by depriving the special division of its "court of Law" status. Prior to 1987, the special division had jurisdiction to hear one type of "Case or Controversy":[143] a review of the Attorney General's decision to remove an independent counsel.[144] This jurisdiction made the special division an Article III court which could then appoint certain officers pursuant to the appointments clause.[145] Yet the 1987 amendments did away with this jurisdiction of the special division, moving the review of the removal decision to the United States District Court for the District of Columbia.[146] There is no indication that any of the members of Congress realized the effect of removing the jurisdiction;[147] however, in so doing, Congress has made the special division constitutionally unable to appoint any federal officers because it is no longer a "court of Law" within the meaning of the appointments clause.

The mode by which Congress has sought to vest the appointment power of the independent counsel is unique in that it has never consistently granted the courts such a power over executive officials. It is also a violation of the separation of powers doctrine as determined by both case law and the tradition of not vesting such a power in the courts throughout the history of the government.

C. *Removal: The President's Prerogative*

Normally the President may "remove an officer when in his discretion he regards it for the public good."[148] This conclusion was the result of the interpretation of the Constitution by the first Congress in 1789. A provision of the original bill to establish the Department

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[142]Independent Counsel Reauthorization Act of 1987, 101 Stat. 1293, 1305 (to be codified as 28 U.S.C. § 596(a)(3)).

[143]The Constitution extends the judicial power to certain types of "cases" and "controversies." U.S. CONST. art. III, § 2, cl.2.

[144]28 U.S.C. § 596(a)(3) (1982).

[145]*See* Simon, *The Constitutionality of the Special Prosecutor Law*, 16 U. MICH. J.L. REF. 45, 68 (Fall 1982).

[146]Independent Counsel Reauthorization Act of 1987, 101 Stat. 1293, 1305 (to be codified as 28 U.S.C. § 596(a)(3)).

[147]*See, e.g.*, H.R. REP. No. 316, 100th Cong., 1st Sess. 33-34 (1987) (The House Judiciary Committee made the change to the district court "because this is a trial court accustomed to determining issues of fact. . . . [I]t was inappropriate for the appointing authority to also sit in judgment of a dispute over removal."). *See also* S. REP. No. 123, 100th Cong., 1st Sess., *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 2150; H.R. CONF. REP. No. 452, 100th Cong., 1st Sess., *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 2185.

[148]Parsons v. United States, 167 U.S. 324, 343 (1897).

of Foreign Affairs allowed the President to remove the Secretary of State at will. Several Congressmen, including Madison, objected to the provision because it sounded like a grant of the removal power to the executive, and they felt that the removal power was inherent to the office of the Executive. The Madison faction eventually prevailed and the clause was stricken from the law.[149] This "decision of 1789," as it came to be known, established that "the power to remove officers appointed by the President and the Senate vested in the President alone."[150]

This congressional construction of the Constitution was affirmed in the 1926 case of *Myers v. United States*.[151] In that case, a postmaster first class was removed from office by the action of the President before the postmaster's term had expired. The statute provided that the postmasters were to be appointed *and removed* by the President with the advice and consent of the Senate. Chief Justice Taft writing for the majority, held that "the Court never has held, nor reasonably could hold, . . . that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power."[152] In the opinion, Chief Justice Taft emphasized that the President must be at liberty to surround himself with competent, loyal officers to do his bidding and permit him to discharge his constitutional duty to execute the laws.[153] Thus, the power of removal of all officers is a constitutional prerogative of the President and cannot be subject to limitation by Congress.[154]

Myers was limited less than ten years later by *Humphrey's Executor v. United States*.[155] In that case, Humphrey, a member of the Federal Trade Commission, was removed from his office by President Roosevelt after only two years in the position. The statute which created the FTC[156] provided for seven-year terms for the commissioners and that they "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."[157] The Court found that the statute

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[149]*See* Myers v. United States, 272 U.S. 52, 114-26 (1926); *Parsons*, 167 U.S. at 328-30.

[150]*Myers*, 272 U.S. at 114.

[151]272 U.S. 52 (1926).

[152]*Id.* at 161.

[153]*Id.* at 133-34.

[154]*Id.* at 134. *Accord* Shurtleff v. United States, 189 U.S. 311, 312-13 (1903) (a customs official was removed by the President without cause notwithstanding a statute which provided that he may be removed only for "inefficiency, neglect of duty, or malfeasance in office").

[155]295 U.S. 602 (1935).

[156]15 U.S.C. § 41 (1982).

[157]*Id.*

was designed to limit the power of the President so that the commissioners could operate fairly free from executive control for the entire seven-year term.[158] The Court held that this limitation was not an unconstitutional interference with the executive branch because the duties of the FTC were "neither political nor executive, but predominantly quasi-judicial and quasi-legislative."[159] The FTC acts in its legislative character "[i]n making investigations and reports thereon for the information of Congress."[160] It acts in its judicial character when it assumes the role of "master in chancery."[161] The Court noted that "such a body cannot in any proper sense be characterized as an arm or an eye of the executive."[162]

This principle was taken even further by the Supreme Court in *Wiener v. United States.*[163] In that case, a member of the War Claims Commission was removed before his term expired. The War Claims Commission was established by Congress[164] to adjudicate claims for compensating those "who suffered personal injury or property damage at the hands of the enemy in connection with World War II."[165] The Commission was to finish its duties no later than three years after the time for filing claims and the commissioners' tenure would last until that time. There was no provision as to removal of the commissioners.[166] Justice Frankfurter, writing for the court, discussed *Humphrey's Executor* saying, "[i]t drew a sharp line of cleavage between officials who were part of the Executive establishment,"[167] removable at will by the President, and those officials with some degree of independence from the executive, such as members of the FTC, "as to whom a power of removal exists only if Congress may fairly be said to have conferred it."[168] Frankfurter reasoned that the War Claims Commission was intended to be free of executive interference and thus, even though Congress was silent about removal, the executive was powerless to remove a commissioner.[169] It should be noted, however, that the com-

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[158]*Humphrey's Executor*, 295 U.S. at 625-26. In Shurtleff v. United States, 189 U.S. 311, 314, 318-19 (1903), the Court upheld the removal of the customs official on grounds that he was presumed removed for reasons other than those enumerated in the statute.

[159]*Humphrey's Executor*, 295 U.S. at 624.

[160]*Id.* at 628

[161]*Id. See also* 15 U.S.C. § 47 (1982).

[162]*Humphrey's Executor*, 295 U.S. at 628.

[163]357 U.S. 349 (1958).

[164]War Claims Act of 1948, 62 Stat. 1240.

[165]*Wiener*, 357 U.S. at 350.

[166]*Id.* at 352.

[167]*Id.* at 353.

[168]*Id.*

[169]*Id.* at 356.

missioner's duties were clearly "quasi-judicial" in character. Thus, *Myers* is still good law where the officer involved does not perform "quasi-legislative" or "quasi-judicial" duties, i.e., an officer whose duties are purely executive, and the President may not be limited in his right to remove such an officer.[170]

An independent counsel is a purely executive officer, as is any United States Attorney, because his or her function is the exclusive executive function of prosecution. "[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."[171] The attorney is also an officer of the court,[172] but this does not remove him from the "purely executive" category. As then Judge Warren Burger wrote:

> An attorney for the United States, as any other attorney, however, appears in a dual role. He is at once an officer of the court and the agent and attorney for a client; in the first capacity he is responsible to the court for the manner of the conduct of a case, *i.e.*, his demeanor, deportment and ethical conduct; but in his second capacity, as agent and attorney for the Executive, he is responsible to his principal and the courts have no power over the exercise of his discretion or his motives as they relate to the execution of his duty within the framework of his professional employment.[173]

In *Morrison v. Olson*,[174] the Supreme Court did not suggest that the independent counsel was anything but a purely executive official.[175] The Court held, however, that the removal power restriction does not "turn on whether or not that official is classified as 'purely executive.' "[176] The Court had admittedly, deviated from the *Myers*, *Hum-*

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[170]Justice White, dissenting, in Bowsher v. Synar, 478 U.S. 714, 761 n.3 (1986), argued that "although the court in *Humphrey's Executor* found the use of the labels 'quasi-legislative' and 'quasi-judicial' helpful in 'distinguishing' its then-recent decision in [*Myers*], these terms are hardly of any use in limiting the holding of the case." However, that is exactly what the *Humphrey's Executor* court did and said it was doing.

[171]United States v. Nixon, 418 U.S. 683, 693 (1974); *accord* Nathan v. Smith, 737 F.2d 1069, 1079 (D.C. Cir. 1984) (Bork, J., concurring) ("the principle of Executive control extends to all phases of the prosecutorial process").

[172]This dual role of both federal and state prosecuting attorneys is the basis for the absolute immunity they enjoy from civil suits for malicious prosecutions and § 1983 claims. Imbler v. Pachtman, 424 U.S. 409 (1976). *See also* Cleavinger v. Saxner, 474 U.S. 193 (1985); Butz v. Economou, 438 U.S. 478, 511-12 (1978); Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927).

[173]Newman v. United States, 382 F.2d 479, 481 (D.C. Cir. 1967).

[174]108 S. Ct. 2597 (1988).

[175]*Id.* at 2619; *see also supra* note 107 and accompanying text.

[176]*Morrison*, 108 S. Ct. at 2618.

phrey's Executor, and *Wiener* line of cases which specifically relied on the classification of officers to determine whether Congress may restrict the Executive's removal power.

Under the rule that "the power of removal is incident to the power of appointment,"[177] the court would have been the recipient of the power to remove the independent counsel. However, Congress felt that giving the court that power as well would strain the separation of powers doctrine too much,[178] so a limited power of removal was given to the Attorney General.[179] In *United States v. Perkins*,[180] the Secretary of the Navy removed a cadet-engineer without a court martial nor a showing of misconduct required by statute. In reinstating the cadet, the Supreme Court noted that "[t]he head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto."[181] Thus, when the heads of departments are the appointing authorities, Congress may "limit and restrict the power of removal as it deems best for the public interest."[182]

The Supreme Court reasoned that the Attorney General's power to remove the independent counsel for good cause is the "most important" factor in finding that the Act does not violate the separation of powers principle.[183] The Court notes that this limited removal power gives the President "substantial ability to ensure that the laws are 'faithfully executed' by an independent counsel."[184] It merely needs to be repeated, as a rejoinder to this argument of the Court, that the *President* is to see that the laws are faithfully executed.[185] The President's role is not to be limited to overseeing a purely executive official thrust upon him by the Congress and Courts.

Justice Scalia's retort to the Court's reasoning in this regard is to remind the Court of the significance of so limiting the removal power. To assert that removal for good cause is control over the independent counsel, "is somewhat like referring to shackles as an effective means

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[177]Reagan v. United States, 182 U.S. 419, 424 (1901). *See also* Shurtleff v. United States, 189 U.S. 311 (1903); *Ex parte* Hennen, 38 U.S. (13 Pet.) 230, 259 (1839).

[178]S. Rep. No. 170, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. Code Cong. & Admin. News, 4217, 4221.

[179]28 U.S.C. § 596(a) (1982). *See supra* notes 66-70 and accompanying text.

[180]116 U.S. 483 (1886).

[181]*Id.* at 485.

[182]*Id.*

[183]Morrison v. Olson, 108 S. Ct. 2597, 2621 (1988).

[184]*Id.*

[185]U.S. Const. art. II, § 3.

of locomotion.[186] That is to say, "limiting removal power to 'good cause' is an impediment to, not an effective grant of, presidential control."[187]

D. Oversight: An Inappropriate Function

1. The Court.—One of the reasons that the District Court for the District of Columbia upheld its power to appoint Board of Education members in *Hobson* was that the court was only "to appoint the members of the board, not to administer the schools."[188] The same is true for the function in *Siebold*; the court merely appointed the election supervisors, it did not supervise the election.[189] Yet, the independent counsel law provides that the court is to determine the prosecutor's jurisdiction once it makes the appointment.[190] The court can refer matters to the counsel,[191] and the counsel must report to the court his or her reasons for dropping a case, as well as the disposition of any prosecution that is brought.[192]

These powers go far beyond the simple appointment of the officer and represent not only further infringement on the executive branch, but also the performance of clearly non-judicial functions by an Article III court. At issue in one of the first cases decided by the Supreme Court of the United States, *Hayburn's Case*,[193] was an Act of Congress that had granted the circuit courts the authority to regulate the pensions of Revolutionary War veterans. The case was dismissed for lack of jurisdiction, but letters from the Justices to President Washington, reprinted in a note to the case, showed that they believed they could not constitutionally perform the duty imposed upon them by Congress. "Because the business directed by this act is not of a judicial nature. [sic] It forms no part of the power vested by the constitution in the courts of the United States. . . ."[194]

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[186]*Morrison*, 108 S. Ct. at 2627 (Scalia, J., dissenting).

[187]*Id.*

[188]Hobson v. Hansen, 265 F. Supp. 902, 913 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968).

[189]*Ex parte* Siebold, 100 U.S. 371 (1879).

[190]28 U.S.C. § 593 (1982).

[191] *Id.* § 594(e).

[192]*See supra* note 62 and accompanying text.

[193]2 U.S. (2 Dall.) 408 (1792).

[194]*Id.* at 410 n.2. It seems rather ironic that one of the first "cases" that stands for the proposition that the courts cannot give advisory opinions was itself an advisory opinion. This specific holding, however, is given a more formal setting in an unreported decision of the Supreme Court in 1794, *United States v. Yale Todd*, excerpts of which are found in a note inserted after United States v. Ferreira, 54 U.S. (13 How.) 39, 51-53 (1851).

The Court reaffirmed this principle in *Interstate Commerce Commission v. Brimson.*[195] The Interstate Commerce Act gives the I.C.C. authority to petition the district court to compel the attendance of witnesses, to issue contempt orders, and to take depositions. Because all these functions are judicial in nature, "[t]hey do not . . . infringe upon the salutary doctrine that Congress (excluding the special cases provided for in the Constitution, as, for instance, in section two of article two of that instrument) may not impose upon the courts of the United States any duties not strictly judicial."[196] It seems that the statement in *Hobson* that "[t]here is no constitutional principle that federal judges may not engage officially in nonjudicial duties"[197] is simply not true.[198]

In the 1987 case of *In re Sealed Case*,[199] the court upheld the power of the special division to define the independent counsel's jurisdiction as "a necessary and proper incident of this appointing power."[200] This argument is meritless; defining the independent counsel's jurisdiction is, in effect, defining the duties of the independent counsel. As Justice Taft wrote in *Myers*, "To Congress under its legislative power is given the establishment of offices, [and] the determination of their functions and jurisdiction . . . ."[201] Therefore, the special division is called upon to strike a division of labor between the Department of Justice and the Office of Independent Counsel. This power is clearly legislative in nature, and Congress must either retain it or delegate it to the Department of Justice.

Nevertheless, the Supreme Court in *Morrison*[202] "disagreed." Citing to no authority, the Court noted that in "certain circumstances" Con-

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[195]154 U.S. 447 (1894).

[196]*Id.* at 485. *Accord* Muskrat v. United States, 219 U.S. 346 (1910); United States v. Ferreira, 54 U.S. (13 How.) 39 (1851); *In re* Application of the President's Comm'n on Organized Crime (Subpoena of Scaduto), 763 F.2d 1191 (11th Cir. 1985). *But see* Matter of the President's Comm'n on Organized Crime (Subpoena of Scarfo), 783 F.2d 370 (3d Cir. 1986).

[197]Hobson v. Hansen, 265 F. Supp. 902, 915 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968).

[198]*See id.* at 922 (Wright, J., dissenting) ("[T]he insistent doctrine of our law, articulated by Article III and constitutional history, [is] that the federal judiciary refrain from indulging in nonjudicial activities."); *In re* Richardson, 247 N.Y. 401, 420, 160 N.E. 655, 661 (1928) (Cardozo, C.J.) ("The policy is to conserve the time of the judges for the performance of their work as judges, and to save them from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties.").

[199]665 F. Supp. 56 (D. D.C. 1987), *rev'd*, 838 F.2d 476 (D.C. Cir.), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988).

[200]*Id.* at 60 n.5.

[201]Myers v. United States, 272 U.S. 52, 129 (1926).

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

gress may "vest the power to define the scope of the office in the court as an incident to the appointment of the officer pursuant to the Appointments Clause."[203] The Court then held that because the jurisdiction of the independent counsel "must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of an independent counsel,"[204] the grant of the jurisdiction determining power to the court did not run afoul of Article III.

2. Congress.—In the Act, Congress has retained oversight power over the independent counsel and has demanded that the independent counsel obey any exercise of that power.[205] Although this power has not been exercised by Congress to date, its existence is repugnant to the Constitution. "Authority to prosecute an individual is that government power which most threatens personal liberty."[206] The Constitution protects personal liberty from the prosecutorial power through the separation of powers, forbidding Congress to exercise prosecutorial power by passing a "Bill of Attainder or ex post facto Law."[207]

When any prosecution is conducted, the prosecutor must be an officer of the executive branch; this is the meaning of the Constitution.[208] To allow the Congress to have a direct hand in any such prosecution violates the Constitution. Because "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex,"[209] the legislature can "mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments."[210] The independent counsel is one of those "indirect" measures. "It is all the more necessary, therefore, that the exercise of power by this body, when acting separately from and independently of all other depositories of power, should . . . receive the most careful scrutiny."[211]

In *Morrison*, the Supreme Court did not seriously address this contention, "observing" that "this case does not involve an attempt by Congress to increase its own powers at the Expense of the Executive

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[203]*Id.* at 2612-13.

[204]*Id.* at 2613.

[205]*See supra* note 63 and accompanying text.

[206]*In re* Sealed Case, 838 F.2d 476, 487 (D.C.Cir. 1988).

[207]U. S. Const art. I, § 9, cl. 3.

[208]*See generally* Community for Creative Non-Violence v. Pierce, 786 F.2d 1199 (D.C. Cir. 1986); United States v. Nixon, 418 U.S. 683 (1974); United States v. Cox, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

[209]The Federalist Papers *No. 48*, at 253 (J. Madison) (M. Beloff ed. 1948).

[210]*Id.*

[211]Kilbourn v. Thompson, 103 U.S. 108, 192 (1880).

Branch."[212] The Court did note that the act empowers certain members of Congress to request that the Attorney General apply for an independent counsel,[213] but found this power innocuous because the Attorney General need not comply with such request.[214] The power is not innocuous, however, because of the great practical and political implications it possesses. Justice Scalia, in his dissent, made this abundently clear using Olson's case as an example of this political tool. The request to apply for the independent counsel came with a 3,000 page document following over two years of Congressional investigation.[215] "Merely the political consequences (to [Attorney General Meese] and the President) of seeming to break the law by refusing to [comply with the request] would have been substantial."[216] Justice Scalia hit the nail on the head in observing, "The context of this statute is acrid with the smell of threatened impeachment."[217]

V. Conclusion

The Tenure in Office Act of 1867 purported to require the Senate's approval before any official who was appointed by the President with the advice and consent of the Senate could be removed from office. President Johnson's refusal to comply with the Act was one reason for his near impeachment. Chief Justice Taft, in *Myers*, noted that the Act "exhibited in a clear degree the paralysis to which a partisan Senate and Congress could subject the executive arm and destroy the principle of executive responsibility and separation of powers, sought for by the framers of our Government."[218] Taft's words ring true today in regard to the Ethics in Government Act of 1978. In light of Watergate, the laudatory nature of Congress' action cannot be doubted. Congress wanted to "ensure that in the next national emergency such an office [independent counsel] would come into existence at an early stage."[219] However, this goal cannot justify ignoring the plain dictates of the Constitution.

The Ethics in Government Act has obliterated the authority of the executive branch to conduct all public prosecutions by allowing a court of law to appoint an independent counsel and define his duties in

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[212]Morrison v. Olson, 108 S. Ct. 2597, 2620 (1988).
[213]*See supra* notes 64-65 and accompanying text.
[214]*Morrison*, 108 S. Ct. at 2621.
[215]*See supra* note 64.
[216]*Morrison*, 108 S. Ct. at 2624 (Scalia, J., dissenting).
[217]*Id.* at 2625.
[218]*Myers*, 272 U.S. at 167.
[219]S. Rep. No. 170, 95th Cong., 2d Sess. 6, *reprinted in* 1978 U.S. Code Cong. & Admin. News, 4217, 4222.

violation of the separation of powers doctrine. The Act has purported to stay the hand of the President by limiting his power to remove a purely executive branch official. It has given Congress an unprecedented role in policing the executive branch. It is a wolf that Congress has hidden in sheep's clothing. But if its true nature is revealed, it displays the unmistakable characteristics of an unconstitutional, institutionalized wolf.[220]

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[220]Perhaps the true, wolfish nature of the independent counsel is revealed rather easily. Justice Scalia wrote in his dissent in Morrison v. Olson, 108 S. Ct. 2597, 2623 (1988) (emphasis added):

> Frequently an issue of this sort will come before the court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibruim of power is not immediately evident, and must be discerned by a careful and perceptive analysis. *But this wolf comes as a wolf.*