REQUIRING THE EXECUTIVE BRANCH TO SHARE CONTROL OVER THE PROSECUTORIAL FUNCTION: MORRISON V. OLSON

INTRODUCTION

In Morrison v. Olson, the Supreme Court ruled that the independent counsel provisions of the Ethics in Government Act of 1978 (the “Act”) are constitutional. The Act was challenged on several grounds: That it violated the appointments clause of article II of the United States Constitution, that it violated the limitations of article III, and that it impaired the President’s ability to carry out his constitutionally-assigned duties. In a seven-to-one decision, the Court encountered little difficulty in upholding the Act, finding it necessary to place a narrowing construction on only one of the Act’s provisions.

Morrison basically concerns the proper allocation of governmental functions among Congress, the Courts, and the President, and the degree to which each branch—particularly the Executive—enjoys exclusive control over its assigned functions. The case also reflects Congress’ skepticism about the self-monitoring capacity of the Executive Branch following Watergate, and Congress’ carefully planned attempt to insure against a recurrence of that experience. Most importantly, however, Morrison demonstrates the tension between the formalistic and functionalistic approaches to the separation of powers.

2. Id. at 2622.
3. Id. at 2602.
4. Id. Justice Kennedy did not take part in the consideration or decision of the case. Id.
5. 28 U.S.C. § 596(b)(2) (1982). The majority stated that it was “more doubtful” about this particular power of the Special Division insofar as it presented a problem of judicial encroachment upon executive power, but concluded that it was administrative in that it should be used only when the independent counsel’s duties were completed. Morrison, 108 S. Ct. at 2614.
6. Morrison, 108 S. Ct. at 2616. Under the Ethics in Government Act, 28 U.S.C. §§ 49, 591-98 (1982), the office of the independent counsel was established. Although it technically belongs to the Department of Justice, the Attorney General has very limited control over that office. The independent counsel’s duties chiefly consist of investigating and prosecuting high ranking executive officers. See infra notes 29-30, 32-35 and accompanying text.
8. See infra note 259. See also Strauss, Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency? 22 Cornell L. Rev. 488,
Justice Scalia, the sole dissenter in *Morrison*, made a patently formalistic argument against the constitutional validity of the Ethics in Government Act.\(^9\) Chief Justice Rehnquist, writing for the majority, adopted a functionalistic approach to the separation-of-powers question presented in the case.\(^10\) This Note analyzes the decision in *Morrison* in the context of the opposing views of Justice Scalia and the majority and the theories underlying those views.\(^11\) In addition, the Note critically examines the interpretations of key precedents by the majority and the dissent.\(^12\)

**FACTS AND HOLDING**

The challenge to the independent counsel provisions of the Act was made when Theodore B. Olson, Edward C. Schmults, and Carol E. Dinkins, officials in the Department of Justice (appellees), moved to quash subpoenas issued to them by a grand jury at the prompting of the independent counsel, appellant, appointed under the Act.\(^13\)

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526 (1987) (asserting that formalism is not consistent with Framers' intent and that functionalism, while giving rise to certain dangers, is better suited for a federal government having a complex and varied structure).

9. *Morrison*, 108 S. Ct. at 2638 (Scalia, J., dissenting). Justice Scalia argued that art. II, § 1, cl. 1 of the Constitution, which provides that "[t]he executive Power shall be vested in a President of the United States," requires that nothing less than all of the executive power be subject to the President's complete control. *Id.* Justice Scalia further argued that the prosecutorial power "is a quintessentially executive function." *Id.* at 2626-27. This kind of reasoning is overtly formalistic because it is based on an assumption that what the Constitution requires must be obeyed according to the literal wording of its text. R. Summers, *Instrumentalism and American Legal Theory* 153 (1982). Summers recapitulates the difficulties of this formalism, stating:

In [Roscoe Pound's] view, the most common vice of the formalistic approach was simply that judges purported to draw out what they assumed to be the necessary logical implications of very general constitutional words and phrases and then to apply them mechanically to the varied facts of the particular cases that had arisen. Indeed, some formalistic judges assumed broad responsibility to test the constitutionality of legislation and held that legislation was presumptively invalid whenever it seemed to conflict with the literal wording of the constitutional text.

*Id.*

10. *Morrison*, 108 S. Ct. at 2602, 2620. It has been stated that functionalism "stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened." Strauss, 72 Cornell L. Rev. at 489. Justice Jackson expressed a functionalist view of the separation of powers in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Justice Jackson stated that

[while the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

*Id.* at 635.

11. See infra notes 212-21 and accompanying text.

12. See infra notes 222-230 and accompanying text.

The officials claimed that the independent counsel provisions were unconstitutional and that Alexia Morrison, the independent counsel, was therefore without authority to compel their testimony.\(^\text{14}\)

The challenged portions of the Act allow for the appointment of an “independent counsel” who is responsible for investigating and, if necessary, prosecuting certain high level officials in the Executive Branch.\(^\text{15}\) The independent counsel is appointed by a special court—the Special Division of the United States Court of Appeals for the District of Columbia (“Special Division”).\(^\text{16}\)

Appointment may be made in one of two ways.\(^\text{17}\) First, upon receipt by the Attorney General of the United States of information regarding alleged wrongdoing on the part of executive officers named in the Act, the Attorney General is required to undertake a “preliminary investigation” of the allegations.\(^\text{18}\) If, upon completion of the investigation, the Attorney General “determines that there are reasonable grounds to believe that further investigation is warranted,” then the Attorney General “shall apply to the [Special Division] for the appointment of an independent counsel.”\(^\text{19}\) The Attorney General is given only ninety days in which to complete a preliminary investigation.\(^\text{20}\) Moreover, the Attorney General may not use grand juries, plea bargaining, grants of immunity, or subpoenas in such an investigation.\(^\text{21}\) If, on the other hand, the Attorney General notifies the Special Division within ninety days that there are no reasonable grounds for further action, the Special Division is precluded from appointing an independent counsel and the matter is closed.\(^\text{22}\) Furthermore, the Attorney General’s decision as to whether appointment of an independent counsel is warranted is unreviewable by any court.\(^\text{23}\)

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14. Id.
16. Id. § 49(a).
17. Id. § 591(c).
18. Id. The Attorney General is authorized to conduct a preliminary investigation of persons not listed in § 591(b) of the Act who may have violated a federal criminal law where there would be a potential conflict of interest if a full investigation were carried out against such persons by the Attorney General or the Department of Justice. Id.
19. Id. § 592(c).
20. Id. § 592(a)(1).
21. Id. § 592(a)(2).
22. Id. § 592(b)(1).
23. Id. § 592(f). Section 592(f) of the Act provides that the Attorney General’s decision to seek appointment of an independent counsel “shall not be reviewable in any court.” Although there is actually no provision in the Act stating that the Attorney General’s determination that appointment of an independent counsel would be inap-
The second instance in which an independent counsel may be appointed occurs when the Attorney General fails to notify the Special Division within the ninety-day period allotted for the Attorney General’s determination as to whether reasonable grounds for further investigation exists. In such a case, the Attorney General is required to apply to the Special Division for appointment of an independent counsel. In other words, once the Attorney General has received the information and the preliminary investigation has been triggered, appointment of an independent counsel will result unless the Attorney General within ninety days notifies the Special Division that no reasonable grounds for further investigation exist.

The Attorney General’s application for appointment of an independent counsel must contain sufficient information to enable the Special Division to define the scope of the counsel’s investigation. When application has been made, the court then “shall appoint an appropriate independent counsel and shall define that independent counsel’s prosecutorial jurisdiction.” The independent counsel has—within the jurisdictional limits established by the Special Division—“full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice.” This power includes conducting grand jury proceedings, participating in civil as well as criminal litigation, and appealing decisions in cases in which the independent counsel is unreviewable, the Special Division has construed § 592(b)(1) as precluding review in this situation. Morrison, 108 S. Ct. at 2605.


25. Id. The Attorney General may, however, apply to the Special Division for a single sixty-day extension in which to complete his preliminary investigation. Id. § 592(a)(3).

26. Id. § 592(c)(1). In a speech given at the University of Detroit Law School, Senator Carl Levin commented that Attorney General Edwin Meese had attempted to undermine the Act in a number of ways, one of which was “by introducing a whole new concept called pre-preliminary investigations,” whereby “[t]his Attorney General has spent months and months and months investigating cases without triggering the ninety day preliminary investigation period.” Speech by Senator Carl Levin: Independent Counsel, 65 U. DET. L. REV. 73, 76-78 (1987). Senator Levin, as Chairman of the Subcommittee on Oversight of Government Management, has had considerable involvement with the Act since its enactment in 1978. Levin, The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance, 16 HOFSTRA L. REV. 11, 11 (1987).

27. 28 U.S.C. § 592(d).

28. Id. § 593(b). The Attorney General may later request an expansion of the independent counsel’s jurisdiction rather than apply for appointment of another independent counsel to investigate any new matters which have come to the Attorney General’s attention. Id. § 593(c).

29. Id. § 594(a).
participates. In addition, the independent counsel may appoint employees for assistance. The independent counsel is technically a member of the Department of Justice (the "Department"): the office is funded through the Department; the counsel can expect assistance from the Department; accept referrals of matters from the Attorney General that pertain to the counsel's jurisdiction; and the counsel is expected to perform its duties in accordance with the Department's policies and guidelines.

The independent counsel's tenure is limited by the investigation for which the counsel's appointment was made. The independent counsel may terminate the counsel's office by notifying the Attorney General that the counsel's tasks have been completed; or the Special Division, acting on its own or at the suggestion of the Attorney General, may do so when there is no further need of the counsel's services. Removal of the independent counsel, "other than by impeachment and conviction," may occur "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." Any decision by the Attorney General to remove the independent counsel is reviewable in the United States District Court for the District of Columbia.40

Finally, there are specific provisions in the Act for Congressional involvement and oversight of the activities of the independent counsel. For example, requests may be made by the House and Senate Judiciary Committees for application by the Attorney General for appointment of an independent counsel. The independent counsel is responsible for submitting reports to Congress. Furthermore, "[the] independent counsel shall advise the House of Representatives of any substantial and credible information that may constitute

30. Id. §§ 594(a)(1)-(3).
31. Id. § 594(c).
32. Id. § 591 note.
33. Id. § 594(b).
34. Id. § 594(e).
35. Id. § 594(f).
38. Id. § 596(b)(2).
39. Id. § 596(a)(1).
40. Id. § 596(a)(3). The section further provides that "[a] member of the [Special Division] may not hear or determine any such civil action or any appeal of a decision in any such civil action. The independent counsel may be reinstated or granted other appropriate relief by order of the court." Id.
41. Id. § 592(g)(1).
42. Id.
43. Id. § 595(a)(2).
grounds for impeachment."\(^{44}\)

The dispute in *Morrison* stemmed from events beginning in 1982, at which time two subcommittees of the House of Representatives were probing into the joint activities of the Environmental Protection Agency (the "EPA") and the Department of Justice in the administration of the "Superfund law."\(^{45}\) When subpoenas were issued directing the EPA to produce certain documents, the President, acting on the advice of the Department of Justice, invoked executive privilege to withhold some of the documents.\(^{46}\) The Administrator of the EPA ("Administrator") obeyed the President's order to withhold these documents, and in response the House voted to hold the Administrator in contempt.\(^{47}\) This conflict subsided in 1983 when the Administrator agreed to allow the House subcommittees access to the documents.\(^{48}\) However, the following year the House Judiciary Committee began investigating the role of the Department of Justice in the controversy.\(^{49}\) During the course of the Judiciary Committee's investigation, appellee Olson was called to testify before a House subcommittee.\(^{50}\)

Eventually the House Judiciary Committee produced a report on the findings in the investigation.\(^{51}\) The report suggested that Olson had committed perjury when testifying before the subcommittee, and also that the other two appellees, Schmults and Dinkins, had acted to obstruct the Committee's investigation.\(^{52}\) A copy of the report was forwarded by the Chairman of the Judiciary Committee to the Attorney General, along with a request that the Attorney General seek appointment of an independent counsel to investigate the allegations against Olson, Schmults, and Dinkins.\(^{53}\) Under the Attorney General's direction, a preliminary investigation was conducted by the Public Integrity Section of the Criminal Division (the "Section").\(^{54}\) Although the Section concluded in its report that appointment of an

\(^{44}\) *Id.* § 595(e).


\(^{46}\) *Morrison*, 108 S. Ct. at 2605.

\(^{47}\) *Id.*

\(^{48}\) *Id.*

\(^{49}\) *Id.*

\(^{50}\) *Id.* at 2605. At the time the subpoenas were issued to the EPA, Olson was the Assistant Attorney General for the Office of Legal Counsel. Appellee Schmults was Deputy Attorney General and appellee Dinkins was the Assistant Attorney General for the Land and Natural Resources Division. *Id.*

\(^{51}\) *Id.* at 2606.

\(^{52}\) *Id.*

\(^{53}\) *Id.*

\(^{54}\) *Id.*
independent counsel would be appropriate with respect to all three officials, the Attorney General decided that further investigation was warranted only in the case of Olson. In the application to the Special Division, the Attorney General requested not only that the independent counsel be given jurisdiction to investigate the allegations against Olson, but also "any other matter related to [those allegations]." Later, when appellant Morrison requested the Special Division to expand her jurisdiction to include the allegations against Schmults and Dinkins the court declined to do so because under the Act the Attorney General's decision regarding Schmults and Dinkins was final. However, the court concluded that its original grant of jurisdiction was broad enough to allow Morrison to investigate the possible existence of a conspiracy among Olson, Schmults, and Dinkins. Following this ruling Morrison obtained the subpoenas against the three officials. They, in turn, moved to quash the subpoenas, claiming that the Act was unconstitutional.

The United States District Court for the District of Columbia, in In re Sealed Case, held that the powers of the Special Division to appoint an independent counsel were proper under both article III and the appointments clause, and that the Act did not violate separation-of-powers principles. This decision was reversed by the United States Court of Appeals for the District of Columbia Circuit. The District of Columbia Circuit held the independent counsel provisions unconstitutional based upon its findings that: the independent counsel is a principal officer within the meaning of the appointments

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55. Id. at 2606.
56. Id.
57. Id. at 2606-07. Morrison had first requested that the Attorney General, pursuant to § 594(e) of the Act, refer these allegations to her as "related matters," but the Attorney General refused. Id. at 2606. The Special Division ruled that under § 592(b)(1), the Attorney General's decision not to seek appointment of an independent counsel to investigate these allegations was final and unreviewable. Id. at 2606-07. See also supra note 23 (discussing the origin of the "unreviewable" holding).
59. Id.
60. Id.
61. 665 F. Supp. 56 (D.D.C. 1987). This was the name of the case when it was heard by the district court and also when it was appealed to the Circuit Court of Appeals for the District of Columbia.
62. Id. at 58-61. The court found that the Supreme Court's decisions in United States v. Nixon, 418 U.S. 683 (1974), Humphrey's Ex'r v. United States, 295 U.S. 602 (1935), and Wiener v. United States, 357 U.S. 349 (1958), established that the limitations upon the Executive Branch's power of removal under the Act are not improper. Id. at 61. The district court also found that the independence afforded by the Act to the independent counsel was consistent with the "unique authority and tenure" of the Watergate special prosecutor which the Supreme Court approved of in Nixon. Id.
clause, the Constitution does not allow interbranch appointments, the Act as a whole unconstitutionally interferes with the President's duties, and the Act gives courts powers which exceed the limitations of article III. The United States Supreme Court reversed the District of Columbia Circuit, finding the independent counsel provisions to be consistent with the appointments clause, article III, and the separation of powers.

The Court, in an opinion written by Chief Justice Rehnquist, addressed first whether the independent counsel is a principal or inferior officer for purposes of the appointments clause. The Court relied on four factors for determining where the line between the two types of officers should be drawn: (1) whether the officer may be removed by a higher official, (2) whether the officer's duties are limited to the discharge of a principal's trust, (3) whether the officer holds a defined term of office, and (4) whether the officer is appointed by a court.

64. Id. at 487. An officer of the United States is defined as "any appointee exercising significant authority pursuant to the laws of the United States." Buckley v. Valeo, 424 U.S. 1, 126 (1976). Officers are divided into two categories: principal officers and inferior officers. "Principal officers are selected by the President with the advice and consent of the Senate." Buckley, 424 U.S. at 132. The circuit court first decided whether the independent counsel is an inferior or principal officer. Judge Silberman, writing for the majority, stated that...
ited, (3) whether the officer's jurisdiction is limited, and (4) whether the officer's tenure is limited. The Court applied these factors and concluded that the independent counsel is an inferior officer. The Court found further support for this proposition in several cases which confirmed the authority of inferior officers charged with prosecutorial functions.

The Supreme Court next disposed of the appointments clause issue by finding that interbranch appointments are proper, although they are not the usual method of appointing inferior officers. But since the appointing authority under the Act was a court — the Special Division — it was necessary to determine whether the Act comports with the limitations of article III. The Court determined that the Act does not violate article III because the Special Division's functions "are not inherently 'Executive,'" but rather "are directly analogous to functions that federal judges perform in other contexts." The Court cautioned that the provisions of the Act granting power to the Special Division should be narrowly construed.

Lastly, the Supreme Court examined the Act in relation to the separation of powers. It divided its analysis of the issue into two parts: the first focusing on the "for good cause" restriction on the Attorney General's removal power and the second focusing on the President's ability to control the independent counsel. The Court evaluated several cases addressing the removal power and divided them according to whether they involved an expansion of congressional power and a corresponding contraction of executive power. Because Morrison did not involve "an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction," the Court viewed Humphrey's Executor v. United States and Wiener v. United States as the controlling precedents. The Court interpreted these cases as allowing Congress to restrict the President's power to remove principal officers charged with independent functions, particu-
larly if the functions of the principal officers are of a "quasi-judicial" or "quasi-legislative" nature. The Court then announced that the removal of even "purely executive" officers could be restricted so long as the President's ability to carry out the duties of the Executive Branch is not impaired. The Court concluded that the removal restriction is proper based on its reasoning that the independent counsel is an inferior officer and has no policy-making role in the Executive Branch.

The Supreme Court swiftly disposed of the contention that the Act unduly interferes with the role of the President. The Court reiterated the fundamental notion that the branches of government, although separate, are necessarily interdependent. The Court specifically found that the Act authorizes no usurpation of executive power by either the Legislative or Judicial Branch. Rather, the Court stated that the Act "give[s] the Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel."

Justice Scalia, the sole dissenter, posed a syllogistic argument: the prosecutorial power is a "quintessentially executive function" which must be kept within the full control of the President, the Act interferes with the President's control over this function, and therefore the Act is unconstitutional. For Justice Scalia the case was a simple one in that any reduction of the President's control over the prosecutorial function would be sufficient to render the Act invalid. Justice Scalia's argument was premised on the view that the Constitution allocates specified powers among the branches of government, and that the framers were particularly concerned about the possibility of the Legislative Branch encroaching upon executive authority.

Before addressing the issues of the case, Justice Scalia examined the Act from a holistic perspective and attempted to demonstrate that history had already proved that the Act disturbs the internal workings of the Executive Branch. Justice Scalia pointed to previous independent counsel investigations as evidence of the Act's potential to inflict political harm upon the President's administration.
and to hamper the President's ability to accomplish executive policy aims. These previous investigations had been tremendously publicized due to the Act's "highly visible procedures" and had consumed large amounts of Department of Justice funds.

In Justice Scalia's determination, the independent counsel could only be considered a principal officer because of the huge powers at the counsel's disposal for conducting investigations. Justice Scalia criticized the majority's handling of the removal power issue, stating that the Court's extension of the holding in Humphrey's Executor was done in a shoddy and unprincipled manner. Justice Scalia asserted that the majority ignored, or in any event neglected, the basic holding of Myers v. United States, which established that Congress could not impose restrictions upon the President's power to remove principal officers having purely executive duties. Justice Scalia concluded that the Act seriously harms the separation of powers and consequently threatens individual freedom.

BACKGROUND

This portion of the Note will examine the key cases lending support to the Supreme Court's decision. Particular attention will be given to those cases upon which the majority and dissent most differed as to proper interpretation. The cases will be discussed under the following classification: (A) the appointments clause, (B) the limitations of article III authority, (C) the power to remove, and (D) interference with article II authority.

A. THE APPOINTMENTS CLAUSE

All appointments of federal government officers must be made in accordance with the appointments clause. The appointments clause of article II, section 2 of the United States Constitution reads as follows:

[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

95. Id. at 2631.
96. Id.
97. Id. at 2632-33.
98. Id. at 2637.
100. Morrison, 108 S. Ct. at 2636.
101. Id. at 2637.
102. See infra notes 104-05 and accompanying text.
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.\textsuperscript{103}

The Supreme Court, in \textit{United States v. Germaine},\textsuperscript{104} stated that "[t]he Constitution for purposes of appointment very clearly divides all its officers into two classes."\textsuperscript{105} The task facing the Court in Germaine, however, did not require treatment of the differences between principal and inferior officers; rather, the Court only needed to decide whether Germaine, the defendant in the case, was an officer or merely an employee of the United States.\textsuperscript{106} In reaching its decision, the Germaine Court simply concluded that because the individual who had appointed Germaine was not a head of a department, Germaine must then have been an employee and not an officer.\textsuperscript{107} The Court went on to say in dictum that

look[ing] to the nature of [Germaine's] employment, we think it equally clear that he is not an officer the term embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary. In the case before us, the duties are not continuing and permanent, and they are occasional and intermittent.\textsuperscript{108}

The relatively recent decision by the Supreme Court in \textit{Buckley v. Valeo}\textsuperscript{109} also concerns the distinction between officers and employees.\textsuperscript{111} There the Court found certain provisions of the Federal Election Campaign Act of 1971 (the "Campaign Act"),\textsuperscript{112} as amended

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\textsuperscript{103} U.S. CONST. art. II, § 2, cl. 2.
\textsuperscript{104} 99 U.S. 508 (1879).
\textsuperscript{105} Id. at 509.
\textsuperscript{106} Id. In Germaine, the Supreme Court decided that a civil surgeon appointed by the Commissioner of Pensions was not an officer of the United States, but rather was an employee, and therefore was not subject to a federal criminal statute that was intended to punish "officer[s] of the United States who [are] guilty of extortion." Id. at 509, 512 (citation omitted).
\textsuperscript{107} Id. at 510-11.
\textsuperscript{108} Id. at 511-12. Strangely, Justice Rehnquist, writing for the majority in Morrison, relied on that dictum in Germaine to support the proposition that the independent counsel is not a principal but is rather an inferior officer. Morrison, 108 S. Ct. at 2688-89. Justice Scalia, in his dissenting opinion, did not hesitate to point this out: "Besides the fact that this was dictum, it was dictum in a case where the distinguishing characteristics of inferior officers versus superior officers were in no way relevant, but rather only the distinguishing characteristics of an 'officer of the United States' (to which the criminal statute at issue applied) as opposed to a mere employee." Id. at 2633 (citation omitted).
\textsuperscript{109} 424 U.S. 1 (1976).
\textsuperscript{110} Id. at 126.
\textsuperscript{111} Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified in scattered sections of the U.S.C.). The Act was intended "[t]o promote fair practices
in 1974, to be violative of the appointments clause and the doctrine of separation of powers. The provisions called for appointments to the Federal Election Commission to be allotted to the President pro tempore of the Senate, the Speaker of the House of Representatives, and the President. The Buckley Court, in a per curiam opinion, stated that “[t]he [a]ppointments [c]lause specifies the method of appointment only for ‘Officers of the United States’ whose appointment is not ‘otherwise provided for’ in the Constitution.” The Court established a test for determining whether an individual is an officer, as opposed to an employee, for purposes of the appointments clause: “[A]ny appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed by [section] 2, cl. 2 of [article II].” If the commissioners were “principal officers” their appointments had to be made by the President with Senate approval; the Campaign Act did not provide for this procedure. If they were “inferior officers” their appointments could have been “vest[ed] in the President alone, in the Courts of Law, or in the Heads of Departments.” The Campaign Act improperly allocated this power to the President pro tempore of the Senate and the Speaker of the House, since neither of those individuals was a department head within the meaning of the appointments clause. The Court found that the commissioners were officers and that therefore their appointments were invalid.

The Court in Buckley treated the appointments clause question as one necessarily arising within the framework of the doctrine of separation of powers. The Court stated the appointments clause
was intended as no mere instrument of “etiquette or protocol.” Rather, the clause was chief among “the checks and balances that the [Framers] had built into the tripartite Federal Government,” and was intended to help insure that the Legislative Branch did not “aggrandize itself at the expense of the other two branches.” While Buckley and Germaine attach significance to the appointments clause, both fail to treat the distinction between principal and inferior officers.

A case delineating the differences between principal and inferior officers is United States v. Eaton. In Eaton the Supreme Court held that it was proper for Congress to vest the power of appointing a vice-consul in the President. The controversy in Eaton arose when the United States Consul-General to Siam, pursuant to a statute and with approval of the Department of State, appointed a vice-consul to perform his duties during his leave of absence. The Court reasoned that although the vice-consul would assume the duties of the consul—a principal officer—his status was nonetheless “inferior” because he was a subordinate officer and would hold those duties only temporarily. Thus, an individual charged with the duties of a principal officer may be appointed by the President alone if the appointment is temporary and made under exceptional circumstances.

In Ex parte Siebold the Supreme Court upheld a law under which United States circuit court judges were empowered to appoint election supervisors. These supervisors were required to be present at congressional elections and oversee the counting of votes; "to

122. Id. at 125.
123. Id. at 122, 129. One commentator, critical of the significance attached to the appointments clause by the Court in Buckley, stated that “the [appointment] clause hardly reflects a consensus on the structure of government. Compared with the history of the other clauses which Buckley listed as a prelude to its [appointment] clause discussion the history of article II, section 2, clause 2 suggests that it was a bastard child.” Blumoff, Separation of Powers and the Origins of the Appointment Clause, 37 Syracuse L. Rev. 1037, 1041 (1987).
124. See supra notes 104-20 and accompanying text.
125. 169 U.S. 331 (1898).
126. Id. at 343. The vice-consul was essentially a temporary officer appointed to fill a vacancy in the post of the consul-general of the United States, an ambassador. Id. at 331-32.
127. Id. at 331-33, 337-38.
128. Id. at 343. The Court stated as follows:

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. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer.

Id.
129. 100 U.S. 371 (1880).
130. Id. at 398.
challenge any vote the legality of which they may doubt; . and to personally inspect and scrutinize at any and all times, on the day of election, the manner in which the poll-books, registry lists, and tallies are kept." The election supervisors worked close at hand with federal marshals who were required to arrest individuals who interfered with the supervisors or otherwise violated the law. It was argued to the Court that these inferior officers were given duties of an executive nature, since they played a role of some importance in the enforcement of the law. However, the Court dismissed this argument, suggesting that Congress could, if it chose, vest the appointment of even the marshalls in the courts.

In several cases judicial appointments of prosecutorial officers have been approved. For example, in Go-Bart Co. v. United States the Supreme Court implicitly approved United States district court appointments of commissioners who had a variety of prosecutorial powers. This holding was based on the reasoning that the commissioners were inferior officers. The Court in United States v. Nixon approved the President's appointment of the Watergate special prosecutor, who had "plenary authority to control the course of investigations and litigation related to 'all offenses arising out of the 1972 Presidential Election.' " In Young v. United States ex rel. Vuitton Et Fils, S.A., the Court held that a district court had the authority to appoint a special prosecutor to initiate contempt proceedings against an individual who had violated a court order. Finally, in United States v. Solomon, a federal law allowing

131. Id. at 380.
132. Id.
133. Id. at 397.
134. Id.
135. See infra notes 136-44 and accompanying text.
137. Id. at 352-53 n.2.
138. Id. at 352.
140. Id. at 694 n.8.
142. Id. at 2134. In Vuitton the petitioners were defendants in a contempt proceeding who had violated a permanent injunction prohibiting infringement of a manufacturer's trademark. They argued that "out-of-court contempts, which require prosecution by a party other than the court, are essentially conventional crimes, prosecution of which may be initiated only by the [E]xecutive [B]ranch." Id. at 2132. The Court's response was that "[w]hile contempt proceedings are sufficiently criminal in nature to warrant the imposition of many procedural protections, their fundamental purpose is to preserve respect for the judicial system itself. As a result, courts have long had, and must continue to have, the authority to appoint private attorneys to initiate such proceedings when the need arises." Id. at 2134.

In a concurring opinion, Judge Scalia refused to accept this proposition. His remarks, which anticipated his dissent in Morrison, are in part as follows:
a temporary United States attorney to be appointed by a district court to fill a vacancy in the United States Attorney’s office was upheld by the United States District Court for the Southern District of New York.\textsuperscript{144}

Another concern regarding the appointments clause is the propriety of interbranch appointments. The question in \textit{Siebold} was whether federal circuit court judges could appoint election supervisors charged with duties “entirely executive in their character.”\textsuperscript{145} The Supreme Court responded by stating:

\begin{quote}
It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged.\textsuperscript{146}
\end{quote}

\section*{B. THE LIMITATIONS OF ARTICLE III AUTHORITY}

Even if it has been clearly established that interbranch appointments are proper, article III imposes restrictions upon the role of the judicial power is the power to decide, in accordance with law, who should prevail in a case or controversy. That includes the power to serve as a neutral adjudicator in a criminal case, but does not include the power to seek out law violators in order to punish them—which would be quite incompatible with the task of neutral adjudication. It is accordingly well established that the judicial power does not generally include the power to prosecute crimes. There are numerous instances in which the Constitution leaves open the theoretical possibility that the actions of one Branch may be brought to nought by the actions or inactions of another. Such dispersion of power was central to the scheme of forming a government with enough power to serve the expansive purposes set forth in the preamble of the Constitution, yet one that would ‘secure the blessings of liberty’ rather than use its power tyrannically.\textsuperscript{Id. at 2142-43 (citations omitted).}

\textsuperscript{143.} 216 F Supp. 835 (S.D.N.Y. 1963).

\textsuperscript{144.} \textit{Id.} at 843. In support of its determination that the appointment did not violate the doctrine of separation of powers, the district court reasoned that “the appointive power of the judiciary contemplated by Section 506 [of the law] in no wise equates to the normal appointive power” because of the temporary nature of the appointive power and because the President would be left free to appoint a U.S. attorney at any time. \textit{Id.} at 842.

\textsuperscript{145.} \textit{Siebold}, 100 U.S. at 397.

\textsuperscript{146.} \textit{Id.} This statement apparently settled the question for the majority in \textit{Morrison}. The \textit{Morrison} Court attributed the first sentence in the quoted passage to \textit{ex parte} Hennen, 38 U.S. (13 Pet.) 230 (1839) (concerning the power of federal district court judges to appoint and remove their court clerks). The Court in \textit{Hennen} stated, “[f]or in the organization of the three great departments of state, war, and treasury, in the year 1789, provision is made for the appointment of a subordinate officer by the head of the department.” \textit{Id.} at 259. Note the use of the word \textit{subordinate}, which Justice Scalia argued is key to the concept of an inferior officer. \textit{See Morrison}, 108 S. Ct. at 2833. Justice Scalia differed sharply with the majority’s interpretation of \textit{Siebold}. \textit{Id.} at 2835.
courts in government. In article III, section 1, clause 1 of the Constitution it is stated that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." In section 2 it is stated that "[t]he judicial Power shall extend to all Cases, in Law and Equity". Essentially, article III instructs that the role of courts is limited to resolving differences between parties to cases or controversies. The purpose of article III is to keep the judiciary in its proper place in the tripartite governmental structure.

In *Buckley* the Supreme Court stated "that executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under art. III of the Constitution." The Court cited as support for this proposition its decisions in *United States v. Ferrera* and *Hayburn's Case*. While neither of these cases established any sort of a definitive rule on the limits of article III power, they are regarded as having engendered the notion that a court's adjudicative duties should serve only the ends of justice and not some other objective, such as the determination of legislative policy.

Recently, in *Commodity Futures Trading Commission v. Schor*, the Supreme Court adopted a functional—or pragmatic—approach to the separation of powers insofar as it applies to article III. There the Court was called to decide whether the Commodity Futures Trading Commission's ("CFTC") authority to entertain state law counterclaims in reparations proceedings violated article III. In a seven-to-two decision, the Court upheld the Commission's au-

147. U.S. CONST. art. III.
148. Id. § 1, cl. 1.
149. Id. § 2.
150. Muskrat v. United States, 219 U.S. 346, 356 (1911) (holding that the judicial power is limited to justiciable controversies).
152. *Buckley*, 424 U.S. at 123.
154. 2 U.S. (2 Dall.) 409 (1792).
155. *Buckley*, 424 U.S. at 123. *Ferrera* involved a statute authorizing a federal court in Florida to hear and adjudicate claims for losses for which the United States was held responsible under a treaty with Spain. *Ferrera*, 54 U.S. (13 How.) at 40. *Hayburn's Case* involved a statute empowering federal and state courts to set pensions for disabled Revolutionary War veterans. *Hayburn's Case*, 2 U.S. (2 Dall.) at 409. In neither case did the Court reach the article III question presented. The notes in *Hayburn's Case* contain references to circuit court decisions which illuminate the thinking at that time regarding the proper role of judges. *Morrison*, 108 S. Ct. at 2612 n.15.
156. 106 S. Ct. 3245 (1986).
157. Id. at 3258.
158. Id. at 3249.
The case dealt with an administrative agency’s assumption of article III power, as opposed to a court’s assumption of duties belonging to another branch of government. Justice O’Connor, writing for the majority, stated as follows:

In determining the extent to which a given congressional decision to authorize the adjudication of article III business in a non-article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules. Although such rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress’ ability to take needed and innovative action pursuant to its article I powers. While wholesale importation of concepts of pendent or ancillary jurisdiction into the agency context may create greater constitutional difficulties, we decline to endorse an absolute prohibition on such jurisdiction out of fear of where some hypothetical ‘slippery slope’ may deposit us.

The critical findings leading to the Court’s ruling were: (1) the necessity of allowing the CFTC to have counterclaim jurisdiction so as to “make the reparations procedure workable,” and (2) the fact that the case “raise[d] no question of the aggrandizement of congressional power at the expense of a coordinate branch.”

The Court in Schor made clear that the limitations of article III are not so rigid as to prevent a transfer of judicial authority to a regulatory agency. The Court in Schor also suggested that the perimeter of the judicial power is not so absolutely fixed as to prevent a welding together of functions lying within and without in order to achieve particular legislative aims.

C. THE POWER TO REMOVE

Whereas in Schor the Court relied on a functional approach to the separation of powers issue that arose in the context of article III, it adopted a formalistic approach to the separation-of-powers issue in Bowsher v. Synar, which was decided the same day. The Bow-

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159. Id. at 3249, 3261.
160. Id. at 3249.
161. Id. at 3258 (citation omitted).
162. Id. at 3260.
163. Id. at 3261.
164. Id. at 3258.
165. Id. at 3258, 3260.
166. 106 S. Ct. 3181 (1986).
Court examined the Balanced Budget and Emergency Deficit Control Act of 1985. The Court's inquiry focused on the provisions governing the Comptroller General. Because the Comptroller General was charged with executive responsibilities but was removable only by a joint resolution of Congress or by impeachment, the Court ruled that these provisions were unconstitutional.

The Court's decision did not rest on the fact that the Comptroller General was a principal officer, but as evidenced in Chief Justice Burger's opinion, rested on a formalistic conception of the respective provinces of the governmental branches:

To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws. . . The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.

Five of the justices who comprise the majority in the seven-to-two Bowsher decision were among the majority in Schor; the apparent justification for this switch in positions was that Bowsher involved an aggrandizement of power by one branch at the expense of another while Schor did not. One author has suggested that the Court switches approaches depending on which branch's interests are at stake.

169. Bowsher, 106 S. Ct. at 3192.
170. Id. at 3185-94. The Comptroller General was responsible for reviewing reports containing deficit estimates and proposed budget reductions submitted by the Office of Management and Budget and the Congressional Budget Office, and making his own conclusions as to their accuracy; he would then forward his conclusions to the President, who would issue an order based on them. Id. at 3184.
171. Id. at 3185. The Comptroller General was "appointed by the President with the advice and consent of the Senate." Id.
172. Id. at 3188. See Strauss, 72 CORNELL L. REV. at 489; see also Bruff, Presidential Power and Administrative Rulemaking, 88 YALE L.J. 451, 470-71 (1979) (stating that the separation of powers doctrine has been improperly understood to prohibit the sharing of functions among the branches).
174. Strauss, 72 CORNELL L. REV. at 515-16. Author Peter L. Strauss commented that the Supreme Court has vacillated over the years between using a formalistic approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government (and consequently appearing to draw rather sharp boundaries), and a functional approach that stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened. In Bowsher, seven Justices relied on formalism in rejecting Congress's work, over the vigorous protests of two dissenting functionalists. In Schor, seven functionalists—the Bowsher dissenters plus five of the majority in that case—sustained Congress's choice over a formalist dissent. Five Justices, then, apparently wanted to have it both ways.
The power to remove officers implicates concerns which are central to the separation of powers. Chief Justice Taft, writing for the majority in *Myers v. United States*, articulated these concerns forcefully:

The Court has recognized that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal. But 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. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers.

In *Myers* the Court ruled unconstitutional a statute requiring Senate approval before the President could remove postmasters who had been appointed by the President with the advice and consent of the Senate. The Court's rationale was that if "Congress has regarded the office as of sufficient importance to make it proper to fill it by appointment to be made by the President and confirmed by the Senate," then Congress "has thereby classed [the office] as appropriately coming under the direct supervision of the President." The Court therefore held that only the President may exercise the power of removal with respect to the office. In both *Bowsher* and *Myers* the Court used a strict, formalistic analysis for evaluating the propriety of the removal provisions. However, in *Bowsher* the deciding factor was the officer's functions, whereas in *Myers* it was the method of appointment.

The effect of *Myers* was narrowed in *Humphrey's Executor v.*
United States, in which the Court upheld statutory restrictions on the President’s power to remove Federal Trade Commissioners. Moreover, the Court adopted a functionalist approach to the separation of powers question presented in the case. Myers clearly stood for the proposition that principal officers (officers who were appointed by the President upon Senate approval) could be removed subject only to the President’s will. In Humphrey’s Executor, the Court stated that “[t]he actual decision in the Myers case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive.”

The Court then stated that the holding in Myers reached no further than “purely executive officers,” notwithstanding dicta to the contrary. In contrast to the postmaster in Myers who “[was] an executive officer restricted to the performance of executive functions,” the Federal Trade Commissioners were charged with “quasi-legislative” and “quasi-judicial” duties, and any executive duties incumbent upon them were merely incidental. In addition, the Federal Trade Commission “was created by Congress as an agency of the legislative and judicial departments.” The Court summed up its opinion by stating that Congress’ authority to condition the President’s power to remove an officer “will depend upon the character of the office.”

There was an additional aspect of Humphrey’s Executor which distinguished the case from Myers. The statutory scheme in Humphrey’s Executor did not allow Congress to participate in the removal of a commissioner except through the impeachment process. The statute at issue in Myers, however, required the Senate’s ap-

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182. Id. at 627.
183. See infra notes 185-89 and accompanying text; see also Strauss, 72 CORNELL L. REV. at 489 (describing the functional approach).
184. Myers, 272 U.S. at 163.
185. Humphrey’s Ex’r, 295 U.S. at 627.
186. Id. at 627-28.
187. Id.
188. Id. at 630.
189. Id. at 631. Justice Scalia differed sharply with the Morrison majority’s treatment of Humphrey’s Ex’r. The majority extended the holding of the case by declaring that the propriety of a good cause removal restriction could not “be made to turn on whether or not that official is classified as ‘purely executive.’” Morrison, 108 S. Ct. at 2618. Instead, the propriety of such a provision would simply depend on whether it interfered with the President’s appointed duties under article II. Id. In other words, no longer would there be “rigid categories of those officials who may or may not be removed at will by the President.” Id. Justice Scalia referred to this “shoddy treatment” of Humphrey’s Ex’r as making “an open invitation for Congress to experiment.” Id. at 2637.
190. See Humphrey’s Ex’r, 295 U.S. at 623.
proval of the President's decision to remove a postmaster.191

In a later case, Wiener v. United States,192 the Supreme Court ruled that the President could not remove at will a member of the War Claims Commission.193 These commissioners were determined to be principal officers.194 The issue as to their removal arose because the War Claims Act did not specify any removal procedures.195 In the Court's assessment, when Congress chose to endow the War Claims Commission with adjudicatory—or quasi-judicial—functions, it "did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing."196 The Commission was out of necessity an independent agency, and therefore, at the very least, a "for cause" restriction upon the President's power of removal was proper.197

In Myers, Humphrey's Executor, and Wiener there is an obvious progression from formalism to functionalism regarding the restrictions that Congress may impose upon the President's power to remove principal officers. In Bowsher the Court broke from this pattern, likening the case to Myers and distinguishing it from Humphrey's Executor and Wiener.198 The decision thus apparently signaled a return to formalism in cases where removal of principal officers charged with executive functions was involved.199

D. INTERFERENCE WITH ARTICLE II AUTHORITY

Some functions may be so central to the duties of the President's office that they must be guaranteed total protection from outside interference.200 In United States v. Nixon,201 the Supreme Court re-

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193. Id. at 356.
194. Id. at 350.
195. Id.
196. Id. at 356. The Commission was required "'to receive and adjudicate according to law' claims for compensating internees, prisoners of war, and religious organizations who suffered personal injury or property damage at the hands of the enemy in connection with World War II." Id. at 350.
197. See Id. at 356.
198. Bowsher, 106 S. Ct. at 3188. In the Court's opinion the former two involved executive officers while the latter two did not. Id.
199. See supra note 174.
200. INS v. Chadha, 462 U.S. 919, 946-47 (1983); cf. United States v. Nixon, 418 U.S. 683, 705 (1974) (stating that there is no absolute presidential privilege of immunity). After resolving the issues pertaining to the appointments clause, the article III limitations, and the removal power, the Court in Morrison gave separate attention to the question of "whether the Act, taken as a whole, violates the principle of separation of powers by unduly interfering with the role of the Executive Branch." Morrison, 108 S. Ct. at 2620. Even under a functionalist view of the separation of powers, it is conceded
jected the President’s claim of absolute privilege to withhold evidence pertaining to presidential communications which had been subpoenaed. In order to justify his claim, the President asserted the importance of keeping confidential the communications between high-level government officials and their advisors, and that each branch of government occupies a sphere which insulates it from the others. The Court replied that although “each branch [is supreme] within its own assigned area of constitutional duties,” the branches “were not intended to operate with absolute independence.”

The Court then quoted a famous passage from the concurring opinion of Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer:

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

Because the branches of government are interdependent and must cooperate, the Nixon Court balanced the interests underlying the President’s assertion of executive privilege against the interests inhering in the need for compliance with the subpoena. The Court found the latter to be greater. The Court also observed the President’s confidentiality interest could be accommodated by way of an in camera examination of the subpoenaed evidence.

Thus, there remains a choice of two basic analyses in cases where a statute allegedly threatens the President’s ability to fulfill his duties: one which is functionalistic, such as the balancing type employed in Nixon; and another which is formalistic, and has

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that there may be “core functions” belonging to each branch which must be protected so as to preserve the relationship among the branches. In other words, functionalism should not be understood as suggesting that there are no true boundaries dividing the branches. Strauss, 72 Cornell L. Rev. at 489.

Id. at 707.

Id. at 705-06.

Id. at 705, 707.

343 U.S. 579 (1952).

Nixon, 418 U.S. at 707 (quoting Youngstown, 343 U.S. at 635 (Jackson, J., concurring)). The same passage is quoted in the majority opinion of Morrison, 108 S. Ct. at 2620. Justice Jackson’s language describes a theory of government that is consistent with a functionalist view of the separation of powers. Strauss, 72 Cornell L. Rev. at 489. Functionalism requires judicial examination into the competing interests that are at stake in a confrontation between branches, resulting in a determination as to which must prevail. Id.

Id.

Nixon, 418 U.S. at 711-12.

Id. at 713.

Id. at 714-16.

See supra note 207 and accompanying text.
characteristically been employed in cases such as *Bowsher* which involve legislative aggrandizement of power.\(^{211}\)

**ANALYSIS**

In his dissenting opinion in *Morrison v. Olson*, Justice Scalia argued that the independent counsel is a principal officer charged with responsibilities of a quintessentially executive nature.\(^{212}\) Implicit in Justice Scalia's assessment is that the independent counsel provisions are invalid on their face because they fail to comport with the separation of powers—a principle which "[t]he framers of the Federal Constitution viewed... as the absolutely central guarantee of a just government."\(^{213}\) Justice Scalia noted that the separation of powers is reflected in the very structure of the Constitution.\(^{214}\) At the end of the prelude to his dissent, Justice Scalia characterized *Morison* as a case about power: there could be no doubt that Congress' intention in enacting the Ethics in Government Act was in part to steal power from the Executive Branch.\(^{215}\) In its sum, the dissenting opinion is almost irresistibly persuasive, owing to the creativity of the various formalistic arguments which it sets forth. Justice Scalia's opinion deftly pierces through the abstract language of the Act and breathes into it life and color.\(^{216}\)

On the other side, Justice Rehnquist, writing for the majority, presented very straightforward arguments to uphold the validity of

\(^{211}\) See supra notes 172-73 and accompanying text.


\(^{213}\) Id. at 2622, 2625. Justice Scalia stated that "[i]f to describe this case is not to decide it, the concept of a government of separate and coordinate powers no longer has meaning." Id. at 2625.

\(^{214}\) Id. at 2622. Justice Scalia noted that "[t]he principle of the separation of powers is expressed in our Constitution in the first section of each of the first three Articles." Id.

\(^{215}\) Id. at 2623. In characterizing the suit in this way, Justice Scalia ominously warned that "this wolf comes as a wolf." Id. In actuality, the Act resulted from careful planning and deliberation. *See* Amicus Brief of the Speaker and Leadership Group of the House of Representatives at 10-12, *Morrison* v. Olson, 108 S. Ct. 2597 (1988) (No. 87-1279). The intention of the Legislature in making the law was to avoid the difficulties that were encountered during the Watergate proceedings with respect to the appointment of the special prosecutor. *See* Senate Comm. on Governmental Affairs, Ethics in Government Act of 1978, S. Rep. No. 95-170, 95th Cong., 2nd Sess. 4, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4216, 4218-19. Congress wished to eradicate the conflict of interest that arises in Department of Justice investigations of executive officials, and to institute a mechanism that would facilitate timely appointment of a special prosecutor in extreme situations. Id. at 4218-19. Timely appointment simply could not be accomplished by ad hoc methods. Id. at 4219. Also, Congress was concerned because, if left to the President or the Attorney General, "[i]t is not at all obvious that such an appointment will occur." Id. at 4222.

\(^{216}\) *Morrison*, 108 S. Ct. at 2625. As an example, Justice Scalia forcefully argued that the exercise of power implicit in the Act amounts to coercion by Congress of the Executive Branch. *Id.*
The independent counsel, in the majority's view, is not a principal officer because the counsel's duties are restricted to the accomplishment of a single task. Furthermore, even though the independent counsel performs prosecutorial functions, the Act does not constitute a forbidden intrusion into executive authority. Although Justice Scalia was correct that the majority mishandled certain precedents in its analysis, the majority nonetheless found ample support from caselaw to sustain its holding. While the majority opinion could not match the vigor of Justice Scalia's dissent, the majority relied on functionalistic arguments that seem better suited for resolving the separation-of-powers problems that arise in the context of a complex modern government.

The Independent Counsel as Inferior Officer

The Morrison Court had little difficulty in establishing that the independent counsel is an inferior officer for purposes of the appointments clause. The Court went about this in two ways. First, the Court applied four factors which it derived from United States v. Germaine. Those factors were: (1) whether the officer is subject to removal by a higher Executive Branch official, (2) whether the officer is empowered to perform only certain duties, (3) whether the officer's jurisdiction is limited, and (4) whether the officer's tenure is limited. The independent counsel in Morrison satisfied this four-factor test for the reasons that she was removable for good cause by the Attorney General, her role was confined to investigation and prosecution of certain federal crimes, she could only act within the scope of jurisdiction granted by the Special Division, and her tenure expired upon the completion of her task.

There are some problems with this analysis, however, which render it somewhat artificial. Should removability necessarily connote rank? As Justice Scalia pointed out in his dissent, and as the majority recognized, the independent counsel is not truly subordinate
to the Attorney General.226 The independent counsel has under the Act "full power and independent authority to exercise all investiga-
tive and prosecutorial functions and powers of the Department of Justice," with some minor exceptions.227 This raises another ques-
tion: How much significance should be attached to the fact that the focus of the independent counsel's investigation is constricted in light of the tremendous powers at the counsel's command? While the breadth of the independent counsel's office is limited to the jurisdic-
tion granted, its depth is measured by the counsel's own unfettered discretion as to what powers the counsel shall use in an investiga-
tion.228 Furthermore, the independent counsel's tenure in office is uncertain because it is primarily determined by the time it takes to complete the counsel's tasks.229 Finally, the most obvious problem with this portion of the majority's analysis is that the Germau case, cited as the source of these factors, did not even concern the disting-
huon between inferior and principal officers; rather, it concerned the disting-
huion between government officers and employees.230 As Justice Scalia protested, "[t]he apparent source of these factors is a state-
ment in [Germasne]. . . . Besides the fact that this was dictum, it was dictum in a case where the distinguishing characteristics of inferior officers versus superior officers were in no way relevant."231

The second way in which the Court went about establishing the inferior status of the independent counsel was by examining prior cases, particularly United States v. Eaton,232 Ex parte Siebold,233 Go-

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226. Id. at 2608, 2635. Justice Scalia argued that United States v. Eaton, 169 U.S. 331 (1898) supported the proposition that an inferior officer must be subordinate to a higher official. Id. at 2634; see Eaton, 169 U.S. at 343. Justice Scalia also argued that the Framers intended that inferior would be understood as meaning subordinate because that is how the word was defined at the time the Constitution was drafted. Morrison, 108 S. Ct. at 2633.


228. Morrison, 108 S. Ct. at 2608-09. Justice Scalia stated that one of the checks against abuse of prosecutorial power is a political one, whereby the President is answerable to the electorate for such abuses. In the case of the independent counsel, he argued, this check is absent. Id. at 2638-39 (Scalia, J., dissenting). This same argument was posited by David A. Strauss in his Brief for Edward H. Levi, Griffin B. Bell, and William French Smith as Amici Curiae in Support of Appellees at 7, Morrison v. Olson, 108 S. Ct. at 2597 (1988) (No. 87-1279):

It would be folly to entrust an enterprise that is so sensitive and so difficult to a single individual who comes new to the task, who is essentially free of all supervision, and who has no institutional connection to the officials responsible for the many other constitutional responsibilities of the Executive Branch.

Id.


230. See supra notes 104-08 and accompanying text.


232. 169 U.S. 331 (1898). See supra notes 125-28 and accompanying text.

233. 100 U.S. 371 (1880). See supra notes 129-34 and accompanying text.
Bart Importing Co. v. United States,234 United States v. Nixon,235 and Young v. United States ex rel. Vusston Et Fils, S.A.236 In Eaton, a consul-general's appointment of a substitute to assume all of his duties while he was on an indefinite leave of absence was upheld.237 In Siebold, the Court upheld the appointment of federal election supervisors who were appointed by courts to assist in the enforcement of laws insuring fair federal elections.238 The court-appointed commissioners in Go-Bart Importing Co., who were expressly recognized as inferior officers, were empowered to perform a variety of prosecutorial as well as adjudicative functions.239 In Nixon, a special prosecutor possessing powers very similar to the independent counsel's and who was appointed by the Attorney General, was referred to as a subordinate officer.240 Lastly, the Court in Vusston upheld a federal-district-court appointment of a special prosecutor who had the power to institute contempt proceedings against individuals who had violated a court order.241 What emerges from these cases is the perception of an inferior officer as enjoying a certain amount of discretionary authority. These cases lead to the inevitable conclusion that the independent counsel is an inferior officer. Such a conclusion is especially appropriate with regard to the unique purpose of the office and the special circumstances surrounding the appointment.242

The Propriety of Interbranch Appointments

The appointments clause prescribes two methods for appointment of officers.243 The power to appoint inferior officers may be vested, "as [Congress] think[s] proper, in the President alone, in the Courts of Law, or in the Heads of Departments."244 The language of the appointments clause does not appear to require that Congress vest the power to appoint inferior officers in whichever of these bodies—the President, the courts, or department heads—the officers will be called to serve.245 Moreover, the words, "as they think proper," buttress the view that Congress has considerable latitude in choosing

237. See supra notes 125-28 and accompanying text.
238. See supra notes 129-34 and accompanying text.
239. See supra notes 136-38 and accompanying text.
240. See supra notes 139-40 and accompanying text.
241. See supra notes 141-42 and accompanying text.
242. See supra note 215.
244. U.S. CONST. art. II, § 2, cl. 2.
245. Siebold, 100 U.S. at 397.
where to vest the power of appointment.\textsuperscript{246}

In \textit{Siebold} the Supreme Court expressly adopted this view, stating that “it would be difficult in many cases to determine to which department an office properly belonged.”\textsuperscript{247} In addition, the Court observed that “looking at the subject in a practical light, it is perhaps better that it should rest there, than that the country should be harassed by the endless controversies to which a more specific direction on the subject might have given rise.”\textsuperscript{248} Hence, the \textit{Siebold} case could not have greater pertinence to \textit{Morrison}, for it is indeed difficult to ascertain precisely to which, if any, department the independent counsel belongs.\textsuperscript{249} Because the independent counsel’s appointment results from the Attorney General’s application,\textsuperscript{250} because the counsel can be removed by the Attorney General for good cause,\textsuperscript{251} and because the counsel’s office is funded through the Department of Justice,\textsuperscript{252} it would seem that the independent counsel belongs to the Department of Justice.\textsuperscript{253} However, the independent counsel is actually appointed by a court—the Special Division—which also defines the counsel’s jurisdiction.\textsuperscript{254} Furthermore, during the independent counsel’s tenure there will likely be ongoing dealings with both the Attorney General and the Special Division.\textsuperscript{255}

The complexity of the independent counsel’s office is suggestive of the special needs and circumstances which led to its creation.\textsuperscript{256} A special prosecutor answerable to and dependent upon the Attorney General could not be relied on to carry out the duties of investigating and prosecuting high executive branch officials.\textsuperscript{257} The provision in the Act allowing the Attorney General to decline—without court review of the decision—to seek appointment of an independent counsel, serves to preserve the integrity and vitality of the Attorney General’s office and the Department of Justice as a whole.\textsuperscript{258} Such complexity can be countenanced by the Constitution if the view is adopted that the separation of powers calls for intricate dispersals of power, rather

\begin{itemize}
\item \textsuperscript{246} \textit{Id}.
\item \textsuperscript{247} \textit{Id}.
\item \textsuperscript{248} \textit{Siebold}, 100 U.S. at 398.
\item \textsuperscript{249} \textit{See infra} notes 250-55 and accompanying text.
\item \textsuperscript{250} 28 U.S.C. § 592(c) (1982).
\item \textsuperscript{251} \textit{Id}., § 596(a).
\item \textsuperscript{252} \textit{Id}., § 591 note.
\item \textsuperscript{253} \textit{See supra} notes 32-35 and accompanying text.
\item \textsuperscript{254} 28 U.S.C. § 593(a) and (b) (1982).
\item \textsuperscript{255} \textit{See id.} §§ 593(c)(2), 594(d) and (e).
\item \textsuperscript{257} \textit{See id.}
\item \textsuperscript{258} \textit{See supra} note 23 and accompanying text.
\end{itemize}
than sealing off of one governmental branch from another.259

The Concept of a Unitary Executive

The sealing off of the governmental branches is an idea that is reflected in the concept of a unitary Executive Branch.260 Consistent with this idea all executive functions, and the officers charged with them, are under the full control of the President.261 Justice Scalia explicitly argued in Morrison for the validity of this concept.262 "It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they all are."263 In Justice Scalia's view, there could be no doubt that the prosecutorial function is just such a "purely executive power."264 Therefore, it should fall entirely within the control of the President.265 However, the general effect of the independent counsel provisions, according to Justice Scalia, is to deprive the President of the ability to determine policy pertaining to the exercise of the prosecutorial function.266 This deprivation would so severely hamper the President's ability to perform executive duties as "to remove the

259. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). One authority has stated that
the [separation of powers] doctrine has sometime been construed to mean a simplistic and complete separation of governmental functions that precludes one branch from performing tasks that resemble the duties of another branch. Yet the doctrine has also been understood, in terms more faithful to the intent of the Constitution's framers, to reflect a complicated theory of shared but reciprocally limiting powers, distributed among the branches of government. The framers were careful to divide and disperse political power; to accomplish this goal fully, governmental responsibilities had to be shared in order to check abuses that could accompany the exercise of entirely independent power.


260. See infra notes 261-65 and accompanying text.

261. Morrison, 108 S. Ct. at 2637-649 (Scalia, J., dissenting). This concept provided the central basis for argument in one of the briefs submitted on behalf of the appellants:

Under the unitary Executive established by the Framers, no agency with a narrow mission can pursue its policies without restraint. All of them must submit to the authority of higher officials who take a broader view—and ultimately to the authority of the President, who, as the single person elected by the nation as a whole, has the broadest view.


263. Id. at 2628.

264. Id. at 2626.

265. Id. at 2637.

266. See infra note 267.
core of the prosecutorial function" from the President's control.267

The concept of a unitary executive requires that every executive officer be accountable to the President, so that the President can be held responsible to the electorate for their acts.268 Accountability—or the lack thereof—for the actions of the independent counsel is one of the chief problems of the Act, according to Justice Scalia.269 And yet the President is given a substantial measure of control over the independent counsel by way of the removal provision270—something Justice Scalia apparently ignored in this portion of his analysis. It is certainly true that the President does not have full control over the independent counsel; if such were the case then the Act would be rendered pointless.271 But Justice Scalia would have settled for nothing less than full presidential control in order to uphold the Act.272

Justice Scalia did deal with the removal provision in a different portion of his opinion273 Essentially, Justice Scalia argued that Bowsher v. Synar274 and Myers v. United States275 were the controlling cases.276 According to Justice Scalia these cases required strict treat-
ment of any infringements or restrictions upon the President's ability to remove principal officers charged with uniquely executive functions. \textsuperscript{277} However, because both these cases "involve[d] an attempt by Congress . . . to gain a role in the removal of executive officials other than its established powers of impeachment and conviction," whereas \textit{Morrison} did not,\textsuperscript{278} the majority found \textit{Wiener v. United States}\textsuperscript{279} and \textit{Humphrey's Executor v. United States}\textsuperscript{280} to be more relevant.\textsuperscript{281} Those cases made it permissible for Congress to impose restrictions on presidential removal of principal officers in many instances.\textsuperscript{282} Perhaps the most daring—or careless—step in the majority's analysis came in its treatment of \textit{Humphrey's Executor}. The majority held that the categories used in \textit{Humphrey's Executor} for determining the propriety of removal restrictions ("quasi-legislative" and "quasi-judicial") are "designed not to define rigid categories of those officials who may or may not be removed at will by the President."\textsuperscript{283} Rather, they are simply intended "to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty . . . under [a]rticle II."\textsuperscript{284} Hence, the propriety of such restrictions could not "be made to turn on whether or not that official is classified as 'purely executive.' "\textsuperscript{285} Justice Scalia vehemently protested against this alteration of the case's basic holding, stating that the Court had "swept \textit{[Humphrey's Executor]} into the dustbin of repudiated constitutional principles."\textsuperscript{286} Clearly, with regard to the removal provision, the majority opted for a functional approach.

Absent from Justice Scalia's analysis on this point is any reference to \textit{Nixon}, in which the Court specifically approved the appointment of a special prosecutor whose duties and functions were essentially the same as those of the independent counsel.\textsuperscript{287} The only substantial differences between the Watergate special prosecutor and the independent counsel involved in \textit{Morrison} are that the former was appointed by the Attorney General against the background of

\textsuperscript{277} \textit{Id.} at 2637.
\textsuperscript{278} \textit{Morrison}, 108 S. Ct. at 2616. The Act does not provide for congressional involvement in the removal process. Instead, Congress is given an oversight role. \textit{Id.}
\textsuperscript{279} 357 U.S. 349 (1958).
\textsuperscript{280} 295 U.S. 602 (1935).
\textsuperscript{281} \textit{Morrison}, 108 S. Ct. 2616.
\textsuperscript{282} \textit{See supra} notes 181-89, 192-97 and accompanying text.
\textsuperscript{283} \textit{Morrison}, 108 S. Ct. at 2618.
\textsuperscript{284} \textit{Id.}
\textsuperscript{285} \textit{Id.}
\textsuperscript{286} \textit{Id.} at 2626.
\textsuperscript{287} 418 U.S. at 694-95.
growing public outrage and the incipient threat of impeachment, whereas the latter was appointed by a special court pursuant to federal statute. However, these differences have no bearing on the issue of independence. While the Court in Nixon did note that the special prosecutor was subordinate to the Attorney General, virtually the same degree of independence was required for the successful completion of his tasks as for the independent counsel’s.

The concept of a unitary executive is little more than a rewording of the formalistic approach to the separation of powers. It is simplistic and totally intolerant of any sharing of executive functions with either of the other two branches of government.

**Article III Authority**

In *Commodity Futures Trading Commission v. Schor*, the Supreme Court ruled that the Commodity Exchange Act did not violate the Constitution by empowering the Commodity Futures Trading Commission to entertain common law counterclaims in reparations proceedings. This ruling undermines the central thrust of Justice Scalia’s formalistic argument that the independent counsel provisions violate the separation of powers. Essentially, Justice Scalia argued that because the prosecutorial function is a purely executive power, neither Congress nor the courts can in any way restrict or control the exercise of that function. In an attempt to persuade the majority to adopt his line of reasoning, Justice Scalia made the following appeal:

> Or to bring the point closer to home, consider a statute giving to non-[article III judges just a tiny bit of purely judicial power in a relatively insignificant field, with substantial control, though not total control, in the courts—perhaps ‘clear error’ review, which would be a fair judicial equivalent of the Attorney General’s ‘for cause’ removal power here. Is there any doubt that we would not pause to inquire whether the matter was ‘so central’ to the functioning of the Judicial

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291. It should be noted that after Attorney General Bork selected Leon Jaworski to be the special prosecutor, he issued regulations restricting the removal of the special prosecutor which required “prior notice to and approval by certain Congressional leaders.” Levin, 16 HOFSTRA L. REV. at 13. Furthermore, the regulations prohibited removal of the special prosecutor “except for extraordinary improprieties on his part.” *Nixon*, 418 U.S. at 694-95 n.8.
293. Id. at 3258.
Branch' as really to require complete control, or whether we retained ‘sufficient control over the matters to be decided that we are able to perform our constitutionally assigned duties’? We would say that our ‘constitutionally assigned duties’ include complete control over all exercises of the judicial power. . . .

Yet, the Commodity Exchange Act does essentially permit a non-article III tribunal to exercise "just a tiny bit of purely judicial power," and this was upheld by the Court in Schor. Justice O'Connor, writing for the majority in Schor, stated that:

The counterclaim asserted in this case is a 'private' right for which state law provides the rule of decision. It is therefore a claim of the kind assumed to be at the 'core' of matters normally reserved to [a]rticle III courts.

* * *

[W]e are persuaded that the congressional authorization of a limited CFTC jurisdiction over a narrow class of common law claims as an incident to the CFTC's primary, and unchallenged, adjudicative function does not create a substantial threat to the separation of powers.

Moreover, the fact that Schor did not involve "aggrandizement of congressional power at the expense of a coordinate branch" makes the case particularly applicable to Morrison. Clearly, Schor lends itself to the proposition that a degree of core power of one branch may be transferred to another branch.

Checks and Balances Woven Into the Act Itself

The scheme embodied in the Ethics in Government Act is quite complicated and involves all three branches of government. Although Congress' chief role is one of oversight, it also has a role in initiating a preliminary investigation by the Attorney General. The Judiciary, via the Special Division, is responsible for appointing the independent counsel and defining the counsel's jurisdiction. The Judiciary also has the power to review any decision by the Attorney General to remove the independent counsel. Finally, the Executive Branch, via the Attorney General, determines whether to
apply for an appointment of an independent counsel, and may re-
move the independent counsel for good cause.\textsuperscript{305} The careful coordi-
nation and assignment of functions in the Act is necessary, at least in
Congress’ view, in order to assure that the Department of Justice in-
vestigations into alleged wrongdoing by high executive officials will
be untainted by any conflict of interest.\textsuperscript{306} A careful examination of
the Act reveals that this distribution of functions effectuates a sys-
tem of checks and balances to protect the Executive Branch against
unnecessary intrusions.\textsuperscript{307}

The Act affords the Executive Branch substantial control over
investigations conducted by the independent counsel.\textsuperscript{308} The Atto-
ney General, having completed a preliminary investigation, may de-
cline to seek appointment of an independent counsel if it is
\textquotedblleft determined\textquotedblright{} that there are no reasonable grounds to believe that
further investigation is warranted.\textsuperscript{309} Furthermore, the Attorney
General’s decision not to seek appointment is final and unreview-
able.\textsuperscript{310} Justice Scalia argued that in practical terms the Attorney
General would have no choice but to apply to the Special Division for
appointment of an independent counsel because not doing so would
invite dire political consequences.\textsuperscript{311} Also, Justice Scalia argued, the
limitations on the investigative techniques available to the Attorney
General for conducting the preliminary investigation would make it
nearly impossible to conclude, in good faith, that no reasonable
grounds warranting further investigation existed.\textsuperscript{312} Justice Scalia
stated, \textquoteleft\textquoteleft{}[t]he context of this statute is acrid with the smell of
threatened impeachment.\textquoteright\textquoteright{}\textsuperscript{313}

Justice Scalia’s analysis is unconvincing for several reasons.
First, the plain language of the Act as reasonably construed grants
the Attorney General wide discretion in choosing whether or not to
seek appointment of an independent counsel.\textsuperscript{314} Of course, the At-
torney General is expected to comply with the Act’s terms in good
faith. Second, the Attorney General’s ability to conduct a prelimi-
nary investigation is limited for the very reason that the investiga-

\textsuperscript{305} Id. §§ 592(b) and (c) and 596 (a)(1).
\textsuperscript{306} See supra note 215.
\textsuperscript{307} See infra notes 308-20 and accompanying text.
\textsuperscript{308} See infra notes 309-10, 314, 318-20 and accompanying text.
\textsuperscript{309} 28 U.S.C. § 592(b)(1).
\textsuperscript{310} See supra note 23.
\textsuperscript{311} Morrison, 108 S. Ct. at 2624-25 (Scalia, J., dissenting).
\textsuperscript{312} Id. at 2624.
\textsuperscript{313} Id. at 2625.
\textsuperscript{314} 28 U.S.C. § 592(b)(1) (1982). It is stated in § 592(b)(1) that when the Attorney
General has notified the Special Division of a decision not to apply for appointment of
an independent counsel, the Special Division “shall have no power” to make such an
appointment.
tion's only "purpose is to allow an opportunity for frivolous or totally groundless allegations to be weeded out." Once it is established "that a matter justifies further investigation, then the purpose of a preliminary investigation has been completed and the matter should be immediately referred to the court for the appointment of [an independent counsel]." Lastly, Congress may resort to impeachment at any time it wishes.

Although the Attorney General may not direct the independent counsel's investigation, the Attorney General is authorized to occasionally provide assistance or refer other matters to the independent counsel which are pertinent to the investigation. When the independent counsel is conducting an investigation, compliance with all "written or other established policies of the Department of Justice respecting enforcement of the criminal laws" is required. Failure to observe these guidelines would ostensibly provide the "good cause" for removal by the Attorney General. Justice Scalia, however, argued that the exception to this requirement rendered it an "empty promise." That is probably an overstatement, since in any event the Attorney General is not prevented from invoking the power of removal.

Clearly, the Executive Branch is given adequate control over the independent counsel to preserve the integrity of its functions. All of the powers of the Attorney General, the courts, and Congress combine in such a way as to give the Act a structure of tightly woven reciprocating powers that hold each other in proper alignment while accomplishing a single purpose.

CONCLUSION

The Ethics in Government Act is a result of Watergate. It is, furthermore, a finely-tuned piece of legislation. Without effecting an accretion of power in one branch that would throw the government off its constitutional balance, the Act does force the Executive Branch to share control over the prosecutorial function in an important and necessary way. Or, perhaps to put it more accurately, the Act transfers a measure of prosecutorial power to an independent body. The

316. Id. at 4271.
319. Id. § 594(f).
320. Id. § 596(a)(1).
wisdom of the Act was not a proper concern for the United States Supreme Court. The Court’s task was simply to determine whether there was a legal basis for the Act, and not to judge it in light of its presumed effects. In upholding the Act, the Court appropriately adopted a functionalistic approach to the separation of powers which was—and is—more descriptive of the modern complex governmental structure ours has become.

Peter J. Garofalo—’89