

University of Colorado Law School

## Colorado Law Scholarly Commons

---

Publications

Colorado Law Faculty Scholarship

---

1988

### Independent Counsel and the Constitution

Harold H. Bruff

*University of Colorado Law School*

Follow this and additional works at: <https://scholar.law.colorado.edu/faculty-articles>



Part of the [Administrative Law Commons](#), [Constitutional Law Commons](#), [Law and Politics Commons](#), [Legislation Commons](#), [President/Executive Department Commons](#), and the [Supreme Court of the United States Commons](#)

---

#### Citation Information

Harold H. Bruff, *Independent Counsel and the Constitution*, 24 WILLAMETTE L. REV. 539 (1988), available at <https://scholar.law.colorado.edu/faculty-articles/943>.

#### Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Publications by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact [rebecca.ciota@colorado.edu](mailto:rebecca.ciota@colorado.edu).

# HEINONLINE

Citation:

Harold H. Bruff, Independent Counsel and the  
Constitution, 24 Willamette L. Rev. 539, 564 (1988)

Provided by:

William A. Wise Law Library

Content downloaded/printed from [HeinOnline](http://heinonline.org)

Fri Sep 22 16:20:25 2017

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

## [Copyright Information](#)



Use QR Code reader to send PDF to  
your smartphone or tablet device

### INDEPENDENT COUNSEL AND THE CONSTITUTION

BY HAROLD H. BRUFF\*

Separation of powers issues swirl around a current challenge to the independent counsel provisions of the Ethics in Government Act of 1978.<sup>1</sup> The Act, passed in response to the abuses of Watergate, provides for the appointment of "special prosecutors" independent of the Justice Department to investigate and prosecute serious crimes committed by high officials of the executive branch.<sup>2</sup>

---

\* B.A., Williams College; J.D., Harvard Law School (Magna Cum Laude); John S. Redditt Professor of Law, University of Texas.

This Article is adapted from remarks given at Willamette University College of Law, October, 1987. I would like to thank the faculty and students at Willamette, and especially Dean Robert L. Misner, for their hospitality.

1. 28 U.S.C. § 49 (1982); Pub. L. No. 100-191, 101 Stat. 1293 (to be codified at 28 U.S.C. §§ 591-99), *reprinted in* 56 U.S.L.W. 39 (Feb. 2, 1988) [hereinafter 28 U.S.C. §§ 591-99].

2. The Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, *reauthorized and amended by* Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (1983); Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293. The amendments respond to perceived problems in the administration or constitutionality of the Act. The important ones will be discussed in context below. *See infra* notes 29, 31, 32 & 68 and accompanying text. Overall, the Act retains its original structure. The 1982 amendments changed the title of "special prosecutor" to "independent counsel," in order to "spare the subject of such investigation adverse public reaction" and to avoid suggesting "that an indictment . . . will be brought." S. REP. NO. 97-496, 97th Cong., 2d Sess. 18, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3537, 3554.

In *In re Sealed Case (Olson)*,<sup>3</sup> the District of Columbia Circuit Court of Appeals has invalidated the Act. The case involves the refusal of former Assistant Attorney General Theodore B. Olson to honor an independent counsel's subpoena, issued pursuant to an investigation of allegations that Olson gave false testimony to a subcommittee of the House Judiciary Committee.<sup>4</sup> The constitutionality of insulating prosecution from presidential control has been uncertain from the Act's inception.<sup>5</sup> Indeed, the Justice Department has taken both sides of the issue, now lining up with the challengers.<sup>6</sup>

This Article explores the issues surrounding the Act, and concludes that it is constitutional. After outlining the reasons for the Act's passage and the nature of its principal provisions, I seek the appropriate standard for constitutional analysis. Separation of powers cases feature two competing approaches, with sharply divergent implications for the permissibility of such blended powers as the Act creates. I first consider a formal analysis that emphasizes the separation of powers. I conclude that formalism should be employed only when traditional concepts of political responsibility

---

3. 838 F.2d 476 (D.C. Cir. 1988), *prob. juris. noted sub. nom.* Morrison v. Olson, 108 S. Ct. 1010 (1988).

4. Readers should know that from 1979-81, I was a Senior Attorney-Adviser in the Office of Legal Counsel of the Department of Justice. From January to June of 1981, Ted Olson headed the Office. I have no personal knowledge of the events leading to the investigation, all of which occurred after I left the Office. Of course, I take no position here on the allegations under investigation. I do wish to say, though, that I formed both personal and professional respect for Ted Olson in our brief time together. Knowing someone who is subject to the ordeal of an investigation brings home the cost of a statute that I believe is both constitutional and necessary. I hope that this Article adequately reflects an appreciation of that cost, and that Ted Olson will understand that I take my positions here despite my personal feelings regarding him.

5. Passage of the 1978 Act was preceded by extensive hearings in several Congresses, with testimony on the constitutional issue from many luminaries. *See, e.g., Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973); *Hearings Before the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. (1975); *Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977).

6. In 1973, Acting Attorney General Bork opposed the constitutionality of special prosecutor legislation. *1973 House Hearings, supra* note 5, at 251. Acting Assistant Attorney General Harmon supported the constitutionality of the 1978 Act, *1977 House Hearings, supra* note 5, at 2, 19, reflecting the views of President Carter (Message to Congress, May 3, 1977). In the current litigation, the Department filed an *amicus curiae* brief urging invalidation of the Act. President Reagan signed the 1987 reauthorization of the Act, noting his "very strong doubts" about its constitutionality and the fact of pending litigation to resolve the question. Independent Counsel Reauthorization Act of 1987, 23 WEEKLY COMP. PRES. DOCS. 1526, 1526-27 (Dec. 15, 1987).

need to be honored, and that pursuit of executive misconduct is not such a context. Turning to a functional analysis that emphasizes checks and balances, I conclude that the Act is consistent with the needs of both Congress and the executive, and with an appropriately limited judicial role. Therefore, the Supreme Court should uphold it.

## I. INTRODUCTION

### A. *The Problem at Hand*

Miscreance at high levels is an enduring problem in our government. Four times in this century, major scandals resulting in criminal prosecutions have plagued the executive branch.<sup>7</sup> In the Harding administration, a Secretary of the Interior was convicted for participating in the Teapot Dome affair,<sup>8</sup> and an Attorney General, accused of failing to prosecute the wrongdoers, was eventually indicted in unrelated matters.<sup>9</sup> In the Truman administration, corruption in revenue collection led to the eventual convictions of an Assistant Attorney General of the Tax Division, the President's Appointments Secretary, and a Commissioner of Internal Revenue.<sup>10</sup> In the Nixon administration, many of the "President's men," including an Attorney General, were convicted of felonies.<sup>11</sup> Only the pardon of President Nixon mooted the question whether a President himself may be indicted. Today, scandal again surrounds many executive officials, including some of the President's closest associates—and another Attorney General.

The Act responds to a structural feature of the executive branch that hampers prosecution of high-level misconduct. The problem lies in the dual nature of the Attorney General's role. On one hand, he is the nation's chief law enforcement officer, expected

---

7. For a historical summary, see *In re Olson*, 818 F.2d 34, 39-43 (D.C. Cir. Indep. Couns. Div. 1987). The most famous nineteenth century scandal to touch the White House was the Whiskey Ring in the Grant administration. See L. COOLIDGE, *THE LIFE OF ULYSSES S. GRANT* 473-91 (1922).

8. *Fall v. United States*, 49 F.2d 506 (D.C. Cir. 1931); *United States v. Fall*, 10 F.2d 648 (D.C. Cir. 1925). See generally B. NOGGLE, *TEAPOT DOME: OIL AND POLITICS IN THE 1920's* (1962).

9. See *McGrain v. Daugherty*, 273 U.S. 135 (1927).

10. See *Connelly v. United States*, 249 F.2d 576 (8th Cir. 1957), *cert. denied*, 356 U.S. 921 (1958).

11. See generally R. WOODWARD & C. BERNSTEIN, *ALL THE PRESIDENT'S MEN* (1974); see also *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977).

to investigate and prosecute federal crimes<sup>12</sup> dispassionately. On the other, as the administration's highest ranking legal adviser,<sup>13</sup> he is ordinarily a political and personal confidant of the President and his circle, providing advice on both law and policy. Therefore, allegations of misconduct in high places often cast the Attorney General in the deeply troubling role of investigating close political and personal associates.

Before passage of the 1978 Act, when scandal arose the executive appointed special prosecutors. The results were mixed. In response to Teapot Dome, Congress authorized the appointment of special counsel, who prosecuted the cases successfully.<sup>14</sup> In the Truman administration, Attorney General McGrath appointed a special prosecutor to investigate the tax cases, fired him when he requested access to the Attorney General's files, and was himself promptly fired by Truman. No prosecutions resulted, however, until the Eisenhower administration took office. In the Nixon administration, the famous "Saturday night massacre" occurred when the Attorney General and his Deputy resigned rather than execute the President's order to discharge Special Prosecutor Archibald Cox for his investigation of the President.<sup>15</sup> Public outrage forced the appointment of Leon Jaworski to finish the task. To Congress, this history demonstrated the need for a more permanent arrangement, and the 1978 Act ensued.

### *B. Constitutional Tensions*

Statutory special prosecutors present two kinds of constitutional difficulties. First, prosecution is traditionally classified as an executive function, and therefore within the "executive Power" that Article II vests in the President. Indeed, the Constitution's command that the President "take Care that the Laws be faithfully executed"<sup>16</sup> has been thought to place supervision of prosecution at the very core of executive power.<sup>17</sup> One reason for this view is historical: from the time of the framers, prosecutors have usually been

---

12. 28 U.S.C. §§ 516, 519 (1982).

13. 28 U.S.C. §§ 511-12 (1982).

14. H.R.J. Res. 160, 68th Cong., 1st Sess., 43 Stat. 16 (1924).

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

16. U.S. CONST. art. II, § 3.

17. See, e.g., *The Jewels of the Princess of Orange*, 2 Op. Att'y. Gen. 482 (1831) (Taney) (President may direct United States Attorney to discontinue action to condemn stolen jewels belonging to foreign monarch).

executive officers.<sup>18</sup> Another is functional: substantial discretion necessarily attends the selection of targets of investigation and the decision to bring charges to trial. Vesting that discretion in the executive allows setting priorities and allocating resources<sup>19</sup> under the "mass of legislation" that the President is charged to execute.<sup>20</sup> A final, powerful reason for allocating prosecution to the executive lies in the purposes of our scheme of separated powers: tyranny might ensue if legislators could both define and prosecute crime, or if judges could both charge and adjudge guilt.<sup>21</sup>

The second kind of constitutional issue is specific to prosecution of executive officers. Our law has long recognized that there is a delicate balance between deterring official misconduct and vitiating official courage. The law of official immunity from tort damages addresses these tradeoffs.<sup>22</sup> Many executive decisions must be made under pressure of time and with uncertainty about both the facts and the law. Those harmed by such decisions are apt to ascribe evil motive and pursue retaliation.<sup>23</sup> The Supreme Court

---

18. In *Young v. United States ex rel. Vuitton Et Fils S.A.*, 107 S. Ct. 2124 (1987), the Court recognized a limited exception to this principle by upholding the power of federal courts to appoint private attorneys to prosecute contempts of their orders. Justice Scalia disagreed, arguing that the prosecution of law violators is vested in the executive. He noted that notwithstanding an English practice of private prosecution at the time of the Constitution, since the Judiciary Act of 1789 the executive has controlled prosecution of federal crimes. *Id.* at 2142 n.2 (citing Comment, *The Outmoded Concept of Private Prosecution*, 25 AM. U.L. REV. 754, 762-64 (1976)).

19. The Supreme Court has held that agency decisions not to prosecute are presumptively unreviewable in court, *Heckler v. Chaney*, 470 U.S. 821 (1985), under the Administrative Procedure Act's category of actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1982). The Court emphasized the broad issues of priority-setting that prosecutorial discretion involves, and alluded to "the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" *Chaney*, 470 U.S. at 832.

20. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 702 (1952) (Vinson, C.J., dissenting) ("Unlike an administrative commission confined to the enforcement of the statute under which it was created, . . . the President is a constitutional officer charged with taking care that a 'mass of legislation' be executed.").

21. "'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.'" THE FEDERALIST No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961) (emphasis in original, quoting Montesquieu).

22. See generally Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110 (1981).

23. See *Nixon v. Fitzgerald*, 457 U.S. 731, 751-52 (1982) (explaining why the President, judges, and prosecutors enjoy absolute immunity from tort damages for actions within the scope of their official responsibilities).

now grants most executive officers immunity from damages absent proof that they knew or should have known that they violated clearly established statutory or constitutional rights.<sup>24</sup> To foster vigorous decisionmaking, the Court protects officers not only from unjust awards of damages, but also from the jeopardy and expense of trials.<sup>25</sup>

Traditionally, an officer's protection against excessive fear of criminal prosecution has lain in executive branch control of the process. If the President were shorn of all negative power over prosecution of official misconduct, he might reasonably doubt whether subordinates would execute their duties. Thus, control of prosecution bears directly on the President's power over the executive branch, and the effective discharge of his constitutional duties.

### C. *The Ethics in Government Act*

Plainly, the creation of independent prosecutors of official misconduct presents high constitutional stakes, involving both the integrity and the effectiveness of our government. The Act is a careful attempt to balance the competing considerations. It applies to the President, the Vice President, the cabinet, and to senior officials in the White House, the Justice Department, the Central Intelligence Agency, and the President's campaign committee.<sup>26</sup> It directs the Attorney General to conduct a preliminary investigation upon receipt of information "sufficient to constitute grounds to investigate" whether a covered official has committed a serious federal crime.<sup>27</sup> If the Attorney General determines that "there are reasonable grounds to believe that further investigation is warranted," he or she must apply to a Special Division of the Court of Appeals for the District of Columbia Circuit for the appointment of an independent counsel.<sup>28</sup> If, on the other hand, the Attorney General concludes that there are "no reasonable grounds" to warrant

---

24. *Harlow & Butterfield v. Fitzgerald*, 457 U.S. 800, 818 (1982).

25. *Id.* at 818-19.

26. 28 U.S.C. § 591.

27. *Id.*

28. *Id.* § 592(c)(1)(A). The Act also authorizes the Attorney General to apply for the appointment of independent counsel when the investigation of persons not covered "may result in a personal, financial, or political conflict of interest." *Id.* § 591(c)(2). The Special Division, created by 28 U.S.C. § 49, consists of three judges, one of whom must be from the District of Columbia Circuit Court of Appeals, appointed by the Chief Justice to serve for two years. No member of the division may sit on a case involving an independent counsel appointed during the judge's tenure on the division. *Id.* § 49(f).



further investigation, he or she so notifies the Special Division, and no appointment can be made.<sup>29</sup>

The Act directs the Special Division to define the jurisdiction of an independent counsel to include the subjects specified in the Attorney General's application, and "all matters related."<sup>30</sup> The independent counsel then enjoys the full investigative and prosecutorial powers of the Department of Justice, whose policies the counsel must follow "except where not possible."<sup>31</sup> The Attorney General may remove the counsel "for good cause, . . ." and the Special Division may terminate the office on grounds that the investigation has been "substantially completed . . ."<sup>32</sup>

## II. SEPARATION OF POWERS: THE CHOICE OF ANALYTIC APPROACH

### A. *The Competing Standards of Review*

Litigation over the constitutionality of this scheme, like other separation of powers controversies, is marked by debate over which

---

29. *Id.* § 592(b)(1). Judicial review of the Attorney General's decision not to conduct a preliminary investigation is barred. CONFERENCE REPORT ON THE INDEPENDENT COUNSEL REAUTHORIZATION ACT OF 1987, H.R. CONF. REP. NO. 452, 100th Cong., 1st Sess. 21-22 (1987) [hereinafter 1987 CONFERENCE REPORT] (codifying *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986); *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984)). Although the Special Division may not overrule the Attorney General's determination, it may "return the matter to the Attorney General for further explanation of the reasons for such determination." 28 U.S.C. § 593(d).

30. 28 U.S.C. § 593(b)(3). Upon the Attorney General's request, but not otherwise, the Special Division may expand the jurisdiction of an independent counsel beyond these parameters. *Id.* § 593 (c)(1). The counsel must ask either the Special Division or the Attorney General for authority to pursue "related matters" within the original jurisdictional grant. See 1987 CONFERENCE REPORT, *supra* note 29, at 29.

31. 28 U.S.C. § 594(f). The 1982 reauthorization of the Act substituted the quoted phrase for the earlier directive to follow departmental policies "to the extent the special prosecutor deems appropriate." S. REP. NO. 496, 97th Cong., 2d Sess. 16-17 (1982), *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3537, 3552. This change was meant "to urge the special prosecutor to apply the uniform standards of the Department except in extreme, extenuating circumstances." *Id.* The only power specifically denied the counsel is to request wiretaps under 18 U.S.C. § 2516 (1982).

32. 28 U.S.C. § 596(a)(1)&(b)(2). The "good cause" standard reflects "existing law regarding officials subject to removal only for good cause." The conferees stated that the standard incorporates a ban on removing counsel for defying presidential orders that would compromise the integrity of the proceedings, such as an order to grant immunity to the targets of the investigation. The conferees also removed provisions in previous versions of the Act that specified a standard for judicial review of removals (whether "removal was based on error of law or fact"), in hopes of clarifying that existing law was to apply here as well. 1987 CONFERENCE REPORT, *supra* note 29, at 36-37.

of two analytic approaches should be employed.<sup>33</sup> As elsewhere in the law, choice of analytic style tends to determine the outcome of the cases. The Supreme Court has often used a formalistic approach that reasons logically from the constitutional text and the framers' acknowledged purpose to create three independent branches with distinct functions.<sup>34</sup> These cases tend to draw bright lines between the responsibilities of the branches. The *Olson* majority chose formalism and invalidated the Act.

The competing approach is a functional one that assesses the needs of each branch for protection of its "core" constitutional functions.<sup>35</sup> These cases stress the framers' inclusion of checks and balances, shared powers that aid the overall strategy of controlling each branch and ultimately the government as a whole.<sup>36</sup> Functional analysis therefore favors complex arrangements that blend the powers of the branches, which formalism is likely to condemn. The *Olson* dissent urged the consistency of the Act with functional principles.

The Court has explained that formalism is appropriate for cases presenting a threat that one branch will aggrandize itself at

---

33. For a general discussion of recent separation of powers controversies, see Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 491 (1987), and the authorities cited therein.

34. See, e.g., *Bowsher v. Synar*, 106 S. Ct. 3181 (1986) (invalidating the Comptroller General's power to shape budget deficit reduction plans); *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating legislative veto by either house of Congress over executive branch deportation decisions); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (invalidating seizure by the President of steel mills to avert impact of strike on steel production during Korean conflict because of contrary statutory policy).

35. See *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1986); *Nixon v. Fitzgerald*, 457 U.S. at 748-54; *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 441-43 (1977); *United States v. Nixon*, 418 U.S. 683, 703-07 (1974).

36. Familiar examples of checks and balances include the President's participation in legislation through his qualified veto and the Senate's participation in appointing executive officers through its power to advise and consent. For each quotation from the framers that emphasizes the need for strict separation of powers, there is another supporting checks and balances. For example, after quoting Montesquieu on the necessity for separated powers in *The Federalist* No. 47, Madison hastened to add that the "oracle" Montesquieu

did not mean that these departments ought to have no *partial agency* in, or no *control* over the acts of each other. . . .

. . . .

[He meant] no more than this, that where 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 NO. 47, *supra* note 21, at 302-03 (emphasis in original).

the expense of another.<sup>37</sup> Here, "good fences make good neighbours."<sup>38</sup> In contrast, where a branch is alleged to have undermined the power of another without expanding its own, functionalism allows for the diverse structure that modern government demands. Although this distinction helps to reconcile the Constitution's competing themes, it has limits. Aggrandizement lies in the eyes of the beholder. It reflects (often unarticulated) value judgments about desirable allocations of power among the branches. For example, is a legislative veto a congressional aggrandizement, or only an attempt to restore power lost to executive usurpation?<sup>39</sup> Beyond a broad principle that no branch should be allowed to destroy the overall balance of powers, "aggrandizement" may serve only to label conclusions that flow from other values. But what are they?

### B. Formalism in Service of Political Accountability

The Court may be choosing between formal and functional approaches according to perceived needs to clarify political accountability for executive action.<sup>40</sup> One effect—and I think a primary benefit—of the Court's recent formalist decisions has been to draw clear lines between legislative and executive responsibilities for everyday administration. In *Buckley v. Valeo*,<sup>41</sup> the Court refused to allow Congress to appoint executive officers. In *INS v. Chadha*,<sup>42</sup> the Court invalidated the legislative veto, by which Congress had sought to override executive action by means less formal than legislation. And in *Bowsher v. Synar*,<sup>43</sup> the Court forbade an officer removable by Congress to perform executive functions. The result of these three decisions is to place responsibility for the exercise of delegated statutory powers squarely on the executive.<sup>44</sup> In con-

37. *Schor*, 106 S. Ct. at 3261. See generally Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987) (analyzing the Court's reasoning in *Bowsher v. Synar* and *Schor* concerning the structure of the federal government).

38. R. FROST, *Mending Wall*, in NORTH OF BOSTON (2d ed. 1915).

39. See *INS v. Chadha*, 462 U.S. at 945 (citing proponents of the competing positions: Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455 (1977); Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253 (1982)).

40. Bruff, *supra* note 33, at 500-06.

41. 424 U.S. 1 (1976).

42. 462 U.S. 919 (1983).

43. 106 S. Ct. 3181 (1986).

44. The framers' most prominent attempt to concentrate political accountability was

trast, where the need to ensure political accountability is low, as for adjudicative functions, the Court has approved insulation from executive supervision.<sup>45</sup>

### C. *The Limits of Political Accountability*

Focusing on political accountability and its limits leads me to favor the more flexible functional approach to the constitutionality of the independent counsel statute. Investigation of high level misconduct is fundamentally unlike ordinary administration, including most prosecution. To see why, first we must consider administrative law generally. Like the Court's formalist separation of powers decisions, modern administrative law clarifies the political responsibility of officers exercising statutory discretion.<sup>46</sup> Judicial review presses administrators to articulate policy choices clearly,<sup>47</sup> whereupon courts can verify their fidelity to statutory standards and the administrative record the agency has compiled.<sup>48</sup> Once courts have made these inquiries, they are supposed to leave substantive policymaking to the executive.<sup>49</sup> Two vital checks then remain—ac-

---

in their choice of a single rather than a plural executive. See THE FEDERALIST NO. 70, at 424-25 (A. Hamilton) (C. Rossiter ed. 1961). Hamilton argued that a plural executive tends to conceal faults and destroy responsibility. . . .

. . . .

. . . [It] tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, *first*, the restraints of public opinion which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number as on account of the uncertainty on whom it ought to fall; and, *second*, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, . . . [so the people can remove or punish them].

*Id.* at 427-29.

45. See *Schor*, 106 S. Ct. at 3250, 3260 (CFTC was "relatively immune from the 'political winds that sweep Washington'").

46. See generally Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (discussing a republican conception of government and how this conception affects administrative law doctrine that responds to political factionalism by controlling the behavior of public officials); Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207 (1984) (discussing ways that the structure of government and the nature of administrative law combine to influence administrators to respond to broad segments of the public).

47. See *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) for a famous early statement of this requirement.

48. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-48 (1983); Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505 (1985).

49. *Chevron, U.S.A., Inc., v. Natural Resources Defense Council*, 467 U.S. 837 (1984). See generally Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986).

ceptability to Congress and the public. If sufficiently displeased, Congress may change the statute. The public may change the administration.

Administrative law recognizes, however, that political accountability is not always to be trusted. Due process considerations have long forbidden the assignment of decisions to individuals having an interest in the outcome.<sup>50</sup> Indeed, it is a felony for any federal officer to participate in a decision in which he or she has a financial interest.<sup>51</sup> These barriers to interested decisionmakers do not depend on proof of any actual effect on outcomes, in light of needs both to prevent harm and to preserve public confidence in government. The underlying premise is that personal interest places unacceptable stress on the integrity of public decisionmaking.

#### *D. The Limits of Prosecutorial Discretion*

Turning to prosecution, we find that the executive generally enjoys very broad discretion. The Supreme Court has emphasized that "the decision to prosecute is particularly ill-suited to judicial review."<sup>52</sup> And decisions *not* to prosecute are presumptively unreviewable in court, because they involve judgments about priorities that may be fully understood only in the context of the full range of choices and resources available to the agency.<sup>53</sup> Thus, the primary control on the fairness of decisions whether to prosecute is the political accountability of the prosecutor. Nevertheless, as with administrative law generally, prosecutors are expected to recuse

---

50. See, e.g., *Gibson v. Berryhill*, 411 U.S. 564 (1973) (state board of optometry, made up of private practitioner optometrists, sought to exclude corporate employee optometrists from practicing); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (mayor as judicial officer for traffic offenses with power to impose fines and thus add to the city's treasury).

51. 18 U.S.C. § 208 (1982). The Standards of Conduct of the Department of Justice forbid employees to participate in decisions in which they have a financial interest. 28 C.F.R. § 45.735-5 (1987). The Standards also generally forbid employees to participate in criminal investigations or prosecutions if they have a "personal or political relationship" with the targets. *Id.* § 45.735-4(a). Disqualifying personal relationships are those that are "normally viewed as likely to induce partiality." *Id.* § 45.735-4(c)(2). Political ones involve "close identification" with an elected officeholder or candidate. *Id.* § 45.735-4(c)(1).

52. *Wayte v. United States*, 470 U.S. 598, 607 (1985). The Court explained: "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Id.*

53. *Chaney*, 470 U.S. at 832-33.

themselves in situations of personal interest.<sup>54</sup> For example, the Attorney General *voluntarily* requested the appointment of an independent counsel to investigate the Iran/Contra affair, under a provision of the Act authorizing him to do so in situations of "personal, financial, or political conflict of interest."<sup>55</sup>

Two additional considerations suggest that the constitutionality of independent counsel should not be approached via a formalistic analysis that is geared to preserving political accountability. First, investigation of high level misconduct does not involve an ordinary exercise of prosecutorial discretion, for which interference with executive branch priority setting might be very troubling. Instead, credible allegations of serious criminal activity by senior executives may reasonably be given automatic high priority, in view of the importance of public confidence in the integrity of government. Surely, we would not have expected the Attorney General to respond to the Iran/Contra scandal by arguing that the Department could not pursue the matter, in light of the need to devote its limited resources to prosecuting those who traffic in contraband dentures.<sup>56</sup>

Second, accountability depends on information if it is to be effective. The courts, Congress, and the public can evaluate only those executive decisions for which the basis of decision is known.<sup>57</sup> Criminal prosecutions present no insurmountable monitoring problems, because the trial exposes information about both the crime and (at least inferentially) the soundness of the charging decision. In contrast, decisions not to prosecute are very difficult to oversee. They are presumptively unreviewable in court, and claims of executive privilege may bar attempts by Congress and the public to examine them.<sup>58</sup> Moreover, when executive misconduct is suspected, there is reason for special concern about both the possible

---

54. See *supra* note 51.

55. 28 U.S.C. § 591(c)(2); see also *In re Sealed Case* (North), 829 F.2d 50, 51 (D.C. Cir. 1987); *In re Olson*, 818 F.2d 34, 42 (D.C. Cir. Indep. Couns. Div. 1987).

56. For the federal criminal law of dentures, see 18 U.S.C. § 1821 (1982) (last polished by Congress in 1948; 62 Stat. 786).

57. Of course, for some executive functions such as foreign relations and national defense, information must be channeled carefully. For example, some information is provided only to select congressional committees or to courts reviewing it *in camera*, and some information is held entirely within the executive.

58. For an overview of executive privilege and an example of a protracted dispute between the executive and Congress over review of enforcement policy, see P. SHANE & H. BRUFF, *THE LAW OF PRESIDENTIAL POWER* 162-208 (1988).

guilt of the target and the *bona fides* of the decision to forego prosecution. Allegations of a Watergate-style coverup are easy to make and hard to refute to the satisfaction of the public.

### III. APPLYING FUNCTIONAL ANALYSIS TO THE ETHICS IN GOVERNMENT ACT

Hence some dilution of executive branch responsibility for prosecution of high-level crime seems permissible. Critical questions remain, however: how much dilution, and of what kinds? Functional analysis focuses on these questions, balancing the nature and extent of interference with the power of one branch against the purposes that justify the legislative scheme.<sup>59</sup>

In addition, there is a need to make inquiries that define the legitimacy of *any* power exercised within the bureaucracy—whether the nature and strength of the relationships between an officer executing the law and the three constitutional branches are sufficient to ensure preservation of the rule of law.<sup>60</sup> To evaluate the independent counsel statute, I will focus on three central attributes of control over prosecutors: their appointment, supervision, and removal.

#### A. Appointment

The appointments clause of the Constitution authorizes the appointment of unspecified “inferior Officers” by the President

---

59. Judge Ruth Bader Ginsburg’s dissent in *Olson* cogently summarized the approach of the Supreme Court’s most recent functional decision, *Schor*, 106 S. Ct. 3245, which concerned a displacement of judicial power:

*Schor*’s separation of powers analysis turns on the nature and extent of the intrusion, or siphoning off, and the purpose it is designed to serve: “Among the factors upon which we have focused are the extent to which the ‘essential attributes of judicial power’ are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.” 106 S. Ct. at 3258. In the context of removing certain matters from the executive, rather than judicial, branch, *Schor*’s approach counsels a consideration of three factors: the extent of the removal, whether the limitation affects a core executive function, and the purposes of the legislation.

*Olson*, 838 F.2d at 525 (footnote omitted).

60. See generally Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (argues in favor of abandoning a rigid separation of powers compartmentalization of government functions and replacing it with an analysis of separation of functions and checks and balances); Bruff, *supra* note 46.

alone, the heads of departments, or the courts.<sup>61</sup> Because the Act calls for judicial appointment of independent counsel, controversy surrounds whether they are inferior officers in the constitutional sense. In *Ex parte Siebold*,<sup>62</sup> the Court upheld a statute placing appointment of election supervisors in the courts. Congress was trying to enforce the fifteenth amendment by extending broad federal oversight to state regulation of elections to federal office.<sup>63</sup> The supervisors were to monitor elections for fraud or interference; they could register or challenge voters. The Court rejected an argument that the clause should be read according to strict separation of powers principles, so that the courts could appoint only judicial officers, and not those having executive functions.<sup>64</sup>

---

61. The appointments clause provides that 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.

U.S. CONST. art. II, § 2, cl. 2.

62. 100 U.S. 371 (1880). See generally 7 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-1888, 472-80 (Part 2 1987).

63. T. EISENBERG, CIVIL RIGHTS LEGISLATION 896-97 (2d ed. 1987).

64. It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial . . . 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. Take that of marshal, for instance. He is an executive officer, whose appointment, in ordinary cases, is left to the President and Senate. But if Congress should, as it might, vest the appointment elsewhere, it would be questionable whether it should be in the President alone, in the Department of Justice, or in the courts. The marshal is pre-eminently the officer of the courts . . . .

But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress. And, 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 this subject might have given rise. The observation in the case of [*In re Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839)], that the appointing power in the clause referred to "was no doubt intended to be exercised by the department of the government to which the official to be appointed most appropriately belonged," was not intended to define the constitutional power of Congress in this regard, but rather to express the law or rule by which it should be governed. . . . But the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no



The *Siebold* Court included a caveat, however, noting that there was "no such incongruity" in the duty imposed on the courts as to invalidate the statute. Much has been made of this in the independent counsel litigation. The challengers have argued that having judges appoint prosecutors is unconstitutionally "incongruous," because this particular erosion of separation of powers threatens liberty.<sup>65</sup> This is a serious charge. Appraising it requires attention to the Act's exact allocation of appointive powers.

The Ethics in Government Act balances the dangers of underdetering and overdetering executive activity that might lead to criminal prosecution. As noted above, leaving investigation of high level crime to ordinary executive procedures may produce too few prosecutions. Stripping the executive of all control may produce too many.<sup>66</sup> Here a critical feature of the Act is its grant to the Attorney General of unreviewable threshold discretion to terminate the investigation.<sup>67</sup> This serves the executive's strong need to protect against baseless prosecutions, so that courageous decisionmaking will not be chilled.<sup>68</sup>

An unfortunate consequence of this unreviewable discretion is to preserve some opportunity for a coverup, because decisions not

---

such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void. It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depository of official power capable of exercising it. Neither the President, nor any head of department, could have been equally competent to the task.

*Siebold*, 100 U.S. at 397-98.

65. The *Olson* majority thought that if the appointment of inferior officers were not restricted to their own branch, no principled limits could be stated, so that the courts could be authorized to appoint the Secretary of State. 838 F.2d at 494-95. That example perfectly illustrates the possibility of an unacceptable "incongruity"; it is also remote enough from the independent counsel context to suggest that workable distinctions can be made. I will confine my discussion to the case at hand.

66. See *supra* text accompanying notes 22-25.

67. The courts may not review either decisions not to conduct preliminary investigations or decisions not to apply for appointment of independent counsel. See *supra* note 29 and accompanying text.

68. Compare the parallel policy of the tort immunity cases, discussed *supra* at text accompanying notes 22-25. The 1982 reauthorization of the Act removed the original requirement that the Attorney General apply for an independent counsel unless he could state that "the matter is so unsubstantiated that no further investigation or prosecution is warranted," because it led to investigation of cases not ordinarily prosecuted by the Department of Justice. S. REP. NO. 496, 97th Cong., 2d Sess. 14-15 (1982), *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3537, 3550-51. See also *supra* note 31, reporting related efforts in 1982 to clarify applicability of the Department's policies to the activities of independent counsel.

to prosecute are so difficult to monitor. Here, our ultimate protection probably lies with the press, which displays high levels of interest and aggressiveness when government corruption is alleged. Given the rather low threshold that governs the Attorney General's decision to apply for an independent counsel,<sup>69</sup> it is difficult to justify terminating an investigation that appears to have a basis. An additional constraint lies in the Act's requirement that the Attorney General notify the Special Division that a preliminary investigation is being terminated without applying for the appointment of an independent counsel. This notification must be accompanied by a summary of the investigation's results, which the court may disclose to the public.<sup>70</sup>

Regarding the role of the courts in appointing independent counsel, the issue is whether the Act grants courts a power that is "incongruous" with the judicial role. History suggests not. The separation between prosecution and adjudication has never been absolute. Federal judges have traditionally played a limited role in prosecution, by approving search warrants and supervising grand juries.<sup>71</sup> Moreover, in *Young v. United States ex rel. Vuitton Et Fils S.A.*,<sup>72</sup> the Court recently upheld the "inherent" power of federal courts to appoint private attorneys to prosecute contempts of their orders. The Court thought this power necessary to the independence of the judiciary, notwithstanding its potential for undermining the core function of neutral adjudication.<sup>73</sup> In contrast, under the Act courts possess no roving commission to initiate prosecutions on their own.<sup>74</sup> Therefore, threats to neutrality and to liberty

---

69. See *supra* text accompanying note 28. Thus, some overdeterrence problems remain, due to the prospect for continuing thinly based investigations that would ordinarily be dismissed. A compensating factor is the need for public confidence in the integrity of senior officials.

70. 28 U.S.C. § 592(b)(2); *id.* § 593(g). In the absence of such reporting and disclosure mechanisms, the Freedom of Information Act, 5 U.S.C. § 552 (1982 & Supp. IV), might require disclosure of the contents of a preliminary investigation. Litigation would probably be necessary, however, and the court would balance the public and private interests involved, leading to indeterminate results. See generally Vaughn, *Open Government Laws and Public Employment Provisions*, 32 BUFFALO L. REV. 465, 506-10 (1983).

71. See generally *Brown v. United States*, 359 U.S. 41, 49-52 (1959), noting that judges summon witnesses to the grand jury, and bring the contempt power to bear on recalcitrant witnesses.

72. 107 S. Ct. 2124 (1987).

73. Justice Scalia, concurring in the judgment, argued that the contempt power should depend on the willingness of the executive branch to prosecute. *Id.* at 2141-47.

74. See *United States v. Cox*, 342 F.2d 167 (5th Cir.) (en banc), *cert. denied sub nom. Cox v. Hauberg*, 381 U.S. 935 (1965), holding that a district court could not order a United

should be much less than under the scheme approved in *Young*.

### B. Supervision

Like appointment, supervision of an independent counsel is divided between the Attorney General and the Special Division. They share responsibility for defining the jurisdiction of an independent counsel, whose daily operations are then free of supervision by either, except for the possibility of removal or termination of the office. The Attorney General's application for appointment of an independent counsel guides the Special Division's jurisdictional grant.<sup>75</sup> There is some ambiguity here, however, due to the court's power to define the jurisdiction as "all matters related" to those in the application.<sup>76</sup> The court of appeals approved the Special Division's expansion of the jurisdiction requested by the Attorney General in the Iran/Contra affair.<sup>77</sup> Yet in *Olson* the Special Division declined to grant the independent counsel's application for an expansion that the Attorney General had refused to approve.<sup>78</sup> The overall result seems sound—the Attorney General retains the power to forbid investigations that appear to be baseless, and the court has the flexibility to define an independent counsel's jurisdiction in ways that are compatible with the Attorney General's request and that will avoid hypertechnical objections about jurisdiction from defendants.

Once empowered, an independent counsel is subject to few constraints. Surely, the most troubling aspect of the Ethics in Government Act is the specter of a rogue prosecutor, with license to

---

States Attorney to draft or sign indictments as requested by the grand jury. 342 F.2d at 172.

75. The prosecutorial jurisdiction can only be properly defined if the Attorney General provides complete and detailed information to the court about the true nature of the allegations of criminal wrongdoing, any related criminal investigation which are [sic] presently being conducted by the Department, and any information or leads collected as a result of the preliminary investigation which would indicate the potential that further investigation will involve additional related matters.

S. REP. NO. 170, 95th Cong., 1st Sess. 56 (1977), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4217, 4273.

76. 28 U.S.C. § 593(b)(3); see *supra* note 30.

77. *In re Sealed Case (North)*, 829 F.2d 50. The Attorney General subsequently ratified the expansion by making a parallel appointment of the independent counsel in the same terms as the court's jurisdictional grant, in an effort to pretermitt constitutional doubts about the investigation. *Id.* at 52-53.

78. *In re Olson*, 818 F.2d 34.

trample the rights of those within the jurisdictional orbit. To evaluate this possibility, let us compare the pursuit of executive misconduct under the Act with the situation in its absence. The Act attempts to correct incentives for the Attorney General to underprosecute—does it create incentives for an independent counsel to overprosecute?

Without the Act, the Attorney General would have one reason to prosecute executive officers more stringently than other suspects: to demonstrate his own integrity, or that of the administration. Especially in a post-Watergate world, this consideration may play a role. It seems, however, likely to be overborne by competing incentives. The most powerful is probably the personal and political loyalty that exists in any administration. In the rough and tumble of politics, there is never a shortage of outsiders attributing evil character to important officials. Reaction by insiders is only natural. Even absent the siege mentality that develops in times of crisis, such as Watergate, senior Department of Justice officials display attitudes of protectiveness toward their colleagues in the administration.

Moreover, many allegations of executive misconduct involve “abuse of office” crimes, as in *Olson* and the Iran/Contra affair. Here, as both cases illustrate, three factors deter full prosecution. First, suspicion often surrounds not one isolated official, who might be sacrificed to preserve public confidence, but a group of high officials. The reputation of the administration as a whole may be in question. Second, each of the four scandals in this century has involved the Department of Justice, with allegations of personal misconduct on the part of the Attorney General. Third, a background of interbranch conflict with Congress may exacerbate executive branch defensiveness.<sup>79</sup> All of these disincentives to prosecute are strongest at the highest levels of the Justice Department, but they would influence other political appointees as well, such as the Assistant Attorneys General.

Has the creation of the independent counsel overcompensated for these problems? The *Olson* majority credited arguments of the challengers that counsel have incentives to overprosecute, for two

---

79. Indeed, the allegations of false testimony to Congress in *Olson* stem from a protracted, often bitter, controversy over congressional demands for enforcement documents of the Environmental Protection Agency, which the Department of Justice resisted with claims of executive privilege. The story is told in P. SHANE & H. BRUFF, *supra* note 58, at 187-200.

reasons.<sup>80</sup> First, they need to justify their existence, in view of the time and money involved in an investigation. Second, their focus on a single transaction deprives them of the perspective of the Department's seasoned prosecutors, who are protected from obsession with a particular case by the need to place it in context with others. This frame of reference helps to ensure that only cases meriting prosecution under prevailing standards will be pursued.

These are serious yet unpersuasive arguments. The self-justification hypothesis is not borne out by the record to date.<sup>81</sup> Further, there is an offsetting incentive: the prospect of professional embarrassment from the much greater loss of time and money that attends an unsuccessful criminal prosecution. Congress has made clear its desire that the Justice Department's policies bind most decisions by independent counsel.<sup>82</sup> These policies state that prosecution should be initiated only when "the government believes that the person probably will be found guilty by an unbiased trier of fact."<sup>83</sup> A counsel appearing to ignore this directive should expect criticism. Also, the constraints of conscience should affect the decision to prosecute.

As for perspective, analysis above suggests the wisdom of the Act's premise that allegations of executive misconduct distort ordinary prosecutorial judgment in the Department. In addition, there may be disruption of structural arrangements in the Department that normally foster consistency. This problem stems from the comprehensive strictures against conflict of interest that govern all the Department's lawyers.<sup>84</sup> In a given investigation, recusals may

---

80. *Olson*, 838 F.2d at 509-10.

81. Since the Act's inception, four cases have concluded without indictment (Jordan, Kraft, Donovan, Meese). Two (Deaver, Nofziger) have produced both indictment and conviction. Others pend at this writing. See *Washington Post*, Feb. 23, 1988, at A4, col. 1.

82. See *supra* note 31.

83. DEPARTMENT OF JUSTICE MANUAL § 9-27.220 (1987). The *Olson* majority noted that the Iran/Contra counsel had espoused a looser standard, by which he should prosecute "if he finds probable cause to believe that a crime has been committed, . . . ." *Olson*, 838 F.2d at 510. The courts should correct any such misapprehension.

84. See *supra* note 51. In addition, the Department has applied to its attorneys the ABA Model Code of Professional Responsibility, 28 C.F.R. § 45.735-1(b) (1987), whose numerous provisions relating to conflict of interest are summarized in *Young*, 107 S. Ct. at 2135 n.14 (holding that although courts could appoint private attorneys to prosecute contempts of their orders, appointing the attorney for one of the parties to the earlier litigation created an intolerable conflict of interest). See also Kramer & Smith, *The Special Prosecutor Act: Proposals for 1983*, 66 MINN. L. REV. 963, 985-87 (1982) (discussing the application of the ABA standards to the Department).

substantially alter the normal chain of command.<sup>85</sup>

Of course, recusal may ameliorate the personal and political conflicts of interest that gave rise to the Act. Nevertheless, no political appointee charged with investigating a senior member of the administration is wholly free of such conflicts. Moreover, the goal of ensuring public confidence in investigations is unlikely to be met. Whatever the bureaucratic arrangements, the public may believe that a subordinate in the Department is under implicit pressure to clear a high official.

Opponents of the independent counsel often imply that prosecutorial discretion is ordinarily exercised under highly centralized control in the executive branch.<sup>86</sup> Therefore, the argument runs, the Act deeply invades core executive responsibilities. In fact, from the nation's founding to the present, decisions to prosecute particular cases have been rather decentralized in the executive. In the early years, federal prosecutors were largely independent, operating under the loose control of the Secretary of State.<sup>87</sup> Today, the United States Attorneys retain considerable autonomy, the exact extent of which is a matter of bureaucratic politics within the Department of Justice.<sup>88</sup> Within this structure, delicate questions surround the degree of supervision over individual prosecutions that senior officials in the Department and the White House should exercise.<sup>89</sup> The competing considerations are the potential for a case to raise important issues of national policy, most properly resolved

---

85. For example, the Department recently announced its decision that no independent counsel would be sought regarding allegations against former Assistant Attorney General Douglas Ginsburg. The decision was made by another Assistant Attorney General, fifth in rank in the Department, because all higher-ranked officers had recused themselves. *Washington Post*, Feb. 11, 1988, at A1, col. 4-5, to A6, col. 1.

86. See e.g., *Olson*, 838 F.2d at 488. The majority in *Olson* stated: "The Executive has 'exclusive authority and absolute discretion to decide whether to prosecute a case.' *United States v. Nixon*, 418 U.S. 683, 693. . . ." *Id.* This citation is, to say the least, ironic in view of the fact that the Court in *Nixon* allowed the Special Prosecutor to contest the President's view of the executive's needs relating to a pending prosecution.

87. L. WHITE, *THE FEDERALISTS, A STUDY IN ADMINISTRATIVE HISTORY* 406-11 (1948). In 1831, Attorney General Taney opined that the President could discharge a United States Attorney if he refused to discontinue a prosecution that hindered foreign policy, although the President could not himself dismiss the case. *The Jewels of the Princess of Orange*, 2 Op. Att'y Gen. 482.

88. D. MEADOR, *THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE* 138-40, 145-46 (1980).

89. *Id.* at 27-36. Indeed, constitutional concerns now surround the extent of appropriate political responsiveness of the United States Attorneys. See *Branti v. Finkel*, 445 U.S. 507, 524-25 (1980) (Powell, J., dissenting).

by high officials, and the threat that political pressure on prosecutors will invade individual liberties or subvert the public interest. Obviously, these tradeoffs are especially sensitive in cases involving high level crime.

In *United States v. Nixon*,<sup>90</sup> the Court upheld the fragmentation of authority over a pending prosecution within the executive, rejecting the President's claim that he possessed exclusive constitutional authority to decide whether government evidence needed in a pending prosecution should be supplied. Since the President's immediate subordinates faced charges for which he had been named an unindicted co-conspirator, the conflict of interest overtones to the dispute were manifest. The Court's treatment of the issue was conclusory and unilluminating.<sup>91</sup> Nevertheless, *Nixon* stands for the proposition that appropriate exceptions to plenary executive branch control of prosecution can be crafted, at least in situations presenting disabling conflicts of interest.

Still, the executive retains supervisory needs in cases involving official misconduct. These fall into two broad categories. One is to preserve policymaking prerogatives that are distinct from the charging decision. For example, an independent counsel's attempt to subpoena the Canadian Ambassador recently provoked State Department objections that the executive's foreign policy powers had been infringed.<sup>92</sup> The other need, which I have discussed, is to forestall baseless prosecutions of officials. Both can be satisfied under the Act's present structure.

Litigation unrelated to the Act routinely involves claims by the executive that information in its possession should not be disclosed, or that the court should defer to the executive's substantive policy judgments.<sup>93</sup> For example, courts review whether documents have been properly classified, and determine whether claims of the state secrets privilege should be honored.<sup>94</sup> Similarly, the executive asks courts to honor its judgment that the Act of State doctrine should bar inquiry into the actions of a foreign government, or that a certain foreign government should be recognized as

---

90. 418 U.S. 683 (1974).

91. See generally Symposium, *United States v. Nixon*, 22 UCLA L. REV. 4 (1974).

92. See *Olson*, 838 F.2d at 503.

93. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (validity of Iranian hostage settlement); *United States v. Reynolds*, 345 U.S. 1 (1952) (availability of government information in tort litigation).

94. See generally P. SHANE & H. BRUFF, *supra* note 58, at 154-56.

legitimate.<sup>95</sup> Although the courts often defer to these executive judgments, they retain their power to "say what the law is."<sup>96</sup> Thus, the executive must submit many of its positions to judicial resolution, even when national security or foreign policy is involved. The Act preserves the executive's opportunity to present its views on such issues.<sup>97</sup> In most situations, the Constitution requires no more.

### C. Removal

The executive's ultimate protection for its constitutional prerogatives lies in the power to remove an independent counsel who will not honor them. Indeed, in *Bowsher v. Synar* the Court equated removal power with control of an officer for separation of powers purposes.<sup>98</sup> Therefore, the Act's removal provisions are central to the constitutionality of the scheme. The Attorney General may remove an independent counsel for "good cause," subject to judicial review.<sup>99</sup> The legislative history rather disingenuously explains that the "good cause" standard is meant to invoke existing law on the removal of independent officers.<sup>100</sup> This body of "law," however, consists entirely of speculation by observers on what might suffice to justify a removal, because Presidents have not asserted specific cause when removals have actually occurred.<sup>101</sup> Therefore, the ambiguity of the statutory text and its history might best be viewed as an invitation to the courts to allow removal for reasons necessary to the Act's constitutionality and consistent with its efficacy. But what does that mean?

---

95. See T. FRANCK & M. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW* 211-14, 443-59 (1987).

96. The quote, of course, is from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and often appears in place of analysis when a court asserts its power to decide a question that could be allocated to one of the other branches. See, e.g., *United States v. Nixon*, 418 U.S. at 703; see also Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30, 34 (1974) ("[T]here is nothing in *Marbury* . . . that precludes a constitutional interpretation which gives final authority to another branch").

97. 28 U.S.C. § 597(b) confirms the Attorney General's authority to appear as amicus curiae in cases involving independent counsel.

98. The court stated: "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." *Bowsher v. Synar*, 106 S. Ct. at 3188 (quoting *Synar v. United States*, 626 F. Supp. 1374, 1401 (D.D.C. 1986)).

99. 28 U.S.C. § 596; see also *supra* note 32.

100. See *supra* note 32.

101. See generally P. SHANE & H. BRUFF, *supra* note 58, at 290-327.



The legislative history of the removal provision does say that counsel must not be removed for defying executive orders that would compromise the integrity of the proceedings, such as an order to grant unwarranted immunity to the targets of the investigation.<sup>102</sup> On a facial challenge to the Act, it should be enough to read this statement to allow removal for either of two grounds: interference with the executive's independent constitutional prerogatives, for example in foreign policy, or pursuit of a baseless prosecution.<sup>103</sup> Of course, either kind of removal could threaten the "integrity of the proceedings" and the efficacy of the Act. Here, judicial review of an actual removal would play a critical role. Thus, an examination of the nature of judicial review is necessary.

Given the *Bowsher* Court's equation of removal power with constitutional control of an officer, judicial review must tread a narrow line. Too little, and the Act's central purpose to guarantee a degree of independence from the executive is vitiated; too much, and the reins pass to the judiciary, creating severe separation of powers difficulties by vesting executive functions in courts. The *Olson* majority characterized judicial review under the Act as *de novo* in nature, and therefore concluded that the court's powers over counsel were excessively supervisory.<sup>104</sup> This reading conflicts with the Act's legislative history.<sup>105</sup> Instead, courts should apply the familiar standard of "arbitrary and capricious" review under the Administrative Procedure Act (APA).<sup>106</sup> The APA standard would govern review in the absence of a special statutory standard. The

---

102. 28 U.S.C. § 596; *see also supra* note 32.

103. The latter ground for removal would protect the executive's constitutional power to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. Of course, the President retains his ultimate pardon power. U.S. CONST. art. II, § 2. *See generally* P. SHANE & H. BRUFF, *supra* note 58, at 439-43.

104. *Olson*, 838 F.2d at 501-02.

105. In deciding that removal of a special prosecutor should only be for the causes described above, and should only be accomplished by the personal action of the Attorney General, the Committee was attempting to balance the need for independence for a special prosecutor with the desire, for constitutional and other reasons, that the division of the court not be engaged in supervision of the special prosecutor. In order to exercise the removal power, a certain degree of supervision is required and the Committee felt it appropriate that this supervision be conducted by the Attorney General, who is a member of the executive branch of the government.

S. REP. NO. 170, 95th Cong., 1st Sess. 73 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4217, 4289.

106. 5 U.S.C. § 706(2)(a) (1982).

Act's most recent reauthorization called for existing law to apply.<sup>107</sup>

Accordingly, courts should inquire whether a removal "was based on a consideration of the relevant factors and whether there has been a clear error of judgment."<sup>108</sup> Because this style of review is restrained, and is not supposed to substitute the court's judgment for that of the administrator, concerns about the constitutionality of the judicial role should be laid to rest. At the same time, the courts would provide a check on the Attorney General by reviewing the justification provided for a removal. The risk that the Act's purposes might still be undermined by the threat of removals based on the minimum support necessary to survive judicial review seems illusory in light of the political furor that is likely to follow any debatable removal.

Incorporating the existing APA standard would follow the tradition of interpreting statutes in ways that preserve their constitutionality.<sup>109</sup> The same approach should be taken to interpreting the power of the Special Division to terminate an independent counsel. The legislative history emphasizes that this authority is meant to apply only to a "runaway" counsel, and is not to displace the principal allocation of removal power to the executive.<sup>110</sup>

#### IV. CONCLUSION

Overall, the Ethics in Government Act should satisfy a functional analysis. It leaves enough power in the executive for the discharge of its core constitutional responsibilities. Further, the sum of controls vested in the executive and the courts should adequately bind independent counsel to law. However, they still possess a large amount of discretion. Nevertheless, some highly important

---

107. 28 U.S.C. § 596; *see supra* note 32.

108. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *see also* G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* 165-79 (3d ed. 1986).

109. The statutory standard applicable at the time *Olson* was decided, allowing reversal for "error of law or fact," 28 U.S.C. § 596(a)(3) (Supp. III 1985), could easily be conformed to the APA standard.

110. "This paragraph provides for the unlikely situation where a special prosecutor may try to remain as special prosecutor after his responsibilities under this chapter are completed. . . . The drastic remedy of terminating the office of special prosecutor without the consent of the special prosecutor should obviously be exercised with caution." S. REP. NO. 170, 95th Cong., 1st Sess. 75 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4217, 4291.

functions in our government are committed to officers who are largely independent of daily supervision by any of the three branches. A few examples will help to place the Act in a broader perspective. If it is unconstitutional, many other statutes may be as well.

The current challenge to the Act occurs against a background of controversy about the constitutionality of independent agencies.<sup>111</sup> They perform important executive tasks free of plenary presidential supervision. A prominent example is the Federal Reserve Board's central role in the economy.<sup>112</sup> Other independent officers are scattered throughout the government, often in watchdog roles that can be analogized to the independent counsel.<sup>113</sup> Examples include the Comptroller General<sup>114</sup> and the Inspectors General.<sup>115</sup>

The Supreme Court has linked the appropriate independence of officers to the nature of the functions they perform.<sup>116</sup> This suggests that permissible kinds and degrees of independence must ordinarily be decided in the context of a particular administrative scheme, not by sweeping generalizations about the separation of powers.<sup>117</sup> This Article is one such particularistic effort; the others must wait for another day.

---

111. See generally Symposium, *The Uneasy Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 277 (1987); Symposium, *Bowsher v. Synar*, 72 CORNELL L. REV. 421 (1987); Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (1987); Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779.

112. See generally W. MELTON, *INSIDE THE FED* (1985).

113. See generally Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U.L. REV. 59 (1983).

114. See *Bowsher v. Synar*, 106 S. Ct. 3181.

115. INSPECTOR GENERAL ACT OF 1978, 5 U.S.C. App. § 3 (1982).

116. See, e.g., *Wiener v. United States*, 357 U.S. 349, 352-53 (1958) (War Claims Commissioner not removable at will of President despite lack of statutory restriction, because adjudicative functions require independence).

117. See Strauss, *supra* note 37; Bruff, *supra* note 33.

