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## Independent Counsels Under the Ethics in Government Act of 1978: A Violation of the Separation of Powers Doctrine or an Essential Check on Executive Power?

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## I. INTRODUCTION

When Watergate Special Prosecutor Archibald Cox attempted to investigate allegations of misconduct by officials in the Nixon administration, President Richard Nixon ordered him fired.<sup>1</sup> Although Leon Jaworski replaced Cox as Watergate Special Prosecutor,<sup>2</sup> the President's dismissal of Cox patently demonstrated that the executive branch could not carry out an impartial investigation of its own mem-

1. Kneeland, *Bork Takes Over*, N.Y. Times, Oct. 21, 1973, § 1, at 1, col. 8. Attorney General Elliot Richardson appointed Cox pursuant to a Department of Justice regulation that created the Office of Watergate Special Prosecution Force. See 38 Fed. Reg. 14,688 (June 4, 1973). Under the regulation, Cox could be removed only for "extraordinary improprieties." *Id.* President Nixon ordered Cox' dismissal when Cox insisted that the President turn over numerous tape recordings of White House conversations. Finding that Cox had committed no "extraordinary improprieties" to justify his removal, a United States district court subsequently held that President Nixon's discharge of Archibald Cox violated the Department of Justice regulation creating the office. *Nader v. Bork*, 366 F. Supp. 104, 108 (D.D.C. 1973).

2. Herbers, *Nixon Names Saxbe Attorney General; Jaworski Appointed Special Prosecutor*, N.Y. Times, Nov. 2, 1973, at 1, col. 5. Acting Attorney General, Robert H. Bork, appointed Jaworski pursuant to a regulation similar to the one under which Cox was appointed. See 38 Fed. Reg. 30,738 (Nov. 7, 1973).

bers. In response to this fundamental conflict of interest, Congress enacted the Ethics in Government Act of 1978.<sup>3</sup> The Ethics Act provides for the appointment of independent counsels to investigate and prosecute certain high level executive officers suspected of criminal violations.<sup>4</sup> To ensure that these independent counsels may act without bias, the Act vests significant authority over their appointment, supervision, and removal in the judicial rather than in the executive branch of the federal government.

The notion of removing a prosecutor from the supervision of the executive branch has been the subject of controversy since Watergate.<sup>5</sup> This controversy stems from concern that the independent counsels' close relationship with the judicial branch may contravene the separation of powers doctrine.<sup>6</sup> In 1987, this controversy contin-

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3. Pub. L. No. 95-521, §§ 601-602, 92 Stat. 1824, 1867-74 (codified as amended at 28 U.S.C. §§ 49, 591-598 (1982 & Supp. III 1985)) [hereinafter Ethics Act].

In an effort to renew the independent counsel provisions of the Ethics Act, with amendments, for a period of five years, Congress recently passed the Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (to be codified at 28 U.S.C. §§ 591-599 (enacted Dec. 15, 1987)). Except for those provisions specifically mentioned in section 6(b)(2) of the Reauthorization Act, the Reauthorization Act does not take effect for any investigations that were pending on December 15, 1987, the date of enactment of the Reauthorization Act. The constitutionality of the office of independent counsel is currently being challenged before the Supreme Court of the United States by Theodore Olson, whose investigation was pending when Congress passed the Reauthorization Act. Thus, any textual reference in this Comment to the independent counsel legislation refers to the version of the Ethics Act currently in effect for investigations that were pending on December 15, 1987.

The provisions of the Reauthorization Act, however, represent no major departure from those of the Ethics Act, and are thus not likely to have a significant effect on the constitutionality of the office of independent counsel.

4. Those officers subject to the Act include the President, Vice President, Director of Central Intelligence, Commissioner of Internal Revenue, the heads of the Cabinet departments, and numerous subordinate executive officers. 28 U.S.C. § 591(b) (1982). Other individuals who are not officers in the government may nonetheless be subject to the Act. 28 U.S.C. § 591(b)(6)-(b)(8), (c) (1982). Such individuals include the chairman and treasurer of the national campaign committee seeking the election or reelection of the incumbent President. 28 U.S.C. § 591(b)(8) (1982).

When Congress enacted the Ethics Act in 1978, Congress used the term "special prosecutor." In 1983, Congress amended the Act to refer to the prosecutor as "independent counsel." Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, § 2, 96 Stat. 2039, 2039 (1983). Members of Congress determined that the words "special prosecutor" created undue negative publicity for a person under investigation, primarily because of the Watergate stigma associated with the term. S. REP. NO. 496, 97th Cong., 2d Sess. 18, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 3537, 3554.

5. Compare *Special Prosecutor: Hearings Before the Comm. on the Judiciary United States Senate*, 93d Cong., 1st Sess. 449 (1973) (testimony of Robert H. Bork, Acting Attorney General) (arguing that the special prosecutor legislation is unconstitutional) with *Special Prosecutor: Hearings Before the Comm. on the Judiciary United States Senate*, 93d Cong., 1st Sess. 319 (1973) (testimony of Philip B. Kurland, Professor of Law, University of Chicago) (arguing that the special prosecutor legislation is constitutional).

6. See *id.*

ued as former National Security Council member Oliver North,<sup>7</sup> former White House deputy chief of staff Michael Deaver,<sup>8</sup> and former Assistant Attorney General Theodore Olson<sup>9</sup> brought suit in federal court challenging the constitutionality of the Ethics Act on separation of powers grounds. Opponents of the Ethics Act claim that the Act vests the independent counsel with substantial authority to enforce the law and prosecute offenders<sup>10</sup>—both traditionally executive functions—and that the Act thus violates separation of powers principles by conferring on the judiciary the power to appoint, remove, and supervise officers exercising executive functions.<sup>11</sup>

In *In re Sealed Case*,<sup>12</sup> the Court of Appeals for the District of Columbia Circuit held that the independent counsel provisions of the Ethics Act are unconstitutional.<sup>13</sup> The D.C. Circuit's ruling, pending an appeal to the Supreme Court of the United States, threatens the

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7. *In re Sealed Case*, 666 F. Supp. 231 (D.D.C.) (upholding the authority of an independent counsel under Attorney General's regulation), *aff'd*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 753 (1988).

The current challenges to the constitutionality of the Ethics Act are not likely to affect the investigation of Oliver North by independent counsel Lawrence Walsh. Even if the Supreme Court eventually declares the Act unconstitutional, Walsh's investigation would remain valid because Walsh accepted a parallel appointment as independent counsel from the Department of Justice. *But see* Crovitz, *Independent Counsels: Quo Warranto?*, Wall St. J., Feb. 9, 1988, at 38, col. 3.

8. *Deaver v. Seymour*, 656 F. Supp. 900 (D.D.C.) (denying plaintiff's motion for a preliminary injunction against an independent counsel under the Ethics Act), *aff'd*, 822 F.2d 66 (D.C. Cir.), *cert. denied*, 108 S. Ct. 99 (1987).

9. *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988) (2-1 decision), *rev'g*, 665 F. Supp. 56 (D.D.C. 1987) (mem.), *prob. juris. noted sub nom.* Morrison v. Olson, 108 S. Ct. 1010 (1988).

10. See 28 U.S.C. § 594 (1982).

11. See, e.g., Memorandum in Support of Plaintiff's Motion for Summary Judgment, North v. Walsh, 656 F. Supp. 414 (D.D.C. 1987) (Nos. 87-0457, 87-0626) [hereinafter North's Memorandum in Support of Summary Judgment]; Memorandum in Support of Plaintiff's Application for a Preliminary Injunction, *Deaver v. Seymour*, 656 F. Supp. 900 (D.D.C. 1987) (No. 87-0477) [hereinafter Deaver's Memorandum in Support of Preliminary Injunction]; Brief on Behalf of Amicus Curiae United States, *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988) (Nos. 87-5261, 87-5264, 87-5265). *But see*, e.g., Brief for Independent Counsel Lawrence E. Walsh as Amicus Curiae, *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988) (Nos. 87-5261, 87-5264, 87-5265); Brief of United States Senate as Amicus Curiae, *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988) (Nos. 87-5261, 87-5264, 87-5265); Brief of the Speaker and Bipartisan Leadership Group of the United States House of Representatives, *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988) (Nos. 87-5261, 87-5264, 87-5265); Brief of Common Cause as Amicus Curiae, *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988) (Nos. 87-5261, 87-5264, 87-5265); Brief of American Bar Association as Amicus Curiae, *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988) (Nos. 87-5261, 87-5264, 87-5265).

12. 838 F.2d 476 (D.C. Cir. 1988) (2-1 decision), *rev'g*, 665 F. Supp. 56 (D.D.C. 1987) (mem.), *prob. juris. noted sub nom.* Morrison v. Olson, 108 S. Ct. 1010 (1988).

13. *In re Sealed Case*, 838 F.2d 476, 481 (D.C. Cir. 1988). *In re Sealed Case* involved a challenge to the constitutionality of independent counsels under the Ethics Act brought by former Assistant Attorney General Theodore Olson. Olson is under investigation by independent counsel Alexia Morrison.

elimination of independent counsels and raises, once again, the specter of an executive branch responsible for policing itself.

This Comment examines the constitutionality of the independent counsel legislation within the context of the separation of powers doctrine. Section II explores the genesis of the law as a product of Watergate. Section III examines the two principal issues arising from the appointment provisions of the Ethics Act: First, whether the independent counsel is an "inferior officer" under the appointments clause of the Constitution;<sup>14</sup> and second, if the independent counsel is an "inferior officer," whether it is constitutional to vest the appointment of the independent counsel, an executive officer, in a court of law. Section IV analyzes those provisions of the Ethics Act that confer upon the judiciary the authority to remove the independent counsel and define his prosecutorial jurisdiction. Finally, Section V concludes that the independent counsel provisions of the Ethics Act do not violate the doctrine of separation of powers, but are a constitutionally valid response to the need for checks and balances in the investigation and prosecution of high level executive officers.

## II. THE LAW AND ITS ORIGINS

### A. *Legislative History: The Lessons of Watergate*

Several factors prompted Congress to enact a statute creating an independent counsel. Initially, members of Congress believed it would be unrealistic and naive to expect the Attorney General's office to vigorously and impartially investigate executive officers.<sup>15</sup> Because the President nominates the Attorney General and serves as his superior, the Attorney General's ability to impartially investigate key members of the President's administration, including the President himself, is suspect.<sup>16</sup> In many cases, the Attorney General has been the President's long-time personal friend or colleague.<sup>17</sup> Thus, when the Department of Justice must investigate executive officers, it is faced with a potential conflict of interest on both a personal and professional level.<sup>18</sup>

Members of Congress felt that such a conflict should be addressed similar to the way conflicts of interest are addressed by the

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14. U.S. CONST. art. II, § 2, cl. 2.

15. S. REP. NO. 170, 95th Cong., 2d Sess. 5, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4216, 4221 [hereinafter S. REP. No. 170].

16. *Id.* at 6.

17. Taylor, *Meese Fits Attorneys General Mold: Close Ties to the Chief*, L.A. Daily J., Jan. 31, 1984, at 4, col. 3 (Presidents of the United States have traditionally chosen personal, business, or political associates to serve as Attorney General).

18. S. REP. NO. 170, *supra* note 15, at 5-6.

private bar.<sup>19</sup> When private attorneys are faced with a conflict of interest, the American Bar Association, according to the Model Rules of Professional Conduct, suggests that attorneys recuse themselves.<sup>20</sup> Members of Congress reasoned that the government should strive, as do private lawyers, to avoid even the appearance of bias.<sup>21</sup> For even the perception of a conflict of interest may undermine the public's confidence in the Department of Justice and damage the legitimacy of the executive branch.<sup>22</sup> Aside from avoiding these problems, members of Congress believed that the objectivity of an independent counsel could improve the thoroughness and efficacy of investigations, while enhancing their deterrent effect on future violations.<sup>23</sup>

In attempting to eliminate this conflict of interest through the enactment of the independent counsel legislation, Congress sought, for constitutional reasons, to ensure a proper balance between the autonomy of the independent counsel and the need to maintain some relation between the independent counsel and the executive branch.<sup>24</sup> Because, as a prosecutor, the independent counsel performs executive functions,<sup>25</sup> creating an absolute dichotomy between the independent counsel and the executive branch would appear to violate separation of powers principles.<sup>26</sup> To overcome this constitutional hurdle, Congress created an independent counsel who possesses considerable autonomy, yet who retains some relation to the executive branch.<sup>27</sup>

### B. *A Statutory Overview*

The Ethics Act gives the Attorney General the sole authority to decide whether sufficient grounds exist for the appointment of an independent counsel.<sup>28</sup> Upon receiving information that an official who is subject to the Act<sup>29</sup> has violated a federal criminal law, other than certain classes of misdemeanors, the Attorney General may conduct a preliminary investigation to assess whether an independent

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19. *Id.* at 6.

20. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 comment (1983) ("A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.").

21. S. REP. NO. 170, *supra* note 15, at 6-7.

22. See *id.*

23. *Id.* at 7.

24. *Id.* at 73.

25. See *infra* notes 151-52 and accompanying text.

26. See S. REP. NO. 170, *supra* note 15, at 73.

27. See *id.*

28. 28 U.S.C. § 592(b)(1) (1982).

29. For a list of those individuals subject to the Act, see *supra* note 4.

counsel should be appointed.<sup>30</sup> If, after conducting the preliminary investigation, the Attorney General "finds reasonable grounds to believe that further investigation or prosecution is warranted,"<sup>31</sup> he must then apply for the appointment of an independent counsel.<sup>32</sup> If he determines that there is no need for further investigation, no independent counsel can be appointed.<sup>33</sup> In either case, the Attorney General's decision is not subject to judicial review.<sup>34</sup>

After making a determination as to whether an independent counsel should be appointed, the Attorney General's involvement in the investigation and prosecution of the particular individual is primarily over.<sup>35</sup> If the Attorney General finds that such an appoint-

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30. 28 U.S.C. § 591(a) (Supp. III 1985). In determining whether to proceed with the preliminary investigation, the Attorney General is to consider "the degree of specificity of the information received, and . . . the credibility of the source of the information." 28 U.S.C. § 592(a)(1)(A)-(a)(1)(B) (1982). In deciding whether to initiate this investigation, the Attorney General is to filter out only groundless or frivolous allegations. S. REP. NO. 170, *supra* note 15, at 53-55. The Attorney General does not have his usual discretion to decide that, although the claim may not be frivolous, the particular individual should not be prosecuted for other reasons. He merely performs the administrative duty of rejecting baseless claims. The Attorney General may also be asked to conduct a preliminary investigation upon a majority vote of the minority or majority party members of the Committee on the Judiciary of either House of Congress. 28 U.S.C. § 595(e) (1982).

During the preliminary investigation phase, the Attorney General's powers are severely restricted. 28 U.S.C. § 592(a)(2) (1982) ("In conducting preliminary investigations . . . the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas.").

31. 28 U.S.C. § 592(c)(1) (1982). In this case as well, the Attorney General need only decide whether the claim is frivolous, based on his preliminary investigation. S. REP. NO. 170, *supra* note 15, at 55.

32. 28 U.S.C. § 592(c)(1) (1982).

33. 28 U.S.C. § 592(b)(1) (1982). If the Attorney General decides that an independent counsel should not be appointed, he must submit a "memorandum [to the special division of the court] containing a summary of the information received and a summary of the results of any preliminary investigation." 28 U.S.C. § 592(b)(2) (1982). The fact that the special division may make this report public provides a check against the Attorney General's decisions. S. REP. NO. 496, 97th Cong., 2d Sess. 15, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3537, 3551. *But cf.* 28 U.S.C. § 592(b)(3) (1982) (Attorney General's report cannot be made public without the approval of the special division).

34. The Ethics Act explicitly provides that decisions to appoint an independent counsel are not subject to judicial review. 28 U.S.C. § 592(f) (1982). Judicial review of a decision by the Attorney General not to seek appointment of an independent counsel appears to be precluded by judicial decisions, although the Act does not directly address this question. *See Banzhaf v. Smith*, 737 F.2d 1167, 1169-70 (D.C. Cir. 1984); 28 U.S.C. § 592(b)(1) (1982); *see also* Note, *The Ethics in Government Act of 1978: Problems with the Attorney General's Discretion and Proposals for Reform*, 1985 DUKE L.J. 497, 507 (courts may not review an Attorney General's decision under the Ethics Act); Comment, *Banzhaf v. Smith: Judicial Review Under the Independent Counsel Provisions of the Ethics in Government Act*, 70 IOWA L. REV. 1339, 1346-51 (1985) (criticizing the *Banzhaf* court for holding that an Attorney General's decision is not reviewable).

35. Once the special division appoints an independent counsel, the Attorney General can remove the independent counsel "only for good cause." 28 U.S.C. § 596(a)(1) (1982).

ment is warranted, it then becomes the responsibility of a special division of the United States Court of Appeals for the District of Columbia Circuit<sup>36</sup> to select a particular individual to serve as independent counsel.<sup>37</sup> This special division also defines the prosecutorial jurisdiction of the independent counsel and thus determines who may be subject to investigation.<sup>38</sup> The special division is composed of three judges who are appointed to two-year terms by the Chief Justice of the United States.<sup>39</sup>

An independent counsel is vested with extremely broad power in the performance of his duties.<sup>40</sup> The Act provides that he is to exercise "independent authority"<sup>41</sup> so that members of the executive branch will be unable to influence the way in which he fulfills his responsibilities.<sup>42</sup> He can "[review] all documentary evidence avail-

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36. 28 U.S.C. § 49 (1982).

37. 28 U.S.C. § 593(a)-(b) (1982). The special division of the court must appoint an independent counsel when so requested. 28 U.S.C. § 593(b) (1982). The independent counsel who is appointed cannot be someone "who holds or recently held any office of profit or trust under the United States." 28 U.S.C. § 593(d) (1982).

38. 28 U.S.C. § 593(b) (1982). The special division may expand the jurisdiction of the independent counsel during the course of an investigation. 28 U.S.C. § 594(e) (1982); S. REP. NO. 170, *supra* note 15, at 65.

39. 28 U.S.C. § 49(a), (d) (1982).

40. *See* 28 U.S.C. § 594 (1982). Apparently, the only limitation on the independent counsel's power is the authority retained by the Attorney General with regard to wiretaps. *See* 28 U.S.C. § 594(a) (1982) ("[T]he Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18 [Attorney General's authorization required for interception of wire, oral, or electronic communication by Federal Bureau of Investigation or other federal agency]."); S. REP. NO. 170, *supra* note 15, at 67.

41. 28 U.S.C. § 594(a) (1982).

42. S. REP. NO. 170, *supra* note 15, at 66-67. The lack of executive supervision over the independent counsel in the conduct of prosecutions may be problematic in the area of foreign affairs. *See* North's Memorandum in Support of Summary Judgment, *supra* note 11, at 38-42. In the course of an investigation, an independent counsel may try to elicit information from a foreign government. A prime example is Whitney North Seymour's attempt to obtain information from the Canadian Government. Seymour, the independent counsel investigating Michael Deaver, served a subpoena on Canada's Ambassador to the United States. A federal court quashed the subpoena. *United States v. Deaver*, No. 87-096 (D.D.C. June 22, 1987). Seymour then sent a letter to the Ambassador that was laced with implicit threats that a failure to cooperate might have repercussions for Canada. *Seymour v. North America*, Wall St. J., Oct. 16, 1987, at 30, col. 1; *Independent Counsel Is No Diplomat*, Wall St. J., Oct. 16, 1987, at 30, col. 3. The incident seriously angered the Canadian Government and it subsequently demanded that the Department of State take action. Once again, the Department of Justice had to seek relief in court. *Seymour v. North America*, *supra*, at 30, col. 1; *Independent Counsel Is No Diplomat*, *supra*, at 30, col. 3.

Such incidents may recur. Because the law focuses on the conduct of the highest executive officials, United States foreign policy may occasionally be implicated due to the tendency of prominent executive officers to deal with matters of international import. Because any communication between the United States Government and a foreign country can affect United States foreign policy, an unsupervised independent counsel may undermine ongoing



able from any source,"<sup>43</sup> receive national security clearance,<sup>44</sup> pursue indictments,<sup>45</sup> and initiate prosecutions<sup>46</sup> and appeals.<sup>47</sup> Although the independent counsel generally must comply with Department of Justice policies, he may deviate from such policies if compliance is "not possible."<sup>48</sup>

To preserve the autonomy of the independent counsel, the authority of the executive branch to remove an independent counsel is strictly limited.<sup>49</sup> Of those officers in the executive branch, only the Attorney General can remove an independent counsel,<sup>50</sup> and "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."<sup>51</sup> The Attorney General's "for cause"

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diplomatic objectives. Seymour's attempt to gain information from the Canadian Ambassador, for example, occurred at a delicate time in Canadian-American free trade negotiations. See *Seymour v. North America*, *supra*, at 30, col. 1.

43. 28 U.S.C. § 594(a)(4) (1982). To aid him in his task, the independent counsel can appoint subordinates as he deems necessary. 28 U.S.C. § 594(c) (1982). The independent counsel may also request the services of the Federal Bureau of Investigation in gathering information. See 28 U.S.C. § 594(d) (1982); S. REP. NO. 170, *supra* note 15, at 68.

44. 28 U.S.C. § 594(a)(6) (1982). As with the Watergate Special Prosecutor, the independent counsel can challenge in court "any claim of privilege or attempt to withhold evidence on grounds of national security." *Id.*

In response to the demands of the Watergate Special Prosecutor that President Nixon comply with a subpoena duces tecum and release certain tape recordings of White House conversations, the President invoked the doctrine of executive privilege. The Supreme Court ordered the production of the tapes and held that the need for information in a criminal prosecution had to prevail over the President's general interest in confidentiality. *United States v. Nixon*, 418 U.S. 683, 712-13 (1974).

45. 28 U.S.C. § 594(a)(1) (1982).

46. 28 U.S.C. § 594(a)-(a)(2) (1982).

47. 28 U.S.C. § 594(a)(3) (1982). The independent counsel can also dismiss a matter within his jurisdiction. 28 U.S.C. § 594(g) (1982).

48. 28 U.S.C. § 594(f) (1982). The power of the independent counsel to decide not to follow Department of Justice policies underscores his autonomy from the executive branch. Although the Ethics Act establishes a presumption that the independent counsel will follow Department of Justice policies except in extreme cases, an independent counsel's failure to adhere to such policies should not be construed as grounds for removal by the Attorney General. S. REP. NO. 496, 97th Cong., 2d Sess. 16-17, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3537, 3552-53.

The independent counsel is subject to general reporting requirements and congressional oversight. 28 U.S.C. § 595 (1982). This includes periodically apprising Congress of his activities. 28 U.S.C. § 595(a) (1982). An independent counsel must also submit a report to the special division detailing the final disposition of a matter. 28 U.S.C. § 595(b)(1)-(b)(2) (1982). Such a report allows the special division to evaluate the independent counsel's decisions. S. REP. NO. 170, *supra* note 15, at 70-71. Presumably, further action could be taken regarding the subject of the investigation if the special division finds that the independent counsel's performance was deficient in some way. See *id.*

49. See 28 U.S.C. § 596 (1982 & Supp. III 1985).

50. 28 U.S.C. § 596(a)(1) (1982).

51. *Id.*

removal power, however, is subject to judicial review by the United States District Court for the District of Columbia.<sup>52</sup> The district court may, if it finds that the Attorney General has removed an independent counsel without good cause, reinstate the independent counsel or grant other appropriate relief.<sup>53</sup> Moreover, the special division itself may remove an independent counsel "at any time, on the ground that the investigation . . . [has] been completed or so substantially completed" that the Department of Justice may complete the investigation or prosecution.<sup>54</sup> In either case, the ultimate removal power over the independent counsel lies with the judicial branch.

### III. APPOINTMENT OF THE INDEPENDENT COUNSEL

The Ethics Act authorizes a special division of the D.C. Circuit to appoint an independent counsel upon the request of the Attorney General.<sup>55</sup> This legislative delegation of appointment power to an article III court raises two distinct constitutional issues arising from the language of the appointments clause of the Constitution. The appointments clause states:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>56</sup>

The appointments clause thus establishes two methods of appointing officers of the United States. The first method provides that certain officers, who may be referred to as "principal officers," must be appointed by the President with the advice and consent of the Senate. The second method of appointment provides that Congress may, if it chooses, vest the appointment of "inferior officers" in the President

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52. Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, § 2, 101 Stat. 1293, 1305.

53. *Id.* This review power serves to discourage the President or the Attorney General from unjustifiably firing an independent counsel.

54. 28 U.S.C. § 596(b)(2) (1982). The special division is only to exercise its removal power if an independent counsel attempts to stay in office after his investigation is completed. S. REP. NO. 170, *supra* note 15, at 75 ("[Section 596(b)(2)] provides for the unlikely situation where a special prosecutor may try to remain as special prosecutor after his responsibilities . . . are completed.").

55. 28 U.S.C. § 593(b) (1982).

56. U.S. CONST. art. II, § 2, cl. 2.

alone, in the courts, or in the heads of departments. Those challenging the constitutionality of the Ethics Act have argued that the independent counsel is not an inferior officer within the meaning of the appointments clause, and therefore that he must be nominated by the President and confirmed by the Senate.<sup>57</sup> Further, opponents of the Act claim that, even if the independent counsel is an inferior officer, the Constitution does not allow Congress to vest the inter-branch appointment of executive officers in the judiciary.<sup>58</sup>

A. *The Definition of "Inferior Officer" Under  
the Appointments Clause*

The appointments clause of the Constitution applies only to "officers of the United States." Accordingly, an analysis of the constitutional challenges to the independent counsel legislation requires an initial determination as to whether the independent counsel is an officer of the United States. In *Buckley v. Valeo*,<sup>59</sup> the Supreme Court held that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' "<sup>60</sup> and must be appointed in accordance with the appointments clause.<sup>61</sup> Under this reasoning, because the independent counsel possesses "significant authority pursuant to the laws of the United States,"<sup>62</sup> he is an officer of the United States, and therefore must be appointed pursuant to the appointments clause.<sup>63</sup>

The appointments clause authorizes appointments in only two ways: Either the President nominates an officer with the advice and consent of the Senate, or Congress vests the appointment of an officer, specifically an "inferior officer," in the President, the courts, or the head of a department.<sup>64</sup> It is thus necessary to determine whether the independent counsel is an inferior or principal officer under the appointments clause.

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57. North's Memorandum in Support of Summary Judgment, *supra* note 11, at 34-38; Deaver's Memorandum in Support of Preliminary Injunction, *supra* note 11, at 15-16.

58. North's Memorandum in Support of Summary Judgment, *supra* note 11, at 43-51; Deaver's Memorandum in Support of Preliminary Injunction, *supra* note 11, at 16-20.

59. 424 U.S. 1 (1976).

60. *Id.* at 126.

61. *Id.*; see also *United States v. Germaine*, 99 U.S. 508, 510 (1878) (all officers of the United States are to be appointed according to one of the two methods specified in the appointments clause).

62. *Buckley*, 424 U.S. at 126. The broad powers of the independent counsel are delineated at 28 U.S.C. § 594 (1982).

63. See *Buckley*, 424 U.S. at 126.

64. *Id.* at 125-27.

1. *In re Sealed Case*

In striking down the independent counsel legislation, the United States Court of Appeals for the District of Columbia Circuit in *In re Sealed Case*<sup>65</sup> held that the independent counsel is not an inferior officer within the meaning of the appointments clause,<sup>66</sup> but a principal officer, who may be appointed only by the President with the advice and consent of the Senate.<sup>67</sup> In reaching this conclusion, the majority read the Supreme Court's decision in *United States v. Germaine*<sup>68</sup> as standing for the proposition that the appointments clause is to be given a "functional interpretation";<sup>69</sup> thus, whether an officer is an inferior officer depends on the powers of the office in question and whether such powers render the officer inferior, or subordinate, to a principal officer.<sup>70</sup> The majority in *In re Sealed Case* concluded, based on its reading of *Germaine*, that the "independent counsel's authority is so broad"<sup>71</sup> that appointment must be by the President with the advice and consent of the Senate.

The majority's conclusion in *In re Sealed Case*, however, is questionable because the *Germaine* Court never defined the term "inferior officer." *Germaine* involved the indictment of a civil surgeon for extortion under the provisions of a federal statute that explicitly applied only to "officer[s] of the United States."<sup>72</sup> The surgeon moved to dismiss the indictment on the grounds that he was not an officer of the United States, but only an employee.<sup>73</sup> The Court agreed that the surgeon was not an officer because he had not been

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65. 838 F.2d 476 (D.C. Cir. 1988) (2-1 decision), *rev'g*, 665 F. Supp. 56 (D.D.C. 1987) (mem.), *prob. juris. noted sub nom.* Morrison v. Olson, 108 S. Ct. 1010 (1988).

66. *In re Sealed Case*, 838 F.2d at 486. The court went on to address other constitutional issues pertaining to the independent counsel statute. The court's discussion of these other issues, however, is arguably dicta as evidenced by the language of the court:

The Act's failure to comply with the appointments clause is sufficient to render it unconstitutional. We decide appellants' other constitutional claims, however, so that if this decision is appealed, and the Supreme Court decides that these additional claims must be reached, it will not have to 'either proceed without the usual benefit of a lower-court opinion or else delay final disposition by remanding for that purpose.'

*Id.* at 487 (quoting *Synar v. United States*, 626 F. Supp. 1374, 1383 (D.D.C.), *aff'd sub nom.* Bowsher v. Synar, 106 S. Ct. 3181 (1986)) (The statute at issue in *Bowsher*, the Balanced Budget and Emergency Deficit Control Act of 1985, specifically provided for direct Supreme Court review of the lower court decision.).

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

68. 99 U.S. 508 (1878).

69. *In re Sealed Case*, 838 F.2d at 484.

70. *See id.* at 484-87.

71. *Id.* at 486.

72. *Germaine*, 99 U.S. at 509.

73. *Id.*

appointed in accordance with either of the two methods provided for in the appointments clause.<sup>74</sup> Thus, although the Court in *Germaine* addressed the preliminary question of whether a civil surgeon appointed by the Commissioner of Pensions was an officer of the United States, subject to the appointments clause,<sup>75</sup> the Court at no time inquired as to what type of officer a civil surgeon might be: principal or inferior.<sup>76</sup>

Notwithstanding the majority's reliance on *Germaine*, the D.C. Circuit's decision provides an administratively unworkable definition of inferior officer. In finding that the independent counsel's authority was "so broad" as to require appointment by the President with the advice and consent of the Senate,<sup>77</sup> the court created a standard that offers little guidance as to which officers are principal and which are inferior. Because this standard does not specify precisely how broad an officer's power must be to require appointment by the President with the advice and consent of the Senate, disagreements will inevitably arise as to whether an officer's power is broad enough, under this standard, to make him a principal officer. Thus, the courts will frequently be called upon to make ad hoc determinations as to the scope of a particular officer's power.

## 2. THE INTENT OF THE FRAMERS

Although there is a scarcity of legislative history addressing the question of which officers were regarded as inferior officers, an examination of the intent of the Framers of the Constitution suggests that the appointments clause resulted from a compromise between those Framers who wanted Congress to possess the appointment power, and those advocating that the President be vested with such power.<sup>78</sup> The product of this compromise is a system in which the appointment power is divided between the President and Congress. The President, for example, may nominate certain officers subject to the advice and consent of the Senate, but Congress may vest the appointment of other officers in the President alone, the courts, or the heads of departments.<sup>79</sup> To discern which appointment method is appropriate

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74. *Id.* at 509-11.

75. *Id.* at 509.

76. Specifically, the Court held that the Commissioner of Pensions, who appointed the surgeon, was not the head of a department within the meaning of the appointments clause. *Id.* at 509-11. In addition, the surgeon was not an officer because his duties were only "occasional and intermittent." *Id.* at 512.

77. *In re Sealed Case*, 838 F.2d 476, 486 (D.C. Cir. 1988).

78. See Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037, 1061-70 (1987).

79. The provision for appointment of inferior officers appears to have been made for

for particular officers, an examination of the language and interpretation of the appointments clause is essential.

### 3. A PLAIN READING OF THE APPOINTMENTS CLAUSE

The language of the appointments clause provides for the appointment of officers falling generally into two categories. First, the appointments clause specifies that the President must appoint certain officers with the advice and consent of the Senate. These "principal officers" are expressly named in the clause: "Ambassadors, other public Ministers and Consuls, [and] Judges of the supreme Court."<sup>80</sup> The judges of the "courts of law" as well as the "heads of departments" should probably be treated as included among this group. Because Congress may vest in the heads of departments and in the courts of law the power to appoint inferior officers under the clause, by implication, these individuals cannot themselves be inferior officers.<sup>81</sup>

Second, the appointments clause provides for the appointment of another group of officers, deemed "inferior officers." From a plain reading of the appointments clause, any officer not included in the first category of officers (any officer who is not a principal officer) is an inferior officer. After expressly naming those principal officers who must be nominated by the President with the advice and consent of the Senate, the clause states that appointment by the President with the advice and consent of the Senate also applies to "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."<sup>82</sup> The use of the word "such," if given its ordinary construction, refers back to the phrase that provides for the appointment of "all other Officers . . . whose Appointments are

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reasons of administrative convenience. *Germaine*, 99 U.S. at 510; see 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 627-28 (M. Farrand rev. ed. 1937).

In order to ensure that appointments would be made only to bona fide offices and not simply to reward political allies with government posts, the Framers provided that any appointment must first be authorized by an act of Congress. Thus, the appointments clause provides that all appointments must be authorized "by Law." U.S. CONST. art. II, § 2, cl. 2; see 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 405-06.

80. U.S. CONST. art. II, § 2, cl. 2.

81. See also 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1530, at 386 n.1 (Boston 1833) (suggesting that heads of departments are not inferior officers).

82. U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

not herein otherwise provided for.”<sup>83</sup> Certainly, “such inferior Officers” would not be referring back to the principal officers whose appointments require Senate confirmation and who were thought important enough to be listed by name.

Thus, “all other Officers . . . whose Appointments are not . . . provided for” in the appointments clause should be deemed inferior officers. Stated another way, an inferior officer is any officer who is not an ambassador, public minister or consul, a federal judge, or the head of a department. Therefore, because the independent counsel does not fall into any of these categories, he should be considered an inferior officer.<sup>84</sup>

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83. Additionally, the presence of a colon before the words “but the Congress” in the appointments clause supports the conclusion that “such inferior Officers” refers to all officers not specifically mentioned in the appointments clause. Because a colon is used, the words that come after the colon (including “such inferior Officers”) are intended to amplify or modify the words that appear before the colon (“all other Officers”).

84. The Ethics Act limits the ability of the President to remove the independent counsel. 28 U.S.C. § 596 (1982 & Supp. III 1985). The Attorney General may remove the independent counsel only if certain stipulated criteria are met. 28 U.S.C. § 596(a)(1) (1982). Even then, the United States District Court for the District of Columbia can overrule the Attorney General and reinstate the independent counsel if the district court finds that the termination was improper. Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, § 2, 101 Stat. 1293, 1305.

Congress has the right to delegate the appointment of an inferior officer. U.S. CONST. art. II, § 2, cl. 2. It, therefore, has the correlative right to impose restrictions on that officer's removal. *United States v. Perkins*, 116 U.S. 483, 485 (1886). In *Perkins*, the Secretary of the Navy had dismissed a cadet-engineer. *Id.* at 483. Congress had explicitly “vested the appointment of cadet-engineers in the Secretary of the Navy” and had enacted a law restricting their removal. *Id.* at 484 (quoting, with approval, language of lower court opinion in *Perkins v. United States*, 20 Ct. Cl. 438, 444 (1885)). The Court held that the removal was invalid because the Secretary had no power to remove this inferior officer at will when Congress had passed a statute limiting removal. *Id.* at 484-85. The Court stated:

‘We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.’

*Id.* at 485 (quoting, with approval, language of lower court opinion in *Perkins v. United States*, 20 Ct. Cl. 438, 444 (1885)). The Court noted that this ruling related only to inferior officers and not to those officers nominated by the President, and confirmed by the Senate. *Id.* at 484; accord *Myers v. United States*, 272 U.S. 52, 161-62 (1926). The *Myers* Court cited *Perkins*: “The Court . . . has recognized in the *Perkins* case 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.” *Id.* at 161. For a discussion of the *Myers* decision, see E. CORWIN, *The President's Removal Power Under the Constitution*, in 1 CORWIN ON THE CONSTITUTION 317 (R. Loss ed. 1981).

The difference between imposing restrictions on the removal of officers appointed by the heads of departments, as opposed to officers appointed by the President and confirmed by the Senate, appears to render inapposite those cases dealing with the latter type of officer. See, e.g., *Wiener v. United States*, 357 U.S. 349, 349-50 (1958) (member of War Claims Commission

As to inferior officers, Congress has the discretion to vest their appointment either in the President with the advice and consent of the Senate, or in the President alone, the courts, or the head of a department. The appointments clause specifically gives Congress this authority by providing that it "may" vest the appointment of inferior officers in the President, the courts, or the head of a department.<sup>85</sup>

#### 4. RELEVANT DECISIONS

The conclusion that the independent counsel is an inferior officer is supported by what is ostensibly the only case to squarely address the issue.<sup>86</sup> In *Collins v. United States*,<sup>87</sup> the Court of Claims held that inferior officers are those officers who are inferior to the entity that appoints them.<sup>88</sup> As to the appointment of inferior officers, the court held that Congress has the discretion to either provide that they be appointed by the President subject to Senate confirmation, or to vest their appointment in the President alone, in the courts, or in the heads of departments.<sup>89</sup> In *Collins*, the court stated:

In our opinion, the words [of the appointments clause] as used in connection with the other language of the same clause, have a plain, definite, and intelligible meaning, capable of unmistakable application to effect the purposes of that provision of the Constitution. Having specified certain officers, ministers, consuls, and judges of the Supreme Court who shall be nominated by the President and appointed by and with the advice and consent of the Senate in all cases, the Constitution leaves it to Congress to vest in the President alone, the courts of law, or the heads of departments the appointment of any officer inferior or subordinate to them respec-

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nominated by the President with the advice and consent of the Senate); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 618 (1935) (member of the Federal Trade Commission nominated by the President with the advice and consent of the Senate); *Shurtleff v. United States*, 189 U.S. 311, 312-13 (1903) (general appraiser of merchandise nominated by the President with the advice and consent of the Senate). Thus, Congress has plenary authority to impose restrictions on the removal of the independent counsel, an inferior officer.

85. U.S. CONST. art. II, § 2, cl. 2. If Congress remains silent as to the method of appointment of an inferior officer, the language of the clause provides that the inferior officer is to be appointed by the President with the advice and consent of the Senate. *See id.*

86. *Collins v. United States*, 14 Ct. Cl. 568 (1879).

87. *Id.*

88. *Id.* at 574-75.

89. *Id.* at 575. *Collins* involved the reinstatement of Joseph Collins, an Army major, whom the President had originally appointed with the advice and consent of the Senate. *Id.* at 569. After having been "ungenerously mustered out of service" by the Army, Congress authorized the President to reinstate Collins and retire him with the pay accorded to a retired officer of his rank. *Id.* at 570. The appropriate Treasury officer refused to pay Collins because the President had unilaterally reappointed Collins, and not with the advice and consent of the Senate as in the original appointment. *Id.* The court upheld Collins' reappointment. *Id.* at 576.



tively, whenever Congress thinks proper so to do.<sup>90</sup>

Independent counsels qualify as inferior officers under this approach because independent counsels are inferior to the entity that appoints them. The appointing authority is a combination of the Attorney General and a special division of the D.C. Circuit.<sup>91</sup> Together, the Attorney General and the special division can remove the independent counsel and define the parameters of his jurisdiction.<sup>92</sup> Because the independent counsel is subordinate to the collective power of this joint appointment authority, he would be an inferior officer under the *Collins* definition.

## 5. UNITED STATES ATTORNEY GENERAL OPINIONS

The interpretation of the appointments clause by Attorneys General of the United States since 1853 also supports the conclusion that the independent counsel is an inferior officer.<sup>93</sup> In response to questions as to how a particular officer should be appointed, Attorneys General have issued opinions addressing the subject of inferior officers. Some opinions have relied on the *Collins* definition of inferior officer: An inferior officer is any officer who is subordinate, or "inferior," to some higher authority.<sup>94</sup> As discussed above, the independent counsel would be an inferior officer under such a definition.

The overwhelming majority of Attorney General opinions addressing the subject of inferior officers, however, have taken a different approach. Generally, in determining how an officer should be appointed, Attorneys General have simply looked to the statute creat-

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90. *Id.* at 574.

91. 28 U.S.C. §§ 592, 593 (1982).

92. 28 U.S.C. §§ 593, 596 (1982 & Supp. III 1985).

93. See, e.g., Memorandum Opinion for the Assistant Attorney General, Officer for Improvements in the Administration of Justice, 2 Op. Off. Legal Counsel 58 (1978); Appointment of the Commissioner of Immigration and Naturalization, 38 Op. Att'y Gen. 566 (1937); Authority of Civil Service Commission to Appoint a Chief Examiner, 37 Op. Att'y Gen. 227 (1933); Promotion of Army Officers, 30 Op. Att'y Gen. 177 (1913); Appointments in the Department of Commerce and Labor, 29 Op. Att'y Gen. 116 (1911); Paymasters' Clerks in the Army — Retirement, 27 Op. Att'y Gen. 493 (1909); Delivery of an Insignia from the German Emperor to a Clerk in the Post-Office Department, 27 Op. Att'y Gen. 219 (1909); Second Deputy Comptroller of the Currency — Appointment, 26 Op. Att'y Gen. 627 (1908); Appointment — Student Interpreters at Legation to China, 24 Op. Att'y Gen. 52 (1902); President — Appointment of Officers — Holiday Recess, 23 Op. Att'y Gen. 599 (1901); Army Officers — Appointment — Original Vacancy, 23 Op. Att'y Gen. 574 (1901); Statutory Construction — Chinese Secretary, 23 Op. Att'y Gen. 136 (1900); Department Clerks — Departmental Practice, 21 Op. Att'y Gen. 363 (1896); Civil Service Commission — Chief Examiner, 18 Op. Att'y Gen. 409 (1886); Appointments in the Treasury Department, 15 Op. Att'y Gen. 3 (1875); Appointment of Assistant Secretary of State, 6 Op. Att'y Gen. 1 (1853).

94. See, e.g., Memorandum Opinion for the Assistant Attorney General, Officer for Improvements in the Administration of Justice, 2 Op. Off. Legal Counsel 58 (1978).

ing the office in question.<sup>95</sup> In instances in which Congress has not specifically vested the appointment of an officer in the President alone, in a court of law, or in the head of a department, these opinions have concluded that the officer must be appointed by the President with the advice and consent of the Senate.<sup>96</sup> In instances in which Congress, however, has vested the appointment of an officer in the President alone, in a court of law, or in the head of a department, Attorneys General have normally deferred to Congress' judgment regarding the method of appointment. Thus, when Congress has chosen to vest the appointment of an officer other than ambassadors, consuls, or Justices of the Supreme Court in the President alone, in a court of law, or in the head of a department, these opinions have not questioned whether the officer is principal or inferior; they have simply deferred to Congress' choice of appointment method. The only plausible explanation for this consistent exercise of deference to Congress' choice of appointment method is that Attorneys General have construed the appointments clause to mean that all officers other than ambassadors, consuls, and Justices of the Supreme Court are inferior officers and that Congress has discretion to provide for how such officers are to be appointed.

An opinion by Caleb Cushing, Attorney General of the United States in 1853, illustrates the view of Attorneys General that all officers not expressly mentioned in the appointments clause are inferior officers.<sup>97</sup> Secretary of State William Marcy had asked the Attorney General for an opinion as to how to appoint the Assistant Secretary of State, whose appointment had been provided for by an act of Congress.<sup>98</sup> The Attorney General responded that, in instances in which Congress does not specifically provide for the method of appointment, the President has the responsibility of appointing the officer with the advice and consent of the Senate.<sup>99</sup> Because "there [had been] no such express exceptional enactment in the present case,"<sup>100</sup> the Attorney General recommended that the President appoint the Assistant Secretary of State with the advice and consent of the Senate.<sup>101</sup> The Attorney General, however, distinguished the case of the Assistant Secretary of State from other cases, such as the case of the Assistant Secretary of the Treasury, whose appointment

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95. See, e.g., *infra* notes 97-103 and accompanying text.

96. See *id.*

97. Appointment of Assistant Secretary of State, 6 Op. Att'y Gen. 1 (1853).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

Congress had explicitly vested in the head of a department.<sup>102</sup> Thus, the Attorney General inferred that, in a case such as that of the Assistant Secretary of the Treasury, Congress' choice to vest the appointment power in the head of a department would be respected.<sup>103</sup>

### B. *Interbranch Appointment of Inferior Officers*

Opponents of the independent counsel statute have argued that even if the independent counsel is an inferior officer, Congress cannot delegate the power to appoint an executive officer to another branch of government; namely, the judiciary.<sup>104</sup> Such an argument is based upon the premise that the power to appoint an executive officer can be vested only in the executive branch. The Supreme Court of the United States, in *Ex parte Siebold*,<sup>105</sup> however, refused to adhere to such a narrow view of Congress' appointment power.<sup>106</sup> *Siebold* is directly relevant to the case of the independent counsel because the Supreme Court held in *Siebold* that Congress could vest the appointment of executive officers in a court of law.<sup>107</sup> *Siebold* involved a challenge to a statute<sup>108</sup> that authorized a court to appoint election supervisors to prevent tampering with election results.<sup>109</sup> The Court discussed, in general terms, Congress' power under the appointments clause:

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 . . . .

. . . [A]s the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress.<sup>110</sup>

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102. *Id.* at 1-2.

103. *Id.*

104. North's Memorandum in Support of Summary Judgment, *supra* note 11, at 43-51; Deaver's Memorandum in Support of Preliminary Injunction, *supra* note 11, at 16-20.

105. 100 U.S. 371 (1879).

106. *Id.* at 397-98.

107. *Id.* For other decisions upholding federal court appointment of officers not strictly within the judicial branch, see *Rice v. Ames*, 180 U.S. 371 (1901) (court appointment of commissioners of extradition); *Hobson v. Hansen*, 265 F. Supp. 902 (D.D.C. 1967) (court appointment of members of District of Columbia Board of Education); *United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963) (court appointment of temporary United States Attorneys).

108. Act of Feb. 28, 1871, ch. 99, § 2, 16 Stat. 433, 433-34, *repealed by* Act of Feb. 8, 1894, ch. 25, 28 Stat. 36, 36-37.

109. *See Siebold*, 100 U.S. at 373-82.

110. *Id.* at 397-98. The Court in *Siebold* narrowed the holding of the earlier case of *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839). In *Hennen*, the Supreme Court had enunciated a

The *Siebold* Court stated that, as long as there is no "incongruity"<sup>111</sup> in the power vested in a court by Congress, the delegation of such power will be upheld.<sup>112</sup> The *Siebold* majority held that the appointment of executive officers by a court was not incongruous, "[b]ut . . . a constitutional duty of the courts"<sup>113</sup> when the law so requires.<sup>114</sup>

The *Siebold* Court's interpretation of the scope of Congress' appointment power is consistent with the plain language of the appointments clause. The appointments clause states that "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."<sup>115</sup> The language of the clause suggests that Congress has flexibility to decide in whom to vest the appointment of an inferior officer. The *Siebold* Court's interpretation of the appointments clause provides that Congress' choice in selecting the appointing entity should be guided by considerations of "propriety,"<sup>116</sup> "convenience,"<sup>117</sup> and generally, by a determination as to which appointing entity will be most "competent to the task."<sup>118</sup> Under such criteria, the appointment of independent counsels by a court of law is justified because vesting the appointment in the President alone or in the head of a department would defeat the statute's goal of insulating independent counsels from executive influence.

The *Siebold* interpretation of the appointments clause parallels the views of various commentators on the Constitution. Justice Story, writing in 1833, stated that Congress has latitude to decide in whom to vest the power to appoint inferior officers.<sup>119</sup> Congress needs this discretion because "[i]t is difficult to foresee, or to provide for all the combinations of circumstances, which might vary the right to appoint . . . . In one age the appointment might be most proper in the presi-

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more restrictive view of Congress' appointment power and stated that, as delegated by Congress under the appointments clause, the appointment power "was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged." *Id.* at 258. The *Siebold* Court asserted that the language in *Hennen* "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." *Siebold*, 100 U.S. at 398.

111. *Siebold*, 100 U.S. at 398.

112. *Id.* at 397-98. Such an incongruous delegation of power, for example, would be to entrust a court with nonjudicial powers. *See id.* at 398.

113. *Id.* at 398.

114. *Id.*

115. U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

116. *Siebold*, 100 U.S. at 398.

117. *Id.*

118. *Id.*

119. *See* 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1529, at 385-86 (Boston 1833).

dent; and in another age, in a department.”<sup>120</sup> The comments of the “Federal Farmer,” an anonymous author and opponent of the Constitution whose letters are considered to be an important example of the antifederalist position,<sup>121</sup> also accord considerable flexibility to Congress.<sup>122</sup> Writing in 1788, the “Federal Farmer” viewed Congress’ power to vest the appointment of inferior officers as a mechanism to preserve the balance among the three branches of government.<sup>123</sup> Congress, for example, could increase or decrease the number of appointments it vests in the President depending on whether the President is too powerful or too weak at a particular time.<sup>124</sup> Because all such appointments must be created by statute, the ability of Congress to abuse this discretion is checked by the President’s veto power.<sup>125</sup>

Contrary to the fears of the majority in *In re Sealed Case*,<sup>126</sup> a Supreme Court decision upholding Congress’ power to vest the appointment of independent counsels in an article III court would not allow Congress to vest the appointment of any executive officer in a court. The *Siebold* “incongruity”<sup>127</sup> test serves as an effective limitation on Congress’ power to vest appointments. It would not, for example, be “prop[er]”<sup>128</sup> or “convenien[t],”<sup>129</sup> using the words of the *Siebold* Court, for Congress to vest in a court the appointment of Assistant Secretaries of State. Such a delegation of appointing power to a court would be found “incongru[ous]”<sup>130</sup> because the degree of interaction between Assistant Secretaries of State and other executive officers is necessarily significant. In order to perform his job effectively, the Secretary of State must have the power to appoint his subordinates. The appointment of independent counsels by a court, however, is not incongruous because, unlike Assistant Secretaries of State and many other executive officers, an independent counsel does not work closely with other members of the executive branch. Instead, an independent counsel requires autonomy so that he may act without bias.

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120. *Id.*

121. 2 THE COMPLETE ANTI-FEDERALIST 214-16 (H. Storing ed. 1981).

122. Letter from The Federal Farmer (Jan. 17, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 2.8.173, at 307-08 (H. Storing ed. 1981).

123. See *id.* at 308.

124. *Id.*

125. See *id.*

126. See *In re Sealed Case*, 838 F.2d 476, 494-95 (D.C. Cir. 1988).

127. *Siebold*, 100 U.S. at 398.

128. *Id.*

129. *Id.*

130. *Id.*

#### IV. THE POWER OF THE SPECIAL DIVISION TO REMOVE THE INDEPENDENT COUNSEL AND DEFINE PROSECUTORIAL JURISDICTION

The Ethics Act also accords the judiciary significant power over the removal of independent counsels and the definition of an independent counsel's prosecutorial jurisdiction. Upon receiving an application from the Attorney General for appointment of an independent counsel,<sup>131</sup> a special division of the D.C. Circuit defines the prosecutorial jurisdiction of the independent counsel by deciding who should and should not be subject to investigation by the independent counsel.<sup>132</sup> Additionally, the special division may remove an independent counsel.<sup>133</sup> Although the Attorney General may himself dismiss an independent counsel, the United States District Court for the District of Columbia may review the Attorney General's decision.<sup>134</sup> The question thus arises as to whether the judiciary's powers over an independent counsel's removal and prosecutorial jurisdiction violate the doctrine of separation of powers.

In addressing separation of powers questions, the Supreme Court of the United States has often adopted a balancing approach.<sup>135</sup> In such cases, the Court has weighed the need for the particular statute or governmental action with the degree to which the statute or action prevents a branch of government from carrying out its constitutional responsibilities.<sup>136</sup> In *Bowsher v. Synar*,<sup>137</sup> a case involving the constitutionality of the Balanced Budget and Emergency Deficit Control Act of 1985 (Balanced Budget Act),<sup>138</sup> however, the Court adopted a

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131. 28 U.S.C. § 592(c)(1) (1982).

132. 28 U.S.C. § 593(b) (1982).

133. 28 U.S.C. § 596(b)(2) (1982).

134. Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, § 2, 101 Stat. 1293, 1305.

135. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3258-61 (1986); *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 582-83, 586-87 (1985); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 441-46 (1977); *United States v. Nixon*, 418 U.S. 683, 706-13 (1974).

136. See, e.g., *id.*

137. 106 S. Ct. 3181 (1986).

138. Pub. L. No. 99-177, §§ 251-257, 273-275, 1985 U.S. CODE CONG. & ADMIN. NEWS (99 Stat.) 1037, 1063-93, 1098-1101 (to be codified at 2 U.S.C. §§ 901-907, 921-922) [hereinafter *Balanced Budget Act*]. Congress enacted this statute, also known as the Gramm-Rudman-Hollings Act, in response to the federal budget deficit. See H.R. CONF. REP. NO. 433, 99th Cong., 1st Sess. 71-123, reprinted in 1985 U.S. CODE CONG. & ADMIN. NEWS 988, 988-1041. Congress, through the Balanced Budget Act, sought to eliminate the budget deficit by authorizing automatic spending reductions over a period of years. See *id.* The Act authorized the Comptroller General to mandate across-the-board spending reductions consistent with a five-year deficit reduction plan. 2 U.S.C.A. §§ 901-907 (West Supp. 1987).

different approach.<sup>139</sup> The *Bowsher* Court declared the Act unconstitutional, holding that the influence of Congress over the decisions of the Comptroller General, an officer exercising executive duties, was a per se violation of the separation of powers doctrine.<sup>140</sup> In rejecting the balancing test, the Court did not weigh other factors, nor did it examine whether, in fact, the Act prevented the executive branch from carrying out its constitutional duties. This Section considers the application of both the Supreme Court's balancing and per se tests to the independent counsel dispute.

A. *The Per Se Approach: Bowsher v. Synar*

The removal provisions of the Ethics Act are very similar to those contained in the Balanced Budget Act. In *Bowsher*, the Court found that the Act violated the separation of powers doctrine by vesting in Congress the power to execute the laws of the United States.<sup>141</sup> The Court reasoned that because Congress had the sole authority to remove the Comptroller General, an officer exercising executive duties, Congress had significant influence over his decisions.<sup>142</sup> Thus, the Act gave Congress the power to indirectly execute the laws.<sup>143</sup> The independent counsel is analogous to the Comptroller General in that both exercise executive functions.<sup>144</sup> Similar to the way in which the Comptroller General is removable by Congress,<sup>145</sup> the authority to remove the independent counsel lies with the judiciary.<sup>146</sup> The independent counsel law could be found unconstitutional, as was the Balanced Budget Act, because it authorizes another branch of government to remove, and thus influence, an officer who performs executive duties.

The *Bowsher* decision rested on two major premises. First, the Court found that the Comptroller General exercised executive functions.<sup>147</sup> By having final authority to decide which programs to cut,

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These cuts would go into effect if Congress failed to reduce the deficit each year as prescribed by the Act. *Id.*

139. For a discussion of the Supreme Court's treatment of separation of powers challenges, see Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

140. See *Bowsher*, 106 S. Ct. at 3192.

141. *Id.*

142. *Id.* at 3189-92.

143. *Id.*

144. *Id.* at 3191-92; see *infra* notes 151-52 and accompanying text.

145. See 31 U.S.C. § 703(e)(1)(B) (1982).

146. 28 U.S.C. § 596 (1982 & Supp. III 1985); see *infra* notes 153-55 and accompanying text.

147. *Bowsher*, 106 S. Ct. at 3191-92. For a critique of the majority's classification of the Comptroller General's functions as "executive," see *Bowsher*, 106 S. Ct. at 3199-202 (Stevens,

the Comptroller General was executing the law.<sup>148</sup> Second, the Court reasoned that the Comptroller General was subject to the control of the legislature.<sup>149</sup> Due to the fact that he could be removed only by Congress, the potentially coercive influence of his superiors affected his decisions.<sup>150</sup>

Similarly, the Ethics Act appears to contradict the holding of *Bowsher v. Synar* because the independent counsel law contains the two characteristics found in *Bowsher*. First, like the Comptroller General, the independent counsel performs executive functions. The Act provides for the independent counsel to be vested with the power of the Attorney General in prosecuting executive officials who are suspected of violating the law.<sup>151</sup> The responsibility to enforce the laws and prosecute offenders is an executive function.<sup>152</sup> Second, the independent counsel, like the Comptroller General in *Bowsher*, is subject to interbranch removal; the ultimate authority over his removal lies not with the executive but with the judicial branch. A special division of the D.C. Circuit can remove the independent counsel at any time if, as in *Bowsher*, certain criteria are met.<sup>153</sup> Moreover,

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J., concurring); Levinson, *Balancing Acts: Bowsher v. Synar, Gramm-Rudman-Hollings, and Beyond*, 72 CORNELL L. REV. 527, 530-35 (1987); *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 220, 225-28 (1986).

148. *Bowsher*, 106 S. Ct. at 3191-92.

149. *Id.* at 3189-91.

150. *Id.* Under the Balanced Budget Act, although the Comptroller General could be removed at any time by a joint resolution of Congress, the President could veto such a resolution. *Bowsher*, 106 S. Ct. at 3189 n.7. The Court in *Bowsher* held the President's veto power to be inconsequential: "Although the President could veto such a joint resolution, the veto could be overridden by a two-thirds vote of both Houses of Congress. Thus, the Comptroller General could be removed in the face of Presidential opposition . . . . [W]e therefore read the removal provision as authorizing removal by Congress alone." *Id.* (citation omitted). *Contra Bowsher*, 106 S. Ct. at 3212 (White, J., dissenting) ("[T]he . . . [potential for a Presidential veto] reduces to utter insignificance the possibility that the threat of removal [by joint resolution of Congress] will induce subservience to the Congress.").

151. 28 U.S.C. § 594 (1982).

152. See *Wayte v. United States*, 470 U.S. 598, 607 (1985); *INS v. Chadha*, 462 U.S. 919, 1002 (1983) (White, J., dissenting); *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980); *United States v. Batchelder*, 442 U.S. 114, 124 (1979); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457, 458-59 (1868); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

153. 28 U.S.C. § 596(b)(2) (1982). With respect to the power of the special division to remove an independent counsel, the Act provides:

The division of the court, either on its own motion or upon suggestion of the Attorney General, may terminate an office of independent counsel at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of the independent counsel . . . and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions.



although the Attorney General can remove the independent counsel for certain reasons,<sup>154</sup> if the United States District Court for the District of Columbia finds that the termination was improper, the court may reinstate the independent counsel.<sup>155</sup>

According to the Court's rationale in *Bowsher*, the judiciary's removal power over the independent counsel is tantamount to judicial control over an officer exercising executive functions. Because the independent counsel is subject to the pressure of his superiors, the views of the judicial branch may color his decisions. Thus, under *Bowsher*, the power vested in the judiciary to remove the independent counsel could be held to violate the doctrine of separation of powers.<sup>156</sup>

The *Bowsher* Court found the Balanced Budget Act to be a per se violation of the separation of powers doctrine because the Act resulted in an invasion of the powers of the executive branch. In eschewing a more flexible approach, the Court did not examine the extent of this invasion to determine whether the constitutional power of the executive branch was actually being affected in any significant way. The Court found the Balanced Budget Act unconstitutional simply by labeling the Comptroller General's functions as "executive"<sup>157</sup> and concluding that he was subject to the control of the legislative branch.<sup>158</sup>

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*Id.*

154. 28 U.S.C. § 596(a)(1) (1982). The Attorney General may remove the independent counsel "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." *Id.*

155. Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, § 2, 101 Stat. 1293, 1305.

156. Some may argue that *Bowsher* is inapplicable to the independent counsel legislation because a court of law is not as politically manipulable as is the Congress. This distinction would appear to be irrelevant. The *Bowsher* opinion seems to give little weight to the political character of Congress. Instead, the focus is simply on the influence that one branch of government can have over an official through the power of removal. See, e.g., *Bowsher* 106 S. Ct. at 3188 ("As the District Court observed, '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.'") (quoting, with approval, language of lower court opinion in *Synar v. United States*, 626 F. Supp. 1374, 1401 (D.D.C. 1986)). Thus, the *Bowsher* holding suggests that, once the determination is made that the independent counsel is an executive officer, the power to remove the independent counsel would be unconstitutional were it lodged anywhere except in the executive branch, because neither the judiciary nor Congress may exercise executive power.

157. See *Bowsher*, 106 S. Ct. at 3192.

158. See *id.* at 3189-91.

B. *The Balancing Approach: Commodity Futures Trading Commission v. Schor*

A constitutional analysis of the judiciary's power under the Ethics Act changes significantly upon the application of a balancing approach. Although a court of law is permitted to exercise "executive" functions under the Ethics Act, this does not, in and of itself, render the Act presumptively unconstitutional under a balancing approach to the separation of powers doctrine.

The Supreme Court's opinion in *Commodity Futures Trading Commission v. Schor*,<sup>159</sup> a case decided on the same day as *Bowsher*, is an example of the application of a balancing approach to separation of powers questions. The *Schor* Court addressed the question of whether an administrative agency, the Commodity Futures Trading Commission (CFTC), had the power to hear common law counterclaims.<sup>160</sup> In *Schor*, an investor had an account with a commodity futures broker.<sup>161</sup> The account had a negative balance because the investor's losses and expenses exceeded the money deposited in the account.<sup>162</sup> Alleging that the negative balance was due to the broker's violations of the Commodity Exchange Act (CEA), the investor filed suit before the CFTC, which is empowered under the CEA to adjudicate investors' reparations claims that a broker violated CEA or CFTC regulations.<sup>163</sup> The broker then sought to file a counterclaim, in the same CFTC action, to recover the negative balance in the investor's account.<sup>164</sup>

In upholding the CFTC's jurisdiction over such counterclaims, the Court approached the separation of powers question in a manner completely distinct from the Court's approach in *Bowsher*. The language of Justice O'Connor, writing for the majority in *Schor*, illustrates this contrast:

[B]right line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries. Rather, due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III.<sup>165</sup>

The *Schor* majority held that the CFTC's jurisdiction to hear common law counterclaims was not a violation of the separation of pow-

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159. 106 S. Ct. 3245 (1986).

160. *Id.* at 3249.

161. *Id.* at 3250.

162. *Id.*

163. *Id.*

164. *Id.* at 3251.

165. *Id.* at 3261 (citation omitted).

ers doctrine.<sup>166</sup> In particular, the Court found the CFTC's encroachment upon the power of the judicial branch to be slight and the need for CFTC counterclaim jurisdiction to be significant.<sup>167</sup> Initially, the Court stated that the CFTC's article III power does not differ significantly from the adjudicatory powers of most agencies.<sup>168</sup> The only difference, the Court said, is the CFTC's jurisdiction over common law counterclaims.<sup>169</sup> Moreover, the CFTC's counterclaim jurisdiction and other powers are confined to a narrow field of law and are enforceable only by a United States district court.<sup>170</sup> Parties are not forced to bring their claims before the CFTC, but have the option to sue in federal court instead.<sup>171</sup> Further, the Court stated that to deny counterclaim jurisdiction to the CFTC would undermine the congressional purpose behind the Commodity Exchange Act.<sup>172</sup> Without CFTC counterclaim jurisdiction, for example, a broker would have to bring a separate action in court to recover the deficit in an investor's account, despite the fact that an action brought by the investor may already be pending before the CFTC.<sup>173</sup> Such a result would impede the objective of achieving quick and inexpensive resolution of such disputes.<sup>174</sup>

Thus, although the CFTC, an administrative agency, exercises "judicial" power, such a finding was held not to be a per se constitutional violation. In analyzing whether the CFTC's counterclaim jurisdiction violated separation of powers principles, the Court examined several factors, none of which was independently dispositive. Unlike the *Bowsher* majority's rigid, presumptive finding of unconstitutionality, the majority in *Schor* took a flexible approach, examining "the degree of judicial control saved to the federal courts, [the] . . . congressional purpose behind the jurisdictional delegation, the demonstrated need for the delegation, and the limited nature of the delegation."<sup>175</sup>

If applied to the independent counsel dispute, *Schor*'s balancing approach leads to a finding that the removal and jurisdiction powers delegated to the judicial branch do not violate the doctrine of separation of powers. For, as in *Schor*, the executive power delegated to the

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166. *Id.* at 3259-60.

167. *Id.* at 3258-61.

168. *Id.*

169. *Id.*

170. *Id.* at 3258-59.

171. *Id.* at 3260.

172. *Id.* at 3260-61.

173. *See id.*

174. *See id.*

175. *Id.* at 3260 (citation omitted).

special division under the Ethics Act is strictly limited, while the need for the independent counsel legislation is compelling.

Under the Ethics Act, the judicial branch may exercise its power only if the Attorney General, a member of the executive branch, first determines that there are sufficient grounds for the appointment of an independent counsel.<sup>176</sup> Moreover, an independent counsel may only investigate those officials specified under the Ethics Act<sup>177</sup> who have been accused of committing a criminal offense other than certain classes of misdemeanors.<sup>178</sup> Thus, the judiciary is authorized to act only when the Attorney General authorizes an appointment, the Department of Justice is presented with a conflict of interest, and one of the limited number of officials specified under the Act is suspected of having committed a criminal offense.

Second, the independent counsel legislation is vital to overcome the inherent conflict of interest that would affect the judgment of members of the executive branch. Because the Attorney General is closely associated with the President, the Vice President and other high level executive officials in both a professional and a personal capacity,<sup>179</sup> the members of the Department of Justice cannot be relied upon to conduct an impartial investigation of executive officers. Because of this conflict of interest, the power to remove the independent counsel and define his jurisdiction should not be lodged in the executive branch.

The policy issues underlying the independent counsel dispute were considered by the Supreme Court in *United States v. Nixon*,<sup>180</sup> another opinion in which the Court applied a balancing approach to the separation of powers question. In *Nixon*, the President refused to comply with a subpoena duces tecum ordering the President to turn over various tape recordings of his conversations.<sup>181</sup> In response to the subpoena, President Nixon invoked, under the doctrine of executive privilege, the right to refuse to disclose records of his communications.<sup>182</sup> In addition, he argued that the need to preserve the autonomy of the executive branch justified a President's refusal to obey a subpoena.<sup>183</sup> The Supreme Court, however, ordered the pro-

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176. 28 U.S.C. § 592 (1982). The Attorney General's decision is not subject to judicial review. See *supra* note 34.

177. 28 U.S.C. § 591(a)-(b) (1982). For a list of those individuals subject to the Act, see *supra* note 4.

178. 28 U.S.C. § 591(a) (Supp. III 1985).

179. See *supra* notes 16-17 and accompanying text.

180. 418 U.S. 683 (1974).

181. *Id.* at 687-88.

182. *Id.* at 688, 703.

183. *Id.* at 706.

duction of the tapes,<sup>184</sup> and held that the need to achieve justice in a criminal prosecution must prevail over a "generalized interest in confidentiality."<sup>185</sup> The Court described the compelling need for the President to obey the subpoena: "Without access to specific facts a criminal prosecution may be totally frustrated."<sup>186</sup> Further, the Court stated that the intrusion on the executive branch would be minimal: "The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases."<sup>187</sup> Similar to the Court's reasoning in *Schor*, the *Nixon* Court found the encroachment on executive power to be limited and the need for the particular governmental action significant.<sup>188</sup>

The balancing of interests arguments that the Court made in *Schor* and *Nixon* can be applied to the independent counsel legislation. That is, although the limited nature of the judiciary's power under the Ethics Act does not intrude substantially upon the power of the executive branch, the need for independent counsels is manifest. Consequently, under a balancing approach, the independent counsel legislation appears not to violate the doctrine of separation of powers.

### C. Bowsher and Schor: *Determining the Proper Test for Resolving Separation of Powers Questions*

To prevent any one branch of the federal government from acquiring too much power, the Framers of the Constitution created a tripartite system of government based on both separation and interdependence. Although the Framers recognized the need for autonomy, the Framers did not intend the branches to be completely separate.<sup>189</sup>

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184. *Id.* at 716.

185. *Id.* at 713.

186. *Id.*

187. *Id.*

188. *See id.*

189. In rejecting the idea of total separation between the branches, James Madison quoted the words of Montesquieu:

[I]t may clearly be inferred that in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," [Montesquieu] did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import . . . can amount to 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, at 302-03 (J. Madison) (C. Rossiter ed. 1961); *see also* *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 441-43 & n.5 (1977) (concluding that the Constitution does not require total separation).

Rather, the Constitution provides for interdependence between the branches so that the actions of one branch may act as a check on the powers of another. As examples of such interdependence, the Constitution grants the President "legislative" power by authorizing the President to either approve or veto acts of Congress.<sup>190</sup> The House of Representatives exercises "executive" power in prosecuting officers during an impeachment proceeding.<sup>191</sup> The Senate exercises "judicial" power through its authority to try those officers accused of impeachable offenses.<sup>192</sup> Through this framework of interdependence, the Constitution enables each branch to check the powers of another, and thus ensures a balance of power among the branches.<sup>193</sup>

Consequently, the Court's per se approach in *Bowsher v. Synar*, focusing on complete separation, is not the proper test for resolving separation of powers questions. The *Bowsher* approach, used to strike down the Balanced Budget Act upon a showing of any encroachment on executive branch power, fails to account for the essential roles of both separation and checks and balances in the structure of the federal government. Conversely, the balancing approach to the separation of powers doctrine applied by the Court in *Schor* and *Nixon*, focusing on the extent of one branch's invasion on the power of another, is consistent with the constitutional balance of autonomy and interdependence.

Thus, in analyzing whether the independent counsel legislation violates the doctrine of separation of powers, the question is not whether the judicial branch may be exercising some executive power, but whether the Ethics Act accords the judiciary so much executive power as to upset the Constitution's balance of separation and checks and balances. Viewed in this context, the power given by the Ethics Act to the judicial branch does not violate the doctrine of separation of powers. The judicial branch is not given sweeping executive power under the Ethics Act so as to emasculate the authority of the executive branch. Nor does the Act vest so much power in the judiciary as to create a realistic fear of judicial usurpation of power at the expense of the other branches.

Rather, the judiciary's role under the Ethics Act is characterized by congressional grants of authority narrowly tailored to meet specific needs. The provisions of the Act apply only to those situations in

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190. U.S. CONST. art. I, § 7, cl. 2.

191. U.S. CONST. art. I, § 2, cl. 5.

192. U.S. CONST. art. I, § 3, cl. 6.

193. For a discussion of the system of checks and balances, see THE FEDERALIST NO. 51 (J. Madison).

which the executive branch is presented with a conflict of interest. Moreover, no independent counsel is appointed unless the Attorney General, an executive officer, first determines that there are grounds to suspect that another executive officer has committed a criminal offense. Once an independent counsel is appointed, the Act authorizes a special three-member court, which is barred from adjudicating any matter brought by the independent counsel,<sup>194</sup> to define the prosecutor's jurisdiction and to remove him under certain circumstances.

Moreover, the independent counsel legislation is essential to maintain the system of checks and balances. Without such legislation, members of the executive branch will be responsible for the prosecution of other executive officers, a stark conflict of interest. The presence of this conflict of interest undermines the Framers' objective of diffusing power among the three branches in order to prevent those in government from abusing their authority and circumventing the fair and impartial administration of the laws. Writing in the *Federalist Papers*, James Madison alluded to the need for a system of checks and balances:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.<sup>195</sup>

The independent counsel legislation provides a necessary check on executive branch power by ensuring the impartial investigation of executive officers. Thus, it is the elimination of independent counsels, rather than their continued presence, that poses a significant threat to the underlying principles of the Constitution.

## V. CONCLUSION

The central purpose of the Ethics Act is the elimination of executive branch influence over the investigation and prosecution of executive officers. To eliminate this fundamental conflict of interest, Congress created an independent counsel who cannot be appointed, supervised, or removed at will by any member of the executive branch. In essence, Congress established an executive office with little relation to the executive branch.

To ensure that independent counsels remain impervious to exec-

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194. 28 U.S.C. § 49(f) (1982); Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191 § 2, 101 Stat. 1293, 1305.

195. THE FEDERALIST NO. 51, at 322 (J. Madison) (C. Rossiter ed. 1961).

utive branch influence, the Act vests the power to appoint independent counsels in a court of law. The appointment provisions of the Act are constitutional because independent counsels are inferior officers and because Congress may, consistent with the Constitution, delegate to a court the appointment of inferior executive officers. Congress may not, however, vest the appointment of any executive officer in a court. The Supreme Court's language in *Ex parte Siebold* limits Congress' power to vest interbranch appointments to only those cases in which an executive officer's appointment by a court will not adversely affect, or may even be essential to, the successful performance of his statutory duties.<sup>196</sup> The unique responsibility of independent counsels in the impartial investigation of executive officers presents such a case.

Further, the judiciary's powers of removal and jurisdiction under the Ethics Act are constitutional because they are consistent with the Constitution's system of separation and checks and balances. The judiciary's power over independent counsels poses no realistic threat to the constitutional integrity of executive branch power. The grants of authority to the judiciary are strictly limited and are thus not likely to serve as a springboard for wholesale judicial intervention into executive branch affairs.

Moreover, the need for a system of checks and balances justifies the Act's minor invasion on executive branch authority. The investigation of executive officers by other executive officers presents a conflict of interest that undermines the impartial application of the laws of the United States. Such a conflict of interest is inconsistent with the Framers' goal of providing checks against the propensity for abuses of power. The independent counsel legislation responds to this constitutional anomaly by importing traditional notions of checks and balances into the procedure for investigation of executive officers.

ALEXANDER I. TACHMES

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196. See *supra* notes 126-31 and accompanying text.