Introduction

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This symposium is most timely. It comes on the eve of a major Supreme Court evaluation, in constitutional terms, of the role of the special prosecutor, called an independent counsel in modern federal parlance. In a case to be known as Morrison v. Olson, the Court

1. 56 U.S.L.W. 3568 (Feb. 22, 1988)(probable jurisdiction noted). Alexia Morrison, the independent counsel appointed in this case under the Ethics in Government Act, took an appeal to the Supreme Court from a divided panel ruling of the Court of Appeals for the District of Columbia Circuit, holding Title VI of the Ethics Act unconstitutional. See In re Sealed Case, 838 F.2d 476 (D.C. Cir. 1988). See also 28 U.S.C. § 1252 (1982). The proceedings in the circuit court took the form of appeals by three former Department of Justice officials (Theodore B. Olson, Carol E. Dinkins, and Edward C. Schmults) from a district court order holding the officials in civil contempt for failing to answer subpoenas issued by the independent counsel. The subpoenas directed the officials to testify before a grand jury investigating their actions while in office. The three officials at each juncture of the contempt proceedings contended that the Act on which the independent counsel's authority is based is unconstitutional.

The 2 to 1 ruling of the court of appeals was entered on January 22, 1988. On February 22, 1988, the Supreme Court noted probable jurisdiction of the appeal and set oral argument for April 26, 1988, following an expedited briefing schedule. The Court noted that Justice Kennedy took no part in the consideration or decision of the order noting jurisdiction or the
will examine the constitutionality of Title VI of the Ethics in Government Act, which establishes the office and duties of the independent counsel.

Special prosecutorial offices, insulated from political interference, have played a long and honored role in American history at federal, state and local levels. But it is the federal prosecutorial sector that has witnessed the most dramatic increase in the use of this special office.

Much of that increased use is due to a growing public sensitivity, generated by the Watergate scandal of the early 1970s, to perceived unethical and illegal conduct of officials high in the echelons of the executive branch. A critical aspect of the Watergate affair had been the influence of White House staff and political appointees in the Justice Department over the Department’s investigations of high officials within the executive branch. The Watergate experience, said the Senate Watergate Committee, “raises a serious question as to whether high Department of Justice officials can effectively administer criminal justice where White House personnel, or the President himself, are the subjects of the investigation.”

After extensive hearings dealing with the constitutional and legal implications of creating the office of independent counsel to investigate and prosecute Watergate-like matters, Congress in 1978 enacted the Ethics in Government Act. The statute has been re-endorsed twice through reauthorizations in 1983 and 1987. It represents a carefully crafted response to the extraordinary problem of investigating and prosecuting high executive branch officials suspected of unethical or illegal conduct in office.

The Act is designed as a check or balance against the unseemly

4. For a detailed discussion of the Watergate scandal as the primary impetus for the Ethics in Government Act, see Levin, supra note 3, at 11-20.
spectacle of executive branch prosecutors making final prosecutorial decisions respecting high ranking executive branch officers, including the prosecutors' own superiors. As the Act provides, if the Attorney General's preliminary investigation reveals "reasonable grounds to believe that further investigation or prosecution is warranted," such further and final prosecutorial decisions should not and need not be made by Justice Department prosecutors appointed by, answerable to, and removable at the whim of the President of the United States. It strains public credulity to have executive branch watchmen ultimately watching themselves. As former Watergate Special Prosecutor Archibald Cox once remarked, "[t]he pressures, the tensions of divided loyalty are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential."\(^8\)

The "outside person" employed by the Ethics Act is known as an "independent counsel," appointed by a special federal court on application of the Attorney General. Such an application can be made only if the Attorney General concludes, following his own preliminary inquiry, that the situation is serious enough to warrant further investigation and possible prosecution. As investigations conducted by these court-appointed counsel have mounted during the Reagan years, so too have risen constitutional challenges to the Act and to the role and function of the independent counsel. The challengers include not only those present and former executive branch officials currently targeted for inquiry and investigation by independent counsel but also the executive branch itself. The Department of Justice, represented in the *Morrison* proceedings in the Supreme Court by the Solicitor General of the United States, has become the most prominent challenger.\(^9\)

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10. This has not always been so. During the Carter years, when the Ethics Act was being formulated, a Department of Justice representative testified that the President, the Attorney General and the Department fully supported the proposed legislation. He indicated that the Department had "no objections to the manner in which the appointment process is initiated, the method of judicial appointment, or the restrictions placed on the Executive's power of removal over the special prosecutor . . . . We believe that judicial appointment is justified by the Appointments Clause, Article II, section 2 . . . ." *Public Officials Integrity Act of 1977 Blind Trusts and other Conflict of Interest Matters: Hearings on S.555 Before the Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess. 15-16* (1977)(testimony of John M.
The executive branch enters this battle holding high the banner of the separation of powers doctrine. Drawing support from such recent decisions as *INS v. Chadha*¹¹ and *Bowsher v. Synar*,¹² the executive branch takes a highly simplistic and literal approach to the separation doctrine. Under that view, all executive-type functions are vested by Article II of the Constitution in the executive branch, performable only by those totally subservient to the Executive. But neither of the doctrinal fathers, Montesquieu or Madison, ever articulated the doctrine in such rigid terms. As Madison explained in *The Federalist No. 47*,¹³ the doctrine means only that the “whole” power of one branch ought not to be exercisable by another branch. The doctrine does not require, in the words of *The Federalist No. 48*,¹⁴ that the branches “be wholly unconnected with each other[,] unless these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.”¹⁵ In other words, the doctrine does not hermetically divide the three basic functions of government so as to preclude whatever blending or checking is deemed necessary to prevent unhealthy concentrations of power in one branch. That is what the concept of checks and balances is all about. And that is what is at the heart of the delegation doctrine, whereby Congress delegates or dispenses some — but not all — of one or more of the three functions (usually called “quasi-functions”) to agencies independent of the Executive.

The arguments projected by the executive branch in the *Morrison* case reflect no real appreciation of the flexible and “blended” nature of the separation doctrine. But then, neither did the Supreme Court in *Chadha* or *Bowsher*. In both cases the Court roundly rejected any notion of shared powers in the absence of express constitutional provision, while railing against the dangers of legislative tyranny and despotism.¹⁶ We can only guess how the Court will treat the separation doctrine in *Morrison*, although the context in which

Harmon, Acting Assistant Attorney General, Office of Legal Counsel, Dept. of Justice). Similar supportive testimony was received from the American Bar Association and from the deans of 49 law schools.

15. Id. at 308.
16. See *Chadha*, 462 U.S. at 949; *Bowsher*, 106 S. Ct. at 3189.
the problem is presented is somewhat different.

Nowhere is this separation misconception more evident than in the executive branch’s argument stemming from the fact that Article II vests in the Executive the duty to “take Care that the Laws be faithfully executed.” The argument is that the Executive can “faithfully execute” federal criminal laws, even as to those in high executive office, only if the executive branch prosecutors retain exclusive power to decide when to investigate, and when to prosecute, alleged violations of those laws. Such investigative and prosecutorial powers are said to be “core” executive functions that cannot be blended with, delegated to, or performed by any officer outside the executive branch. Thus, in the executive’s view, a statute that purports to authorize performance of these functions by an officer not appointed by and controlled by the Executive is unconstitutional.

Underlining the fact that the *Morrison* case is another chapter in the long standing feud between the legislative and executive branches respecting the nature of the separation doctrine, both the Senate and the House of Representatives appear in the case as *amici curiae* in support of the independent counsel’s defense of the Ethics Act. These two legislative protagonists come to the fray armed with several constitutional weapons.

The Senate and the House have traditionally viewed the separation doctrine as functional in nature, permitting a blending of governmental powers in the Madisonian sense so as not to “preclude the establishment of a Nation capable of governing itself effectively.” Such a blending can be effected by Congress whenever deemed “necessary and proper” in the course of enacting laws, provided that no other constitutional provision or principle is violated. Thus where the executive branch is perceived to be incapable of faithfully and even-handedly executing criminal laws respecting actions of high executive branch officials, the blended nature of the separation doctrine should not prohibit Congress from lodging certain limited investigative and prosecutorial functions in an officer who is truly independent of executive domination. The argument is that such a limited delegation of prosecutorial functions, made “necessary and proper” by the unusual conflict of interest within the executive branch, is faithful to

17. U.S. Const. art. II, § 3.
Additionally, the argument is made that the Ethics Act adheres to the separation doctrine in the sense that Congress is not thereby taking unto itself any part — let alone the whole — of the prosecutorial function. As was true in *Commodity Futures Trading Commission v. Schor*, the *Morrison* case "raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this case is whether Congress impermissibly undermined, without appreciable expansion of its own power, the role of the Judicial Branch." Thus, the argument goes, the question whether the judiciary's role has been unduly undermined is to be tested by the legislative purpose in enacting the Ethics Act, the extent of its intrusion into the executive function, and the extent to which the affected function is a "core" function of the Executive.

The most potent argument in the legislative arsenal, one that should dispose of any claim that the judiciary's role has been compromised, is based on an explicit power vested in Congress by the Appointments Clause of Article II, Section 2. The clause begins by providing that the President shall, with the advice and consent of the Senate, appoint ambassadors, Supreme Court justices, and "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." The clause concludes with this explicit language: "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."

The resulting argument is that the independent counsel under the Ethics Act is truly an "inferior Officer," and therefore Congress can vest the appointment of such an officer in a court of law.

The Ethics Act designates as the appointing court a special

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22. Id. at 3261.
23. Nixon v. Administrator of General Services, 433 U.S. 425 (1977). See also *Wiener v. United States*, 357 U.S. 349 (1958). *Wiener* held that there is a functional and therefore a constitutional difference between "those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference." Id. at 353. An independent counsel under the Ethics Act would appear to fall within the latter category, at least in the eyes of Congress.
three-judge division of the Court of Appeals for the District of Columbia, popularly known as the Special Court. The court is composed of three circuit judges, selected by the Chief Justice to serve for two-year periods. An independent counsel can be appointed only on application of the Attorney General, following a finding by the Attorney General that a preliminary investigation provides "reasonable grounds to believe that further investigation or prosecution is warranted." The statute provides for the determination by the Special Court, with the advice of the Attorney General, of the prosecutorial jurisdiction of the independent counsel, as well as a detailed description of counsel's authority and duties. Finally, provision is made for the removal of an independent counsel other than by impeachment, i.e., "only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." Thus these Ethics Act provisions represent a rather unique blend of governmental functions, a blend that appears neither to undermine the core functions of any one branch nor to permit an undue concentration of power in any one branch. But is this blend constitutional?

The District of Columbia Circuit, in invalidating the Ethics Act, produced 128 pages of opinions in slip form. The opinion of the panel majority, written by Judge Silberman, covered 88 pages, while Judge Ruth Bader Ginsburg's dissent took 40 pages. Judge Silberman's opinion states that it was sufficient to decide the case "to hold as we do that the independent counsel is not an inferior officer and thus falls at minimum within that category of the appointments clause of 'all other Officers of the United States, whose Appointments are not herein otherwise provided for,'" thereby rendering Ms. Morrison's appointment as independent counsel "constitutionally invalid."

This conclusion followed a very literal reading of the language of the Appointments Clause, which was said to require presidential appointment not only of ambassadors and Supreme Court justices

26. Id. § 592(e)(1).
27. Id. § 594.
28. Id. § 596.
29. In re Sealed Case, 838 F.2d 476 (D.C. Cir. 1988) (as reported, the opinions cover more than 57 pages).
30. Id. at 487.
31. Id.
but also all principal officers of the United States, such as departmental heads. Since an independent counsel under the Ethics Act was found by Judge Silberman to be a principal rather than an inferior officer, Congress was said to be incapable of lodging her appointment in a court of law, as the last part of the Appointments Clause permits. Obviously this matter of interpreting the clause and applying it to Ms. Morrison’s appointment will be a focal point in the forthcoming Supreme Court ruling.

Having held that the invalid appointment was sufficient to dispose of the case, the panel majority then indulges in what can be described as a fit of judicial activism, a rendering of numerous advisory opinions on other constitutional claims raised by the challengers. Judge Silberman’s opinion ranges far and wide, finding inter alia that (1) the Ethics Act interferes with the President’s core duty to faithfully execute laws by means of criminal prosecutions,32 (2) the Ethics Act impermissibly limits the President’s power to supervise and remove an independent counsel, ignoring the fact that no attempt had been made to supervise or remove Ms. Morrison,33 (3) the Attorney General’s power to remove independent counsel for “good cause,” a power not here exercised, is “almost illusory,”34 and (4) the Ethics Act violates the separation of powers doctrine because it entrusts a court of law with the executive function of making appointments, as well as intruding too far into the vested functions of a “unitary executive.”35

The panel opinion seeks to justify this series of advisory opinions on the theory that if the Supreme Court decides that all 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.”36 Whether the Supreme Court will feel compelled to reach these other claims, most of which do not spring from the facts of the case, is at best problematic. Historically, the Court has followed its own advice “never to anticipate a question of constitutional law in advance of the necessity of deciding it [and] never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be

32. Id. at 488-89.
33. Id. at 496.
34. Id. at 501.
35. Id. at 503-04.
applied."

Make no mistake about it. The *Morrison* case is but the latest effort, an aggressive effort, by the Executive to mold the separation of powers doctrine into a means of inflating the powers of the Executive under the rubric of the vested but imprecise duty to execute the laws faithfully. The effort succeeded in *Chadha* and *Bowsher*. In each case the Supreme Court read the separation doctrine to mean that no kind of executive function may be delegated to or performed by anyone outside the executive branch, thus diminishing some of the constitutional power of Congress to make modern government effective and efficient. In light of those precedents, the Court’s forthcoming treatment of the separation problem in *Morrison* is difficult to predict. Will the Court find that Congress lacks any constitutional authority under the Appointments Clause or the separation doctrine to establish an independent mode of inquiry into high executive crimes and misdemeanors? Or will the Court recognize that Congress has constitutional authority to legislate, pursuant to the Necessary and Proper Clause and as it “thinks proper” under the Appointments Clause, so as to avoid the outrageous spectacle of executive branch prosecutors, answerable only to the Executive, having total power to decide whether or not to inquire into or prosecute alleged crimes committed at the highest executive levels?

To repeat, this symposium comes at a most opportune time. The discussions herein shed valuable light on the nature and role of the office of independent counsel, or special prosecutor. A proper understanding of that office is the essential predicate to any assessment of the constitutional conundrums posed in the *Morrison* case.

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