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THE CONSTITUTIONAL VALIDITY OF THE ETHICS IN GOVERNMENT ACT:
MORRISON V. OLSON

Editor's Note

As this symposium began to take shape it became apparent that the Supreme Court would shortly be addressing many of the constitutional questions raised by the use of independent counsel through the Court's consideration of Morrison v. Olson. Recognizing the critical nature of the Court's deliberations in this case, the editors concluded that this symposium would be incomplete without commentary and debate of the issues with which the Court must deal. The editors contacted the principal parties involved in the case; they suggested that the best discussion of these issues could be found in the briefs which had been submitted to the D.C. Circuit. The parties noted that while the D.C. Circuit had already rendered its decision, many of the same arguments considered by the circuit court, and discussed by these briefs, would be reexamined by the Supreme Court. Therefore, in the interest of presenting what are perhaps the most cogent arguments for and against the Ethics in Government Act, the Hofstra Law Review reprints below the brief filed on behalf of the Appellee, and the brief filed on behalf of the United States as amicus curiae in In re Sealed Case.

IN RE SEALED CASE — BRIEF FOR APPELLEE*

I. STATEMENT OF FACTS

In 1982 two Subcommittees of the House of Representatives subpoenaed documents from the Environmental Protection Agency. The Department of Justice advised the President that certain of the documents were subject to a claim of executive privilege because their release could imperil ongoing EPA enforcement actions. Acting on the Department's advice, the President directed the Administrator of EPA to withhold the "enforcement sensitive" documents, and she did so.

There ensued a serious constitutional confrontation between the legislative and executive branches. The House voted to hold the Administrator in contempt. The United States Attorney took no steps to prosecute the contempt. The Department of Justice sued the House of Representatives seeking a declaration that the President's claim of privilege was valid.1

It later turned out that some of the withheld documents contained evidence of political manipulation of the so-called "Superfund" hazardous waste site clean-up program. The claim of executive privilege was abandoned, the Administrator resigned, and one high-level EPA official responsible for Superfund program administration was convicted of making a false statement.

The House Committee on the Judiciary undertook an investigation of the role of the Justice Department in the EPA documents controversy. During that investigation, then-Assistant Attorney General for the Office of Legal Counsel Theodore B. Olson testified on March 10, 1983, before the Judiciary Subcommittee on Monopolies and Commercial Law. The Department later produced documents responsive to requests from the Committee. For a substantial period of time the Department withheld from production both handwritten notes of participants in the controversy and chronologies prepared within the Department, without informing the Committee that it was doing so. Once their existence was discovered by the Committee,

* This brief was filed in In re Sealed Case, 838 F.2d 476 (D.C. Cir. 1988). The only changes made were those necessary to conform the brief to Law Review style.

these items were also turned over.

The Committee published an extensive report of its investigation on December 11, 1985.\textsuperscript{2} It asserted, inter alia, that Mr. Olson had testified untruthfully in several respects before the Subcommittee on March 10, and that former Deputy Attorney General Edward C. Schmults and former Assistant Attorney General for the Lands and Natural Resources Division Carol E. Dinkins had engaged in acts which obstructed the Committee's inquiry. Committee Chairman Peter W. Rodino, Jr., forwarded the report to the Attorney General on December 12, 1985, with a formal request that the latter seek the appointment of an independent counsel under Title VI of the Ethics in Government Act.\textsuperscript{3}

At the direction of the Attorney General, the Public Integrity Section of the Criminal Division conducted the preliminary investigation required by section 592(a)(1) of the Act.\textsuperscript{4} In a lengthy and careful report, the Public Integrity Section concluded that the appointment of an independent counsel was warranted with respect to the conduct of Messrs. Olson and Schmults and Ms. Dinkins.\textsuperscript{5} Most high-level members of the Criminal Division recused themselves from the review process because of their relationship with the matter or the individuals involved. Invoking a "rule of necessity," John C. Keeney, Deputy Assistant Attorney General, reviewed the matter and recommended that only Mr. Olson be referred for further investigation by an independent counsel.\textsuperscript{6}

Because so many high-level Department officials had recused themselves, the Attorney General asked then-United States Attorney for the District of Massachusetts William F. Weld to act as his Special Assistant in the matter and review the Criminal Division's recommendations. Mr. Weld recommended the appointment of an independent counsel to investigate the conduct of Messrs. Olson and Schmults, but not Ms. Dinkins.\textsuperscript{7}

\begin{footnotes}
\item 5. Analysis & Recommendations Concerning the Report of the House Judiciary Committee, Public Integrity Section (Apr. 4, 1986) 151-52 [hereinafter "Public Integrity report"].
\item 6. Memorandum from John C. Keeney to William F. Weld 8 (Apr. 4, 1986).
\item 7. Memorandum from William F. Weld to Attorney General 1, 4, 5, 8 (April 4, 1986).
\end{footnotes}
On April 10, 1986, Attorney General Edwin Meese III applied to the Special Division of this Court for the Purpose of Appointing Independent Counsels (the "Division") for the appointment of an independent counsel to investigate Mr. Olson. Overruling the views of the professional prosecutors in the Public Integrity Section and his own Special Assistant in the matter, the Attorney General concluded that there were "no reasonable grounds to believe that further investigation or prosecution [was] warranted," with respect to either Mr. Schmults or Ms. Dinkins. Regarding Mr. Olson, the Attorney General requested that the independent counsel be given jurisdiction to investigate whether Mr. Olson gave false testimony to the Subcommittee "and any other matter related to that allegation."

On April 23, 1986, the Division appointed James C. McKay as Independent Counsel to investigate whether testimony of Mr. Theodore Olson and his revision of such testimony on March 10, 1983, violated either 18 U.S.C. § 1505 or § 1001, or any other provision of federal law [and] any other allegation or evidence of violation of any Federal criminal law by Theodore Olson developed during . . . and connected with or arising out of that investigation . . . .

After Mr. McKay resigned, the Division on May 29, 1986, appointed Alexia Morrison to replace him.

Following the initial stages of the investigation, Independent Counsel he...
Counsel concluded that the conduct of Mr. Schmults and Ms. Dinkins required further scrutiny. On November 14, 1986, Independent Counsel applied to the Attorney General pursuant to 28 U.S.C. section 594(e) for referral of allegations regarding Mr. Schmults and Ms. Dinkins as “related matters.” On December 17, 1986, the Attorney General declined the requested referral.

On January 13, 1987, Independent Counsel sought referral of the Dinkins and Schmults matters from the Division. The Attorney General opposed the referral, as did Mr. Schmults and Ms. Dinkins, participating as amicus curiae. On April 2, 1987, the Division ruled that the Attorney General’s determination that there were no reasonable grounds for further investigation of Mr. Schmults and Ms. Dinkins was final and unreviewable under 28 U.S.C. section 592(b)(1), and hence that it had no power to make the requested referral under section 594(e).\(^\text{13}\) The Division went on, however, to state that the existing grant of jurisdiction authorized an investigation of whether Mr. Olson may have participated with others, including Mr. Schmults and Ms. Dinkins, in an unlawful scheme to obstruct the Committee’s inquiry.\(^\text{14}\) Independent Counsel has proceeded to conduct the investigation within the framework of the Division’s order.

Challenges to the constitutional authority of the Independent Counsel to proceed were brought in the District Court by three individuals. Those challenges were resolved in favor of the constitutionality of the Act in an opinion by Chief Judge Robinson on July 20, 1987. These appeals ensued.\(^\text{15}\)


\(^{14}\) *Id.* at 47-48.

\(^{15}\) All three appellants challenge the constitutionality of the statute. Appellant in No. 87-5264 raises a separate issue with respect to the scope of Independent Counsel’s authority under the Division’s appointing order. This Court ordered the appeals in Nos. 87-5261 and 87-5265 consolidated, and appellants therein have filed a single brief confined to the constitutional issues. Appellant’s Briefs, *In re* Sealed Case, 838 F.2d 476 (D.C. Cir. 1988)[hereinafter Appellant Brief I]. Appellant in No. 87-5264 filed a separate brief addressing both the constitutional issues and the issue of the scope of Independent Counsel’s authority. Appellant Brief, *In re* Sealed Case, 838 F.2d 476 (D.C. Cir. 1988)[hereinafter Appellant Brief II]. The Department of Justice filed a brief amicus curiae supporting appellants’ position on the constitutional issue. Brief for the Department of Justice, *In re* Sealed Case, 838 F.2d 476 (D.C. Cir. 1988)[hereinafter Department of Justice Brief]. Appellee addresses in this brief the constitutional arguments of all three appellants and the Department. A separate brief addressing the scope of authority issue is being filed by appellee in No. 87-5264.
II. Summary of Argument

A. The provisions of Title VI of the Ethics Act do not violate the separation of powers principle. They are a measured and limited congressional response to the recurring problem of allegations of criminal misconduct involving high Executive Branch officials, which inevitably place the Justice Department in a conflict of interest. The Act does not invade the law enforcement prerogatives of the Executive Branch. It requires a request by the Attorney General before any independent counsel may be appointed, and its reach is narrowly limited to the accomplishment of a specific purpose within Congress' power. The Constitution does not contemplate separate "airtight compartments" of government. The Act does not prevent the Executive Branch from accomplishing its constitutionally assigned functions, but creates a mechanism to permit effective law enforcement and secure public confidence in the extraordinary cases where the Justice Department is disabled to act. The Executive Branch has repeatedly acquiesced in this and other measures to achieve the foregoing objectives by divesting itself of law enforcement responsibility in such cases. Any impact on executive prerogatives is justified by the overriding need to promote fair and effective law enforcement and public confidence in the integrity of the enforcement process. To this end, the limited strictures on the power of the Executive Branch to remove an independent counsel are appropriate to the functions of that office and do not improperly aggrandize congressional power.

B. The Constitution permits Congress to vest the power to appoint an independent counsel in a "Court of Law." The independent counsel, who is appointed temporarily to conduct a single, narrowly defined, investigation, is an "inferior officer" within the meaning of art. II, section 2, cl. 2, and thus does not require presidential appointment and Senate confirmation. There is no constitutional impediment to the appointment of a prosecutorial official by a court.

C. The power granted to the court to appoint an independent counsel and define his or her jurisdiction does no violence to the limitations of art. III. The powers of the court derive, not from art. III alone, but from the Appointments Clause as well. Moreover, those powers are not inconsistent with art. III, and the functions performed by the court do not differ qualitatively from functions traditionally performed by courts sitting under art. III.
III. ARGUMENT

A. The Independent Counsel Provisions of the Ethics in Government Act are a Measured Congressional Response to a Significant Law Enforcement Problem, and they do no Violence to the Separation of Powers Principle

The major thrust of appellants' and the Department's arguments is that the Act is unconstitutional because criminal law enforcement is a "core executive function," no aspect of which may be taken from the control of the Executive Branch by congressional enactment. This contention has been rejected by every judge who has opined upon it to date, and by the overwhelming weight of scholarly and practical legal opinion. We shall demonstrate that the Act is a measured and limited response to a real and recurring law enforcement problem, and that it does not impermissibly invade the sphere of the executive.

1. The Act Is a Measured Response to a Real and Recurring Law Enforcement Problem.—In passing the Ethics Act, Congress wrote against a backdrop of Executive Branch scandals from Teapot Dome to Watergate, in each of which the Department of Justice was effectively immobilized by an evident conflict of interest. The Senate Committee gave expression to Congress' conclusion:

The basic purpose of the special prosecutor provisions is to promote public confidence in the impartial investigation of alleged wrongdoings by government officials. Prompted by the events of Watergate, Congress recognized that actual or perceived conflicts of interest may exist when the Attorney General is called on to investigate alleged criminal activities by high-level government officials.

When conflicts exist, or when the public believes there are


17. For a compendium of legal scholars and eminent practitioners who supported the independent counsel provisions of the legislation, see Appendix to this Brief (on file at Hofstra Law Review).

18. For a discussion of the history of major Executive Branch scandals leading to the passage of the Act, see In re Olson, 818 F.2d 34, 39-43 (D.C. Cir. Indep. Couns. Div. 1987). Of the eight presidential administrations since World War II, five—those of Presidents Truman, Eisenhower, Nixon, Carter and Reagan—have encountered serious allegations of criminal wrongdoing at the upper echelons of the Executive Branch.
conflicts, public confidence in the prosecutorial decisions is eroded if not totally lost. Thus, a statutory mechanism providing for a temporary special prosecutor is necessary to insulate the Attorney General from making decisions in these instances.

The Committee believes that the dangers of conflict of interest were not unique to Watergate, but rather are inherent in our system of government. The Attorney General is a political appointee of the President, at times close advisor to the President, and a part of an Administration that may aspire to reelection or have other political objectives. Thus, an Attorney General may be placed in a difficult situation when called upon to investigate allegations against senior Administration officials. Even when an Attorney General makes totally unbiased decisions in investigating officials, the public may perceive actions as having political motivations....

Ironically, there is also a danger that, in other cases, the Attorney General may bend over backwards to avoid the risk of loss of public confidence in his office, and make a harsh and unfair prosecutorial decision against a public official.

Historical experience demonstrates that public confidence is served only when these investigations are conducted by a person totally outside the control of the Attorney General and senior officials of the Department of Justice.19

Congress' response to this historical experience, Title VI of the Ethics Act, is carefully crafted both to preserve a substantial role for the Attorney General and to limit narrowly the circumstances in which an independent counsel may be appointed and the scope of the counsel's powers.

First, the reach of the Act is extremely narrow, and no independent counsel may be appointed without a specific request from the Attorney General, who may cut the process off at any of several stages. Upon receipt of information that he determines is “sufficient to constitute grounds to investigate” possible serious criminal conduct20 by one of the small class of persons covered by the Act,21 the Attorney General is directed to conduct a preliminary investigation.22 His determination that no preliminary investigation is war-

21. The coverage of the Act is narrowly limited to persons at the very top echelon of the Executive Branch. 28 U.S.C. § 591(b)(1982).
ranted is not subject to judicial review. If a preliminary investigation is conducted, the Attorney General is required to seek the appointment of an independent counsel if he finds "reasonable grounds to believe that further investigation or prosecution is warranted . . . ." A determination by the Attorney General that no further investigation or prosecution is warranted, and hence that no independent counsel should be appointed, is likewise final and reviewable, even at the behest of an independent counsel claiming to possess newly discovered evidence.

Once an independent counsel has been appointed, the Executive Branch retains significant control over the process and its ultimate outcome. Thus the Attorney General may refer "related matters" to the independent counsel, but the Division may not do so without

23. Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986); Nathan v. Smith, 737 F.2d 1069 (D.C. Cir. 1984).
25. 28 U.S.C. § 592(b)(1)(1982); Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984) (en banc). Appellants complain that the Act improperly confines the Attorney General's exercise of prosecutorial discretion, which will often turn upon a variety of factors beyond the existence of an evidentiary justification for further proceedings. Appellant Brief II, supra note 15, at 23-24, 34; Department of Justice Brief, supra note 15, at 49. The Act, however, does not so constrain the Attorney General. It is true that § 592(a)(1) mandates a preliminary investigation by the Attorney General if the evidence warrants it. However, the standard for the Attorney General's determination whether to seek the appointment of an independent counsel at the conclusion of the preliminary investigation — "whether there are reasonable grounds to believe that further investigation or prosecution is warranted" — does not by its terms confine the Attorney General to a bare consideration of evidentiary justification. Indeed, § 592(c)(1) was amended in 1982 to direct the Attorney General in determining whether further investigation or prosecution is warranted to "comply with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws." See 1982 Senate Report, supra note 19, at 3550.

In any event, the reasoning of Dellums, Nathan and Banzhaf renders it virtually inconceivable that an Attorney General's refusal to seek the appointment of an independent counsel will ever be reviewed and overturned, even when he relies explicitly or implicitly on non-evidentiary factors. Here, for example, the Attorney General overruled the Department's prosecuting professionals and declined to seek the appointment of an independent counsel with respect to Mr. Schmults and Ms. Dinkins purportedly on the basis of a "finding" made at the investigatory threshold that they lacked "criminal intent," even though the existence vel non of such intent is ordinarily a matter for inference on the basis of all the evidence at the conclusion of the investigatory process. Yet his determination was treated by the Division as unreviewable. In re Olson, 818 F.2d at 47.

26. In re Olson, 818 F.2d at 47. The Attorney General, by contrast, is empowered to review newly discovered evidence and make an unreviewable determination whether it justifies reversing a prior decision not to seek the appointment of an independent counsel. 28 U.S.C. § 592 (c)(2)(1982).
27. For a catalog of the Attorney General's substantial array of powers under the Act, see In re Olson, 818 F.2d at 45-46.
the Attorney General's concurrence. And while the independent counsel is given most investigative and prosecutorial powers within the scope of his or her jurisdiction, the Attorney General retains "direction and control" with respect to authorizations for the interception of wire or oral communications. More important, the Attorney General has the sole power (other than the impeachment process) to remove an independent counsel, though he may do so only for "good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." And the President retains the exclusive and unfettered constitutional authority, pursuant to Article II, section 2, clause 1, to pardon the subject of an investigation at any stage of the process.

The statutory powers of an independent counsel, while admittedly (and necessarily) broad within the sphere of his or her jurisdiction, are carefully circumscribed. He or she has no authority to investigate or prosecute beyond the confines of the specified jurisdiction and must "except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." Public accountability of an independent counsel is ensured by the requirement that he or she submit a comprehensive report of the investigation to the Division, and by the provision for congressional oversight of his or her activities.

29. In re Olson, 818 F.2d at 47.
31. Id. § 596(a)(1).
34. 28 U.S.C. § 594(a),(c),(d),(g)(1982).
35. 28 U.S.C. § 594(f)(1982). Appellants' complaints that independent counsels are not in a position to give weight to the full range of factors normally encompassed within the concept of "prosecutorial discretion," Appellant Brief II, supra note 15, at 16-17; Appellant Brief II, supra note 15, at 25, lack substance. An independent counsel has authority under 28 U.S.C. § 594(g) to decline investigation or prosecution pursuant to the Department's written or established policies, which provide guidelines for the exercise of prosecutorial discretion. See U.S. DEPARTMENT OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION 5-15 (1980). The exercise of such discretion within the Department's guidelines by Justice Department Attorneys is in any event a highly individualized process. And the history under the statute hardly suggests that independent counsels feel pressured to bring prosecutions where the Department ordinarily would not. There have been at least nine publicly identified independent counsels since the passage of the Act in 1978, and possibly others whose appointment has not been made public, see 28 U.S.C. § 592(b)(3) (1982), and so far only two indictments have been brought.
37. Id. § 595(d). Appellants complain that the Act's provision for congressional oversight of an independent counsel's activities, which is plainly designed to secure the accountabil-
And in addition to the Attorney General's power of removal, the office of the independent counsel automatically terminates when he or she notifies the Attorney General that the investigation is completed,\(^3^8\) or earlier if the Division on its own motion or that of the Attorney General determines that the investigation is substantially completed.\(^3^9\)

The Act thus authorizes the creation of a temporary office in narrowly defined circumstances where the normal prosecuting authorities are disabled by a conflict of interest. The office may only be created upon the request of the Attorney General, and its jurisdiction is closely confined by the order creating it. The office terminates when its purpose has been accomplished, and the accountability of its occupant is assured by the Attorney General's power of removal, the power of the Division to terminate the office and the power of the Congress to conduct appropriate oversight proceedings.

2. The Act Does Not Invade the Law Enforcement Prerogatives of the Executive Branch.

   a. The Constitution Does Not Contemplate Three Separate "Airtight Compartments." — The position of appellants and the Department rests upon a rigid and formalistic view of the separation of powers. "Law enforcement" is invoked as a talisman to shield absolute executive prerogative from any control by the legislature or the judiciary. This approach to the separation of powers is "inconsistent with the origins of that doctrine, recent decisions of the [Supreme] Court, and the contemporary realities of our political system."\(^4^0\) The Court has "squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches,"\(^4^1\) and with it the "archaic view of the separation of powers as requiring three airtight departments of government."\(^4^2\)

   Indeed, the vision of the Framers was far more sophisticated


\(^{39}\) Id. § 596(b)(2).


\(^{41}\) Id. at 443 (citing United States v. Nixon, 418 U.S. 683, 703 (1974)).

\(^{42}\) Nixon v. Administrator of Gen. Serv., 433 U.S. at 443.
and common-sensical than that contended for by appellants. Madison, a principal architect of this aspect of the Constitution, argued that the separation of powers "does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other." To the contrary, he urged, that "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." Interpreting the words of Montesquieu on this subject, Madison contended that

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

From this practical and undogmatic beginning there has evolved a pragmatic approach to the analysis of separation of powers issues. This approach received its most comprehensive and oft-quoted statement from Justice Jackson:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure

43. THE FEDERALIST No. 48, at 308 (J. Madison)(Lodge ed. 1888).
44. Id.
45. Id. No. 47 at 302 (emphasis in original). Two scholars have recently pointed out:

[M]ost of the Framers conceded that a rigid separation of powers was unacceptable . . . . Therefore, instead of separated powers--shared powers. Instead of divided government—mixed government. Accordingly, Madison was forced to reinterpret Montesquieu, to find in his work support for the idea of shared powers . . . .

The product was a constitution, not of separated powers, but of "separated institutions sharing powers." The institutions of government were formally separated by the stricture that no member of one branch could simultaneously hold office in another. To an extent, the powers of government were separated as well: the three branches were allocated particular functions over which they held primary responsibility. But most importantly, powers were shared. Dual concurrence, for example was required for policymaking . . . .

As a description of the actual functioning of government, then, the term "separation of powers" is quite misleading. Indeed, it seems fair to say that the constitutional commitment to this doctrine has been, at best, "vague and uncertain."

liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciproc-ity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.46

Thus the Court has recently reiterated that "the Constitution by no means contemplates total separation of each of these three essential branches of Government," 47 and that the Framers were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.48

The Supreme Court has articulated a two-pronged test for "determining whether [an Act of Congress] disrupts the proper balance between the coordinate branches."49 First,

the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of

48. Id. Scholars have noted and approved the Court's avoidance of dogma in its resolution of separation of powers questions. See, e.g., P. KAUPER & F. BEYTAGH, CONSTITUTIONAL LAW 342-43 (1980); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 16-17 (1978). Noting the many places where the text of the Constitution requires that one branch take part in the functioning of another (e.g., presidential approval of legislation), Professor Tribe remarked: "Although the late nineteenth century Supreme Court expressed a wooden notion that each branch must 'be limited to the exercise of the powers appropriate to its own department and no other,' that view has since been widely dismissed as indefensibly extreme and largely beside the point." Id. at 16 (footnote omitted). The rise of what Justice White has called "the modern administrative state," INS v. Chadha, 462 U.S. 919, 984 (White, J., dissenting), which invests administrative agencies with powers traditionally exercised by all three branches, has led some scholars to question the continued utility of the traditional separation of powers model. E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 2-3 (1978). While the Supreme Court has never suggested abandonment of the concept of separation of powers, it has been at pains to make it clear that the doctrine does not prevent administrative agencies from exercising mixed powers which partake of the traditional powers of the three branches. E.g., CFTC v. Schor, 106 S. Ct. 3245, 3257-61 (1986); Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935); cf. Bowsher v. Synar, 106 S. Ct. 3181, 3188 n.4 (1986)(distinguishing cases where agencies exercise independent powers from those in which congress retains direct control).
The Ethics Act satisfies both prongs of the Nixon test.

b. The Act Does Not Prevent the Executive Branch From Accomplishing its Constitutionally Assigned Functions.— It is thus clear that the mere description of a function as involving "law enforcement" does not automatically place it within a sphere of exclusive Executive Branch prerogative. Once this is understood, there can be no serious claim that the provisions of the Act impermissibly invade the province of the Executive Branch.

As we have shown, the Act is narrowly tailored to achieve a limited objective—the creation of a law enforcement mechanism.

50. Id. (citations omitted). See also Commodity Futures Trading Comm’v v. Schor, 106 S. Ct. 3245, 3261 (1986) (focusing on potential for “aggrandizement of congressional power at the expense of a coordinate branch”).

51. E.g., Young v. United States ex rel. Vuitton et Fils S.A., 107 S. Ct. 2124, 2131-35 (1987) (approving judicial appointment of private counsel to prosecute criminal contempt of court); Humphrey’s Executor v. United States, 295 U.S. 602, 624 (1935) (approving law enforcement functions of the FTC); ICC v. Chatsworth Coop. Mktg. Ass’n, 347 F.2d 821, 822 (7th Cir. 1965); cf. Bowsher v. Synar, 106 S. Ct. 3181, 3206-07 & n.3 (1986) (White, J., dissenting). This Court held in National Treasury Employees Union v. Nixon, 492 F.2d 587, 604 (D.C. Cir. 1974), that the President’s duty to “take Care that the laws be faithfully executed... does not permit the President to refrain from executing laws duly enacted by the Congress as those laws are construed by the judiciary.” See also Kendall v. United States, 37 U.S. (12 Pet.) 524, 612-13 (1838) (stating that the obligation imposed on the President to see the laws faithfully executed does not imply a power to forbid their execution). Of course, the President’s exercise of his law enforcement powers is constrained by a wide range of congressional and judicial prescriptions, including, for example, the wiretap provisions of the Omnibus Crime Act, 18 U.S.C. §§ 2510-21 (1982 & Supp. 1986), and the Federal Rules of Criminal Procedure.

52. Appellants’ reliance on statements in such cases as United States v. Nixon, 418 U.S. at 693, and United States v. Cox, 342 F.2d 167, 190 (5th Cir.), cert. denied, 381 U.S. 935 (1965) (Wisdom, J., concurring), to the effect that the decision whether to prosecute a criminal case is committed to the exclusive discretion of the executive, Appellant Brief I, supra note 15, at 11-12; Appellant Brief II, supra 15, at 19-20; Department of Justice Brief, supra note 15, at 25-27, is misplaced. These dicta import nothing more than the obvious proposition that the exercise of prosecutorial discretion in particular cases is an “executive” or “law enforcement” function, as opposed to a legislative or judicial function. Neither the statements themselves nor, more importantly, the cases in which they were made, speak even remotely to the question whether Congress may lodge the performance of that “executive” function in an officer insulated from at least some degree of Executive Branch control in the extraordinary circumstances addressed by the Act. Cox merely held that a court may not compel a federal prosecutor to sign an indictment and proceed with a case by use of its contempt power. Of course, the Act does not purport to give any judicial body the power to force the initiation of a prosecution. And in Nixon the Supreme Court upheld, over the President’s constitutional protest, the power of a special prosecutor appointed with solemn assurances of independence from presidential control to compel the President himself to turn over to a grand jury tapes of his confidential conversations with his aides. Appellants can hardly take comfort from such a holding.
where the Executive Branch is disabled to act by virtue of a conflict of interest. Its reach is modest, and it preserves substantial Executive Branch power even within its compass. It was enacted only after repeated historical demonstrations of the inability of the Executive Branch to police its own top echelons in a manner consistent with public confidence in the integrity of law enforcement. To deny in these circumstances the power of Congress to create this mechanism would be to exalt a never-accepted dogma to a point where it interferes with the nation's "capab[ility] of governing itself effectively." 

i. The Actions of the Executive Branch Belie the Notion That Its Functions Have Been Disrupted. — Under the Constitution the President is an active participant in the legislative process. Article I, section 7, clause 2, provides that no Act of Congress may become law without his signature, unless both Houses vote by two-thirds majority to override his veto. Presidents have routinely vetoed legislation which they deemed invasive of their constitutional prerogatives. 

Title VI of the Ethics Act has been signed into law, not just by one President, but by two, including President Reagan. When President Carter signed the original Act in 1978, he not only raised no protest that it deprived him of his rightful constitutional authority, he declared: "I'm hopeful, of course, that this authority will be rarely needed, but I believe it is necessary in response to the lessons that we have learned to the embarrassment of our country in the past." President Reagan does not appear to have issued a statement when he signed the extension and amendment of the statute in 1982, but he likewise failed to protest what the Department of Justice now asserts is a fundamental tear in the constitutional fabric. Indeed, the Department of Justice testified on behalf of the Executive Branch in favor of the legislation in 1977:

The Department has 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. . . . [O]n balance, we think that the extraordinary circumstances which would warrant a resort to a spe-

54. To cite but two famous examples, President Nixon vetoed the War Powers Act, which was passed over his veto, on this ground, 9 WEEKLY COMP. PRES. DOC. 1285 (Oct. 29, 1973), and President Jackson did the same with the second Bank of the United States legislation, see A. SCHLESINGER, JR., THE AGE OF JACKSON 90-91 (1950).
cial prosecutor would also justify granting him the measure of independence provided.\textsuperscript{66}

We recognize, of course, that cases since \textit{Marbury v. Madison},\textsuperscript{57} hold that the concurrence of the legislative and executive branches in the constitutionality of a law is not binding on the judiciary, and we do not mean to suggest that the acquiescence of Presidents Carter and Reagan in the Act's passage forecloses judicial inquiry. However, the constitutional process affords the Executive Branch ample opportunity to make its objections known and their weight felt. Thus we submit that where the question is whether a statute impermissibly strips the Executive Branch of its fundamental prerogatives, the executive's assent is entitled to substantial weight in the judicial analysis.\textsuperscript{68} As the Supreme Court put it in rejecting another claim of congressional invasion of executive prerogative, "[t]he Executive Branch became a party to the Act's regulation when President Ford signed the Act into law, and the administration of President Carter ... vigorously supports ... its constitutionality."\textsuperscript{59}

The actions of the Executive Branch are relevant in yet another way. Presidents since Calvin Coolidge have explicitly recognized their disability to act in criminal matters affecting high administration officials and have taken action, sometimes pursuant to congressional enactment, to divest themselves of law enforcement responsibility and authority in such matters.\textsuperscript{60} Indeed, the current Attorney


\textsuperscript{57} 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{58} See \textit{Myers v. United States}, 272 U.S. 52, 254-59 (1926) (Brandeis, J., dissenting).

\textsuperscript{59} \textit{Nixon v. Administrator of Gen. Serv.}, 433 U.S. at 441.

\textsuperscript{60} Thus in the Teapot Dome scandal, Congress created a special prosecutor "with full power and authority to carry on [criminal] proceedings," H.J. Res. 160, 43 Stat. 16 (1924), and President Coolidge appointed such a prosecutor. \textit{See In re Olson}, 818 F.2d at 40. In the IRS scandal during the Truman Administration, a special counsel was appointed within the Department of Justice. The failure to secure his independence from Executive Branch control proved disastrous, since the Attorney General fired him when he sought papers from the Attorney General himself, and President Truman fired the Attorney General. \textit{See id. at }40-41. The story of the firing of Watergate Special Prosecutor Archibald Cox in the famous "Saturday Night Massacre" at the Justice Department and the subsequent appointment of Leon Jaworski with full assurances of immunity from presidential interference, embodied in a formal regulation, \textit{see United States v. Nixon}, 418 U.S. at 694-95, is too well known to require extensive repetition. Two independent counsels were appointed under the statute during the Carter Administration to investigate his White House Chief of Staff and his former campaign manager, and the Attorney General appointed another official from outside the Department to investi-
General has promulgated regulations under which independent counsels previously appointed under the statute may be—and have been—reappointed to conduct precisely the same investigations with precisely the same insulation from presidential removal as they had under the Act.\textsuperscript{61} It hardly seems likely that successive administrations would have acted in this manner if direct control by the President and the Attorney General of prosecutions of high government officials were truly essential to the preservation of Executive Branch prerogatives. On the contrary, Presidents and Attorneys General have apparently perceived these investigations as political liabilities and law enforcement nightmares and have willingly and repeatedly shed this aspect of their law enforcement authority. The Act merely regularizes a heretofore haphazard process and represents cooperation between the executive and legislative branches to achieve a mutually desired goal. It is a perfect example of "practice . . . integrating the dispersed powers into a workable government."\textsuperscript{62}

c. Any Impact on Executive Branch Prerogatives is Justified by an Overriding Need to Promote an Objective Within the Constitutional Authority of Congress. — Assuming arguendo that the Act creates some potential for disruption of the functioning of the Executive Branch, it nonetheless clearly passes the second prong of the Nixon test.

Neither appellants nor the Department assert that it is beyond the constitutional authority of the Congress to attempt to ensure that the criminal laws will be applied to high government officials in a fair and even-handed manner and in a way that will secure public confidence in the integrity of the process. The constitutional crisis which grew out of Watergate is a sufficient demonstration that without a mechanism to achieve this goal, there is grave question whether we are in fact "a Nation capable of governing itself effectively."\textsuperscript{63}

The achievement of both the fact and the appearance of fairness


\textsuperscript{62} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 635 (Jackson, J., concurring).

\textsuperscript{63} Buckley v. Valeo, 424 U.S. at 121.
in the prosecutorial process is a sine qua non of effective law enforce-
ment and hence of effective government in a free society. Thus de-
spite the extremely broad discretion afforded prosecutors to choose
whether to go forward with a criminal case, the Fifth Amendment
requires the concurrence of a grand jury in all cases of “capital, or
otherwise infamous crime,” and the Due Process Clauses of the Fifth
and Fourteenth Amendments prevent prosecutors from proceeding
selectively, \[64\] or on the basis of “an unjustifiable standard such as
race, religion, or other arbitrary classification,” \[65\] or vindictively. \[66\]

The Supreme Court has repeatedly emphasized that a federal
prosecutor

is the representative not of an ordinary party to a controversy, but
of a sovereignty whose obligation to govern impartially is as com-
pelling as its obligation to govern at all . . . . As such, he is in a
peculiar and very definite sense the servant of the law, the twofold
aim of which is that guilt shall not escape nor innocence suffer. \[67\]

Only last Term the Court held that the need for a disinterested pros-
cutor bars the appointment of a lawyer with a potential conflict of
interest to investigate and prosecute a criminal contempt of court. \[68\]
The Court deemed the point so fundamental that it declined to apply
harmless error analysis. \[69\] Noting the “concern that prosecution by
an interested party may be influenced by improper motives,” \[70\] the
Court concluded that any interest on the part of the prosecutor “cre-
ates an appearance of impropriety that diminishes faith in the fair-
ness of the criminal justice system in general.” \[71\] The Court held:
“Public confidence in the disinterested conduct of [the prosecuting]
official is essential. Harmless error analysis is not equal to the task of
assuring that confidence.” \[72\]

The provisions of Title VI of the Ethics Act come into play only
where the status of the subject of the investigation as a high-level
member of the administration infuses the Attorney General and the

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711, 725 (1969).
68. Young v. United States ex rel. Vuitton et Fils S.A., 107 S. Ct. 2124, 2135-41
69. Id. at 2138-41.
70. Id. at 2137.
71. Id. at 2139.
72. Id. at 2141.
Department which he heads with precisely the sort of actual or potential conflict of interest which the Court held absolutely disqualifying in Young. The experience of the Watergate scandal and the allegations of criminal misconduct against members of the Carter and Reagan administrations demonstrate graphically that public confidence in the administration of justice cannot be maintained where the Attorney General is called upon to investigate close personal and political associates of the President.73

The present case offers the paradigm of a conflict on the part of the Attorney General and the Department, for the subject of the investigation is a former high-level Justice Department official and the investigation concerns allegations of improprieties pervading the Department's conduct in a serious confrontation with the Legislative Branch. Neither appellants nor the Department have suggested that the fact and the appearance of fairness can be achieved in these circumstances by an investigation conducted or controlled by the Department.

Thus neither the Act on its face nor its invocation in the circumstances of this case impermissibly invades the province of the Executive Branch in light of the standards developed by the Supreme Court for judging separation of powers questions.

3. The Act's Restrictions on the Executive's Power of Removal Do Not Violate the Separation of Powers Principle. — Finally, the Ethics Act, by restricting the Attorney General to removal of an independent counsel for "good cause,"74 does no violence to the separation of powers doctrine. The Supreme Court has never struck down a statute defining and limiting the circumstances in which the Executive Branch can remove an officer. To the contrary, it has upheld essentially identical limitations on the executive's removal power where they are justified by a functional need for independence from Executive Branch control.75 The Court's only decisions invalidating statutory removal provisions have involved aggrandizement of legislative power through direct congressional control of the removal of an officer performing executive functions.76 A brief review of the

73. This was, of course, precisely the conclusion which led Congress to act. See supra note 19 and accompanying text.
76. See Bowsher v. Synar, 106 S. Ct. 3181 (1986) (invalidating exercise of final executive budgetary power by Comptroller General, an officer removable by Congress); Myers v.
Court's decisions in this area will demonstrate that the removal provisions of the Ethics Act pose no constitutional problem.

The Supreme Court's first major treatment of the separation of powers implications of the removal authority was the *Myers* decision, upon which appellants place major reliance. In a lengthy opinion filled with strong assertions concerning executive prerogative, Chief Justice (and, incidentally, former President) Taft held that Congress could not constitutionally require Senate concurrence in the removal of a postmaster.\(^77\)

The broad-ranging dicta of the *Myers* opinion did not long hold sway as a definitive statement of constitutional theory. Nine years later, in *Humphrey's Executor*,\(^78\) the Court upheld against Executive Branch attack statutory limitations upon the President's power to remove commissioners of independent administrative agencies exercising law enforcement powers.\(^79\) The narrow holding of *Myers* was undisturbed, but its dicta were disapproved and its scope severely limited.\(^80\)

*Humphrey's Executor* was a milestone in the judicial acceptance of independent administrative agencies, through which Congress has chosen to accomplish much of its modern-day regulation of commerce. The Court expressly recognized the intermixture in the

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77. The *Myers* opinion developed and relied on the notion that the power of removal is an incident of the power of appointment. See 272 U.S. at 119. This view would seem to permit Congress to lodge the power to remove an independent counsel in the Division, bypassing the Attorney General altogether. The Court need not face that question, however, since under the Ethics Act the Attorney General has exclusive power to remove an independent counsel. Of course, strict application of the notion that removal power is incident to appointment power would lead to a different result in *Myers* itself, since Senate confirmation of postmasters was required. See id. at 106.


79. The FTC Act prohibited presidential removal of a commissioner except for "inefficiency, neglect of duty, or malfeasance in office." 295 U.S. at 620. This standard is essentially indistinguishable from the "good cause" requirement of the Ethics Act.

80. The Court stated:

[T]he narrow point actually decided [in Myers] was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of stare decisis. In so far as they are out of harmony with the views here set forth, these expressions are disapproved.

295 U.S. at 626.
agency's mandate of traditionally separate governmental functions, and the inclusion of law enforcement within its powers. It also paid deference to Congress' determination that the agency's "duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control." It thus upheld the insulation of the Commissioners from unfettered presidential removal, rejecting the argument that this invaded the power of the Executive Branch. The Court stated that the scope of Congress' authority to limit the President's removal power "will depend upon the character of the office.

The Court developed this theme further in the Wiener case, where it rejected President Eisenhower's assertion of authority to remove a War Claims Commissioner from office. The statute creating the Commission was silent on the subject of removal, and the Court implied a limitation of presidential power from the nature and functions of the office itself. It said that the test for identifying those officers who may be wholly or partly insulated from presidential removal

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81. 295 U.S. at 628.
82. Id. at 624. Thus the Court remarked that the Commission "is charged with the enforcement of no policy except the policy of the law." Id.

Appellants seek to avoid the impact of Humphrey's Executor by emphasizing the Court's description of the FTC as an agency performing "quasi judicial" and "quasi legislative" functions. However, the language quoted above makes it clear that the Court recognized the obvious fact that the Commission was engaged in enforcing the law. As Justice White recently put it:

"[I]t is clear that the FTC's power to enforce and give content to the Federal Trade Commission Act's proscription of "unfair" acts and practices and methods of competition is in fact "executive" . . . — that is, it involves the implementation, (or the interpretation and application) of an act of Congress. Thus, although the Court in Humphrey's Executor found the use of the labels "quasi-legislative" and "quasi-judicial" helpful in "distinguishing" its then-recent decision in Myers v. United States, these terms are hardly of any use in limiting the holding of the case; as Justice Jackson pointed out, "[t]he mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed."

Bowsher v. Synar, 106 S. Ct. at 3207 n.3 (White, J., dissenting) (citation omitted).
83. Id. at 628; see id at 624-26.
84. Id. at 631.
85. The Court was once again at pains to distance itself from the Myers dicta:

The assumption was short-lived that the Myers case recognized the President's inherent constitutional power to remove officials, no matter what the relation of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure. The versatility of circumstances often mocks a natural desire for definitiveness.

357 U.S. at 352.
derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from executive interference. Thus, the most reliable factor for drawing an inference regarding the President’s power of removal is the nature of the function that Congress invested in the [officer involved].

Finally, the Court in 1986 invalidated portions of the Gramm-Rudman-Hollings Deficit Reduction Act on the ground that it committed final decision-making authority with respect to spending cutbacks in certain circumstances to the Comptroller General, an official responsible to and removable by the Congress. The Court reasoned that the final decision with respect to specific spending reductions was primarily an executive function, which Congress could not vest in an official whom it retained exclusive power to remove.

The teaching of these cases is that Congress has the power to create offices or agencies outside the “executive establishment” and independent of Executive Branch control, and to vest those offices or agencies with carefully circumscribed law enforcement powers where this is necessary in its judgment to the fair and impartial implementation of valid legislative policy. What it may not do is to aggrandize its own power by forcing an official exercising “executive” powers to be responsive to its will through the reservation to itself of a role in his removal.

It is quite plain, we submit, that the Ethics Act both meets the test of Humphrey’s Executor and Wiener for the creation of valid limitations on the executive’s power of removal and avoids the prohibitions of Myers and Bowsher by lodging the removal power in the Attorney General and reserving no role in the removal process for Congress. Here Congress has, with ample justification, concluded that the public interest demands the creation of a law enforcement mechanism “free from executive control” to deal with the recurring problem of allegations of criminal misconduct against

86. 357 U.S. at 353 (emphasis added).
88. 106 S. Ct. at 3192.
89. Bowsher certainly does not stand for the proposition that the President possesses unfettered power either to remove or to direct the performance of any officer exercising “executive” or “law enforcement” powers. The Solicitor General made precisely this argument in Bowsher, but as Justice White correctly pointed out, the Court was careful not only to avoid any such implication, but to reaffirm the vitality of Humphrey’s Executor and Wiener. 106 S. Ct. at 3206; see id. at 3188 n.4.
90. Humphrey’s Executor, 295 U.S. at 628.
high government officials and that that mechanism can function effectively only if certain limitations are placed upon the power of the Executive Branch to remove the officer temporarily in charge of it. The Constitution simply is not offended by the removal provisions of the statute.

Finally, the Court has long held that Congress possesses broader discretion to control the removal of officers who, like the independent counsel, are "inferior Officers" within the meaning of the Appointments Clause of the Constitution.\textsuperscript{91} We turn now to a consideration of issues under the Appointments Clause.

B. The Appointment of the Independent Counsel by a Court of Law is Proper Under the Appointments Clause

Article II, section 2, cl. 2 of the Constitution, known as the "Appointments Clause," provides in relevant part:

[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.

Appellants and the Department make two arguments why the Act violates the Appointments Clause: (1) the independent counsel is a "superior officer" who must be appointed by the President and confirmed by the Senate; and (2) Congress may not vest the appointment of a prosecuting official in a court of law. Neither argument will withstand scrutiny.

1. The Independent Counsel Is an "Inferior Officer" Who Need Not Be Appointed by the President and Confirmed by the Senate. — There are two textual reasons why an independent counsel is not a "superior officer"\textsuperscript{92} requiring presidential nomination and Senate confirmation. First, the Appointments Clause specifies a rather narrow class of officers who are constitutionally required to be appointed by the President by and with the advice and consent of the Senate.

\textsuperscript{91} United States v. Perkins, 116 U.S. 483, 485 (1886).

\textsuperscript{92} The text of the Appointments Clause does not use the term "superior officer," but instead distinguishes between "Officers of the United States" and "inferior Officers." The term "superior officer" is used merely as a convenient shorthand to denote the former class of officers.
They are "Ambassadors, other public Ministers and Consuls [and] Judges of the supreme Court." An independent counsel is none of these. Second, the second segment of the Clause expressly commits to Congress the power to "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 Clause, of course, permits presidential nomination and Senate confirmation of "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." But the "as they [Congress] shall think proper" language makes it clear that it is for Congress to determine (with presidential concurrence, of course) whether a particular inferior officer should be subject to presidential nomination and Senate confirmation or to direct appointment by the President, a court or the head of a department.

This reading of the text of the Appointments Clause comports with the few judicial declarations in point. More than a century ago the Supreme Court stated:

The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments.

The textual reading is consistent with a functional analysis of the offices involved. Thus in United States v. Solomon, the court held that United States Attorneys are "inferior Officers" whose interim appointments can constitutionally be vested in the federal courts. It follows a fortiori that independent counsels, whose prosecutorial powers are strictly limited temporally and jurisdictionally, are "inferior Officers." The district court so held, as did the Division, which remarked that "the Independent Counsel is clearly an 'inferior officer'—he is appointed for a single task to serve for a temporary limited period."

93. U.S. CONST. art II, § 2, cl. 2.
94. Id. (emphasis added).
95. Id.
Indeed, the Attorney General has effectively conceded the “inferior Officer” issue by himself appointing, and offering to appoint, independent counsels with powers absolutely identical to those granted by the statute. As a “Head of Department” the Attorney General may constitutionally appoint only “inferior Officers.” In fact, this Court last month sustained the power of the Attorney General to make such appointments on this ground in the face of an identical argument that the powers of the independent counsel’s office demanded presidential appointment and Senate confirmation.99

Thus it is clear that the independent counsel is an “inferior Officer” properly appointed by an authority other than the President.100

99. In re Sealed Case, 829 F.2d 50 (D.C. Cir. 1987), cert. denied, 56 U.S.L.W. 3482 (U.S. Jan. 19, 1988) (No. 87-869). The Court avoided deciding the question whether an independent counsel appointed under the statute is an “inferior officer,” on the ground that the Attorney General could rescind the regulation establishing the office created by him at any time. Id. at 56-57. While the Court’s avoidance of an unnecessary constitutional question was plainly proper, the potential distinction proffered is, we submit, ultimately one without a difference. The determination whether an officer is an “inferior Officer” under art. II, § 2, cl. 2 must be made with reference to the text of the Clause and the nature and powers of the office while it is in existence. As this Court noted, the authority granted an independent counsel under the regulations is “identical to that provided to an independent counsel by the Ethics Act,” id. at 52, as are the provisions governing jurisdiction, removal, judicial review of removal, congressional oversight and relationship with the Department of Justice. It is inconceivable that the identical office is an “inferior” one when its occupant is appointed by the Attorney General and a “superior” one when its occupant is appointed by a “Court of Law,” which is after all another of the subordinate appointing authorities listed in the second segment of the Clause.

In a similar vein, the argument that an independent counsel cannot be an “inferior” officer because he has no immediate “superior,” Department of Justice Brief, supra note 15, at 13-15, is little more than a play on words. It finds no support in the decisions construing the Clause. To the contrary, the federal election commissioners whose appointments as “inferior officers” were upheld in Ex parte Siebold, 100 U.S. 371, 397-98 (1880), had no statutory “superiors.” See id. at 379-80. And the very legislative history cited by the Department, Department of Justice Brief, supra note 15, at 13-14, refutes its simplistic argument: each “Head of Department” within the Executive Branch is “inferior” in the “hierarchical sense” to the President and serves at his pleasure, but the First Congress concluded, according to the Department, that they were not “inferior officers” for purposes of the Appointments Clause. Thus simple “subordinancy” is not and never has been the test. In any event, an independent counsel has a “superior” in the constitutionally significant sense, see Bowsher v. Synar, 106 S. Ct. at 3188, for the Attorney General is granted the exclusive power of removal. See 28 U.S.C. § 596(a)(1)(1982). See supra p. 83-87 where we deal with the argument that limitations on the Attorney General’s power of removal transgress the separation of powers, but the fact remains that it is the Attorney General who can remove an independent counsel.

100. It is equally clear that staff appointed by an independent counsel to assist in the performance of his or her duties are “employees” and not “officers” who must be appointed in conformity with the Appointments Clause. The Supreme Court recognized in United States v. Germaine, 99 U.S. 508, 511-12 (1878), that not all persons employed by the federal government must be deemed “officers” appointed under art. II, § 2, cl. 2. The Court held that the term “officer” “embraces the idea of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary.” Id. Thus it concluded...
2. A "Court of Law" Mayconstitutionally Appoint a Temporary Prosecuting Official. — The plain language of the Appointments Clause gives to Congress the power to "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." Nothing in this language pursues to limit Congress' choice of a particular appointing authority for any specific "inferior Officer." And the Supreme Court more than a century ago gave this language its natural construction, squarely rejecting the argument put forward here by appellants and the Department:

[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. And, looking at the subject in a practical light, it is perhaps better that it should rest there, than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise.101

The argument that appointments may constitutionally be made only by the branch of government in which the office is located finds

that a civil surgeon appointed by the Commissioner on Pensions was an "employee," not an "officer" subject to the requirements of the Appointments Clause. And in Auffmordt v. Hedden, 137 U.S. 310 (1890), the Court held that a merchant appraiser was an employee who need not be appointed in conformity with the Clause. It noted that the appraiser had no "employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case." Id. at 327. In Buckley v. Valeo the Court, relying on Germaine and Auffmordt, distinguished between "officers" who exercise "significant authority pursuant to the laws of the United States," 424 U.S. at 126, and "employees", who are "lesser functionaries subordinate to officers of the United States." Id. n.162. It noted that the federal election commissioners in that case were "appointed for a statutory term, [and] are not subject to the control or direction of any other executive, judicial, or legislative authority." Id.

The Ethics Act vests all the powers and duties of the office directly in the independent counsel. See, e.g., 28 U.S.C. § 594(a)(1)(1982). Among the powers granted to the independent counsel is "to appoint, fix the compensation, and assign the duties, of such employees as such independent counsel deems necessary . . . ." 28 U.S.C. § 594(o)(1982) (emphasis added). In context, the choice of the word "employees" was hardly fortuitous, but embodied a congressional judgment about the status of the staff of independent counsels. The text of the Appointments Clause makes clear that the judgment of Congress in this area is entitled to great weight. See Ex parte Siebold, 100 U.S. at 397-98. Moreover, there is no record support for the assertion that deputy independent counsel are "the equivalent of Assistant U.S. Attorneys." Appellant Brief I, supra note 15, at 32. This Court, we submit, should not fly in the face of a considered congressional judgment in the absence of clear contrary evidence. The proffered analogy to Assistant United States Attorneys is in any event highly attenuated on its face. Assistant United States Attorneys are appointed for indefinite terms and have general charge of numerous investigations. By statute, independent counsel's staff can have no tenure or authority beyond the single investigation for which their boss was appointed and cannot exercise the powers which are committed to the independent counsel alone.

101. Ex Parte Siebold, 100 U.S. at 397-98 (emphasis added).
its sole support in an oblique 148-year-old dictum in *Ex parte Hen-
nen*, where the Court remarked, in approving judicial appointment and removal of a court clerk, that "[t]he appointing power here des-
ignated . . . [by the Appointments Clause] was no doubt intended to be exercised by the department of the government to which the off-
ficer to be appointed most appropriately belonged."103

The force of the *Hennen* dictum was roundly put to rest in *Sie-
bold*, where the Court stated that it "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."104 The *Siebold* Court upheld the appointment of officials exercising purely "execu-
tive" powers—federal election supervisors—by the federal courts.105

Appellants and the Department seize upon a phrase at the end of the *Siebold* opinion in an effort to resurrect a slightly diminished version of the *Hennen* dictum.106 Distinguishing cases where, without express constitutional authorization, Congress had sought unsuccessfully to impose nonjudicial duties upon courts, the Court stated: "But the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void."107 Appel-
lants would find "incongruity" in the appointment by a court of an official exercising "executive" or "law enforcement" functions. But such a reading would make the exception swallow the rule. The elec-
tion supervisors in *Siebold* were plainly executive officers whose role in criminal law enforcement gave rise to the challenge which the Court rejected.

Appellants have not pointed to a single case where congressional vesting of the appointment power has been struck down as "incon-
gruous." The few cases in point reject appellants’ argument. Thus in

103. *Id*.
104. 100 U.S. at 398.
105. The ruling in *Siebold* appears to conform, not merely to the plain language of the Clause, but to the understanding of its meaning by the members of the Senate Judiciary Com-
mittee of the First Congress, many of them former members of the Constitutional Convention, who reported out a bill lodging the power to appoint United States Attorneys in the federal

107. 100 U.S. at 398.
United States v. Solomon, the court, relying on Siebold, found no violation of separation of powers in the appointment of United States Attorneys on an interim basis by the courts. And last Term the Supreme Court upheld the power of federal courts to appoint prosecutors in criminal contempt cases.

There is simply no impediment in the Appointments Clause to the appointment of independent counsels by a "Court of Law."

C. The Powers Granted to the Division by the Statute do not Contravene the Limitations of Article III

The powers of the Division under the statute do no violence to the limitations of Article III, both because those powers are grounded, not in Article III alone but in the Appointments Clause as well, and because those powers are not in and of themselves inconsistent with Article III.

1. The Division's Powers Under the Statute Derive From the Appointments Clause, as Well as Article III. — We may agree with appellants that Congress may not, as a general matter, vest courts sitting under Article III with "executive or administrative duties of a nonjudicial nature." The Division operates under the Act, how-

110. Young v. United States ex rel. Vuitton et Fils S.A., 107 S. Ct. at 2142, 2130-34 (1987). While no issue under the Appointments Clause was involved in Young, see 107 S. Ct. at 2142 & n.1 (Scalia, J., concurring), the argument put forward by petitioners and rejected by the Court was essentially the same "incongruity" argument put forward here: that courts cannot appoint prosecutors in cases of contempt committed outside the presence of the court, because such "contempt, which require prosecution by a party other than the court, are essentially conventional crimes, prosecution of which may be initiated only by the executive branch." Id. at 2132. If a court may take the first step to initiate the prosecution of an out-of-court contempt without violating the separation of powers, it necessarily follows that there is no inherent "incongruity" in a court exercising powers vested in it by Congress to appoint a temporary prosecuting officer.

We note a certain irony in the fact that the Solicitor General in Young filed a Brief Amicus Curiae supporting the power of the courts to appoint private lawyers to prosecute criminal cases in the name of the United States where there is "substantial justification" and it is done "in conformity with principles of fairness, sound judicial administration and the disinterested exercise of federal prosecutorial responsibility." Brief for United States as Amicus Curiae, Young. Even more, the Solicitor General pointed to Title VI of the Ethics Act as an example of an appropriate "departure from the exclusive authority of the Attorney General to prosecute federal crimes." Id. at 19 n.14.

111. Buckley v. Valeo, 424 U.S. at 123; see, e.g., United States v. Ferreira, 54 U.S. (13
ever, not exclusively as an Article III court, but also as an ap-
pointing authority vested with powers by Congress under the Ap-
pointments Clause. It follows that the exercise of powers incident to
the specific grant of authority to Congress in the Appointments
Clause takes precedence over the more general limitations inherent
in the provisions of Article III and the concept of separation of pow-
ers. It was argued in United States v. Solomon\textsuperscript{112} that the statutory
power of district court judges to appoint an interim United States
Attorney was inconsistent with the limitations on the judicial func-
tion under Article III and the separation of powers. The court re-
jected this argument, stating that “application . . . [of the doctrine of
separation of powers] must be subordinated to the particular provi-
sions of [the Constitution] in this instance as to methods of
appointment.”\textsuperscript{113}

This authority derived from the Appointments Clause sustains,
not merely the bare power of appointment, but also the Division’s
power under section 593(b) to define the jurisdiction of an indepen-
dent counsel. The latter power is plainly a necessary incident, under
the statutory scheme, of the power to appoint. In creating a law en-
forcement mechanism largely independent of Executive Branch con-
trol, to be invoked in those narrow circumstances where the Depart-
ment of Justice is disabled to proceed, Congress sought to intrude as
little as possible into the executive’s law enforcement functions. To
achieve this end, it was necessary to confine the authority of an inde-
pendent counsel, a task which in the nature of things could only be
performed on a case-by-case basis. Evidently deeming the perform-
ance of this fact-intensive task a proper incident of the appointment
power, Congress vested it in the Division, rather than the Attorney
General, whose actual or potential conflict of interest could obviously
play itself out quite powerfully in the definition of an independent
counsel’s jurisdiction.\textsuperscript{114}

\textsuperscript{112} This obvious potential for a conflict of interest on the part of the Attorney General
in defining an independent counsel’s jurisdiction renders lame the argument that the Division’s
power to perform this function undermines the constitutionality of the statute. Lodging this
power in the Division obviously serves the vital law enforcement imperative of securing the
fact and the appearance of disinterest on the part of prosecuting officials. See Young v. United

This case in any event presents no issue concerning the power of the Division under either
the statute or the Constitution to grant an independent counsel substantially broader jurisdic-
tion than that contended for by the Attorney General. The Division here was entirely faithful...
It has been held in a somewhat different context that the power of a federal court to engage in activities arguably beyond the normal judicial sphere may derive from or at least be augmented by authority vested pursuant to the Appointments Clause. In *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, the court upheld the constitutionality of the Federal Magistrate's Act, and the authority vested in the courts by the Act to delegate certain judicial tasks to magistrates, on the ground that the power derived from the Appointments Clause augmented the judicial power derived from Article III:

This constitutional authority for the exercise of the appointment power by Article III judges implies an important dimension to the judicial power: the judiciary is permitted a degree of control and discretion for the design and shape of its own system. The Magistrates Act implements this constitutional authority.

It is thus clear that the strictures of Article III do not apply to a court of law exercising the power to appoint under Article II, section 2, cl. 2, and that such a body may properly exercise all powers necessarily incident to the power to appoint.

2. The Division's Powers Under the Statute Do Not Violate Article III. — Even assuming that the Division comes to its tasks under the Act encumbered by Article III's limitations on the judicial power, those limitations are not inconsistent with its exercise of the power to define the jurisdiction of an independent counsel.

Federal courts sitting under Article III exercise extensive supervisory powers over the conduct of criminal proceedings, frequently on the basis of ex parte applications by prosecuting authorities.

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117. 725 F.2d at 545.
118. Also relevant to the analysis at this point is the Necessary and Proper Clause, art. I, § 8, cl. 18. While this clause is not an independent source of congressional power, e.g., *Buckley v. Valeo*, 424 U.S. at 135-36, "once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine." *Berman v. Parker*, 348 U.S. 26, 33 (1954). The Division considered that the Necessary and Proper Clause supported Congress' choice of means in the Ethics Act, *In re Olson*, 818 F.2d at 44.
119. Appellants complain that art. III is violated because much of the Division's business is conducted *in camera* pursuant to 28 U.S.C. §§ 592(d)(2), 593(b)(1982). Appellant...
and have done since the beginnings of the Republic. The Fourth Amendment expressly contemplates that neutral, detached magistrates exercising judicial power will pass upon the ex parte applications of prosecutorial officers for search and arrest warrants, and judges of Article III courts are fully empowered in this context to tell the representatives of the Executive Branch whether the evidence presented justifies the prosecutorial actions they seek to carry out.  

Yet another important function of Article III courts during the investigative stages of the law enforcement process is the supervision and direction of the grand jury and of the conduct of executive officers before the grand jury. The court may, among other things, decide challenges to the array, rule upon motions to quash or limit subpoenas and grant or deny ex parte applications for immunization of witnesses. In the early days of the Republic, the court's power to charge the grand jury represented an especially potent means of controlling the course of law enforcement. The courts still posses broad powers to supervise the activities of grand juries, and one who is tempted to view this power as a mere vestige of a different era should recall the very substantial influence exercised by Chief Judge Sirica throughout the deliberations of the Watergate grand jury.

These and other functions traditionally exercised by courts sitting under Article III do not differ qualitatively from the power to define the jurisdiction of an independent counsel. Appellants make no effort to distinguish these everyday judicial activities defining and limiting the executive's law enforcement powers. Instead, they rely upon cases such as United States v. Cox, which denied to courts the power to compel prosecutors to proceed upon indictments by

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120. See also, e.g., 18 U.S.C. §§ 2516, 2518 (1982) (applications to court for approval of electronic surveillance).

121. FED. R. CRIM. P. 6(b).


123. For his highly partisan exercise of that power under the Alien and Sedition laws, Justice Samuel Chase of the Supreme Court was impeached by the House of Representatives in the first Congress of the Jefferson Administration. The Senate refused to convict Justice Chase, apparently on the view that the importation of partisan quarrels over the manner in which judicial power was exercised threatened judicial independence. 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 273-82, 289-97 (rev. ed. 1926). Implicit in this judgment was the proposition that Article III countenanced this form of vigorous judicial control of the law enforcement process.

124. 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965).
means of the contempt power. These cases are inapposite. The Division appoints independent counsels, not pursuant to any asserted judicial power to override executive decisions, but pursuant to statutory authority and only on the application of the Attorney General. And the statute does not purport to give the Division power to compel an independent counsel to prosecute a criminal case. All decisions respecting criminal law enforcement within the independent counsel's jurisdiction are committed by the Act to the independent counsel.

Nor may appellants take comfort from the fact that many of the judicial activities referred to above involve the imposition of limits upon the exercise of prosecutorial powers, as opposed to affirmative involvement in the initiation of the criminal process. Federal judges have traditionally referred evidence of potential criminal misconduct coming to their attention to the Department of Justice for consideration of criminal prosecution, and they are even authorized to make arrests "'[f]or any offense against the United States."

More important, the courts possess broad powers to initiate prosecutions for contempt of court, including the power to refer such matters to the United States Attorney or to appoint private counsel to prosecute the matter where appropriate. This power was upheld by the Supreme Court last Term in Young v. United States ex rel. Vuitton et Fils S.A.. That decision is, we submit, dispositive of appellants' argument. Certainly the justification for the exercise of the power to appoint a prosecutor outside the Executive Branch in Young—the vindication of judicial authority—differs from the justification for its exercise under the Ethics Act. But Young stands incontrovertibly for the proposition that there is nothing inherently nonjudicial about the exercise of such power by a court.

III. CONCLUSION

For the foregoing reasons it is respectfully prayed that the judgments below be affirmed.

125. Id. See also United States v. Cowan, 524 F.2d 504 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976) (holding that a federal court has no inherent power to appoint a special prosecutor to carry on a criminal case the Executive Branch has declined to prosecute).
126. 28 U.S.C. § 594(a), (g) (1982).
IN RE SEALED CASE — BRIEF ON BEHALF OF AMICUS CURIAE UNITED STATES**

I. INTEREST OF THE UNITED STATES

This appeal raises complex and difficult constitutional issues of the most fundamental and enduring importance to the government of the United States. While our professional and governmental responsibilities compel us to advise the Court of the Executive's views on the constitutional issues presented, these views are advanced with some reluctance — a reluctance born of our appreciation and endorsement of the policy objectives served by the Independent Counsel statute¹ and our profound sense of obligation to defend enactments of the Legislative Branch. For these reasons, we have sought to further the policy goals reflected in the statute in every manner that could be reconciled with our oft-expressed views concerning separation of powers principles.

In the decade since the Independent Counsel statute was enacted, the Executive Branch has consistently and faithfully complied with all of its requirements, despite our well-known misgivings about the constitutionality of certain of its provisions. We have also taken extraordinary measures to protect against constitutional challenge the work of the more recently appointed Independent Counsel — including the Independent Counsel at issue in this litigation — by offering each of them appointments in the Department of Justice.² Two Independent Counsel have accepted these parallel appointments, under which they enjoy the full authority conferred by their court appointments. The validity of these parallel appointments and their ability to protect ongoing investigations against constitutional challenge has recently been upheld by this Court.³ We regret that the Independent Counsel involved in this litigation chose not to accept our offer, which was renewed on August 31, 1987 and, of course, remains open.

We have also gone to great lengths to offer a saving construc-

** This brief was filed in In re Sealed Case, 838 F.2d 476 (D.C. Cir. 1988). The only changes made were those necessary to conform the brief to Law Review style.
tion of the statute where we thought it possible to do so. In one case, we argued strenuously for a narrow interpretation of certain statutory provisions involving the Court's power to expand the jurisdiction of the Independent Counsel. The Special Division of the Court accepted our proffered construction of the provisions in question, noting the serious constitutional issues that would otherwise have arisen. Regrettably, this case in its present posture offers no such opportunity, for the challenge before this Court appears to ripe and encompasses the statutory scheme in its entirety.

Moreover, during the years leading up to the enactment of the Ethics in Government Act (hereafter "the Ethics Act"), and thereafter, successive Administrations have repeatedly expressed their profound constitutional concerns to Congress. Attorneys General over different administrations since the passage of the original Ethics Act in 1977 have stated that the Independent Counsel provisions of this law transgress the separation of powers limitations embodied in the Constitution. In 1981, then-Attorney General Smith informed the Senate Legal Counsel, as had prior Attorneys General, of our "serious reservations" respecting the constitutionality of the statute, and stated quite plainly that "[i]f the Department's position is sought in future litigation, we would espouse views consistent with" those reservations. The Department reiterated its profound doubts about the constitutionality of the statute during the reauthorization hearings in 1981, 1982, and again this year. We have repeatedly suggested statutory alternatives that fully address the concerns of public integrity that underlie this statute without sacrificing the Constitution's most fundamental structural imperative — the separation of powers.

4. See In re Olson, 818 F.2d 34, 47 (D.C. Cir. 1987).
We have undertaken these efforts because we recognize that ensuring public confidence in the impartiality and integrity of criminal law investigations of high Executive Branch officials is a most important goal. Indeed, we can appreciate Congress’ view that divesting the President of his constitutionally-established authority to conduct such investigations is the simplest and most convenient method of attaining this end. But our sympathy for the goal reflected in the Ethics Act can neither influence our legal analysis nor blind us to the enduring harm it visits on constitutional values; “[t]he tendency is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic.” 9 “The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but . . . we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.” 10 It is to preserve this ultimate safeguard against majoritarian tyranny — the other checks and balances of our tripartite system of government — that we file this brief. 11

II. Statement

The Ethics Act 12 states that the Attorney General shall conduct an investigation if he receives sufficient evidence of wrongdoing by specified high-level Executive Branch and presidential election campaign officials. 13 If the Attorney General determines within 90 days that further investigation or prosecution is warranted (or if no determination is made in that time), he shall apply to a Special Division of this Court 14 to appoint an Independent Counsel to take over the matter. 15 This Court must then appoint an “appropriate” counsel...

and define his jurisdiction.\textsuperscript{16}

Upon appointment, an Independent Counsel essentially assumes exclusively the powers of the Attorney General in investigating and prosecuting the matter.\textsuperscript{17} An Independent Counsel may appoint his own staff to assist him as he deems necessary, or he may use existing Department of Justice personnel.\textsuperscript{18} "[E]xcept where not possible," an Independent Counsel shall "comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws."\textsuperscript{19}

An Independent Counsel may be removed by the Attorney General, other than by impeachment, only for "good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."\textsuperscript{20} An Independent Counsel may challenge his removal in a civil action before the Special Division, which may order "reinstatement or other appropriate relief" if removal was based on "error of law or fact."\textsuperscript{21}

Before terminating his office, an Independent Counsel must report to the Special Division, detailing his work and the reasons for not prosecuting any matter within his authority.\textsuperscript{22} In addition, the Special Division may \textit{sua sponte} terminate an Independent Counsel's office upon determining that any investigations or prosecutions within his jurisdiction have been completed "or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions."\textsuperscript{23}

In this matter, an Independent Counsel was appointed and is currently conducting an investigation. The constitutionality of the Ethics Act has been challenged. On July 20, 1987, the district court upheld the validity of the statute.\textsuperscript{24} The constitutional issue is now properly raised in this Court.\textsuperscript{25}

\begin{itemize}
  \item \textsuperscript{16} 28 U.S.C. § 593 (1982).
  \item \textsuperscript{17} 28 U.S.C. §§ 594(a), 597(a) (1982).
  \item \textsuperscript{18} 28 U.S.C. § 594(c)-(d) (1982).
  \item \textsuperscript{19} 28 U.S.C. § 594(f) (1982).
  \item \textsuperscript{20} 28 U.S.C. § 596(a)(1) (1982).
  \item \textsuperscript{22} 28 U.S.C. § 595(b)(1)-(2) (1982).
  \item \textsuperscript{23} 28 U.S.C. § 596(b)(2) (1982).
  \item \textsuperscript{24} \emph{In re} Sealed Case, 665 F. Supp. 56 (D.D.C. 1987).
  \item \textsuperscript{25} \textit{See In re} Sealed Case, 827 F.2d 776 (D.C. Cir. 1987).
\end{itemize}
III. INTRODUCTION AND SUMMARY OF ARGUMENT

Two key constitutional doctrines — separation of powers and the unitary Executive — govern the issues posed here.

A. The Separation of Powers

The Constitution divides the powers of the Federal Government among the three Branches as part of a system of checks and balances. In order to avoid the danger of a single part of the Federal Government both passing and executing tyrannical laws, the Framers intended the separation of powers to ensure, as nearly as possible, that each Branch would operate only within its assigned sphere of responsibility.26 "The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny."27 Thus, the Constitution was informed by Montesquieu's theory of distinct and separate departments of government, qualified by express departures from that theory where deemed necessary by the Framers as a self-executing safeguard against possible abuse by one of those departments.28

B. The Unitary Executive

Although the Framers wanted to disperse the powers of the new Federal Government among three Branches, they also united the power to administer the laws in a single Executive: "The executive Power shall be vested in a President of the United States of America."29 This statement, giving executive power to the President, does more than "merely nam[e] the department;" rather, it is a grant of power.30

The vesting of the "executive Power" in the President and his duty to "take Care that the Laws be faithfully executed,"31 give substance to the Framers' agreement that there must be a unitary, vigorous, and independent Executive responsible directly to the peo-
Unity in the execution of the laws was deemed by the Framers to be "a leading character in the definition of good government." In Alexander Hamilton's view, "[t]his unity may be destroyed... by vesting it ostensibly in one man, subject in whole or in part to the control and cooperation of others." The Framers thus considered and rejected several plans which would have diffused executive responsibility.

An absence of unity in the Executive would, in the eyes of the Framers, create a lack of responsibility and accountability. As this Court has explained, "[t]he executive power under our Constitution... is not shared—it rests exclusively with the President... [T]he founders chose to risk the potential for tyranny inherent in placing power in one person, in order to gain the advantages of accountability fixed on a single source."

C. The Ethics Act Violates the Appointments Clause

The Appointments Clause is one of the primary mechanisms in the Constitution implementing the doctrines of separation of powers and the unitary Executive. The Ethics Act violates the clause in two separate ways.

1. The Ethics Act violates the Appointments Clause insofar as it authorizes court appointment of an Officer who, because of the powers given him, must be appointed by the President with the advice and consent of the Senate. The powers given the Independent Counsel under the Ethics Act, as interpreted in its legislative history,

33. The Federalist No. 70, at 423-24 (A. Hamilton) (C. Rossiter ed. 1961). The importance to the Framers of a single Executive may have sprung from the disorganization that plagued the Continental Congress' efforts to direct the American Revolution. See Miller, Independent Agencies, 1986 The Supreme Court Review 41, 68-69; Thach, supra note 32, at 57-68; id. at 62 (Confederation experience prompted demands for "unitary departmental control and integration" in executing laws).
34. The Federalist No. 70, at 424.
35. The first plan was Edmund Randolph's proposal that the Executive consist of three members drawn from separate geographical regions. See 1 M. Farrand, The Records of the Federal Convention of 1787 66, 71-74, 88, 91-92, 97 (rev. ed. 1966). The Convention also turned down a proposal for the President to have a Privy Council, consisting either of the Chief Justice and the heads of the executive departments, 2 M. Farrand, supra, at 335-37, or representative of regions. Id. at 533, 542.
38. U.S. Const. art. II. § 2, cl. 2.
make inescapable the conclusion that Congress intended the Independent Counsel to be subordinate to no one. An Independent Counsel, who himself appoints Inferior Officers, reigns supreme within his assigned area.

2. Even if the Independent Counsel is deemed to be a proper Inferior Officer, he must be appointed by the Executive Branch because he performs an indisputably executive function. Otherwise, the separation of powers is substantially undermined and the Framers' crucial goal of accountability is defeated because the voters cannot hold the Executive Branch responsible if the Judicial Branch made the appointments.

Criminal prosecution is a function indisputably assigned by the Constitution to the Executive Branch.\textsuperscript{39} Enforcement of the criminal laws requires a vast amount of discretion because the prosecutor must determine whether a particular prosecution represents the best allocation of government resources and the likelihood of obtaining favorable and useful results, as well as fairness to the accused. The prosecutor must often weigh policy concerns in other crucial areas such as foreign relations and national security before embarking on a public prosecution.

The argument has been made that the Appointments Clause should nevertheless be given a new meaning because Congress must be able to provide for selection of Independent Counsels outside the Executive Branch so that high level officials in that Branch can successfully be investigated and prosecuted. This contention is unavailing because the Framers provided in the Constitution the means to monitor the performance of the Executive Branch in carrying out the laws, and history has demonstrated that the Executive Branch can effectively investigate itself.

D. The Ethics Act Assigns Non-Judicial Functions to a Court in Violation of Article III

The Framers provided that the courts will decide only "cases or controversies,"\textsuperscript{40} thereby safeguarding the independence of the Judicial Branch, and assuring public confidence in the disinterestedness of the judiciary. In violation of these principles, the Act assigns judges the non-judicial functions of determining the scope of an Independent Counsel's authority, and of deciding when the office of an

\begin{footnotesize}
\begin{itemize}
\item[39.] U.S. Const. art. II, § 3.
\item[40.] U.S. Const. art. III, § 2, cl. 1.
\end{itemize}
\end{footnotesize}
Independent Counsel should be terminated because its assigned task is thought to have been completed. Neither of these decisions is to be made within the context of a specific case or controversy.

E. The Ethics Act Violates Article II Because Criminal Law Enforcement Must be Subject to the Supervision of the Executive

The Ethics Act also contravenes the Constitution by eliminating or strictly limiting the power of the Executive Branch to appoint, control, and remove an Officer charged with the quintessential executive duty of criminal law enforcement. Such a key Officer must serve under the direct supervision of the Executive. If the doctrines of separation of powers and the unitary Executive are to have meaning, Officers charged with these law enforcement responsibilities must function within the Executive Branch.

IV. ARGUMENT

A. The Ethics Act is Invalid Because it Provides for Appointment of an Independent Counsel in a Manner Inconsistent With the Appointments Clause of the Constitution

The Supreme Court made clear in Buckley, that any official exercising “significant authority pursuant to the laws of the United States” is an “Officer of the United States” and must, therefore, be appointed consistent with the Appointments Clause of the Constitution. That clause provides:

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

An Independent Counsel who exercises the substantial power of the Attorney General of the United States is obviously an “Officer of the United States” covered by the Appointments Clause.

41. See infra notes 76-87 and accompanying text.
42. See infra notes 76-96 and accompanying text.
43. 424 U.S. 1, 126 (1976).
44. U.S. CONST. art. II, § 2, cl. 2.
45. Id.
The Ethics Act violates the Appointments Clause in two ways. First, an Officer who exercises executive power such as that invested in the Independent Counsel can be appointed only by the President with the advice and consent of the Senate. Second, even if an Independent Counsel is properly classified as an Inferior Officer, he cannot be appointed by this Court since the duties he fulfills are purely executive in nature.

1. The Powers Conferred on an Independent Counsel by the Ethics Act Require That he be Appointed by the President with the Advice and Consent of the Senate.

a. The Constitution establishes two distinct procedures of the appointment of “Officers of the United States.” The first procedure is appointment by the President, with the advice and consent of the Senate. This is the procedure that must be followed for certain named officers — Ambassadors, Consuls, and Supreme Court justices — and also for all other Officers of the United States unless they fall within the exception established for “inferior” Officers.

For Inferior Officers, Congress may, in its discretion, vest appointment authority in the President alone, the courts of law, or the Heads of Departments, thus avoiding the requirement of advice and consent by the Senate. The Appointments Clause acts as a limitation upon the ability of Congress to dispense with the Senate’s role in the appointment process; only Inferior Officers may be so appointed.

b. There is virtual unanimity among the courts and commentators, and in the congressional debates from the First Congress, that the term “inferior” is used in the Constitution in its hierarchical sense. That is, an Officer who is subordinate to another is, in that respect, inferior to that Officer. Accordingly, Executive Branch Officers may be Inferior Officers only if they are subordinate to another who controls, supervises, or oversees their performance.

The debate in the First Congress, when “the founders of our Government and framers of our Constitution were actively participating in public affairs,” adopts this hierarchical construction of “in-

46. The phrase “Head of Departments” is used in the Inferior Officer exception to the Appointments Clause. The phrase “principal Officer in each of the executive Departments” appears in the preceding clause which states that the President may require the written opinion of such persons, U.S. CONST. art. II, § 2, and in Amendment XXV, § 4, dealing with presidential disability. We understand these phrases to mean the same thing. See United States v. Germaine, 99 U.S. 508, 511 (1978).
"In the great debate concerning the establishment of the original Department of Foreign Affairs, the First Congress extensively discussed the construction of Article II's appointment power. Some congressman argued that a Department Head is an Inferior Officer because he is subordinate to the President in the exercise of his duties.48

This view was rejected. Rather, the First Congress concluded that Heads of Departments are principal or superior officers, and those subordinate to these officials are "inferior."49

All points of view in this early congressional debate were premised on the notion of subordination as defining Inferior Officers. The contention that Department Heads are Inferior Officers turned upon their subordinate relation to the President; the rejection of this view turned upon the recognition in the text of the Constitution of the "superior" status of the Department Heads (as "principal" officers) and, hence, Inferior Officers were regarded as those subordinate to them. No member of that First Congress argued that a classification as inferior or superior turns upon the relative importance of the office at issue.50

The Supreme Court's opinions are consistent with this construction.51 And, as the court held in Collins v. United States:52

[T]he word inferior is not here used in that vague, indefinite, and quite inaccurate sense which has been suggested — the sense of petty or unimportant; but it means subordinate or inferior to those officers in whom respectively the power of appointment may be

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47. Myers, 272 U.S. at 175. See Bowsher, 106 S. Ct. at 3187; Marsh v. Chambers, 463 U.S. 783, 790 (1983) (substantial weight should be accorded to constitutional interpretations by early sessions of Congress).
48. See, e.g., 1 ANNALS OF CONGRESS 492 (J. Gales ed. 1789) (statement of Representative Clymer).
49. See 1 ANNALS OF CONGRESS 455-56 (J. Gales ed. 1789) (statement of Representative White); id. at 509 (statement of Representative Benson); id. at 518 (statement of Representative White); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION 386 n.1 (3d ed. 1858) ("Whether the heads of departments are inferior officers, in the sense of the constitution, was much discussed . . . . The result of the debate seems to have been, that they were not.").
50. This view has largely been accepted by scholars and commentators. See, e.g., E. CORWIN, THE PRESIDENT, OFFICE AND POWERS 76 (1957) ("What officers are 'inferior' in the sense of the constitutional provision? . . . The term seems to suggest in this particular context officers intended to be subordinate to those in whom their appointment is vested, and at the same time to exclude the courts of law and heads of departments.").
52. 14 Ct. Cl. 568, 574 (1879).
vested — the President, the courts of law, and the heads of departments.\textsuperscript{53}

Defining an Inferior Officer by reason of his subordinate status, rather than the importance of his duties, has also been the practice of the Attorney General for many years.\textsuperscript{64}

In the context of this case, the subordinancy that identifies an Inferior Officer is demonstrated only if the relevant official's actions are subject to the direction and control, on pain of removal, of another official.\textsuperscript{55} Accordingly, only if the relevant provisions of the Act are construed to subject an Independent Counsel, in the full range of his activities, to the direction and control of the Attorney General can he be said to be an inferior officer in the constitutional sense. In light of the Act's language, legislative history and purposes, however, we are constrained to the view that the Act cannot reasonably be so interpreted.\textsuperscript{56}

c. The very arguments offered in support of the validity of the Independent Counsel establish that such an Officer is not subordinate for Appointment Clause purposes. The Ethics Act is premised on the theory that an Independent Counsel is a necessity because only an Officer free from direction and control of the President or the Attorney General can perform an investigation and prosecution of high Executive Branch officials.\textsuperscript{57} Thus, the Ethics Act specifically contemplates that the Independent Counsel will not subordinate to any Officers in that Branch; and, any decisions made by the Independent Counsel are final insofar as the Executive Branch is involved.

\textsuperscript{53} Id. at 574.
\textsuperscript{54} In 1901, the Attorney General explained that he did not think that the term Inferior Officer "while importing a difference in relative rank, necessarily conveys the idea of unimportant or petty officers. It means subordinate officers in a general way, and indicates those who are different from as well as lower in rank than the officers specified." 23 Opin. Atty. Gen. 574, 577-78 (1902).
\textsuperscript{55} See Myers, 272 U.S. at 135.
\textsuperscript{56} This reading of the Appointments Clause preserves the congressional discretion that was apparently meant to be part of the clause. See 1 ANNALS OF CONGRESS 557 (J. Gales ed. 1789) (June 19, 1789 statement of Representative Baldwin) ("[w]e may find it necessary that subordinate officers should be appointed in the first instance by the President [with the advice and consent of the] Senate"). Congress still can determine that, despite the fact that a particular office is an inferior one, it is important enough so that presidential appointment and senatorial approval are needed.
The legislative history of the Ethics Act reveals that Congress intended the Independent Counsel to conduct his prosecutorial responsibilities "independent from any control or supervision by the Department of Justice." Indeed, the drafters appear to have determined that the purposes of the Ethics Act would be frustrated if the two entities were functionally related to each other in any way, "since the premise of the statute is that there is an institutional conflict of interest for the Department of Justice to conduct the investigation and prosecution" of matters under the Independent Counsel's jurisdiction. Accordingly, notwithstanding the numerous references in the legislative history to the Independent Counsel as an "inferior officer," Congress did not intend that he be inferior — in the constitutional sense of subordinate — to any other Officer of the United States.

The legislative history of the 1982 reauthorization of the Independent Counsel statute further confirms that the Independent Counsel was meant to be insulated from Executive Branch control. Although the standard for removal of the Independent Counsel was changed from "extraordinary impropriety" to "good cause," this was not done to permit the Attorney General greater authority over his operations, but instead to make use of the familiar standard of removal for independent agencies, rather than a standard thought to be "undefinable" by Congress. The degree of insulation of the Independent Counsel is evidenced by the Senate's intent with regard to the requirement that the Independent Counsel follow established policies of the Department of Justice except where not possible. The Senate Report stated that "this section should not be interpreted to mean that failure of the special prosecutor to follow departmental policies would constitute grounds for removal of the special prosecutor by the Attorney General." Such an interpretation "would seriously compromise the special prosecutor's independence."

58. S. REP. No. 170 at 67, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4216, 4250. See also id. at 34; H.R. REP. No. 1307 at 2.
60. See, e.g. H.R. REP. No. 1307 at 5; S. REP. No. 95-170 at 36, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4216, 4252.
64. Id.
Given this evidence of legislative intent, the Independent Counsel statute cannot reasonably be interpreted to establish an Inferior Officer.

Independent Counsel do not appear to view themselves as subject to Executive Branch authority. Independent Counsel Walsh has, for instance, taken the position before this Court that in any disagreement with the President, or with the Secretary of State regarding the foreign policy implications of a prosecution, the Independent Counsel's view prevails. And, Independent Counsel Seymour insisted on pursuing a subpoena (unsuccessfully) against the Canadian Ambassador despite strenuous opposition by the Department of State on this diplomatic question. Thus, Independent Counsels purport to act unsupervised and essentially unchecked.

Moreover, the method of the Independent Counsel's appointment and his limited removability also demonstrate his superior officer status. This Court appoints an Independent Counsel and the Attorney General may remove him "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance" of his duties. This removal is then subject to review by the Special Division of this Court for errors of fact or law.

If this 'for cause' limitation is read quite broadly to mean that the Attorney General may remove an Independent Counsel for disobedience of a lawful direction, the Independent Counsel would appear to be a subordinate. Such a reading would, however, be squarely inconsistent with the congressional intent to create an Officer free from the Attorney General's influence. Unless the Court is willing so to read the 'removal for cause' provision, the restrictive statutory limitation on removal makes the Independent Counsel not truly subordinate to anybody.

65. See Walsh Pits His Authority Against Executive Branch, UPI Wire Release, June 3, 1987 (available on NEXIS).
69. See supra notes 59-66 and accompanying text.
70. In In re Olson, 818 F.2d 34 (D.C. Cir. Indep. Couns. Div. 1987), we successfully urged a narrow, saving interpretation of a specific provision in the Act that arguably gave the appointing court power to expand the jurisdiction of the independent counsel, 28 U.S.C. § 594(e)(1982). There was therefore no occasion specifically to consider whether the statutory "good cause" provision governing removal of an independent counsel affords the Attorney General sufficient authority over the independent counsel to obviate any constitutional difficulty with the latter's appointment by a court without Senate approval. Nor did the case
The limited subject matter and duration of an Independent Counsel's responsibilities do not render him an Inferior Officer. The duration of his assignment is not truly temporary because it extends until the matter assigned is completed, regardless of how long that takes. And, the fact that an Independent Counsel looks into only one matter (which can be quite substantial, such as the Iran/Contra matter) makes no difference for constitutional purposes either. Rather, the key factor is that an Independent Counsel reigns supreme within his assigned area.

In sum, an Independent Counsel does not have the essential quality of subordinancy that makes an Officer "inferior."

d. Apart from the question of whether an Independent Counsel is subject to the authority of any Officer of the United States, and Independent Counsel cannot be an Inferior Officer because he himself has the power under the Ethics Act to appoint Inferior Officers. The Ethics Act provides Independent Counsel with the power to appoint Associate Independent Counsel. Since such associate counsel presumably have the power to sign pleadings, to conduct grand juries, and to represent the Independent Counsel in court, they "exercise significant authority pursuant to the laws of the United States" and therefore are officers of the United States. Yet, the power to appoint officers of the United States is explicitly reserved under the Appointments Clause to the President, the courts of law, and

squarely present an issue concerning the validity, under the Appointments Clause, of the Independent Counsel's appointment by a court. We did clearly state in that brief, however, that it would be inconsistent with our constitutional scheme for Congress to impose restrictions on the President's ability to issue lawful directives to appointees charged with enforcing the criminal laws. Brief for the United States at 23, In re Olsen 818 F.2d 34 (D.C. Cir. Indep. Couns. Div. 1987). We advanced a similar position in our testimony during the recent reauthorization hearings, stating that in order to survive constitutional challenge, the independent counsel statute would have to allow removal for failure to comply with a lawful directive of the President or his delegate, the Attorney General. Subcomm. on Administrative Law and Government Relations of the House Judiciary Comm., 100th Cong., 1st Sess. 21 (April 23, 1987)(testimony of Assistant Attorney General John Bolton). As the text of this brief makes clear, our examination of the statute in its entirety constrains us to the view that the existing removal provision cannot reasonably be so construed.

71. For this reason United States v. Eaton, 169 U.S. 331 (1898) is inapposite. There, the Court found that a Vice Consul General had been appropriately appointed to relieve the Consul General who was ill, only until a new Consul General was named. In the case at bar, the Independent Counsel is not merely serving temporarily until a permanent official can be named.


73. See Buckley, 424 U.S. at 126. Similarly, Assistant United States Attorneys are also Inferior Officers, who are appointed and removable by the head of the Department of Justice, the Attorney General. 28 U.S.C. § 542 (1982).
"Heads of Departments." We have demonstrated that the Head of a Department cannot be an Inferior Officer and must be appointed by the President and confirmed by the Senate.

Accordingly, the Independent Counsel's ability to appoint officers of the United States itself demonstrates that they are not Inferior Officers and, therefore, must be appointed by the President and confirmed by the Senate.

2. Even if Independent Counsel are Inferior Officers, Permanent Appointment Power Over Prosecutors Cannot be Assigned to the Federal Courts. — If the Court rejects our argument above that the unsupervised powers granted to the Independent Counsel cannot be assigned by Congress to an Officer not appointed by the President with the consent of the Senate, it should nevertheless strike down the Ethics Act because the courts cannot appoint Independent Counsel to carry out prosecutive functions. The Inferior Officer provision was added with little debate towards the end of the Constitutional Convention, and there is nothing to indicate it was intended to destroy the fundamental principles of separation of powers and the unitary Executive so carefully crafted into the Constitution.

a. 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." This language says only that Congress can grant federal courts the ability to appoint Inferior Officers; it does not by its terms indicate that Congress can empower those courts to appoint Officers in another Branch of the Government.

Nor does the history of the Inferior Officer provision support allowing judges to appoint prosecutors. The provision was added late in the Constitutional Convention with little discussion. After the clause was proposed, Madison responded that it "does not go far enough if it be necessary at all — Superior Officers below Heads of Departments ought in some cases to have the appointment of lesser offices." Gouverneur Morris then noted that "[t]here is no necessity. Blank Commissions can be sent . . . ." The Framers thus believed that the Inferior Officer provision

74. U.S. CONST. art II, § 2, cl. 2.
75. 2 M. FARRAND, supra note 35, at 627.
76. Id. The vote on this suggested provision was divided equally, and it therefore did not then carry. However, Madison reports that "[i]t was urged that it be put a second time, some such provision being too necessary, to be omitted[,] and on a second question it was agreed to nem. con." Id. at 627-28.
might have been unnecessary because it was assumed that Principal Officers would have the power to appoint Inferior Officers to assist them. The provision was nevertheless included so that it would be clear that not all Officers of the United States perform in such a manner that they need be nominated by the President and confirmed by the Senate.

Debate on an earlier version of the Appointments Clause, which did not then contain any explicit reference to Inferior Officers, confirms that the Framers envisioned that lower Officers would be appointed by their superiors within their own Branch. Rufus King commented upon the heavily debated suggested by George Mason that there be a council to appoint Officers rather than having it done by the President with the approval of the Senate. King opposed that idea, explaining that he did not think that the Senate would have to sit constantly in order to fulfill its appointment approval duties: "He did not suppose it was meant that all the minute officers were to be appointed by the Senate, or any other original source, but by the higher officers of the departments to which they belong." Thus, there is nothing to suggest the Framers contemplated that judges would be assigned the authority by Congress to appoint Officers to perform executive functions.

b. Reading the Appointments Clause to allow judges to appoint Inferior Officers primarily charged with executive tasks is directly contrary to the principles of separation of powers and a single Executive accountable to the people. Therefore, this Clause must be interpreted to mean that the Executive Branch alone can appoint Officers whose primary function is criminal prosecution, an obviously executive function.

i. The Constitution does not pristinely divide governmental powers, but, to establish practically effective checks and balances, in limited and specific instances gives one Branch some authority in the sphere of another. When the Framers were silent, however, the Su-

77. Id. at 539.
78. Id. (emphasis added).
79. See Buckley, 424 U.S. at 124 (Appointments Clause must be read consistently with the separation of powers principle). "For judges to appoint their own clerks makes obvious sense; for them to appoint State Department officials would seem quite inconsistent with the Framers' notions of unified executive power. For them to appoint prosecutors... offends the separation of powers as well by giving judges too much influence over the prosecution." Currie, The Distribution of Powers after Bowsher, 1986 Sup. Ct. Rev. 19, 36 (footnotes omitted).
80. For example, the Senate must approve presidential appointments of all Principal Officers, including Supreme Court justices. U.S. Const. art. II, § 2, cl. 2. The President can
The Supreme Court has been unwilling to legitimate a mixture of powers on its own fiat. "[T]he reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires."\(^8\) A departure from this rule here — allowing judge to appoint prosecutors — would violate the separation of powers principle in a most fundamental way. As Madison explained, for "the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others."\(^82\)

The Framers recognized that the President’s power and duty to execute the laws must carry with it the right to choose the subordinate officers of government to assist him in that task:

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws.\(^83\)

The Framers’ decision to vest the power of nomination and appointment of Officers in the President was consistent with their concept of a strong, unitary, and responsible Executive. A number of delegates to the Convention expressed the fear that individual members of a numerous legislative body would not have the requisite sense of personal responsibility for the selection of Officers. By contrast, the President was expected to be more capable of selecting a suitable candidate and to be held accountable by the voters for his choice.\(^84\) As James Wilson commented: "Good laws are of no effect without a good Executive; and there can be no good Executive with-
out a responsible appointment of officers to execute."\(^85\)

This important purpose is severely undermined if appointments are made by the one Branch of the Government that is not responsible to the voters through the democratic process. Certainly, the courts should have the power to appoint Inferior Officers, such as court clerks, who are necessary to make that Branch function properly. Hence, the Appointments Clause explicitly allows such appointments to be made by the courts of law. Nevertheless, separation of powers and the unitary Executive, and the accountability these doctrines were designed to establish, are seriously eroded if Officers who actually administer the law (such as prosecutors) are chosen, without Senate approval, by members of the Judiciary, which is fully insulated from the democratic process.

ii. The prosecution of crimes is the duty of the Executive Branch, not the courts, and hence there is no justification for treating prosecutors as the kind of Inferior Officers that courts may appoint.

The Supreme Court has unequivocally affirmed that criminal prosecution is an Executive Branch responsibility.\(^86\) This view is plainly correct since the decision to prosecute a particular individual involves taking the general legal prohibition enacted by Congress and deciding whether and how to apply it to particular individuals and sets of facts.\(^87\)

Further, the Attorney General is the specific Executive Branch official to whom the daily execution of this power has been assigned as the representative of the President.\(^88\) The Attorney General “is

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\(^87\) By contrast, as the constitutional prohibition on bill of attainder, U.S. CONST. art. I, § 9, cl. 3, shows, the legislative function is to pass the general law and not to provide for its enforcement against a particular individual. The judicial function is then to judge whether the attempted application of the law by the prosecutor is correct.

\(^88\) In the Judiciary Act of 1789, one of the earliest statutes passed by the First Congress, the offices of Attorney General and “attorney for the United States” in each judicial district were created and assigned responsibilities for representing the interests of the United States in court. The Attorney General was charged with the duty to “prosecute and conduct all suits in the Supreme Court,” while the “attorney[s] for the United States” were given the “duty . . . to prosecute . . . all delinquents for crimes and offences, cognizable under the
the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offences, be faithfully executed."

The authority to enforce the laws vested in the Executive Branch by the Constitution also carries with it the discretion not to exercise that power in particular cases.

The command of the Constitution committing the law enforcement power to the Executive Branch is not simply an allocation of power consistent with political theory, but has a highly practical rationale. The executive powers assigned to the President by the Constitution are not discrete responsibilities to be exercised in a vacuum. They are instead powers to be exercised in relation to each other. For example, a decision to prosecute a particular individual may raise issues of national security or foreign policy, which are matters committed by the Constitution to the President. Such a decision may implicate matters that a specially appointed Independent Counsel simply does not have the knowledge or expertise to consider properly.

In short, the constitutional command to the President to take care that the laws be faithfully executed does not mean that an unthinking policy of blind enforcement of every law at every time is appropriate. If that were the case, the entire concept of

authority of the United States . . . ." § 35, 1 Stat. 92, 93 (1789).

89. Ponzi, 258 U.S. at 262; see also Wilcox, 38 U.S. at 513 (the President acts through department heads).

90. See United States v. Cox, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965) (United States Attorney cannot be compelled by the courts to sign an indictment; as an incident of the constitutional separation of powers, courts are not to interfere with the free exercise of the discretionary powers of the United States Attorneys); Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967) (United States Attorney's decision to accept a plea bargain from one defendant, but not from a co-defendant, was not reviewable; the U.S. Attorney's discretion, even if abused, could be reviewed only by his superiors). Accord United States v. Alessio, 528 F.2d 1079, 1081-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976).

91. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). Indeed, it has been widely reported recently that the North Independent Counsel has taken actions with possible significant effects on relations with Israel, one of our closest allies. And, as noted earlier, the Deaver Independent Counsel became embroiled in a controversy with the Canadian Ambassador, a person representing one of this nation's most significant trading and military partners. See supra note 66 and accompanying text.

92. In Sanchez-Espinosa v. Reagan, 770 F.2d 202, 210 (D.C. Cir. 1985), then-Judge Scalia, writing for this Court, concluded that implying a private right of action from the Neutrality Act, 18 U.S.C. § 960 (1982), would destroy the Executive's ability to exercise prosecutorial discretion, an ability especially necessary in cases touching upon foreign relations.

93. An example of the legitimate considerations to be balanced by the Executive in de-
prosecutorial discretion and grants of immunity would be of questionable validity under the Constitution. The Constitution vests the Executive Branch with the discretion to weigh these types of considerations and to make appropriate choices. That discretion is so well-established that it is unreviewable, save in those narrow circumstances where it results in a selective prosecution based on constitutionally prohibited criteria. How well or poorly the Executive's prosecutorial discretion is exercised is a matter for the voters to decide, or, in appropriate instances, for Congress through the impeachment process. In the Ethics Act a well-recognized Executive Branch function of taking care that the laws are faithfully executed has been invalidly assigned to an Officer not appointed by that Branch. The Independent Counsel is a prosecutor who has not been chosen because he is believed by the Executive Branch to be a capable person who will properly carry out his responsibilities. Additionally, if a particular Independent Counsel is found to be a bad choice and does a poor job, there is no democratic accountability. The voters certainly cannot affix blame on the Executive or Legislative Branches, and they are unable to express their displeasure through the ballot box against this Court, which actually made the appointment.

iii. The principles of separation of powers and the unitary Executive established by the Framers cannot be ignored in this instance on the basis of a 'necessity' argument. The theory used to support the Ethics Act is that the Executive Branch will not investigate and prosecute its own high ranking members, and this 'flaw' in the system established by the Framers must be rectified by reading the Appointments Clause in a way that would otherwise be contrary to the clear tenor of the remainder of the Constitution.

Nearly identical reasoning was urged in Buckley after Congress had there too attempted to give the Appointments Clause a new meaning. Supporters of the legislation in Buckley contended that

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deviation from normal constitutional principles was necessary because of perceived conflicts of interest for the President in enforcing law. The Supreme Court expressly declined to accept this reasoning, "however rational," to justify "a distortion of the Framers' work." In this case the "distortion of the Framers' work" would be considerably greater than that unsuccessfully urged in *Buckley* since the Framers already provided for the problem sought to be addressed by the Ethics Act. The Framers explicitly provided for impeachment of all civil Officers if they commit "Treason, Bribery, or other high Crimes and Misdemeanors."

There can be no true concern that the Ethics Act is needed to expose wrongdoing by high level public officials which would otherwise go unrevealed. Congress itself possesses ample oversight responsibility and is fully capable of conducting necessary investigations. Thus, Congress has the power to bring wrongdoing to light so that the voters can then determine whether law enforcement officers chosen by the Executive Branch are properly fulfilling their responsibilities.

Furthermore, the Executive Branch is fully capable of appointing Officers of sufficient quality and independence who will fulfill their duties even if it means pursuing charges against high ranking officials. The regular investigative and prosecutorial organs of the Justice Department have been effectively used in instances involving wrongdoing by high ranking officials. Vice President Agnew, for example, was prosecuted through the offices of the United States

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96. 424 U.S. at 134. Indeed, 'necessity' arguments will almost always be made in cases involving attempts to avoid the separation of powers. The Supreme Court has found them unconvincing. Chadha, 462 U.S. at 944; Bowsher, 106 U.S. at 3193.


98. See, e.g., Hearings Before the Select Comm. on Investigation of the Attorney General, 68th Cong., 1st Sess. (1924) (investigating the alleged failure of the Attorney General to prosecute or defend certain criminal and civil actions).

99. Ensuring actual punishment of wrongdoers whom the President wants to protect cannot be the true goal of the Ethics Act since the statute leaves intact the President's unrestricted constitutional pardon power. U.S. CONST. art. II, § 2, cl. 1.

100. Congress has created Inspector General Offices in departments of the Executive Branch, Inspector General Act of 1978, Pub. L. 95-452, 92 Stat. 1101, reprinted in 5 U.S.C. app. at 987-93 (1982), and we are not aware of evidence that the persons chosen by the Executive Branch to fill these positions have abdicated their responsibilities. The Department of Justice itself has an Office of Professional Responsibility charged with investigating wrongdoing by departmental officials, regardless of their possible exalted status. 28 C.F.R. § 0.39 (1987). Congress too has provided statutory protection for 'whistleblowers' who expose improper conduct. See 5 U.S.C. § 1206(b)(1)(B) (1982).
Attorney. In those rare circumstances in which independence from the normal processes of the Department is necessary, steps can be taken to provide for appointment of an Independent Counsel with the authority of an Inferior Officer. Such steps were taken in the Watergate prosecutions and, more recently, in the Iran-Contra and Nofziger investigations. If the situation demands the full authority of a principal "Officer of the United States," the President may proceed through appointment of such an Officer.

At bottom, the 'necessity' argument contends that Congress can intrude upon an Executive Branch function such as criminal law prosecution whenever it perceives that the coordinate branch is confronted by an inherent conflict of interest. In other words, it is assertedly consistent with our system of separated powers for one Branch or combination of Branches to assume or limit the functions of another Branch when that third Branch is 'disqualified' from performing that function itself. However, each Branch of government, even when arguably beset by a conflict of interest, has always retained hegemony over matters within its domain. For instance, the judiciary has without exception adjudicated "cases and controversies" involving judges, despite occasional attacks that the impartiality of the courts could not be trusted. Similarly, Congress sets its own pay and determines the conditions under which itself and its members can be sued, without any effective check from the Executive or Judicial Branch. Congress, like the Executive, is responsible to the people and must determine to its own satisfaction that the actions in these areas are appropriate.

c. In an early ruling on appointment of Inferior Officers, the Supreme Court held that federal judges can appoint and remove court clerks. In so holding, the Court explained that "[t]he ap-

103. For example, President Coolidge appointed, with the consent of the Senate, two attorneys as special counsel to investigate wrongdoing in connection with the Teapot Dome leases. See Act of Feb. 8, 1924, ch. 16, 43 Stat. 5-6. See also McGrain v. Daugherty, 273 U.S. 135 (1927). The investigation ultimately resulted in the prosecution and conviction of the former Secretary of the Interior.
104. See, e.g., United States v. Will, 449 U.S. 200, 214 (1980); Atkins v. United States, 556 F.2d 1028 (Cl. Cir. 1977). cert. denied, 434 U.S. 1009 (1978) (under the 'rule of necessity,' courts are required to remain arbiters over the judges' pay claims).
pointing power . . . was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged." 3 Therefore, the Supreme Court initially gave the Inferior Officer provision the reading most consistent with the overall intent of the Constitution. 4

Forty years later, the Supreme Court again addressed the Inferior Officer provision, this time within the context of a challenge to the ability of Congress to empower the courts to appoint federal election supervisors, who were charged with observing elections to guard against fraud. 5 The Court rejected a challenge to the statute on the ground that it was unconstitutional insofar as it authorized courts to appoint election supervisors whose duties were allegedly executive in nature. 6 The Court explained that 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 offices appertain." 7 However, there is no absolute requirement to that effect in the Appointments Clause, and "it would be difficult in many cases to determine to which department an office properly belonged." 8 The Court concluded 9 that Congress can determine where to vest Inferior Officer appointment power, governed by the principle set out in Hennen. Such a congressional decision would be void, however, if there is an "incongruity of duty required" of the Inferior Officer and of the appointing Branch. 10

Significantly, the duties of the Officer at stake in Siebold — an election supervisor — were not found to fit exclusively within any of the Executive departments. The Court accordingly upheld the ap-

106. 38 U.S. at 257-58 (emphasis added).
107. In Collins, 14 Ct. Cl. at 575, the court addressed Congress' power to vest authority in the President to reinstate a military officer. The court explained that the Inferior Officer provision permits the President, the Heads of Departments, and the courts of law to appoint "any of their respective subordinate officers . . . ." Id. (emphasis added).
109. 100 U.S. at 397.
110. Id.
111. Id.
112. Id. at 397-398.
113. Id. at 398. The Court in dictum discussed the appointment of a United States Marshal, and opined that such an Officer could be appointed by a court. Id. at 397. Assuming that this dictum is correct, such an appointment would constitute less of an intrusion into Executive Branch affairs than does judicial appointment of Independent Counsel because, unlike Independent Counsels, Marshals are under the direct supervision of the Attorney General, 28 U.S.C. § 569(c)(1982), and can be removed at the will of the Executive. In re Neagle, 135 U.S. 1, 63 (1890).
pointment power in the courts. Unlike in Siebold, the Officer at issue here — a prosecutor — is manifestly part of the Executive Branch alone. There is no confusion, as there was in Siebold, as to which Branch should properly be appointing prosecutors. Thus, if this Court can appoint a prosecutor, it can just as easily be empowered to appoint pardon officials or generals. Yet, those officials carry out obvious executive functions.

Because the function at issue is a prosecutorial one, there is also an obvious incongruity of duties, proscribed by Siebold, between those of the appointing Branch and those of the appointed Officer. As explained earlier, the courts have made clear on numerous occasions that the separation of powers principle prohibits judges from interfering with prosecutorial discretion, which often involves consideration of broad Executive Branch issues. Moreover in United States v. Thompson, the Supreme Court reversed a lower court for attempting to prevent a United States Attorney from instituting a prosecution by resubmitting the matter to a grand jury. The Court’s decision was expressly based upon “the right of the Government to initiate prosecutions for crime,” a right not subject to control by judicial decision. Furthermore, the duty of the prosecutor cannot be linked to the duty of the judge lest the due process rights of the defendant be infringed. An obvious and troubling conflict is

114. 100 U.S. at 398.
115. See supra notes 88-96 and accompanying text.
116. In Young v. United States ex rel. Vuitton et Fils S.A., 107 S. Ct. 2124 (1987), the Supreme Court ruled that the courts may appoint attorneys for the special purpose of prosecuting contempt actions. This ruling is irrelevant here because this power was viewed as an integral part of the courts’ inherent Article III authority to ensure respect for the courts and the judicial process. Id. at 2131-34.
118. See supra note 92 and accompanying text.
119. We also note that the plurality opinion in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 80 n. 31 (1982), rejected an argument that the newly created bankruptcy judges were adjuncts of the district courts, in part on the ground that the new judges were appointed by the President rather than by the district courts. The plurality thus viewed it as significant that the invalid bankruptcy judges had been appointed by another Branch.
120. 251 U.S. 407 (1920).
121. Id. at 415. Similarly, in Ex parte United States, 287 U.S. 241 (1932), the Supreme Court held that a district court lacks jurisdiction to refuse to issue an arrest warrant following an indictment by a grand jury. See also Ullmann v. United States, 350 U.S. 422 (1956) (construing statute authorizing U.S. Attorney to confer immunity in a way to avoid serious constitutional questions that would arise from providing judicial review of prosecutorial immunity determinations).
raised when this Court must judge actions taken by a prosecutor whom other judges of this same Court have selected because they believe him to be the person best qualified to be the prosecutor in that particular case.\textsuperscript{122}

Consequently, there is an incongruity of functions between judges and a prosecutor and the result in \textit{Siebold} does not resolve this case, which is instead "governed"\textsuperscript{123} by the rule set out in \textit{Hennen} that Inferior Officers are to be appointed by the Branch to which they belong if, as in this case, that Branch can easily be identified.\textsuperscript{124}

\section*{B. Investing the Special Division of this Court with Non-Judicial Powers Violates Article III of the Constitution}

1. Article III of the Constitution limits the "judicial Power" of the United States to "Cases" and "Controversies."\textsuperscript{125} "[T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded."\textsuperscript{126} The power of the judiciary to act, therefore, must be based on the exercise of the adjudicative function, and on the presence of a concrete dispute between adverse parties.\textsuperscript{127}

The Supreme Court has consistently held that Congress may not impose non-judicial duties upon the federal judiciary. In \textit{Hayburn's Case}, the Court held that courts cannot be assigned the task of recommending to the Secretary of War whether Revolution-

\begin{footnotesize}
\textsuperscript{122} Congress has provided in the past for interim court appointment of United States Attorneys when the position is vacant. 28 U.S.C. § 546 (1982). However, that statute has recently been amended to recognize the primary role of the Attorney General in filling such vacancies. 100 Stat. 3616 (1986). Unlike Independent Counsels, United States Attorneys are removable at will by the President, and serve under the direct supervision of the Attorney General. Finally, this vacancy appointment practice has never been addressed by the Supreme Court. \textit{But see} United States v. Solomon, 216 F. Supp. 835 (S.D.N.Y. 1963)(appointment of an interim United States Attorney by federal district court judge does not violate separation of powers doctrine).

\textsuperscript{123} 100 U.S. at 398.

\textsuperscript{124} 38 U.S. at 258. In Hobson v. Hansen, 265 F. Supp. 902 (D.D.C. 1967) (three-judge court), over the dissent of Judge J. Skelly Wright, the court upheld judicial appointment of the members of the District of Columbia school board. As the court noted, however, the federal court in that location exercises unique \textit{article I} power over the District of Columbia. \textit{Id.} at 909-11. Moreover, there was not the same obvious incongruity of functions that is present here. We also note that in Nader v. Bork, 366 F. Supp. 104, 109 (D.D.C. 1973), the court criticized judicial appointment of independent prosecutors, recognizing the incongruity of functions between judges and prosecutors.

\textsuperscript{125} U.S. CONsT. art. III, § 2.


\textsuperscript{127} Maskrat v. United States, 219 U.S. 346 (1911); United States v. Ferreira, 54 U.S. (13 How.) 40 (1851); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).
\end{footnotesize}
ary War veterans were owed pensions. In the note to the report of the case, Chief Justice Jay, Justice Cushing, and District Judge Duane agreed that “neither the Legislative nor the Executive branches, can constitutionally assign to the Judicial [branch] any duties, but such as are properly judicial, and to be performed in a judicial manner.”

Similarly, the Court in Ferreira held that Congress cannot invest courts with law administration duties. The Court there determined that it lacked jurisdiction over an appeal from the district court given that the power invested in the district court “is not judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States.” Rather, the task was that which could be assigned to a claims commissioner and “[t]he proceeding is altogether ex parte; and all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain.”

The rule prohibiting courts from discharging non-judicial tasks flows from two interrelated aspects of the Constitution’s separation of powers framework. First, requiring courts to perform executive tasks or to act as legislative commissioners would undercut “the Framers’ desire to safeguard the independence of the judicial from the other branches by confining its activities to ‘cases of a judicial nature.’” Second, the discharge of other tasks would “involve the judges too intimately in the process of policy and thereby weaken

128. 2 U.S. at 410.
129. 54 U.S. at 48.
130. 54 U.S. at 46. See also Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948) (holding that the judiciary cannot pass on awards of international air routes by the Civil Aeronautics Board since any decision would ultimately be subject to modification by the President).
131. Glidden Co. v. Zdanok, 370 U.S. 530, 582 (1962) (opinion of Harlan, J.) (quoting 2 M. FARRAND, supra note 35, at 430). See also Hayburn’s Case, 2 U.S. at 411 (opinion of Justices Wilson, Blair, and District Judge Peters); Speech of John Marshall to the House of Representatives, 18 U.S. (5 Wheat.) App. 3, 16 (expansion of judicial power beyond cases or controversies would usurp the power and independence of the other Branches and “[t]he division of power [among the Branches] could exist no longer, and the other departments would be swallowed up by the judiciary”); J. ADAMS, Thoughts on Government, in 4 WORKS OF JOHN ADAMS 198 (C.F. Adams ed. 1851) (“The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial powers ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that.”).
confidence in the disinterestedness of their judicatory functions.\textsuperscript{132} Aligning the judiciary with either of the two other Branches poses not only a threat to the remaining Branch, but also erodes one of the safeguards for individual liberty — an independent, objective judiciary.\textsuperscript{133} Empowering this Court to discharge the duties prescribed in the Ethics Act violates both of these precepts because it undermines the Executive’s constitutional prerogative to enforce the laws, and jeopardizes the structural protections afforded targets of criminal law enforcement investigations.\textsuperscript{134}

2. Under the Ethics Act, Congress has invested this Court with wide-ranging powers that have no roots in any particular case or controversy.

a. Congress plainly intended that the Special Division exercise a non-judicial role in defining the Independent Counsel’s prosecutorial jurisdiction.\textsuperscript{135} The Senate Report explained that

\begin{quote}
[i]n defining the prosecutorial jurisdiction of a special prosecutor, the division of the court is given the authority to define that jurisdiction to extend to related matters. For example, if allegations of criminal wrongdoing involve a cabinet secretary, and for that reason an application is made for the appointment of a special prosecutor undersubsection 592(c), the court would probably want to define the prosecutorial jurisdiction to include any potential co-conspirators . . . .\textsuperscript{136}
\end{quote}

Indeed, "even if the Attorney General should not request that related matters be assigned to an existing special prosecutor, the court
has the authority to do so . . . .”

Thus, Congress has assigned this Court a policymaking role in determining whether, or to what extent, to modify the Attorney General's original grant of jurisdiction to the Independent Counsel. Indeed, the Special Division exercised that power in the case involving Lieutenant Colonel North, defining the Independent Counsel’s jurisdiction to include more events and persons than those included in the Attorney General’s application under 28 U.S.C. 592(c)-(d).

b. Moreover, Congress authorized the Special Division “on its own motion” to terminate the investigation on the ground that the investigation is substantially or fully complete. The House Report explained that this termination provision was “intended to deal with situations where a special prosecutor is attempting to prolong his office beyond the time it is really needed.”

Determining whether an Independent Counsel is “really needed” is far removed from the exercise of the adjudicative function, and the Senate report acknowledges that the Ethics Act gives the Court the administrative option to impose the “drastic remedy of terminating the office [of Independent Counsel]” when the court believes that the essential responsibilities of the Independent Counsel have been completed. As with the provisions allowing the Court discretion in setting the contours of the Independent Counsel’s investigation, the termination provision plainly calls for the Court's exercise of non-judicial duties.

137. Id. at 65, reprinted in 1978 U.S. CONG. & ADMIN. NEWS 4216, 4281.
138. See In re Oliver L. North, No. 86-6, Order of Dec. 19, 1986 (D.C. Cir. Indep. Counsel Div.). See also In re Sealed Case, 829 F.2d 50, 65 n.3 (D.C. Cir. 1987) (Williams J., concurring and dissenting) (noting that the Special Division's decision to vest greater authority in Independent Counsel than that proposed by the Attorney General followed a letter from members of the Senate Judiciary Committee urging the Court to expand the investigation; “[u]nhitching the Independent Counsel from the executive may make the office naturally prone to domination by the branch that represents its primary competitor”).
140. H.R. REP. NO. 1307 at 11.
142. Courts, of course, may discharge non-judicial functions in managing the business of the judiciary and in keeping their “own house in order.” Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 85 (1970); In re Certain Complaints Under Investigation, 783 F.2d 1488, 1503-1506 (11th Cir.), cert. denied sub nom. Hastings v. Goldbold, 106 S. Ct. 3273 (1986). Similarly, federal courts may exercise a type of prosecutive authority in vindicating their own integrity through exercise of the criminal contempt power. See Young, 107 S.Ct. at 2131-2134; Gompers v. Bucks Stove and Range Co., 221 U.S. 418 (1911). The duties that this Court discharges under the Ethics Act, however, in no way relate to the management of judicial business.
The Court's exercise of such functions under the Ethics Act cannot be defended as an outgrowth of the constitutionally legitimate judicial function in overseeing aspects of an inchoate case or controversy between the Independent Counsel and the targets of the investigation. The power to determine whether probable cause exists justifying issuance of a search warrant is far different from the power to establish and/or terminate a prosecutor's investigation. This Court does not act pursuant to the Ethics Act as the guardian of the target's rights, but solely to effectuate the congressional aims underlying the Independent Counsel provisions, regardless of the target's interests.\textsuperscript{143}

3. The principle articulated in \textit{Ferreira} and \textit{Hayburn's Case} — that Congress cannot impose non-judicial functions upon the courts — is a mirror image of the more recent Supreme Court cases stressing the restrictions upon congressional efforts to influence administration of the laws through means other than legislation.

In \textit{INS v. Chadha},\textsuperscript{144} and in \textit{Bowsher v. Synar},\textsuperscript{145} the Supreme Court made clear that Congress can directly affect those outside its Branch only by passing laws. In striking down the legislative veto provision in \textit{Chadha}, the Court held that Congress had impermissibly taken action, outside the constitutionally prescribed means, which "alter[ed] the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha [a private party], all outside the Legislative Branch."\textsuperscript{146}

Similarly, in \textit{Bowsher}, the Court held that the Comptroller General, an officer of Congress, cannot consistent with our system of separated powers exercise the administrative authority invested in him under the Gramm-Rudman Act. The Court reaffirmed that "as \textit{Chadha} makes clear, once Congress makes its choice in enacting leg-

\begin{footnotes}
\item[143.] Congress also invested this Court with the responsibility to determine whether various developments in the prosecution should be made public when the "best interests of justice" so require. 28 U.S.C. § 593(b)(1982). Similarly, § 595(b)(3) provides that the Court shall make the Independent Counsel's progress reports public as it "deems appropriate." \textit{See also} 28 U.S.C. § 596(a)(2)(1982) (same authority with respect to a report concerning the Attorney General's decision to remove an Independent Counsel). In the context of a case or controversy, courts may determine whether releasing information to the public furthers the public interest. Here, however, Congress has directed this Court to make such determinations on its own motion in the absence of any adversarial process. The reporting provisions thus reflect Congress' decision to make the Special Division a partner of the Independent Counsel in conducting the investigation and safeguarding what the Court perceives to be in the public interest.
\item[144.] 462 U.S. 919 (1983).
\item[145.] 106 S. Ct. 3181 (1986).
\item[146.] 462 U.S. at 952.
\end{footnotes}
islation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly — by passing new legislation.”

Just as Congress may directly affect the rights of individuals and the other Branches only through constitutional prescribed means of legislation, so Congress can empower the judiciary to affect such rights only through its constitutionally prescribed power of adjudicating cases and controversies. Here, Congress, as in Chadha and Bowsher, has empowered a Branch other than the Executive to exercise administrative authority affecting the legal rights of the Executive Branch and of private individuals as well. The danger to the balance of powers presented by the court’s assumption of such tasks under the Ethics Act is far from academic.

The powers invested in the Special Division — to define the Independent Counsel’s prosecutorial jurisdiction, to determine whether to release certain information to the public, and to decide whether to terminate the office of Independent Counsel — not only usurp the policymaking authority of the Executive Branch, they also remove the systemic protections afforded to the criminally accused. By empowering the Special Division to participate in the prosecutorial function, Congress has threatened to erode the “structural protections against abuse of power [that are] critical to preserving liberty.”

C. The Ethics Act Unconstitutionally Vests Executive Power in an Independent Counsel Outside the Executive’s Control

The Constitution places in the Executive Branch alone the power and responsibility to enforce the law. The Ethics Act, however, seeks to carve part of that constitutionally-assigned power out of the Executive Branch and to vest it with Independent Counsels who are appointed by the Judicial Branch and who operate almost entirely independently of Executive Branch control. This result is contrary to the allocation of powers provided by the Constitution.

1. The First Congress implemented the concept of the unitary Executive in the “Decision of 1789.” In urging that the Secretary of Foreign Affairs would be subject to removal by the President at will, Madison explained that, inasmuch as the President has the responsi-

147. 106 S. Ct. at 3192.
148. See supra notes 88-96 and accompanying text.
149. Bowsher, 106 S. Ct. at 3191 (citation omitted).
150. See supra notes 28-41, 88-96 and accompanying text.
bility for faithful execution of the laws, he necessarily must have the
authority to remove those officials he does not trust. Additionally, Madison referred to the "great principle of unity and responsibility in the Executive Department, which was intended for the security of liberty and the public good." In keeping with the concept of a unitary Executive, the Supreme Court has recognized that the President must have the power to supervise and, if necessary, remove subordinates appointed to assist him in the exercise of his executive power. In a series of cases, the Court has addressed the degree to which the President must have authority to remove governmental officials in order to discharge the constitutional power to execute the laws properly. While the Court's analysis has changed somewhat through time, one principle underlies each of the Court's decisions: the degree of Executive Branch control required over a particular office is determined by the nature of the authority exercised by that office. It is our position that Officers exercising such a quintessential executive power as criminal law enforcement must be subject to full Executive Branch control and removal.

In *Myers v. United States*, the Supreme Court engaged in an exhaustive analysis of judicial and legislative precedent on the question of removal of Officers. It affirmed that Congress cannot interfere with the President's performance of his duty to execute the laws by curtailing his control over the subordinates whom he has appointed to assist him in that task. The Court acknowledged the reality that "the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates." Further, the Court recognized that the concept of a unitary Executive requires that the President have control over those subordinates.

In *Humphrey's Executor v. United States*, the Court upheld

151. 1 Annals of Cong. 462-65, 496-501 (J. Gales ed. 1789).
152. Id. at 499.
153. As Hamilton explained: "The persons . . . to whose immediate management [the administration of government is] committed ought to be considered as the assistants or deputies of the Chief Magistrate, and on this account they ought to derive their offices from his appointment, [or] at least from his nomination, and ought to be subject to his superintendence." The Federalist No. 72, at 436 (A. Hamilton)(C. Rossiter ed. 1961).
154. 272 U.S. 52 (1926).
155. Id. at 162-163.
156. Id. at 117.
157. Id. at 135.
158. 295 U.S. 602 (1935).
a statutory limitation providing that the President could remove an FTC Commissioner for inefficiency, malfeasance, or neglect of duty. The Court thereby limited its prior opinion in Myers. It continued, however, to focus on the nature of the duties assigned to the particular official in order to determine whether the Constitution requires that the President have unlimited removal power:

Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers . . . .

In Wiener v. United States, the President sought to remove a member of a temporary commission established to adjudicate war claims. The Supreme Court concluded that "the most reliable factor for drawing an inference regarding the President's power of removal in our case is the nature of the function that Congress vested in the War Claims Commission." Finding the function of the commission to have an "intrinsic judicial character," the Court concluded that the President had no removal power under the Constitution or by statute.

Most recently, in Bowsher v. Synar, the Supreme Court determined that certain budgetary functions cannot be assigned to the Comptroller General, an official subject to removal for cause by Congress. In so holding, the Court stressed that the nature of the powers delegated to the office control the nature and location of the removal power.

Underlying each of these decisions is the recurring theme that executive power must reside in the Executive Branch in the hands of

159. Id. at 631-32 (emphasis added). The Supreme Court went on to hold that the FTC does not exercise executive power, but "quasi-judicial" and "quasi-legislative" power instead. Id. at 627-28. This case does not involve such distinctions of governmental powers as discussed above, the power involved here is unquestionably executive in nature.


161. Id. at 353.

162. Id. at 355.

163. Id. at 356. By contrast, in Morgan v. TVA, 115 F.2d 990 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941), the court found that the TVA exercises "predominantly an executive or administrative function." Id. at 993. Accordingly, the court concluded that the President has the inherent power to remove the chairman of the Board of Directors of the TVA, notwithstanding an apparent intent by Congress to limit the President's removal authority and preserve such authority for itself. Id. at 992-94.

164. 106 S. Ct. 3181 (1986).
officials subject to executive control and supervision. Simply put, since the Constitution vests the executive power in the President, those officials who exercise that power must, consistent with the Constitution, be subject to Executive Branch control and direction. As the Supreme Court has stated, the President is “entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity[,] . . . includ[ing] the enforcement of federal law . . . and management of the Executive Branch — a task for which ‘imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties.’”

2. It is indisputable that criminal prosecution, the Independent Counsels’ primary task, is a quintessential executive function. Consequently, the Ethics Act violates the Constitution insofar as it vests a significant portion of this executive law enforcement authority in an office effectively insulated from Executive Branch appointment, control, supervision, and removal.

Prosecution of high level officials often requires a careful balancing of such factors as the results to be obtained, the resources required, foreign policy implications, the extent to which national security information may be revealed, as well as a host of other considerations. Such factors cannot properly be considered in isolation. The whole concept of a unitary Executive is undermined if these decisions are made by different Independent Counsel with no democratic accountability, each concerned solely about his own view of the nation’s interests as defined by his narrow prosecutorial jurisdiction.

The Ethics Act, however, places enforcement of the criminal law outside the control of the President or the Attorney General. The sole effective function assigned to the Executive Branch under the Ethics Act is the charge to the Attorney General to conduct a preliminary investigation to determine whether there are reasonable grounds to believe that further investigation or prosecution is warranted. Upon such a finding, or even the failure to conclude the required investigation within ninety days, the function of the Executive ceases, even if the case contains important and legitimate factors

166. See supra notes 28-41, 88-96 and accompanying text.
167. See supra notes 93-96 and accompanying text.
which would otherwise lead to the exercise of the discretion not to proceed with a prosecution.

Like the President's powers in foreign affairs, the pardon power, and the power of the President over the military, the President's authority to enforce the criminal laws flows directly from the Constitution and may not be so seriously undermined by legislation. The Executive Branch's authority to enforce the criminal laws is such a key part of the executive function that it cannot be assigned to an Officer who is so clearly outside the control and supervision of that Branch.

V. CONCLUSION

For the foregoing reasons, the provisions of the Ethics in Government Act regarding Independent Counsels is unconstitutional.