MORRISON V. OLSON

487 U.S. 654 (1988)

The following contains excerpts from the majority opinion of Chief Justice Rehnquist and the dissenting opinion of Justice Scalia. Each addresses whether the Ethics in Government Act of 1978, which established the U.S. Office of Independent Counsel, violated the constitutional separation of powers.

From the majority opinion by Chief Justice Rehnquist

V

We now turn to consider whether the Act is invalid under the constitutional principle of separation of powers. Two related issues must be addressed: The first is whether the provision of the Act restricting the Attorney General's power to remove the independent counsel to only those instances in which he can show "good cause," taken by itself, impermissibly interferes with the President's exercise of his constitutionally appointed functions. The second is whether, taken as a whole, the Act violates the separation of powers by reducing the President's ability to control the prosecutorial powers wielded by the independent counsel.

A

Two Terms ago we had occasion to consider whether it was consistent with the separation of powers for Congress to pass a statute that authorized a Government official who is removable only by Congress to participate in what we found to be "executive powers." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). We held in *Bowsher* that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." Id., at 726....

...[O]ur present considered view is that the determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as "purely executive." The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II....

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...Considering for the moment the "good cause" removal provision in isolation from the other parts of the Act at issue in this case, we cannot say that the imposition of a "good cause" standard for removal by itself unduly trammels on executive authority. There is no real dispute that the functions performed by the independent counsel are "executive" in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch. As we noted above, however, the independent counsel is an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority. Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.

Nor do we think that the "good cause" removal provision at issue here impermissibly burdens the President's power to control or supervise the independent counsel, as an executive official, in the execution of his or her duties under the Act. This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the "faithful execution" of the laws. Rather, because the independent counsel may be terminated for "good cause," the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act. Although we need not decide in this case exactly what is encompassed within the term "good cause" under the Act, the legislative history of the removal provision also makes clear that the Attorney General may remove an independent counsel for "misconduct." See H. R. Conf. Rep. No. 100-452, p. 37 (1987). Here, as with the provision of the Act conferring the appointment authority of the independent counsel on the special court, the congressional determination to limit the removal power of the Attorney General was essential, in the view of Congress, to establish the necessary independence of the office. We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.

B

The final question to be addressed is whether the Act, taken as a whole, violates the principle of separation of powers by unduly interfering with the role of the Executive Branch. Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches. See, e.g., *Bowsher v. Synar*, 478 U.S. at 725 (citing *Humphrey's Executor*, 295 U.S. at 629-630). As we stated in *Buckley v. Valeo*, 424 U.S. 1 (1976), the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as "a self-executing safeguard against the encroachment or aggrandizement of one branch at

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the expense of the other." Id., at 122. We have not hesitated to invalidate provisions of law which violate this principle. See id., at 123. On the other hand, we have never held that the Constitution requires that the three branches of Government "operate with absolute independence...."

We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch. Cf. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S., at 856. Unlike some of our previous cases, most recently *Bowsher v. Synar*, this case simply does not pose a "dange[r] of congressional usurpation of Executive Branch functions." 478 U.S., at 727; see also *INS v. Chadha*, 462 U.S. 919, 958 (1983). Indeed, with the exception of the power of impeachment -- which applies to all officers of the United States -- Congress retained for itself no powers of control or supervision over an independent counsel. The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General has no duty to comply with the request, although he must respond within a certain time limits s. 592(g). Other than that, Congress' role under the Act is limited to receiving reports or other information and oversight of the independent counsel's activities, s. 595(a), functions that we have recognized generally as being incidental to the legislative function of Congress. See *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

Similarly, we do not think that the Act works any judicial usurpation of properly executive functions. As should be apparent from our discussion of the Appointments Clause above, the power to appoint inferior officers such as independent counsel is not in itself an "executive" function in the constitutional sense, at least when Congress has exercised its power to vest the appointment of an inferior office in the "courts of Law." We note nonetheless that under the Act the Special Division has no power to appoint an independent counsel sua sponte; it may only do so upon the specific request of the Attorney General, and the courts are specifically prevented from reviewing the Attorney General's decision not to seek appointment, s. 592(f). In addition, once the court has appointed a counsel and defined his or her jurisdiction, it has no power to supervise or control the activities of the counsel. As we pointed out in our discussion of the Special Division in relation to Article III, the various powers delegated by the statute to the Division are not supervisory or administrative, nor are they functions that the Constitution requires be performed by officials within the Executive Branch. The Act does give a federal court the power to review the Attorney General's decision to remove an independent counsel, but in our view this is a function that is well within the traditional power of the Judiciary.

Finally, we do not think that the Act "impermissibly undermine[s]" the powers of the Executive Branch, *Schor*, supra, at 856, or "disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions," *Nixon v. Administrator of General Services*, supra, at 443. It is undeniable that the Act reduces the amount of control or supervision that the

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Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity. The Attorney General is not allowed to appoint the individual of his choice; he does not determine the counsel's jurisdiction; and his power to remove a counsel is limited. n34 Nonetheless, the Act does give the Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel. Most importantly, the Attorney General retains the power to remove the counsel for "good cause," a power that we have already concluded provides the Executive with substantial ability to ensure that the laws are "faithfully executed" by an independent counsel. No independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request appointment if he finds "no reasonable grounds to believe that further investigation is warranted" is committed to his unreviewable discretion. The Act thus gives the Executive a degree of control over the power to initiate an investigation by the independent counsel. In addition, the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy unless it is not "possible" to do so. Notwithstanding the fact that the counsel is to some degree "independent" and free from executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.

VI

In sum, we conclude today … that the Act does not violate the separation-of-powers principle by impermissibly interfering with the functions of the Executive Branch. The decision of the Court of Appeals is therefore Reversed.

From the dissenting opinion of Justice Scalia

It is the proud boast of our democracy that we have "a government of laws and not of men." Many Americans are familiar with that phrase; not many know its derivation. It comes from Part the First, Article XXX, of the Massachusetts Constitution of 1780, which reads in full as follows:

"In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; The executive shall never exercise the legislative and judicial powers, or either of them; The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a

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government of laws and not of men."

The Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government. In No. 47 of The Federalist, Madison wrote that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." The Federalist No. 47, p. 301 (C. Rossiter ed. 1961) (hereinafter Federalist). Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.

The principle of separation of powers is expressed in our Constitution in the first section of each of the first three Articles. Article I, s. 1, provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Article III, s. 1, provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." And the provision at issue here, Art. II, s. 1, cl. 1, provides that "[t]he executive Power shall be vested in a President of the United States of America."

But just as the mere words of a Bill of Rights are not self-effectuating, the Framers recognized "[t]he insufficiency of a mere parchment delineation of the boundaries" to achieve the separation of powers. Federalist No. 73, p. 442 (A. Hamilton). "[T]he great security," wrote Madison, "against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack." Federalist No. 51, pp. 321-322. Madison continued:

"But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. . . . As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified." Id., at 322-323.

The major "fortification" provided, of course, was the veto power. But in addition to providing fortification, the Founders conspicuously and very consciously declined to sap the Executive's strength in the same way they had weakened the Legislature: by dividing the executive power. Proposals to have multiple executives, or a council of advisers with separate authority were rejected. See 1 M. Farrand, Records of the Federal Convention

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of 1787, pp. 66, 71-74, 88, 91-92 (rev. ed. 1966); 2 id., at 335-337, 533, 537, 542. Thus, while "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives," U.S. Const., Art. I, s. 1 (emphasis added), "[t]he executive Power shall be vested in a President of the United States," Art. II, s. 1, cl. 1 (emphasis added).

That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish -- so that "a gradual concentration of the several powers in the same department," Federalist No. 51, p. 321 (J. Madison), can effectively be resisted. Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

I

The present case began when the Legislative and Executive Branches became "embroiled in a dispute concerning the scope of the congressional investigatory power," United States v. House of Representatives of United States, 556 F. Supp. 150, 152 (DC 1983), which -- as is often the case with such interbranch conflicts -- became quite acrimonious. In the course of oversight hearings into the administration of the Superfund by the Environmental Protection Agency (EPA), two Subcommittees of the House of Representatives requested and then subpoenaed numerous internal EPA documents. The President responded by personally directing the EPA Administrator not to turn over certain of the documents, see Memorandum of November 30, 1982, from President Reagan for the Administrator, Environmental Protection Agency, reprinted in H. R. Rep. No. 99-435, pp. 1166-1167 (1985), and by having the Attorney General notify the congressional Subcommittees of this assertion of executive privilege, see Letters of November 30, 1982, from Attorney General William French Smith to Hon. John D. Dingell and Hon. Elliott H. Levitas, reprinted, id., at 1168-1177. In his decision to assert executive privilege, the President was counseled by appellee Olson, who was then Assistant Attorney General of the Department of Justice for the Office of Legal Counsel, a post that has traditionally had responsibility for providing legal advice to the President (subject to approval of the Attorney General). The House's response was to pass a resolution citing the EPA Administrator, who had possession of the documents, for contempt. Contempt of Congress is a criminal offense. See 2 U. S. C. s. 192. The United States Attorney, however, a member of the Executive Branch, initially took no steps to prosecute the contempt citation. Instead, the Executive Branch sought the immediate assistance of the Third Branch by filing a civil action asking the District Court to declare that the EPA Administrator had acted lawfully in withholding the documents under a claim of executive privilege. See ibid. The District Court declined (in my view correctly) to get involved in the controversy, and urged the other two branches to try "[c]ompromise and cooperation, rather than confrontation." 556 F.

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Supp., at 153. After further haggling, the two branches eventually reached an agreement giving the House Subcommittees limited access to the contested documents.

Congress did not, however, leave things there. Certain Members of the House remained angered by the confrontation, particularly by the role played by the Department of Justice....

...Accordingly, staff counsel of the House Judiciary Committee were commissioned (apparently without the knowledge of many of the Committee's members, see id., at 731) to investigate the Justice Department's role in the controversy. That investigation lasted 2 1/2 years, and produced a 3,000-page report issued by the Committee over the vigorous dissent of all but one of its minority-party members. That report, which among other charges questioned the truthfulness of certain statements made by Assistant Attorney General Olson during testimony in front of the Committee during the early stages of its investigation, was sent to the Attorney General along with a formal request that he appoint an independent counsel to investigate Mr. Olson and others.

As a general matter, the Act before us here requires the Attorney General to apply for the appointment of an independent counsel within 90 days after receiving a request to do so, unless he determines within that period that "there are no reasonable grounds to believe that further investigation or prosecution is warranted." 28 U. S. C. s. 592(b)(1). As a practical matter, it would be surprising if the Attorney General had any choice (assuming this statute is constitutional) but to seek appointment of an independent counsel to pursue the charges against the principal object of the congressional request, Mr. Olson. Merely the political consequences (to him and the President) of seeming to break the law by refusing to do so would have been substantial. How could it not be, the public would ask, that a 3,000-page indictment drawn by our representatives over 2 1/2 years does not even establish "reasonable grounds to believe" that further investigation or prosecution is warranted with respect to at least the principal alleged culprit? But the Act establishes more than just practical compulsion. Although the Court's opinion asserts that the Attorney General had "no duty to comply with the [congressional] request," ante, at 694, that is not entirely accurate. He had a duty to comply unless he could conclude that there were "**no reasonable grounds to believe**," not that prosecution was warranted, but merely that "**further investigation**" was warranted, 28 U. S. C. s. 592(b)(1) (1982 ed., Supp. V) (emphasis added), after a 90-day investigation in which he was prohibited from using such routine investigative techniques as grand juries, plea bargaining, grants of immunity, or even subpoenas, see s. 592(a)(2). The Court also makes much of the fact that "the courts are specifically prevented from reviewing the Attorney General's decision not to seek appointment, s. 592(f)." Ante, at 695. Yes, n1 but Congress is not prevented from reviewing it. The context of this statute is acrid with the smell of threatened impeachment. Where, as here, a request for appointment of an independent counsel has come from the Judiciary Committee of either House of Congress, the Attorney General must, if he decides not to seek appointment, explain to that Committee why. See also 28 U. S. C. s. 595(c) (1982 ed.,

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Supp. V)

Thus, by the application of this statute in the present case, Congress has effectively compelled a criminal investigation of a high-level appointee of the President in connection with his actions arising out of a bitter power dispute between the President and the Legislative Branch. Mr. Olson may or may not be guilty of a crime; we do not know. But we do know that the investigation of him has been commenced, not necessarily because the President or his authorized subordinates believe it is in the interest of the United States, in the sense that it warrants the diversion of resources from other efforts, and is worth the cost in money and in possible damage to other governmental interests; and not even, leaving aside those normally considered factors, because the President or his authorized subordinates necessarily believe that an investigation is likely to unearth a violation worth prosecuting; but only because the Attorney General cannot affirm, as Congress demands, that there are no reasonable grounds to believe that further investigation is warranted. The decisions regarding the scope of that further investigation, its duration, and, finally, whether or not prosecution should ensue, are likewise beyond the control of the President and his subordinates.

II

If to describe this case is not to decide it, the concept of a government of separate and coordinate powers no longer has meaning. The Court devotes most of its attention to such relatively technical details as the Appointments Clause and the removal power, addressing briefly and only at the end of its opinion the separation of powers. As my prologue suggests, I think that has it backwards. Our opinions are full of the recognition that it is the principle of separation of powers, and the inseparable corollary that each department's "defense must . . . be made commensurate to the danger of attack," Federalist No. 51, p. 322 (J. Madison), which gives comprehensible content to the Appointments Clause, and determines the appropriate scope of the removal power. Thus, while I will subsequently discuss why our appointments and removal jurisprudence does not support today's holding, I begin with a consideration of the fountainhead of that jurisprudence, the separation and equilibration of powers....

...To repeat, Article II, s. 1, cl. 1, of the Constitution provides:

The executive Power shall be vested in a President of the United States.

As I described at the outset of this opinion, this does not mean **some** of the executive power, but **all** of the executive power. It seems to me, therefore, that the decision of the Court of Appeals invalidating the present statute must be upheld on fundamental separation-of-powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise

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of that power? Surprising to say, the Court appears to concede an affirmative answer to both questions, but seeks to avoid the inevitable conclusion that since the statute vests some purely executive power in a person who is not the President of the United States it is void.

The Court concedes that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive'," though it qualifies that concession by adding "in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch." Ante, at 691. The qualifier adds nothing but atmosphere. In what other sense can one identify "the executive Power" that is supposed to be vested in the President (unless it includes everything the Executive Branch is given to do) except by reference to what has always and everywhere -- if conducted by government at all -- been conducted never by the legislature, never by the courts, and always by the executive. There is no possible doubt that the independent counsel's functions fit this description. She is vested with the

> full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice [and] the Attorney General.

28 U. S. C. s. 594(a) (1982 ed., Supp. V) (emphasis added). Governmental investigation and prosecution of crimes is a quintessentially executive function. See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *United States v. Nixon*, 418 U.S. 683, 693 (1974). As for the second question, whether the statute before us deprives the President of exclusive control over that quintessentially executive activity: The Court does not, and could not possibly, assert that it does not. That is indeed the whole object of the statute. Instead, the Court points out that the President, through his Attorney General, has at least some control. That concession is alone enough to invalidate the statute, but I cannot refrain from pointing out that the Court greatly exaggerates the extent of that "some" Presidential control....

...Moving on to the presumably "less important" controls that the President retains, the Court notes that no independent counsel may be appointed without a specific request from the Attorney General. As I have discussed above, the condition that renders such a request mandatory (inability to find "no reasonable grounds to believe" that further investigation is warranted) is so insubstantial that the Attorney General's discretion is severely confined. And once the referral is made, it is for the Special Division to determine the scope and duration of the investigation. See 28 U. S. C. s. 593(b) (1982 ed., Supp. V). And in any event, the limited power over referral is irrelevant to the question whether, once appointed, the independent counsel exercises executive power free from the President's control. Finally, the Court points out that the Act directs the independent counsel to abide by general Justice Department policy, except when not "possible." See 28 U. S. C. s. 594(f) (1982 ed., Supp. V). The exception alone shows this to be an empty promise. Even without that, however, one would be hard put to come

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up with many investigative or prosecutorial "policies" (other than those imposed by the Constitution or by Congress through law) that are absolute. Almost all investigative and prosecutorial decisions -- including the ultimate decision whether, after a technical violation of the law has been found, prosecution is warranted -- involve the balancing of innumerable legal and practical considerations. Indeed, even political considerations (in the nonpartisan sense) must be considered, as exemplified by the recent decision of an independent counsel to subpoena the former Ambassador of Canada, producing considerable tension in our relations with that country. See N. Y. Times, May 29, 1987, p. A12, col. 1. Another preeminently political decision is whether getting a conviction in a particular case is worth the disclosure of national security information that would be necessary. The Justice Department and our intelligence agencies are often in disagreement on this point, and the Justice Department does not always win. The present Act even goes so far as specifically to take the resolution of that dispute away from the President and give it to the independent counsel. 28 U. S. C. s. 594(a)(6) (1982 ed., Supp. V). In sum, the balancing of various legal, practical, and political considerations, none of which is absolute, is the very essence of prosecutorial discretion. To take this away is to remove the core of the prosecutorial function, and not merely "some" Presidential control.

As I have said, however, it is ultimately irrelevant how much the statute reduces Presidential control. The case is over when the Court acknowledges, as it must, that

> [i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity.

Ante, at 695. It effects a revolution in our constitutional jurisprudence for the Court, once it has determined that (1) purely executive functions are at issue here, and (2) those functions have been given to a person whose actions are not fully within the supervision and control of the President, nonetheless to proceed further to sit in judgment of whether

> the President's need to control the exercise of [the independent counsel's] discretion is **so central** to the functioning of the Executive Branch

as to require complete control, ante, at 691(emphasis added), whether the conferral of his powers upon someone else

> **sufficiently** deprives the President of control over the independent counsel to interfere impermissibly with [his] constitutional obligation to ensure the faithful execution of the laws,

ante, at 693 (emphasis added), and whether

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> the Act give[s] the Executive Branch **sufficient** control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties,

ante, at 696 (emphasis added). It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they **all** are.

…

Is it unthinkable that the President should have such exclusive power, even when alleged crimes by him or his close associates are at issue? No more so than that Congress should have the exclusive power of legislation, even when what is at issue is its own exemption from the burdens of certain laws. See Civil Rights Act of 1964, Title VII, 42 U. S. C. s. 2000e et seq. (prohibiting "employers," not defined to include the United States, from discriminating on the basis of race, color, religion, sex, or national origin). No more so than that this Court should have the exclusive power to pronounce the final decision on justiciable cases and controversies, even those pertaining to the constitutionality of a statute reducing the salaries of the Justices. See *United States v. Will*, 449 U.S. 200, 211-217 (1980). A system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused. As we reiterate this very day, "[i]t is a truism that constitutional protections have costs." *Coy v. Iowa*, post, at 1020. While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty.

The checks against any branch's abuse of its exclusive powers are twofold: First, retaliation by one of the other branch's use of its exclusive powers: Congress, for example, can impeach the executive who willfully fails to enforce the laws; the executive can decline to prosecute under unconstitutional statutes, cf. *United States v. Lovett*, 328 U.S. 303 (1946); and the courts can dismiss malicious prosecutions. Second, and ultimately, there is the political check that the people will replace those in the political branches (the branches more "dangerous to the political rights of the Constitution," Federalist No. 78, p. 465) who are guilty of abuse. Political pressures produced special prosecutors -- for Teapot Dome and for Watergate, for example -- long before this statute created the independent counsel.

…

Before this statute was passed, the President, in taking action disagreeable to the Congress, or an executive officer giving advice to the President or testifying before Congress concerning one of those many matters on which the two branches are from time to time at odds, could be assured that his acts and motives would be adjudged -- insofar as the decision whether to conduct a criminal investigation and to prosecute is concerned -- in the Executive Branch, that is, in a forum attuned to the interests and the policies of the Presidency. That was one of the natural advantages the Constitution gave

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to the Presidency, just as it gave Members of Congress (and their staffs) the advantage of not being prosecutable for anything said or done in their legislative capacities. See U.S. Const., Art. I, s. 6, cl. 1; *Gravel v. United States*, 408 U.S. 606 (1972). It is the very object of this legislation to eliminate that assurance of a sympathetic forum. Unless it can honestly be said that there are "no reasonable grounds to believe" that further investigation is warranted, further investigation must ensue; and the conduct of the investigation, and determination of whether to prosecute, will be given to a person neither selected by nor subject to the control of the President -- who will in turn assemble a staff by finding out, presumably, who is willing to put aside whatever else they are doing, for an indeterminate period of time, in order to investigate and prosecute the President or a particular named individual in his administration. The prospect is frightening (as I will discuss at some greater length at the conclusion of this opinion) even outside the context of a bitter, interbranch political dispute. Perhaps the boldness of the President himself will not be affected -- though I am not even sure of that. … But as for the President's high-level assistants, who typically have no political base of support, it is as utterly unrealistic to think that they will not be intimidated by this prospect, and that their advice to him and their advocacy of his interests before a hostile Congress will not be affected, as it would be to think that the Members of Congress and their staffs would be unaffected by replacing the Speech or Debate Clause with a similar provision. It deeply wounds the President, by substantially reducing the President's ability to protect himself and his staff. That is the whole object of the law, of course, and I cannot imagine why the Court believes it does not succeed.

Besides weakening the Presidency by reducing the zeal of his staff, it must also be obvious that the institution of the independent counsel enfeebles him more directly in his constant confrontations with Congress, by eroding his public support. Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naive, ineffective, but, in all probability, "crooks. " And nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better, prosecution. The present statute provides ample means for that sort of attack, assuring that massive and lengthy investigations will occur, not merely when the Justice Department in the application of its usual standards believes they are called for, but whenever it cannot be said that there are "no reasonable grounds to believe" they are called for. The statute's highly visible procedures assure, moreover, that unlike most investigations these will be widely known and prominently displayed. Thus, in the 10 years since the institution of the independent counsel was established by law, there have been nine highly publicized investigations, a source of constant political damage to two administrations. That they could not remotely be described as merely the application of "normal" investigatory and prosecutory standards is demonstrated by, in addition to the language of the statute ("no reasonable grounds to believe"), the following facts: Congress appropriates approximately $ 50 million annually for general legal activities, salaries, and expenses of the Criminal Division of the Department of Justice. See 1989 Budget Request of the Department of Justice, Hearings before a Subcommittee of the House Committee on Appropriations, 100th Cong., 2d Sess., pt. 6,

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pp. 284-285 (1988) (DOJ Budget Request). This money is used to support "[f]ederal appellate activity," "[o]rganized crime prosecution," "[p]ublic integrity" and "[f]raud" matters, "[n]arcotic & dangerous drug prosecution," "[i]nternal security," "[g]eneral litigation and legal advice," "special investigations," "[p]rosecution support," "[o]rganized crime drug enforcement," and "[m]anagement & administration." Id., at 284. By comparison, between May 1986 and August 1987, four independent counsel (not all of whom were operating for that entire period of time) spent almost $ 5 million (one-tenth of the amount annually appropriated to the entire Criminal Division), spending almost $ 1 million in the month of August 1987 alone. See Washington Post, Oct. 21, 1987, p. A21, col. 5. For fiscal year 1989, the Department of Justice has requested $ 52 million for the entire Criminal Division, DOJ Budget Request 285, and $ 7 million to support the activities of independent counsel, id., at 25.

In sum, this statute does deprive the President of substantial control over the prosecutory functions performed by the independent counsel, and it does substantially affect the balance of powers. That the Court could possibly conclude otherwise demonstrates both the wisdom of our former constitutional system, in which the degree of reduced control and political impairment were irrelevant, since all purely executive power had to be in the President; and the folly of the new system of standardless judicial allocation of powers we adopt today.

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The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom. Those who hold or have held offices covered by the Ethics in Government Act are entitled to that protection as much as the rest of us, and I conclude my discussion by considering the effect of the Act upon the fairness of the process they receive.

Only someone who has worked in the field of law enforcement can fully appreciate the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation. Justice Robert Jackson, when he was Attorney General under President Franklin Roosevelt, described it in a memorable speech to United States Attorneys, as follows:

> ...One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints... What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain. If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is

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> the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm -- in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself." R. Jackson, *The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys*, April 1, 1940.

Under our system of government, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion are selected and can be removed by a President, whom the people have trusted enough to elect. Moreover, when crimes are not investigated and prosecuted fairly, nonselectively, with a reasonable sense of proportion, the President pays the cost in political damage to his administration. If federal prosecutors "pick people that [they] thin[k] [they] should get, rather than cases that need to be prosecuted," if they amass many more resources against a particular prominent individual, or against a particular class of political protesters, or against members of a particular political party, than the gravity of the alleged offenses or the record of successful prosecutions seems to warrant, the unfairness will come home to roost in the Oval Office. I leave it to the reader to recall the examples of this in recent years. That result, of course, was precisely what the Founders had in mind when they provided that all executive powers would be exercised by a single Chief Executive. As Hamilton put it, "[t]he ingredients which constitute safety in the republican sense are a due dependence on the people, and a due responsibility." Federalist No. 70, p. 424. The President is directly dependent on the people, and since there is only one President, he is responsible. The people know whom to blame, whereas "one of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults and destroy responsibility." Id., at 427.

That is the system of justice the rest of us are entitled to, but what of that select class consisting of present or former high-level Executive Branch officials? If an allegation is made against them of any violation of any federal criminal law (except Class B or C misdemeanors or infractions) the Attorney General must give it his attention. That in itself is not objectionable. But if, after a 90-day investigation without the benefit of normal investigatory tools, the Attorney General is unable to say that there are "no

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reasonable grounds to believe" that further investigation is warranted, a process is set in motion that is not in the full control of persons "dependent on the people," and whose flaws cannot be blamed on the President. An independent counsel is selected, and the scope of his or her authority prescribed, by a panel of judges. What if they are politically partisan, as judges have been known to be, and select a prosecutor antagonistic to the administration, or even to the particular individual who has been selected for this special treatment? There is no remedy for that, not even a political one. Judges, after all, have life tenure, and appointing a surefire enthusiastic prosecutor could hardly be considered an impeachable offense. So if there is anything wrong with the selection, there is effectively no one to blame. The independent counsel thus selected proceeds to assemble a staff. As I observed earlier, in the nature of things this has to be done by finding lawyers who are willing to lay aside their current careers for an indeterminate amount of time, to take on a job that has no prospect of permanence and little prospect for promotion. One thing is certain, however: it involves investigating and perhaps prosecuting a particular individual. Can one imagine a less equitable manner of fulfilling the executive responsibility to investigate and prosecute? What would be the reaction if, in an area not covered by this statute, the Justice Department posted a public notice inviting applicants to assist in an investigation and possible prosecution of a certain prominent person? Does this not invite what Justice Jackson described as "picking the man and then searching the law books, or putting investigators to work, to pin some offense on him"? To be sure, the investigation must relate to the area of criminal offense specified by the life-tenured judges. But that has often been (and nothing prevents it from being) very broad -- and should the independent counsel or his or her staff come up with something beyond that scope, nothing prevents him or her from asking the judges to expand his or her authority or, if that does not work, referring it to the Attorney General, whereupon the whole process would recommence and, if there was "reasonable basis to believe" that further investigation was warranted, that new offense would be referred to the Special Division, which would in all likelihood assign it to the same independent counsel. It seems to me not conducive to fairness. But even if it were entirely evident that unfairness was in fact the result -- the judges hostile to the administration, the independent counsel an old foe of the President, the staff refugees from the recently defeated administration -- **there would be no one accountable to the public to whom the blame could be assigned....**

The above described possibilities of irresponsible conduct must, as I say, be considered in judging the constitutional acceptability of this process. But they will rarely occur, and in the average case the threat to fairness is quite different. As described in the brief filed on behalf of three ex-Attorneys General from each of the last three administrations:

> The problem is less spectacular but much more worrisome. It is that the institutional environment of the Independent Counsel -- specifically, her isolation from the Executive Branch and the internal checks and balances it supplies -- is designed to heighten, not to check, all of the occupational hazards of the dedicated prosecutor; the danger of too narrow a focus, of

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> the loss of perspective, of preoccupation with the pursuit of one alleged suspect to the exclusion of other interests." *Brief for Edward H. Levi, Griffin B. Bell, and William French Smith as Amici Curiae* 11.

It is, in other words, an additional advantage of the unitary Executive that it can achieve a more uniform application of the law. Perhaps that is not always achieved, but the mechanism to achieve it is there. The mini-Executive that is the independent counsel, however, operating in an area where so little is law and so much is discretion, is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide. What would normally be regarded as a technical violation (there are no rules defining such things), may in his or her small world assume the proportions of an indictable offense. What would normally be regarded as an investigation that has reached the level of pursuing such picayune matters that it should be concluded, may to him or her be an investigation that ought to go on for another year. How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile -- with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities. And to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment. How admirable the constitutional system that provides the means to avoid such a distortion. And how unfortunate the judicial decision that has permitted it.

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