Morrison v. Olson: Renewed Acceptance For a Functional Approach to Separation of Powers

Introduction

Fundamental constitutional structure divides the United States Government into three separate entities, namely, the legislative, executive, and judicial branches.[1] The Constitution allocates the various functions of creating and enforcing law to the branches in a manner that ensures that each operates independently of the others, while still maintaining the interdependence between the branches necessary to avoid single domination. The appointed powers of the three branches dovetail, so that each checks or restrains one or both of the others at various times.[2]

Among the Constitution's grants of power to the executive is the function of "tak[ing] Care that the Laws [are] faithfully executed."[3] This grant establishes the executive, through the Attorney General and the Department of Justice, as the primary enforcer of federal criminal law.[4] As such, an apparent conflict of interest arises when the executive is required to pursue criminal allegations against one of its own officials. Concerns quickly arise regarding the fairness and impartiality of such in-house investigations and prosecutions.

In an attempt to address this problem, Congress enacted the Ethics

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1. U.S. CONST. arts. I, II, III; F.A. OGG & P.O. RAY, INTRODUCTION TO AMERICAN GOVERNMENT: THE NATIONAL GOVERNMENT 239-40 (6th ed. 1938). "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U.S. CONST. art. I, § 1. "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. "The 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." U.S. CONST. art. III, § 1.

2. The Senate was given the power to confirm or reject the President's appointments and to approve or disapprove the ratification of his treaties. Congress, as a whole, was granted the right to make or withhold appropriations required to carry out executive policies. The President was entrusted with the power to veto nearly every kind of measure passed by the two houses. The courts, by implication, were allowed the right to pass upon the constitutionality, and therefore the enforceability, of acts of Congress, and also to review administrative acts of officers belonging to the executive branch. F.A. OGG & P.O. RAY, *supra* note 1, at 240.

3. U.S. CONST. art. II, § 3.

4. "[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ." United States v. Nixon, 418 U.S. 683, 693 (1974) (citations omitted) (dictum).

in Government Act of 1978 (Ethics Act),[5] which provides a procedure for the appointment of an independent counsel to examine allegations of criminal wrongdoing by designated high-level executive officials. The separation-of-powers concerns implicated by this provision were at issue in *Morrison v. Olson*.[6] In June 1988, a seven-to-one majority of the Supreme Court found the Act constitutional, holding that the Ethics Act did not sanction impermissible interference with executive functions.[7]

This Comment will examine the separation-of-powers concerns raised by the Ethics Act and the Court's attempt to resolve these concerns in *Morrison v. Olson*. Part I summarizes the provisions of the Ethics Act.[8] Part II sets forth the existing law regarding separation-of-powers challenges.[9] This Part acknowledges, as previous scholars have noted, two distinct standards the Supreme Court has applied, one rigid and formal, the other flexible and functional.[10] Part III describes the facts and holding of *Morrison v. Olson*.[11] Finally, Part IV focuses on *Morrison*'s contribution to resolving the competing approaches surrounding separation-of-powers questions.[12]

This Comment concludes that *Morrison* suggests that the Court will follow a flexible, functional approach to separation-of-powers questions when no branch of government is clearly encroaching upon the constitutionally assigned powers of another. This Comment further concludes that the *Morrison* holding suggests that the Court will reserve a rigid, formalistic approach for separation-of-powers questions involving one branch "aggrandizing"[13] itself with the constitutional functions of another branch.

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5. 28 U.S.C.A. §§ 49, 591-599 (West Supp. 1988).

6. 108 S. Ct. 2597 (1988).

7. *Id.* at 2620-21.

8. *See infra* notes 14-40 and accompanying text.

9. *See infra* notes 41-66 and accompanying text.

10. *See* Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U.L. REV. 491, 495-96 (1987); Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions - A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

11. *See infra* notes 67-117 and accompanying text.

12. *See infra* notes 118-135 and accompanying text.

13. The Court first used the term "aggrandize" in relation to separation-of-powers questions in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Burton, J., concurring). As used in this Comment, the term reflects the meaning most recently construed as one branch of government attempting to increase its powers at the expense of a coordinate branch. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986) (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976)).

I. The Ethics in Government Act of 1978

A. Recurring Confrontations Led to Congressional Action

Five of the last nine presidential administrations have encountered serious allegations of criminal wrongdoing by high-level officers of the executive branch.[14] When such allegations arise, a conflict of interest emerges within the executive branch between the Department of Justice and the official against whom the allegations are directed. The Attorney General, as head of the Justice Department, finds himself in the inherently conflicting roles of the nation's chief law enforcement officer and the accused administration's highest ranking legal advisor.[15]

The Watergate scandal most graphically illustrated the unique problems this conflict of interest presents.[16] In response to the investigative and prosecutorial problems encountered during Watergate, Congress enacted the Ethics in Government Act of 1978.[17] Congress enacted the

14. *See In re* Olson, 818 F.2d 34, 39-43 (D.C. Cir. 1987), *rev'd sub nom. In re* Sealed Case, 838 F.2d 476 (D.C. Cir. 1988), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988) (noting allegations of criminal activity in the administrations of Presidents Truman, Eisenhower, Nixon, Carter, and Reagan).

15. *See* Bruff, *Independent Counsel and the Constitution*, 24 WILLAMETTE L. REV. 539, 541-42 (1988).

16. The scandal began with the break in at the Democratic National Committee headquarters in the Watergate office complex on June 17, 1972. Five men were arrested and later determined to be agents of the Committee to Re-Elect the President. Shortly thereafter, newspaper reports circulated alleging that those arrested had been paid hush-money by executive branch officials. On April 30, 1973, President Nixon accepted the resignations of Chief of Staff H.R. Halderman, John Ehrlichman (White House assistant for domestic affairs), John W. Dean III (Presidential counsel), and Attorney General Richard G. Kleindiest. All four resigning officials were later convicted for their involvement in the Watergate cover-up. President Nixon himself resigned in 1974.

The conviction of the four resigning officials was obtained through the appointment of a special prosecutor, but not before what became known as the "Saturday Night Massacre." Shortly after the resignations, President Nixon announced his willingness to have Attorney General-Designate Eliot Richardson appoint a special prosecutor, if Richardson deemed it necessary to ensure an impartial investigation into Watergate. Richardson appointed Archibald Cox, who was sworn in on May 25, 1973. During the course of the investigation, Cox insisted that President Nixon relinquish tapes, notes, and memoranda of presidential conversations. As a result, Nixon ordered the Attorney General to remove Cox. Instead of complying with this presidential order, Richardson resigned. Subsequently, Deputy Attorney General William Ruckelshaus was ordered to remove Cox, refused, and was terminated. Acting Attorney General Robert Bork finally carried out Nixon's order. Special Prosecutor Cox was then replaced by Leon Jaworski, who ultimately obtained the convictions. *See generally* J.A. LUKAS, NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS, (1976); C. BERNSTEIN & B. WOODWARD, ALL THE PRESIDENT'S MEN (1974).

17. 28 U.S.C.A. §§ 49, 591-599 (West Supp. 1988); S. REP. NO. 170, 95th Cong., 1st Sess., 3 (1977). The Ethics Act was reauthorized in 1983 and amended to refer to the "special prosecutor" as "independent counsel." Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, § 2(b)(1), 96 Stat. 2039 (1983). The Ethics Act was again reauthorized in 1987. Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (1987).

Ethics Act "to preserve and promote the accountability and integrity of public officers and of the institutions of the Federal Government and to invigorate the Constitutional separation of powers between the three branches of Government."[18]

B. Summary of the Ethics Act

Title VI of the Ethics Act establishes procedures by which a special federal court appoints an independent counsel at the request of the Attorney General to investigate and, if necessary, prosecute certain high-level executive officials accused of misconduct.[19] The Ethics Act directs the Attorney General's office to conduct a preliminary investigation into a "sufficiently grounded" allegation of criminal wrongdoing by a high-level executive official.[20] During this preliminary investigation, the Attorney General's authority is limited and the office is without some of its normal investigatory tools and means of leverage such as grand juries, plea bargaining, grants of immunity, and subpoenas.[21]

If, after this preliminary investigation, the Attorney General finds that "no reasonable grounds" exist for further investigation, the matter ends and no judicial review is available.[22] Should the Attorney General find grounds for further investigation, he must then apply to a specially appointed division of the federal court, the Special Division, which will appoint an independent counsel to continue the investigation and, if necessary, prosecute the executive official in question.[23] The Attorney Gen-

18. S. REP. NO. 170, *supra* note 17, at 1.

19. *See infra* notes 20-28.

20. Executive officials subject to such an investigation include the President, the Vice President, the Cabinet, as well as principal officials in the Department of Justice, the Central Intelligence Agency, and the Presidential campaign committee. 28 U.S.C.A. § 591(b) (West Supp. 1988). The Ethics Act encompasses all violations of federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction. 28 U.S.C.A. § 591(c)(1).

The Attorney General must determine within 15 days whether sufficient grounds to investigate exist. 28 U.S.C.A. § 591(d)(2). 28 U.S.C.A. § 591(d) lists the specificity of the information and the credibility of the source of information as factors for the Attorney General to consider when determining whether sufficient grounds to investigate exist. No judicial review is available for the decision not to investigate. 28 U.S.C.A. § 592(f). If the Attorney General determines that the allegation constitutes sufficient grounds to investigate, he must conduct this preliminary investigation within 90 days. 28 U.S.C.A. § 592(a)(1).

21. 28 U.S.C.A. § 592(2).

22. 28 U.S.C.A. § 592(b)(1), (f). As a result of the 1987 amendment, effective December 15, 1987, the standard for the appointment of independent counsel is "reasonable grounds to believe further investigation *or prosecution* is warranted . . . ." *Id., as amended by* Independent Counsel Reauthorization Act of 1987, Pub. L. 100-191, 101 Stat. 1293 (1987) (emphasis added).

23. 28 U.S.C.A. § 592(c). The Special Division consists of three judges designated by the Chief Justice of the United States Supreme Court. One judge must be from the United States Court of Appeals for the District of Columbia and each will serve for a two-year term. 28 U.S.C.A. § 49.

eral's application to the special court must include sufficient information to assist the court both in selecting an independent counsel and in defining the independent counsel's prosecutorial jurisdiction.[24]

At this point, the Attorney General and the executive branch's direct power and influence over the matter in question effectively terminate. The Attorney General and Department of Justice must suspend all investigation into the matter once the independent counsel is appointed unless the independent counsel gives written approval for them to continue.[25] The Attorney General does retain, though, a restricted power to remove the independent counsel from office. This removal power is limited to a "good cause" showing similar to removal restrictions for heads of independent agencies.[26] Removal by the Attorney General must be accompanied by a report to Congress[27] and is subject to judicial review.[28]

Similarly, the appointment of an independent counsel ends the Special Division's influence over the independent counsel and the matter; however, the Special Division does retain the power to expand the independent counsel's jurisdiction (pursuant to a request by the Attorney

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24. 28 U.S.C.A. § 592(d), which states:

> Any application for the appointment of an independent counsel under this chapter shall contain sufficient information to assist the division of the court in selecting an independent counsel and in defining that independent counsel's prosecutorial jurisdiction so that the independent counsel has adequate authority to fully investigate and prosecute the subject matter and all matters related to that subject matter.

Id.

> In defining the independent counsel's prosecutorial jurisdiction, the division of the court shall assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter. Such jurisdiction shall also include the authority to investigate and prosecute Federal crimes, other than those classified as Class B or C misdemeanors or infractions, that may arise out of the investigation or prosecution of the matter with respect to which the Attorney General's request was made, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

28 U.S.C.A. § 593(b)(3).

This jurisdiction can be expanded by the Special Division only upon the request of the Attorney General. 28 U.S.C.A. § 593(c).

25. 28 U.S.C.A. § 597.

26. 28 U.S.C.A. § 596(a)(1) provides:

> An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties.

Id.

An essentially identical limitation on the executive's removal power was upheld in Humphrey's Executor v. United States, 295 U.S. 602 (1935). In *Humphrey's Executor*, removal of the Commissioner of the Federal Trade Commission was limited to "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 620. The Court found this restriction justified by a functional need for independence from executive-branch control. *Id.* at 629.

27. 28 U.S.C.A. § 596(a)(2).

28. 28 U.S.C.A. § 596(a)(3).

General) and to appoint a successor in the event of death, incapacity, or resignation.[29] Finally, the Special Division retains a narrow power to terminate the office of independent counsel should the counsel attempt to remain in office after his or her duties have ended.[30]

Once appointed, the independent counsel has broad authority and autonomy to function within the defined jurisdiction. The independent counsel acquires the "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice . . . ." [31] The Ethics Act expressly establishes the counsel's independence from the Department of Justice.[32] Furthermore, the independent counsel has control over hiring of additional personnel[33] and may also dismiss the action on his or her own initiative.[34]

Just as the independent counsel is insulated from the judiciary and the executive, so is the office removed from congressional influence. Although certain members of Congress may request that the Attorney General apply for the appointment of an independent counsel, the Attorney General has no duty to comply with such a request.[35] In the absence of circumstances warranting a congressional request, however, Congress's role is limited to oversight by the appropriate committees.[36]

This oversight consists of receiving such statements and reports on the activities as the independent counsel "considers appropriate."[37] Of course, Congress does have the power of impeachment, but that is an

29. 28 U.S.C.A. § 593(c), (e); *see supra* note 24 and accompanying text.

30. Pursuant to 28 U.S.C.A. § 596(b)(2), the Special Division may terminate the office of independent counsel whenever a majority believes the investigation no longer serves a useful purpose. The power is intended to be extremely narrow in scope. This section "provides for the unlikely situation where a special prosecutor may try to remain as a special prosecutor after his responsibilities . . . are completed." S. REP. No. 170, *supra* note 17, at 75.

31. 28 U.S.C.A. § 594(a).

32. 28 U.S.C.A. § 594(i).

33. The independent counsel may appoint, set compensation for, and assign duties for additional employees that the counsel considers necessary for the purpose of carrying out the duties of the office of independent counsel. 28 U.S.C.A. § 594(c).

34. The independent counsel may dismiss the action within his or her prosecutorial jurisdiction without conducting an investigation, or at any time before actual prosecution. This power is limited by the established policies of the Department of Justice. 28 U.S.C.A. § 594(g).

35. "The Committee on the Judiciary of either House of the Congress, or a majority of majority party members or a majority of all nonmajority party members of either such committee, may request in writing that the Attorney General apply for the appointment of an independent counsel." 28 U.S.C.A. § 592(g)(1). See *supra* note 22 and accompanying text for the Attorney General's lack of a duty to comply with any such request. In the instance of a congressional request, the Attorney General must submit a report setting forth the reasons for the decision. 28 U.S.C.A. § 592(g)(2).

36. 28 U.S.C.A. § 595.

37. 28 U.S.C.A. § 595(2).

independent constitutional grant applying to all officers of the United States.[38]

The politically packed "reasonable grounds" standard for the Attorney General's application for the appointment of an independent counsel clearly erodes some of the executive's prosecutorial power and discretion when dealing with allegations of criminal wrongdoing by one of its own officials. This standard is much lower than the probable cause standard for indictment. Arguably, with such a minimal threshold for application for appointment, political pressure may be such that the Attorney General loses the freedom to determine whether "reasonable grounds" for further investigation actually exist. In *Morrison v. Olson*, though, Attorney General Edwin Meese chose not to initiate action against two of the accused officials—even against recommendations by Justice Department officials.[39]

The judiciary is given power to select and define the prosecutorial jurisdiction of the independent counsel. Although the Ethics Act requires a nexus between the Attorney General's application and the actions of the Special Division, one can easily conceive a situation in which a contemptuous Special Division would disregard the application, opting for its own judgement in defining jurisdiction. Furthermore, the constitutional validity of Congress vesting such powers in a court of law may be in question.

Executive-branch power is further eroded by a "good cause" limitation on removal by the Attorney General. This restriction weakens the executive's control as compared to that in other prosecutorial procedures. Other federal prosecutors, such as the United States Attorneys, are appointed by the President and subject to termination at will.[40]

II. Existing Judicial Standards for Separation-of-Powers Cases

As scholars previously have noted, the Supreme Court has applied two competing approaches in it decisions regarding separation of powers.[41] The first is a rigid, formalistic approach advocating three independent branches of government each with distinct and separate

38. U.S. CONST. art. I, § 3.

39. The professional prosecutors of the Justice Department's Public Integrity Section of the Criminal Division, who had conducted the preliminary investigation, had concluded that the appointment of an independent counsel was warranted to investigate the conduct of Assistant Attorney General Theodore B. Olson and Deputy Attorney General Edward C. Schmults, but not for Assistant Attorney General Carol E. Dinkins. Brief for Appellee, *In re* Sealed Case, 838 F.2d 476 (D.C. Cir. 1988) (Nos. 87-5261, 87-5264, 87-5265), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988), *reprinted in* 16 HOFSTRA L. REV. 65, 67-68 (1987).

40. Morrison v. Olson, 108 S. Ct. 2597, 2621 n.34.

41. *See* Bruff, *supra* note 10, at 495-96; Strauss, *supra* note 10.

functions.[42] This approach allows no flexibility when one branch attempts to invade the constitutionally appointed role of another branch.

The second is a flexible, functional approach in which the Court assesses the needs of each branch to protect its core constitutionally appointed functions.[43] The Court then applies a balancing approach, weighing the necessity for the questioned action against the amount of likely interference with the branch's functions as prescribed by the Constitution.

The Court most recently applied the rigid, formalistic approach in *Bowsher v. Synar*[44] and *INS v. Chadha*.[45] In *Bowsher*, the Court examined the constitutionality of the Balanced Budget and Emergency Deficit Control Act (Balanced Budget Act)[46], popularly known as the "Gramm-Rudman-Hollings Act." A provision of the Balanced Budget Act gave the Comptroller General "executive" powers of final authority in targeting federal allocation programs for budget cuts.[47] Because Congress had retained the sole authority to remove the Comptroller General, the Court reasoned that Congress was directly participating in executing the laws by interfering with the budget duties of the executive.[48] The Court found that this direct control violated the principle of separation

42. *See* Bowsher v. Synar, 478 U.S. 714, 721-27 (1986) (invalidating congressional attempt to directly control the execution of law by vesting budgetary functions in office under its control); INS v. Chadha, 462 U.S. 919, 951-59 (1983) (congressional veto held to violate legislative process prescribed by Constitution); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-89 (1952) (finding presidential order for seizure of steel company exceeded presidential authority, even under extraordinary circumstances); Myers v. United States 272 U.S. 52, 161 (1926) (holding Congress should not have implied powers to participate in functions constitutionally assigned to the executive).

43. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 847-58 (1986) (holding CFTC assumption of jurisdiction over common-law counterclaims does not violate Article III of the Constitution); Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 582-93 (1985) (upholding congressional imposition of binding arbitration for participants in pesticide-registration scheme); Nixon v. Fitzgerald, 457 U.S. 731, 748-54 (1982) (finding absolute presidential immunity from private damage claims stemming from official acts); Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 441-45 (1977) (holding valid congressional power to regulate disposition of presidential material); United States v. Nixon, 418 U.S. 683, 703-07 (1974) (rejecting absolute executive privilege for production of Presidential communications); Humphrey's Executor v. United States, 295 U.S. 602, 628-29 (1935) (upholding congressional authority to limit the executive's power of removal over members of independent commission).

44. 478 U.S. 714 (1986).

45. 462 U.S. 919 (1983).

46. 2 U.S.C.A. §§ 901-909, 921-922 (West Supp. 1988).

47. *Bowsher*, 478 U.S. at 732-34.

48. The Court equated the removability of an officer to the control of that officer for constitutional purposes, stating:

> By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.

Id. at 734.

of powers, and thus was unconstitutional.[49] The *Bowsher* Court had no tolerance for the blending of legislative and executive power.

The Court used this same formalistic reasoning earlier in *INS v. Chadha*.[50] In *Chadha*, the Court found that the legislative veto authorized under the Immigration and Nationality Act (Immigration Act)[51] violated the doctrine of separation of powers.[52] Congress, through the passage of the Immigration Act, had delegated the power to suspend specific deportations to the executive branch's Immigration and Naturalization Service, subject, however, to legislative veto by resolution of either house of Congress.[53] The Court rejected the argument that the legislative veto was a useful "political invention," clinging to a formal construction of the constitutional functions of Congress and the executive in the legislative process.[54] The Court reasoned:

> The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibilities. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.[55]

By contrast, the Court also has applied a flexible, functional approach to separation-of-powers questions.[56] In *Nixon v. Administrator of General Services*,[57] the Court addressed a legislative-executive power struggle. The Presidential Recordings and Materials Preservation Act[58] directed the Administrator of General Services to take custody of former President Nixon's presidential materials and have government archivists screen them in order to return to Nixon those materials that were personal and private in nature and to preserve those having historical value.[59] The Court summarized the functional approach by stating:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States v. Nixon*, 418 U.S., at 711-712. Only where the potential for disruption is present must we then determine whether that impact is justified by

49. *Id.* at 721-36.
50. 462 U.S. 919 (1983).
51. 8 U.S.C. § 1254(c)(2) (1982).
52. *Chadha*, 462 U.S. at 959.
53. 8 U.S.C. § 1254(c)(2).
54. *Chadha*, 462 U.S. at 945.
55. *Id.* at 951.
56. *See supra* note 43.
57. 433 U.S. 425 (1977).
58. 44 U.S.C. § 2107 (1982).
59. Nixon v. Administrator of Gen. Servs., 433 U.S. at 429.

> an overriding need to promote objectives within the constitutional authority of Congress.[60]

In applying this standard, the Court recognized that no absolute independence can exist between separate branches of government. The Court held that because the Administrator of General Services, an executive official, screened the documents, the Act was not unduly disruptive of executive-branch functions.[61]

On the same day that the Court delivered the formalistic *Bowsher* opinion, it applied a functional approach to uphold the Commodity Exchange Act (Exchange Act)[62] in *Commodity Futures Trading Commission v. Schor*.[63] The Exchange Act, which empowered an administrative agency to hear common-law counterclaims, did not violate the principle of separation of powers because the encroachment upon constitutionally appointed judicial functions was "de minimis" and was outweighed by the need for agency counterclaim jurisdiction.[64] The Court noted that the agency shared, rather than displaced, federal district court jurisdiction and that the Exchange Act granted jurisdiction only to a very narrow class of controversies.[65] In *Schor*, the Court allowed a blending of the constitutionally appointed functions allocated to the different branches, again recognizing that the separation-of-powers inquiry must be guided by " 'practical attention to substance rather than doctrinaire reliance on formal categories . . . .' "[66]

III. *Morrison v. Olson*

A. Facts of the Case

Morrison v. Olson[67] arose from a confrontation between the legislature and the executive over documents the executive attempted to withhold from House subcommittees investigating the Environmental Protection Agency's (EPA) Superfund hazardous waste cleanup program.[68] In 1982, President Reagan, acting on advice of the Justice Department, claimed executive privilege to prevent the production of the EPA documents, reasoning that their release could imperil ongoing EPA enforcement actions.[69] This privilege claim was later abandoned when the withheld documents were found to contain evidence of political ma-

60. *Id.* at 443.
61. *Id.* at 441-45.
62. 7 U.S.C. §§ 1-26 (1982).
63. 478 U.S. 833, 847-58 (1986).
64. *Id.* at 851-57.
65. *Id.* at 852-53.
66. *Id.* at 848 (quoting Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 587 (1985)).
67. 108 S. Ct. 2597 (1988).
68. *Id.* at 2605.
69. Brief for Appellee, *supra* note 39.

nipulation of the Superfund program.[70]

The House Committee on the Judiciary began an investigation into the Justice Department's role in the controversy over these EPA documents.[71] As part of this investigation, Assistant Attorney General Theodore B. Olson testified before a House subcommittee on March 10, 1983. In 1985, the House Judiciary Committee published a report[72] on the role of the Justice Department in the EPA documents controversy, suggesting that Olson testified untruthfully before the subcommittee and that Deputy Attorney General Edward C. Schmults and Assistant Attorney General Carol E. Dinkins had obstructed the Committee's inquiry.[73]

The House forwarded its report to the Attorney General with a formal request, pursuant to the Ethics Act,[74] that the Attorney General seek the appointment of independent counsel.[75] The Attorney General, after the preliminary investigation was completed, found that appointment of independent counsel was warranted for Olson, but not for either Schmults or Dinkins. [76] As a result, the Special Division appointed as independent counsel James C. McKay, who later resigned and was replaced by Alexia Morrison.[77]

The independent counsel's original jurisdiction was interpreted to include inquiry into whether Olson may have conspired with others, including Schmults and Dinkins, to obstruct the Committee's investigation.[78] Independent Counsel Morrison then caused the grand jury to subpoena Olson, Schmults, and Dinkins.[79] Each moved to quash the subpoenas, "claiming, among other things, that the independent counsel provisions of the [Ethics] Act were unconstitutional and [therefore] that [the independent counsel] had no authority to proceed."[80]

In upholding the constitutionality of the Ethics Act, the district court denied the motions and held Olson, Schmults, and Dinkins in contempt for continuing to refuse to comply with the subpoenas.[81] The court of appeals reversed in a split decision, finding that the Act violated the Constitution's Appointments Clause and principles of separation of

70. *Id.*

71. *Morrison*, 108 S. Ct. at 2605.

72. H.R. REP. No. 435, 99th Cong., 1st Sess. (1985).

73. *Morrison*, 108 S. Ct. at 2606.

74. 28 U.S.C.A. § 592(g) (West Supp. 1988).

75. *Morrison*, 108 S. Ct. at 2606.

76. *Id.*

77. *Id.*

78. *In re* Olson, 818 F.2d 34, 47-48 (D.C. Cir. 1987), *rev'd sub nom. In re* Sealed Case, 838 F.2d 476 (D.C. Cir. 1988), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988).

79. *Morrison*, 108 S. Ct. at 2607.

80. *Id.*

81. *In re* Sealed Case, 665 F. Supp. 56 (D.D.C. 1987), *rev'd*, 838 F.2d 476 (D.C. Cir. 1988), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988).

powers.[82] The United States Supreme Court noted probable jurisdiction for appeal in February of 1988.[83]

B. Holding and Reasoning of the Supreme Court

1. Majority Opinion

A majority of seven justices found the Ethics Act constitutional in the face of three separate challenges.[84] First, the Court found that the Ethics Act did not violate the Appointments Clause of the Constitution.[85] Second, the Court held that the Ethics Act did not violate Article III of the Constitution, under which executive or administrative duties of a nonjudicial nature may not be imposed on Article III judges.[86] Finally, the Court reasoned that the Ethics Act did not violate separation-of-powers principles by impermissibly interfering with the constitutionally appointed functions of the executive branch.[87]

a. Appointments Clause Challenge

The Constitution's Appointments Clause provides for Presidential nomination and Senate confirmation of "principal" officers of the United States.[88] Olson had claimed that the appointment of the independent counsel should conform to this mandate because the powers granted to the independent counsel make the office subordinate to no one, and therefore not "inferior."[89] In holding the Ethics Act consistent with the Appointments Clause, the Court reasoned that the independent counsel was an "inferior" officer of the United States and as such did not need to be appointed by the President with the consent of the Senate.[90] The Court found that although the independent counsel is not necessarily subordinate to the Attorney General, the office is ultimately subject to

82. *In re* Sealed Case, 838 F.2d 476 (D.C. Cir. 1988), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988). U.S. CONST. art. II, § 2, cl. 2 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.

83. Morrison v. Olson, 108 S. Ct. 1010 (1988), *prob. juris. noted.*

84. Justices Brennan, White, Marshall, Blackmun, Stevens, and O'Connor joined Chief Justice Rehnquist's opinion. Justice Scalia filed a dissenting opinion. Justice Kennedy did not participate in the decision. *Morrison*, 108 S. Ct. at 2602.

85. *Id.* at 2609-11.

86. *Id.* at 2615.

87. *Id.* at 2620-22.

88. *See supra* note 82.

89. Brief on Behalf of Amicus Curiae United States, *In re* Sealed Case, 838 F.2d 476 (D.C. Cir. 1988) (Nos. 87-5261, 87-5264, 87-5265), *rev'd sub nom.* Morrison v. Olson, 108 S. Ct. 2597 (1988), *reprinted in* 16 HOFSTRA L. REV. 97, 102-03 (1987).

90. *Morrison*, 108 S. Ct. at 2608.

removal by the Attorney General and therefore should be considered inferior.[91]

The Court also considered other factors, first introduced in *United States v. Germaine*,[92] in finding the independent counsel an inferior officer.[93] These factors included the independent counsel's limited duties, the office's limited jurisdiction, and its limited tenure.[94] Of determinative consideration was that the independent counsel had no "authority to formulate policy for the Government or the Executive Branch."[95] The Court used a plain reading of the Appointments Clause in authorizing interbranch appointments according to which officers of one branch appoint an officer of another.[96]

b. Article III Challenge

Article III, in an effort to "ensure the independence of the Judicial Branch and to prevent the judiciary from encroaching into areas reserved for the other branches," expressly limits judicial power to "Cases and Controversies."[97] The Court in *Morrison* acknowledged the general rule that " 'executive or administrative duties of a nonjudicial nature may not be imposed upon judges holding office under Art[icle] III of the Constitution,' "[98] but stressed that the Appointments Clause is a source of authority for judicial appointment independent from Article III.[99] In addition, the Court found that neither the miscellaneous powers granted to the Special Division under the Ethics Act, nor its restricted power to terminate the independent counsel, constituted an impermissible judicial intrusion upon the authority of the executive branch.[100]

c. Separation of Powers

Finally, the Court found that the Ethics Act did not violate the principle of separation of powers because the Act did not allow either Con-

91. *Id.*

92. 99 U.S. 508 (1878).

93. *Morrison*, 108 S. Ct. at 2608-09.

94. *Id.*

95. *Id.*

96. *Id.* at 2609-11.

97. *Id.* at 2611-12.

98. *Id.* at 2612 (quoting Buckley v. Valeo, 424 U.S. 1, 123 (1976) (citing United States v. Ferreira, 54 U.S. (13 How.) 40 (1852); Hayburn's Case 2 U.S. (2 Dall.) 409 (1792))).

99. [A]ccept[ing] that the Appointments Clause gives Congress the power to vest the appointment of officials such as the independent counsel in the "courts of Law," there can be no Article III objection to the Special Division's exercise of that power, as the power itself derives from the Appointments Clause, a source of authority for judicial action that is independent of Article III.

Morrison, 108 S. Ct. at 2612.

100. *Id.*

gress or the judiciary to significantly usurp executive functions.[101] The Court distinguished *Morrison* from *Myers v. United States*[102] and *Bowsher v. Synar*,[103] both of which involved attempts by Congress to "aggrandize" itself with the constitutionally assigned functions of the executive.[104] The Court found that the Act gave Congress no control or supervision over the independent counsel; the only involvement Congress has in the process is the power of some of its members to request that the Attorney General apply for an independent counsel and to receive reports when the independent counsel decides the reports are appropriate.[105]

Likewise, the Court held that the judicial branch had not adopted extensive executive functions.[106] The Special Division has no power to order a sua sponte appointment of independent counsel; it must await a request from the Attorney General.[107] When an independent counsel appointment is requested, the grant of jurisdiction is determined by the Attorney General's application.[108] The judiciary is not empowered to examine the Attorney General's decision not to apply for an independent counsel.[109] Again, the Court found the judiciary, like Congress, had no direct control or supervision over the independent counsel once appointed.

The Court noted that the "good cause" limitation on removal by the Attorney General has eroded some executive control over investigation and prosecution, but held that the necessity for independence from the executive required that removability be limited and that the judiciary select and appoint the independent counsel.[110] This limitation and the other provisions of the Ethics Act were found not to be so restrictive as to keep the executive branch from accomplishing its constitutionally assigned functions of "tak[ing] Care that the Laws be faithfully executed."[111] The Court reexpressed the view that the Constitution " 'enjoins upon its branches separateness but interdependence, autonomy but reciprocity.' "[112] In sum, the Court found that the Ethics Act, taken as a whole, did not disrupt the Constitution's proper balance of power among the three branches of government.

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101. *Id.* at 2620-21.
102. 272 U.S. 52 (1926).
103. 478 U.S. 714 (1986).
104. *Morrison*, 108 S. Ct. at 2617-20, 2618 nn.26, 28.
105. *Id.* at 2620.
106. *Id.* at 2621.
107. 28 U.S.C.A. § 593 (West Supp. 1988); *see also supra* note 23 and accompanying text.
108. *See supra* note 24.
109. 28 U.S.C.A. § 592(b) (West Supp. 1988).
110. *Morrison*, 108 S. Ct. at 2619-20.
111. U.S. CONST. art II, § 3; *Morrison*, 108 S. Ct. at 2621.
112. *Morrison*, 108 S. Ct. at 2620 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

2. Dissenting Opinion

Justice Scalia summarized his strong but lone dissent in a nine-minute oration at the time the Court issued the decision.[113] According to Scalia, the Ethics Act violated the principle of separation of powers because Article II, Section 1, Clause 1 of the Constitution requires that all purely executive power be under the complete control of that branch.[114] He stated that the constitutional grant of executive power "does not mean *some* of the executive power, but *all* of the executive power. . . . Governmental investigation and prosecution of crimes is a quintessentially executive function."[115] Therefore, Scalia reasoned, the good cause limitation on removal power strips the executive of prosecutorial discretion and intolerably weakens the executive.[116] To ensure the faithful execution of law, Justice Scalia would seem to require a unitary executive with plenary power and control over all investigation and prosecution.[117]

IV. The Court's Choice of Analysis

In the past, the Court has provided little guidance to direct which approach to use in deciding separation-of-powers controversies. When deciding legislative-executive confrontations, the Court has used both approaches almost interchangeably.[118] Arguably, the Court makes an ad hoc decision about how it will rule and then later chooses the theory or approach most appropriate for that result. Notably, each time the Court has applied the rigid, formalistic approach, it has invalidated the legislation,[119] and each time the Court has used a flexible, functional approach, it has upheld the legislation.[120]

A. The Dissent's Formalistic Approach

Justice Scalia, in his *Morrison* dissent, applied the rigid, formalistic approach exemplified by *Bowsher* and *Chadha*. He argued for an independent, unitary executive, interpreting the constitutional grants of

113. Justice Scalia, in his rare oral summation of his dissent, called the *Morrison* decision "one of the most important opinions the Court has issued in many years." N.Y. Times, July 3, 1988, at 1, col. 2.

114. *Morrison*, 108 S. Ct. at 2626-28 (Scalia, J., dissenting).

115. *Id.* at 2626-27 (emphasis in original).

116. *Id.* at 2628.

117. *Id.* at 2628-29.

118. In Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); and Myers v. United States, 272 U.S. 52 (1926), the Court applied the formalistic test. In Nixon v. Fitzgerald, 457 U.S. 731 (1982); Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977); United States v. Nixon, 418 U.S. 683 (1974); and Humphrey's Executor v. United States, 295 U.S. 602 (1935), the Court opted for a functional approach to separation-of-powers concerns.

119. *See supra* note 42.

120. *See supra* note 43.

power to the executive as complete and absolute.[121] Any sharing of constitutionally appointed power would appear to be intolerable under this view.

Scalia's inflexible position is understandable (or at least predictable) in the light of his earlier opinions involving constitutional construction. Before appointment to the Supreme Court, Scalia had questioned the constitutionality of independent regulatory agencies, the so-called fourth branch of government with no express constitutional authority to legislate.[122] In addition, as a Supreme Court Justice in *Young v. United States*,[123] Scalia applied a strict construction of the Constitution to interpret the district court's article III judicial power. Scalia found that the district court had exceeded its constitutional power by appointing the interested party's counsel as special counsel to prosecute the contempt of an injunction issued earlier by the court.[124] In Scalia's view, judicial power includes "the power to serve as a neutral adjudicator . . . but does not include the power to seek out law violators in order to punish them . . . ."[125]

Justice O'Connor recently discussed appropriate application of the formalistic approach, as advocated by Scalia and used by the Court in *Bowsher*, in the majority opinion for *Schor*, and apparently limited it to controversies involving Congress "aggrandizing" itself with the constitutional powers of another branch.[126] The majority opinion in *Morrison* repeated this qualification. Chief Justice Rehnquist stated, "Unlike both *Bowsher* and *Myers*, this case does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction. The Act instead puts the removal power squarely in the hands of the Executive Branch . . . ."[127] Accordingly, after *Morrison*, a clear majority of the Supreme Court seems to accept the notion of limiting the formalistic approach to aggrandizement problems.[128]

Such a limitation also finds historical backing. "The framers knew that '[t]he accumulation of all powers, Legislative, Executive, and Judiciary, in the same hands, whether of one, a few, or many, and whether

121. *Morrison*, 108 S. Ct. at 2626 (Scalia, J., dissenting).

122. Lazarus & Larson, *The Constitutionality of the Independent Counsel Statute*, 25 AM. CRIM. L. REV. 187, 192 n.22 (1987). Scalia, in dicta, questioned the constitutionality of the concept of regulatory agencies in Synar v. United States, 626 F. Supp. 1374, 1399-1400 nn.28-29 (D.D.C. 1986), *aff'd sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986). For a discussion of *Bowsher*, see *supra* notes 44, 46-49 and accompanying text.

123. Young v. United States *ex rel.* Vuitton Et Fils S.A., 107 S. Ct. 2124 (1987) (Scalia, J., concurring in judgment).

124. *Id.* at 2141-42.

125. *Id.*

126. Commodities Futures Trading Comm'n v. Schor, 478 U.S. 833, 856-57 (1986).

127. *Morrison*, 108 S. Ct. at 2616.

128. *See* Strauss, *supra* note 10.

hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.' "[129] But, this very limiting to instances of "aggrandizement" creates its own dilemma. Aggrandizement is a completely subjective standard. As one scholar has noted, "Aggrandizement lies in the eyes of the beholder."[130] Thus, the danger still exists that the court may decide a case at first glance and develop a rationale of aggrandizement later.

The full implications of the danger of limiting the formalistic approach to aggrandizement cases remains untested. The *Morrison* decision sheds little light on the dangers inherent in such a subjective standard because no clear argument for aggrandizement existed in *Morrison*. Even Scalia, in his formalistic approach, did not argue that Congress or the judiciary was aggrandizing itself with executive functions. Instead, he focused on complete separation of the three branches of government. Although the independent counsel may be considered aggrandizing itself with the executive functions of investigation and prosecution, neither Congress nor the judiciary had sufficient control over the office to raise the concerns found in *Bowsher*. In fact, Scalia never cited *Bowsher* in his dissent.

B. Functional Approach

The Court in *Morrison* clearly applied a functional, balancing approach in finding that the Ethics Act did not unduly interfere with the executive branch's ability to execute its constitutionally assigned functions.[131] The Court's decision in *Morrison* should not be interpreted, however, as a broad grant of discretion to Congress to encroach upon the functions of other branches by the creation of independent entities. Apparently, the need must be significant and the intrusion minor for the Court to uphold any such enactment. Instead, the *Morrison* decision is best viewed as a limited, narrow application of separation-of-powers principles to a specific, yet recurring problem of conflicting interests in the executive branch.

The focus of the Court's analysis in *Morrison* was upon the small magnitude of the independent counsel's intrusion upon the executive branch functions of investigation and prosecution. The significant need for independence and impartiality in examining allegations of criminal wrongdoing by high-level executive-branch officials validated this intrusion. Again, notably, neither Congress nor the judiciary had significant control or influence over the independent counsel, and the executive re-

129. *Schor*, 478 U.S. at 859-60 (Brennan, J., dissenting) (quoting THE FEDERALIST NO. 46, at 334 (J. Madison) (H. Dawson ed. 1876)).

130. Bruff, *supra* note 15, at 547.

131. *Morrison*, 108 S. Ct. at 2616-21.

tained control over removal.[132]

Even after *Morrison*, no clear guidelines for separation-of-powers concerns exist. Perhaps none should exist. As Justice O'Connor stated in the *Schor* majority, "Although such [clear] rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers."[133]

What *Morrison* does provide, though, is strong support for a functional approach to separation-of-powers questions when no aggrandizement exists. A majority of seven justices, each of whom (excepting Justice White) had joined at least one of the Court's recent formalistic opinions, applied a functional approach to the legislative-executive confrontation in *Morrison*.[134]

Given the persistence of the "aggrandizement" problem, however, similar questions of separation of powers must be approached on a case-by-case basis.[135] Each case's unique factors should be independently examined and balanced against competing interests. Only when one branch is obviously aggrandizing another branch's power will the result be remotely predictable.

Conclusion

The Ethics in Government Act of 1978 was a legislative answer to a recurring executive problem, the conflict of interest arising when the executive must investigate and prosecute one of its own high-level officials. The Ethics Act's provision for the judicial appointment of an independent counsel to examine the matter addressed this conflict. The appointed counsel is truly an "independent" counsel, isolated from direct influence by either the executive, the judiciary, or the legislature.

The Supreme Court's upholding of the Ethics Act in *Morrison v. Olson* sheds light on the morass of law encompassing the Constitution's doctrine of separation of powers. The majority applied a flexible, functional analysis in holding the Ethics Act constitutional. Although the Court found that the appointment of an independent counsel did encroach somewhat upon the constitutionally assigned executive functions of investigation and prosecution, the need for independence and impartiality outweighed this intrusion. The majority's adoption of a flexible, balancing approach signals a renewed commitment to this analysis, espe-

132. *See supra* notes 29-30, 36-37 and accompanying text.

133. *Schor*, 478 U.S. at 851.

134. The *Bowsher* majority included current Justices Brennan and Rehnquist, with Stevens and Marshall concurring. 478 U.S. at 716. In *Chadha*, current Justices Marshall, Stevens, O'Connor, Brennan, and Blackmun joined in the majority. 462 U.S. at 922.

135. *Schor*, 478 U.S. at 851.

cially in instances in which no branch of government is directly participating in the constitutionally allocated powers of another branch.

Morrison continued to distinguish the rigid, formalistic approach adopted in earlier Court decisions regarding separation of powers. After *Morrison*, this approach seems to be reserved for instances in which one branch attempts to aggrandize itself with another branch's power. Unfortunately, limiting this approach to aggrandizement merely begs the question of "aggrandizement" that *Morrison* left unaddressed. The Court's holding in *Morrison* does suggest, however, solid support for a functional approach to separation of powers when no aggrandizement exists.

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