On the Constitutionality of the Independent Counsel Provisions of the Ethics in Government Act: Do They Comport with the Separation of Powers?

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On the Constitutionality of the Independent Counsel Provisions of the Ethics in Government Act: Do They Comport with the Separation of Powers?

The independent counsel provisions of the Ethics in Government Act have come under attack by the Reagan administration and by persons who have been investigated or prosecuted by independent counsels. It is possible that these important provisions, intended to prevent conflicts of interest by the Justice Department in investigating high government officials, will be declared unconstitutional by the United States Supreme Court.


2. Prior to the passage of the Reauthorization Act, supra note 1, the Reagan administration took the position that the independent counsel provisions of the Ethics in Government Act should not be reenacted. Werner, Justice Dept. Says Prosecutor Law Should be Vetoed, N.Y. Times, June 17, 1987, § 1 at 1, col. 4. The administration has also filed a brief in a court case taking the position that the Act is unconstitutional. Shenon, U.S. Challenges Special Counsel Law, N.Y. Times, Sept. 1, 1987 § 1 at 10, col. 4. See also In Re Olson, 818 F.2d 34 (D.C. Cir. 1987).


5. The United States Court of Appeals for the District of Columbia recently declared the independent counsel provisions unconstitutional. See supra note 3.
The need for the independent counsel is evident. The events of the Watergate scandal made it apparent to Congress that the Justice Department cannot be expected to impartially investigate high government officials. Congress concluded that it was necessary to create a means by which an impartial, independent officer could investigate where politics might hamper the Justice Department. Recent events have shown the wisdom of that conclusion. The Iran-Contra affair and the Deaver and Nofziger affairs, because of their political implications, could not have been effectively investigated by persons under the President's control. What is even more apparent is that the Justice Department could have never effectively investigated Attorney General Edwin Meese or its own former officials.

This comment will discuss the constitutionality of the independent counsel provision, a matter on which the United States Court of Appeals for the District of Columbia Circuit has recently ruled. This comment will also analyze the Act itself, the arguments for and against its constitutionality and the impact of recent United States Supreme Court cases. In addition, this piece will discuss the courts' handling of the Act to date.

Given the recent strict interpretations of the separation of powers doctrine, it is by no means obvious that the independent counsel provision will survive a constitutional challenge in the United States Supreme Court. It is hoped that this comment will show why the

7. Members of the President's National Security Council, including Lieutenant Colonel Oliver North, have been accused of illegally selling arms to Iran and diverting the proceeds to the Contras, a group attempting to overthrow the Nicaraguan government. Some of the proceeds of the arms sale are unaccounted for. This affair and attempts to cover it up were the subject of Senate hearings. See generally N.Y. Times, July 8-Aug. 1, 1987.
8. Michael Deaver, a close friend of President Reagan, was recently convicted of perjury for lying to Congress about influence-peddling activities. Franklin, Deaver Found Guilty of Lying 3 Times Under Oath, N.Y. Times, Dec. 17, 1987, §1 at 1, col. 2. Lyn Nofziger, a former presidential aide, was found guilty of impermissibly lobbying the White House on behalf of various organizations. Johnston, Nofziger Is Convicted on 3 Counts of Violating Federal Ethics Law, N.Y. Times, Feb. 12, 1988, §1 at 1, col. 2.
9. Attorney General Edwin Meese has been investigated by independent counsels on several occasions. Gerth, Prosecutor Studying Actions of Meese While in the Cabinet, N.Y. Times, Oct. 16, 1987, §1 at 1, col. 1; Legal Life Jacket for Mr. Meese, N.Y. Times, May 13, 1987, §1 at 26, col. 1.
11. 1988 Sealed Case, supra note 3. The court held that the independent counsel provisions of the Ethics in Government Act were unconstitutional.
independent counsel provisions of the Ethics in Government Act comport with the appointments clause of the Constitution and with the separation of powers doctrine of *Bowsher v. Synar* and *INS v. Chadha*.

I. DISCUSSION OF THE ACT'S PROVISIONS

The independent counsel provisions, originally enacted as the special prosecutor provisions in 1978, were part of the congressional response to the Watergate scandal. There had been scandals prior to the Nixon administration, some of which were not well investigated. However, only during the Nixon administration were there significant amendments to the special prosecutor provisions of the Ethics in Government Act. The Watergate scandal was the most serious of these, involving illegal leases of naval oil reserves. The investigation of this scandal resulted in the imprisonment of the Secretary of the Interior and the indictment of the Attorney General. It may have resulted in the impeachment of President Harding had he not died in office.

The Truman administration scandal involved corrupt handling of tax evasion cases, resulting in the firings or forced resignations of over 150 IRS agents, plus the forced resignations of the Assistant Attorney General of the Tax Division and an Assistant Commissioner of Internal Revenue. The investigator appointed to look into this corruption was fired by the Attorney General because of the rigor with which the investigation was pursued. President Truman was then fired by the Justice Department and the investigation was pursued. The Attorney General was then fired by the President's control.

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The most serious of these were the Teapot Dome scandal during the Harding administration and a scandal involving the Internal Revenue Service (IRS) during the Truman administration. The Teapot Dome scandal, which involved illegal leases of naval oil reserves, resulted in the imprisonment of the Secretary of the Interior and the indictment of the Attorney General. It may have resulted in the impeachment of President Harding had he not died in office. *Brooklyn Note, supra* note 16, at 116.

The Truman administration scandal, which involved corrupt handling of tax evasion cases, resulted in the firings or forced resignations of over 150 IRS agents, plus the forced resignations of the Assistant Attorney General of the Tax Division and an Assistant Commissioner of Internal Revenue. The investigator appointed to look into this corruption was fired by the Attorney General because of the rigor with which the investigation was pursued. The Attorney General was then fired by President Truman. 818 F.2d at 40-41.

Despite these scandals, the power to investigate and prosecute remained in the Justice Department and under the President's control.
conflicts of interest in the Justice Department and actions by the President to impede investigations which prompted Congress to act on the need for a prosecutor independent of the President. It was apparent to Congress that an impartial investigator, not controlled by the President, was needed to revive the public's confidence in the government. After considering various measures over a period of five years, Congress settled on the special prosecutor provisions (later renamed independent counsel provisions) of the Ethics in Government Act of 1978.

The Ethics in Government Act provides for the appointment of an independent counsel by a special division of the United States Court of Appeals for the District of Columbia Circuit. If the United States Attorney General (Attorney General) receives information re-

18. The Watergate scandal was a sorry affair which began in 1972 with the burglary of the Democratic National Committee headquarters by agents of Nixon's reelection campaign. It ended with the convictions of high officials of the Nixon administration and the resignation of the President in 1974. See Brooklyn Note, supra note 16, at 116. Two situations in particular made apparent the need for a special prosecutor who is independent of the President. The first of these was the firing of Special Prosecutor Archibald Cox. Because he did not wish to turn over his own tapes and notes, President Nixon ordered the removal of Mr. Cox. Rather than remove the Watergate investigator, Attorney General Elliot Richardson resigned. Deputy Attorney General Ruckelshaus was dismissed for his refusal to remove Mr. Cox. Finally, Acting Attorney General Robert Bork removed Mr. Cox. This series of events, known as the "Saturday Night Massacre," had a direct connection to the eventual enactment of the special prosecutor provisions. Brooklyn Note, supra note 16, at 117-118. See also S. Rep. No. 170, 95th Cong., 2d Sess. 2-3, reprinted in, 1978 U.S. Code Cong. & Ad. News 4216, 4218-19; In re Olson, 818 F.2d at 41-42. The second, and possibly more serious situation was the pervasive corruption of the Justice Department during the Nixon administration. It has been shown that the Justice Department staff conveyed information concerning the ongoing Watergate investigation to President Nixon and presidential counsel John Dean. In addition, there were FBI wiretaps of journalists and government officials not supporting the President; possible settlement of antitrust cases by the Justice Department in return for campaign contributions; and other misuses of information and investigative powers. See Simon, The Constitutionality of the Special Prosecutor Law, 16 U. Mich. J.L. Ref. 45, 48-50 (1982) [hereinafter Simon]. Perhaps it was the pervasiveness of conflicts of interest in the Nixon administration Justice Department which caused Congress to conclude that a prosecutor who was independent of the President was needed.


20. On the extensive history of the special prosecutor provision (later independent counsel provisions), see Kramer & Smith, supra note 16, at 964-66; Brooklyn Note, supra note 16, at 118 n.27 and 126 n.62.

21. See supra note 1.

garding a federal criminal violation by someone covered by the Act, and the information is sufficiently specific and credible, the Attorney General must conduct a preliminary investigation. If the Attorney General determines that further investigation is warranted, or does not find it unwarranted within ninety days of the start of the preliminary investigation, he or she can then apply to the special division of the court for the appointment of an independent counsel. The Attorney General’s decision to apply for such appointment, or not to apply, is nonreviewable.

23. 28 U.S.C. § 591. Those covered by the Act are the President and Vice President; high officials of the Executive Office of the President and the Justice Department; the Director and Deputy Director of Central Intelligence; the Commissioner of Internal Revenue; high officials in the President’s campaign organization; and certain other high officials. Id.

This list of covered officials is smaller than in the list in the original 1978 Ethics in Government Act. Although the 1982 Amendments narrowed the scope of the Act’s mandatory coverage, a “catch-all” provision was added to the Act which can result in coverage of other persons whose investigation by the Justice Department could lead to a conflict of interest. Use of an independent counsel in such cases is at the discretion of the Attorney General. S. Rep. No. 498, 97th Cong., 2d Sess. 6-11, reprinted in, 1982 U.S. Code Cong. & Ad. News 3537, 3542-47 [hereinafter 1982 Senate Report].

The “catch-all” provision was added in part because of the “Billygate affair,” in which an allegedly improper relationship between President Carter’s brother and the government of Libya was investigated. Prior to the 1982 Amendments, an independent counsel could not be appointed in such a situation. In addition, Congress deemed that the Attorney General should have broad discretion to investigate conflicts of interest through the use of the independent counsel mechanism. Id. at 3544-46.

On the then-proposed 1982 amendments in general, see Kramer & Smith, supra note 16, at 983-97.

24. 28 U.S.C. § 592(a)(1). Prior to the 1982 amendments, the Attorney General had to investigate allegations of criminal wrongdoing upon receipt of “specific information,” even if that information was not provided by a credible source. Congress considered this to be unworkable due to the potential for the waste of time and money and the unfairness to persons accused if the need for an investigation was determined not to exist. 1982 Senate Report, supra note 23, 3347-49.


26. See 28 U.S.C. § 592(f). The statute provides that the Attorney General’s decision to apply for appointment of an independent counsel is not reviewable. Id.

The statute has been interpreted to preclude review of an Attorney General’s decision not to apply for appointment of an independent counsel, as well. See Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984); Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986); Nathan v. Smith, 737 F.2d 1069, 1077-1082 (D.C. Cir. 1984) (Bork, J. concurring) (individuals were held to have no standing to challenge an Attorney General’s refusal to appoint a special prosecutor [now independent counsel]). For a discussion of the Banzhaf case, see Comment, Banzhaf v. Smith: Judicial Review Under the Independent Counsel Provisions of the Ethics in Government Act, 70 IOWA L. REV. 1339 (1985).
The court sets forth the jurisdiction of an independent counsel. Although limited, this jurisdiction is exclusive; all Justice Department investigations within the counsel’s jurisdiction must cease. The counsel has broad powers and considerable independence. Removal must be for good cause and only by the Attorney General. The independent counsel’s position is temporary, lasting only until all investigations and prosecutions within his or her jurisdiction are complete, or until the court decides to terminate it.

Although the Ethics in Government Act provides that an independent counsel must be appointed by a court and insulated from the Department of Justice, this does not mean that the Attorney General has no prosecutorial discretion. There can be no investigation or prosecution by an independent counsel until the Attorney General decides that one should be appointed. In addition, the Attorney General has some control over the removal of an independent counsel. Even though an independent counsel is insulated from executive branch control while investigations and prosecutions are in progress, the Attorney General’s power under the Act should not be underestimated.

II. CONSTITUTIONAL ISSUES

Because the independent counsel provisions of the Ethics in Government Act involve judicial appointment of an executive branch officer, and because that officer is given independence from the President, the constitutionality of this statute has been questioned.

27. 28 U.S.C. § 593(b).
28. 28 U.S.C. §§ 593(a) and 597.
33. The “good cause” requirement for removal grants an independent counsel some freedom from pressure by either the President or other executive branch officers. The impact of this protection is heightened by the requirement of a report to Congress on removal and by the reviewability of removal. See 28 U.S.C. § 596 and supra note 30. The requirement of suspension of Justice Department investigations of matters assigned to the independent counsel also insulates the independent counsel from the executive branch. See 28 U.S.C. § 597.
Doubts were raised in Congress when an independent prosecution mechanism was first considered and these doubts continued to surface over the next several years. During the Reagan administration, the constitutionality of the independent counsel provisions has been challenged repeatedly. Generally, the questions as to constitutionality involve the appointment of the independent counsel under the appointments clause; restrictions on removal; separation of powers questions surrounding interference with the prosecution function of the executive branch; and the role of the courts in the independent counsel scheme.

III. THE CONSTITUTIONALITY OF JUDICIAL APPOINTMENT UNDER THE APPOINTMENTS CLAUSE

The appointments clause mandates that certain important government officials must be nominated by the President and confirmed by the Senate. However, the clause also states that “Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” The constitutionality of the appointment of an independent counsel by a court depends upon whether an independent counsel is such an “inferior Officer.”

Those who would invalidate judicial appointment of an independent counsel point to Buckley v. Valeo as standing for the propo-

34. See, e.g., Special Prosecutor: Hearings Before the Senate Committee on the Judiciary, 93d Cong., 1st Sess. (1973), particularly the article by Dean Roger C. Cramton of the Cornell University Law School, at 34-37 and the Staff Memorandum at 37-40.


36. U.S. CONST. art. II, § 2, cl. 2. See infra note 37, for the text of the appointments clause.

37. Id. The full text of the appointments clause is set forth below:

[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.

Id.

sition that the counsel is not an inferior officer. It has been argued that the independent counsel, wielding all the powers of the Justice Department, must be seen as an important government officer subject to the nomination and confirmation process.  

This argument ignores the true nature of the independent counsel's position. While the counsel has broad powers and great independence, he or she may investigate and prosecute only within the narrow area set forth by the court, and only for a limited time. Such a single-purpose prosecutor is far different from the Federal Election Commissioners involved in *Buckley* who were to serve for a longer time and who had broad powers similar to those of an independent agency.

More than the statute overturned in *Buckley*, the independent counsel provisions resemble a statutory scheme upheld in *United States v. Eaton* in 1898. In that case, the emergency appointment of Ethics in Government Act of 1978: Hearings Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 97th Cong. 1st Sess. 294, 306-7 (1981) [hereinafter plaintiff's brief in *Kraft*]. (*Kraft* involved a Carter administration official who was investigated by a special prosecutor for the use of cocaine. It was dismissed when the investigation ended with no indictment.)


The appointment mechanism for members of the Federal Election Commission, an executive agency, was also overturned. The Court held that Congress could not appoint members of the Commission, as the appointments clause does not allow for congressional appointment of officers of the United States. Because of their substantial powers, the Federal Election Commissioners were held not to be inferior officers. *Id.* at 140-43.

For discussion of *Buckley*, see Kramer & Smith, *supra* note 16, at 975-78.

40. See plaintiff's brief in *Kraft*, *supra* note 38, at 306-07.

41. See *supra* notes 28-30 and accompanying text.

42. See 28 U.S.C. §§ 593(b), 596(b). For a discussion of the limitations on the independent counsel's powers, see also Simon, *supra* note 18, at 60-61.

43. See *supra* note 39 and accompanying text.

44. 169 U.S. 331 (1898). In this case, the Minister resident and consul-general to Siam became too ill to fulfill his duties and had to return to the United States. At the time, a vice-consul who had been appointed was in the United States. The consul appointed an emergency vice-consul in accordance with a statute and regulations then in effect, to perform the consul's duties until the other vice-consul arrived. There was a controversy over whether the emergency vice-consul to Siam was constitutionally appointed. The Supreme Court upheld the appointment of the emergency vice-consul because of the temporary nature of the position and the need for an immediate appointment. *Id.*
of a vice-consul was upheld by the United States Supreme Court, although the vice-consul wielded all the powers of the consul.\textsuperscript{45} Despite the requirement that a consul be nominated by the President and confirmed by the Senate,\textsuperscript{46} the vice-consul was held to be an inferior officer because his appointment was temporary.\textsuperscript{47} The emergency vice-consul, who wielded the powers of a superior officer temporarily, can be compared to an independent counsel. The counsel wields the powers of the Attorney General, but within a limited sphere and for a short time.

\textit{Eaton} supports the argument that only a few officers must be nominated by the President and confirmed by the Senate. In fact, the appointments clause has been construed to require nomination and confirmation only for those officers specifically mentioned\textsuperscript{48} and Cabinet level officials.\textsuperscript{49} All others are inferior officers for purposes of the Constitution. The United States Supreme Court so held in \textit{United States v. Germaine}.\textsuperscript{50} It is therefore apparent that past interpretations of the appointments clause support the contention that an independent counsel is an inferior officer.

Like other powers expressly given by the Constitution, the power of Congress to vest the appointment of inferior officers in other branches is broad. As the Supreme Court decided in \textit{Ex Parte Siebold},\textsuperscript{51} unless it is somehow incongruous to vest the appointment of an inferior officer in some particular department, Congress may

\begin{itemize}
  \item 45. \textit{Id.} at 336-40.
  \item 46. \textit{See supra} note 37 for the text of the appointments clause.
  \item 47. 169 U.S. at 343-44.
  \item 48. \textit{See supra} note 37 for the text of the appointments clause.
  \item 50. 99 U.S. 508 (1878). The question in the case was whether a surgeon retained by the Commissioner of Pensions was an officer of the United States. The Court stated that officers below those mentioned in the appointments clause were inferior officers and that Congress could vest their appointment in the President, the courts or department heads. \textit{Id.} at 509-10. For discussion of \textit{Germaine}, \textit{see Common Cause brief in \textit{Kraft, supra} note 49}.
  \item 51. 100 U.S. 371 (1879). In this case, the Court upheld a law vesting the power to appoint federal election supervisors in the circuit courts. This law was upheld even though it permitted the courts to appoint officers to serve in another branch of the government.
\end{itemize}
vest the appointment power as it chooses. Unless such an appointment is incongruous, a court may appoint an independent counsel. Given the extensive involvement of courts with prosecutors and the conflict of interest which would result from executive branch appointment, court appointment of an independent counsel is appropriate.

IV. THE CONSTITUTIONALITY OF THE "GOOD CAUSE" REMOVAL STANDARD

When the 1982 amendments changed the standard for removal of an independent counsel from "extraordinary impropriety" to the present "good cause" standard, many doubts as to the constitutionality of the Act were removed. The removal standard became much the same as that applicable to the heads of independent agencies. Nonetheless, an independent counsel is not freely removable by the President, as are most executive branch officers. Therefore, some discussion of the constitutional implications of the removal restrictions is in order.

Myers v. United States stood for the proposition that the President had the power to remove officers, as part of his power to execute...
the laws. However, *Myers* applied only to officers nominated by the President and confirmed by the Senate. The effect of *Myers* was diminished considerably by *Humphrey's Executor v. United States*, in which the Supreme Court upheld the power of Congress to restrict presidential removal of a Federal Trade Commissioner. The Supreme Court limited absolute removal power to purely executive officers and held that such absolute power did not necessarily apply to those exercising quasi-legislative or quasi-judicial powers. Similarly, *Wiener v. United States* involved the removal of a War Claims Commissioner, a member of a quasi-judicial body. Even though Congress had not limited presidential removal powers by statute, the *Wiener* Court held that the removal power was restricted.

In none of these cases did the Supreme Court hold that a limitation on the President's power to remove a purely executive officer was constitutional. The independent counsel has none of the quasi-legislative or quasi-judicial powers of the officers discussed in *Humphrey's Executor* and *Wiener*. However, the removal restriction should be upheld nonetheless.

First, a strong argument can be made that the Supreme Court has upheld removal restrictions primarily because of the need for certain executive officials to independently carry out their duties. If this rationale is applied, the removal restrictions will definitely be upheld in the case of the independent counsel. The purpose of this office, created to eliminate executive branch conflicts of interest in the investigation of executive officers, would be defeated by an absolute removal power.

In addition, an examination of *INS v. Chadha* and *Bowsher v. Synar* demonstrates that the distinction between purely executive powers and quasi-legislative or quasi-judicial powers is being eliminated. In both cases, statutory provisions giving Congress a role in

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60. 272 U.S. at 176.
61. *Id.*
64. 357 U.S. at 355.
66. *See supra* notes 16-19 and accompanying text.
68. 106 S. Ct. 3181 (1986). *See infra* notes 91-95 and accompanying text.
the exercise of legislative power delegated to the executive branch were overturned as impermissible interferences with the executive. The executive branch, in its exercise of delegated powers, was treated as if it were exercising purely executive powers.

Once the distinction between executive powers and delegated powers becomes blurred, one can easily defend the application of Humphrey's Executor and Wiener to purely executive officers. If officers exercising delegated powers and those exercising executive powers are constitutionally the same, there is no reason to allow removal restrictions for one category of officers and not for the other.71

V. GENERAL SEPARATION OF POWERS CONCERNS

It has been argued that the independent counsel provisions violate the separation of powers doctrine because they interfere with the Executive's power to execute the laws and diminish the power of the Executive, thereby advancing the other branches. Until recently, it was easy enough to dismiss such arguments.72 However, given the separation of powers doctrine enunciated in INS v. Chadha and Bowsher v. Synar, it is necessary to reassess these concerns.

Opponents of the independent counsel provisions insist that prosecution is at the heart of executive branch powers and that the counsel, as a prosecutor, must therefore be controlled by the President.75 In support of this position, some would state that prosecution constitutes execution of the laws, a power reserved to the Executive by the Constitution.76

69. See supra note 62 and accompanying text.
70. See supra note 63 and accompanying text.
71. Conversely, if purely executive officers and officers exercising delegated powers are the same, there is no reason why removal restrictions should be constitutional for the latter. The Supreme Court's treatment of the removal restrictions for the independent counsel could, therefore, have implications for officers exercising delegated powers.
72. For instance, the Common Cause brief in Kraft, supra note 49, at 342-43, defended the Ethics in Government Act on the grounds of common sense and because one branch was not usurping the whole power of another.
73. See supra note 67.
74. See supra note 68.
76. See Staff Memorandum, supra note 34, at 38; see also Ledewitz, The Uncertain Power of the President to Execute the Laws, 46 Tenn. L. Rev. 757, 777-84 (1979) [hereinafter Ledewitz].
It is unclear whether the President’s duty under the Constitution to “take Care that the Laws be faithfully executed,”77 involves a grant of power or a limitation.78 This constitutional language can be seen as limiting the President to carrying out congressional intent.79 Even if the duty to see that the laws are executed involves a positive grant of power to the executive branch, it is unclear what aspects of execution of the laws are exclusively for that branch. Neither historical nor current practice supports the contention that only officers under the control of the President may prosecute. Prosecutorial functions have been given to independent officers in the past;80 in fact, this is fairly common. Thus, past practice as well as necessity can be seen as justifying the prosecutorial authority of the independent counsel.

However, there are further questions involving the separation of powers. One must examine the separation of powers doctrine of Chadha81 and Bowsher.82 If the Supreme Court interprets these two cases as requiring presidential direction of executive branch officers, the independent counsel provisions will not be upheld. However, it can be argued that the independent counsel provisions are sufficiently distinguishable from the provisions overturned in Chadha and Bowsher to withstand a constitutional challenge in the Supreme Court.

In INS v. Chadha,83 a deportable alien challenged the one-house veto84 of the suspension of his deportation.85 Congress had delegated

77. U.S. Const. art. II, § 3.
78. See Ledewitz, supra note 76, at 757-59; 1988 Sealed Case, supra note 3 (Ginsburg, J., dissenting).
80. One version of the first Judiciary Act would have allowed court appointment of United States Attorneys. See 1988 Sealed Case supra note 3, at 187 n.41. Various cases have upheld prosecution by officers not appointed by the President or otherwise independent of executive control. See, e.g., United States v. Solomon, 216 F. Supp. 835 (S.D.N.Y. 1963) (upholding the prosecutorial authority of an interim United States Attorney appointed by a court); ICC v. Chatsworth Cooperative Marketing Ass’n., 347 F.2d 821 (7th Cir), cert. denied, 382 U.S. 938, Reh. denied, 382 U.S. 1000 (1965) (upholding the prosecutorial authority of an independent agency); Young v. United States ex rel. Vuitton et Fils S.A., 107 S. Ct. 2124 (1987) (upholding the authority of courts to appoint special prosecutors to prosecute contempts). As noted by Tiefer, supra note 16, at 59-60, there have been several statutes authorizing prosecution by independent officers; these statutes have allowed prosecution by the Comptroller General and investigations by agency inspectors general who have considerable independence.
81. See supra note 67.
82. See supra note 68.
84. The Immigration and Nationality Act, 8 U.S.C. § 1254 (1982), permitted
to the Attorney General the power to suspend the deportation of aliens, retaining for itself the power to veto any such suspension by a resolution of one house.86

The Supreme Court held this one-house veto unconstitutional as a violation of the bicameralism and presentment clauses87 and as an interference with the executive branch in its execution of the laws.88 Essentially, the Supreme Court held that Congress could not control the exercise of legislative power delegated to the executive branch except by legislation.89

It is evident that Chadha does not speak directly to the independent counsel provisions. However, if the Supreme Court extends this strict view of the separation of powers to the Ethics in Government Act, it may well overturn the statute. The reasoning of Chadha can be extended so that any restriction which Congress puts on the exercise of executive power is unconstitutional. By following this line of reasoning, one must conclude that the independence of the independent counsel, guaranteed by freedom from presidential direction and at-will removal,90 is an unwarranted congressional interference with the Executive. By removing a prosecuting officer from executive control, Congress vitiates the power of the executive branch, according to this line of reasoning.

A similarly strict view of the separation of powers was evident in Bowsher v. Synar.91 In Bowsher, the Supreme Court held unconstitutional the automatic budget-cutting mechanism of the "Gramm-Rudman-Hollings Act."92 The Act set budget deficit ceilings which,
if unattainable by Congress, were to be implemented *via* an automatic budget cutting mechanism. The directors of the President's Office of Management and Budget and the Congressional Budget Office were to recommend budget cuts to meet the deficit ceiling. Based on their reports, the Comptroller General was to make budget cut recommendations to the President, who had to implement them *via* a sequestration order. If Congress did not act on the deficit, this order became a permanent budget cut. The constitutional infirmity in this automatic budget cutting process was that the Comptroller General was removable only by Congress. For this reason, the Comptroller was held to be a congressional officer and his participation in the budget cutting process was held to be congressional interference in the execution of the law. The Comptroller General's role was considered to be the equivalent of a congressional veto, as Congress could influence his actions by the threat of removal.

The applicability of *Bowsher* to the independent counsel provisions of the Ethics in Government Act is evident. The Comptroller General is appointed by the President but removable only by Congress or by impeachment; an independent counsel is appointed by the courts and removable by the Attorney General under certain restrictions. It is possible that the court will extend the rationale of *Bowsher* and hold that execution of the laws by anyone not under presidential direction is impermissible. The appointment of the independent counsel by a court and the restrictions on his or her removal may be enough to justify a holding that the Ethics in Government Act impermissibly interferes with the power of the Executive.

If the Supreme Court continues to follow the view of separation of powers manifested in *Chadha* and *Bowsher*, it still should not

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93. 106 S. Ct. at 3184.
94. *Id.* at 3188-90.
95. *Id.* at 3189.
96. *Id.* at 3185, 3189. It is interesting that the Court declined to reach the constitutionality of the removal provisions relating to the Comptroller General. *Id.* at 3192-93. This may indicate that the Court did not regard removal restrictions as an important constitutional issue in terms of congressional interference with the Executive.
97. Both of these cases were decided by the Burger Court. In fact, former Chief Justice Warren Burger wrote both opinions. With two new justices on the Court, Justice Antonin Scalia and Justice Anthony Kennedy, the view of separation of powers may change. Also, the influence of a different Chief Justice should not be discounted. However, it should be noted that Justice Scalia wrote the trial court opinion in *Bowsher*, 106 S. Ct. 3181 (1986) (Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986)). His opinion questioned the status of independent agencies on
invalidate the independent counsel provisions. These provisions of the Ethics in Government Act are sufficiently distinguishable from the statutes invalidated in Chadha and Bowsher that they should stand regardless of the direction of the Court on separation of powers. Chadha and Bowsher involved the direct participation either of Congress itself or of a congressionally controlled officer in the execution of the laws. An independent counsel is not congressionally controlled. The only involvement which Congress ever had with an independent counsel, aside from passing the authorizing statute, was the receipt of reports.\textsuperscript{98} The potential for diminution of executive power inherent in a legislative veto or involvement of a legislative officer in executing a law is simply not present in the independent counsel provision. While it is true that the counsel is not under presidential direction, neither is he or she under congressional direction.

It is true that a court appoints an independent counsel and can terminate his or her office when all investigations and prosecutions are complete.\textsuperscript{99} The court also sets forth the jurisdiction of the counsel.\textsuperscript{100} However, the court cannot appoint an independent counsel unless the Attorney General applies for such an appointment.\textsuperscript{101} If the Attorney General decides that an independent counsel is unnecessary, there can be no appointment; the Attorney General has the final say in this matter.\textsuperscript{102} Only the Attorney General can remove the counsel for any reason other than the completion of his or her task.\textsuperscript{103} Under the rationale of Bowsher,\textsuperscript{104} this gives the Attorney General control of the counsel. While the court sets forth the counsel's jurisdiction, it can do so only after the Attorney General's investigation and application, and only in accordance with the application.\textsuperscript{105}

separation of powers grounds. Justice Kennedy wrote the appeals court's opinion in Chadha, 462 U.S. 919 (1983) (Chadha v. INS, 634 F.2d 408 (9th Cir. 1980)) in which the legislative veto was held unconstitutional. It seems likely, therefore, that the Court will continue to interpret the separation of powers strictly. This has implications beyond the independent counsel question. The status of independent agencies and of broad delegations of power to executive agencies could come into question.

\textsuperscript{98} See 28 U.S.C. § 595.
\textsuperscript{99} See 28 U.S.C. §§ 593(b), 596(b)(2).
\textsuperscript{100} See 28 U.S.C. § 593(b).
\textsuperscript{101} See 28 U.S.C. §§ 592(c), 593(b).
\textsuperscript{102} See supra note 26 and accompanying text.
\textsuperscript{103} 28 U.S.C. § 596. See supra note 58 concerning judicial review of removal.
\textsuperscript{104} See supra notes 91-95 and accompanying text.
\textsuperscript{105} See 28 U.S.C. § 593 as amended by the Independent Counsel Reauthor-
Thus, the court’s power to set the counsel’s jurisdiction is severely limited. When one looks at the independent counsel provision in its entirety, one can find no serious infringement on the Executive’s powers. The executive branch controls appointment of the counsel and plays the primary role in removal. The counsel is appointed only temporarily and can act only in his or her prescribed jurisdiction.

Clearly, the Supreme Court should not hold that the independent counsel provisions violate the separation of powers doctrine, even if the Court continues to follow *Chadha* and *Bowsher*. While the independent counsel provisions could be overturned under the strictest interpretation of these precedents, the statute does not violate the separation of powers doctrine enunciated by these cases.

VI. THE RECENT CASES

In only four cases have the courts considered the constitutionality of the independent counsel provisions. *In re Sealed Case* (the North case)\(^{106}\) and *In re Olson*\(^{107}\) dealt with the issue of constitutionality only in dicta. *In re Sealed Case* (the 1988 case)\(^{108}\) did involve a direct ruling on the constitutionality of the provisions. Although the district court upheld the Ethics in Government Act, the United States Court of Appeals for the District of Columbia Circuit found the Act unconstitutional. Since the Supreme Court may find any of the four opinions to be persuasive, this comment will discuss the opinion in the North *Sealed Case* and *Olson*, as well as the district court and circuit court opinions in the 1988 *Sealed Case*.

A. The North Case

*In re Sealed Case* (the North case),\(^{109}\) decided by the United States Court of Appeals for the District of Columbia Circuit, dealt with the constitutionality of the independent counsel provisions in a very limited fashion. The case involved a challenge by Lieutenant Colonel

\(^{106}\) 829 F.2d 50 (D.C. Cir. 1987), cert. denied, No. 87-869 (January 19, 1988).

\(^{107}\) 818 F.2d 34 (D.C.Cir. 1987).

\(^{108}\) 1988 *Sealed Case*, *supra* note 3.

\(^{109}\) *See supra* note 106.
Oliver North\textsuperscript{110} of a contempt order of the district court. The order was issued because of North's failure to comply with a subpoena issued by a grand jury empaneled by Independent Counsel Lawrence Walsh. North refused to comply because of his contention that Walsh lacked authority due to the unconstitutionality of the Ethics in Government Act.\textsuperscript{111}

The court never addressed most of the constitutional issues. Because the Attorney General had reappointed Independent Counsel Walsh under his own authority,\textsuperscript{112} the court held that Walsh had the authority to investigate, whether or not the Act was constitutional.\textsuperscript{113} This was so despite the potential effect of the Act's provisions\textsuperscript{114} in insulating the counsel from removal without cause by the Attorney General.\textsuperscript{115}

The court only addressed the constitutionality of the counsel's appointment in terms of appointment by the Attorney General. Finding the counsel to be an inferior officer, the court held that he could be appointed by a department head under the appointments clause\textsuperscript{116} of the Constitution.\textsuperscript{117}

\textbf{B. The EPA/Justice Department Cases}

\textit{In re Olson}\textsuperscript{118} and \textit{In re Sealed Case} (the 1988 Sealed Case)\textsuperscript{119} both involved the following set of facts: because of concerns that Environmental Protection Agency (the "EPA") officials were misusing funds to aid republican Senate candidates in the 1982 elections, two subcommittees of the House of Representatives sought EPA documents on hazardous waste cleanup.\textsuperscript{120} Some documents were refused

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\textsuperscript{110} As to the source of Lieutenant Colonel North's difficulties, see supra note 7.
\textsuperscript{111} 829 F.2d at 51-54.
\textsuperscript{112} See 52 Fed. Reg. 7270 (March 10, 1987).
\textsuperscript{113} 829 F.2d at 62.
\textsuperscript{114} 28 U.S.C. § 596.
\textsuperscript{115} In his dissent, Judge Williams contended that the "good cause" removal provision of the Act should be enough to make Lieutenant Colonel North's challenge to the Act's constitutionality reviewable. Because of this provision, the officer who investigated North considered himself independent of the executive branch; therefore, according to Judge Williams, North's challenge was ripe. 829 F.2d at 65-69.
\textsuperscript{116} U.S. Const. art. II, § 2, cl. 2. See supra note 37 for the text of the appointments clause.
\textsuperscript{117} 829 F.2d at 56-57.
\textsuperscript{118} 818 F.2d 34 (D.C. Cir. 1987).
\textsuperscript{119} See supra note 3.
\textsuperscript{120} 1988 Sealed Case, supra note 3, at 4.
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on the grounds of executive privilege and an interbranch dispute arose. Eventually, an agreement was reached as to document production.\textsuperscript{121}

After an investigation of the role of the Justice Department in the EPA document dispute, the Senate Judiciary Committee asked the Attorney General to investigate possible wrongdoing by certain officials, in accordance with the Ethics in Government Act.\textsuperscript{122} Three of those investigated were Theodore Olson, former Assistant Attorney General, Office of Legal Counsel; Carol Dinkins, former Assistant Attorney General, Lands Division (and later Deputy Attorney General); and Edward Schmults, former Deputy Attorney General.\textsuperscript{123}

The Attorney General concluded that possible wrongdoing by Mr. Olson warranted the appointment of an independent counsel and requested such appointment of the special division of the court.\textsuperscript{124} However, the Attorney General found no basis for further investigation of Mr. Schmults and Ms. Dinkins.\textsuperscript{125}

\textbf{C. In re Olson}

The \textit{Olson}\textsuperscript{126} case involved a request by the independent counsel for jurisdiction to investigate Mr. Schmults and Ms. Dinkins.\textsuperscript{127} Because the Attorney General denied her request for expanded jurisdiction,\textsuperscript{128} the independent counsel applied to the special division of the court.\textsuperscript{129} Although this request was denied because only the Attorney General may refer matters for investigation by an independent counsel, the counsel was permitted to investigate whether Mr. Olson conspired with Ms. Dinkins and Mr. Schmults.\textsuperscript{130}

The case did not require a decision on the constitutionality of the Ethics in Government Act, but the court discussed this topic in extended dictum.\textsuperscript{131} After discussing the history of conflicts of interest in the executive branch, the court justified the independent counsel

\textsuperscript{121} \textit{Id.} at 4-5.
\textsuperscript{122} \textit{Id.} at 5-7.
\textsuperscript{123} \textit{Id.} at 7-8.
\textsuperscript{124} \textit{Id.} at 5-7.
\textsuperscript{125} \textit{Id.} at 8.
\textsuperscript{126} 818 F.2d 34 (D.C. Cir. 1987).
\textsuperscript{127} \textit{Id.} at 37.
\textsuperscript{128} \textit{Id.} at 38.
\textsuperscript{129} \textit{Id.} at 38-39.
\textsuperscript{130} \textit{Id.} at 48.
\textsuperscript{131} \textit{Id.} at 43-46.
provisions based on necessity. In addition, the court found support for the Act in the necessary and proper clause of the Constitution.

Citing the appointments clause, the court stated that Congress could vest the appointment of an independent counsel in a court because he or she was clearly an inferior officer. This conclusion was based on the limitation of a counsel's duties to one task and of the counsel's tenure to the time required to complete that task. Because of these limitations and the Attorney General's removal power, the court found insufficient interference with executive branch functions to constitute a violation of separation of powers.

The Olson case was the first to discuss the constitutionality of the Ethics in Government Act. The court's rationale as to the constitutionality of the Act could be significant when the question comes before the United States Supreme Court.

D. 1988 Sealed Case—The District Court Opinion

Although the judgment was reversed, the district court opinion in In re Sealed Case should be discussed as it was the first case to deal with the constitutionality of the Act on the merits. The court followed the rationale of In re Olson in determining that an independent counsel could constitutionally be appointed by a court. However, the court also found that court appointment of a counsel is not incongruous under the rationale of Ex parte Siebold. In this context, the lack of involvement of the appointing court in investigations and the Attorney General's role in the appointment procedure were seen as important.

132. Id. at 39-42.
133. Id. at 43-44, citing U.S. CONST. art. I, § 8, cl. 18.
134. U.S. Const. art. II, § 2, cl. 2. See supra note 37 for the text of the appointments clause.
135. 818 F.2d at 43-44.
136. Id. at 44.
137. 28 U.S.C. § 596.
138. 818 F.2d at 44.
139. 1988 Sealed Case, supra note 3. The facts of this case were originally sealed, but were released when the case was appealed. See 1988 Sealed Case, supra note 3, at 4 n.2.
140. Id.
141. See supra note 126.
142. See supra notes 134-38.
143. 100 U.S. 371 (1880). See supra notes 51-52 and accompanying text.
144. See supra note 3, at 4 n.2.
The removal provision was upheld by the district court based on the counsel's need for independence and on prior cases upholding removal restriction.\textsuperscript{145} The court also noted that \textit{United States v. Nixon}\textsuperscript{146} upheld removal restrictions relating to the Watergate special prosecutor, which the executive branch imposed on itself. The same case was cited as support for the independent counsel's freedom from supervision, similar to that of the Watergate special prosecutor.

Oddly, the court dismissed the applicability of \textit{Buckley v. Valeo},\textsuperscript{147} and \textit{INS v. Chadha}\textsuperscript{148} and \textit{Bowsher v. Synar}\textsuperscript{149} in a footnote. The court stated that, because the independent counsel provisions provided neither Congress nor the courts with an opportunity to "aggrandize [themselves] at the expense of the other [branch],"\textsuperscript{150} these three cases could be distinguished.\textsuperscript{151}

Overall, the court found the independent counsel provisions of the Ethics in Government Act to be a reasonable and constitutional solution by Congress to the problem of conflicts of interest in the investigation of high government officials. The role of the Act in promoting public trust in government\textsuperscript{152} weighed very heavily in the opinion.

\textbf{E. The 1988 Sealed Case-Circuit Court Opinion}

In \textit{In re Sealed Case}\textsuperscript{153} the United States Court of Appeals for the District of Columbia Circuit held the Ethics in Government Act unconstitutional. This important case produced a voluminous majority opinion which discussed every possible objection to the Act. The lengthy and scholarly dissenting opinion ably rebutted the majority's arguments. The Supreme Court's disposition of this case may well fix the Court's position on the separation of powers doctrine, in addition to determining the validity of the independent counsel provisions.

The majority opinion first discussed the appointment of the independent counsel. The majority had two major objections to the

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145. \textit{Id.}
151. \textit{See supra} note 139.
153. \textit{See supra} note 3.
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method of appointment. The first was that the counsel was not an inferior officer under the appointments clause and, therefore, had to be nominated by the President and confirmed by the Senate. The second was that, even if the independent counsel were an inferior officer, the counsel’s appointment by another branch of government was outside the framers’ intent and a usurpation of the powers of the President.

In support of the contention that the independent counsel is not an inferior officer, Judge Silberman first outlined those officers considered to be superior: those mentioned in the appointments clause, and others, such as department heads and federal judges, who have considerable discretion.

Although an independent counsel does not have the level of authority of these officers, the majority considered the counsel to be likewise a superior officer because the counsel has no hierarchical superior. The counsel’s limited jurisdiction and temporary appointment were not considered determinative.

The court distinguished several important precedents. Although it held the independent counsel to be an inferior officer, In re Sealed Case (the North Case) was held not to apply because the counsel there was originally appointed by the Attorney General. Although originally appointed under the Government in Ethics Act, the Iran-Contra independent counsel was held to be subordinate to the Attorney General and, therefore, an inferior officer.

United States v. Solomon, which involved court appointment of temporary United States Attorneys, was also distinguished. The majority pointed out that, unlike an independent counsel, the temporary United States Attorneys were not insulated from executive branch supervision or removal.

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154. Id. at 13-35.
155. Id. at 35-65.
156. U.S. Const. art. II, §2, cl. 2. See supra note 37 for the text of the appointments clause.
158. Id. at 33-34.
159. Id. at 23-27, 30-33. However, the court does admit that some officers on its list of superior officers, such as ambassadors, do have hierarchical superiors. Id. at 20-22. The majority seems to contradict itself.
160. Id. at 33-34.
161. See supra notes 109-117 and accompanying text.
Ex parte Siebold, in which court appointment of election commissioners was upheld, was distinguished because these officers were not clearly executive and because of the plenary authority of Congress over its own elections. The fact that the commissioners had no superiors was not considered determinative.

Lastly, United States v. Eaton was held to be inapplicable because of the emergency nature of the appointment there considered. The appointment by the consul of a vice-consul who wielded all the powers of a superior officer, albeit temporarily, was considered appropriate by the majority.

Considered together, the many distinctions made by the court in its discussion of these cases seriously undercut the court’s argument that the independent counsel is not an inferior officer. It is hard to avoid the conclusion that some of these cases apply to the independent counsel.

Even if the independent counsel were considered to be an inferior officer, this court would consider the statutory appointment mechanism to be unconstitutional on general separation of powers grounds. The court’s objections to court appointment focus on the overall unconstitutionality of interbranch appointments and its potential interference with the President’s power to execute the laws.

In support of its holding that only the executive branch may prosecute, the majority pointed to the division of power over criminal matters in the Constitution: Congress enacts laws, the executive branch prosecutes and the judiciary adjudicates. Allowing a non-executive officer to take over prosecution was seen as a threat to liberty.

More specifically, the court considered the removal of a prosecuting official from presidential supervision to be in contravention of the President’s express power to execute the laws. Court appointment

165. 100 U.S. 371 (1880). See supra notes 51-52 and accompanying text.
167. Id.
168. 169 U.S. 331 (1898). See supra notes 44-47 and accompanying text.
169. 1988 Sealed Case, supra note 3, at 31-33.
171. Id. at 35. On the power to execute laws, see supra notes 75-80 and accompanying text.
172. Id. at 35-42.
173. Id. at 35-37.
174. Id. at 36, 42-44.
of an independent counsel was considered as vitiating the power of the Executive.\textsuperscript{175}

The majority also concluded that the appointments clause does not authorize the appointment of officers of one branch of government by another branch.\textsuperscript{176} Neither the legislative history of the clause\textsuperscript{177} nor cases interpreting it were found to authorize interbranch appointments.\textsuperscript{178}

In addition to the appointment provisions, the court found the independent counsel removal provisions of the Ethics in Government Act unconstitutional. Both the “good cause” removal restriction\textsuperscript{179} and the provision for judicial review of removal\textsuperscript{180} were found to infringe too greatly on presidential control of an executive officer.\textsuperscript{181}

According to the majority’s rationale, only officers who do not make policy or who do not exercise purely executive powers\textsuperscript{182} may be insulated from at-will removal.\textsuperscript{183} As an officer exercising core executive powers, the independent counsel was held to be outside the category of officers who may be so insulated.\textsuperscript{184}

The judicial review of removal was more objectionable to the of the court than were the removal restrictions.\textsuperscript{185} The mechanism al-

\textsuperscript{175} Id. at 43. The court cited Buckley v. Valeo, 424 U.S. 1 (1976), discussed \textit{supra} at notes 39-43, as authority for its argument. However, \textit{Buckley} involved the removal of virtually all executive power over campaigns from the executive branch. Moreover, Congress vested this power in itself. The independent counsel provisions do not involve so great a diminution of executive power nor do they involve a congressional appropriation of executive power. \textit{Id.}

\textsuperscript{176} 1988 \textit{Sealed Case, supra} note 3, at 44-54.

\textsuperscript{177} \textit{Id.} at 48-53. The court’s argument for its interpretation of the appointments clause is not convincing. Among the items offered as evidence of the framers’ intent were discussions of the propriety of Senate confirmation, a discussion of appointment of officers by states and a discussion of appointment by a council. \textit{Id.}

\textsuperscript{178} \textit{Id.} at 55-58, 64-65. The court discussed \textit{Siebold, supra} note 163, and Young v. United States \textit{ex rel. Vuitton et Fils S.A.}, 107 S. Ct. 2124 (1987) (upholding the power of courts to appoint prosecutors for contempt cases). The analysis of both cases as involving plenary powers of other branches is not convincing.

\textsuperscript{179} See \textit{supra} notes 53-71 and accompanying text.

\textsuperscript{180} See \textit{supra} note 30.

\textsuperscript{181} 1988 \textit{Sealed Case, supra} note 3, at 65-66.

\textsuperscript{182} But see \textit{supra} notes 67-71 and accompanying text. One may ask whether the majority appreciated the effect of \textit{Chadha} and \textit{Bowsher} in blurring the distinction between purely executive and delegated powers. \textit{Id.}


\textsuperscript{184} 1988 \textit{Sealed Case, supra} note 3, at 67-71.

\textsuperscript{185} \textit{Id.} at 76-81. This court discussed the judicial review provisions in effect before the 1987 amendments to the Ethics in Government Act. See \textit{supra} note 30.
allowing for judicial review of the Attorney General’s decision to remove independent counsel was seen as a judicial veto of the removal decision, as the standard of review was not deferential. Overall, the removal provisions of the Act were held to interfere with the President’s execution of the laws by removing the independent counsel from presidential control.

Concluding his main separation of powers arguments, Judge Silberman contended that the independent counsel provisions manifested a mistrust of the President which did not fit into the constitutional scheme. Conflicts of interest were seen as a lesser evil than the upset of the balance of powers occasioned by the independent counsel provisions. According to Judge Silberman, the Executive is to be controlled only by the impeachment mechanism provided by the framers of the Constitution. The majority saw the independent counsel provisions in their entirety as lessening the power of the Executive and thereby allowing Congress to advance itself at the other branches’ expense.

While the majority opinion discussed at some length the powers given to a court by the Ethics in Government Act, that topic is largely outside the scope of this comment. If the Supreme Court were to decide this case based on the powers given to the court, it would not touch on the questions involving executive power which have been the main purpose of this comment. Essentially, the majority found that some duties given to the court by the Ethics in Government Act were outside the “case or controversy” limitations on the judicial power set forth in Article III of the Constitution. The duties of appointment, setting of jurisdiction and removal were objected to as “necessarily involv[ing] the [court] in the non-Article

186. 1988 Sealed Case, supra note 3 at 82-86. The majority has an unusual way of looking at judicial review. Every agency action is presumptively subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1982). Judicial review is not normally regarded as a veto of executive action.

187. 1988 Sealed Case, supra note 3 at 86-89.

188. Id. at 92-115.

189. Id. at 93-97.

190. Id. at 97-98.

191. Id. at 102-115. Oddly enough, the court cited in support of its strict view Commodity Futures Exchange Commission v. Schor, 106 S. Ct. 3245 (1986) (This case upheld the power of an administrative agency to hear common law claims ordinarily reserved for Article III courts, if both parties consented.) Schor is generally seen as supporting a less restrictive view of the separation of powers doctrine. Young v. United States ex rel. Vuitton et Fils S.A., see supra note 177, is also cited, and supports a less restrictive view of the separation of powers.
III task of supervising the day-to-day activities of an executive branch official."  

Thus, the majority opinion in In re Sealed Case gives one a number of different arguments for the unconstitutionality of the independent counsel provisions. Although it is not well written, the opinion should not be discounted. If it invalidates the Ethics in Government Act, the Supreme Court may use some of the same arguments on vitiation of executive power and execution of the laws as this majority used.

In her scholarly dissenting opinion, Judge Ruth Ginsburg argued well for the constitutionality of the Ethics in Government Act. Judge Ginsburg would uphold the Act because, rather than contravening the separation of powers outlined in the Constitution, it preserves the system of checks and balances by curbing executive abuses.

Judge Ginsburg did not find that the independent counsel provisions impermissibly allowed Congress or the judiciary to control prosecution. Rather, she argued that the Act severely limits the participation of these two branches and lodges most of the power over independent counsel prosecution in the Attorney General. Thus, although the independent counsel provisions do not give the Executive a free hand in prosecution, they pass the test of Bower v. Synar by not giving supervision of an executive function to another branch. As noted in the dissent, the role of Congress under these provisions is limited to requesting the appointment of a counsel and obtaining information. This is not a supervision of prosecution. Although the special division of the court appoints the counsel, establishes jurisdiction, and can review removal or terminate the counsel's office as necessary, this does not constitute supervision.

192. 1988 Sealed Case, supra note 3, at 118-19. Similar duties of a court were upheld in Young, supra note 177, and United States v. Solomon, supra note 163. The majority's statement that the court is the independent counsel's supervisor contradicts an earlier statement that the counsel is a superior officer because he or she has no superior, supra notes 158-159.
193. See supra note 3, at 1-138.
194. Id. at 138-195.
195. Id. at 138.
196. Id. at 140-157.
198. 1988 Sealed Case, supra note 3, at 141-150.
199. Id. at 142-49.
200. The case involved the Act prior to the 1987 amendments. See supra note 30.
The dissenting judge did not consider the Act an impermissible intrusion into areas reserved for the Executive. First, she did not consider the duty to execute the laws as an express grant of power; instead she viewed this duty as a limitation. Second, Judge Ginsburg argued that the independent counsel provisions constituted only a limited incursion into executive territory, permissible under the rationale of *Commodity Futures Exchange Commission v. Schor.* Given the Attorney General’s retention of much power over the course of the prosecution, and the limited authority of the special counsel, the incursion into the Executive’s realm occasioned by the Act was seen as valid.

The dissenting judge, unlike the majority, would not describe prosecution as a core executive function. Only those functions specifically mentioned in Article II of the Constitution, such as commanding the armed forces, making treaties and granting pardons, were seen as core functions. Thus, the limitation of executive control over a prosecutor was not seen as an impermissible encroachment on executive power.

Judge Ginsburg applied a similar encroachment analysis to the removal limitations. Absent congressional participation in removal, a limitation on the power to remove was not seen as too great an encroachment where an executive officer required independence. The dissent completely abandoned the “purely executive” versus “quasi-legislative or quasi-judicial” test of the validity of removal restrictions, which was advocated by the majority.

202. *Id.* at 157-58. See *supra* note 75-80 on the execution of the laws.
203. 106 S. Ct. 3245, *see supra* note 191. The judge made an interesting argument that *Schor* limits *Bowsher, supra* notes 91-96 and accompanying text, in allowing a limited intrusion on a branch’s powers. *Id.* at 159-61. The judge proposed a *Schor*-style test for the validity of an incursion on a branch’s powers, as follows: the extent of the removal of matters from a branch’s authority; whether the removal effects a core function; and the purposes of the legislation. *Id.* Judge Ginsburg saw this intrusion as limited, as not affecting a core function, and as justified by the purpose of the Ethics in Government Act. *Id.* at 161-72.
204. *Id.* at 162. For a discussion of the extent of the Attorney General’s powers under the independent counsel provision, *see supra* notes 23-26, 30.
205. 1988 *Sealed Case, supra* note 3, at 159.
206. Dissent, *id.* at 166-67. For the majority’s position, *see supra* notes 170-175 and accompanying text.
207. 1988 *Sealed Case, supra* note 3, at 166.
208. *Id.* at 166-67.
209. *Id.* at 173-78.
210. *Id.* at 176. For the majority’s position, *see supra* notes 179-187 and accompanying text.
In discussing the validity of court appointment of an independent counsel, Judge Ginsburg took a different course. Completely rejecting the majority's arguments that the counsel is a superior officer, and its rationale as well, she counselled deference to the congressional designation of the counsel as an inferior officer. Considering Congress' reasons for this designation to have a sound basis, she would allow it to stand.

Analyzing the implications of court appointment of an independent counsel, Judge Ginsburg concluded that such an appointment was valid. Because the encroachment on executive powers which would result would be minimal, she concluded that court appointment was not incongruous. In addition, she stated that the framers of the Constitution had not seen this arrangement as violative of the separation of powers. In fact, in her opinion, appointment of an independent counsel by an executive officer would be incongruous because it would defeat the purpose of the Ethics in Government Act: to eliminate conflicts of interest in the investigation and prosecution of government officials.

Throughout her opinion, Judge Ginsburg took the position that the separation of powers among the three branches cannot be absolute; however, the separation must be sufficient to preserve each branch's integrity. She supported the Ethics in Government Act as a measure which furthers the system of checks and balances and does not advance one branch over another.

In dealing with the question of whether the Ethics in Government Act gave nonjudicial functions to a court, Judge Ginsburg rejected the majority's position. She saw all functions of the court under the Act as either incident to the appointment power or related to a "case or controversy."

Thus, it is evident that the independent counsel provisions can be reconciled with the Constitution and the separation of powers doc-

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211. 1988 Sealed Case, supra note 3, at 178-83. For the majority's position, see supra notes 177-178 and accompanying text.
213. Id.
214. Id. at 185-93.
215. Id. at 186-87.
216. Id. at 187 n.41, citing a preliminary version of the first Judiciary Act, which would have allowed courts to appoint United States Attorneys.
217. Id. at 188.
218. Id. at 138-195.
219. Id. at 188-193. For the majority's position, see supra note 191-192 and accompanying text.
trine of Chadha\textsuperscript{220} and Bowsher.\textsuperscript{221} However, this cannot be accom-
plished if one takes a strict view of the current separation of powers doctrine.

VII. CONCLUSION

Soon the United States Supreme Court will decide whether the
Ethics in Government Act is constitutional.\textsuperscript{222} Certainly, the Court’s
decision will have an effect on future investigations of high govern-
ment officials, and, therefore, on the integrity of our government.
The decision may affect the very structure of our government.

Chadha and Bowsher had implications which affected the power
of administrative agencies.\textsuperscript{223} The 1988 Sealed Case will probably
have similar implications. If the appointment and removal provisions
of the Ethics in Government Act are invalidated, the status of
independent agencies will change greatly. The independent counsel
provisions are important in themselves, but the decision on their
validity may well signal a new trend in constitutional law.

Carolyn M. Corry

\textsuperscript{221} 106 S. Ct. 3181 (1986). See supra notes 91-96 and accompanying text.
\textsuperscript{222} See supra note 153. The oral arguments are scheduled for April 26, 1988.
\textsuperscript{223} See, e.g., Chadha, 462 U.S. at 967-1003 (White, J. dissenting); Bowsher,
106 S. Ct. at 3205-15 (White, J. dissenting).