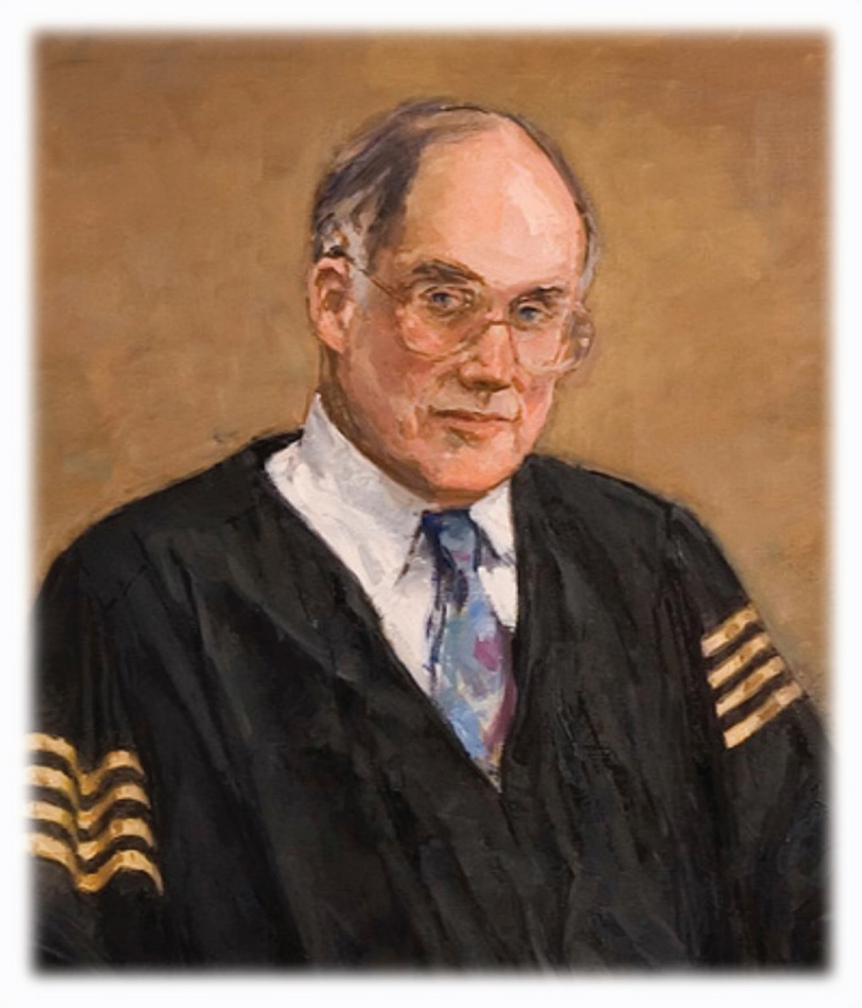
Cases that Shaped the Federal Courts

Morrison v. Olson

1988



Chief Justice William Rehnquist

Federal Judicial Center
2020

Central Question

Could Congress empower federal judges to appoint independent counsel investigating executive branch officials?

Historical Context

In the late 1960s and 1970s, several senior government officials were forced to leave office amid allegations of corruption. The most infamous of these scandals, the Watergate affair, ultimately led President Richard Nixon to resign as the House of Representatives prepared articles of impeachment against him. In the aftermath of these scandals, Congress passed a number of laws designed to prevent and punish unethical and illegal conduct by public servants. One of these laws, the Ethics in Government Act of 1978 ("EGA"), provided a special process for the investigation of high-ranking officials.

The Act empowered a special division of the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") to appoint an independent counsel to investigate officials. The special division was presided over by three judges serving on a part-time basis for two-year terms. One of these judges had to be from the D.C. Circuit and no more than one judge could be from any single court. The special division could not act on its own initiative; it could only appoint counsel if the Attorney General of the United States determined there was sufficient evidence to warrant an investigation.

Unlike other federal law enforcement officers, independent counsel were not subject to removal at the order of the President. Instead, the Attorney General could remove independent counsel only if there was "good cause" (such as evidence the counsel had acted unethically) or if the counsel had become mentally or physically unable to perform the job. This system was designed to ensure the independence of investigators probing senior officials. Congress was concerned, for example, that an unscrupulous President or cabinet member might use his or her power to interfere with an investigation.

Legal Debates Before *Morrison*

Both before and after its creation, critics charged that the independent counsel system was unconstitutional. Early criticisms often focused on separation-of-powers concerns raised by the use of federal judges to appoint investigators. They argued that this process exceeded the courts' powers under Article III of the Constitution and interfered with the President's authority to hire and fire executive officers under Article II. The EGA's defenders noted that Article II, Section 2's Appointments Clause permitted Congress to give courts the power to appoint "inferior Officers." This position, however, raised the question whether independent counsel should be classed as "inferior" or "principal" officers. "Principal" of-

ficers, such as ambassadors and cabinet members, must be appointed by the President "by and with the Advice and Consent of the Senate." Judges cannot appoint principal officers.

Prior to the EGA's passage, both the Department of Justice and President Jimmy Carter expressed approval for the EGA's independent counsel provisions. Despite renewals and minor amendments to the scheme in 1982 and 1987, however, President Ronald Reagan's administration (1981–1989) expressed growing concern that the independent counsel system could be abused. These criticisms intensified during the Iran-Contra Affair in Reagan's second term of office. The investigation of that scandal ultimately led to charges against several officials who had participated in dubious weapons sales to free hostages and fund a foreign militia. Even so, many officials claimed the independent counsel was unfairly targeting them for investigation. The Reagan administration took the unusual step of refusing to defend the constitutionality of the independent counsel system in the courts during the *Morrison* litigation, which took place against the backdrop of the Iran-Contra controversy.

The Case

Morrison v. Olson grew out of a separate dispute between Congress and the Reagan administration. On the advice of Department of Justice lawyers including Theodore "Ted" Olson, President Reagan ordered the head of the Environmental Protection Agency not to turn over documents to a congressional committee. The House Judiciary Committee subsequently launched an investigation into the administration's refusal to produce the documents. The committee issued a report that suggested Olson may have provided false testimony during this investigation. It sent the report to Attorney General Edwin Meese III, requesting that he start independent counsel investigations into the conduct of Olson and two other individuals. The Attorney General notified the special division that there were grounds to investigate Olson's conduct. The special division appointed attorney James McKay as independent counsel. When McKay later resigned, the special division replaced him with Alexia Morrison.

Morrison convened a grand jury. Grand juries hear evidence to determine whether criminal charges should be brought. She then subpoenaed Olson, among others, to appear and testify before the jury. Olson then filed a motion with the U.S. District Court for the District of Columbia challenging the subpoena on the grounds that the special counsel system violated the Constitution. The Court ruled against Olson and subsequently held him in contempt of court for refusing to testify. Olson appealed to the D.C. Circuit, which held the EGA's independent counsel provisions unconstitutional. Morrison then appealed to the Supreme Court of the United States, where she argued the case herself.

The Supreme Court's Ruling

Through his attorneys, Olson claimed that the independent counsel system violated the Constitution on several grounds. He argued that Congress could not give the judges of the special division the power to appoint Morrison because she was a principal officer and thus had to be appointed by the President and approved by the Senate. Even if she *was* an inferior officer, he argued it was improper for Congress to give a body in the judicial branch (the special division) the power to appoint a member of the executive branch (the independent counsel). He also claimed that the special division violated Article III because the role of the courts is to decide cases, rather than to investigate crimes before charges are brought (traditionally an executive role). Finally, he argued the EGA violated the principle of separation of powers by interfering with the President's powers to enforce the law and hire and fire executive officials.

The Supreme Court upheld the EGA's constitutionality by a 7–1 margin (recently appointed Justice Anthony Kennedy did not participate in the case). In an opinion by Chief Justice William Rehnquist, the Court ruled that Congress could empower judges to appoint independent counsel. Although the Constitution does not define the difference between principal and inferior officers, Rehnquist reasoned that Morrison was an inferior officer because she was subject to removal by the Attorney General, she could only perform limited duties, and her jurisdiction was restricted to the investigation of matters related to Olson's conduct. The Court also held that Congress could give judges the power to appoint executive officers where their roles were not "incongruous" (out of place) with the normal work of the courts. Morrison's work as an investigator and lawyer met this standard.

The Court also held that the special division complied with Article III. While the regular involvement of judges in investigations might exceed the judicial powers granted by that article, Rehnquist reasoned, the special division's involvement in the independent counsel's work was limited. The judges appointed counsel, defined her jurisdiction, and terminated the appointment when the investigation was complete, but they did not supervise her work and could not fire her if they did not approve of the investigation. Moreover, judges who served on the special division could not hear other matters, such as criminal trials, deriving from the investigation. The Court reasoned this limited involvement was unlikely to bring the courts' impartiality into question should Olson or others be prosecuted.

Finally, the Court held that the independent counsel system did not violate the separation of powers by unduly interfering with the President's ability to carry out the laws or remove executive officers. The Chief Justice noted that Congress was not trying to enhance its own powers through the EGA and, since the Appointments Clause authorizes Congress to allow courts to appoint inferior officers, this was not a case of judges assuming executive

powers, either. The executive branch also retained some control over investigations, since the Attorney General, who answers to the President, still had a limited ability to remove the independent counsel.

Justice Antonin Scalia wrote a lengthy dissenting opinion that emphasized the importance of separation of powers and the President's authority over the executive branch. Scalia advanced what is sometimes called the "unitary executive theory," the idea that the Constitution gives all federal executive power to the President and that neither Congress nor the courts can restrict this power as long as it does not violate some other part of the Constitution. He argued the Court's alternative approach amounted to an arbitrary judgment call that the independent counsel system did not interfere "too much" with the powers the Constitution had given to the President alone. Rejecting the Court's holding that Morrison was an inferior officer, Scalia argued that Congress did not have the power to allow judges to appoint her, nor the authority to restrict the President from firing her at will. He concluded with a warning that, because independent counsel were not accountable, their powers could easily be abused.

Aftermath and Legacy

Morrison ultimately concluded that while Olson's testimony to Congress was "misleading," he had not committed perjury or any other crime. Olson continued a successful career in law and politics, winning the landmark case *Bush v. Gore* (2000), which decided the contested 2000 presidential election, and serving as Solicitor General of the United States from 2001 to 2004.

The independent counsel system continued to generate controversy after *Morrison v. Olson*. Independent Counsel Kenneth Starr's investigation into President William and First Lady Hillary Clinton's Arkansas real estate dealings lasted several years and ultimately expanded to include revelations about the President's marital infidelity and allegations that he had lied under oath. Clinton was impeached by the House of Representatives, but acquitted by the Senate. The lengthy and costly investigation ultimately led members of both major political parties to turn against the use of independent counsel, and Congress declined to renew the system in 1999. Since that time, the Department of Justice has employed outside counsel, without the use of the special division or the "good cause" protections of EGA, to investigate allegations against senior officials.

Documents

Ronald Reagan, Statement on Signing the Independent Counsel Reauthorization Act of 1987, December 15, 1987

The EGA required Congress to reauthorize the use of independent counsel periodically. Congress passed a reauthorization bill in 1987, leaving President Reagan with the decision whether to sign the bill into law or veto it. Although his administration was then arguing against the constitutionality of independent counsel in Morrison*, Reagan signed the bill "to ensure that public confidence in government [would] not be eroded while the courts" decided the case.*

Like its predecessors, H.R. 2939, the Independent Counsel Reauthorization Act of 1987, raises constitutional issues of the most fundamental and enduring importance to the Government of the United States. During the years leading up to the original enactment of this statute, and thereafter, the Department of Justice has repeatedly expressed profound concern over the serious departures authorized by the act from separation of powers principles. The Congress has not heeded these concerns, apparently convinced that it is empowered to divest the President of his fundamental constitutional authority to enforce our nation's laws.…

I fully endorse the goal manifested in the Independent Counsel Act of ensuring public confidence in the impartiality and integrity of criminal law investigations of high-level executive branch officials. Indeed, despite constitutional misgivings, my administration has faithfully and consistently complied with all of the requirements of the act. Even as the constitutional issues grew more clear … we took extraordinary measures to protect against constitutional challenge the work of the more recently appointed independent counsel by offering each of them appointments in the Department of Justice.

Continuance of these independent counsel investigations was deemed important to public confidence in our government. Nevertheless, this goal, however sound, may not justify disregard for the carefully crafted restraints spelled out in the Constitution. An officer of the United States exercising executive authority in the core area of law enforcement necessarily, under our constitutional scheme, must be subject to executive branch appointment, review, and removal. There is no other constitutionally permissible alternative, and I regret that the Congress and the President have been unable to agree under that framework on a procedure to ensure impartial, forthright, and unimpeded criminal law investigations of high-level executive branch officials.

In view of the [l]ong-standing and continuing differences in the positions maintained by the executive and the legislative branches about the constitutionality of a statutory scheme providing for judicial appointment and supervision of officers exercising

executive power, I am gratified that the constitutional issues presented by the statute are now squarely before the United States Court of Appeals for the District of Columbia Circuit. We will continue to express our constitutional objections in that case as it moves through the courts.

Action on this bill, however, cannot await the resolution of that case. In order to ensure that public confidence in government not be eroded while the courts are in the process of deciding these questions, I am taking the extraordinary step of signing this bill despite my very strong doubts about its constitutionality.

Document Source: Ronald Reagan, Statement on Signing the Independent Counsel Reauthorization Act of 1987, December 15, 1987.

Oral Argument of Alexia Morrison in *Morrison v. Olson*, April 26, 1988

The following extracts from Morrison's oral argument before the Supreme Court highlight issues related to the special division's appointment of the independent counsel. Morrison sought to deemphasize the special division's role to undermine Olson's claim that the use of judges violated the separation of powers.

Alexia Morrison: … In the case before the Court here, the Special Division of the U.S. Court of Appeals actually adopted almost verbatim the jurisdictional recommendation made by the Attorney General in his report seeking an independent counsel to—

Justice Sandra Day O'Connor: But it wouldn't have to, isn't that right? Isn't there some flexibility there for the Special Division to determine its jurisdiction?

Alexia Morrison: Yes, Your Honor. Under the statute the court is given the information made available by the Attorney General, but is also empowered to define jurisdiction within the bounds established by that report.

Justice Sandra Day O'Connor: Doesn't that raise some separation of powers concerns? The extent to which the Special Division is given Executive Branch powers?

Alexia Morrison: We would suggest, Your Honor, that that is not an Executive Branch power in the sense that it is not a substantive part of the investigation conducted. The court plays no role in formulating the investigative plan ….

Justice Byron R. White: Does the Special Division determine when the job is over?

Alexia Morrison: There is a provision in the statute, Your Honor, which would allow … and this provision has not yet been used and indeed may never … the court having fashioned the appointment to say, My appointment authority has now been substantially completed, the independent counsel's task appears to me to be conducted.

Justice Byron R. White: How would they know that?

Alexia Morrison: The statute specifically provides that the court can do it on the recommendation of the Attorney General, or on its own if it were to come into possession of information.

Justice Byron R. White: As a matter of fact, do independent counsel regularly or at any time consult with the Special Division or members of the Special Division with respect to problems that may arise?

Alexia Morrison: Concerning the progress of the investigation, no, Your Honor. In this case we did re-approach the Special Division of the court to ask for jurisdiction that would encompass two additional individuals, and that request was denied. But in the ordinary course, Your Honor, removal under the statute occurs solely and exclusively at the hand of the Attorney General.… Pursuant to the statute, independent counsel are required to follow the established policies of the Department of Justice. Independent counsel are removable, albeit only for cause, but nonetheless are removable only by the Attorney General. As I indicated before, no independent counsel is subjected to direct or even indirect supervision by either the judicial or legislative branches.…

Chief Justice William H. Rehnquist: Well, Ms. Morrison, it certainly could be argued that the appointment of the prosecutor is ordinarily an Executive function, that it gives that to the judicial branch, don't you think?

Alexia Morrison: The identity of the prosecutor, yes, Your Honor. That is something that is given to the judicial branch, although that, it seems to us, recalls the Appointments Clause issue …. We would suggest that the specific provisions of the Appointments Clause, far from raising concerns of constitutional nature in this case, actually … speak to the constitutionality of the statute rather than against it. The Appointments Clause specifically delegates to Congress authority to make a determination where inferior officers are concerned as to whether or not their appointment properly belongs in the President alone, under the principal officer treatment requiring both President and Senate to participate, or in the department heads or the courts of law.

Chief Justice William H. Rehnquist: Yes, but our cases, I think, suggest it isn't just the Appointments Clause that is involved, but that you cannot assign to one branch certain functions that inherently belong to the other.

Alexia Morrison: That is correct, and we contend that none of that has happened here, Your Honor. That because the specific Appointments Clause question is addressed in the Constitution itself, and that Congress is given the discretion and authority to do what it has done in this legislation, that the appointment question is addressed specifically by the Constitution and therefore is not a problem, and that after that, the analysis applied by this Court in other cases involving law enforcement as an insulateable aspect of the Executive function, that those two concepts address the Separation of Powers concerns. Indeed, in Siebold this Court approved judicial appointment of clearly Executive officers performing clearly Executive functions. That case also provided approval for a statute that provided for no Executive or Presidential supervision or direction of the officers appointed by the court.

Justice Antonin Scalia: Those functions were not exclusively executive, were they?

Alexia Morrison: They may not have been, although even the dissent in that case, Your Honor, speaks about the weightiness of the nature of the Executive function, talking about how that statute went further than any statute to date at the time of the decision in Siebold [an 1879 Supreme Court case about election officials] in granting law enforcement or Executive functions.

Justice Antonin Scalia: Let me ask about your position on the Appointments Clause as far as the ability of judges to appoint officers. You wouldn't contend, I suppose, that judges can appoint officers in the military, or would you? Could Congress vest that in the judiciary?

Alexia Morrison: I think that would create more problems.

Justice Antonin Scalia: Why would it create more problems? I mean, the other side argues that that would create less problems because it seems much worse to have the courts appointing the people who are going to present cases to them, which they are supposed to judge impartially, than it would be for judges to appoint officers who are going to go off to fight a war that they have nothing to do with.

Alexia Morrison: But of course that contention, Your Honor, flies in the face of a long tradition of judicial appointment of attorneys to represent parties before them, and in those cases there is inherently the fact that the attorneys being appointed to handle matters that may well end up in that courthouse as litigated matters. The suggestion in the statute is that courts participating in the appointment cannot in any future way participate in review of any independent counsel prosecutions or cases that flow from the appointment, and so there is a greater insulation there than there would be even in the normal case of court appointment.…

Document Source: Oral Argument of Alexia Morrison in *Morrison v. Olson*, April 26, 1988, available online at SCOTUS Search [erroneously referring to Morrison as "Mr."].

Supreme Court of the United States, Opinion in *Morrison v. Olson*, June 29, 1988

The following excerpts from Chief Justice Rehnquist's majority opinion and Justice Scalia's dissenting opinion in Morrison *focus on the Article III and separation of powers issues related to the special division's appointment of independent counsel.*

[Olson] contend[s] that the [Appointments] Clause does not contemplate congressional authorization of "interbranch appointments," in which an officer of one branch is appointed by officers of another branch. The relevant language of the Appointments Clause is worth repeating. It reads: "… 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." On its face, the language of this "excepting clause" admits of no limitation on interbranch appointments. Indeed, the inclusion of "as they think proper" seems clearly to give Congress significant discretion to determine whether it is "proper" to vest the appointment of, for example, executive officials in the "courts of Law." …

We do not mean to say that Congress' power to provide for interbranch appointments of "inferior officers" is unlimited. In addition to separation-of-powers concerns, which would arise if such provisions for appointment had the potential to impair the constitutional functions assigned to one of the branches,… Congress' decision to vest the appointment power in the courts would be improper if there was some "incongruity" between the functions normally performed by the courts and the performance of their duty to appoint.… In this case, however, we do not think it impermissible for Congress to vest the power to appoint independent counsel in a specially created federal court. We thus disagree with the Court of Appeals' conclusion that there is an inherent incongruity about a court having the power to appoint prosecutorial officers.… Congress, of course, was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers. If it were to remove the appointing authority from the Executive Branch, the most logical place to put it was in the Judicial Branch.…

We have long recognized that by the express provision of Article III, the judicial power of the United States is limited to "Cases" and "Controversies." As a general rule, we have broadly stated that "executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution." The purpose of this limitation is to help ensure the independence of the Judicial Branch and to prevent the Judiciary from encroaching into areas reserved for the other branches. With this in mind, we address … the various duties given to the Special Division by the Act.

Most importantly, the Act vests in the Special Division the power to choose who will serve as independent counsel and the power to define his or her jurisdiction.… Appellees contend … that the Division's Appointments Clause powers do not encompass the power to define the independent counsel's jurisdiction. We disagree. In our view, Congress' power under the Clause to vest the "Appointment" of inferior officers in the courts may, in certain circumstances, allow Congress to give the courts some discretion in defining the nature and scope of the appointed official's authority. Particularly when, as here, Congress creates a temporary "office" the nature and duties of which will by necessity vary with the factual circumstances giving rise to the need for an appointment in the first place, it may vest the power to define the scope of the office in the court as an incident to the appointment of the officer pursuant to the Appointments Clause. This said, we do not think that Congress may give the Division *unlimited* discretion to determine the independent counsel's jurisdiction. In order for the Division's definition of the counsel's jurisdiction to be truly "incidental" to its power to appoint, the jurisdiction that the court decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case.…

The Act simply does not give the Division the power to "supervise" the independent counsel in the exercise of his or her investigative or prosecutorial authority. And, the functions that the Special Division is empowered to perform are not inherently "Executive"; indeed, they are directly analogous to functions that federal judges perform in other contexts, such as deciding whether to allow disclosure of matters occurring before a grand jury, deciding to extend a grand jury investigation, or awarding attorney's fees.…

[W]e [do not] believe, as [Olson] contend[s], that the Special Division's exercise of the various powers specifically granted to it under the Act poses any threat to the "impartial and independent federal adjudication of claims within the judicial power of the United States." We reach this conclusion for two reasons. First, the Act as it currently stands gives the Special Division itself no power to review any of the actions of the independent counsel or any of the actions of the Attorney General with regard to the counsel. Accordingly, there is no risk of partisan or biased adjudication of claims regarding the independent counsel by that court. Second, the Act prevents members of the Special Division from participating in "*any* judicial proceeding concerning a matter which involves such independent counsel while such independent counsel is serving in that office or which involves the exercise of such independent counsel's official duties, regardless of whether such independent counsel is still serving in that office." We think both the [Special Division] and its judges are sufficiently isolated by these statutory provisions from the review of the activities of the independent counsel so as to avoid any taint of the independence of the Judiciary such as would render the Act invalid under Article III.…

We observe … that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch. Unlike some of our previous cases, . . . this case simply does not pose a "dange[r] of congressional usurpation of Executive Branch functions." Indeed, with the exception of the power of impeachment—which applies to all officers of the United States—Congress retained for itself no powers of control or supervision over an independent counsel. The Act does empower certain Members of Congress to request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General has no duty to comply with the request, although he must respond within a certain time limit.…

Similarly, we do not think that the Act works any *judicial* usurpation of properly executive functions. As should be apparent from our discussion of the Appointments Clause above, the power to appoint inferior officers such as independent counsel is not in itself an "executive" function in the constitutional sense, at least when Congress has exercised its power to vest the appointment of an inferior office in the "courts of Law." We note nonetheless that under the Act the Special Division has no power to appoint an independent counsel *sua sponte*; it may only do so upon the specific request of the Attorney General, and the courts are specifically prevented from reviewing the Attorney General's decision not to seek appointment. In addition, once the court has appointed a counsel and defined his or her jurisdiction, it has no power to supervise or control the activities of the counsel.… The Act does give a federal court the power to review the Attorney General's decision to remove an independent counsel, but in our view this is a function that is well within the traditional power of the Judiciary.…

Document Source: *Morrison v. Olson*, 487 U.S. 654, 673, 675–79, 681, 683–84, 694–95 (1988) (citations omitted).

Justice Antonin Scalia, Dissenting Opinion in *Morrison v. Olson*, June 29, 1988

[T]his suit is about … [p]ower. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish—so that "a gradual concentration of the several powers in the same department," can effectively be resisted. Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.…

If to describe this case is not to decide it, the concept of a government of separate and coordinate powers no longer has meaning. The Court devotes most of its attention to such relatively technical details as the Appointments Clause and the removal power, addressing briefly and only at the end of its opinion the separation of powers.… I think that has it backwards.…

Article II, § 1, cl. 1, of the Constitution provides:

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

[T]his does not mean *some of* the executive power, but *all of* the executive power. It seems to me, therefore, that the decision of the Court of Appeals invalidating the present statute must be upheld on fundamental separation-of-powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power? Surprising to say, the Court appears to concede an affirmative answer to both questions, but seeks to avoid the inevitable conclusion that since the statute vests some purely executive power in a person who is not the President of the United States it is void.…

[I]t is ultimately irrelevant *how much* the statute reduces Presidential control. The case is over when the Court acknowledges, as it must, that "[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." … It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are.…

The Court has, nonetheless, replaced the clear constitutional prescription that the executive power belongs to the President with a "balancing test." What are the standards to determine how the balance is to be struck, that is, how much removal of Presidential power is too much? Many countries of the world get along with an executive that is much weaker than ours—in fact, entirely dependent upon the continued support of the legislature. Once we depart from the text of the Constitution, just where short of that do we stop? The most amazing feature of the Court's opinion is that it does not even purport to give an answer.… Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis. This is not only not the government of laws that the Constitution established; it is not a government of laws at all.…

Under our system of government, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise th[e] awesome discretion [as to whom to in-

vestigate and prosecute] are selected and can be removed by a President, whom the people have trusted enough to elect. Moreover, when crimes are not investigated and prosecuted fairly, nonselectively, with a reasonable sense of proportion, the President pays the cost in political damage to his administration.…

That is the system of justice the rest of us are entitled to, but what of that select class consisting of present or former high-level Executive Branch officials? … An independent counsel is selected, and the scope of his or her authority prescribed, by a panel of judges. What if they are politically partisan, as judges have been known to be, and select a prosecutor antagonistic to the administration, or even to the particular individual who has been selected for this special treatment? There is no remedy for that, not even a political one. Judges, after all, have life tenure, and appointing a surefire enthusiastic prosecutor could hardly be considered an impeachable offense. So if there is anything wrong with the selection, there is effectively no one to blame.…

How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile …. And to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment. How admirable the constitutional system that provides the means to avoid such a distortion. And how unfortunate the judicial decision that has permitted it.…

Document Source: *Morrison v. Olson*, 487 U.S. 654, 699, 703–04, 705, 708–09, 711–12, 728–30, 732 (1988) (citations omitted).

Carl Levin with assistance from Elise J. Bean, *Hofstra Law Review*, 1987

In this article, U.S. Senator Carl Levin (D-Michigan) defends the constitutionality of the independent counsel system just before the Supreme Court handed down its decision employing a similar logic in Morrison.

"[S]eparation of powers" is not an end in itself. The separation of powers among the branches is part of a larger constitutional principle favoring checks and balances. The three branches are given separate powers so that each serves as a check on the others. The ultimate goal is a constitutionally mandated balance of power among the principal actors in government, so that none dominates and assumes disproportionate control.

Critics of the independent counsel statute often charge that the law undermines the principle of separation of powers. They argue that the Constitution assigns the power to enforce the laws to the executive branch, that criminal prosecutions are an inherent part

of that enforcement power, and that it is therefore unconstitutional to assign prosecutorial responsibilities to an independent counsel, who is not appointed by and removable at the will of the President.

This constitutional argument is unpersuasive for several reasons. First, since the Constitution mandates maintaining checks and balances among the branches of government, it makes sense that the executive branch not exert absolute control over criminal prosecutions, particularly in the rare cases where its own top officials are alleged to have committed serious crimes. In such rare circumstances, the other branches may participate to ensure a fair and impartial investigation, authorizing a counsel with some independence from the chief executive to conduct proceedings. Such participation by the other branches serves as a check against the extreme case in which the executive branch might shield its top officials from prosecution, even where they deliberately flout the laws and judgments of Congress and the courts, committing serious crimes.

It is worth noting that, in creating the independent counsel system, Congress did not reserve a major role for itself or aggrandize the legislature at the expense of the other branches of government.…

The role assigned to the judiciary is also a limited one, though crucial to ensuring the integrity of the process. A special court, whose members are selected by the Chief Justice of the United States Supreme Court, is charged with appointing the persons who serve as independent counsels and defining the scope of their inquiries. By lodging this appointment power with a court of law, Congress relies directly on Article II, section 2 of the Constitution which states in pertinent part: "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."

Congress determined, correctly I believe, that the selection of the person to serve as independent counsel is key to ensuring the independence of the proceedings and is a decision which should be made by an impartial yet knowledgeable body, such as a court.…

The independent counsel statute serves two purpose and serves them well. It restores public confidence in our criminal justice system, severely shaken after the debacle of Watergate, and it further the Framers' goal of installing appropriate checks and balances within the federal government. The statute merits a permanent place in American law.

Document Source: Carl Levin with assistance from Elise J. Bean, "The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance," *Hofstra Law Review* 16 (1987): 18–19, 20, 22 (footnotes omitted).

Kenneth W. Starr, *Hastings Law Journal*, 2000

Former federal judge Kenneth Starr served as independent counsel investigating President and First Lady Clinton in the 1990s. In this excerpted speech, delivered shortly after the independent counsel system expired, Starr nonetheless criticized the system for embroiling the judiciary in the investigatory process.

[In creating the independent counsel system, some] called for presidential appointment subject to Senate Confirmation, as in Teapot Dome, but others proposed—for the first time in our nation's history—the power to appoint and to remove a special prosecutor being vested in the federal judiciary. This was another dimension of … Watergate's creation of a "volcano of change."

And this, it seems to me, spawned one of Watergate's less-observed but truly baleful effects: embroiling the federal judiciary, previously neutral, at least in theory and almost always in practice—in the ever-constant two-branch warfare between the Congress and the Executive. That is the nature of our system. But the Judiciary found itself embroiled in the politics of ethics, forcing upon the federal judiciary an operational role that tugged at the integrity and purity of the Article III function. Historically, the Judiciary's role in such matters was quite limited in form by a common sense operational rule of necessity, such as appointing interim United States Attorneys until the President, typically an incoming President, could select a permanent replacement. But the President enjoyed absolute power to remove any such interim United States Attorney.

The point is that the practice on the part of the federal judiciary in our history tended to be entirely ministerial, nonpolitical and quite uncontroversial …. But these post-Watergate initiatives represented an entirely different, very visible, and inevitably divisive and controversial task being thrust upon an unwelcoming judiciary.

It should be said that this role was seen as anathema by thoughtful and experienced federal judges. One great judge with whom I was privileged to serve, Gerhard Gesell …, lamented in the judicial literature that the idea of a court appointment of a special prosecutor was (and he understated this) "most unfortunate." These lamentations were seconded by none other than the soon-to-be-legendary Chief Judge in Washington, John Sirica. He wrote the Senate Judiciary Chairman that eight—that was virtually all—of his fellow judges shared his sense of hearty disapprobation: "Keep the judges out of the pig sty." …

Now, it may be said by the constitutional lawyers and scholars here that these self-interested plaintive views were misguided lamentations, as revealed by the ringing seven-to-one decision in *Morrison v. Olson*, upholding the statute's constitutionality … in the face of exactly … these kinds of submissions. Far be it for me to suggest that the Supreme Court could somehow have been wrong, and that Justice Scalia's lone voice in dissent—in

a masterpiece of judicial literature—could somehow have gotten it right. We know full well, as the late Robert Jackson taught us, that the Supreme Court is not final because it is infallible—to the contrary, it is infallible because it is final, and that is it.… And so *Morrison* stands, and Congress was thus allowed, in the late 1980s, to continue the post-Watergate experiment under the Ethics in Government Act for another—count them—eleven years.…

Congress wanted Executive Branch public integrity cases, or possible federal criminal wrongdoing more generally, to have a remarkable priority. That's a policy choice, but it's not an inevitable choice (it's certainly not a necessary choice), it's simply a choice that Congress made after Watergate. And it was a choice that, in my judgment, threatened the Founders' structure embodied in balanced government. That is, the Independent Counsel statute … undid the balance. Even though honest men and women of ability . . . were called upon to take this responsibility and worked diligently at it, the structural imbalance became, with the searing light of two controversial investigations of sitting Presidents, increasingly evident.…

Document Source: Kenneth W. Starr, "The Independent Counsel Act," *Hastings Law Journal* 51 (2000): 727–28, 729, 731–32 (footnotes omitted).

Case Note, *University of Cincinnati Law Review*, 1989

In this article, law student Laura L. Cox defends the Court's decision in Morrison *against Justice Scalia's argument that the independent counsel system violated the separation of powers. The Court, she argued, rightly balanced the concerns of separation against the equally important ideals of political accountability and checks and balances in the structure of government.…*

Justice Scalia's contention that the Act upheld in *Morrison* violated the principle of separation of powers, a fundamental structural component in the American system of government, ignored a second and equally important bulwark of our system, the concept of checks and balances. Neither of these concepts may exist in a vacuum if the system of government, crafted over two hundred years ago, is to remain viable and flexible in the face of the pressures placed upon it by our rapidly changing society. Although the independent counsel provisions of the Act stretch the separation of powers principle, perhaps to its outermost limits, this extension is justified by the necessity of assuring that investigation of alleged wrongdoing on the part of executive officials is conducted by an impartial mechanism that is independent of the executive's control. This method of prosecuting wrongdoing by executive officials maintains political accountability, while preserving the public's confidence in the integrity of our system.…

[I]n reacting to the Watergate scandal, Congress sought to provide the executive branch with a means of policing itself while preserving the appearance and the reality of political accountability.

The … approach followed by the Court in *Morrison* is appropriate in this situation because the value sought to be preserved by the Act, particularly by the independent counsel provisions, is the political accountability of high ranking executive officials. While the Court chose not to dwell on the necessity of the legislative structure designed by Congress, the means selected is clearly tailored to obtain this end.

Document Source: Laura L. Cox, Note, "Political Accountability and the Independent Counsel: A Sheep in Wolf's Clothing," *University of Cincinnati Law Review* 57 (1989): 1496, 1497–98 (footnotes omitted).

Cases that Shaped the Federal Courts

This series includes case summaries, discussion questions, and excerpted documents related to cases that had a major institutional impact on the federal courts. The cases address a range of political and legal issues including the types of controversies federal courts could hear, judicial independence, the scope and meaning of "the judicial power," remedies, judicial review, the relationship between federal judicial power and states' rights, and the ability of federal judges to perform work outside of the courtroom.

- *Hayburn's Case* (1792). Could Congress require the federal courts to perform non-judicial duties?
- *Chisholm v. Georgia* (1793). Could states be sued in federal court by individual citizens of another state?
- *Marbury v. Madison* (1803). Could federal courts invalidate laws made by Congress that violated the Constitution?
- *Fletcher v. Peck* (1810). Could federal courts strike down state laws that violated the U.S. Constitution?
- *United States v. Hudson and Goodwin* (1812). Did the federal courts have jurisdiction over crimes not defined by Congress?
- *Martin v. Hunter's Lessee* (1816). Were state courts bound to follow decisions issued by the Supreme Court of the United States?
- *Osborn v. Bank of the United States* (1824). Could Congress grant the Bank of the United States the right to sue and be sued in the federal courts?
- *American Insurance Co. v. Canter* (1828). Did the Constitution require Congress to give judges of territorial courts the same tenure and salary protections afforded to judges of federal courts located in the states?
- *Louisville, Cincinnati, and Charleston Rail-road Co. v. Letson* (1844). Should a corporation be considered a citizen of a state for purposes of federal jurisdiction?
- *Ableman v. Booth* (1859). Could state courts issue writs of habeas corpus against federal authorities?
- *Gordon v. United States* (1865). Could the Supreme Court hear an appeal from a federal court whose judgments were subject to revision by the executive branch?
- *Ex parte McCardle* (1869). Could Congress remove a pending appeal from the Supreme Court's jurisdiction?
- *Ex parte Young* (1908). Could a federal court stop a state official from enforcing an allegedly unconstitutional state law?
- *Moore v. Dempsey* (1923). How closely should federal courts review the fairness of state criminal trials on petitions for writs of habeas corpus?

- *Frothingham v. Mellon* (1923). Was being a taxpayer sufficient to give a plaintiff the right to challenge the constitutionality of a federal statute?
- *Crowell v. Benson* (1932). What standard should courts apply when reviewing the decisions of executive agencies?
- *Erie Railroad Co. v. Tompkins* (1938). What source of law were federal courts to use in cases where no statute applied and the parties were from different states?
- *Railroad Commission of Texas v. Pullman Co.* (1941). When should a federal court abstain from deciding a legal issue in order to allow a state court to resolve it?
- *Brown v. Allen* (1953). What procedures should federal courts use to evaluate the fairness of state trials in habeas corpus cases?
- *Monroe v. Pape* (1961). Did the Ku Klux Klan Act of 1871 permit lawsuits in federal court against police officers who violated the constitutional rights of suspects without authorization from the state?
- *Baker v. Carr* (1962). Could a federal court hear a constitutional challenge to a state's apportionment plan for the election of state legislators?
- *Glidden Co. v. Zdanok* (1962). Were the Court of Claims and the Court of Customs Appeals "constitutional courts" exercising judicial power, or "legislative courts" exercising powers of Congress?
- *United States v. Allocco* (1962). Were presidential recess appointments to the federal courts constitutional?
- *Walker v. City of Birmingham* (1967). Could civil rights protestors challenge the constitutionality of a state court injunction, having already been charged with contempt of court for violating the injunction?
- *Bivens v. Six Unknown Named Agents* (1971). Did the Fourth Amendment create an implied right to sue officials who conducted illegal searches and seizures?
- *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (1982). Did the Bankruptcy Reform Act of 1978 violate the Constitution by granting too much judicial power to bankruptcy judges?
- *Morrison v. Olson* (1988). Could Congress empower federal judges to appoint independent counsel investigating executive branch officials?
- *Mistretta v. United States* (1989). Could Congress create an independent judicial agency to guide courts in setting criminal sentences?
- *Lujan v. Defenders of Wildlife* (1992). Could an environmental organization sue the federal government to challenge a regulation regarding protected species?
- *City of Boerne v. Flores* (1997). Could Congress reverse the Supreme Court's interpretation of the Constitution through a statute purportedly enforcing the Fourteenth Amendment?