COMMENT

THE INDEPENDENT COUNSEL MESS

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To many contemporary commentators, the doctrine of separation of powers is a hoary non sequitur used to justify reactionary results. To the evident frustration of the critics, however, the Supreme Court has recently been quite solicitous of the original understanding on the way in which federal power is to be distributed. In the face of a chorus of calls for innovative legislative action to undo a supposed government paralysis or to reverse a perceived concentration of authority in the executive branch,1 the Supreme Court has generally stuck to its guns, consistently reminding the Congress and the nation that policy inconsistent with the structure of government mandated by the Constitution is impermissible. So, for example, the Justices made short work of the legislative veto2 and of the automatic budget sequestration provisions of Gramm-Rudman-Hollings.3 The principle of separation of powers, the Court explained in those cases, cannot yield to claimed gains in efficiency, for the constitutional rule that is subverted one day with the best intentions can just as easily be evaded the next day with the worst.4

Against this background, many observers were surprised by the Court's 7-1 vote last Term in Morrison v. Olson,5 which sustained the constitutionality of a key provision of the Ethics in Government Act.6

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1 For examples of the argument that the current model of separation of powers is itself outmoded, see C. Hardin, Presidential Power and Accountability: Toward a New Constitution (1974); Cutler, Political Parties and a Workable Government, in A Workable Government?: The Constitution After 200 Years 49 (B. Marshall ed. 1987); Cutler, To Form a Government, in Separation of Powers — Does It Still Work? 1 (R. Goldwin & A. Keufman eds. 1986); and Hardin, The Separation of Powers Needs Major Revision, in Separation of Powers — Does It Still Work?, cited above, at 90. See also W. Wilson, Congressional Government 253±85 (1885) (arguing that the Congress has too much power to check the executive branch).


4 See Chadha, 462 U.S. at 958±59 ("It is crystal clear . . . that the Framers ranked other values higher than efficiency."); Synar, 478 U.S. at 722 (stating that separation of powers must not be circumvented even though it "produces conflicts, confusion, and discordance").


That statute, passed in the heady days after Richard Nixon was toppled from office, permits judicial appointment of independent counsels, popularly known as special prosecutors, to investigate allegations of criminal wrongdoing in the executive branch, and, if necessary, to prosecute the wrongdoers.

The proclamation that the Congress may assign the prosecution of crime to an individual not under the control of any executive branch official may be no more than a sop tossed to advocates of a stronger Congress by a Supreme Court that has lately disdained their arguments. If it is a sop, however, it is a highly interesting one. For the method that the majority employed in *Morrison* is markedly different from the one that the Justices have recently used to decide separation of powers cases. To reach the result that they did, the Justices must have found an original understanding dramatically different from those they found in striking down other recent congressional assaults on presidential prerogative; or they must have mistakenly thought they had found one; or they must have not found one and not cared.

The first explanation is interesting if one wishes to debate constitutional history, but not otherwise. The second explanation might have some relevance in a discussion of the circumstances in which judicial error implies illegitimacy. The third possibility, however, ought to be enormously interesting to students of the separation of powers. For even as the critics have called the search for an original understanding on the structure of government a foolish one, the Court until now has seemed to understand what the critics evidently have not — that an originalist approach to questions about the structure of government might represent the key to legitimacy of the judicial function.

Consequently, if *Morrison* marks a move away from originalism and toward deference to the Congress in the resolution of separation of powers disputes, something important and in many ways troubling is plainly in the wind. The other tantalizing possibility is that in *Morrison* the originalist approach to separation of powers cases finally and inevitably came into conflict with the Court's other structural project, a project of longer standing: the legitimation and preservation of the independent agencies. Thus, far from signalling a change in direction, the decision to sustain the independent counsel provision of the Ethics in Government Act might herald the Supreme Court's resolution to stay the course as Court and Congress work together to build an administrative, managerial government independent of effective executive control. If so, the decision arguably does no more than maintain the status quo on the constitutionality of the independent agencies. That status quo, however, has always been an uneasy one, and if the Supreme Court, which has lately spent so much effort championing the original understanding in separation of powers cases,
ever applies its chosen analytical method to the burgeoning independent administrative state, the results might be surprising.

I.

The independent counsel provisions of the Ethics in Government Act might best be understood by trying to play the game that some hermeneutical approaches deny is possible — to imagine one's self within the minds of the members of the post-Watergate Congress, an enormously powerful institution, aided by the first elected post-Watergate President, Jimmy Carter, who had promised to give America a government it could be proud of again. In 1978, when the Act was adopted, Richard Nixon's resignation was but four years old, and his Administration's efforts to sabotage both the electoral process and the freedom to dissent were far from forgotten. On the contrary, in the years after President Nixon was driven from office, the malfeasance during his term assumed mythic proportions in the American political imagination. The rhetoric of the hour insisted that the Republic itself had ultimately been threatened by the conduct of the Nixon Administration — that, if not for a few hardy journalists and the President's foolishness in taping his own conversations, the system might have collapsed.

Faced with this folklore, the Congress girded itself somberly for the battle to control executive authority. (Actually, the battle had already been won: the system of balanced and separated powers had worked, and the President, under threat of impeachment, had resigned. But never mind.) The Congress decreed that such a threat to the survival of constitutional government must not occur again. The best way to preserve constitutional government, the Congress decided, was to protect it in the same way that threatened air and water and wildlife and wilderness are protected: through what are in essence regulatory statutes, although they regulate not electrical power or financial power but executive power. Beginning in the last part of the Nixon Administration, the Congress enacted a series of these statutes, including the War Powers Resolution of 1973, the constitutionality of which is still fiercely debated, the Federal Election Campaign Act amendments of 1974, much of which the Supreme Court

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subsequently struck down\textsuperscript{8} and the Presidential Recordings and Materials Preservation Act of 1974, which the Court sustained.\textsuperscript{9}

In 1978, evidently convinced that the abuses of Watergate would have been reined in and punished far sooner had they been independently investigated — not a bad hypothesis — the Congress adopted the Ethics in Government Act. Title VI of the Act requires the Attorney General of the United States, in certain clearly defined circumstances, to apply to a judicial panel known as the Special Division for the appointment of an independent counsel.\textsuperscript{10} The Act provides that the independent counsel, not the Attorney General, will be charged with investigating and prosecuting violations of federal law by executive branch employees. Because the statute tries to remove from the Attorney General any discretion in the matter once the statutory conditions are met, it is plainly designed to make the decision whether to apply for appointment of an independent counsel an essentially ministerial act. The Congress that passed the Act plainly contemplated, moreover, that the independent counsel would undertake her duties in the manner that the name implies — independently. Hence, the counsel was to be independent of the President’s control and, a fortiori, independent of the Attorney General’s control as well.

The premise of the Act is that the executive branch cannot be trusted to investigate allegations of criminality by its own high officials. And it is certainly true, as supporters of the independent counsel provision insist, that there always has been, and always will be, malfeasance by employees of the executive branch. It is also true that those with the power to do so always have been, and always will be, tempted to limit the political damage that any investigation might cause.

Under the approach to separation of powers questions that the Court has followed in recent years, however, such policy concerns as these are essentially irrelevant. The Supreme Court’s jurisprudence on separation of powers represents an admixture of two traditions. The first might be called the evolutionary tradition, for it holds that as the needs of the nation change over time, the Congress may guide the evolution of fresh institutional forms to meet these changing needs.

\textsuperscript{8} See Buckley v. Valeo, 424 U.S. 1 (1976).
\textsuperscript{10} The Act requires the Attorney General to investigate allegations “sufficient to constitute grounds” for suspicion that officials covered by the Act may have “committed a violation of any Federal criminal law” and to inform the Special Division of the results of the investigation. See 28 U.S.C. §§ 591(a), 592 (1982). If the Attorney General determines that there are “reasonable grounds to believe that further investigation or prosecution is warranted,” id. § 592(c)(1), then the Special Division “shall appoint an appropriate independent counsel and shall define that independent counsel’s prosecutorial jurisdiction,” id. § 593(b). The Special Division has no authority to appoint an independent counsel if the Attorney General does not request one. See id. § 592.
The second might be called the de-evolutionary tradition, for it holds that the constitutional scheme of balanced and separated powers should be used as a brake on efforts to alter the form of government that the Framers envisioned.11

Over the past decade or so, a rather strict originalist form of the de-evolutionary tradition has come to dominate the Court's separation of powers jurisprudence. Relying heavily on James Madison's notes of the Philadelphia Convention of 1787 (a less than ideal source, because they played no significant role in the debate over ratification of the Constitution, the process that transformed the document into fundamental law),12 the Court has tried to measure the federal government's deployment of its powers against what it has determined the views of the Founders to have been. So, for example, in rejecting the legislative veto in Immigration and Naturalization Service v. Chadha,13 the Justices concluded that "[t]here is no support in the Constitution" for the idea that the Congress or the President, for the sake of efficiency, are free to avoid "the cumbersomeness and delays often encountered in complying with explicit constitutional standards."14 In Buckley v. Valeo,15 which rejected provisions of the Federal Election Campaign Act amendments permitting the Congress itself to appoint some members of the Federal Election Commission, the Justices dismissed the idea that fears of presidential manipulation in the selection of those who ultimately would investigate allegations of improprieties in the President's election campaign should be allowed to alter the constitutional rules: "[S]uch fears, however rational, do not by themselves warrant a distortion of the Framers' work."16

The common theme running through these and other de-evolutionary decisions is that, whatever disagreements might exist over the appropriate interpretive method in other constitutional cases, there is only one correct method when the structure of the federal government is at issue: enforcing the Founders' shared vision of the way in which

11 I develop this model in detail in Carter, From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers, 1987 B.Y.U. L. REV. 719, 722-60 [hereinafter Carter, Separation of Powers]. When I wrote that article in the autumn of 1986, I was unaware that Geoffrey Miller was developing a similar paradigm. See Miller, Independent Agencies, 1986 SUP. CT. REV. 41, 52-58 (contrasting "pragmatic" and "neoclassical" approaches to separation of powers analysis). Although our analyses are quite different, we reach similar conclusions: Professor Miller believes that the neoclassical approach is the more sensible, and I believe the same of the de-evolutionary tradition. We also offer similar cautions. Compare id. at 54 ("These two approaches are distinguishable principally in terms of emphasis and nuance.") with Carter, supra, at 720 ("The important distinction between the traditions is one of emphasis.").
12 See infra note 21.
14 Id. at 959.
16 Id. at 134.
the federal government was to work. Claims of necessity, claims of
good policy, and claims of efficiency are not sufficient, under this
approach, to justify a new institutional form that runs afoul of the
system of balanced and separated powers that the Founders devised.
Consequently, careful readers of the Supreme Court's recent separation
of powers decisions would reasonably have expected the opinion in
Morrison v. Olson, whatever its conclusion, to reflect a painstaking
search through the notes of the Philadelphia Convention, the debates
over ratification, and other historical materials.

The Court, however, had a surprise in store. The surprise was
not that title VI was sustained, because, after all, without a study of
the history, it would not be easy to guess which way the history might
point. The surprise was that the majority opinion in Morrison, quite
unlike the Court's recent de-evolutionary analyses, treated the history
as virtually irrelevant, and in the end subordinated it to the very
policy concerns that earlier decisions had chosen to ignore. The in-
dependent counsel provision, the majority announced, is constitu-
tional, evidently because it does not transgress too far onto any specific
presidential power, and also because the Congress has determined that
independence is necessary to the prosecutor's function. A little con-
stitutional language, no constitutional history, a dash of deference,
and the case is done. None of this necessarily makes the decision
wrong, but all of it makes the opinion startling.

The independent counsel provisions of title VI were challenged on
several grounds. First, the appointment of the independent counsel
by the Special Division was said to violate the appointment clause of
article II,\(^{17}\) either because the counsel was a "principal" executive
officer whose appointment could not be delegated, or because execu-
tive officers could not in any case be appointed by the courts. Second,
the continuing supervision of the counsel by the Special Division was
said to violate the "case or controversy" requirement for judicial action
under article III.\(^ {18}\) Third, the cornerstone of the Act, the very inde-
pendence of the counsel from presidential control, was said to intrude
in a variety of ways on presidential prerogative, and, as a conse-
quence, to violate the separation of powers.

\(^{17}\) The appointment clause provides in relevant part:
[The President] shall nominate, and by and with the Advice and Consent of the Senate,
shall appoint . . . 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.
U.S. CONST. art. II, § 2, cl. 2.

\(^{18}\) The case or controversy requirement arises from the following language in article III: "The
judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution,
the Laws of the United States, and Treaties made, or which shall be made, under their Authority
. . . to Controversies to which the United States shall be a party . . . ." Id. art. III, § 2, cl. 1.
The challenges to the method of appointment were hardly frivolous, and Judge Silberman’s majority opinion when the case was before the District of Columbia Circuit found them compelling.\textsuperscript{19} Given the Supreme Court’s jurisprudence on the appointment power, however, the subjects of investigation who were the plaintiffs in \textit{Morrison} could not seriously have expected to prevail on them.\textsuperscript{20} In assessing the appointment power claim, Chief Justice Rehnquist’s majority opinion did discuss some of the history of the appointments clause (not of article III), but considered only the third-best evidence of the original understanding, Madison’s secret notes of the Convention.\textsuperscript{21} In the end, the Justices dismissed the assault on the appointment process in a passage as predictable as it was lengthy.\textsuperscript{22}

In rejecting the challenges to the supervisory authority of the Special Division, the majority chose an easy (and, as will be seen, troubling) way out. The Court construed the statute to deny the Special Division any supervisory role over the counsel “in the exercise of her investigative or prosecutorial authority.”\textsuperscript{23} The majority reached this construction notwithstanding its admission that the Special Division may select the counsel, define the counsel’s jurisdiction, alter that jurisdiction, refer additional matters to the counsel, decide

\textsuperscript{19} See \textit{In re Sealed Case}, 838 F.2d 476, 481–87 (D.C. Cir. 1988).

\textsuperscript{20} The Court has read the appointment clause to vest the Congress with enormous discretion in determining which branch or official will make appointments of “inferior” officers. See, e.g., \textit{Go-Bart Importing Co. v. United States}, 282 U.S. 344 (1931) (holding that the Congress may grant circuit courts the power to appoint United States commissioners); \textit{United States v. Eaton}, 169 U.S. 331 (1898) (holding that the Congress can confer power on the President to appoint vice consul); \textit{Ex parte Siebold}, 100 U.S. 371 (1880) (holding that the Congress enjoys discretion to confer on one department the power to appoint officers with duties in another).

\textsuperscript{21} The best evidence of the original understanding is a comprehensive review of the political science and practical concerns that motivated the Founders. See \textit{infra} pp. 124–25. The second-best evidence is a study of the ratification debates, including the pamphlets and newspapers available to the public. (Note that \textit{The Federalist} falls in the second category and is therefore better evidence than Madison’s notes.) On the unavailability of Madison’s notes to the ratifiers, see Hutson, \textit{The Creation of the Constitution: The Integrity of the Documentary Record}, 65 \textit{Tex. L. Rev.} 1, 2 (1986). On the significance of this unavailability to originalism, see Brest, \textit{The Misconceived Quest for the Original Understanding}, 60 B.U.L. Rev. 204, 214–17 (1980), and Dworkin, \textit{The Forum of Principle}, 56 N.Y.U. L. Rev. 469, 482–88 (1981). Too heavy a reliance on Madison’s notes causes other problems as well. One recent study of Madison’s notes concluded that it is unlikely that he recorded more than a fraction of what was actually said. See Hutson, \textit{supra}, at 34. It is too often forgotten by present-day readers, moreover, that Madison’s notes were his private diaries, not the official minutes. He was under no obligation to give a full sense of the deliberations of the Convention, and it makes no sense to assume that he did so simply because his diaries have survived.

\textsuperscript{22} See 108 S. Ct. at 2608–16. The Court did not discuss the suggestion by the court of appeals that the “inferior Officer” language is a staffing clause and refers to the appointment of officers who are subordinate to the individual doing the appointing. See \textit{In re Sealed Case}, 838 F.2d at 490–96. Justice Scalia, dissenting in \textit{Morrison}, echoed the lower court’s theme. See 108 S. Ct. at 2631–35 (Scalia, J., dissenting).

\textsuperscript{23} 108 S. Ct. at 2613.
what to do with the counsel's reports, and decide when the counsel's task is "so substantially completed" that the counsel should be discharged.24

The challenges to title VI on the ground that it interferes with executive authority could not be so easily dismissed, and the arguments that the majority selected suggest a considerable struggle to find a way of evading them. Even as it sustained title VI, the Court seemed to acknowledge by the very awkwardness of its arguments that the constitutional difficulties raised by the independent counsel provision are substantial. Chief among the problems is this: article II vests the executive power in the President, and it was assumed on all sides that the investigative and prosecutorial powers exercised by the independent counsel are entirely executive in nature.25 If one who indulges the de-evolutionary approach accepts that assumption, then no matter who appoints the prosecutors there is at least a colorable case to be made that the President is constitutionally entitled to control them.26

But the President cannot supervise the independent counsel. In fact, the Ethics in Government Act by its terms and its purpose creates a class of prosecutors who, despite being granted the same investigative and prosecutorial authority possessed by the Attorney General, are not under the control of any elected official.27 Nothing about the Act could be plainer. For in spite of the Morrison majority's analytical shenanigans that seem designed to raise doubt about who controls the counsel, it is ultimately to the Special Division — the judicial panel

24 See id. at 2612–14.
25 Whether this should have been so readily conceded is another matter. See infra pp. 125–27.
26 There is an important sense in which the President always retains an ultimate check on federal prosecutors, because he has the apparently unreviewable discretion to issue pardons. But for most federal officials charged with wrongdoing, a prison sentence or a formal record of conviction will be only a very small part of the problem of being prosecuted. There is the public disgrace, the emotional energy that is spent in worry, in defense, and perhaps even in contrition, and there is the permanent blot — whether formal or not — on one's reputation. None of these are cured by a pardon. A pardon prior to prosecution might make matters worse, should the public assume that the official would never have accepted a pardon in the absence of something to hide. Consequently, the President might argue that because he is forced to use it as the only means for controlling the prosecutor, the independent counsel provision raises the political cost of exercising the pardon power and therefore burdens that power impermissibly. But a Court unprepared to hold unconstitutional the direct burden that title VI places on an implied but conceded power could hardly be expected to hold unconstitutional the indirect burden that it might conceivably place on an enumerated power.
27 For Alexander Bickel, considering the matter at the height of the controversy over President Nixon's dismissal of Special Prosecutor Archibald Cox, this was the basic argument against an independent special prosecutor: "I think the real problem is that if you try to set him up independently by judicial appointment he is answerable to no one. He is not responsible to anyone within the whole scheme of American government." Bickel, Alexander M. Bickel on the Special Prosecutor, Yale L. Rep., Winter 1974, at 24.
that makes the appointment — and not to the Attorney General or to any other executive functionary that the independent counsel answers, if, indeed, the counsel answers to anyone. It is difficult to accept that the Justices were unable to grasp this, for a moment's thought will reveal that no other view makes sense: the Congress would hardly go to all the trouble of setting up the independent counsel mechanism if the individual occupying the office is to be considered just another executive appointee in the chain of command that ultimately reaches the President. And there is some experience to support this proposition. The special panel that appoints the independent counselors has frequently issued orders to them, but the Attorney General has never dared try.28

In Morrison, however, the Justices seemed unwilling to concede that the Attorney General — and therefore the President — lacks all effective ability to control the independent counsel. The Act, the majority explained, merely "reduces the amount of control or supervision" that the President and the Attorney General may exercise.29 As evidence of the President's continuing supervisory authority, the Court pointed out that the independent counsel may be removed for good cause and that no judicial review is available of the Attorney General's decision to decline to ask the Special Division for appointment in the first place.30

This argument is in some tension with earlier separation of powers cases suggesting that the ability of the Congress to limit the President's removal power to "good cause" situations was a legislative check on executive discretion, not an affirmative grant of authority to the President.31 The general understanding of those cases has long been that they meant what they said — that the Congress had the authority to limit presidential power to remove officials in agencies constituted outside the executive branch.32 Consequently, the Morrison majority

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28 For a discussion of the orders issued to independent counsels by the Special Division, see In re Sealed Case, 838 F.2d 476, 513–14 (D.C. Cir. 1988). The Morrison majority strongly suggests that orders on such matters as exemption from conflict of interest rules are beyond the statutory mandate, and perhaps beyond the limits of the judicial power, because they involve neither an appointment nor the resolution of a case or controversy. See 108 S. Ct. at 2615. Even if the Special Division cannot issue orders to the independent counsel, however, it is somewhat disingenuous for the Court to suggest that the President can control the independent counsel through his ability to ensure that she performs her statutory duty. One need only imagine the political firestorm that would follow the receipt of a letter from the President to the independent counsel threatening dismissal unless she ceases her investigation into area X which, the President says, is not covered by her mandate or is beyond her statutory duty.

29 See 108 S. Ct. at 2621.

30 See id. at 2621.

31 See infra notes 78–85 and accompanying text.

32 See, e.g., Miller, supra note 11, at 90–96; Sargentich, The Contemporary Debate About Legislative-Executive Separation of Powers, 72 CORNELL L. REV. 430, 460–64 (1987); Strauss,
faced the need to explain how a prosecutor — assumed on all sides to be within the executive branch — could nevertheless be exempt from removal by the President. In response to the logical claim that the Congress may not interfere with the President’s control over his subordinates in carrying out “core executive functions,” the majority offered the following analysis:

[O]ur present considered view is that the determination of whether the Constitution allows Congress to impose a “good cause”-type restriction on the President’s power to remove an official cannot be made to turn on whether or not that official is classified as “purely executive.” The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President’s exercise of the “executive power” and his constitutionally appointed duty to “take care that the laws be faithfully executed” under Article II.33

The Justices added:

We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.34

True to their words, the Justices proceeded to analyze the functions of the independent counsel and concluded that “because the independent counsel may be terminated for ‘good cause,’ the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing her statutory responsibilities in a manner that comports with the provisions of the Act.”35 Consequently, the opinion concluded, the removal restriction does not “sufficiently deprive[] the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.”36

The only sensible construction that can be placed upon this bizarre argument is that the President’s supervisory responsibilities over subordinate executive branch employees arise not from the clause of

33 108 S. Ct. at 2618 (citation omitted).
34 Id. at 2619.
35 Id.
36 Id. at 2620.
article II vesting the executive power in the President\textsuperscript{37} — the obvious place to look for it — but from the clause stating that the President "shall take Care that the Laws be faithfully executed."\textsuperscript{38} Whether one believes that the "take care" clause was intended as a limitation of executive authority or as a grant, this much of the argument is at least plausible. But because the test of presidential control is whether the President is able to ensure that the counsel is performing "competently" and "in a manner that comports with the provisions of the Act," the Court must be conceiving the President's supervisory authority under the "take care" clause as purely ministerial in nature. Thus, the only constitutional "control" that the President is able to exercise free from congressional restraint is the control that the Congress is least likely to restrain: taking care that all executive employees are doing what the Congress requires of them.\textsuperscript{39}

A rule of that nature wreaks havoc upon the system of checks and balances inherent in the separation of powers.\textsuperscript{40} The President loses the traditional executive discretion in the execution of law, which has included the discretion not to enforce the law if, in the executive's judgment, the law is unjust or oppressive, either in general or in a particular case.\textsuperscript{41} The President loses the independent will that the

\textsuperscript{37} See U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."). As Justice Scalia pointed out in his dissent in Morrison, see 108 S. Ct. at 2623 (Scalia, J., dissenting), the executive power is granted in terms far less equivocal than those of the article I grant of legislative power, which reads: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U.S. CONST. art. I, § 1. Among the many ways of accounting for this discrepancy is the conclusion that the phrase "executive power," unlike the phrase "legislative power," is meant to subsume implied as well as express authority.

\textsuperscript{38} U.S. CONST. art. II, § 3, cl. 4.

\textsuperscript{39} This is not to deny the general proposition that executive employees are bound to follow the law. The question, rather, is whether presidential authority over them can be limited to supervising their performance of a set of congressionally mandated ministerial duties.

\textsuperscript{40} As M.J.C. Vile has pointed out, the doctrines of a "pure" separation of powers and of a system of checks and balances "are not merely logically distinct, but to a considerable extent they conflict with each other." M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 33 (1967); see also G. WILLS, EXPLAINING AMERICA: THE FEDERALIST PAPERS 119 (1981) (concluding that the notions are "at odds" with one another). It is possible, however, to develop an admixture of separation of powers and checks and balances — what I call the system of balanced and separated powers — and this is what the Founders did when designing the structure of the federal government. See Carter, Separation of Powers, supra note 11, at 771–78.

\textsuperscript{41} The rule is well established in American constitutional jurisprudence that, absent a violation of an independent constitutional right, the executive holds the unreviewable authority to decide whether to prosecute. See, e.g., Wayte v. United States, 470 U.S. 598 (1985); Bordenkircher v. Hayes, 434 U.S. 357 (1978); The Confiscation Cases, 74 U.S. (7 Wall.) 454 (1869); cf. United States v. Cox, 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965) (suggesting that neither judge nor grand jury can force the government to prosecute or even to sign an indictment). The courts have interpreted the arguably mandatory language of the Ethics in Government Act itself to preserve a scintilla of this discretion: the Attorney General's discretion.
Founders had in mind when they called for an executive with greater energy. Instead, the President is reduced to a sort of minion of the Congress, an elected auditor whose task is to fire those employees who fail to carry out their duties in the way that the Congress commands.

The most surprising aspect of the *Morrison* decision is not, however, the Court's conclusion on the nature of presidential authority, but the fact that the conclusion was reached without significant reference to the original understanding that has guided so many important separation of powers decisions in recent years. The reason that the Justices chose not to debate the history cannot be that the records are thin, because they are voluminous, and their significance is the subject of lively debate. Unfortunately, without the guidance of that history, there is no way (at least, no de-evolutionary way) of assessing the propriety of the majority's implicit disdain for the claims that the President's duties include supervising every employee of the executive branch, and that the supervisory function is frustrated if an employee cannot be dismissed for disobeying the President's command — claims that form the basis of the argument that the counsel's independence violates the separation of powers.

What, then, can one make of the analysis in *Morrison*? One possibility is that the Justices have simply abandoned the de-evolutionary tradition in separation of powers jurisprudence, and have decided to allow congressional judgments about necessity to dominate the Founders' vision. Yet so extraordinary a development would surely find hints and precursors in other recent opinions, and there simply are none to be found.

If, however, the majority's approach in *Morrison* stands in the de-evolutionary tradition of recent years, then it is de-evolutionary analysis of a peculiar sort, because Chief Justice Rehnquist's opinion gave no sense of appreciating the flavor of the Constitution as a whole, the political science of the Founding Era, or the rich and dynamic interplay of one section of the document with another. So unimaginative an approach poses the risk that *Morrison* might be read to enshrine not to seek a prosecutor or not to investigate a charge against an executive official in the first place has been held not subject to judicial review. *See*, e.g., *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986); *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984). The Supreme Court in *Morrison* cited this unreviewable discretion not to appoint as evidence that the President can "control" the independent counsel, *see* 108 S. Ct. at 2621, but the problem is that once the appointment is made, the executive branch has no further say in the counsel's performance of her quintessentially executive function.


as the law of the land Charles Black’s fanciful rumination that the
plain text of the Constitution sets out only four or five significant
presidential powers: the power (or duty) to receive ambassadors, the
power (or duty) to take care that the laws be faithfully executed, the
commander-in-chief power, the veto power, and the pardoning
power. \(^4\) And to a Congress minded to limit them, Professor Black
suggests, the commander-in-chief power and the veto power are not
particularly important. \(^5\) Thus, he concludes, “[o]n paper, and as a
matter of irreducible minimum, the presidency is an office of very
little uncontrollable power.” \(^6\) The Congress, on the other hand, has
in its power “just about everything.” \(^7\)

The Chief Executive described by Professor Black is effectively a
creature of the Congress, rather than a representative of the states (or
the people) meant to balance what might otherwise be a runaway
legislature. So hapless a President is certainly not what the American
political system has come to expect, and so weak an office does not
bear much resemblance to what the Founders thought that they were
creating. Yet it seems a perfectly sensible way of reading Morrison
to conclude that the Congress has the authority to reduce the President
to precisely that, through the simple device of making presidential
“subordinates” independent of presidential control.

That reading of Morrison may not be quite what the Justices had
in mind. The Court may have supposed that it was preserving a
strong executive in the general case, but that the President’s preroga-
tive had to yield in this specific matter, because the Congress had
determined that independence of the counsel was vital to the operation
of the Ethics in Government Act. If this was what the Justices had
in mind, then although the opinion might have been poorly drafted,
it stands in an established constitutional tradition. The trouble is that
it is a tradition that may rest on sand. This tradition holds that when
the Congress decides that independence is necessary for an agency to
do its job, even a job partly executive, it may insulate the agency
from presidential control. This is the tradition that undergirds the
modern administrative state, but it has never been adequately justified
by the Court as a matter of constitutional law. In a constitutional
world in which the Justices understand the link between legitimacy
and originalism in separation of powers disputes, a constitutional
reeexamination of the tradition of independent administrative govern-
ment is long overdue. Before sketching the outline of such a reex-
amination, however, it is useful to pause and consider a bit of theory.

\(^4\) See Black, The Working Balance of the American Political Departments, 1 Hastings
\(^5\) See id.
\(^6\) Id. at 20.
\(^7\) Id. at 15.
II.

Morrison v. Olson is a paradoxical decision only to the enthusiast of the de-evolutionary originalism that has dominated the Supreme Court's recent separation of powers jurisprudence. The curious aspect of originalism, however, is that its principal enthusiasts are the Justices themselves. Among constitutional theorists, originalism holds roughly the status of Lysenkoism among geneticists: a silly idea no longer worth the energy required to refute it. Besides, volumes and volumes have already been written about the impracticality, impossibility, or immorality of originalism in most of its forms.48

As Philip Soper has pointed out, however, "[c]ountless judicial opinions line the shelves of countless professional libraries mutely attesting to the irrelevance of legal theory by their utter disregard for this body of scholarship."49 Thus it should not be particularly surprising that the Justices of the Supreme Court seem blissfully unaware of, or perhaps merely unimpressed by, the stinging and often cogent criticisms of originalism in its various guises. True, the critics dismiss what the Justices are doing as reactionary, pointless, or simply crazy, but there may be method to the Court's apparent madness. It is worth taking a moment to consider whether there might be a sensible theoretical reason for the Justices to cling to their much-maligned vision of the way constitutional interpretation ought to take place, because, if there is, then Morrison's method might turn out to be as troubling as it is startling.

Consider, first, the possibility that we have a multitude of Constitutions, for the Constitution of the United States is many documents, and not all of these documents serve the same purpose. One of the many lines along which the Constitution might be sliced is this one: some clauses relate to rights of individuals within the system of government, and others relate to the structure of the system itself. The individual rights clauses are usually written in the glowing and evocative terms of moral appeal, and, taken together, might be called our Natural Law Constitution. The structural clauses, which constitute what might be called our Political Constitution, are relatively dry and relatively concrete. The individual rights clauses, when considered as ordinary language, seem to deny by their very words the possibility that they have very specific referents. The structural clauses, on the other hand, carry with them the suggestion that the authors had in mind a very specific vision of the system under construction.50

50 I make no claim that the structural clauses are determinate in the sense that they require
It is a mistake to assume that the Political Constitution and the Natural Rights Constitution, with their different emphases and different forms of language, ought necessarily to be subjected to the same rules for interpretation. Every act of interpretation is an act undertaken for a specific purpose, and the purpose of the interpretation generates the question that the interpreter ought to ask. The error of conflating interpretation under the Political and Natural Law Constitutions arises from the assumption that the interpretations share a common purpose, usually captured in the word "adjudication." But although it is true that the happenstance of adjudication occasions judicial interpretation, it is not correct to call adjudication the purpose. To do so takes too narrow a view of the role that the Founding Generation and the Constitution itself play in American political iconography.

Constitutional interpretation is (or ought to be) a narrative activity. When the courts announce what the Constitution means, they are doing more than adjudicating; they are adding chapters to a story, not entirely of their own making, of the American people and their place in history. For the Constitution, at its heart, is not a document but a continuing saga — the saga of We, the People of the United States, in whose name the document speaks. The story provides us with continuity, by linking our world to the world that has gone before; and it provides us with immortality, by linking our world to the world that is yet to come. It is not a story told by the judges alone, or by the historians, or by the politicians; it is also a constitutional story that we — We, the People — tell about ourselves.

The recent battle over the nomination of Robert Bork to the Supreme Court suggests a widespread public cynicism about adjudication under the Natural Rights Constitution. The public sense seems to be that individual rights are more or less historical accidents, controlled entirely by the biases of the people who happen to sit as Justices at a given moment in time — a sense that helps to explain the proprietary interest people take in the particular balance of votes

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52 But cf. J. ELY, DEMOCRACY AND DISTRUST 41 n.* (1980) (arguing that “the Constitution is not divided into two sets of provisions, precise and open-ended”); Brest, supra note 21, at 237 n.124 (making a similar argument).

that a new appointment might bring. In the face of this public cynicism, and of the invitation evident in the words of the Natural Law Constitution, it is not easy to propose with confidence a "best" interpretive rule, and those who do — and there are many — do so at considerable intellectual and political peril.

What the Supreme Court apparently recognizes in its separation of powers jurisprudence, however, is that adjudication under the Political Constitution requires more concrete rules for interpretation to match the Political Constitution's quite different status. The Political Constitution, which is basically the work of the Founding Generation, plays a central role in our political iconography, because that is where the myths are. Many years ago, Mad Magazine satirized Disneyland's Frontierland as embodying "true tales made up from the legendary past" — which is as good a definition as there is of popular history, and as good a description as there is of the popular attitude toward the Founders.

In American political iconography, the Founders are the larger-than-life figures who cast off the shackles of taxation without representation and founded the most successful and stable and just government that the world has ever known. The link between the government that they founded and the one that we have provides us with a continuity in nationhood that places us — We, the People — within the great sweep of the nation's history. We are the same We, the People, who ordained the Constitution, and we live in the same nation that the Founders created precisely because we retain the form of government that they gave us: "They were the Founders who laid down the rules; we are the inheritors who follow the rules that the Founders laid down." If there really is in the American political system any functional equivalent of the consent of the governed, whether actual or tacit, then surely it arises from the role that our myths about the Founding play in the popular attitude about American government. If political obligation is willed at all, it is surely willed against the background of that mythology. In our political iconography, as Sanford Levinson has pointed out, the Philadelphia Convention "is most certainly, and profoundly, an event in addition to a text." Whether treated as text or event, however, "'Philadelphia' itself gains meaning only from being placed within a narrative structure, itself of civil religious dimension." The public may not know what is in the Constitution, and in a sense may not even care, but the people evidently believe that

54 Carter, Separation of Powers, supra note 11, at 792. I discuss this model of public regard in more detail in S. Carter, The Republican Vision of the Demos (work in progress).
55 S. LEVINSON, supra note 52, at 134.
56 Id.
their government, the Republic to which schoolchildren pledge daily allegiance, is in its fundamental structure the one that the Founders designed. It matters little whether the people are right or wrong to assume that the structure of our government has been handed on to us by past generations substantially continuous with our own; it matters still less whether historians or legal scholars or judges think that they know better; for the beginning of legitimacy is the ruler's recognition that the people need not be smart in order to matter.

A judge who is concerned about the legitimacy of the government, and about the legitimacy of the judicial function, which is prescribed in the same Political Constitution that establishes the other branches, will obviously be cautious in permitting the evolution of new institutional forms not contemplated in the system of checks and balances that the Founders set forth. If the judge accepts the notion that much of the public respect for government and for law rests on the supposition that the government operates in accordance with the rules handed down by the Founding Generation, it would be logical for her to decide that the government must play by the rules under which the public supposes that the game is played. Otherwise — so the judge might reason — a massive and unjust fraud is being perpetrated on the citizenry. Indeed, although popular uprising over constitutional interpretation is not a prospect, the judge who understands the popular vision might seriously consider whether such a fraud puts the legitimacy of the government in hazard. If the rules of the game are not the ones devised by the Founders, then there really may be no practical sense in which the federal government, in all its institutional complexity, enjoys the consent of the governed. Thus the judge could sensibly conclude that the ideal theory of interpretation is one that encourages the search for the vision shared by the Founders on the fundamental rules that would control the structure of the government.

This reasoning might explain how the Justices could end up where they were before Morisset: insisting on a form of originalism in cases arising under the Political Constitution, and applying other interpretive rules, sometimes radically inconsistent ones, in cases arising under the Natural Rights Constitution. The Justices might well believe that originalism in structural cases is the key to legitimacy — including

57 The government that must play by the structural rules includes the judicial branch because, as Chief Justice Marshall reminded, the Founders designed the Constitution "as a rule for the government of courts, as well as of the legislature." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803). Even the most dedicated anti-originalists generally base their "proofs" of judicial review on textual and originalist arguments, that is, on the de-evolutionary tradition.

the legitimacy of the judicial freedom to exercise greater discretion in interpretation of the Natural Law Constitution. The originalist project of rendering the Political Constitution relatively concrete might then be viewed as a pragmatic choice as well as one dictated by theory. Nevertheless, if the Court has indeed embarked on such a project (Morrison notwithstanding), it is obviously important to consider the limitations of the method.

The choice to pursue and enforce the original understanding privileges one set of values over another; there is nothing "objective" about the selection. Nor can originalism do all that some of its most ardent advocates may pretend. In fact, intentionalism — the form of originalism that asks what the original authors intended to accomplish — has been shown to be very nearly impossible. The intentionalist, looking at Morrison, would want to know precisely what rule the authors of the Constitution thought they were embodying on the subject of presidential control of executive department employees — or, better yet, of prosecutors. But that question may have no sensible answer. Consider the arguments arrayed against intentionalism in interpreting the 1787 Constitution: an observer in our age is not capable of entering the mind of an actor in an earlier age and, as a consequence, cannot possibly tell what was in the earlier actor's mind; or, if it is possible to tell what was in the actor's mind, we emphasize the wrong source, Madison's secret diary of the Convention, even though the Constitution gained its force of law from ratification, not drafting, and Madison's notes were unavailable to the ratifiers; or, if we use the records of the ratification debates, we find them generally obscure; or, if not obscure, the records of the ratification debates are unreliable; or, if reliable, the records suggest that the Founders themselves did not consider intentionalism to be the proper method of interpretation; or, if the Founders did think

59 Objectivity in constitutional interpretation is not a fact but a hope, an effort to discipline the interpretive act by providing a standard against which the interpretation can be measured. See Bennett, Objectivity in Constitutional Law, 132 U. Pa. L. Rev. 445 (1984); Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739 (1982) [hereinafter Fiss, Objectivity and Interpretation]. A rule can constrain interpretation, in the sense of providing a standard for measurement, as long as the rule is relatively clear and is applied within a community sharing conversational assumptions. The rule "do what the Founders said to do" is therefore no more objective in the sense of providing constraint than the rule "do what redistributes the greatest wealth." Each is capable of reasonably dispassionate application by a judge who acts in good faith. See Carter, Separation of Powers, supra note 11, at 781-82. Consequently, the choice among possible rules must be based on something other than the claim that one of them produces "objective" results.

60 See Brest, supra note 21, at 218-22; Powell, Rules for Originalists, 73 Va. L. Rev. 659, 668-78 (1987).

61 See supra note 21.

62 See Powell, supra note 60, at 688-91.

63 See Hutson, supra note 21, at 13-24; Powell, supra note 60, at 681-82.

64 See Clinton, Original Understanding, Legal Realism, and the Interpretation of "This
intentionalism to be the proper method, the tools of public choice theory show that they did not construct their votes in a way that revealed their intentions.\(^6\)

Intentionalism, moreover, reflects the well-known trap of scientism.\(^6\) Intentionalists hope to describe history with the sort of certainty that natural scientists bring to the task of describing the physical world. The effort to make historical materials do what they are not capable of doing leads to the presentation of some very poor history as originalist argument.\(^6\) The fact that the Supreme Court sometimes seems to seek intentionalist answers has led any number of scholars into the equally well-known trap of "law office history" — of stating highly specific historical conclusions on the basis of sketchy and imprecise historical evidence.\(^6\) Many very fine thinkers have stumbled into this trap, thereby running afoul of one of the best of H. Jefferson Powell's "rules for originalists": "Consensus or even broad agreement among the founders is a historical assertion to be justified, not assumed."\(^6\)

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\(^{65}\) William Riker, for example, has argued that because of the existence of voting cycles, the Convention's decision on how the President would be selected does not necessarily reflect the true preferences of the delegates. See Riker, The Heresthetics of Constitution-Making: The Presidency in 1787, with Comments on Determinism and Rational Choice, 78 Am. Pol. Sci. Rev. 1 (1984).


\(^{68}\) The phrase "law office history" was coined by Alfred H. Kelly. See Kelly, Clio and the Court: An Illicit Love Affair, 1965 Sup. Ct. Rev. 119, 122.

\(^{69}\) Powell, supra note 60, at 684; cf. A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 102 (1962) ("[T]o seek in historical materials relevant to the framing of the Constitution, or in the language of the Constitution itself, specific answers to specific present problems is to ask the wrong questions.").

A good example of this error is the prevailing wisdom among many writers on the war power that the Founders, when they decided at Philadelphia to bestow on the Congress the power to "declare" war rather than the power to "make" it, did so solely and simply in order to leave the President free to respond to "sudden attacks." Some very accomplished scholars have read the history this way. See, e.g., L. Fisher, Constitutional Dialogues 82 (1988); R. Turner, The War Powers Resolution: Its Implementation in Theory and Practice 17 (1983). The conclusion rests entirely on the following sentence from Madison's notes: "Mr. M[adison] and Mr. G[erry] moved to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks." 2 The Records of the Federal Convention
Similarly, a Supreme Court interested in discerning the original understanding on separation of powers issues would make a grave error (and perhaps has occasionally made one) by insisting in an intentionalist way on evidence of what the Founders thought the answer was. There is more to originalism than intentionalism. Originalism means many things to many people, and this is not the place to catalogue all the possibilities. Suffice it to say that the de-evolutionary project of using originalism as a tool of legitimacy requires more historical evidence than often satisfies the intentionalist, but at the same time requires considerably less certainty and precision. The task is to ensure that the fundamental value choices made by the Founders in devising the system of balanced and separated power continue to guide the structure of the federal government. Thus the de-evolutionary project requires an answer not to the question “Did the Founders intend that the President control all executive officers or not?” but to the quite different question “Is independence of this kind consistent with the values underlying the scheme of balanced and separated powers or not?” If the second question accurately captures what the Justices have been doing, then they may have discovered something important.

Although this de-evolutionary project, like all efforts at reading history, possesses certain obvious limitations, it avoids many of the

70 Of 1787, at 318 (M. Farrand ed. 1911). According to Madison’s notes, the motion to substitute “declare” for “make” passed by a vote of seven to two, a vote that then became eight to one after Rufus King convinced Oliver Ellsworth to switch his vote by arguing that “‘make’ war might be understood to ‘conduct’ it which was an Executive function.” Id. at 319 n.*.

But the Convention’s official secretary, William Jackson, whose notes are generally much thinner than Madison’s, has quite a different account of the debate. According to Jackson, the motion initially failed by a vote of five to four and passed only after King’s remarks. See W. Revewey, War Powers of the President and Congress 83–84 (1981); Lofgren, War-Making Under the Constitution: The Original Understanding, 81 Yale L.J. 672, 675–77 (1972). If Jackson is right, and if originalist history really can be done on the basis of a few scribbled words, then the “reason” the convention voted to change “make” to “declare” had nothing to do with sudden attacks and a great deal to do with restricting congressional involvement in warmaking. The better answer, obviously, is to term the records of the Convention obscure on this point, and perhaps even to admit the error of using the records of the Convention in the first place. The interpreter is then free to try to uncover a richer, more widely shared original understanding through a thorough study of the records of the state conventions and other documentary materials pertaining to the controversy over ratification.

71 Even if this is their project, the Justices may not always perform it successfully. I have argued elsewhere that a judge who is uncertain about the fundamental value choices of the Founders ought to invoke the political question doctrine, leaving the political branches to fight over the matter. See Carter, Separation of Powers, supra note 11, at 800–08. But see Goldwater v. Carter, 444 U.S. 996, 999 (1979) (Powell, J., concurring) (arguing that the mere difficulty of applying interpretive rules does not make a question political). The judicial task, in any case, is to strive, not to win. The judicial process is justified by the good faith effort of the judge, and is not undermined by the possibility of an erroneous interpretation. See Fiss, Objectivity and Interpretation, supra note 59, at 749.
pitfalls that have snared other originalist efforts. The judge is searching only for those aspects of constitutional history that provide the continuity linking the nation in which we live with the one that the Founders envisioned, and that is a task that requires only that the judge identify those aspects of the system that were originally understood as fundamental to the transformation of political science into political practice. Implementing this project means avoiding the mistakes of the many "law office" originalists who confine themselves to the records of deliberations on concise constitutional clauses rather than immersing themselves in the intellectual currents of the Founding Generation, a far richer path toward identifying the fundamental postulates standing behind particular provisions of the Constitution.

This might or might not be what the Justices are actually up to, but, if it is, it is no easy theory for them to sell. In the post-liberal legal world, law is policy, not structure. Advocates of particular devices and institutions for the efficient deployment of government authority to attain particular ends have little patience with de-evolutionary review. They would prefer a world in which, as long as individual rights are protected, the government may reconstitute itself in a fresh image, one in which all that matters in selecting the proper legal rule to govern the society's transformation is an appreciation of the learning of the policy scientists. This world would be one in which the only important test is whether the new institutional form will work. The Founders might have imagined that, in crafting the system of balanced and separated powers, they were constructing a bulwark against tyranny, but in today's policy-analytic world, the critics know better. Efficiency, not liberty, is their goal.

It is not possible to show that the critics are wrong; it is only possible to suggest that the project in which the Justices are engaged contemplates legitimacy in another form. The de-evolutionary project links legitimacy to the political iconography that provides the sense

72 The approach may also avoid some of the moral dilemmas that lead so many theorists to bristle at the word "originalism." For example, although the judge might study the history to learn many things about the original understanding of the place of the President in the structure of government, it is not relevant whether the Founders expected that people other than white males would ever hold the office. But see Chemerinsky, Wrong Questions Get Wrong Answers: An Analysis of Professor Carter's Approach to Judicial Review, 66 B.U.L. REV. 47, 56 (1986) (raising this challenge to originalists).

73 Discerning the Federalist political science is not always easy, but the effort to do so has led to some splendid writing. See, e.g., F. McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution (1985); J. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition (1975); G. Wood, supra note 42.

of continuity in nationhood that makes the American people into a People. The de-evolutionary project tries to give people the government that they already think they have, by preserving the basic structure that the Founders designed. The project, in short, tries to treat the Founders as the larger-than-life figures that the popular imagination insists that they are. Their fundamental structural choices must be respected and there can be no tampering with their handiwork. If this be ancestor worship, then the Justices are apparently prepared to make the most of it.\footnote{I discuss the ancestor worship analogy in Carter, \textit{Separation of Powers}, cited above in note 11, at 738–39, and defend it in S. Carter, The Republical Vision of the Demos, cited above in note 54. \textit{See also} S. Levinson, \textit{supra} note 52.}

And this is where the Justices could have, and perhaps should have, made their stand in \textit{Morrison}. The majority could have gone to the history of ratification and the political science of the Founding Era, could have delved and burrowed and studied and filled the opinion with whatever it discovered. Quite conceivably, the Court would have reached the same result. The Justices might have noted, for example, that in England, as late as the eighteenth century, criminal prosecution was still something instigated by private individuals, and although the Attorney General brought some cases and could defeat a private prosecution by filing a writ of \textit{nolle prosequi}, the system was essentially private.\footnote{\textit{See} J. Edwards, \textit{The Law Officers of the Crown} (1964); S. Milson, \textit{Historical Foundations of the Common Law} 403–21 (2d ed. 1981). A very readable, if not exactly scholarly, account of the criminal process in the era of private prosecution is C. Rembar, \textit{The Law of the Land} 18–35 (1980).} A dual system of public and private prosecution, together with some appointments of prosecutors by the courts, was the practice in most of the colonies at the time of the Founding.\footnote{\textit{See} J. Jacoby, \textit{The American Prosecutor: A Search for Identity} 3–28 (1980). The practice in the American colonies varied, depending on which European power controlled the colony. The Dutch colonies that today comprise parts of New York, New Jersey, and Connecticut retained the Dutch tradition of public criminal prosecution even after they were taken over by England. \textit{See} J. Goebel \& T. Naughton, \textit{Law Enforcement in Colonial New York} (1944). An excellent general background source is Goldstein, \textit{History of the Public Prosecutor}, in \textit{3 Encyclopedia of Crime and Justice} 1286–89 (S. Kadish ed. 1983).} In the first decades of the Republic, federal prosecutors — then known as district attorneys — bore a somewhat ambiguous relationship to the executive branch. They were appointed by the President, but had no direct superior in the federal government, and they acted with considerable independence, often as aides to the federal courts and the judicially controlled grand juries.\footnote{An excellent source on the organization of federal prosecution prior to the Civil War, when prosecutors were brought under the control of the Attorney General, is H. Cummings \& C. McFarland, \textit{Federal Justice} 8–187 (1937). The district attorneys were initially considered part-time officers, and Edward Livingston, appointed by President Jefferson as attorney for the district of New York in 1801, served simultaneously as mayor of New York and judge of the} Such historical
evidence as this might have led the majority to conclude that title VI of the Ethics in Government Act simply harks back to an earlier constitutional status quo.

Or the Justices might have reached the opposite conclusion, reading the Constitution, with its carefully crafted system of checks and balances, as so radical a departure from previous models of government that continuity with past practice should not be assumed. These tiny bites of history, the Court might have said, are not enough to overcome the plain historical tradition that the President has always retained effective, ultimate control over criminal prosecution for the violation of federal law. First principles of separation of powers, the Justices could have argued, hold that if one branch makes the laws and a second determines guilt or innocence, a third must be vested with the discretion whether to prosecute or not.

The point is that whichever route the Justices chose to follow, they would at least have placed us in history once more, adding to the constitutional saga with the message: "The political science of the Founding Generation created a system flexible enough to accommodate this necessary device." Or, had the result been different, the Justices would have been saying: "The establishment of an investigator and prosecutor outside of the executive branch is inconsistent with the political science underlying our system of government." In either case, the opinion would have stood for something important, for a discovery about the relationship of our world to the world of the Founders.

Yet despite the years that the Supreme Court has spent building its de-evolutionary project into fundamental structural law, the project was suddenly abandoned in Morrison in favor of a balancing test and a deference to a congressional judgment about necessity. All at once, the Court is back where many of the critics insisted that it should have been all along: letting policy, not history, be its guide. The fact
that the policy is set by the Congress, not the Court, is quite beside
the point; the point is that it is not the policy set by the Founders.
If the reason for the Court’s sudden retreat from de-evolution is its
fear of jeopardizing the status of the independent administrative agen-
cies, then perhaps the time has come to subject those agencies to a
bit of the de-evolutionary discipline that the Justices have recently
used to analyze other institutions of government.

III.

In truth, the Ethics in Government Act and the logic underlying
the Supreme Court’s decision to sustain it are the natural outgrowths
of a seed of questionable quality planted half a century ago in Hum-
phrey’s Executor v. United States. There the Justices ruled that the
Congress possesses the authority to constitute agencies beyond the
direction of the President and to imbue these independent agencies
with authority that is partly executive in nature. This the Congress
can do by directing that specified presidential appointees serve for a
term of years rather than at the pleasure of the President. The Court
has subsequently made clear that it will police the manner of appoint-
ment of the heads of these agencies to guarantee that the Congress’
role is no more substantial than the senatorial confirmation power
specified in article II, and that it will also guard the manner of
removal of the heads of these agencies to ensure that the Congress
can strip them of their commissions only through the device of im-
peachment. Nevertheless, the policy judgment on whether the agen-
cies should be constituted independent of presidential control is left
entirely to the Congress.

Humphrey’s Executor was never an easy case to understand. Did
Mr. Humphrey, the Federal Trade Commissioner whom President
Roosevelt sought to fire, exercise executive authority or not? The
Justices waffled on the point, explaining only that the FTC was not
in the executive branch, and that the agency acted “in part quasi-
legislatively and in part quasi-judicially.” The constitutional basis
for the delegation (or indeed, the existence) of these “quasi” powers
was not specified, which led Justice Jackson to complain two decades
later: “The mere retreat to the qualifying ‘quasi’ is implicit with confession
that all recognized classifications have broken down, and ‘quasi’
is a smooth cover which we draw over our confusion as we might use

81 295 U.S. 602 (1935).
82 See id. at 628–29.
85 Humphrey’s Executor, 295 U.S. at 628.
a counterpane to conceal a disordered bed. Humphrey's Executor, moreover, seemed to fly in the face of Myers v. United States, which was decided just a decade earlier. In Myers, a divided Court had apparently settled the question of removal in the President's favor. According to Chief Justice Taft's majority opinion, the President's discretion to remove executive officials was designed to be plenary, and the Congress lacks constitutional authority to interfere with it. Critics of Myers have subsequently complained (with some force) that Chief Justice Taft played a little fast and loose with constitutional history. But at least the majority discussed the history and language of the Constitution, which is considerably more than can be said for the brief and mysterious opinion in Humphrey's Executor.

Like the Court in Humphrey's Executor, the Morrison majority evidently saw no need to discuss constitutional history in reaching a conclusion about constitutional structure. In explaining why the Congress possesses constitutional authority to clothe a prosecutor with some degree of independence — the Justices never said how much — the majority relied heavily on Humphrey's Executor, treating Myers as an interesting but no longer useful historical relic. Humphrey's Executor was plainly a departure from Myers, but the cases have been harmonized in the past with the explanation that Myers dealt with a principal officer, not an inferior one, and that in Myers the officer at issue exercised purely executive authority. The majority in Morrison, however, would have none of this. Myers, according to the Morrison opinion, turns out not really to have been about the removal power at all, but about ensuring that the "Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed.' As a matter of preserving the constitutional system of balanced and separated powers, it is obviously vital to have some limits on congressional interference with presidential prerogative, so the Court's revision of Myers states a sensible rule. It would surely come as some surprise to the authors of the four opinions in Myers,

87 272 U.S. 52 (1926).
88 For a particularly painstaking dissent from Chief Justice Taft's reading of the history, see L. Fisher, The Constitution Between Friends: Congress, the President, and the Law 51-56 (1978). See also Sargentich, supra note 32, at 460-64 (arguing that the Myers Court took for granted the strict separation between legislature and executive, and paid little attention to the nature of the boundary between the two branches).
89 See 108 S. Ct. at 2616-19.
90 See Wiener v. United States, 357 U.S. 349, 352-53 (1958) (identifying the functions of the official as the key); E. Corwin, The President: Office and Powers 107 (5th ed. 1984) (arguing that the test is whether the official "exercise[s] the President's own powers").
91 108 S. Ct. at 2618.
however, to learn that they were writing about the theoretical standard to be applied in separation of powers cases rather than arguing, as they evidently thought, over the precise historical origins and limits of the removal power.

Having thus disposed of Myers, the Justices rested on Humphrey's Executor to ground the independent counsel firmly in the tradition of establishing officers protected from presidential removal. Yet, even in discussing Humphrey's Executor, the Morrison majority did things with it that had not been done before. The manner in which the Court described the key holding of Humphrey's Executor helps explain why proponents of the independent counsel state with confidence that it is far too late in the day to question the ability of the Congress to shield officials undertaking executive functions from executive control:

In Humphrey's Executor, we found it "plain" that the Constitution did not give the President "illimitable power of removal" over the officers of independent agencies. Were the President to have the power to remove FTC commissioners at will, the "coercive influence" of the removal power would "threaten the independence of [the] commission." \(^{92}\)

If this is what Humphrey's Executor stands for, then there is a substantial cart-and-horse problem. In the first place, to say that the Constitution does not grant the President "illimitable power of removal" over the heads of the independent agencies implies that the Constitution says something about independent agencies. But of course, it doesn't. The Constitution describes three forms of federal authority — legislative, executive, and judicial — and sets out in some detail who shall exercise each. There is no suggestion in the document, or in its ratification history, that the Congress ought to be free to create new forms of federal authority and new officials independent of the control of any branch. \(^{93}\)

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\(^{92}\) Id. at 2617 (citation omitted).

\(^{93}\) At the time of the so-called "Decision of 1789," when the First Congress established the first three executive departments, there was in the Congress substantial sentiment to place at least the Treasury Department under the exclusive control of the legislative branch. See J. Harris, The Advice and Consent of the Senate 30–33 (1953); cf. L. Fisher, President and Congress: Power and Policy 86–89 (1972) (arguing that the place of the Treasury Department was "ambiguous" in the early years of the Republic). To the extent that one is prepared to accept the deliberations of the First Congress as evincing an original understanding on constitutional meaning, but see C.V. Woodward, Responses of the Presidents to Charges of Misconduct, at xiv (1974) (warning of "'golden age' fallacy"), the sentiment to keep control of the Treasury in the legislative branch might be explained by reference to article I, which provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. The political science of the Founders attached particular importance to keeping control of the purse in the hands of a popularly elected legislature. See The Federalist No. 58, at 359 (J. Madison) (C. Rossiter ed. 1961) ("This power over the purse may, in fact, be regarded as the most complete and
And then there is the last part of the quote from Humphrey's Executor: should the President be able to remove the heads of the agencies at will, then the agencies will no longer be independent of executive control. This much is undeniable. What is left undisputed in the majority opinion in Morrison is why this makes a difference. After all, one might reasonably reply that if presidential power to fire those who exercise executive authority renders it impossible to make them independent of presidential control, then perhaps the answer is that all those who exercise executive authority are, as a matter of constitutional law, subject to presidential control. The independent agencies, to the extent that they exercise executive authority, would then be unconstitutional.  

This is heady stuff, but asking whether the Congress possesses authority under the Constitution to assign executive functions to non-executive officials is perfectly logical. The casual reader of Morrison, aware that this point is never broached, might imagine that the answer is found in Humphrey's Executor, because that is the case that the majority discusses at greatest length. But the casual reader would be wrong. Humphrey's Executor, like Morrison, simply takes the permissibility of independence for granted. The sum of the constitutional reasoning in Humphrey's Executor is the bald assertion that the authority of the Congress to establish an agency of this nature "cannot well be doubted." The embarrassing truth is that in the long line of cases since the 1930's discussing the various facets of administrative government, not one makes a serious effort to justify the independent agencies in constitutional terms. There is talk of necessity, talk of chilling, and talk of coercion — in short, talk of policy — but there is nothing about constitutional structure, or the vision of the Founders. In short, the Justices have never undertaken a de-evolutionary analysis of independent administrative government.


95 See Humphrey's Executor, 295 U.S. at 629. For devastating critiques of the reasoning of Humphrey's Executor, see Miller, cited above in note 11, at 93-94, and Strauss, cited above in note 32, at 611-16.
This is probably a poor moment in history to consider whether half a century of constitutional doctrine ought simply to be discarded. The de-evolutionary argument against the independent agencies, however, is not easy to ignore. Justice Scalia, in his heated dissent in *Morrison*, dances close to the argument but in the end seems understandably reluctant to commit himself to it. The *Morrison* majority, Justice Scalia asserts, sweeps *Humphrey's Executor* "into the dustbin of repudiated constitutional principles." This, he says correctly, is because *Humphrey's Executor* expressly conditioned the ability of the Congress to make some agencies independent from presidential control on the fact that the authority vested in the agency heads is only partly executive, partaking also of bits of legislative and judicial authority. In *Morrison*, however, the Court rejected this traditional — if woefully unconvincing — reading of *Humphrey's Executor*, declaring that *Humphrey's Executor* (like *Myers*) actually stands for the quite different proposition that the permissibility of independence rests instead on the degree of intrusion onto presidential authority. Thus, independent agencies are constitutionally acceptable as long as they are not too independent.

This is a contention that Justice Scalia should have met head on, because balancing tests almost always make for indeterminate constitutional law, and determinacy is nowhere more important than in setting forth the relative powers of the branches of the federal government. This particular balancing test, moreover, seems particularly shaky. The Court offers no standards for deciding how much intrusion is too much, and the risk is substantial that the real test is "we know it when we see it." Given the lengths to which the majority goes in its unconvincing effort to demonstrate that title VI is relatively unintrusive, surely a clever executive, jealous of presidential prerogative, ought to prepare an assault on the entire range of administrative agencies, in effect daring the Court to attempt the same analysis with respect to such agencies as the Securities and Exchange Commission, the Consumer Product Safety Commission, or even the Federal Trade Commission — the very agency that *Humphrey's Executor* protected from President Roosevelt's interference. One might imagine that because *Humphrey's Executor* is the case that is cited in *Morrison* as establishing the test, the result would be the same if the status of the FTC were relitigated. But there is nothing in the *Morrison* balancing test to justify a confident assertion that law rather than habit would make it so. Certainly the continuing supervisory power of the President over those agencies is less than the thin authority to dismiss or

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96 108 S. Ct. at 2636 (Scalia, J., dissenting).
97 See id.
98 See 108 S. Ct. at 2618.
99 See supra note 50.
to choose not to seek an independent counsel that the majority cited in *Morrison* as demonstrating sufficient presidential control. So if the Court really believes that this wildly indeterminate balancing test is the best explanation of *Humphrey's Executor*, then what kind of decision is *Humphrey's Executor* in the first place?

Justice Scalia leaves little doubt that he considers it a very poor one. What he may well believe, but would probably feel constrained not to say, is that, if *Humphrey's Executor* cannot be justified, the independent agencies cannot be sustained.\(^{100}\) It may be difficult to imagine now, but given the unequivocal language of *Myers*, President Roosevelt's argument that he was free to dismiss a commissioner of the FTC was far from frivolous at the time it was posed. The *Morrison* Court's new reading of *Humphrey's Executor*, however, strongly implies that the traditional reading of *Myers* is simply bad law,\(^{101}\) a point that Justice Scalia could hardly have been expected to miss. Says Justice Scalia:

One can hardly grieve for the shoddy treatment given today to *Humphrey's Executor*, which, after all, accorded the same indignity (with much less justification) to Chief Justice Taft's opinion 10 years earlier in *Myers* — gutting, in six quick pages devoid of textual or historical precedent for the novel principle it set forth, a carefully researched and reasoned 70-page opinion. It is in fact comforting to witness the reality that he who lives by the *ipse dixit* dies by the *ipse dixit*. But one must grieve for the Constitution.\(^{102}\)

Was *Myers* in fact the better opinion? Certainly it was better reasoned. Yet *Myers* has its critics, and constitutional scholars, laboring in the vineyards that the Court has for some reason avoided, have worked hard to provide the de-evolutionary underpinnings for independent agencies that the Justices have not.\(^{103}\) It would be nice, however, if at some point the Court itself would apply its recent de-evolutionary discipline to this fundamental constitutional question about modern American government. The answer that the Justices would find might well be the same as the one offered by *Humphrey's Executor* and expanded in *Morrison*. If judicial review is to retain

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\(^{100}\) Justice Scalia, while a judge sitting on the United States Court of Appeals for the District of Columbia Circuit, was a member of the panel that first struck down the Gramm-Rudman-Hollings act. The court's unanimous per curiam opinion expressed doubts about the validity of *Humphrey's Executor* because of that case's approval of the vesting of executive authority in officials not removable at the President's discretion. *See* Synar v. United States, 626 F. Supp. 1374, 1398–99 (D.D.C.), aff'd sub. nom. Bowsher v. Synar, 478 U.S. 714 (1986).

\(^{101}\) *See* 108 S. Ct. at 2618–19.

\(^{102}\) *Id.* at 2637 (Scalia, J., dissenting) (citation omitted) (emphasis in original).

its constitutional legitimacy, however, the process of reasoning is more important than the end result.

Even should a de-evolutionary analysis find no significant constitutional difficulties attaching to the independent agencies, there would remain the problem of deciding whether, as the Morrison opinion suggests, the independent counsel is analogous to the independent agency. The agencies, according to Humphrey's Executor, "cannot in any proper sense be characterized as an arm or an eye of the executive."104 In Morrison, by contrast, the parties characterized the independent counsel in just that way. To make the counsel fit the independent agency model, the Justices were forced to lump together all executive authority as one malleable whole, and to test restrictions on that authority only for the degree of their intrusiveness. In so doing, the Court presented the Congress with what Justice Scalia called "an open invitation . . . to experiment."105 Indeed, the Morrison invitation offers a Pandora's Box of authority — a box that the Congress might unwisely choose to pry open.

Already wending its way through the Congress is a proposal for a special environmental prosecutor to handle those cases too explosive to leave to politically accountable officials.106 What might be next? Well, perhaps the Congress, angered by the direction and policies of the Justice Department under the recently resigned Edwin Meese, could decree (over the President's likely veto) that the entire Justice Department is to become an independent agency, like the FTC, thereby placing all criminal prosecution beyond direct presidential control. Nor is there any reason to think that the Morrison invitation is limited to situations involving prosecution. The principal cases cited by the majority on this point have nothing to do with prosecution as such, and besides, the Court itself said that the nature of the power is not the issue. Thus, if the Congress determines that foreign policy is too important a matter to be left to the politically expedient judgments of the White House, it might command the independence of the Department of State, to be called perhaps the Foreign Policy Agency, placing it under the command of a commission of experts nominated by the President and confirmed by the Senate. The Department of Defense, lately scandal-ridden, might be next.

And because the Congress is able to specify not only the tenure of office of executive employees but also their functions, it may not be too far-fetched to wonder whether the President — who, after all, does almost everything through aides — might be stripped of a substantial part of even his inherent constitutional authority. Just a few

104 295 U.S. at 628.
105 108 S. Ct. at 2637 (Scalia, J., dissenting).
months before handing down *Morrison*, the same Supreme Court suggested in *Department of the Navy v. Egan* that presidential authority to determine access to classified information is absolute:

His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give the person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant . . . . This Court has recognized the Government's "compelling interest" in withholding national security information from unauthorized persons in the course of executive business.

These are powerful words, but would they really survive a congressional statute commanding the establishment of an independent Federal Classification Agency to pass on the President's decisions (or requests) to withhold security clearances from particular executive branch officials? The problem with the *Morrison* opinion is that it provides no reliable guide for answering such questions as this one. The reader is left with the uneasy sense that there may, in fact, be no rule at all, and that the principal practical restraint on the Congress is its own discretion.

The struggling, haunted quality of the majority opinion suggests that the Justices understood this and worried about it, but saw no way to escape the slippery slope. And perhaps there is, at this late date, no escape, for title VI of the Ethics in Government Act really does grow quite logically from the line of cases permitting the Congress to vest executive authority in agencies beyond presidential control. Perhaps the constitutional assault on the independent counsel was too late and directed at the wrong target; perhaps, given what has gone before, there was no way that the Court could have avoided reaching the decision that it did. In that case, it may be that legislative government, with a profoundly weaker executive, is indeed what the future holds, or, at least, that nothing more than the wisdom and discretion of one-third-plus-one of the members of either House of the Congress will be available to prevent the legislature from taking us there. It is a shame that a Court that has lately devoted so much effort to ensuring a de-evolutionary approach to the distribution of power refuses to undertake such an approach when the issue is the independence of executive officers from executive control. It is a shame because, if government by independent agency is indeed our future, it would be nice to get there by constitutional amendment rather than legislative fiat.

108 Id. at 824.
IV.

Title VI of the Ethics in Government Act does more than raise profound constitutional problems that the Court in *Morrison*, for all its wriggling, did little to dispel; it also represents a questionable policy judgment. The idea that an independent counsel is necessary or desirable for ferreting out and prosecuting wrongdoing within the executive branch misapprehends the role that the system of checks and balances prescribes for the legislative branch in checking the President. It supposes, quite wrongly, that in the absence of criminal prosecution, malfeasance must go undiscovered and unpunished. The executive branch cannot be trusted to exercise a sensible discretion in investigating itself, so the thesis runs, because the President can always fire prosecutors who get too nosy.

But the thesis doesn't work. Fans of criminal punishment who want to see every wrongdoer in jail surely have little to fear from a world without independent counsels. In an age when the mass media build from every ethically questionable molehill a mountainous betrayal of public trust, a serious presidential effort to rein in a prosecutor who works in the executive branch is hardly a realistic possibility. American history is littered with the names of disgraced executive branch functionaries, including some of the most intimate advisers to the Presidents, who have been indicted and convicted in the absence of “independent” prosecutors. In fact, the last President who took it upon himself to determine how far criminal investigations of his own administration should go was turned out of office within a year. Ironically, the same Watergate scandal that led to the Ethics in Government Act has brought about a post-Watergate morality that arguably makes the Act superfluous. Thus, if the purpose of the Act is to ensure that executive branch criminality is punished, then the independent counsel provision is quite possibly unnecessary.

And if, as may well be the case, the principal purpose of the independent counsel law is to see to it that executive misconduct is discovered and stopped, its perpetrators thrown into disgrace — if, in other words, the statute is really about checking and balancing the executive wrongdoer — then the Congress itself has plenty of power to do exactly that, and has exercised it often. Under a system of balanced and separated powers, this is precisely what would be expected. So what if the executive branch won't prosecute? The Congress has quite an impressive portfolio of powers of its own, and need not wait for criminal conduct — or rest its judgment on criminal standards — before meting out its own effective means of punishment and control. The Congress, for example, may use committee investigations, backed by subpoena power, to bring to light any malfeasance in the executive branch; it may slash the budgets of agencies not doing their jobs; it may decline to confirm presidential nominees
for literally hundreds of positions; and, ultimately, it may impeach executive officials and remove them from office.\textsuperscript{109} Beside all of this, the limited and highly confidential investigation by the independent counsel pales in significance.

The counsel's purported "independence," moreover, has a darker side. There is a sense in which the prosecutor is not independent. The prosecutor is not independent of the will of the Congress. It is true that the statute makes it difficult — although not impossible — for the Congress to interfere with the prosecutor's work.\textsuperscript{110} But that is not the point. The point is that the work that the prosecutor is free to do is the work that the Congress desires. The very purpose of the statute is to remove prosecutorial discretion. The statute instructs the prosecutor, nearly in so many words, to bring a prosecution if the facts show a violation of the law.\textsuperscript{111} The existence of the statute almost encourages the prosecutor to find a violation of the law. In this sense, the independent counsel provision is profoundly unfair to the subjects of investigation — unfair in that the very prosecutorial discretion that it is aimed at stripping away should be a principal check on the oppressive effect of an overly literal enforcement of the law. As Charles Breitel has written:

If every policeman, every prosecutor, every court, and every post-sentence agency performed his or its responsibility in strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable.\textsuperscript{112}

Thus the ordinary prosecutor may bring wrongdoers to justice, but she may also decline to bring charges. The prosecutor might conclude,

\textsuperscript{109} The tradition in the separation of powers literature has been to dismiss the impeachment power as a dead letter. Even putting aside the effort to impeach President Nixon, however, the Congress has at this writing very recently impeached and convicted one federal judge and has started proceedings against two others. The Congress should certainly make more use of the impeachment power than it has; it is odd and probably wasteful to confine its application to rooting out purported corruption in the judicial branch.

\textsuperscript{110} The statute includes reporting requirements, see 28 U.S.C. \textsection 595(a) (1982), and also requires the independent counsel to bring to the attention of the House of Representatives any information that "may constitute grounds for impeachment," \textsection 595(c).

\textsuperscript{111} The paradox of this statutory scheme is illustrated by Independent Counsel James McKay's decision not to indict Attorney General Edwin Meese, but nevertheless to issue a report stating that Mr. Meese had broken criminal laws. On the one hand, Mr. McKay was pilloried for not doing what the statute required; that is, he was attacked for exercising the prosecutorial discretion that the statute was designed to remove. At the same time, as the administrator of New York State's Commission on Judicial Conduct later pointed out, only an independent prosecutor would have dared not to seek an indictment. Had Mr. Meese been investigated instead by his own staff, they "probably would have had no choice but to seek an indictment and let a jury decide why Mr. Meese violated Federal laws." Stern, Letter to the Editor, N.Y. Times, July 29, 1988, at A26, col. 6.

for example, that no crime has been committed. Or the prosecutor might make the judgment that justice is best served in a particular case if the defendant goes free. In this way, the prosecutor can help avoid the consequences of unjust and oppressive enforcement of criminal laws.\textsuperscript{113}

Unlike a prosecutor in a traditional investigation, the independent counsel does not begin with an alleged crime and then search for a culprit; she begins with an alleged criminal and then searches for a crime. There is no effective executive check on the prosecution decision, because the Attorney General is instructed plainly on the circumstances in which an independent counsel should be sought, and the President, as the Court explained in \textit{Morrison}, can remove the counsel only for not carrying out the will of the Congress. The checks and balances are therefore upset: the same branch that makes the laws in the first place also in effect determines whether and how the laws ought to be enforced. The sensible check of a second branch’s discretion simply disappears.

It is no answer to say that a third branch, the judiciary, is interposed between the legislature and the executive, and that the Special Division of that third branch actually makes the decision whether to appoint a prosecutor or not. The statute doesn’t read that way. It states instead that upon receiving the Attorney General’s application, the Special Division “shall appoint an appropriate independent counsel.”\textsuperscript{114} So just as the Attorney General has no discretion under the statute on whether to seek an independent counsel once the statutory conditions are met, the judicial branch — independent or not — also has no discretion.

The principal point is that supporters of the Ethics in Government Act have apparently forgotten that in the system of checks and balances, different branches have different roles to play. In effect, the statute is testimony to a category mistake: the supposition that criminal prosecution has some independent importance in the separation of powers. It does not. The system of balanced and separated powers preserves liberty by preventing the concentration of too much authority in a single branch of the government. The powers of each branch to check the others are plainly established or implied in the Constitution and its history. It is an error to assume that if one power (here, prosecution) looks particularly attractive, then any branch that wants it can take it up as a cudgel with which to batter another — or can force another branch to take up the cudgel and batter itself. The Constitution grants to each of the three branches an awesome

\textsuperscript{113} For an analysis of this argument, see Vorenberg, \textit{Decent Restraint of Prosecutorial Power}, 94 \textit{Harv. L. Rev.} 1521, 1551–52 (1981).

\textsuperscript{114} 28 U.S.C. § 593(b) (1982).
array of powers to deploy against the others, and those are the legitimate means that each should use in its struggle for equality — or supremacy.

There is, moreover, a larger problem with the policy underlying the provision for appointment of an independent counsel. By establishing and exalting a special process for investigating possible criminal behavior by presidential functionaries, the statute raises the stakes too high (and lowers the standard far too much) in policing wrongdoing in the executive branch. Perhaps Tocqueville was right: Americans really do not like to think of misbehaving officials as tyrants, and feel more comfortable if they can instead be labeled criminals.\(^{115}\) It is difficult, however, to make all executive misbehaviors into crimes. Yet because the Ethics in Government Act provides for independent investigation, indictment, and prosecution of miscreants among the President's minions, the focus in considering whether someone has misbehaved is on the narrow question of whether a crime has been committed. Members of the Congress constantly demand special prosecutors to look into one mess or another, as though the principal goal is not to ensure that the executive branch performs with dignity and propriety but rather to embarrass the President and, with luck, to throw a few of his cronies into jail.

Against this background, it is small wonder that those who are investigated by independent counsels refuse to resign, and that those who are investigated but not indicted — former Attorney General Meese is only the most recent example — proclaim themselves vindicated. Critics may complain that mere absence of criminal wrongdoing is too low a threshold for judging the propriety of executive behavior, and they are surely right, but it is the Congress itself, not the executive branch, that has effectively established the threshold. If title VI did not exist, the Congress and the executive would be thrown back on the old rules, under which public officials were expected to resign when their improprieties became too great an embarrassment to the President — not to stay in office because the congressionally mandated criminal investigation might yet prove them to have met a significantly lower ethical standard.

Yet it is scarcely surprising that the Congress would make the category mistake that has led to the bizarre spectacle of executive employees, not excluding the President, acting as though the only standard of sound ethical behavior is the absence of criminal indictment. Ever since Watergate, and to some extent before, the Congress has made a minor obsession of involvement in micro-management of

\(^{115}\) See A. TOCQUEVILLE, DEMOCRACY IN AMERICA 105 (G. Lawrence trans. 1969) ("[T]he Americans . . . think that oppression and tyranny should be treated like theft, by making prosecution easier and the penalty lighter.").
the executive branch. As policy, the independent counsel provision thus suffers from the same myopia that has driven such ill-conceived (although possibly constitutional) measures as the War Powers Resolution of 1973\textsuperscript{116} and such patently unconstitutional efforts as the legislative veto: the belief that participation in or scrutiny of executive-branch decisionmaking by extra-constitutional devices or officers will somehow improve the judgments that are made by the President and other executive functionaries. Not content to check and balance the President, as the Constitution and its underlying political theory contemplate, the members of the Congress sometimes appear to want to exercise a share of the executive power. Supporters of presidential prerogative, when they consider the range of legislation aimed at enabling the legislature to participate in executive decisions, rail in vain about chilling effects and a weakened presidency — in vain because the Congress is rarely in the mood to listen.

A Congress more interested in implementing policy than in setting it also runs the risk of exacerbating the very problems it seeks to resolve. On this point, the words of Justice Jackson may prove prophetic:

\begin{quote}
I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.\textsuperscript{117}
\end{quote}

In the classic vision of separation of powers, and in the structure of government under the Constitution, policy is set by the legislature and carried out by the executive. If both the executive and legislative branches try to implement policy, both will probably end up with a share. Some evidence for this may be found in the fact that a Supreme Court with almost the same set of Justices could decide both to strike down the legislative veto in \textit{Chadha} and to sustain the independent


\textsuperscript{117} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring). Perhaps, however, not even the Congress can stop the slippage of power from legislature to executive:

\begin{quote}
Given their common linkage to the fundamental dynamic of governmental growth, one might expect any disruptions of the interrelated trends toward congressional decentralization, an administrative state, and presidential expansion to be temporary. Indeed, there is strong evidence to suggest that this is true.
\end{quote}

counsel in *Morrison*. But if only the executive tries to set the policy in the first place, the chances are that the concentration of authority in the executive branch will continue, not because Presidents are more ambitious than legislators, but because the ambitions of legislators run in the wrong direction. The critics will then claim that the executive is too powerful, and more micro-management legislation will be proposed, once again meeting the wrong crisis.

And so, bit by bit, the Congress may indeed whittle away at the President's freedom to act. Yet a Congress that would rather participate in decisions to commit troops through the War Powers Resolution than enact a statutory charter that defines the mission for the armed forces of the United States ought not to profess surprise when the President defines that mission. A Congress that would rather have an independent counsel trying desperately to pin criminal charges on government officials whose ethics are shady than have a clear and enforceable set of ethical guidelines that lead to a fall from office when transgressed ought not to profess astonishment when the miscreants hang stubbornly on, hoping for the vindication of nonindictment. If the Congress is unwilling to set policies on politically sensitive questions, it is only natural that the President will do so instead — for the tools of governance belong to those who will use them.