ORIGINAL

# SUPREME COURT
# OF THE UNITED STATES

In the Matter of: )
)
ALEXIA MORRISON, INDEPENDENT COUNSEL, )
) No. 87-1279
Appellant, )
v. )
)
THEODORE B. OLSON, EDWARD C. SCHMULTS )
)
AND CAROL E. DINKINS )

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IN THE SUPREME COURT OF THE UNITED STATES

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ALEXIA MORRISON, INDEPENDENT COUNSEL,

Appellant

v. : No. 87-1279

THEODORE B. OLSON, EDWARD C. SCHMULTS AND CAROL E. DINKINS

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Washington, D.C.

Tuesday, April 26, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

ALEXIA MORRISON, ESQ., Washington, D.C.; on behalf of the Appellant.

MICHAEL DAVIDSON, ESQ., Counsel, U.S. Senate, Washington, D.C.; as amicus curiae, supporting Appellant.

THOMAS S. MARTIN, ESQ., Washington, D.C.; on behalf of Appellees.

CHARLES FRIED, ESQ., Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting Appellees.

C O N T E N T S

P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear arguments now in No. 87-1279, Alexia Morrison v. Theodore B. Olson.

Ms. Morrison, you may proceed whenever you are ready.

ORAL ARGUMENT OF ALEXIA MORRISON

ON BEHALF OF APPELLANT

MS. MORRISON: Mr. Chief Justice, and may it please the Court:

The question before you in this matter concerns whether on its face the independent counsel provisions of the Ethics in Government Act run afoul of the constitution of the United States.

This question was raised by the three Appellees in this matter when each was subpoenaed to give evidence before a federal grand jury. That grand jury was considering matters covered by Title VI of the Ethics in Government Act, and had been referred in 1986 by the Attorney General for treatment under the independent counsel provisions.

The Appellees moved to quash the subpoenas on the basis that Title VI was unconstitutional. The District Court disagreed and ordered compliance with the subpoenas. When the Appellees refused, they were held in contempt.

Upon review, a divided panel of the United States Court of Appeals for the District of Columbia Circuit overruled the District Court's finding, and held the statute

unconstitutional on a number of grounds. Indeed, as we indicate in our brief, the court looked beyond the facts presented by this case and reached out for facts not before it in order to found a basis for finding constitutional problems with the statute.

This statute was enacted in 1978 after several years of congressional hearings and lengthy consideration of its provisions. It has been reauthorized twice: in 1983 and again in 1987. In each case some fine tuning has been done to the statute's provisions, but its basic approach has remained consistent over the last decade.

With each passage of the Act, continuing it for five year terms, the congressional fine tuning has been done with insights provided from those who have observed operations under the Act, including the United States Department of Justice.

Thus Title VI comes before you having three times undergone bicameral passage in the legislature and presentment to the President. On each occasion, the then sitting President has signed the bill into law, albeit on the last occasion with expressed reservations about the Act's constitutionality.

Having made its legislative choices in enacting the bill on three different occasions, Congress's role in the independent counsel process ends. It has reserved for itself no part in the implementation of the independent counsel process. So unlike the cases presented to this Court in Buckley v. Valeo, INS v. Chadha, and Myers v. United States,

there is no concern here about congressional aggrandizement of its powers.

The statute is triggered when the Attorney General receives specific, credible information that one of the high administration officials covered by the Act's provisions has committed a crime. If the Attorney General determines in his own unreviewable discretion that the specific, credible information constitutes grounds to investigate, he causes a preliminary investigation to be conducted under the Act.

If as a result of that preliminary investigation he finds there are no reasonable grounds to believe that further investigation or prosecution is warranted, he reports that finding to the court, and his final determination on the subject ends the matter. The court has no ability to appoint an independent counsel.

If, on the other hand, he finds that there are reasonable grounds to believe that further investigation or prosecution is warranted in one of these matters where the statute imports a conflict --

QUESTION: Ms. Morrison, your opponents suggest that that is really a very narrow kind of discretion that is entrusted to the Attorney General, that following the structure of the statute he is almost bound to recommend the creation of a special prosecutor. What is your reply to that

MS. MORRISON: The statute leaves the matter entirely within his discretion. In fact history, we would suggest,

supports the notion that the Attorney General not only is able under the statute to refuse to appoint an independent counsel where matters have been brought to his attention under the statute, but in fact on repeated occasions Attorney Generals have refused to appoint an independent counsel.

The matter comes to him, as would any allegations of criminal misconduct, and he uses, pursuant to the statute, the same standards and the same policies that he would apply to the review of any matter if he were trying to determine whether or not to cause a full-blown grand jury investigation to be conducted within the Department of Justice.

QUESTION: Except that he doesn't have an unlimited time period in which to conduct that

MS. MORRISON: That's true.

QUESTION: It's quite short. You have said that Congress's function is at an end and that it has not part in the implementation of the law, but in this case Congress or members of Congress did indeed send a letter to the Attorney General, did they not, asserting that there were reasonable grounds to investigate.

What does the Attorney General have to do when the alleged defense consists of false testimony before the Congress, and he gets a letter from the Congress saying that in our view there was false testimony? Can he possibly conclude within the short period of time that he's left for the investigation that there is not reasonable grounds to

investigate

MS. MORRISON: It would very much depend on the facts before him, Your Honor. In this matter the congressional, as interpreted by the Department of Justice, encompassed no fewer than four individuals as to whom the Congress believed that their processes had been violated.

QUESTION: You don't assert that letter from the Congress was inappropriate, Congress can have that participation in the process

MS. MORRISON: Under the statute, and it would seem to us as a matter of basic, inherent powers, any citizen, any body, any entity would be free under the statute to bring their concerns about administration misconduct to the attention of the Attorney General, and command thereby, simply by making allegations, that the review required by the statute take place.

QUESTION: What if that letter reaches the Attorney General on the 80th day after his investigation of whether there are reasonable grounds to further investigate continues, and he has ten days to check that out

MS. MORRISON: The Attorney General has, under the statute as it existed when the matter before the Court was referred for independent counsel treatment, a total of 90 days within which to proceed with the preliminary investigation. So that information coming to him would trigger the commencement of that 90 day period.

Indeed, under the 1987 reauthorization, the Attorney General gets an additional 15 day period within which to make a determination as to whether or not there is reason to even conduct a preliminary investigation, and then the 90 day period begins to run. And the statute, in all of its incarnations, has made provision for those occasions on which 90 days does not prove adequate, for the Attorney General to make an application, and he is allowed, under the statute, to go to the court and seek an additional 60 days where he needs that additional time to make his determination under the statute.

Indeed, it is probably worth noting on that point that in the very matter before the Court, the Attorney General did not comply with the 90 day requirement that he act on the allegations referred to him by the House Judiciary Committee. Despite that fact the 90th day passed, and nothing happened.

Nothing occurred in this matter until the Attorney General, after the 90 day period, made his reference to the court in which he asked that only one of a number of people covered by that House Judiciary Committee report actually be subject to independent counsel treatment.

Once the Attorney General determines that an independent counsel should be appointed, he makes a report to the court providing sufficient information to the court so that it can fulfill its appointing function. Save for this appointing function thus invoked by the Attorney General, the court, like the Congress, plays no further role in the

implementation of the statute.

Granted as an incident of the appointment power, the court defines the independent counsel's jurisdiction. This, as a matter of practice, has been the subject of the Department of Justice of a specific jurisdictional recommendation in the report that goes from the Attorney General to the court.

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

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

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

QUESTION: Doesn't that raise some separation of powers concerns? The extent to which the Special Division is given Executive Branch powers

MS. MORRISON: We would suggest, Your Honor, that that is not an Executive Branch power in the sense that it is not a substantive part of the investigation conducted. The court plays no role in formulating the investigative plan, if you will, in determining at whom the independent counsel is look: that is determined by the Attorney General.

The court, in this statute, is given the power to limit, to place bounds on the arena within which the independent counsel may investigate.

I would submit to the Court that it would have been perfectly proper had the Congress determined that once an Attorney General determined a matter was appropriate for independent counsel investigation, the Congress might have provided that the court simply appoint an appropriate person to conduct the investigation, and to allow that person, as any normal prosecutor would, to take the matter and follow the investigation where it lead.

That is what happens in hundreds of federal prosecutor's offices around the country. A matter comes in, and the investigation proceeds. But Congress decided not to follow that process, but rather to have neither the Attorney General, who by statute has a conflict here, nor the independent counsel as to whom they wanted to set some definitions or boundaries to make the determination of exactly what the outside parameters of the investigation would be.

But in this case they interposed the court and asked that the court review the matters brought to its attention by the Attorney General, and fashion a reasonable jurisdictional mandate, allowing --

QUESTION: Does the Special Division determine when the job is over

MS. MORRISON: There is a provision in the statute,

Your Honor, which would allow -- and this provision has not yet been used and indeed may never -- the court having fashioned the appointment to say, my appointment authority has now been substantially completed, the independent counsel's task appears to me to be conducted --

QUESTION: How would they know that

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

QUESTION: As a matter of fact do independent counsel regularly or at any time consult with the Special Division or members of the Special Division with respect to problems that may arise

MS. MORRISON: Concerning the progress of the investigation, no, Your Honor. In this case we did re-approach the Special Division of the court to ask for jurisdiction that would encompass two additional individuals, and that request was denied.

But in the ordinary course, Your Honor, removal under the statute occurs solely and exclusively at the hand of the Attorney General. Terminating the office, we would submit, was a way for Congress to address its concern that there be no possibility that someone appointed as an independent counsel would overstay their welcome.

Again, this is a provision that has not been used and

may never be used. Removal, in the sense of being terminated for something of substance, is an issue that is left solely to the Attorney General under the statute, albeit that his ability to remove under the statute is limited to for cause --

QUESTION: Is that subject to review

MS. MORRISON: It is subject to review, yes, Your Honor.

QUESTION: Where

MS. MORRISON: As the statute existed at the time of the appointment in the current matter, it was lodged in the Special Division. Subsequently, in the 1987 amendments, that review has been lodged, as it normally would, under an administrative procedure act matter in the District Court.

QUESTION: Ms. Morrison, speaking of the functions of the Special Division, the Court of Appeals judgment that we are reviewing, that opinion, they point out that the Special Division had written an opinion in this case. What part of the function did that represent?

Written an opinion on the constitutionality, really, of this special prosecutor statute

MS. MORRISON: Well, it is interesting because the constitutional question that the Special Division addressed in the matter was actually raised by the Department of Justice in connection with the review by the court of our request for additional jurisdiction.

We went to the Attorney General initially, and asked

that our jurisdictional mandate be expanded to include additional individuals. When that request was turned down, we took the provision in Section 594(e) of the statute, which permitted us to address that question, to the court and asked the court to review the matter in the connection of its role as the definer of jurisdiction, the person who is setting the parameters for the appointed individual to pursue.

Under 594(e), the court took not only our request but also a submission from the Department of Justice, and it ultimately turned out submissions in sort of amicus capacity from the two individuals as to whom we sought to gain jurisdiction, and considered all of those matters in connection with its review of the scope of our jurisdiction.

In connection with the submission made by the Department of Justice, they raised constitutional questions about the statute, particularly as it would be affected by the interpretation that we were asking the court to place on Section 594(e).

And so the question of the constitutionality of the statute was before the court in connection with its consideration of our request which related to jurisdiction. The court's writing of an opinion, we would suggest, simply is a way for it to explain and make a record of how it addressed that jurisdictional question.

QUESTION: Ms. Morrison, are you going to take the position today that under the Blair case this Court shouldn't

exercise jurisdiction over the case?

MS. MORRISON: We are very concerned about that issue, Your Honor, because of the impact that we foresee the Appellate Court's ruling on Blair, particularly as they hold Ryan affects the Blair holding.

We are concerned about how that might impact federal law enforcement in grand jury proceedings across the country, and so we --

QUESTION: Well, did you raise any objection in the District Court?

MS. MORRISON: We did not.

QUESTION: So is it perhaps waived, and is that something that the court below relied on

MS. MORRISON: The court below did find that by not raising the issue in the District Court, that we had somehow waived that jurisdictional question. The case that they relied on, the Air Florida case, is one that we suggest is not appropriate or not dispositive of the issue, because there there was a question relating to a substantive claim, a new substantive claim that was sought to be raised on appeal.

In a case where the question is jurisdictional, we would suggest that that is something that can be reviewed by any court at any point in the proceedings in order to determine whether it is appropriate to proceed.

We would obviously prefer that this Court reach the constitutional question in this matter. It would be of benefit

to us and to everybody else who is operating under the Act to have the question resolved, and not to have to proceed any further with the constitutional question hanging over their investigations.

However, our concern that the Appellate Court's reading of Ryan and its fairly broad inroads on Blair, as they read it, is a subject that concerns us and caused us to raise the question.

With respect to any investigation conducted under the statute, the independent counsel in three critical respects continues to be a member of the Executive Branch. Pursuant to the statute, independent counsel are required to follow the established policies of the Department of Justice. Independent counsel are removable, albeit only for cause, but nonetheless are removable only by the Attorney General.

As I indicated before, no independent counsel is subjected to direct or even indirect supervision by either the judicial or legislative branches.

The Department's routine is interrupted in criminal investigations under this statute only in a very narrow number of cases. Their policies continue to apply to any investigation conducted, and if there are any court proceedings --

QUESTION: Well, to the extent the Court of Appeals had a different view, you think it was just wrong that the independent counsel must follow Department procedures

MS. MORRISON: Yes, the statute says, that except where not possible, the independent counsel shall follow the written or other established procedures or policies of the Department of Justice.

That is the same mandate that is sent by the Department in its own guidelines to U.S. attorneys operating all over the country. That is, it is a recognition by Congress, as there is a recognition within the Department, that the peculiar facts or peculiar situations may render it impossible in a given case to follow a particular guideline.

For example: in the situation where an independent counsel is conducting an investigation or prosecution, it may be impossible to follow those guidelines that require specific reporting up a particular chain of command of events leading to the use of a statute that is specifically committed to the discretion of the independent counsel under the statute. But the words of the statute are clear, it is a mandate except where not possible.

The Attorney General and the Solicitor General are specifically empowered under the Act to appear in any court proceeding in which an independent counsel appears, to urge their view of the law on that body. The Attorney General has the ability and the obligation, if he finds that an independent counsel is proceeding less than faithfully in executing the independent counsel provisions, to step in and cause that independent counsel's removal.

Like every federal prosecutor, the independent counsel can only indict by use of a grand jury. The subject of the investigation retains throughout the entire process all of the substantive and procedural rights that are available to any defendant or person being investigated in connection with criminal allegations.

Throughout the process, the President retains the total ability to determine the final outcome of the process by his exercise of the pardon power.

QUESTION: Excuse me, Ms. Morrison. What policies and guidelines exist that you are bound by? What policies and guidelines does the Department have governing special prosecutors -- or prosecutors in general

MS. MORRISON: There is a United States Attorney's manual, Your Honor, that takes up a full shelf in the library. One full volume of which is devoted entirely to criminal matters that address itself to everything from the considerations to be applied when immunity is granted, to how particular witnesses are to be treated, in connection with determining evidence, the substantive requirements for different criminal offenses.

There is also a Principles of Federal Prosecution manual, which is made available publicly, as is the U.S. Attorney's manual. So there is an extensive and comprehensive set of materials that constrain the independent counsel's exercise of discretion in even the arenas involving witnesses,

much less decisions to bring substantive charges.

QUESTION: And it is your position that so long as the Department of Justice put something in the manual or establishes it in writing -- or I suppose even any unwritten policy would govern you, and you consider yourself bound by that

MS. MORRISON: Yes, Your Honor. In fact, the record in this case indicates in a couple of places the same experience that we have had, which is there continues to be communication between independent counsel and career staff at the Department of Justice on matters of policy and procedure, even where there are not written guidelines.

That is, if a question arises about how to handle a particular matter, there is communication with career prosecutors who may have addressed the issue before, and their input is welcomed in connection with making decisions.

QUESTION: That would not include, I suppose, or would it, guidelines -- as I recall there used to be in the days when I was in Justice Department -- about before an investigation of certain officials is conducted, matters that could be especially sensitive, the matter would be checked with the deputy attorney general or with the attorney general before it goes forward.

Would a policy like that govern the special counsel

MS. MORRISON: We haven't had to confront that question in our case, but where the matter has been referred by

the Attorney General for independent counsel treatment, I assume that at least in the regard that you are addressing, the Attorney General would have made the determination as to whether or not to proceed, the kind of preliminary check on conflicting Executive or departmental interests that would be applied by the deputy Attorney General under that standard.

The minor deviations from the norm that the independent counsel provisions put in place are really moved or motivated by two mutually reinforcing purposes. Both of which were considered by Congress at the time that it enacted the legislation.

One precludes the appearance or reality of a conflict of interest that can lessen public confidence in federal law enforcement. The second provides the subject of an independent counsel inquiry protection against the possibility that a prosecutor, an Attorney General, a Department of Justice anxious to prove its own absence of conflict and neutrality on the issue would bend over backwards in order to appear unconflicted in the matter.

The statute also gives the added benefit to subjects of independent counsel inquiry -- which has resulted in the majority of investigations to date, I might note -- of an independent and therefor much more meaningful clearance or vindication of allegations that ultimately prove to be unwarranted.

Given the limited occasions on which the statute's

provisions are invoked and the care with which Congress has circumscribed the number and nature of the limitations on complete Executive control of independent counsel matters, the question arises, does the independent counsel process somehow offend the constitutional brand of Executive authority to the President.

We submit that it does not. The first and most important element is one I've talked about before, that is, that the statute grants no piece of Executive power to either the Judicial or Legislative Branch. There is no control in either of those --

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

MS. MORRISON: The identity of the prosecutor, yes, Your Honor. That is something that is given to the judicial branch, although that, it seems to us, recalls the Appointments Clause issue, which is addressed both in the opinion below and by the opponents in this matter.

We would suggest that the specific provisions of the Appointments Clause, far from raising concerns of constitutional nature in this case, actually directly address the question of whether or not the prosecution function -- in the one case example caused by the independent counsel laws -- actually speaks to the constitutionality of the statute rather

than against it.

The Appointments Clause specifically delegates to Congress authority to make a determination where inferior officers are concerned as to whether or not their appointment properly belongs in the President alone, under the principal officer treatment requiring both President and Senate to participate, or in the department heads or the courts of law.

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

MS. MORRISON: That is correct, and we contend that none of that has happened here, Your Honor. That because the specific Appointments Clause questions is addressed in the Constitution itself, and that Congress is given the discretion and authority to do what it has done in this legislation, that the appointment question is addressed specifically by the Constitution and therefor is not a problem, and that after that, the analysis applied by this Court in other cases involving law enforcement as an insulateable aspect of the Executive function, that those two concepts address the Separation of Powers concerns.

Indeed, in Siebold this Court approved judicial appointment of clearly Executive officers performing clearly Executive functions. That case also provided approval for a statute that provided for no Executive or Presidential

supervision or direction of the officers appointed by the court.

QUESTION: Those functions were not exclusively executive, were they

MS. MORRISON: They may not have been, although even the dissent in that case, Your Honor, speaks about the weightiness of the nature of the Executive function, talking about how that statute went further than any statute to date at the time of the decision in Siebold in granting law enforcement or Executive functions.

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

MS. MORRISON: I think that would create more problems.

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

MS. MORRISON: But of course that contention, Your Honor, flies in the face of a long tradition of judicial

appointment of attorneys to represent parties before them, and in those cases there is inherently the fact that the attorneys being appointed to handle matters that may well end up in that courthouse as litigated matters.

The suggestion in the statute is that courts participating in the appointment cannot in any future way participate in review of any independent counsel prosecutions or cases that flow from the appointment, and so there is a greater insulation there than there would be even in the normal case of court appointment.

QUESTION: But Ms. Morrison, it is true that in the District of Columbia the court used to appoint members of the school board

MS. MORRISON: That is absolutely correct, Your Honor.

QUESTION: I don't think it was ever challenged

MS. MORRISON: Well, there is a case in this Court in which that very process was approved, Your Honor.

So that in our view the Separation of Powers concerns have been addressed by this Court in Siebold, in Humphrey's Executor, in Wiener, and we believe that the principles there cast a much broader net than the one sought by the statute here.

That is, that in an individual prosecution where the Executive has a conflict, there can be some measure of insulation of that investigation, and the limited prosecutorial

discretion having to be exercised in that case from pure Presidential control.

If I might, I would like to reserve the remainder of my time.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Morrison.

We'll hear now from you, Mr. Davidson.

ORAL ARGUMENT OF MICHAEL DAVIDSON

AS AMICUS CURIAE, SUPPORTING APPELLANT

MR. DAVIDSON: Mr. Chief Justice, and may it please the Court:

The Congress has delegated a vital function to the court in the implementation of the Ethics Act, but has striven to maintain that function within the boundaries of the Appointments Clause.

One manner in which the Appointments Clause carries forward the idea of Separation of Powers is by dividing the function of creating an office under law, and the power of appointing a person to fill that office. In the Ethics Act, the sole power delegated to the court, of substance, is the power of designating an individual to fill an office which has been created by the action of the Attorney General.

QUESTION: Well, Mr. Davidson, you could say that about any cabinet office or any judicial appointment: Congress creates the positions, the Executive designates the people to fulfill them.

MR. DAVIDSON: And that is the point I wish to make,

that this arrangement does not violate that traditional approach. The function of creating the office and the function of filling the office are indeed separate.

Counsel has described to the Court the manner in which the Attorney General --

QUESTION: Mr. Davidson, in your view are there no limits at all on inter-branch appointments of inferior officers, from one branch to another?

MR. DAVIDSON: The textual grant of authority to the Congress is indeed a broad grant of authority, and a grant of authority which this Court recognized in the Siebold case. But it has been no part of the defense of this statute, that the power is unbounded.

First, as a practical matter, what the Framers did in the context of the clause which grants this discretion is that it created substantial inducements for self-restraint. Whenever the Senate would agree to a statute that would vest appointment authority in the President alone, or the heads of departments, or the courts of law, it must of necessity forgo its power to advise and consent.

And whenever the House and Senate joined together in a statute that would vest power in the courts of law, they both must agree to forgo any political influence over the appointment.

But moreover, if one looks at the history of the utilization of this clause, from the first idea -- not

accepted, but proposed -- to vest appointment authority in the court to appoint the Attorney General, from the first enactment of authority of the court to appoint marshals when the marshall appointed by the President has a conflict of interest, to that of appointing interim United States attorneys, to the enactment in Siebold and to this Act, one will see that the pattern that the Congress has historically recognized as a valid pattern is one which recognizes the need for an important degree of affinity between the appointment and function and the role of the courts.

And so we do not come before the Court today suggesting that there is an unlimited, unbridled power of the Congress to reach out throughout the Executive Branch, but it is one which is carefully tailored to a function in which the courts may indeed have a recognition of the problem presented.

A function that is vested in the court here is a single function of appointing a counsel who mirrors the essential characteristic of the Judicial Branch.

QUESTION: Well, can you really say it is a single function, because the Special Division is also given the power to define the jurisdiction, is it not? And to terminate the investigation as well.

MR. DAVIDSON: As the Congress made clear in the most recent reauthorization of the Act in 1987, the power to define the jurisdiction of the independent counsel is solely the power to carry into the appointment order a description of the

authority that is needed to fully investigate the subject matter which the Attorney General has identified.

The Special Division has no power to go beyond that subject matter. If the independent counsel uncovers the most incriminating evidence about a different subject, the independent counsel's sole opportunity is to go back to the Attorney General and to request an expansion of jurisdiction, and the Attorney General has absolute, unreviewable power to make that determination.

QUESTION: Well, is that what happened in this case?

MR. DAVIDSON: As an amicus --

QUESTION: Yes or no.

MR. DAVIDSON: I believe the Court did not, in this case, exceed its jurisdiction. What it sought to do --

QUESTION: When an expansion was requested, was the request made to the Attorney General?

MR. DAVIDSON: The independent counsel did go to the Attorney General, the Attorney General refused an expansion, and the Special Division, in the opinion which was discussed, concluded that it was bound by that limitation, that it could not go beyond the Attorney General's declination of any further jurisdiction for this independent counsel.

And as for the authority to terminate the investigation, the statute provides for three methods by which an investigation may --

QUESTION: Mr. Davidson, may I interrupt? Isn't it

true, though, that when they went back they did enlarge somewhat the jurisdictional definition that had existed originally, to at least encompass review of these two other individuals?

MR. DAVIDSON: The Special Division interpreted the prior application of the Attorney General to include authority to investigate whether the subject of the investigation had engaged in this conspiracy with others. It made clear that because the Attorney General had decided there could be no prosecution of the other individuals, that the independent counsel would be barred from seeking an indictment of those persons.

But the text, the basis for the Special Division's action remained: the determination by the Attorney General of what the appropriate subject matter of the investigation would be.

On the question of --

QUESTION: I guess the concern is that Article III limits the jurisdiction of the courts to cases in controversy, and at least arguably this statute gives more to the courts than Article III case or controversy jurisdiction would indicate, doesn't it?

MR. DAVIDSON: It gives to the courts an Article II appointment authority, just as --

QUESTION: Plus these other aspects, to the extent they are exercised.

MR. DAVIDSON: None of those aspects is at the heart of the necessity for judicial appointment here. The task which is central to the statute is the designation of the impartial investigator. The Congress, in filling out the details of the statute, have provided for a role which the dissenting judge described as administrator.

Some of that indeed may be, if there were ever a constitutional problem, likely to be severable, and the Congress did insert a strong severability in this statute. But there is no need to contemplate the exercise of that. The jurisdiction is a subject matter identified by the Attorney General.

And as to the question of termination, the Congress made clear that that is an auxiliary device or power seldom to be used, and is only the third string in the effort to make sure that independent counsel investigations did not exceed their purpose.

The first method is by the independent counsel's report. The second method is by the Attorney General's request to the court. We have simply not approached the situation in which any issue has been ever presented about the termination of investigation, and we assume that the court would honor the boundaries which the Congress has placed on that power.

QUESTION: Mr. Davidson, can I ask you about the matter in gross rather than in the details? I am concerned about the reality of affecting the balance between the two

Branches. Anyone who has been in a high level in the Executive Branch has occasion to testify before Congress. That is not always a happy occasion. The system has certain conflicts built in it, and that is all very good; it's the way it works.

But isn't the result of this that whenever there is testimony displeasing to a committee of Congress, and the committee believes that the testimony was not forthright, was not fully disclosing and so forth, which happens not infrequently, that committee writes a letter to the Attorney General, and the consequence is unless the Attorney General can determine within 90 days that there is no basis for even investigating further, the individual is subjected to a special prosecutor investigation by someone not appointed by the Attorney General, not appointed by the President, by a staff that didn't sign on simply to investigate but that signed on to investigate him.

That does not really shift the balance of power between the Legislature and Executive officials to any significant degree?

MR. DAVIDSON: I do not think so, Justice Scalia, and for this reason: committees of the Congress have always been able to refer allegations to the Department of Justice, and whatever political influence committees can bring to bear, they have historically been able to bring to bear.

This statute does not change that. Rather it channels the communication to a very specific communication to

the Attorney General, who is then given the power to investigate.

In 1982, the Congress, out of concern and at the suggestion of the Department of Justice, placed into the law the obligation of the Attorney General to weigh the allegations against the established policies of the Department of Justice. It is not his duty to simply ask for an independent counsel because a committee of the Congress has asked for it, but is to engage in sufficient investigation to determine whether there are reasonable grounds.

This case is the example of that: the Attorney General's determination was a discriminating determination which exonerated two of the possible subjects of this investigation.

If I may speak for a moment about the removal provision, which we think is quite central to this litigation. The removal provision is one which the Congress has worked out extensively with Executive Branch.

The first proposals were to vest removal authority in the court, but persuaded particularly by the American Bar Association, the Congress concluded that that might invest a degree of supervisory power in the court which belonged properly in an officer of the Executive Branch. And so it is the Attorney General who has the sole power to remove an independent counsel.

At first the standard that the Congress utilized was

the standard adopted by the Executive Branch in the Watergate matter, where their counsel had engaged in extraordinary impropriety. But when the Department of Justice returned to the Congress in 1982 and asked for a lowering of that standard to good cause, the Congress responded and lowered the standard to good cause.

And then in 1987, to avoid any question whether the appointing court would have a vested interest in maintaining its appointee in office, the Congress removed authority to review removal of an independent counsel from the appointing court to the District Court, and it further eliminated a special standard of review that had been enacted earlier in the law which would have allowed for review of any error of law or fact.

Now the standard is the standard that the District Court will conclude best accords with statutory and constitutional values involved. It is the Attorney General who has the first opportunity to construe the statute. Contrary to the suggestions that have been made that the Attorney General would lack the information upon which to base his determinations, the statute clearly contemplates that the Attorney General will make a reasonable and good faith inquiry to the facts, because he must report on the facts that he has found which would justify a removal.

QUESTION: When you say he must report, you are referring to the Attorney General?

MR. DAVIDSON: That is correct.

QUESTION: And where does the Attorney General get his information?

MR. DAVIDSON: He gets that information from the inquiry that he deems necessary to determine whether there is good cause to remove an independent counsel.

QUESTION: How does he go about it?

MR. DAVIDSON: I presume he must go to the independent counsel, and he must ask the independent counsel questions, and he may engage in any independent inquiry that he would determine is necessary to fulfill his statutory obligation to remove an independent counsel if good cause exists.

Now there is certainly a central idea to the good cause removal provision. Senator Percy put it well when he said that the clause at least prevents the removal of an independent counsel who is too vigilant in pursuing his responsibilities.

The recent conference report stated the matter in this way: that the independent counsel needs to be able to protect the integrity of his proceedings. But beyond that, the Congress has not tried to specify in the text of the law the exact parameters of the good cause provision.

There is indeed a message that pervades the Congress's consideration of this matter. The President is entitled to whatever constitutionally based authority he has

and responsibilities he has to assure that the independent counsel, as any other officer of the government, stays within the constitutionally proscribed parameters of his office, and grants due recognition to the constitutional needs that the President may express.

If there is ever an controversy about a specific removal, that controversy would come back before the court, and the same constitutional values that are now urged upon the Court may be heard by the court at that time, but also in light of a record which would better illuminate the application of those values to a specific removal.

My time has elapsed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Davidson.

We'll hear now from you, Mr. Martin.

ORAL ARGUMENT OF THOMAS S. MARTIN, ESQ.

ON BEHALF OF APPELLEES

MR. MARTIN: Mr. Chief Justice, and may it please the Court:

For covered individuals, Title VI radically alters the structure by which we are governed. It divests the President of prosecutorial power that even the Appellant admits is Executive in nature, and it transfers that power in part to persons accountable only to themselves and in part to an Article III court. It displaces the power to prosecute from institutional controls that curb ambition and bias and misjudgment in a single perspective.

QUESTION: Well, the independent counsel, do you think he or she is part of the Executive Branch?

MR. MARTIN: The independent counsel performs an Executive function. The independent counsel is an anomaly in our system. She performs an Executive function but she is not under the President.

QUESTION: But the independent counsel is part of the Executive Branch in the sense that at least he or she is performing an Executive function.

MR. MARTIN: That is exactly right.

QUESTION: And the fact that he or she is not subject to the usual control of the President doesn't necessarily make it unconstitutional.

MR. MARTIN: I think it does, Mr. Justice White, for these reasons.

QUESTION: You mean Congress may never create an office in the Executive Branch that is not subject to unlimited power by the President?

MR. MARTIN: This case is focused, and narrowly focused, on a single kind of power, and that is the power of criminal prosecution, which this Court has said many times, and all judges have described as inherently and exclusively executive. It is a special and narrow power.

QUESTION: Well, the power is being exercised by the Executive, by an officer of the Executive Branch.

MR. MARTIN: But a power that is being exercised in a

way that is not subject to appointment and control. Madison defined the essence of Executive power in two ways: it is the power to appoint and the power to control those who execute the laws.

Under this statute the appointment power is taken away from the President and given to a court. Under this statute the power to control is taken away from the President and given either to a court or to a group of people who are without any controls upon them.

I am always fascinated to argue this case because the statute keeps changing every time we do it. This is a case in which the essence of the argument relates to how much control is allowed to the President.

And I think facing some problems with the constitutionality of this statute, independent counsel comes and says, well, this statute allows all kinds of control to the Attorney General. But the fact is it cannot be saved on that basis because it is so inconsistent with the legislative history of the statute.

Congress has in its own words declared its intent that the independent counsel be a person totally outside the control of the Attorney General, and that if the statute is interpreted otherwise, its whole purpose is defeated.

QUESTION: But there is a provision that says that the counsel has to obey the written guidelines and unwritten policies of the Department, and the special counsel has

acknowledged that that provision means what it says.

MR. MARTIN: There is such a provision, and I think the '78 Senate report perhaps puts it on the head as to what that means. It says, this Section 594(f) should be interpreted more as a goal than as a command. It was a decision of the Committee that the best procedure was to leave the question of when such written policies of the Department of Justice are to be followed in the discretion of the special prosecutor. That's Congress's intent.

QUESTION: It's not written that way. Do you want to read the legislative history or do you want to read the text? It says, shall be bound by.

MR. MARTIN: There are two other aspects. It says, shall be bound by where possible, and the question is what does that mean and what outs does it give you. But I understand what the text says. I think that there are two other aspects of it.

Presidential power, the power to decide how to exercise discretion, whether a criminal matter should be brought, how it fits with national policy, whether matters should be brought in front of this Court or not cannot be reduced to a set of rules. That is why we have a President.

If we could put it in guidelines we could do away with the President and just put a bunch of books on the shelves and have people follow those guidelines. The essence of the Executive is the ability to make policy judgments based upon

specific facts of complex kinds of interests and to resolve them. So it is not resolvable by a set of guidelines.

In addition, while there are guidelines in the Department of Justice, from what we can tell and from what commentators have said, and as set forth in the brief of the three Attorneys Generals, those guidelines concern an extraordinarily limited -- as they have to be -- part of the total discretion of the Executive Branch.

So the provision, I think, both, if you interpret it consistent with its legislative history, is not binding. In any event it is not enforceable. You do not know what the special prosecutor, often, is doing and how she is proceeding, and in any event it doesn't provide enough control to allow the President to faithfully execute the laws, because he cannot make, at all the various stages of prosecution, the kinds of decisions which are put in his hands and his hands alone by the Constitution.

QUESTION: But the President doesn't have a day by day supervision of the Department of Justice. Do we all know that?

MR. MARTIN: He certainly doesn't, Justice Marshall, and --

QUESTION: He does?

MR. MARTIN: He does not. You are absolutely right, and that power, by Congress's enactment, the Attorney General is the hand of the President with respect to the execution of

those powers.

QUESTION: Does he do the day by day supervision of the United States District Attorney in Utah?

MR. MARTIN: He has --

QUESTION: Does he?

MR. MARTIN: I suspect that the right answer to that is with respect to some matters he makes no consultation with the United States Attorney in Utah, but as to matters where he or the President chooses to exert the power which is essentially Executive, yes, he can, he can direct the United States Attorney if he want to, and that power is the essence of the constitutional scheme.

And if we want to complain about him, the United States Attorney, we can go to the President, who is accountable to the people.

QUESTION: Impossible under an independent prosecutor.

MR. MARTIN: Right, because --

QUESTION: But shouldn't a prosecutor be independent?

MR. MARTIN: A prosecutor --

QUESTION: What's wrong with it?

MR. MARTIN: The question is independent of what. Under our system of government, the prosecutorial power was put in a person who is accountable to the people and who is elected by the people. And the reason for that is our Framers were concerned --

QUESTION: What U.S. Attorney was elected?

MR. MARTIN: Excuse me?

QUESTION: The Attorney General wasn't elected.

MR. MARTIN: No, but the President was elected.

QUESTION: Well, you told me that the Attorney General runs the Department.

MR. MARTIN: He is the hand of the President, and he is accountable to the President in that regard.

The concern -- it was the Framer's concern. It's not a question of whether we think in a particular instance it would be a good idea or a bad idea, but the Framers were concerned and their experience with the presence of Executive power in the hands of an absolute person.

They understood jail, they understood the power of an absolute and unaccountable monarch, and it was their judgment that that extraordinary power ought to be put in the hands of someone who was accountable to the people, and put in the hands, invested it in the President and entirely in the President; it is given to no one else.

And no one throughout our history has ever exercised it except --

QUESTION: Let me ask one question. What branch of the government is the grand jury in?

MR. MARTIN: The grand jury is a unique -- has been described as a unique animal and I think --

QUESTION: I agree it is unique. Which branch of

government is it in?

MR. MARTIN: I'm not sure it is in any branch of government.

QUESTION: Is it independent?

MR. MARTIN: Some judges have described it as independent. It has very limited functions. The grand jury does not exercise the President's power.

QUESTION: Well, I guess it returns indictments, doesn't it?

MR. MARTIN: The grand jury cannot return indictments without the United States Attorney signing the indictment. Ultimately, it is the President's power to exercise the law.

QUESTION: There have never been grand juries that didn't act independently?

MR. MARTIN: Have there been grand juries that did not?

QUESTION: That acted without the guidance of an Executive official?

MR. MARTIN: I think there have been grand juries that have acted in that way, Justice Stevens.

QUESTION: And I'm still not sure what your answer is. Is the grand jury part of the Executive Branch or the Judicial Branch?

MR. MARTIN: I think it is not part of either branch.

QUESTION: It's not part of either.

MR. MARTIN: It's not part of the prosecutorial

function of the Executive Branch, because then it would have to be under the President, and it is not part of the Judicial Branch either.

QUESTION: In this case, if you should prevail, what happens to the grand jury that has issued these subpoenas?

MR. MARTIN: If we should prevail I assume that the grand jury that issued these subpoenas would be dismissed, because it is supporting the actions of an inquiry which would not be constitutional.

Let me --

QUESTION: Is it your position, Mr. Martin, that Congress cannot condition the President's removal power if once we find that the office is strictly an Executive function, that Congress cannot place any limits on the President's power to remove from that office?

MR. MARTIN: I do not take that absolute position, but I do take this position: that under a removal standard, if you have an officer that is exerting classic constitutional Executive functions, if he is prosecuting, that officer has to be subject to the control of the President, and it may be that control --

QUESTION: Now you say control, the President ordinarily would exercise that control by appointing a person in the first place, choosing who it was to be, and removing the person if the President doesn't like what they are doing, yet you agree that Congress can place some limits on the

President's removal authority.

MR. MARTIN: You could have situations -- for example, there is the old case of the military cadet. Now that person who was subject to military discipline was always in the President's control, and Congress placed some limit on the removal power of the president, and the Court sustained that particular situation.

In this situation, by contrast, the conference report in the Congress is very clear that the good cause removal standard is at the heart of the mechanism protecting the independent counsel's ability to act independently of the President's direct control. Even if the independent counsel fails to abide by Presidential order, she cannot be removed, so --

QUESTION: Well, she can be removed for good cause, can she not?

MR. MARTIN: She can be removed for a kind -- the problem with good cause is the question is what is good cause, and the legislative history --

QUESTION: But that would be, good cause would not include refusing to obey the order of the President.

MR. MARTIN: Not according to the legislative history. This statute was intended --

QUESTION: Or the statute, I suppose.

MR. MARTIN: This statute, unlike Bowsher, where a removal clause was intended, apparently, and was exercised to

generate control in the Legislative Branch, this removal clause was intended to make sure that the Executive cannot control, and therefore it separates the Executive from one of its primary functions, first appointment and then control.

Let me say a few words, if I can, about the claim of the independent counsel that of course the Attorney General maintains the ability to make decisions at the threshold with respect to whether an independent counsel shall be appointed.

The Congress, first of all, describes the Attorney General's function as a screening function. As Justice Scalia has said, it has to be done in a very short time period. But more importantly, it has to be done in a situation in which the Attorney General is denied investigatory tools: he can't use a grand jury, he can't use compulsory process.

So, for example, in this case Congress put in front of the Attorney General four volumes, two and half years of investigation, and said decide in 90 days without any investigatory tools whether or not further investigation may be warranted. That question stacks the decks too much. It provides the Attorney General with no real choice --

QUESTION: But Mr. Martin, isn't it likely that the Attorney General had some knowledge of what had been going on for that two and a half years? I mean, it didn't come totally out of the blue.

MR. MARTIN: It did not come totally out of the blue; that is certainly correct.

QUESTION: He had the whole FBI available.

MR. MARTIN: He had the whole FBI available, but the criteria which is imposed on the Attorney General is to make a decision in a short time period as a screen --

QUESTION: Yes, but I think your constitutional argument would be the same if it was six months or a year, wouldn't it?

MR. MARTIN: I think the difficulty constitutionally is that the Attorney General is not given the choice that he normally has, if it were a situation where you or I were involved, to decide, well, I need further investigation, or I need to use a grand jury, or I need to dispose of it in one of many different ways for national policy reasons or national security reasons.

Instead he is given one choice and one choice only, which is to take it out of the Executive Branch and to give it to someone who is subject only to the control of his or her own personal views.

There was some discussion earlier about the power to expand, and again the legislative history, I think, makes clear what's the court's role here. First of all, it matches a person to the particular prosecution, and then it decides what shall be prosecuted.

In the Iran-Contra --

QUESTION: Mr. Martin, I doubt whether we are going to use the legislative history to cause language which on its

face can be interpreted in a constitutional fashion to be interpreted in an unconstitutional fashion. I mean, the chances that we would do that are rather slim, don't you think?

MR. MARTIN: It certainly is true, but it is also true that the language cannot be interpreted in a way wholly inconsistent with the legislative history or to defeat the legislative purpose, as the Schor case said.

But let me look at the language --

QUESTION: Try us, if the difference is between constitutionality and unconstitutionality. Do you know of any case where this Court said, gee, on its face this statute could be constitutional, but the legislative history requires us to interpret it in such a fashion that it is unconstitutional? Can you give me one case where we have done that?

MR. MARTIN: No. But I can give you the specific language that I rely upon for this question of defining. The statute says the Attorney General assists in defining jurisdiction. The statute in its own language says the court defines with respect to jurisdiction.

In the Iran-Contra matter, for example, materials have been lodged with this Court. It was the Court that decided to add the matter of Nicaragua as a response to a Senate recommendation; it was not the Attorney General who decided that.

The Special Division in a number of cases adds additional people or related matters to its jurisdiction. So

the role of the Division is not a ministerial one. It is one which Congress has thought was a substantial one, an important power.

QUESTION: What specifically does the statute say about the role of the court in defining the jurisdiction of the prosecutor?

MR. MARTIN: It's very short: it says the court shall find the jurisdiction of the prosecutor, and it doesn't say, and it indicates that the Attorney General shall provide a report to assist in that process. It places the power squarely on the court; there is no question about that.

QUESTION: It doesn't in any way direct the court to a presumption to follow the recommendation?

MR. MARTIN: It does not, Justice Rehnquist. It does not.

QUESTION: Do you contend that the definition of jurisdiction in this case was unconstitutional in any way? There may be some other cases the court might define the jurisdiction in a way that would be totally intolerable, to go investigate the Soviet Union or something. But what does that got to do with the case before us?

MR. MARTIN: In the case before us, for example, one of the matters which the court resolved the independent counsel could investigate was the matter of a conspiracy claim with respect to Mr. Olson, a matter that the public integrity section of the Department of Justice had decided not to

investigate further because there was so little evidence.

In other words, it fell below this frivolous threshold.

QUESTION: It did not expand the jurisdiction to indict anyone except Mr. Olson, did it?

MR. MARTIN: No, but it did expand it beyond the matters that were referred to by the Attorney General, and included matters that were rejected by the Attorney General.

QUESTION: You think that is unconstitutional?

MR. MARTIN: I do think it is unconstitutional to reverse decisions that the hand of the President makes in enforcing the criminal laws.

QUESTION: If the Attorney General said, I think there is probable cause, or reasonable cause or whatever the statutory language is, to investigate charge A, and he names one statute, could the court authorize the independent counsel to investigate the possibility of violating related statutes?

Or must he just confine it to the particular statute --

MR. MARTIN: The statute, again -- the language doesn't say anything but define, the legislative history suggests the power to add related matters.

QUESTION: But is it your submission that if the Attorney General gives a specific reference naming only one criminal statute and one target, possible defendant, that any enlargement of that scope of jurisdiction to include a second

statute would violate the constitution?

MR. MARTIN: No, our submission is not based upon the expansion activity of the Attorney General, it is based upon the fact that the matter is taken out from the Executive Branch altogether so that he can no longer control what the prosecutor does, and with respect to all the prosecutorial decisions which affect individual rights and subject a person to all the power of the state, all through that process the Attorney General and the President are without control.

And that is what this statute does by its language and by its legislative history was intended to do, and that displacement of the President is, we think, the problem.

Garland concerned the pardon power of the President, and you may recall the issue there was whether from the pardon power of the President there could be excluded out a certain class of offenders. That is to say those people who had raised their hands against the nation in the war between the states.

And the Supreme Court took up that matter and decided unequivocally that that could not happen, that Congress can neither limit its effect nor exclude from its exercise any class of offenders. When the Constitution gives the pardon power, when it gives the execution of the laws and the obligation to faithfully execute, it gives that with respect to you and me and with respect to every governmental employee.

You cannot carve out certain kinds of people and say they are in a separate system.

I would like to speak a little bit more about the Appointments Clause for just a minute. There has been a great discussion here about how one should interpret the Appointments Clause, and it seems to us that there are a number of criteria. First of all, that it should be interpreted consistently with the purposes of the Clause, which is to create accountability and not to place appointments in a Branch which is not subject to the people.

I think it should be read in tandem with the function of appointments. In a number of cases, Myers through Buckley, this Court has said that the appointments function is tied to the faithful execution obligation, and it should be read in terms of that as well.

And thirdly, it should accommodate the specific requirements of Article III, that the courts remain separate and independent, requirements that are reflected in a constitutional history in which there is no indication of court appointment of executive officers.

The Appointments Clause here is relied upon not just for an appointment, but for the transfer of power from the Executive to the independent counsel --

QUESTION: Well, the Siebold case certainly is relevant, isn't it here? Were there any Executive functions involved in the people appointed in the Siebold case?

MR. MARTIN: The Siebold case is critical, and the Court viewed the Siebold case as on in which the functions fell

somewhere in between the Executive and Legislative functions. It surely did not involve court --

QUESTION: I guess the Court thought it involved some Executive functions, didn't it?

MR. MARTIN: It was stipulated by the parties, and the Court took no issue with that characterization. What the Court did say is that --

QUESTION: And the Court did recognize some inter-branch appointment power in Siebold.

MR. MARTIN: It recognized that in situations where with equal congruity it could be placed in either Branch, then the Congress had that power, if you call it inter-branch. What it did not say is that one could use the Appointments Clause to take power from the core of one Branch and remove it.

One could use the Appointments Clause, for example, to take your constitutional power to decide First Amendment cases and put it in some other Branch of government, or put it in some place which is totally independent, some separate and new entity.

Siebold relied heavily on the concept of congruity, which I think must be a concept of looking to the other parts of the Constitution. In this situation, can it be congruous with the Constitution to not only allow the appointment of such a person, but use the Appointments Clause to transfer power and to involve the judiciary in elements of Executive action that it has never been involved in.

Let me say a few words, if I can, about the judicial participation. As the judiciary appoints the independent counsel and the courts have defined its jurisdiction, the judiciary has used its powers, as members of the Court have said, to issue advisory opinions, to sequence investigations. There is a natural invitation for the judiciary to involve itself more and more in the process of the independent counsel.

It has hand-picked these independent counsel, and has hand-crafted their jurisdiction. This presents an enormous problem for the appearance of impartiality of the judiciary. The court is a participant in the Article II power. It first of all participates --

QUESTION: May I interrupt? I really wonder about that argument. Judges have been appointing defense counsel for years to represent indigents. Why is there any greater appearance of impropriety in this situation? Don't judges know that they are separate from the lawyers that appear before them?

MR. MARTIN: I think the question of impropriety is a question of degree of intimacy.

QUESTION: But do you see any impropriety at all in our appointing counsel to represent an indigent defendant?

MR. MARTIN: I do not.

QUESTION: Well, why is there if you do it on the other side? What is the difference?

MR. MARTIN: There are a couple of differences. One,

the court has a particular role with respect to prosecutors. For individuals the court stands between the prosecutor and the individual to protect --

QUESTION: There are many, many cases in the state courts where the special prosecutors have been appointed by judges when the regular prosecutor couldn't handle the matter for some reason or other. I just don't see any impropriety involved.

MR. MARTIN: Well, if you disagree on the question of appointment alone, it seems to me that when you go to the next step, when the court defines jurisdiction it steps over the line. Justice Marshall --

QUESTION: On that definition of jurisdiction, I looked again here at the reference by the Attorney General. It was to see if there was any violation of 18 U.S.C. 1505, 1001, or any other provision of criminal law. So you certainly can't say here that it's the court that gave it too broad a definition.

MR. MARTIN: Of course the question is not just what was done here but what the statute --

QUESTION: Well, but this case involves what was done here.

MR. MARTIN: In this case, then I would ask you, and the Court might well wish to look at as well, those parts of the record which the Special Division had in front of us, and which was indicated specifically that public integrity section

had declined, for example, to even take a look at the conspiracy issue because it was too frivolous, and that is precisely the issue which is added by the Special Division in its reinterpretation. So I think there is a square conflict.

QUESTION: Mr. Davidson, following up on Justice Stevens comment, what do you have to say about the federal courts appointing interim United States attorneys?

MR. MARTIN: I think the answer has to be resolved by looking in two directions: Article III and Article II. In an Article III direction, when you appoint interim United States Attorney, it is not a specific matter. That person is to handle the general matters in the United States Attorney's office. In addition, the Court does not go beyond it; it doesn't sit down with a United States Attorney and say, now here are the matters I want you to handle in this particular -- here is the scope, here is the particular investigation, here are the laws which you will investigate.

QUESTION: But it's still an inter-branch appointment.

MR. MARTIN: It is still an inter-branch appointment. It may not be constitutional. If you look at the Article II side of it, I think the difference is absolutely enormous.

QUESTION: Are you questioning the constitutionality of that as a theoretical matter?

MR. MARTIN: It need not be reached here, but the Court in the Solomon case, which is the one case which said it

was constitutional, relied heavily that in that situation the United States Attorney goes right into the Executive Branch, and he is subject immediately to the control of the Executive Branch, and Attorney General, if he wants to, can move him immediately.

So it doesn't involve the displacement of power from one Branch to the other. That's why I say when you look at these issues of what you can do on the Appointments Clause, it is important to look at what its ramifications are for the various parts of our Constitution, for Article II and Article III.

QUESTION: In other words, who appoints the Librarian of Congress

MS. MORRISON: I don't know the answer to the question, Justice Blackmun.

QUESTION: Well, the President, of course. And it is confirmed by the Senate. The very title of the Librarian of Congress would indicate this is an inter-branch appointment, also.

MR. MARTIN: And that is why I don't think this case ought to be resolved by a mechanical rule. I think the way to resolve this question is to look at what the particular appointing power that has been suggested here, the particular statutory framework that is urged to be founded on this appointing power, and whether exercise of that kind would be consistent, in the words of the Siebold court, would be

incongruous with the other parts of our Constitution.

It is important, I think, not to read the Appointment Clause separate and apart --

QUESTION: My only point is that our history in practice is rife with examples of inter-branch appointments.

MR. MARTIN: I don't think there is anything in our history -- to add to your point -- where someone was appointed by a court to handle, independently of the Executive Branch, one of the core functions of that Branch.

QUESTION: Yes, but you used the term core function. One of the questions is whether this is a core function, because in colonial times the governor didn't have all that much to do with the appointment of prosecutors. They were done by justices of the peace, the grand jury independently, there are a lot variety there, and a lot of private prosecutions.

MR. MARTIN: And yet our forefathers, the Framers, knowing that process decided to vest the Executive power --

QUESTION: Yes, but did they, by using the word Executive power, necessarily refer to this power which had not been exercised to the same extent by the chief executive of the colonies or the crown in England or any of that?

MR. MARTIN: The answer is that it is not explicitly stated in our constitutional history. I think the indication of what has happened since then, that that power has always been put in the hands of someone who has been appointed by the President or the --

QUESTION: In other words, you rely on practice subsequent to the adoption of the Constitution rather than the contemporary practice for your position.

MR. MARTIN: The contemporary practice in the states was, I think, part of what Congress decided, what the Framers decided not to follow. They decided on a separation of powers and decided not to follow a system in states, which often merged the various kinds of powers in the way you've mentioned.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Martin.

We'll hear now from you, General Fried.

ORAL ARGUMENT OF CHARLES FRIED, ESQ.

AS AMICUS CURIAE, SUPPORTING APPELLEES

MR. FRIED: Thank you, Mr. Chief Justice, and may it please the Court:

We raise a number of particular objections to the independent counsel statute: to the total exclusion of the President from her appointment, from the very significant limitation on the President's power to direct and remove the independent counsel, and on the inappropriate involvement of the judiciary in the appointment, direction, and removal of the independent counsel.

But our central objection is that this statute strips the President of purely Executive function, criminal prosecution in an important class of cases, and lodges that function in one almost wholly untethered to the President, and at the same time it deprives the Congress of its power of

advice and consent, but worse, it absolves the Congress of its weightiest and most painful duty, which is the scrutiny of the Executive Branch, backed up by the painful duty of impeachment.

Now the Appointments Clause problem, to our mind, is simply the most extreme of the constitutional anomalies in this statute. It was Justice White, in a separate opinion in Buckley v. Valeo, who said the appointment power was a major building block fitted into the constitutional structure.

By removing that block, this is only one of the several ways in which this statute deforms that structure. Now, one of the reasons that are offered for these constitutional anomalies, the importance to the public to feel that Executive officers would be investigated and prosecuted with vigor and impartiality.

And the instance which the Appellant and all of her amici urge is the Watergate episode. That is the episode which is thought to teach the necessity for this provision. With respect we submit that that episode teaches the exact opposite lesson. True, the dismissal of Special Prosecutor Cox was regrettable, but it was not a constitutional catastrophe.

Had Special Prosecutor Jaworski been dismissed, had the Watergate task force been disbanded, had those prosecutions been abandoned, that would have been another matter. But everyone knows that those prosecutions proceeded to their denouement without missing a beat.

And they did so not because of jury rigged

constitutional innovations such as we have here, but because of public pressure and the long, deep shadow of Congress's power of impeachment. That is our constitutional system, and that is precisely how our Framers envisaged that the matter should work.

To be sure, it did not work without struggle and strain, but it is a central fallacy of this statute to think that a supremely political object -- and I use the word politics in its high sense, of those occasions which concentrate the moral and practical sense of the people -- can be accomplished without politics, that in some sense it can be turned over to serene persons operating outside of the political process, platonic guardians of sort.

Now, in Humphrey's Executor the Court described an appropriate occasion for such perspicience. It said that it's appropriate to have a commission whose duties are neither political nor executive, like the Interstate Commerce Commission, and that commission can then exercise the trained judgment of a body of experts.

That is not what the special prosecutor, what the independent counsel does, and it is profoundly wrong to absolve the political branches of their responsibilities, and hand over those responsibilities to persons who act totally untethered to any politically responsible person.

This temptation is a temptation to which the Congress yielded on one other occasion, in the Gramm-Rudman trigger

mechanism. And this, it seems to us, is a more severe and a more dangerous instance of that fallacious view of the Constitution because the liberty of the subject is involved.

Now turning to the question of the Appointments Clause and who is subject to Presidential appointment, the Appellant and her amici relentlessly misunderstand our submission. We do not say that every subordinate person is an inferior officer. I do not know whether I am principal officer or an inferior officer, but it is quite clear and it is made clear by statute that I am subordinate to the Attorney General and to the President.

What we say is that subordinancy is a necessary condition for a person being an inferior officer, and it is hard to imagine any officer in the government who is less subordinate in her function than is the independent counsel.

The independent counsel is considerably less subordinate than am I, and than is the Attorney General is of the President.

QUESTION: To whom were the election inspectors in Siebold subordinate?

MR. FRIED: They were subordinate to the court, I suppose, Mr. Chief Justice. And as to the Siebold case, I think it is important to note that the functions they were performing were functions which it was recognized could be performed by the Congress itself.

Which brings me to Justice Blackmun's question

regarding the Librarian of Congress, and one might add to the Librarian of Congress, the Public Printer, and the Comptroller General.

QUESTION: And the Architect of the Capitol.

MR. FRIED: And the Architect of the Capitol, all of whom are appointed by the President. It is not entirely clear whether they are officers of the United States or officers of Congress, but if they are officers of the United States, it is quite clear that the Appointments Clause, as it relates to inferior officers, must lodge that appointment either in the President or in the courts of law.

There is no alternative so there's no particular anomaly or any particular problem that Congress decided to lodge the appointment of the Librarian of Congress in the President. So I think those particular group of cases do not cause the difficulty.

It does seem that by allowing this kind of cross branch appointment, we cause the question of who is an inferior officer and who is a principal officer to bear far too much weight. It really is not particularly important whether the Solicitor General is an inferior or a principal officer, an inferior officer like the Cadet in Perkins who figures so prominently in the Appellant's brief.

It isn't important because it's quite clear that the Solicitor General, like the Cadet in Perkins, is wholly subordinate to a person in the Presidential chain of command.

It is only when you have cross branch appointments that it becomes crucially important to decide whether a particular person is important enough, subordinate enough to be subject to the inferior officer clause or the principal officer clause.

We submit that these are problems which the framers did not intend us to face and that we need not face, because the appropriate thing to do is simply to recognize and to maintain the integrity of each of the branches, and not countenance a system which would allow the Executive Branch to be shattered into a thousand small offices, each of whom would be appointed by courts of law.

Now, there's one further point that needs to be mentioned regarding the control of the independent counsel by the Attorney General. It does seem to us that the picture of the prosecutorial function which the Appellant and her Amici offer is one which is scarcely recognizable to anybody who has ever wielded that power.

I think that power is best described by Mr. Justice Jackson when he was Attorney General in the Attorney General's amicus brief. That is not a power, the prosecutor's power is not one which is exhausted by viewing her as an automaton who mechanically processes evidence and law by something called a bureaucratic set of policies.

Do we prosecute for a felony when more than one ounce of marijuana is involved. What is involved is judgment. What is involved is discretion. That was the lesson which Justice

Jackson taught in that splendid address to young prosecutors. And that kind of judgment, that kind of discretion, we urge, is a kind of discretion which can only be safely lodged in somebody who is responsible to an elected official, an elected official who if he does not properly control that responsibility is subject to Congressional oversight and if need be, impeachment.

I thank the Court for its attention.

If there are no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, General Fried.

Ms. Morrison, you have one minute remaining.

ORAL ARGUMENT OF ALEXIA MORRISON, ESQ.

ON BEHALF OF APPELLANT - REBUTTAL

MS. MORRISON: Mr. Martin indicated in his argument that the case that he thought might be important to the Court discussed the President's pardon power that's constitutionally textually committed to the President personally.

In this matter, we are talking about enforcement powers that are created by statute, and Congress has found within its appropriate power, we think, that individual matters of criminal law enforcement should not be matters of politics.

Unless there are further questions?

QUESTION: I have just one since you're not going to use the rest of your time anyway.

What do you interpret the meaning of the words, if possible, to be in that provision that says you must follow the

Attorney General's written guidelines and policies, if possible. When would it not be possible?

MS. MORRISON: I believe the statute says, except when not possible.

QUESTION: All right.

MS. MORRISON: And I made reference before to the fact that there are certain policies within the Department's written guidelines that require checking up the chain of command. Some of those would be checks that would not be possible under the independent counsel statute where the independent counsel is acting in lieu of the Attorney General for purposes of let's say an immunity grant.

So that in those instances, it would not be possible to follow the established policies of the Department.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Morrison.

The case is submitted.

(Whereupon, at 11:30 a.m., the case in the above-identified matter was submitted.)

REPORTER'S CERTIFICATE

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I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States.

Date: 4/27/88

Margaret Daly

Official Reporter

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