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THE CONSTITUTIONALITY OF THE SPECIAL PROSECUTOR LAW

Donald J. Simon*

The Watergate scandal of the early seventies spawned a number of reforms in the operation of the federal government and in the policing of its highest officials. Strict regulations, for instance, were imposed on the role of money in political campaigns,1 ethics codes were enacted in the two houses of Congress,2 and government agencies were directed to conduct their business in public.3 In addition, a new system was established to investigate and prosecute misconduct by high government officials. This system — involving the appointment of temporary special prosecutors independent of the normal prosecutorial power in the Justice Department4 — was designed to ensure that those who control the law can also be made subject to it.

Five years after its passage, the special prosecutor law still comes under frequent attack. The Reagan Administration has been one of the foremost critics of the law, charging that it is unnecessary, unfair, and expensive.5 Congress has recently considered these and other criticisms of the law, and enacted some revisions to it, although the basic special prosecutor mechanism has been left substantially intact.6


Not the least of the criticisms — made by both the Administration and others — is that the special prosecutor law is unconstitutional. The constitutionality of the law has never been adjudicated by a court, although one case directly raised the issue. Because of the importance of the law, and the novelty of the constitutional questions it raises, it is virtually certain that the courts will soon be presented with another direct challenge to it.

This Article explores the constitutional questions posed by the special prosecutor law and concludes that the law is constitutional. Part I examines the political setting that gave rise to the special prosecutor provisions and discusses the intent of the drafters. Part II explains the precise manner in which the provisions operate and surveys the recent experience under the law. Finally, part III evaluates the constitutional objections raised by critics of the legislation.

I. THE RATIONALE BEHIND THE SPECIAL PROSECUTOR LAW

The special prosecutor law is part of the Ethics in Government Act of 1978 (the Ethics Act), a comprehensive congressional effort to safeguard the integrity of the governmental process. That legislation represented a landmark effort to instill public confidence in the fair and ethical behavior of public officials.

after its enactment, unless affirmatively re-enacted by Congress. See 28 U.S.C. § 598 (Supp. IV 1980). The recent amendments passed by Congress did re-enact the law for an additional five year period, in addition to making certain revisions described below. See infra text accompanying notes 35-68. Notwithstanding his Administration's stated opposition to the special prosecutor concept, President Reagan signed into law the 1982 amendments, including the five year extension of the law.

7. The constitutionality of the law was challenged by Timothy Kraft, former assistant to President Carter. Mr. Kraft filed a civil action against a special prosecutor who was conducting an investigation into allegations of drug use by Mr. Kraft. Kraft v. Gallinghouse, No. 80-2952 (D.D.C. dismissed March 24, 1981). The constitutional issues raised were not decided by the court because the civil action was dropped after the special prosecutor concluded his investigation without bringing charges. See infra notes 75-76, 92 and accompanying text.

8. Indeed, a Senate Subcommittee considering revisions to the Act took critical note of the Reagan Administration's statements doubting the constitutionality of the law. The Subcommittee noted that “[b]ecause of the reservations expressed by the Attorney General, the Subcommittee believes that it is virtually inevitable that the next subject of a special prosecutor investigation will move to enjoin the special prosecutor on grounds that the provisions are unconstitutional.” STAFF OF SUBCOMM. ON OVERSIGHT OF GOVERNMENT MANAGEMENT OF THE COMM. ON GOVERNMENTAL AFFAIRS, 97TH CONG., 1ST SESS., REPORT ON THE SPECIAL PROSECUTOR PROVISIONS OF THE ETHICS IN GOVERNMENT ACT OF 1978, at 21 (Comm. Print 1981) [hereinafter cited as SUBCOMMITTEE REPORT 1981). The Subcommittee also stated that the Attorney General's position "will invite an immediate challenge to the Act the next time that it is invoked." Id. at 1.


10. In addition to the special prosecutor provisions, the Ethics Act imposed financial disclosure requirements on officials in the legislative branch, 2 U.S.C. §§ 701-709 (Supp. IV 1980); the
The Ethics Act was the product of the Watergate scandals, which generated the most serious crisis of public confidence in government in modern American history. Yet, notwithstanding the sense of urgency with which Congress and the public sought ways to ensure that a similar crisis could be averted in the future, the special prosecutor provisions of the Ethics Act evolved through a process of careful congressional consideration extending over several years. The result represents a carefully conceived, pragmatic solution to specific problems exposed by Watergate.

The Senate Watergate investigation that began in the fall of 1972 and culminated in President Nixon's resignation nearly two years later exposed not only gross misconduct by high government officials, but also impropriety and favoritism in the Justice Department's investigation of that misconduct. In several important ways, the exposure of these wrongdoings demonstrated the need for some special arrangement to deal with the problem of favoritism in the prosecution of high government officials.

First, the Watergate scandals underscored the inherent conflict of interest created whenever officials in the Department of Justice attempt to investigate or prosecute high-ranking members of the executive branch. At bottom, the problem lies in the inevitable conflicts that compromise, or appear to compromise, efforts by the Justice Department to conduct a fair and impartial investigation of the President and his closest advisers. The conflicts stem from the divided loyalties inherent in the office of the Attorney General. On the one hand, the Attorney General is the head of the Department of Justice and the


nation's chief law enforcer. On the other hand, he is a political appointee and the primary legal adviser to the President. These two roles come into direct and often irreconcilable conflict in those cases where it is the President or his close aides against whom the law must be enforced. As former Watergate Special Prosecutor Archibald Cox testified before the Senate, "The pressures, the tensions of divided loyalty are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential."\textsuperscript{13} Former U.S. Attorney Whitney North Seymour succinctly stated the same sentiment in his Senate testimony, noting that, "loyalty to the political interests of the administration may often require disloyalty to the goal of impartial justice."\textsuperscript{14}

Testimony before the Senate Select Committee on presidential Campaign Activities (the Senate Watergate Committee) revealed ample evidence of such conflicts. It was shown, for instance, that throughout the summer of 1972, and continuing until the spring of 1973, Henry Petersen, chief of the Justice Department's Criminal Division, served as a "conduit for a constant flow of information from the grand jury and the prosecutors" to both presidential counsel John Dean and to the President.\textsuperscript{15} Dean testified that Petersen informed him of the witnesses that would be called before the grand jury, and what they would be asked.\textsuperscript{16} According to Dean, Petersen passed on the information because he was "a soldier."\textsuperscript{17} As Dean phrased it, "[Petersen] believed in you [the President] and he believes in this Administration. This Administration made him. I don't think he ha[s] done anything improper, but he did make sure that the investigation was narrowed down . . . which was a break for us."\textsuperscript{18} On several occasions Petersen even gave the President tactical advice as to "the posture the White House should strike during the investigation."\textsuperscript{19}

In April of 1973, Attorney General Kleindienst removed himself from the Watergate case and Petersen assumed full responsibility for the investigation.\textsuperscript{20} Throughout April, Petersen continued to confer regularly with the targets of his investigation.\textsuperscript{21} The knowledge he imparted was

\textsuperscript{13} Hearings on S. 2803, supra note 11, at 200.
\textsuperscript{14} Id. at 216.
\textsuperscript{15} S. REP. NO. 981, supra note 12, at 80.
\textsuperscript{16} EDITED PRESIDENTIAL CONVERSATIONS 185 (March 21, 1973), quoted in S. REP. NO. 981, supra note 12, at 80.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} S. REP. NO. 981, supra note 12, at 82; see also id. at 91-92.
\textsuperscript{20} WATERGATE SPECIAL PROSECUTION FORCE, REPORT 254 (1975).
\textsuperscript{21} Petersen did not actually assume responsibility for the investigation until April 19, 1973. See id. Petersen testified, however, that he spoke with the President as late as April 18, S. REP.
used by the President and his advisers to formulate strategies in order to counter the investigation. 22 Further, Petersen apparently reached an agreement with White House officials early in the investigation that the scope of the inquiry would be limited to the initial burglary, and would not extend into White House affairs. 23 The Senate Watergate Committee concluded that Petersen's conduct in the Watergate investigation "raises a question as to whether high Department of Justice officials can effectively administer criminal justice when White House personnel, or the President himself, are the subjects of the investigation." 24

The Watergate investigation underscored the need for a special prosecutor in a second and equally important manner by exposing the lack of accountability to the public, and to the rule of law, that existed within the Justice Department. It was apparent that the Justice Department in the Nixon Administration had become politicized to the point of conspiring actively with the White House in abusing prosecutorial power to advance political ends. Press reports in 1973, for example, indicated that the FBI — a branch of the Justice Department — had received orders from the White House to carry out wiretaps on newsmen and government officials whose support of the President was suspect. 25

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22. S. REP. No. 981, supra note 12, at 80-82.
23. Id. at 81.
24. Id. at 80. On April 30, 1973, Attorney General Richard Kleindienst resigned. President Nixon nominated Elliot Richardson to take his place. During his confirmation hearings, Richardson agreed to appoint an independent special prosecutor to take responsibility for the Watergate investigation. On May 25, 1973, Archibald Cox was sworn in as Special Prosecutor and the Watergate Special Prosecution Force was officially established. WATERGATE SPECIAL PROSECUTION FORCE, REPORT 4-5, 254-55 (1975). With the creation of an independent prosecution force under Cox, the potential for collusion was greatly diminished. Yet in October of the same year, in the face of subpoenas by Cox for the release of tapes of Oval Office conversations, President Nixon ordered his subordinates to fire the special prosecutor. Attorney General Richardson resigned in protest, and Assistant Attorney General Ruckelshaus was fired when he too refused to carry out the order. Acting Attorney General Robert Bork finally did fire Cox. The events of the day were referred to by the press as the "Saturday Night Massacre."

While public outrage over the Cox firing was partially assuaged by White House guarantees that the new special prosecutor, Leon Jaworski, would not be removed without consent of a bipartisan coalition in the Congress, see Special Prosecutor and Watergate Grand Jury Legislation: Hearings on H.J. Res. 784 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93d. Cong., 1st Sess. 175 (1973) (remarks of Rep. Kastenmeier) [hereinafter cited as Special Prosecutor Hearings] fears persisted that the President had succeeded in replacing Cox with "his own man," see id., at 176 (remarks of Chesterfield Smith, President, ABA); see also N.Y. Times, Nov. 2, 1973, § 1, at 40, col. 1, quoted in Special Prosecutor Hearings, supra note 24, at 239.

25. WATERGATE SPECIAL PROSECUTION FORCE, REPORT 63-65 (1975). Testimony before the Senate Select Committee on Presidential Campaign Activities subsequently showed these reports to be true. See S. REP. No. 981, supra note 12, at 37-40.
Moreover, the Watergate Special Prosecutor Force investigated charges that during the spring of 1972 the Department of Justice, under the direction of John Mitchell, settled three antitrust suits against the International Telephone and Telegraph Corporation (ITT) in return for ITT’s help in financing the 1972 Republican National Convention. These charges resulted in the subsequent prosecution and conviction for perjury of then Assistant Attorney General Richard Kleindienst by the Watergate Special Prosecution Force. Similarly, the Senate Watergate Committee heard testimony that White House staff members discussed the possibility of using the Justice Department’s Antitrust Division to punish the three major networks. Testimony further revealed that Robert Maridan, then Assistant Attorney General in charge of the Internal Security Division within Justice, forwarded extensive FBI investigative information to the White House and to the Committee to Re-Elect the President.

These activities raised the question whether high Justice Department officials who themselves abused the law could be expected to hold their peers or their superiors accountable. Many in Congress felt that some outside check on the politicization of the Justice Department was needed in order to prevent official corruption on the part of the very officials whose duty it was to police and prosecute official corruption. As the Senate Report on the 1978 Ethics Act noted: “[Nixon Administration officials] made the . . . assumption that ‘their’ Department of Justice would not investigate actions condoned and conducted by employees of the White House . . . [T]he existence of the authority for the court to appoint a temporary special prosecutor would be a deterrent to such an attitude by high-level government officials.”

Thus, Watergate dramatically revealed the fragility of a system of government that relies on officials in positions of power to police themselves. It made clear that without some outside check on officials, it is possible for an unscrupulous President, with compliant subordinates in the Justice Department, to commit “serious crimes” against the government and the public at large.
Finally, Watergate revealed that if public confidence in government was to be restored and maintained, remedying the actual conflict of interest in Justice Department prosecution of high officials was not enough; the appearance of impropriety and favoritism had to be removed as well. The Senate Report on the Ethics Act concluded that, "The appearance of conflict is as dangerous to public confidence in the administration of justice as true conflict itself. Having men of integrity operate in the face of a conflict is an insufficient protection for a system of [justice]."33 One witness testifying in support of the special prosecutor law said, "We must not only do justice, but be able to assure the public that justice has been done."34

II. THE OPERATION OF THE SPECIAL PROSECUTOR LAW

A. The Statutory Mechanism

As the Watergate scandal unfolded, the public reaction produced a clear mandate: practical legislative steps had to be taken to ensure that executive abuse of the public trust did not occur again.35 Inspired by "the greatest mass outpouring of public protest in our history,"36 members of the House and Senate considered a variety of proposals designed to impose independent checks on the activities of high executive officials and to alleviate favoritism in the investigation of official misconduct. Committees in both houses considered proposals ranging from placing the Justice Department wholly outside the executive branch,37 to establishing a permanent special prosecutor for all official misconduct.38

The solution finally adopted by Congress was to provide a mechanism
for the appointment of temporary special prosecutors. Although this mechanism is established as an ongoing feature of the law enforcement authority of the federal government, the office of any particular special prosecutor is of temporary duration. The office comes into being in order to investigate a discrete set of allegations of wrongdoing by an official, and the office expires when that investigation and any concomitant prosecution is completed.

The special prosecutor mechanism is triggered whenever the Attorney General "receives information sufficient to constitute grounds to investigate" that any person within a class of high executive officials defined by statute has committed a violation of federal criminal law. The Attorney General then has discretion to conduct, for a period not to exceed ninety days, a preliminary investigation of the matter as he "deems appropriate." In determining whether grounds to investigate

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The Subcommittee believes, however, that much of the adverse publicity resulting from a special prosecutor investigation could be diminished by simply changing the name from "special prosecutor" to "independent counsel." This change would remove the Watergate connotation of a special prosecutor investigation and would help spare the subject of such an investigation adverse public reaction. Equally important, the name "independent counsel" more accurately indicates that the investigation is being handled outside of normal government channels by an impartial investigator.

SUBCOMMITTEE REPORT 1981, supra note 8, at 2. Notwithstanding this recent change in the law, this Article will continue to use the term "special prosecutor" because it more accurately reflects the current public understanding of the office.

40. The special prosecutor provisions however, as noted above, are subject to a five-year automatic termination provision. 28 U.S.C. § 598 (Supp. IV 1980). See supra note 6.


44. The limited set of officials subject to the special prosecutor provisions includes only the President, Vice President, Cabinet officers, high officials in the White House, Justice Department, the Internal Revenue Service and the Central Intelligence Agency, and ranking officers of the President's national campaign committee. 28 U.S.C. § 591(b) (Supp. IV 1980), as amended by Pub. L. No. 97-409, 96 Stat. 2039 (1983). This encompasses a total of approximately 125 individuals. See SUBCOMMITTEE REPORT 1981, supra note 8, at 31. The 1982 amendments made minor changes to this list, narrowing somewhat the number of officials encompassed by the Act and shortening the period of time during which an official is covered after he leaves office. See Pub. L. No. 97-409, § 3, 96 Stat. 2039 (1983).

In addition, the Attorney General may seek appointment of a special prosecutor to investigate allegations of criminal wrongdoing by individuals other than those specified in the statute where the Attorney General determines that an investigation by him "may result in a personal, financial or political conflict of interest." 28 U.S.C. § 591(c) (Supp. IV 1980).


exist, the Attorney General may consider both the specificity of the information received and the credibility of the source of the information.\textsuperscript{47} If the Attorney General concludes after investigation that there are "reasonable grounds to believe that further investigation or prosecution is warranted,"\textsuperscript{48} the matter must be referred to the District of Columbia Court of Appeals for appointment of a special prosecutor.\textsuperscript{49}

The Ethics Act establishes a three-judge panel of the District of Columbia Circuit Court of Appeals with jurisdiction over matters concerning the appointment and removal of the special prosecutor.\textsuperscript{50} That

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This standard reflects a considerable broadening of the Attorney General's discretion accomplished by the 1982 amendments. As originally enacted, the Attorney General was required to begin a preliminary investigation whenever he received "specific information" that a covered official had violated the law. The original statute gave the Attorney General little or no discretion to evaluate the weight or credibility of the allegation. Further, as originally enacted, the law required the Attorney General to yield to a special prosecutor whenever, after his preliminary investigation, he could not conclude that "the matter is so unsubstantiated as not to warrant further investigation or prosecution." 28 U.S.C. § 592(b)(l) (as amended by Pub. L. No. 97-409, § 4(c), 96 Stat. 2039 (1983)). The new law, in contrast, allows the Attorney General to weigh the sufficiency of the evidence and decide if "reasonable grounds" exist for further investigation. 28 U.S.C. § 592(c)(l) (Supp. IV 1980), as amended by Pub. L. No. 97-409, 96 Stat. 2039 (1983).

These changes were made in response to criticism that the threshold triggering mechanism of the original law was too low, resulting in the appointment of a special prosecutor to investigate alleged criminal violations which are rarely prosecuted by the Justice Department. See, e.g., Hearings Before the Subcomm. on Oversight and Management of the Senate Comm. of Government Affairs, 97th Cong., 1st Sess. 8, 10 (1981) (testimony of Former Attorney General Benjamin Civiletti); id. at 58, 66 (testimony of Philip B. Heymann). The Senate Subcommittee that drafted the 1982 amendments concluded that the original threshold standard "result[ed] in an uneven administration of justice: one standard is applied to the citizenry at large, while another is applied to our public officials." Subcommittee Report 1981 supra note 8, at 48. The Subcommittee concluded that the appointment standard should be raised "[t]o lessen the inequities created by the present low standard and to prevent needless special prosecutor investigations." Id. at 49. The Subcommittee stated that the higher standard would permit the Attorney General "to exercise limited discretion in evaluating the results of the preliminary investigation . . . ." Id.

\textsuperscript{49} 28 U.S.C. § 592(c) (Supp. IV 1980), as amended by Pub. L. No. 97-409, 96 Stat. 2039 (1983). In addition, the Act is triggered whenever a majority of either the majority or the non-majority party members of the Judiciary Committees of either House of Congress requests in writing that the Attorney General seek appointment of a special prosecutor. 28 U.S.C. § 595(e) (Supp. IV 1980). The Attorney General must, after conducting a preliminary investigation of the matter, report back to the Committee in writing on his actions. Id.

\textsuperscript{50} 28 U.S.C. § 49 (Supp. IV 1980). The three judges are designated by the Chief Justice of the United States and sit on the panel in this division for a two year period. 28 U.S.C. § 49(a), (d).
division of the court, upon referral of a matter by the Attorney General, is empowered to appoint a special prosecutor and to define the scope of the prosecutor's investigative and prosecutorial jurisdiction.\textsuperscript{51}

The powers of the special prosecutor, as well as several important accountability features, are set forth in the statute. The investigative powers include conducting grand jury proceedings, reviewing evidence received, inspecting tax returns, compelling testimony, determining whether to contest any privileges asserted by witnesses, and making application to the courts with respect to grants of immunity for witnesses.\textsuperscript{52} The prosecutorial functions include framing and signing indictments, filing informations, initiating and conducting prosecutions and other necessary civil or criminal litigation, and determining whether to appeal adverse decisions.\textsuperscript{53} The special prosecutor may hire staff to aid in performing the functions of the office,\textsuperscript{54} and may seek the assistance of the Department of Justice on matters within the jurisdiction of the investigation.\textsuperscript{55}

Several controls on the power of the special prosecutor are also provided in the Act. First, the scope of the appointee's prosecutorial jurisdiction is circumscribed by court definition.\textsuperscript{56} This definition in turn is based upon the initial report of the Attorney General as to matters which, in his belief, are substantiated sufficiently to warrant further investigation or prosecution.\textsuperscript{57} The special prosecutor has no power to operate outside the scope of this limited jurisdiction or to extend it unilaterally.\textsuperscript{58}

A second limitation on the activities of the special prosecutor lies in a provision of the Act that states: "A special prosecutor shall, except where not possible, comply with the written policies of the Department of Justice respecting enforcement of the criminal laws."\textsuperscript{59} This provision technically does allow the special prosecutor to deviate from established Justice Department guidelines. Yet the intent of Congress

\textsuperscript{53} Id.
\textsuperscript{55} 28 U.S.C. § 594(d) (Supp. IV 1980). The Justice Department is required by statute to provide any assistance requested by the special prosecutor. Id.
\textsuperscript{57} 28 U.S.C. § 592(c) (Supp. IV 1980).
\textsuperscript{58} He may, however, request the Attorney General or the division of the court to refer to him additional matters, but only if they are related to his original jurisdiction. 28 U.S.C. § 594(e) (Supp. IV 1980). The division of the court, upon the request of the Attorney General, may expand the prosecutorial jurisdiction. 28 U.S.C. § 593(c) (Supp. IV 1980).
is plainly that the special prosecutor should conform his discretion to established principles and follow normal Justice Department practices. As the Senate Report to the 1982 amendments stated, the intent of this provision "is to create a presumption that the special prosecutor will follow prosecutorial guidelines."

The third element of accountability is the statutory requirement that the special prosecutor report to the appointing court on both the disposition of all cases brought and the reasons for not prosecuting any matter within the jurisdiction of the office. The court then has the discretion to release that report to the Congress, the public, or to any appropriate person. Further, the prosecutor must "from time to time" send to Congress statements or reports on his activities. The special prosecutor must also cooperate with House and Senate committees exercising oversight jurisdiction.

Finally, the statute provides that the special prosecutor may be removed by the Attorney General for "good cause" or for any disabling condition which impairs the performance of his duties of office. However, if the prosecutor is removed, the Attorney General must report this promptly both to the court and to Congress. Further, the special prosecutor may contest removal by bringing a civil action against the Attorney General. That action is adjudicated before the division of the court which appointed the prosecutor, and that court may order the prosecutor's reinstatement or other appropriate relief.

60. SUBCOMMITTEE REPORT 1981, supra note 8, at 33; see also S. REP. NO. 95-170, supra note 31, at 69-70.
64. 28 U.S.C. § 595(d) (Supp. IV 1980).
65. 28 U.S.C. § 596(a)(1) (Supp. IV 1980), as amended by Pub. L. No. 97-409, 96 Stat. 2039 (1983). The "good cause" standard for removal was added by the 1982 amendments. Pub. L. No. 97-409, 96 Stat. 2039 (1983). As originally enacted, the statute provided for removal of the special prosecutor for "extraordinary impropriety" or "any other condition that substantially impairs . . . performance." The Senate Report on the amendments notes that the original standard "may present too many opportunities for the special prosecutor to abuse his authority." SUBCOMMITTEE REPORT 1981, supra note 8, at 54. Notwithstanding this weakening of the law, however, the Subcommittee "stress[ed] that the Attorney General must use this removal power in only extreme, necessary cases, as removal of a special prosecutor severely undermines the public confidence in investigations of wrongdoing by public officials." Id.
68. Id. In addition to the changes described above, the 1982 amendments also provided that the court may award to the subject of a special prosecutor's investigation reimbursement for all or part of the attorney's fees incurred by that person during the investigation, provided no indictment is brought. Pub. L. No. 97-409, § 5, 96 Stat. 2039 (1983); 28 U.S.C. § 593(g) (Supp. IV 1980). The purpose of this addition is to compensate the subject of an investigation for the "extraordinary costs caused exclusively by this statute." SUBCOMMITTEE REPORT 1981, supra note 8, at 27.
B. Experience Under the Statute

To date, three special prosecutors have been appointed under the Act, and in each of the three cases, the prosecutor has concluded that no criminal charges should be brought against the subject of the investigation. The first appointment occurred after allegations were made that White House Chief of Staff Hamilton Jordan was using cocaine in violation of federal law. After a preliminary investigation required by the Act, Attorney General Benjamin Civiletti on November 19, 1979, applied to the special prosecutor division of the District of Columbia Circuit for the appointment of a special prosecutor. On November 29, 1979, the court appointed Arthur H. Christy special prosecutor. After a six month investigation, Christy, on May 28, 1980, submitted a report to the court describing his investigation and stating his conclusion that the case against Jordan be closed.

The second appointment of a special prosecutor grew directly out of the first. In the report to the court on Hamilton Jordan, Christy filed a confidential memorandum, which was transmitted to Attorney General Civiletti, stating that allegations of drug possession had been made against Timothy Kraft, then campaign manager of the Carter-Mondale Presidential Committee. After a preliminary investigation, the Attorney General requested the court to appoint another special prosecutor. On September 9, 1980, the court named Gerald Gallinghouse as special prosecutor. Gallinghouse completed his criminal investigation in March 1981 and concluded that no charges should be

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69. The description of the special prosecutor's investigation into the Jordan matter is derived from a summary in the Senate Report on the 1982 amendments. SUBCOMMITTEE REPORT 1981, supra note 8, at 12-14. The allegations against Jordan grew out of a federal investigation into alleged tax evasion by the owners of the Studio 54 discotheque in New York. After the two owners were indicted for tax evasion in June 1979, they alleged to the U.S. Attorney's office that Mr. Jordan had used cocaine at Studio 54 in June 1978.

70. The Attorney General noted that he was unable, after a preliminary investigation, to conclude "that the matter is so unsubstantiated that no further investigation . . . is warranted." 28 U.S.C. § 592(b)(1) (as amended by Pub. L. No. 97-409, § 4, 96 Stat. 2039 (1983)).

71. The information compiled by Special Prosecutor Christy during the six month investigation was submitted to a grand jury prior to the submission of the report to the court. On May 21, 1980, the grand jury voted not to bring charges.


73. Mr. Kraft was also subject to the provisions of the Special Prosecutor Act in his capacity as former White House Appointments Secretary and former Assistant to the President for Personal and Political Coordination. See 28 U.S.C. § 591(b) (Supp. IV 1980).

74. The Attorney General made the request on August 26, 1980.

75. During the course of Special Prosecutor Gallinghouse's investigation, Kraft filed a civil action for declaratory and injunctive relief in the United States District Court for the District of Columbia, challenging the constitutionality of the special prosecutor law and seeking to enjoin the investigation. Kraft v. Gallinghouse, No. 80-2952 (D.D.C. dismissed March 24, 1981).
brought against Kraft.\textsuperscript{76}

The third appointment of a special prosecutor occurred in December of 1981, when Leon Silverman was appointed by the court as special prosecutor to investigate bribery allegations made against Secretary of Labor Raymond Donovan.\textsuperscript{77} Mr. Donovan himself called for the appointment of a special prosecutor in order to quell the public controversy over the charges made against him.\textsuperscript{78} After a six month investigation, Mr. Silverman concluded that there was insufficient evidence to warrant the bringing of criminal charges against Mr. Donovan, and the investigation was closed.\textsuperscript{79}

In addition to these three appointments of special prosecutors under the Act, there have been at least six cases in which the Attorney General has conducted a preliminary investigation after receiving information of criminal misconduct by an official covered by the Act.\textsuperscript{80} In all of these cases the Attorney General concluded that the matter should be dropped without appointment of a special prosecutor.\textsuperscript{81} Because of the Act's restrictions on public disclosure of such investigations, it is not known which officials were involved or what charges were made in these cases.\textsuperscript{82}

In each of the instances described above, the appointment of a special prosecutor to investigate criminal charges against high-ranking officials has succeeded in assuring the public that a fair and impartial investigation has taken place. Even where no charges have been brought, the fact that exoneration came from an independent source rather than from the Attorney General has increased public credibility in the outcome of the investigation. In commenting on the special prosecutor's

\textsuperscript{76} Kraft's civil action against the special prosecutor accordingly became moot, and was dismissed by the court on March 24, 1981. Kraft v. Gallinghouse, Order of March 24, 1981.


\textsuperscript{78} Id.

\textsuperscript{79} N.Y. Times, June 29, 1982, at A1, col. 6.

\textsuperscript{80} Subcommittee Report 1981, supra note 8, at 15-16.

\textsuperscript{81} Id.

\textsuperscript{82} The Act provides that if the Attorney General concludes, after a preliminary investigation, that there are no reasonable grounds to believe "further investigation or prosecution is warranted," he shall so notify the court and submit to the court a summary of his investigation. 28 U.S.C. § 592(b)(2) (Supp. IV 1980). The statute provides that this notification of a preliminary investigation shall not be made public without leave of court. 28 U.S.C. § 592(b)(3) (Supp. IV 1980).

The statute also provides that in cases where the Attorney General applies to the court for appointment of a special prosecutor, the application and supporting documents shall not be made public without leave of court. 28 U.S.C. § 592(d)(2) (Supp. IV 1980). Upon appointment of a prosecutor, the statute provides that his identity and prosecutorial jurisdiction shall be made public "upon request of the Attorney General or upon a determination of the division of the court that disclosure of the identity and prosecutorial jurisdiction of such special prosecutor would be in the best interests of justice." 28 U.S.C. § 593(b) (Supp. IV 1980). It is therefore possible, though unlikely, that there have been appointments of special prosecutors, other than the three described above, which have not been made public. In any case, the statute requires public disclosure of a special prosecutor's identity and jurisdiction when "any indictment is returned or any criminal information is filed." Id.
dismissal of allegations against Secretary Donovan, for instance, *The New York Times* noted, "Th[e] law protects the public by guarding against favoritism, and it can be a boon to officeholders by giving them credible clearance when they deserve it. Would anyone have believed the same exoneration if it had come from Mr. Donovan's Cabinet colleague, the Attorney General?" 83 Similarly, *The Washington Post* cautioned against repeal of the law, noting that the special prosecutor provision "has helped restore public confidence in the integrity of the federal government." 84 The Senate Subcommittee that conducted a thorough review of the law's implementation concluded that the law is fundamentally sound, and stated, "By establishing a mechanism to ensure impartial and thorough investigations of allegations against high-ranking Executive branch officials, the Act guards against both actual and perceived conflicts of interest and assures the public that government officials are not above the law." 85 Finally, *The New York Times*, on another occasion, invoked the use of a colloquialism to best sum up the strong policy reasons for continuing the special prosecutor mechanism. In an editorial, the *Times* wrote, "Th[is] law protects officials and citizens alike from Government self-investigations that lack credibility and heighten public distress. You trust your mother, but you cut the cards." 86

III. CONSTITUTIONAL CONSIDERATIONS

Two broad constitutional challenges have been raised to the special prosecutor provisions. First, it is argued that the mechanism for appointment of the special prosecutor violates the appointments clause of the Constitution. 87 Proponents of this argument contend that the special prosecutor is not an "inferior officer" of the United States, that even if he is, he may not be appointed by a court of law, and that even if he may be appointed by a court, the special prosecutor division of the District of Columbia Court of Appeals is not a "court of law" within the meaning of the appointments clause. The second constitutional challenge relies on broader principles of separation of powers, and claims that those considerations are a bar to the law's goal of providing for a prosecutor free from the influence of the President, even in those cases where the prosecutor is empowered to investigate high aides or close associates of the President. According to this view, it is a constitutional requisite that even in such cases, the Presi-

85. SUBCOMMITTEE REPORT 1981, supra note 8, at 1.
87. U.S. CONST. art. II, § 2, cl. 2.
dent must control the initiation, direction, and termination of the prosecution.

These attacks on the special prosecutor law invoke a rigid formalism that does justice neither to the legitimate concerns of Congress nor to the flexibility of the constitutional scheme. In fact, constitutional arrangements are not so unyielding as these arguments contend. The Supreme Court has expressly held that in matters involving the separation of powers, a "pragmatic, flexible approach" must control. Such an approach validates both the mechanism in the Ethics Act for appointment of the special prosecutor, and the statutory independence which Congress has assured him in order that he may do his job.

A. Appointments Clause Objections

The Ethics Act provides that a division of the Court of Appeals for the District of Columbia Circuit shall appoint the special prosecutor upon referral of information by the Attorney General. The Congress, in establishing this mechanism, relied upon the language of the appointments clause of the Constitution, which states:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Critics of the special prosecutor law have raised three objections under the appointments clause to the statutory mechanism for appointment of the special prosecutor. First, it is claimed that the special prosecutor is not an "inferior officer" and thus can be appointed only upon nomination by the President and confirmation by the Senate. Second, the argument is made that, even if the special prosecutor is an "in-

89. 28 U.S.C. § 593(b) (Supp. IV 1980).
90. U.S. Const. art. II, § 2, cl. 2.
91. Id. (emphasis added).
92. See Brief for Timothy Kraft at 11-12, Kraft v. Gallinghouse, No. 80-2952 (D.D.C. filed Nov. 19, 1980) [hereinafter cited as Kraft Brief] (on file with the Journal of Law Reform). For general background to the Kraft case, see supra notes 7, 75-76. 92. The constitutional claims made by Kraft are representative of those voiced by critics of the special prosecutor legislation. For this reason the Kraft brief is cited frequently throughout the remainder of this Article.
fier officer,” his appointment may not be vested by Congress anywhere outside the executive branch.93 Third, it is argued that even if the special prosecutor’s appointment may be vested in the “courts of law,” the panel of judges here vested with the appointment power does not constitute such a “court.”94

1. The special prosecutor as inferior officer—Article II, section 2, clause 2 of the Constitution provides for the appointment of certain principal officers by the President alone, with confirmation by the Senate, and the appointment of all other “inferior Officers” by the “Courts of Law,” the “Heads of Departments,” or the “President alone,” as the Congress “think[s] proper.”95 Thus, if the special prosecutor is held to be a principal officer, a federal statute vesting appointment power in a division of the District of Columbia Circuit Court would be unconstitutional.

On its face, the appointments clause limits principal officers to those enumerated: ambassadors, Supreme Court Justices, public ministers and consuls. The first two categories are self-explanatory. The present-day meaning of the third category — ministers and consuls — is not so clear, but evidence indicates that these officers are no more than the heads of the various government departments and agencies.96

A special prosecutor clearly does not rise to this status. Although it is obvious that a special prosecutor is not the head of any department in name, critics have nonetheless argued that he should be considered a principal “Officer of the United States” because he has the powers of a department head. As Kraft argued in his challenge to the law, “[the prosecutor] acquires the power and authority of the Attorney General and he may, as he alone deems proper, create his own mini-Department of Justice.”97

In practice, however, this is an overstatement of the special prosecutor’s power. To be sure, the authority and the independence he possesses are broad; however, it is broad authority in an extremely limited area. The prosecutor’s duties and powers are statutorily limited to a specific jurisdiction defined by the appointing court.98 Unlike the

93. Id. at 8.
94. Id. at 13.
95. U.S. CONST. art. II, § 2, cl. 2.
96. Time has clouded the understanding of the terms “public ministers and consuls.” At the time the Constitution was drafted, a public minister was understood to be “a person appointed by the chief of state to act for him in a particular department of government; one entrusted with the administration of a department of state.” 6 OXFORD ENGLISH DICTIONARY 473 (1961). In modern political terms, a “public minister” is the head of a department or agency. “Consul” was used to denote “an agent appointed and commissioned by a sovereign state to reside in a foreign town or port, to protect the interests of its traders and other subjects there, and to assist in all matters pertaining to the commercial relations between the two countries.” 2 OXFORD ENGLISH DICTIONARY 884 (1961).
97. KRAFT BRIEF, supra note 92, at 5.
98. 28 U.S.C. § 593 (Supp. IV 1980). Indeed, this jurisdiction is defined in the first instance
head of a department, who is free to pursue any matter within the broad confines of executive power, the special prosecutor is limited to the exercise of his power within a single, specific investigation.\textsuperscript{99} Even in that context, he must follow the guidelines of the Department of Justice, which are ultimately determined by the Attorney General.\textsuperscript{100} Moreover, the prosecutor is subject to oversight scrutiny by both the Court and Congress, to which he must report on his activities and judgments.\textsuperscript{101} Finally, the special prosecutor is subject to removal by the Attorney General on any grounds which constitute "good cause."\textsuperscript{102} In each of these respects, he is far more fettered than the Attorney General or any other department head.

Because the special prosecutor does not exercise the power of a department head or other officer enumerated in article II, he must be treated — for purposes of the appointments clause — as an inferior officer. This point is clear from the language of the clause itself, which leaves to the Congress the authority to create all other offices of the United States beyond Supreme Court Justice, ambassador, consul and minister. The clause then provides that "Congress may by law, vest the appointment of such inferior officers . . . in the President alone, in the courts of law, or in the heads of departments."\textsuperscript{103} The language "such inferior officers" clearly refers back to the holders of all the additional offices created by Congress; in other words, all officers other than Justice, ambassador, consul, or minister.\textsuperscript{104} Thus, simply by construing the language of the clause, inferior officers are those who hold an office that is created by statute and that is below the rank of department head. The special prosecutor falls within this large group.

Judicial interpretation of the appointments clause supports this construction. The Supreme Court first discussed the issue of the demarcation between principal and inferior officers in United States v. Germaine.\textsuperscript{105} There the question was whether a surgeon retained on an \textit{ad hoc} basis by the Commissioner of Pensions was an officer of the United States or simply an employee.\textsuperscript{106} Because the surgeon was

\footnotesize{on the basis of an investigation and report conducted by a department head, the Attorney General. 28 U.S.C. § 593 (Supp. IV 1980). See supra text accompanying notes 35-68.


103. U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

104. Any other interpretation does injustice to the language of the provision, since it would leave the term "such" as surplus language, a result which cannot rationally be assumed. United States v. Menasche, 348 U.S. 528, 538-39 (1955).

105. 99 U.S. 508 (1878).

106. That line of demarcation has been considered by the Court on several occasions. See}
to serve only when summoned by the Commissioner of Pensions and was to be paid only on a fee-for-service basis, the Court found him to be an employee. In the course of its opinion defining the line of demarcation between officers and employees, however, the Court stated that "[t]he Constitution ... divides its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But . . . in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment . . . in the courts of law, or . . . the heads of departments." The Court thus took the position — consistent with the language of the appointments clause — that "inferior officers" are those ranking beneath the officers expressly enumerated in the Clause, or in terms relevant there, those beneath the heads of departments.

Collins v. United States, decided by the Court of Claims the year before the Germaine case, adds further weight to this view. In Collins, the issue was Congress's authority to delegate to the President alone the power to reappoint a major in the army. The Court of Claims found the delegation of authority for Collins's reinstatement to be in conformity with the appointments clause's provisions for inferior officers. In interpreting the phrase "inferior officers," the Court stated that "the Constitution leaves it to Congress to vest in the President alone, the courts of law, or the heads of departments the appointment of any officer inferior or subordinate to them . . . ." Here, too, the court's conclusion is plainly that inferior officers are those ranking below the enumerated ones.

Critics of the special prosecutor law have cited Buckley v. Valeo for the proposition that the special prosecutor is not an "inferior officer" and therefore must be appointed by the President and confirmed

also Auffmordt v. Hedden, 137 U.S. 310, 327 (1890) (merchant appraiser was not an officer); United States v. Smith, 124 U.S. 525, 531 (1888) (customs clerk was not an officer). 107. The Court noted that the duties exercised by the surgeon were "occasional and intermittent." 99 U.S. at 512. While it is true that the special prosecutor under the Ethics Act is not a permanent prosecutor, see supra text accompanying notes 39-42, the magnitude and independence of his position makes it plain that he is more than a mere employee. 108. 99 U.S. at 509-10 (emphasis added). 109. Edwin Corwin, in his commentaries on the Constitution, agreed with this analysis, stating "[i]nferior officers' are evidently officers subordinate to the heads of departments or the courts of law. . . ." E. CORWIN. THE CONSTITUTION AND WHAT IT MEANS TODAY 145 (1973). 110. 14 Ct. Cl. 568 (1878). 111. Id. at 574 (emphasis added). 112. Although the inference raised by language of the case is that the appointing authority must be vested in all instances in a superior official of the same branch, that point is clearly dispelled by Ex Parte Siebold, 100 U.S. 371 (1879). See Hobson v. Hansen, 265 F. Supp. 902, 912 (D.D.C. 1967). See also infra text accompanying notes 124-135. The actual holding of the Court of Claims — that inferior officers are all those officers below the rank of the enumerated officers — is borne out by the Supreme Court's views in the Germaine case. See supra text accompanying note 105. 113. 424 U.S. 1 (1976).
by the Senate. In *Buckley*, the issue was whether Congress could vest appointment of Federal Election Commissioners in the President (with the consent of the Senate and House), in the Speaker of the House, and the President pro tempore of the Senate. The Court held that none of these appointment methods for Commissioners was sanctioned by article II of the Constitution. Because the Commissioners were found to exercise "significant authority pursuant to the laws of the United States," the Court ruled that they were "officers" and thus must be appointed according to one of the several methods prescribed in the appointments clause.

The Court in *Buckley* did not rule — nor did it have to rule — on the question of whether the Commissioners were principal or inferior officers. The Court did not even address that question. Rather, in *Buckley*, the Court distinguished officers — both principal and inferior — from those who are not officers. The Court in *Buckley* said only that the Federal Election Commissioners were officers — either principal or inferior — and thus had to be appointed according to one of the methods under article II, although it did not say which method.

Thus, although *Buckley* supports the proposition that an appointee exercising "significant authority" is an officer rather than an employee of the United States — and hence the proposition that a special prosecutor is an "officer" of the United States — it offers no support for the assertion that the special prosecutor is a principal officer and must therefore be appointed by the President with the advice and consent of the Senate. *Buckley* proves only that the special prosecutor is either a principal or an inferior officer of the United States, but not which. That question, the critical one, is answered by the appointments clause, both on its face and as interpreted by the *Germaine* and *Collins* cases. As an appointee ranking below a department head, and below a "consul" or "minister," the special prosecutor is an inferior officer of the United States. Congress, therefore, has the discretion, "as they think proper," to vest his appointment "in the President alone, in the Courts of Law, or in the Heads of Departments."

2. Delegation to the courts under the appointments clause— Critics of the special prosecutor law maintain that even if the special prosecutor is held to be an inferior officer, the appointments clause does not allow Congress to vest his selection in the courts. This argument

114. *See Kraft Brief, supra* note 92, at 11.
117. In *Buckley*, the Court drew a line similar to the one it had previously drawn in *Germaine*. In *Germaine*, officers were differentiated from employees, while in *Buckley* they were distinguished from legislative functionaries.
118. U.S. CONST. art. II, § 2, cl. 2.
is based not on the language of the clause — for the language expressly allows Congress to vest the appointment in the courts — but rather arises by implication based on principles of separation of powers. Specifically, it is contended that if Congress is permitted to vest appointment of the special prosecutor in the judiciary, there is nothing to prevent an "emasculating [of] the separation of powers between the three branches of government by requiring, for example, 'Inferior' judicial officers to be appointed by heads of executive departments and 'Inferior' executive officers to be appointed by the Judiciary."¹¹⁹

As an initial matter, any attempt to impose substantial restrictions on Congress’s discretion here should be viewed with disfavor. By the language of the clause, Congress is accorded wide latitude in determining where to vest the power to appoint inferior officers. Three options are set out — the President, the courts of law, or the heads of departments. Congress may choose among the three "as they think proper."¹²⁰ Justice Story, in his commentaries on the Constitution, remarked on the scope of this discretion: "[i]f any discretion should be allowed, its limits could hardly admit of being exactly defined; and it might fairly be left to congress to act according to the lights of experience. It is difficult to foresee . . . all the combinations of circumstances, which might vary the right to appoint. . . ."¹²¹

¹¹⁹. KRAFT BRIEF, supra note 92, at 12. See also Hearings on H.J. Res. 784 and H.R. 10937 before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93d Cong., 1st Sess. 343-49 (1973) (Statement of Robert C. Cramton, Dean, Cornell Law School) hereinafter cited as Cramton Hearings. Dean Cramton argues that the "inferior officers" clause was designed "to allow the appointment of subordinate officials of particular branches of the government to be placed in the heads of those branches" and that "it is apparent that one branch cannot be given the sole appointive authority of important officials of another branch." Id. at 344, citing Ex Parte Hennen, 38 U.S. (13 Pet.) 230, 258 (1839).

¹²⁰. The last clause of the provision says that Congress "may" vest the appointment of inferior officers in the President, the courts, or the heads of departments. Thus Congress has a fourth alternative available — to require that particular inferior officers be appointed in the same manner as principal officers, i.e., nominated by the President and confirmed by the Senate. Congress has chosen that method for many inferior officers. See U.S. Const. art. II, § 2, cl. 2.

¹²¹. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 394-98 (3d ed. 1858). The broad discretion given to Congress by the "inferior officer" provision is supported by the history of the appointments clause. As originally proposed, the clause vested in the President alone the power to appoint all officers not provided for in the Constitution. 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 226, 230, 236 (1934) (Virginia Plan), 244 (New Jersey Plan), 63, 67 (Committee of the Whole, June 1, 1787), 22, 33, 117, 121, 132, 141 (Convention, July 17 and 26, 1787). This delegation of unlimited authority to the President met with strong objection. A subsequent draft recommended that Senate confirmation be required for all officers of the United States unless otherwise provided in the Constitution. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 499 (1934). Changes were made to ensure that the President could make no appointment to an office which was not created either by the Constitution or by Congress. Id. at 405, 621. The "inferior officers" provision itself reflects the tension between the executive and legislative branches. Id. at 627-28. Although Congress may not vest the power to appoint inferior officers within itself, Buckley v. Valeo, 424 U.S. 1, 127 (1976), it nonetheless retains authority to select the appointing body from among the President, the heads of departments, and the courts of law.
There is no case support for the contrary contention that an inferior officer can be appointed only by the head of the branch of government in which he is to serve. Indeed, there is no case holding invalid any appointing power vested by Congress in the courts. On numerous occasions the Court has expressly upheld such delegations, both when the appointed officer is directly concerned with the court administration of justice\textsuperscript{122} as well as when he is not.\textsuperscript{123}

More explicit guidance for determining the proper scope of Congress's discretion under the appointments clause has been offered by the Supreme Court. In \textit{Ex Parte Siebold},\textsuperscript{124} the Court established a "congruity" or "propriety" test to govern the delegation to the judiciary of the power to appoint election supervisors. The Court held that Congress may freely exercise its constitutional discretion to vest the power of appointment so long as there is no "incongruity" to its choice.\textsuperscript{125} The Court noted that "[i]t is . . . usual and proper to vest the appointment of inferior officers in that department of the government . . . to which the duties of such officers appertain. But there is no absolute requirement . . . in the Constitution . . . [T]he selection of the appointing power . . . rests in the discretion of Congress."\textsuperscript{126}

Since \textit{Siebold}, it has been squarely held that Congress may vest the power to appoint prosecutors in the courts. In \textit{United States v.}
Solomon,^{127} the court upheld the constitutionality of a statute empowering the courts to appoint U.S. Attorneys when vacancies occur.^{128} The court there relied upon Siebold in concluding that the doctrine of separation of powers, "never rigidly engrafted upon the Constitution," must be "subordinated to the particular provisions [of article II] as to methods of appointment."^{129} Similarly, in Go-Bart Importing Co. v. United States,^{130} the Supreme Court upheld the right of Congress to vest the courts with the power to appoint United States Commissioners. Among the duties of the Commissioners was the power "to institute prosecutions under laws relating to the elective franchise . . ."^{131} Despite the fact that these officers exercised prosecutorial power, the Court upheld judicial appointment under the "inferior officers" provision of the appointments clause.^{132}

Applying the Siebold test of "congruity" to the special prosecutor question, it is clear there is nothing incongruous about vesting a court with power to appoint an independent prosecutor. As in Siebold, "[i]t cannot be affirmed that the appointment . . . [of the special prosecutor] could, with any greater propriety . . . have been assigned to any other depository of official power capable of exercising it."^{133} A prosecutor, unlike a general or a diplomat, is an officer of the court, a counsel to the grand jury, and as such, is subject to the disciplinary power of the court.^{134} Courts are certainly familiar with the qualities that make a good prosecutor; indeed, courts habitually exercise a similar kind of judgment in appointing lawyers to represent indigent parties in criminal proceedings.^{135}

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129. 216 F. Supp. at 840-41. The appropriateness of vesting appointment of the special prosecutor in the courts may rest on even firmer footing than court appointment of temporary United States Attorneys as upheld in Solomon. The U.S. Attorney appointed by the courts, although his tenure may be terminated once the President and Senate agree to a permanent replacement, assumes all of the powers of the prosecutorial office, regardless of subject matter. The special prosecutor, in contrast, has jurisdiction over only a limited subject matter which is defined by the appointing court. See 28 U.S.C. § 594(c) (Supp. IV 1980). See also United States v. Mitchell, 136 F. 896 (C.C.D. Or.) (upholding judicial appointment of U.S. Attorney) writ of error dismissed, 199 U.S. 616 (1905).
130. 282 U.S. 344, 352 n.1, 353 (1931).
131. Id. at 353 n.2.
132. Id. at 352-53. See also Rice v. Ames, 180 U.S. 371 (1901) (upholding the constitutionality of judicial appointment of commissioners).
133. Ex Parte Siebold, 100 U.S. 371, 398 (1879) (emphasis added).
135. See generally Jones v. Morris, 590 F.2d 684 (7th Cir. 1979), cert. denied, 440 U.S. 965 (1979) (courts have discretion to appoint counsel in a criminal case where circumstances indicate accused is impoverished); MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961) (courts have discretion to determine if appointed attorney has rendered effective assistance to his client).
Nevertheless, objections persist that because the special prosecutor is engaged in the enforcement of federal criminal laws, it is more appropriate to vest appointment in the executive. 136 In addition, critics argue that "the appointment of a special prosecutor would impose an incongruous duty upon courts because of the danger that it would tarnish the neutrality of the judiciary and assign it prosecutorial duties." 137 Yet "incongruity" would result not from the law as it now stands, but rather from any contrary arrangement in the executive branch. It plainly would be "incongruous" for the Attorney General to appoint a special prosecutor charged with investigating and prosecuting the President or his close associates. It is precisely in those instances that the Attorney General has the clearest conflict of interest, and that the integrity and independence of his prosecutorial power are most called into question. Indeed, the episodes of collusion between the Justice Department and the White House during Watergate conclusively demonstrated the impropriety of entrusting the investigation of high executive officials to high officials in the executive branch. 138 As Archibald Cox testified before the Senate: "the incongruity is in the top of the executive branch investigating itself." 139

Thus, to read the Constitution as requiring the Attorney General to appoint special prosecutors not only defeats the essential point of the Ethics Act, but inevitably results in the very incongruity and illogic that the appointments clause seeks to avoid. In short, the Constitution grants Congress broad discretion in vesting the power to appoint inferior officers. In the case of special prosecutors, Congress has exercised that discretion with wisdom, with logic, and with clear congruity. 140


137. See Note, supra note 136, at 1699 n.28, citing Baker, supra note 136.

138. See supra text accompanying notes 9-34.

139. Special Prosecutor Hearings, supra note 24, at 315-316 (remarks of Archibald Cox).

140. A number of constitutional scholars have concluded that Congress may vest the courts with the power to appoint special prosecutors. Professor Tribe, in his treatise, directly addressed this question and dismissed any objections: "[A] special judicial commission could properly be created and charged with the duty of selecting an independent agent for the investigation and prosecution of illegal acts by the President or the President's subordinates." L. Tribe, American Constitutional Law 192 n.4 (1978). Other scholars agree. See, e.g., Hearings on H.R. 14476, supra note 11, at 162 (testimony of Archibald Cox); Hearings on Special Prosecutor (1973), supra note 11, at 341 (testimony of Prof. Paul Freund); id. at 319 (testimony of Prof. Philip Kurland).
3. The special prosecutor division as a court of law— Critics of the special prosecutor law proffer one final argument with respect to the constitutionality of the appointment of special prosecutors. The division of the District of Columbia Court of Appeals charged by statute to appoint special prosecutors is not, it is argued, a "court of law" within the meaning of the appointments clause.\(^{141}\) Rather, it is claimed that the three judge division\(^{142}\) is an *ad hoc* group of judges gathered together solely to appoint an executive official. Insofar as the panel does not adjudicate cases and controversies, critics contend, it is not a court of law.\(^{143}\)

This argument, however, is premised upon a misunderstanding of the law. The Ethics Act expressly provides that if the Attorney General for any reason removes the special prosecutor from office, the prosecutor "may obtain judicial review of the removal in a civil action commenced before the division of the court and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief."\(^{144}\) The statute further provides that the court shall cause such an action to be in every way expedited.\(^{145}\)

Thus, the special prosecutor division of the District of Columbia Court of Appeals does adjudicate cases. Congress has great discretion to limit the jurisdiction of lower federal courts, or divisions thereof, as it sees fit.\(^{146}\) Therefore, the fact that Congress limited the article III jurisdiction of a division of the District of Columbia Circuit Court to but one type of controversy — dismissal of special prosecutors — is of no import in determining whether or not that division is a "court." The division will be held to be a court if it is established by Congress pursuant to its power under article III, if it adjudicates "cases or controversies" under article III, and if its judges enjoy article III protections.\(^{147}\) Because these conditions plainly apply to the special prosecutor division of the District of Columbia Court of Appeals, this division of the Circuit Court is in every sense a constitutional court, albeit one with a narrow jurisdiction. As a "court of law" established pursuant

142. The three judge division is required by 28 U.S.C. § 49. See * supra* notes 50-51 and accompanying text.
145. *Id.*
to article III, the division may, when so designated by Congress, exercise the appointment powers granted to the courts of law by article II.

B. Separation of Powers Objections

Apart from challenging the constitutionality of the statutory mechanism for appointing the special prosecutor,148 critics have raised a second, broader claim of unconstitutionality — also based on the separation of powers doctrine — regarding the degree to which the Ethics Act insulates the prosecutor from the President’s control. Specifically, opponents of the law contend that the prosecutorial power belongs solely to the executive branch, and “neither Congress nor the courts can interfere with it in any particular.”149 Thus, it is argued, insofar as the Ethics Act restricts the executive’s power to remove the special prosecutor,150 and makes the special prosecutor directly accountable to a court of law rather than the attorney general, the Act violates principles of separation of powers.

The powers possessed by the federal government are divided and

148. See supra text accompanying notes 119-140.

149. KRAFT BRIEF, supra note 92, at 9. See also 1981 Hearings, supra note 5. Proponents of this position rely heavily on United States v. Cox, 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965), which, they argue, held expressly that prosecutorial power belongs solely to the executive branch. Yet this characterization of the Cox case is erroneous. The issue before the en banc Fifth Circuit in Cox was whether a United States Attorney could be held in contempt for failing to comply with a court order directing him to prepare and to sign particular indictments. That case did not involve the appointment of a prosecutor by the courts, but a directive from the court that the prosecutor perform his duties in a particular manner. Further, a majority of the Cox court expressly ruled that the court could order the prosecutor to draft a particular indictment, 342 F.2d at 181. Finally, although the Cox court did rule that the court could not compel the prosecutor to sign the indictment, the judge whose concurrence provided a majority on that issue based his ruling on statutory rather than constitutional grounds, i.e., the unlimited discretion of the prosecutor under Federal Rule of Criminal Procedure 48(a) to dismiss indictments once issued. 342 F.2d at 182 (Brown, J., concurring). See generally Note, supra note 136, at 1695 (reasoning of Cox is unpersuasive and should no longer be followed). For additional criticism of those relying on Cox, see infra text accompanying notes 167-176.

150. See supra notes 65-68 and accompanying text. The argument made here is that restricting the executive’s removal power interferes with the proper functioning of the executive branch. Proponents of this position rely on Myers v. United States, 272 U.S. 52 (1926), (statute limiting President’s power to remove postmasters held unconstitutional). Yet recent cases have limited the Myers holding. See, e.g., Humphrey’s Executor v. United States, 295 U.S. 602 (1935) (the President cannot remove a member of a quasi-judicial or quasi-administrative independent regulatory agency in violation of federal statutory restrictions); Wiener v. United States, 357 U.S. 349 (1958) (President denied the right to remove a War Claims Commission appointee, despite the absence of express congressional restriction on removal, because the Commissioner’s task required freedom from executive interference); Borders v. Reagan, 518 F. Supp. 250 (1981) (President cannot remove at will officers of the District of Columbia Judicial Nomination Commission). For general discussion of the president’s removal power, see E. CORWIN. THE PRESIDENT’S REMOVAL POWER UNDER THE CONSTITUTION 56-58 (1927); Cross, The Removal Power of the President and the Test of Responsibility, 40 CORNELL L.Q. 81 (1954). Cf. infra text accompanying notes 172-75.
allocated among the three co-equal branches of government.\textsuperscript{151} It has never been entirely clear, however, just how independent the Founding Fathers intended the branches of government to be. Primarily two schools of thought have shaped analysis under the separation of powers doctrine.\textsuperscript{152} James Wilson, one of the Framers of the Constitution, is frequently associated with the rigid "isolationist position."\textsuperscript{153} Wilson argued that the independence of each branch requires that it "should be free from the remotest influence, direct or indirect, of either of the other two powers."\textsuperscript{154} In contrast, James Madison was the leading proponent of a less rigid approach.\textsuperscript{155} Madison argued that, at bottom, the separation of powers doctrine is intended to prevent the undue accumulation of power in one branch of government to the detriment of the others, thus disrupting the delicate checks and balances of the constitutional scheme. Madison described this principle well in the Federalist Papers,\textsuperscript{156} where he defended the degree to which the Constitution blends the powers of the three branches. In his view it was only "[w]here the \textit{whole} power of one department is exercised by the same hands which possess the \textit{whole} power of another department, [that] the fundamental principles of a free constitution are subverted."\textsuperscript{157}

Over time, the Madisonian view has come to predominate.\textsuperscript{158} The Supreme Court has recognized that a rigid interpretation of the separation of powers doctrine is "inconsistent with the origins of that doctrine, recent decisions of the Court, and the contemporary realities of our political system."\textsuperscript{159} The Court has concluded that "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."\textsuperscript{160} According to Justice Jackson's classic formulation, the Constitution "enjoins upon its branches separateness but inter-dependence, autonomy but reciprocity."\textsuperscript{161} This "more pragmatic, flex-

\textsuperscript{151} Kilbourn v. Thompson, 103 U.S. 168, 190 (1881); Humphrey's Executor v. United States, 295 U.S. 602, 629-30 (1935).
\textsuperscript{153} See generally J. ANDREWS, THE WORKS OF JAMES WILSON (1896).
\textsuperscript{154} Id. at 367.
\textsuperscript{156} See THE FEDERALIST No. 47, No. 48 (J. Madison).
\textsuperscript{157} THE FEDERALIST No. 47 325-26 (J. Madison) (Mentor ed.) (emphasis in original).
\textsuperscript{160} Buckley v. Valeo, 424 U.S. 1, 121 (1976).
\textsuperscript{161} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
ible approach” to separation of powers adopted by the Court is set forth in *Nixon v. Administrator of General Services*162 and *Buckley v. Valeo*.163 In these recent cases, the Court urged that resolution of separation of powers questions must “be fixed according to common sense and the inherent necessities of the governmental coordination.”164 Insofar as the central purpose of the separation of powers doctrine is to “safeguard against the encroachment or aggrandizement of one branch at the expense of the other,”165 the doctrine is breached only when the act of one branch prevents another branch “from accomplishing its constitutionally assigned functions.”166

Such usurpation does not result from the Ethics Act. The special prosecutor law does not pose any threat to the executive branch and does not diminish the “separateness” of that branch’s powers. The law does not take the power of criminal prosecution away from the executive branch and lodge it in another; it turns neither legislators nor judges into prosecutors.167 Rather, in a narrow category of cases, the law merely insulates the prosecutorial power within the executive branch from the threat of real or apparent improper influence and conflict of interest. Moreover, it is illogical to argue that the statutory delegation of authority to a special prosecutor usurps executive functions.168 The Supreme Court has recognized not only that a special

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164. *Id.* at 122, quoting *Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928).
166. *Nixon*, 433 U.S. at 443.
167. Notwithstanding appointment of the special prosecutor by the courts, the law clearly does not turn the courts into prosecutors. The division of the District of Columbia Circuit empowered to appoint special prosecutors may define the prosecutor’s jurisdiction, but has no control over the investigatory actions or prosecutorial decisions made by the prosecutor. The court has no more — or no less — control over the special prosecutor than any court has over any United States Attorney or other prosecutor. The Ethics Act thus respects the important distinction between appointment to, and actual administration of, an office, vesting appointment in the courts but reserving administration for the prosecutor. See *Ex Parte Siebold*, 100 U.S. at 398 (contrasting actual judicial administration of federal pension claims with mere judicial appointment of inferior executive branch officers); *Hobson v. Hansen*, 265 F. Supp. 902, 913 (1967) (contrasting judicial administration of schools with judicial appointment of school board members).
168. *See L. Tribe, American Constitutional Law* 192 (1978) (“Thus the Executive Branch is not an indivisible entity with a single head even for prosecutorial purposes; even the core executive mission of enforcing federal law be internally fragmented pursuant to congressional delegations and executive subdelegations.”). More recently, the Court found that Congress could limit presidential control over members of the Federal Election Commission, an agency exercising, *inter alia*, civil law enforcement functions of the kind “usually performed by . . . some department in the Executive Branch . . . .” *Buckley v. Valeo*, 424 U.S. 1, 141 (1976). The Court said, “[T]he President may not insist that such functions be delegated to an appointee of his who is removable at will.” *Id.* In that case, as here, there were strong policy reasons favoring insulation of the law enforcement agency from close presidential supervision. Cf. discussion of United States v. *Cox supra* note 149, and discussion of removal power *supra* note 150. *See also supra* note 123 and accompanying text (discussion of state court encroachment on prosecutorial discretion).
prosecutor may operate and perform prosecutorial functions independently of the President if authorized by law, but that even when fully independent of the President's control, the special prosecutor is nonetheless a member of the executive branch, performing an executive function.

Indeed, the law furthers rather than impedes the functioning of the executive branch in its duty faithfully to enforce the law. By ensuring that the executive branch is able to enforce the law fairly in precisely those cases where fairness is threatened by conflict of interest, the law is fully consistent with the goals and functions of the executive branch. The special prosecutor law guarantees the independence of the investigation and prosecution of high executive officials and ensures that prosecutorial decisions will be made on the basis of merit rather than partiality or favoritism. Moreover, the law instills public confidence in those prosecutorial decisions which, if made by the Attorney General, might be met with skepticism and mistrust.

Finally, even if the operation of the special prosecutor law divests the President of some control over what traditionally have been executive functions, the law is not inconsistent with the constitutional standard governing separation of powers set forth in Nixon and Buckley. "Common sense and the inherent necessities of . . . governmental coordination" plainly support the constitutionality of the special prosecutor law. To say that the President, as head of the executive branch, is charged with controlling the government's prosecutorial functions does not, as a constitutional principle, rigidly require the President to control the prosecution of his own wrongdoings or those of his close associates. Such inflexible thinking is precisely what the Supreme Court has cautioned against in this area. To permit the President to appoint or remove a special prosecutor where high officials in the executive branch have been implicated in illegal activities would risk triggering the same loss of public faith in the national government that

170. Id.
171. See supra text accompanying notes 19-34.
One commentator has argued that the most important of the special prosecutor's functions constitutionally "need not be carried out under executive control." See Note, supra note 136, at 1698-99. At the core of this claim is the contention that the prosecutor's activities can be divided into "'executive' and 'investigative' functions." Id. Prosecutorial functions generally held under executive control include "decisions to go forward with prosecution," the granting of witness immunity, and plea bargaining. Id. The investigative functions of the prosecutor, on the other hand, are firmly rooted in the grand jury — traditionally an independent body. Id. at 1700-01. Thus, insofar as the special prosecutor's primary function is to investigate the executive, control over his activities should be kept independent of the executive branch.
173. See supra notes 162-66 and accompanying text.
174. See discussion of removal power supra note 150.
crippled the country during the Watergate scandal.\textsuperscript{175} Surely the "functional" view of the separation of powers established by the \textit{Nixon} Court is designed to allow the "mixing" of the branches of government in precisely this type of situation where the potential for abuse of power threatens the proper operation of government.\textsuperscript{176}

In sum, the principal error made by critics of the special prosecutor law is their attempt to transform separation of powers as a general approach to the structure of government into a rigid rule of absolute application. The necessary corollary of this position is that the President must retain the power to oversee and control the government's prosecution in all cases, even if that prosecution is directed against himself, his friends, or his close associates. In fact, the separation of powers doctrine is not so inflexible. The Constitution does not compel such a plainly illogical result.\textsuperscript{177}

\textbf{CONCLUSION}

The special prosecutor law is, fundamentally, a pragmatic law. It is addressed to real experiences, not hypothetical fears. It evolved directly out of a prolonged national scandal that exposed the full potential for

\textsuperscript{175} See \textit{supra} text accompanying notes 9-34.

Critics have argued that, accepting the need for the law and its constitutionality, the special prosecutor provisions are "an odd solution to the 'problem'" because "if the Attorney General wishes to thwart the due administration of justice, he may easily do so... by finding the matter 'unsubstantial' after his preliminary investigation." \textit{Kraft Brief, supra} note 92, at 15. This argument, however, is flawed in two respects. First, as a general matter, allegations of wrongdoing by high executive officials are likely to attract extensive press coverage. This close scrutiny by the national press acts as an effective check on any attempt by an Attorney General to avoid appointing a special prosecutor. Second, the Attorney General must have some means of weeding out frivolous allegations. Indeed, those now criticizing the law used this argument to push for the inclusion of an even more flexible "triggering" mechanism than in the original version of the law. See generally \textit{1981 Hearings, supra} note 5.

\textsuperscript{176} See generally \textit{Nixon}, 433 U.S. 125 (1980); Scigliano, \textit{Inquisitorial Proceedings and Separations of Functions: the Case of the Michigan One-Man Grand Jury}, 38 U. Det. L.J. 82, 84-86, 89 (1960) (mixing of branches of government is permissible where abuse of power prevented). Indeed, state courts have long recognized that where one branch has fallen short of public expectations or has failed to remain accountable to both the public and the law, it may be necessary for another branch to provide a remedy. See \textit{Note, supra} note 123, at 584-86. In one sense the special prosecutor law merely codifies this well-accepted view of the separation of powers: it identifies a situation that practical experience has taught will \textit{always} present a fundamental conflict of interest for members of one branch, and then enlists the aid of another branch to vitiate that threat, as a matter of law.

\textsuperscript{177} As one distinguished lawyer stated in a letter to the Senate Committee considering the original law, "One cannot read the Constitution as forcing us to tolerate conflicts of interest on the part of the President, the Attorney General, and their immediate assistants that we cannot, and do not, tolerate in mere judges and lawyers." \textit{Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 & S. 2036 Before the Senate Comm. on Gov't Operations}, 94th Cong., 1st Sess. 206, 212 (copy of speech by Lloyd N. Cutler, Wilmer, Cutler & Pickering, Washington, D.C., enclosed with letter of March 13, 1975, from Cutler to Senators Ribicoff and Percy).
corruption and conflict of interest in those very executive branch officials whose primary duty is to enforce the law. As a pragmatic response to a constitutional crisis, the law must be viewed with an eye toward its purposes and its justifications. In furthering, not usurping, the ability of the executive branch to enforce the law fully and fairly, the Ethics Act's guarantees of independence for the special prosecutor are wholly consistent with both the language of the Constitution and a governmental scheme of mutually interdependent branches.
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