MORRISON v. OLSON

487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988)

Chief Justice **REHNQUIST** delivered the opinion of the Court.

This case presents us with a challenge to the independent counsel provisions of the Ethics in Government Act of 1978. We hold today that these provisions of the Act do not violate the Appointments Clause of the Constitution...nor do they impermissibly interfere with the President's authority under Article II in violation of the constitutional principle of separation of powers.

I

Briefly stated, Title VI of the Ethics in Government Act allows for the appointment of an "independent counsel" to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws. The Act requires the Attorney General, upon receipt of information that he determines is "sufficient to constitute grounds to investigate whether any person [covered by the Act] may have violated any Federal criminal law," to conduct a preliminary investigation of the matter. When the Attorney General has completed this investigation, or 90 days has elapsed, he is required to report to a special court (the Special Division) created by the Act "for the purpose of appointing independent counsels." If the Attorney General determines that "there are no reasonable grounds to believe that further investigation is warranted," then he must notify the Special Division of this result. In such a case, "the division of the court shall have no power to appoint an independent counsel." If, however, the Attorney General has determined that there are "reasonable grounds to believe that further investigation or prosecution is warranted," then he "shall apply to the division of the court for the appointment of an independent counsel." The Attorney General's application to the court "shall contain sufficient information to assist the [court] in selecting an independent counsel and in defining that independent counsel's prosecutorial jurisdiction." Upon receiving this application, the Special Division "shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction."

With respect to all matters within the independent counsel's jurisdiction, the Act grants the counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice."... In addition, whenever a matter has been referred to an independent counsel under the Act, the Attorney General and the Justice Department are required to suspend all investigations and proceedings regarding the matter....

Two statutory provisions govern the length of an independent counsel's tenure in office. The first defines the procedure for removing an independent counsel. Section 596(a)(1) provides: "An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."

The other provision...defines the procedures for "terminating" the counsel's office. Under § 596(b)(1), the office of an independent counsel terminates when he or she notifies the Attorney

General that he or she has completed or substantially completed any investigations or prosecutions undertaken pursuant to the Act. In addition, the Special Division, acting either on its own or on the suggestion of the Attorney General, may terminate the office of an independent counsel at any time if it finds that "the investigation of all matters within the prosecutorial jurisdiction of such independent counsel...have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions."...

III

The Appointments Clause of Article II reads as follows:

> [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. U.S. Const., Art. II, § 2, cl. 2....

The line between "inferior" and "principal" officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn.... We need not attempt here to decide exactly where the line falls between the two types of officers, because in our view appellant clearly falls on the "inferior officer" side of that line.

...Appellees argue that even if appellant is an "inferior" officer, the Clause does not empower Congress to place the power to appoint such an officer outside the Executive Branch.... Congress' decision to vest the appointment power in the courts would be improper if there was some "incongruity" between the functions normally performed by the courts and the performance of their duty to appoint.... In the light of the Act's provision making the judges of the Special Division ineligible to participate in any matters relating to an independent counsel they have appointed, we do not think that appointment of the independent counsel by the court runs afoul of the constitutional limitation on "incongruous" interbranch appointments....

V

We now turn to consider whether the Act is invalid under the constitutional principle of separation of powers. Two related issues must be addressed: The first is whether the provision of the Act restricting the Attorney General's power to remove the independent counsel to only those instances in which he can show "good cause," taken by itself, impermissibly interferes with the President's exercise of his constitutionally appointed functions. The second is whether, taken as a whole, the Act violates the separation of powers by reducing the President's ability to control the prosecutorial powers wielded by the independent counsel....

A

...We held in Bowsher v. Synar (1986) that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." A primary antecedent for this ruling was...Myers v. United States (1926). *Myers* had considered the propriety of a federal statute by which certain postmasters of the United States could be removed by the President only "by and with the advice and consent of the Senate." There too, Congress' attempt to involve itself in the removal of an executive official was found to be sufficient grounds to render the statute invalid. As we observed in *Bowsher,* the essence of the decision in *Myers* was the judgment that the Constitution prevents Congress from "draw[ing] to itself...the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of the [Appointments Clause] and to infringe the constitutional principle of the separation of governmental powers."

Unlike both *Bowsher* and *Myers,* this case does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction. The Act instead puts the removal power squarely in the hands of the Executive Branch; an independent counsel may be removed from office, "only by the personal action of the Attorney General, and only for good cause." There is no requirement of congressional approval of the Attorney General's removal decision, though the decision is subject to judicial review. In our view, the removal provisions of the Act make this case more analogous to Humphrey's Executor v. United States (1935) than to *Myers* or *Bowsher.*

In *Humphrey's Executor,* the issue was whether a statute restricting the President's power to remove the Commissioners of the Federal Trade Commission (FTC) only for "inefficiency, neglect of duty, or malfeasance in office" was consistent with the Constitution. We stated that whether Congress can "condition the [President's power of removal] by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office." *Id.* Contrary to the implication of some dicta in *Myers,* the President's power to remove Government officials simply was not "all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution." At least in regard to "quasi-legislative" and "quasi-judicial" agencies such as the FTC, "[t]he authority of Congress, in creating [such] agencies, to require them to act in discharge of their duties independently of executive control...includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime." *Id.* In *Humphrey's Executor,* we found it "plain" that the Constitution did not give the President "illimitable power of removal" over the officers of independent agencies. Were the President to have the power to remove FTC Commissioners at will, the "coercive influence" of the removal power would "threate[n] the independence of [the] commission."

Appellees contend that *Humphrey's Executor* [is] distinguishable from this case because [it] did not involve officials who performed a "core executive function." They argue that our decision in *Humphrey's Executor* rests on a distinction between "purely executive" officials and officials who exercise "quasi-legislative" and "quasi-judicial" powers. In their view, when a "purely executive" official is involved, the governing precedent is *Myers,* not *Humphrey's Executor.* And, under *Myers,* the President must have absolute discretion to discharge "purely" executive officials at will.

We undoubtedly did rely on the terms "quasi-legislative" and "quasi-judicial" to distinguish

the officials involved in *Humphrey's Executor*...from those in *Myers,* but our present considered view is that the determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as "purely executive." The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II. *Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some "purely executive" officials who must be removable by the President at will if he is to be able to accomplish his constitutional role.[1]...

At the other end of the spectrum from *Myers,* the characterization of the agencies in *Humphrey's Executor*...as "quasi-legislative" or "quasi-judicial" in large part reflected our judgment that it was not essential to the President's proper execution of his Article II powers that these agencies be headed up by individuals who were removable at will. We do not mean to suggest that an analysis of the functions served by the officials...is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.

Considering for the moment the "good cause" removal provision in isolation from the other parts of the Act at issue in this case, we cannot say that the imposition of a "good cause" standard for removal by itself unduly trammels on executive authority. There is no real dispute that the functions performed by the independent counsel are "executive" in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch. As we noted above, however, the independent counsel is an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority. Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.

Nor do we think that the "good cause" removal provision at issue here impermissibly burdens the President's power to control or supervise the independent counsel, as an executive official, in the execution of his or her duties under the Act. This is not a case in which the power to remove an executive official has been completely stripped from the President.... Rather, because the independent counsel may be terminated for "good cause," the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her

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[1]The dissent says that the language of Article II vesting the executive power of the United States in the President requires that every officer of the United States exercising any part of that power must serve at the pleasure of the President and be removable by him at will. This rigid demarcation – a demarcation incapable of being altered by law in the slightest degree, and applicable to tens of thousands of holders of offices neither known nor foreseen by the Framers – depends upon an extrapolation from general constitutional language which we think is more than the text will bear. It is also contrary to our holding in United States v. Perkins [1886], decided more than a century ago.

statutory responsibilities in a manner that comports with the provisions of the Act. Although we need not decide in this case exactly what is encompassed within the term "good cause" under the Act, the legislative history of the removal provision also makes clear that the Attorney General may remove an independent counsel for "misconduct." Here...[t]he congressional determination to limit the removal power of the Attorney General was essential, in the view of Congress, to establish the necessary independence of the office. We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.

B

The final question to be addressed is whether the Act, taken as a whole, violates the principle of separation of powers by unduly interfering with the role of the Executive Branch. Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches. As we stated in Buckley v. Valeo (1976), the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." We have not hesitated to invalidate provisions of law which violate this principle. On the other hand, we have never held that the Constitution requires that the three branches of Government "operate with absolute independence." United States v. Nixon (1974). In the often-quoted words of Justice Jackson: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer (1952) (concurring opinion).

We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch. Unlike some of our previous cases, most recently *Bowsher*, this case simply does not pose a "dange[r] of congressional usurpation of Executive Branch functions." See also INS v. Chadha (1983). Indeed, with the exception of the power of impeachment – which applies to all officers of the United States – Congress retained for itself no powers of control or supervision over an independent counsel....

Similarly, we do not think that the Act works any *judicial* usurpation of properly executive functions. [O]nce the court has appointed a counsel and defined his or her jurisdiction, it has no power to supervise or control the activities of the counsel....

Finally, we do not think that the Act "impermissibly undermine[s]" the powers of the Executive Branch, or "disrupts the proper balance between the coordinate branches [by] prevent [ing] the Executive Branch from accomplishing its constitutionally assigned functions," Nixon v. Administrator of General Services (1977). It is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises.... Nonetheless, the Act does give the Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel. Most importantly, the Attorney General retains the power to remove the counsel for "good cause," a power that...provides the Executive with substantial ability to ensure that the laws are "faithfully executed" by an independent counsel.

Notwithstanding the fact that the counsel is to some degree "independent" and free from executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties....

Reversed.

Justice **KENNEDY** took no part in the consideration or decision of this case.

Justice **SCALIA**, dissenting.

It is the proud boast of our democracy that we have "a government of laws and not of men." Many Americans are familiar with that phrase; not many know its derivation. It comes from Part the First, Article XXX, of the Massachusetts Constitution of 1780, which reads in full as follows:

> In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

The Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government.... Madison wrote that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." The Federalist No. 47. Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours....

That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish – so that "a gradual concentration of the several powers in the same department," Federalist No. 51 (Madison), can effectively be resisted....

II

If to describe this case is not to decide it, the concept of a government of separate and coordinate powers no longer has meaning.... [W]here the issue pertains to separation of powers, and the political branches are (as here) in disagreement, neither can be presumed correct. The reason is stated concisely by Madison: "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers...." Federalist No. 49. The playing field for the present case, in other words, is a level one. As one of the interested and coordinate parties to the underlying constitutional dispute, Congress, no more than the President, is entitled to the benefit of the doubt.

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

...[T]he Court points out that the President, through his Attorney General, has at least *some* control. That concession is alone enough to invalidate the statute.... It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are....

The Court has, nonetheless, replaced the clear constitutional prescription that the executive power belongs to the President with a "balancing test." What are the standards to determine how the balance is to be struck, that is, how much removal of Presidential power is too much? Many countries of the world get along with an executive that is much weaker than ours – in fact, entirely dependent upon the continued support of the legislature. Once we depart from the text of the Constitution, just where short of that do we stop? The most amazing feature of the Court's opinion is that it does not even purport to give an answer. It simply *announces,* with no analysis, that the ability to control the decision whether to investigate and prosecute the President's closest advisers, and indeed the President himself, is not "so central to the functioning of the Executive Branch" as to be constitutionally required to be within the President's control. Apparently that is so because we say it is so. Having abandoned as the basis for our decision-making the text of Article II that "the executive Power" must be vested in the President, the Court does not even attempt to craft a *substitute* criterion...however remote from the Constitution – that today governs, and in the future will govern, the decision of such questions. Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis. This is not only not the government of laws that the Constitution established; it is not a government of laws at all....

In sum, this statute does deprive the President of substantial control over the prosecutory functions performed by the independent counsel, and it does substantially affect the balance of powers. That the Court could possibly conclude otherwise demonstrates both the wisdom of our former constitutional system, in which the degree of reduced control and political impairment were irrelevant, since *all* purely executive power had to be in the President; and the folly of the new system of standardless judicial allocation of powers we adopt today....

IV

...There is, of course, no provision in the Constitution stating who may remove executive officers, except the provisions for removal by impeachment. Before the present decision it was

established, however, (1) that the President's power to remove principal officers who exercise purely executive powers could not be restricted, see *Myers*, and (2) that his power to remove inferior officers who exercise purely executive powers, and whose appointment Congress had removed from the usual procedure of Presidential appointment with Senate consent, could be restricted, at least where the appointment had been made by an officer of the Executive Branch....

Since our 1935 decision in *Humphrey's Executor* – which was considered by many at the time the product of an activist, anti-New Deal Court bent on reducing the power of President Franklin Roosevelt – it has been established that the line of permissible restriction upon removal of principal officers lies at the point at which the powers exercised by those officers are no longer purely executive. Thus, removal restrictions have been generally regarded as lawful for so-called "independent regulatory agencies," such as the Federal Trade Commission, the Interstate Commerce Commission, and the Consumer Product Safety Commission, which engage substantially in what has been called the "quasi-legislative activity" of rulemaking, and for members of Article I courts, such as the Court of Military Appeals, who engage in the "quasi-judicial" function of adjudication. It has often been observed, correctly in my view, that the line between "purely executive" functions and "quasi-legislative" or "quasi-judicial" functions is not a clear one or even a rational one. But at least it permitted the identification of certain officers, and certain agencies, whose functions were entirely within the control of the President. Congress had to be aware of that restriction in its legislation. Today, however, *Humphrey's Executor* is swept into the dustbin of repudiated constitutional principles.... By contrast, "our present considered view" is simply that *any* executive officer's removal can be restricted, so long as the President remains "able to accomplish his constitutional role." There are now no lines.... As far as I can discern from the Court's opinion, it is now open season upon the President's removal power for all executive officers, with not even the superficially principled restriction of *Humphrey's Executor* as cover. The Court essentially says to the President: "Trust us. We will make sure that you are able to accomplish your constitutional role." I think the Constitution gives the President – and the people – more protection than that.

V

The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom. Those who hold or have held offices covered by the Ethics in Government Act are entitled to that protection as much as the rest of us, and I conclude my discussion by considering the effect of the Act upon the fairness of the process they receive.

Under our system of government, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion are selected and can be removed by a President, whom the people have trusted enough to elect. Moreover, when crimes are not investigated and prosecuted fairly, nonselectively, with a reasonable sense of proportion, the President pays the cost in political damage to his administration.... The President is directly dependent on the people, and since there is only *one* President, *he* is responsible. The people know whom to blame, whereas "one of the weightiest objections to a plurality in the executive...is that it tends to conceal faults and destroy responsibility." [The Federalist No. 70.]

That is the system of justice the rest of us are entitled to, but what of that select class consisting of present or former high-level Executive Branch officials?... An independent counsel is selected, and the scope of his or her authority prescribed, by a panel of judges. What if they are politically partisan, as judges have been known to be, and select a prosecutor antagonistic to the administration, or even to the particular individual who has been selected for this special treatment? There is no remedy for that, not even a political one.

It is...an additional advantage of the unitary Executive that it can achieve a more uniform application of the law. Perhaps that is not always achieved, but the mechanism to achieve it is there. The mini-Executive that is the independent counsel, however, operating in an area where so little is law and so much is discretion, is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide. What would normally be regarded as a technical violation may in his or her small world assume the proportions of an indictable offense.... How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile – with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities.... How admirable the constitutional system that provides the means to avoid such a distortion. And how unfortunate the judicial decision that has permitted it.

* * *

...I cannot imagine that there are not many thoughtful men and women in Congress who realize that the benefits of this legislation are far outweighed by its harmful effect upon our system of government, and even upon the nature of justice received by those men and women who agree to serve in the Executive Branch. But it is difficult to vote not to enact, and even more difficult to vote to repeal, a statute called, appropriately enough, the Ethics in Government Act. If Congress is controlled by the party other than the one to which the President belongs, it has little incentive to repeal it; if it is controlled by the same party, it dare not. By its shortsighted action today, I fear the Court has permanently encumbered the Republic with an institution that will do it great harm.

Worse than what it has done, however, is the manner in which it has done it. A government of laws means a government of rules. Today's decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law. It extends into the very heart of our most significant constitutional function the "totality of the circumstances" mode of analysis that this Court has in recent years become fond of. Taking all things into account, we conclude that the power taken away from the President here is not really *too* much. The next time executive power is assigned to someone other than the President we may conclude, taking all things into account, that it *is* too much. That opinion, like this one, will not be confined by any rule. We will...authoritatively announce: "The President's need to control the exercise of the [subject officer's] discretion *is* so central to the functioning of the Executive Branch as to require complete control." This is not analysis; it is ad hoc judgment. And it fails to explain why it is not true that – as the text of the Constitution seems to require, as the Founders seemed to expect, and as our past cases have uniformly assumed – all purely executive power must be under the control of the President....