



U.S. Department of Justice  
Civil Division

FC - J.C.  
Deaver case

Deputy Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM

TO: Samuel A. Alito Jr.  
William C. Bryson  
Charles J. Cooper  
James I. K. Knapp  
David M. McIntosh  
→ John N. Richardson  
Gregory S. Walden  
William F. Weld

FROM: James M. Spears   
Deputy Assistant Attorney General  
Civil Division

SUBJECT: Deaver v. Seymour, Civ. No. 87-0477 (D.D.C.)

Attached is a copy of the Complaint for Declaratory and Injunctive Relief and supporting memorandum in the above referenced matter. This afternoon, Judge Jackson entered a Temporary Restraining Order which I have also included.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MICHAEL K. DEAVER, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 WHITNEY NORTH SEYMOUR, JR., )  
 )  
 Defendant. )

Civil Action No. 87-0477 ✓

**FILED**

**FEB 25 1987**

CLERK, U.S. DISTRICT COURT  
DISTRICT OF COLUMBIA

TEMPORARY RESTRAINING ORDER

Upon consideration of plaintiff's application for a temporary restraining order and defendant's oral opposition thereto, for the reasons set forth in the Court's oral ruling from the Bench, it is, this 25<sup>th</sup> day of February, 1987,

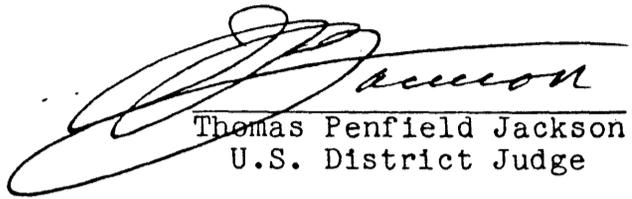
ORDERED, that plaintiff's application for a temporary restraining order is granted in part; and it is

FURTHER ORDERED, that defendant Independent Counsel is temporarily restrained and enjoined from returning a True Bill against Michael K. Deaver pending further order of the Court or the expiration hereof; and it is

FURTHER ORDERED, that plaintiff's motion for a preliminary injunction is set for hearing at 2:00 p.m., Wednesday, March 11, 1987, in connection with which defendant shall file his written opposition by the close of business on Monday, March 9, 1987, and plaintiff shall file his reply, if any, by the close of business on Tuesday, March 10, 1987; and it is

(N)

FURTHER ORDERED, the defendant consenting to the duration hereof, this Temporary Restraining Order shall expire at the conclusion of proceedings in open court on plaintiff's motion for a preliminary injunction.



Thomas Penfield Jackson  
U.S. District Judge

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MICHAEL K. DEEVER,  
4521 Dexter Street, N.W.,  
Washington, D.C. 20007,

Plaintiff,

v.

WHITNEY NORTH SEYMOUR, JR.,  
as Independent Counsel,  
United States Courthouse  
One Marshall Place, N.W.  
Suite 6400  
Washington, D.C. 20001,

Defendant.

87-0477

Civil Action No. \_\_\_\_\_

FILED

FEB 25 1987

CLERK, U. S. DISTRICT COURT  
DISTRICT OF COLUMBIA

JACKSON, J.

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

D

1. This is an action for declaratory and injunctive relief against the exercise of prosecutorial authority by defendant Whitney North Seymour, Jr., pursuant to the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 49, 591-598. Both the Act and Mr. Seymour's exercise of authority thereunder violate the constitutional principle of separation of powers by vesting Executive authority in an officer who is not subject to Presidential appointment or control, but instead is appointed, supervised, and may be removed from office by non-Executive Branch authorities.

I.  
JURISDICTION

2. This Court has jurisdiction over this action under 28 U.S.C. §1331.

II.  
PARTIES

3. Plaintiff Michael K. Deaver resides at 4521 Dexter Street, N.W., Washington, D.C. From January 21, 1981, to May 10, 1985, he was Deputy Chief of Staff of the White House and Assistant to the President of the United States. On May 10, 1985, Mr. Deaver left his position at the White House to found the firm of Michael K. Deaver and Associates, Inc., of which he is the president. Mr. Deaver is currently the target of a grand jury investigation, conducted by defendant Seymour, concerning allegations that Mr. Deaver may have violated the conflict of interest provisions of 18 U.S.C. §207 in connection with his business activities following his departure from the White House.

4. Defendant Whitney North Seymour, Jr., is the Independent Counsel appointed by a Special Division of the United States Court of Appeals for the District of Columbia Circuit to investigate the activities of plaintiff Michael K. Deaver and to exercise all the prosecutorial power of the Department of Justice and the Attorney General in relation to Mr. Deaver's activities.

III.  
THE INDEPENDENT COUNSEL PROVISIONS OF THE  
ETHICS IN GOVERNMENT ACT

5. At issue in this lawsuit are the independent counsel provisions of the Ethics in Government Act, codified at 28 U.S.C. §§ 49, 591-598. These sections provide for the appointment of independent counsel (or, by popular usage, special prosecutors) to investigate and prosecute crimes committed by certain high-ranking executive officials listed in 28 U.S.C. §591(b).

6. Upon receiving information that such an official (or former official) has committed a violation of any federal criminal law (other than a class B or C misdemeanor violation or an infraction), the Attorney General must conduct a "preliminary investigation." 28 U.S.C. §§ 591, 592.

7. If, after 90 days, the Attorney General cannot conclude that there are no reasonable grounds to believe further investigation or prosecution is warranted, he must apply to the Special Division of the United States Court of Appeals for the District of Columbia Circuit (created by 28 U.S.C. §49) for the appointment of an independent counsel. 28 U.S.C. §592(c)(1). The Special Division must then appoint an independent counsel. 28 U.S.C. §593.

8. The court is free to appoint any person it chooses as independent counsel, provided only that the person selected may not hold or have recently held any office of profit or trust under the United States. 28 U.S.C. §593(d). The court also has the sole power to define the scope of an independent counsel's jurisdiction, and to expand that jurisdiction upon the request of the Attorney General. 28 U.S.C. §§ 593(b) and (c). Neither the President of the United States nor any officer under his control has any direct role in selecting an independent counsel or in defining his jurisdiction.

9. Once appointed, an independent counsel possesses, with respect to all matters within his prosecutorial jurisdiction, the "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," 28 U.S.C. §594(a), except that an independent counsel may not authorize wiretaps pursuant to 18 U.S.C. §2516.

10. An independent counsel's powers include but are not limited to: conducting grand jury proceedings and other investigations; engaging in litigation; appealing any judgment in any matter in which he has participated; reviewing all documentary evidence available from any source; determining whether to contest assertions of testimonial privilege, including assertions of privilege based upon national security; applying for grants of witness immunity; and, most importantly, initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case in the name of the United States. 28 U.S.C. §§594(a)(1)-(10)..

11. In exercising these functions, an independent counsel is free to appoint, fix the compensation of, and assign the duties of any employee he deems necessary; an independent counsel may also request any assistance from the Department of Justice, and the Department is obliged to provide such assistance. 28 U.S.C. §§ 594(c) and (d)..

12. Aside from providing such requested assistance, the Department of Justice plays no role in directing an independent counsel's activities, and is in fact foreclosed from conducting its own investigations or proceedings regarding

matters within an independent counsel's jurisdiction. 28 U.S.C. § 597(a).

13. An independent counsel is obliged to submit reports on his activities to Congress and to the Special Division of the D.C. Circuit. 28 U.S.C. §§595(a) and (b). No such reports need be made to the President, the Attorney General, or any other Executive Branch official.

14. An independent counsel is subject to the oversight jurisdiction of "appropriate committees" of Congress with respect to his official conduct. An independent counsel must cooperate with his congressional overseers. 28 U.S.C. §595(d).

15. An independent counsel is subject to removal from office, other than by impeachment or conviction, only by the personal action of the Attorney General, and only for good cause, physical disability, mental incapacity, or other condition substantially impairing the performance of his duties. 28 U.S.C. §596(a)(1): Should he attempt to exercise his removal power, the Attorney General must promptly submit an explanation to the Special Division of the court and to the Congress, and the Special Division may override the Attorney General's decision and reinstate an independent counsel if it finds that his removal was based on an error of law or fact. 28 U.S.C. §§ 596(a)(2) and (3).

16. The Special Division of the court may terminate the office of independent counsel at any time and on its own motion whenever it concludes that further activities by the independent counsel are unnecessary. 28 U.S.C. §596(b)(2).

Unless the court exercises that power, or the Attorney General effects removal of an independent counsel in accordance with 28 U.S.C. §596(a), an independent counsel remains in office until he alone concludes that his investigative and prosecutorial tasks have been completed. 28 U.S.C. §596(b)(1).

IV.  
THE APPOINTMENT AND ACTIVITIES OF  
WHITNEY NORTH SEYMOUR, JR., AS INDEPENDENT COUNSEL

17. On May 22, 1986, the Attorney General's office requested the Special Division of the United States Court of Appeals for the District of Columbia Circuit to appoint an independent counsel to investigate allegations that the plaintiff, Mr. Deaver, may have violated 18 U.S.C. §207(c) and/or §207(b)(ii), on two separate occasions after his departure from government service when he allegedly communicated with former National Security Advisor Robert C. McFarlane concerning a proposed amendment to the United States tax code, and when he allegedly met with former United States Special Envoy on Acid Rain, Drew Lewis, concerning the timing of the release of the envoys' report.

18. On May 29, 1986, the Special Division appointed Whitney North Seymour, Jr., as independent counsel, and defined his jurisdiction to include the two specific allegations mentioned above, as well as "related matters." (A copy of the court's order is attached to this Complaint as Exhibit 1.)

19. In the months that have followed, Mr. Seymour has assembled a staff that includes nine other attorneys and four FBI agents. Despite the limitations on his jurisdictional mandate,

he has used his authority to conduct an unbounded investigation into virtually every aspect of Mr. Deaver's business and social activities since leaving the White House staff, as well as the activities of each of Mr. Deaver's associates, including all contacts between Mr. Deaver and his associates and any official anywhere in the federal government, and the details of Mr. Deaver's relations with virtually all of his clients. The investigation also expanded to include the technical accuracy of every statement Mr. Deaver made in lengthy testimony before Congress in May 1986. The investigation has entailed the presentation of more than 150 grand jury witnesses, including Mr. Deaver, all of his associates, every governmental official with whom Mr. Deaver and his associates have had dealings during the existence of Mr. Deaver's firm, and officers and employees of nearly all of Mr. Deaver's clients. Untold others have been interviewed by the FBI. In addition, all of the business records and documents of Michael K. Deaver and Associates, as well as myriad documents from virtually all of Mr. Deaver's clients and from every governmental agency with which Mr. Deaver's firm has had contact, have been subpoenaed by Mr. Seymour.

20. Seven months after he exceeded the jurisdictional grant of the Special Division of the court, Mr. Seymour filed an ex parte request for "clarification" of the scope of his jurisdiction in the hopes of curing his unauthorized assumption of investigative and prosecutorial power. Without notice to Mr. Deaver, a hearing, or the requirement of any evidentiary showing by Mr. Seymour to justify his request, the court retroactively

approved Mr. Seymour's unauthorized assumption of expanded jurisdiction by an order dated December 16, 1986. (A copy of the court's order is attached to this Complaint as Exhibit 2.) Mr. Seymour's request and the court's December 16, 1986, order were in violation of the statutory requirement that an independent counsel's jurisdiction may be expanded by the court only upon the request of the Attorney General.

21. On information and belief, Mr. Seymour is preparing to procure an indictment from the grand jury charging Mr. Deaver with one or more violations of federal criminal law.

V.  
CAUSE OF ACTION:  
VIOLATION OF SEPARATION OF POWERS

22. Plaintiff here incorporates paragraphs 1-21, supra, by reference.

23. The independent counsel provisions of the Ethics in Government Act and Mr. Seymour's exercise of prosecutorial power thereunder violate the constitutional principle of separation of powers. The investigation and prosecution of federal offenses is a function that, by its nature, must be performed by officials of the Executive Branch, answerable to the President of the United States.

24. The Act unconstitutionally divests the Executive branch of its authority over this function and concomitantly augments the authority of the Judicial and Legislative Branches by: (1) granting prosecutorial powers to an official appointed by the judiciary rather than by the President as required by

Article II, Section 2, Clause 2 of the Constitution and the separation-of-powers concerns it incorporates; (2) limiting the President's power to remove the independent counsel while granting unreviewable power to terminate the office of independent counsel to members of the Judicial Branch; and (3) providing that the jurisdiction of the independent counsel and his conduct in office are to be controlled not by the President or his subordinate Executive officers but by members of the Legislative and Judicial Branches.

25. Because neither his appointment, his conduct in office, nor his tenure in office are within the direction and control of the President or his subordinates, an independent counsel such as Mr. Seymour may not constitutionally perform the Executive functions of investigating and prosecuting suspected crimes. Congress' attempt to delegate such authority to an officer independent of the Executive Branch is thus unconstitutional.

26. Mr. Seymour's unlawful assumption of Executive authority has inflicted and continues to inflict substantial and irreparable injury on the plaintiff.

27. Mr. Seymour's tactic of extending his investigation (with the resulting subpoenas and grand jury summonses) to virtually all of Mr. Deaver's clients has resulted in the loss of substantially all of those clients, and now threatens the complete destruction of his business. Mr. Seymour's investigation and threatened prosecution also have unnecessarily forced and will continue to force the expenditure

of substantial resources in Mr. Deaver's defense, and have severely damaged the reputations of both Mr. Deaver and his firm.

28. These injuries, which will be aggravated dramatically in the event of the threatened indictment, cannot be redressed by anything short of an award of equitable relief halting Mr. Seymour's ongoing and entirely unauthorized assumption of Executive power and his use of such power against Mr. Deaver.

VI.  
PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests this Court:

1. to enter judgment pursuant to 28 U.S.C. § 2201-02, declaring that the provisions of the Ethics in Government Act concerning the appointment and authority of independent counsel (28 U.S.C. §§ 49 and 591-598) unconstitutionally delegate Executive authority to officials outside the Executive Branch;

2. to enter judgment declaring that the appointment of Mr. Seymour as independent counsel to investigate Mr. Deaver is unconstitutional;

3. to enter judgment declaring that Mr. Seymour's appointment of associate counsel and his use of FBI agents to assist him is unconstitutional;

4. to enter judgment declaring that the actions Mr. Seymour and his staff have taken during the course of the investigation are unconstitutional;

5. to enter an order permanently enjoining Mr. Seymour from continuing his unlawful investigative and prosecutorial activities directed at Mr. Deaver and his associates, including any efforts by Mr. Seymour or his staff to secure an indictment against Mr. Deaver;

6. to enter an order permanently enjoining Mr. Seymour from turning over the fruits of his unlawful investigation to any other law enforcement authorities or from making any use whatsoever of those materials; and

7. to enter an order providing such other and further relief as the Court shall determine the plaintiff is entitled to under the circumstances.

Respectfully submitted,



HERBERT J. MILLER, JR.  
D.C. Bar No. 026-120  
RANDALL J. TURK  
D.C. Bar No. 362681  
STEPHEN L. BRAGA  
D.C. Bar No. 366727  
MILLER, CASSIDY, LARROCA & LEWIN  
2555 M Street, N.W., Suite 500  
Washington, D.C. 20037  
(202) 293-6400

Attorneys for  
Plaintiff Michael K. Deaver

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED MAY 29 1986

Division for the Purpose of  
Appointing Independent Counsels

GEORGE A. EISH  
CLERK

Ethics in Government Act of 1978, As Amended

FILED

In Re: Michael K. Deaver

Division No. 86-2

FEB 25 1987

Order Appointing  
Independent Counsel

CLERK, U. S. DISTRICT COURT  
DISTRICT OF COLUMBIA

Before: MacKinnon, Presiding, Morgan and Mansfield, Senior Circuit Judges

Upon consideration of the application of the Deputy Attorney General pursuant to 28 U.S.C. § 592(c)(1) for the appointment of an Independent Counsel with authority to investigate and, if warranted, to prosecute allegations that the conduct of former Chief of Staff and Assistant to the President Michael K. Deaver concerning Mr. Deaver's lobbying business and possible resulting conflicts of interest, including inter alia Mr. Deaver's alleged representation of foreign governments, particularly Canada in the course of its acid rain negotiations with the United States, and any related matters developed in the course of the investigation, violated 18 U.S.C. § 207, or any other provision of federal criminal law; it is hereby

ORDERED, by the Court, that Whitney North Seymour, Jr., Esquire of the New York bar, with offices at 100 Park Avenue, New York, New York be and he is hereby appointed Independent Counsel to investigate and pursue the following questions:

1. whether Michael K. Deaver, with the intent to influence, communicated with Robert C. McFarlane in July or August 1985, in connection with a proposal involving section 936 of the Internal Revenue Code, a particular matter pending before, and of direct and substantial interest to, the White House Office (a possible violation of 18 U.S.C. § 207(c));

Exhibit 1 87-0477

2. whether Michael K. Deaver acted as a representative for the Government of Canada in an appearance October 25, 1985, before Drew Lewis, Special Envoy for the United States, in connection with a controversy between the United States and Canada about what action the United States should take in response to Canada's urging that the United States take action to eliminate or reduce acid rain (a possible violation of 18 U.S.C. § 207(a)); and

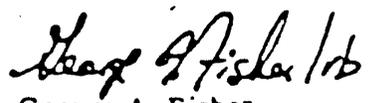
3. whether Michael K. Deaver aided and assisted Canadian officials by attending the October 25, 1986, meeting (a possible violation of 18 U.S.C. § 207(b)(ii)); and

4. whether any allegations presented in the above three referrals, or Mr. Deaver's post-federal employment representation of the Commonwealth of Puerto Rico and the Government of Canada, or any related matters developed in the course of the Independent Counsel's investigation violated 18 U.S.C. § 207, or any other provision of federal law; and it is further

ORDERED, by the Court, that the Independent Counsel shall have jurisdiction to investigate any related matters and other allegations or evidence of violation of any Federal criminal law by Michael K. Deaver developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation, and the Independent Counsel shall have jurisdiction to prosecute for any such violation.

The Independent Counsel shall have all the powers and authority provided by the Ethics in Government Act of 1978, as amended, and specifically by 28 U.S.C. § 594 (copy attached).

Per Curiam  
For the Court

  
George A. Fisher  
Clerk

§ 594. A                      y and duties of a 1 independent counsel

(a) Notwithstanding any other provision of law, a 1 independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, 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, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include—

- (1) conducting proceedings before grand juries and other investigations;
- (2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such independent counsel deems necessary;
- (3) appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity;
- (4) reviewing all documentary evidence available from any source;
- (5) determining whether to contest the assertion of any testimonial privilege;
- (6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;
- (7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;
- (8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1954, and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General; and
- (9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case in the name of the United States; and
- (10) consulting with the United States Attorney for the district in which the violation was alleged to have occurred

(b) A 1 independent counsel appointed under this chapter shall receive compensation at a per diem rate equal to the annual rate of basic pay for level IV of the Executive Schedule under section 5315 of title 5.

(c) For the purposes of carrying out the duties of the office of independent counsel a 1 independent counsel shall have power to appoint, fix the compensation, and assign the duties, of such employees as such independent counsel deems necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. No such employee may be compensated at a rate exceeding the maximum rate provided for GS-11 of the General Schedule under section 5332 of title 5.

(d) A 1 independent counsel may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such independent counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such independent counsel's duties.

(e) A 1 independent counsel may ask the Attorney General or the division of the court to refer matters related to the independent counsel's prosecutorial jurisdiction. A 1 independent counsel may accept referral of a matter by the Attorney General, if the matter relates to a matter within such independent counsel's prosecutorial jurisdiction as established by the division of the court. If such a referral is accepted, the independent counsel shall notify the division of the court.

(f) A 1 independent counsel shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws.

(g) The independent counsel shall have full authority to dismiss matters within his prosecutorial jurisdiction without conducting an investigation or at any subsequent time prior to prosecution if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT **FILED** DEC 16 1986

Division for the Purpose of  
Appointing Independent Counsels

**GEORGE A. FISHER**  
CLERK

Ethics in Government Act of 1978, As Amended

In Re: Michael K. Deaver

Division No. 86-2

**FILED**  
FEB 25 1987

Supplemental Order

Before: MacKinnon, Presiding, Morgan and Mansfield, Senior Circuit Judges  
CLERK, U.S. DISTRICT COURT  
DISTRICT OF COLUMBIA

Upon the petition of Independent Counsel Whitney North Seymour, Jr., appointed by order of this Court on May 29, 1986, it is hereby

ORDERED, by the Court, that the order of May 29, 1986 in the above entitled cause appointing Whitney North Seymour, Jr. as Independent Counsel is hereby amended and supplemented as follows:

With reference to the Court's filed order, page 2 paragraph 4. in the 5th line of said paragraph after the word "further" and before the word "ORDERED" in the next line, insert the following:

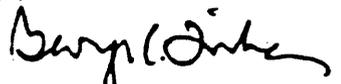
ORDERED, by the Court, that the jurisdiction of such Independent Counsel to investigate and prosecute any related matters developed in the course of his investigation shall include jurisdiction to investigate and prosecute any person or entity who

- (1) has unlawfully conspired with or aided and abetted Michael K. Deaver to violate 18 U.S.C. Section 207 or any other provision of federal criminal law;
- (2) has violated 18 U.S.C. Section 207 or any other provision of federal criminal law while acting as an officer or employee of Michael K. Deaver and Associates, Inc.; or
- (3) has obstructed the due administration of justice, given false testimony, or made any false statement in violation of the Federal criminal law in connection with the investigation conducted by the Independent Counsel pursuant to this Court's order of May 29, 1986 or the preliminary investigations leading up to such order; and it is further

87-0477

ORDERED, by the Court, that such Independent Counsel shall have jurisdiction to prosecute Michael K. Deaver for any willfully false material testimony given to the Subcommittee on Oversight and Investigation of the Committee on Energy and Commerce of the United States House of Representatives on or about May 16, 1986 relevant to any material matters within the jurisdiction of the Independent Counsel's investigation; and it is further

Per Curiam  
For the Court



George A. Fisher  
Clerk

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_  
MICHAEL K. DEAVER,

Plaintiff,

v.

WHITNEY NORTH SEYMOUR, JR.,

Defendant.  
\_\_\_\_\_

Civil Action No. 87-0477

FILED

FEB 25 1987

CLERK, U.S. DISTRICT COURT  
DISTRICT OF COLUMBIA

DECLARATION OF RANDALL J. TURK  
VERIFYING THE ALLEGATIONS OF THE COMPLAINT

CITY OF WASHINGTON  
DISTRICT OF COLUMBIA

I, Randall J. Turk, hereby depose and state:

1. I am an attorney admitted to practice in the District of Columbia and have been a member in good standing of the bar of this Court for 4 years. I practice law with the Washington, D.C. law firm of Miller, Cassidy, Larroca & Lewin, which represents the plaintiff, Michael K. Deaver, in the matter underlying the Complaint in this case.

2. Since before May 22, 1986, I have been personally involved in the details of this firm's representation of Mr. Deaver in connection with the investigation of him by Independent Counsel Whitney North Seymour, Jr.

3. I have reviewed the allegations of the Complaint in this case and hereby swear and affirm that all of the factual

averments contained in the Complaint are true to the best of my knowledge and belief.

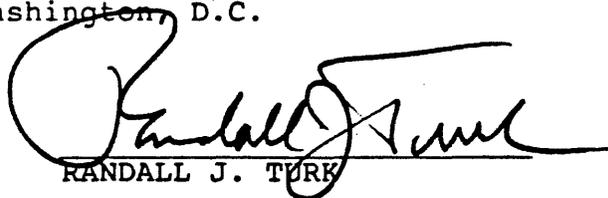
I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 25, 1987.

  
RANDALL J. TURK

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing  
Declaration of Randall J. Turk Verifying The Allegations Of The  
Complaint was delivered by hand, this 25th day of February, 1987  
to Whitney North Seymour, Jr., United States Courthouse, Suite  
6400, One Marshall Place, Washington, D.C.

  
RANDALL J. TURK

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MICHAEL K. DEEVER,  
4521 Dexter Street, N.W.,  
Washington, D.C. 20007,

Plaintiff,

v.

WHITNEY NORTH SEYMOUR, JR.,  
as Independent Counsel,  
United States Courthouse  
One Marshall Place, N.W.  
Suite 6500  
Washington, D.C. 20001,

Defendant.

87-0477

Civil Action No. \_\_\_\_\_

FILED

FEB 25 1987

CLERK, U.S. DISTRICT COURT  
DISTRICT OF COLUMBIA

PLAINTIFF'S APPLICATION FOR  
A PRELIMINARY INJUNCTION

Plaintiff Michael K. Deaver, through undersigned  
- counsel, hereby applies to this Court for a Preliminary  
Injunction enjoining defendant Whitney North Seymour, Jr., from  
proceeding further in his investigation of plaintiff, and  
specifically from seeking to obtain an indictment against Mr.  
Deaver pending a final ruling by this Court on the alleged  
unconstitutionality of Title VI of the Ethics in Government Act,  
28 U.S.C. §§ 591-598.

Any such further actions by Mr. Seymour should be  
enjoined because the legislation pursuant to which he is acting  
in this matter divests the President of important and exclusively  
Executive power and authority, and places the exercise of that

power and authority in an "independent" Office under the control of the Legislative and the Judicial Branches. These features of the statute violate the Constitution both on its face and as applied. Further, the public interest in preserving our constitutional system of separation of powers and the immense harm to Mr. Deaver and his firm inflicted by Mr. Seymour's unconstitutional exercise of Executive power far outweigh any harm that might result from a stay of Mr. Seymour's investigation. The grounds for this Application are set forth in full in the accompanying memorandum of law, and its attached exhibits.

Respectfully submitted,

  
HERBERT J. MILLER, JR.  
D.C. Bar No. 026-120  
RANDALL J. TURK  
D.C. Bar No. 362681  
STEPHEN L. BRAGA  
D.C. Bar No. 366727  
MILLER, CASSIDY, LARROCA & LEWIN  
2555 M STREET, N.W., Suite 500  
Washington, D.C. 20037  
(202) 293-6400

Attorneys for Michael K. Deaver

February 25, 1987

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MICHAEL K. DEEVER,  
4521 Dexter Street, N.W.,  
Washington, D.C. 20007,

Plaintiff,

v.

WHITNEY NORTH SEYMOUR, JR.,  
as Independent Counsel,  
United States Courthouse  
One Marshall Place, N.W.  
Suite 6400  
Washington, D.C. 20001,

Defendant.

87-0477

Civil Action No. \_\_\_\_\_

FILED

FEB 25 1987

CLERK, U.S. DISTRICT COURT  
DISTRICT OF COLUMBIA

MEMORANDUM IN SUPPORT OF PLAINTIFF'S  
APPLICATION FOR A PRELIMINARY INJUNCTION

I.  
INTRODUCTION

On May 29, 1986, three judges, <sup>1/</sup> constituting a special division of the United States Court of Appeals for the District of Columbia Circuit, issued an order vesting in a private attorney -- Whitney North Seymour, Jr., of New York City -- all the power and authority of the Attorney General of the United States for the purpose of investigating and prosecuting Michael K. Deaver.

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<sup>1/</sup> The judges were Senior Circuit Judge George E. McKinnon of the United States Court of Appeals for the District of Columbia Circuit, the late Senior Circuit Judge Walter R. Mansfield of the Second Circuit and Senior Circuit Judge Lewis R. Morgan of the Eleventh Circuit. See Order Appointing Independent Counsel, a copy of which is attached hereto as Exhibit A.

Mr. Seymour thus ascended to an important Executive position without being either nominated by the President or confirmed by the Senate, and without being appointed by the head of any Executive Department. Since being appointed, Mr. Seymour has wielded the immense power and authority of the Attorney General without the slightest input from, or supervision by, the Executive Branch. His investigative and prosecutorial decisions with respect to Mr. Deaver are not subject to review by anyone at any level in any federal law enforcement agency, and, unlike any other similar Executive official, he is virtually immune from removal by the President from his appointed task. At the same time, the scope and exercise of Mr. Seymour's Executive power is subject to the direct supervision and control of the Legislative and Judicial branches.

As we demonstrate in Part II below, the legislation pursuant to which Mr. Seymour is acting in this matter divests the President of important and exclusively Executive power and authority, and places the exercise of that power and authority in an "independent" office under the control of the Legislative and the Judicial Branches. These features of the statute violate the constitutional principle of separation of powers and render the statute unconstitutional both on its face and as applied.

Further, as we previously demonstrated in our Memorandum in Support of Plaintiff's Application for a Temporary Restraining Order, the public interest in preserving our constitutional system of separation of powers and the immense harm to Mr. Deaver inflicted by Mr. Seymour's unconstitutional exercise of Executive

outweigh any harm that might result from a stay of Mr. Seymour's investigation. The Court should therefore enter a preliminary injunction restraining Mr. Seymour from proceeding further in this matter pending a final declaration by the Court of the statute's unconstitutionality.

## II.

**The Independent Counsel Statute Is Unconstitutional Because It Divests The President Of Important And Exclusively Executive Power, And Transfers That Power To The Judicial And Legislative Branches In Violation Of Separation Of Powers.**

As the independent counsel appointed in this matter, Mr. Seymour has, in effect, become the Attorney General of the United States, with Mr. Deaver and his associates as his sole and exclusive targets. Mr. Seymour acquired this extraordinary position through the independent counsel provisions of the Ethics in Government Act ("the Act"), 28 U.S.C. §§ 49, 591-598, as amended.

As we demonstrate below, the Act violates the Constitutional principle of separation of powers in three major respects. First, it provides for the appointment of independent counsel by the judiciary, rather than by the President, in violation of the Appointments Clause of the Constitution. Second, it unconstitutionally limits the President's removal power over a high-ranking Executive official, and by reserving to the Judicial Branch unfettered authority to terminate an independent counsel's office, dictates that an independent counsel will be subservient to the judiciary. Third, the statute divests the President of his authority and duty to ensure that

the laws be faithfully executed by assigning to the judiciary, rather than the Executive Branch, the task of defining the independent counsel's jurisdiction, and by transferring to the Judicial and Legislative Branches other supervisory authority over the independent counsel's exercise of exclusively Executive powers.

The Act and Mr. Seymour's exercise of power thereunder thus usurp in the clearest possible way each of the three powers that James Madison, expressing the Framers' understanding, described as essential ingredients of Executive power within the meaning of the Constitution:

I conceive that if any power whatsoever is in the nature of the executive it is the power of appointing, overseeing, and controlling those who execute the laws.

1 Annals of Cong. 481-82 (J. Gales ed. 1789) (emphasis added). Such inroads upon Executive authority must be remedied by this Court.

In Buckley v. Valeo, 424 U.S. 1, 123 (1976), the Supreme Court warned that it "has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decision of cases or controversies properly before it." Indeed, as the Court noted in INS v. Chadha, 462 U.S. 919, 951 (1983), "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." The Court most recently reaffirmed these principles in its decision last term in Bowsher v. Synar, \_\_\_ U.S. \_\_\_, 106 S.Ct. 3181 (1986). Here, application of the

separation of powers doctrine is, as in the Buckley, Chadha and Bowsher cases, necessary to prevent the Judicial and Legislative Branches from exceeding the outer limits of their constitutionally-defined power.

A. An Overview Of The Act.

The Act requires the Chief Justice of the United States to assign three judges or justices to a special division of the Court of Appeals for the District of Columbia Circuit whose function is not to adjudicate cases or controversies, but to appoint "independent counsel." 28 U.S.C. §49. The persons against whom such independent counsel are to direct their investigative and prosecutorial powers are the hundreds of members of the Executive Branch listed in 28 U.S.C. §591(b). <sup>2/</sup> The offenses covered are all federal criminal laws except petty crimes. 28 U.S.C. §591(a). <sup>3/</sup>

Whenever the Attorney General receives "information" sufficient to constitute "grounds to investigate" whether any of the persons covered by the Act has committed a federal offense,

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<sup>2/</sup> Officers of the "principal national campaign committee seeking the election or reelection of the President" are also included, 28 U.S.C. §591(b)(8), as are former Executive Branch officers and employees for up to two years after leaving office, unless the President currently in office is of a different political party than the President under whom such former officers and employees worked. 28 U.S.C. §591(b)(6).

<sup>3/</sup> The operation of the Act depends not on the Executive Branch official's status at the time he allegedly committed an offense, but rather on his position (or former position) at the time the independent counsel is appointed by the judges. See 28 U.S.C. §§591-593.

he has no choice but to conduct a "preliminary investigation" for a period not to exceed ninety days. 28 U.S.C. §§591(a), 592(a). If the Attorney General finds "reasonable grounds to believe that further investigation or prosecution is warranted," or if he fails to come to a conclusion within the ninety-day period, the Attorney General again has no choice but to apply to the judges of the division for the appointment of an independent counsel. 28 U.S.C. §592(c)(1). <sup>4/</sup> The Attorney General's non-discretionary obligation to conduct an investigation preliminary to an application for the appointment of an independent counsel also may be triggered by a direct request from Congress. See 28 U.S.C. §595(e).

Upon receiving an application for the appointment of an independent counsel, the special division of the court has virtually unfettered discretion to appoint whomever it chooses. 28 U.S.C. §593(b). The only qualifications for the office are that the appointee must not hold or recently have held any office of profit or trust under the United States. 28 U.S.C. §593(d). Neither the President, nor any other Executive Branch official has any voice whatsoever in the selection process.

In addition to appointing an independent counsel, the judges are assigned the responsibility of "defining that independent counsel's prosecutorial jurisdiction." 28 U.S.C. §593(b). The Act itself supplies no standards regarding how

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<sup>4/</sup> If on the other hand, the Attorney General finds that there are no reasonable grounds to believe that further investigation or prosecution is warranted, no independent counsel may be appointed. 28 U.S.C. §592(b)(1).

broadly or narrowly the judges should define this jurisdiction. There is nothing in the Act, for example, that requires the judges to limit the independent counsel's jurisdiction to the individual or the offenses that were the subjects of the Attorney General's preliminary investigation. For all that appears, the judges could include within the jurisdictional definition not only the person and matter that gave rise to the Attorney General's application, but also any other Executive official or employee or former official or employee, or indeed any other person not otherwise covered by the Act, regarding any offense under federal law. See, e.g., S. Rep. No. 170, 95th Cong., 1st Sess. 64 (1978). 5/

The Act makes clear, moreover, that the Attorney General, the Department of Justice and all of its officers and employees are deprived of power to investigate or prosecute any matter within the jurisdiction of the independent counsel as defined by the court. 28 U.S.C. §597. In the sphere of his jurisdiction, whatever its scope, the independent counsel is supreme. He acquires the full power and authority of the Attorney General to exercise all investigative and prosecutorial functions and powers of the Department of Justice, 28 U.S.C. §594(a), and he may, as he alone deems proper, create his own mini-Department of Justice by exercising his power to "appoint,

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5/ The Order in this case, for example, includes within it not only the "matters" involving 18 U.S.C. §207 referred by the Attorney General, but also "any related matters" or "other allegations or evidence" developed in the course of the investigation. See Exhibit A.

fix the compensation, and assign the duties, of such employees as [he] deems necessary." 28 U.S.C. §594(c). He may conduct proceedings before grand juries; he may bring and handle all aspects of actions in the name of the United States, and engage in any other litigation that he deems necessary; he may appeal adverse decisions without the approval of the Solicitor General; and he may review documentary evidence from any source, contest assertions of privilege, including those based on national security, apply for grants of statutory immunity, and initiate and conduct prosecutions in any court of competent jurisdiction. See 28 U.S.C. §594. 6/

Whenever he alone deems it appropriate, the independent counsel may issue public reports on his activities, containing such information as he alone deems appropriate. 28 U.S.C. §595(a). He is required, however, to submit statements or reports to the Congress on his activities, id., as well as to submit a final report to the three-judge court before the termination of his office, 28 U.S.C. §595(b)(i). His official conduct is subject to the oversight jurisdiction of the House and Senate Judiciary Committees, with which he is required to cooperate. 28 U.S.C. §595(d).

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6/ Although the statute loosely requires the independent counsel to comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws, it does so only where the independent counsel decides that such compliance is possible.

There is no time limit on the independent counsel's term of office: he does not descend to the status of private citizen until he determines that he has completed his duties and files a report with the court, or until the division of the court concludes that he has completed his duties. 28 U.S.C. §596(b). The independent counsel may not be removed from office by the Attorney General or any other agent of the President except for good cause or because of a condition that substantially impairs his performance. 28 U.S.C. §596(a)(1). Moreover, if the independent counsel objects to his ouster by the Attorney General, he has the right to bring an action for judicial review before the judges that appointed him, and may obtain reinstatement "or other appropriate relief" if the judges believe the Attorney General's removal of their appointee was based on a factual or legal error. 28 U.S.C. §596(a)(3). In contrast to the Attorney General's circumscribed power of removal, the court itself possesses unreviewable discretion to terminate an independent counsel's office on its own motion at any time the court feels that no further purpose is served by an independent counsel's exercise of his powers. 28 U.S.C. §596(b)(2).

We turn now to demonstrate how these statutory provisions are fatally defective under our constitutional form of government.

B. Mr. Seymour's Appointment By a Three Judge Panel  
Violates Article II, §2, Cl.2 Of The Constitution.

There can be no doubt that the power, authority and duties given to Mr. Seymour by the Act are core Executive functions, and that under the Appointments Clause of the Constitution, only the President is empowered to appoint such Executive Officers. The Act's transfer of this appointment power to the Judiciary is thus plainly in violation of the Constitution.

. 1. Mr. Seymour is Exercising Exclusively Executive  
Power and Functions.

Article II, §1 of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America" who, under the Take Care Clause, "shall take Care that the Laws be faithfully executed . . . ." U.S. Const., Article II, §3. Both the history of these constitutional provisions and the judicial decisions interpreting them demonstrate that the enforcement of federal criminal law against private persons constitutes the very essence of Executive power in the constitutional sense.

As one commentator has noted, participants at the Federal Convention of 1787 viewed the Executive "problem" as:

primarily one of law enforcement, the institution of a department well enough equipped with power to see to it that the laws were faithfully executed in distant Georgia and individualistic western Pennsylvania and western Massachusetts as well as in the commercial centers of the seaboard.

C. Thach, The Creation of the Presidency, 1775-1789: A Study in Constitutional History, 77 (1969 ed.) (hereinafter "C. Thach"). Even under the Virginia resolutions that Edmund Randolph submitted to the Convention in its early stages -- resolutions that otherwise generally subordinated the President to the Legislature, id. at 84 -- the only Executive power expressly and directly identified was the "general authority to execute the national laws . . . ." 1 M. Farrand, The Records of the Federal Convention of 1787, 21 (rev. ed. 1937) (hereinafter "1 M. Farrand").

The process at the Convention of defining and expanding upon the powers to be entrusted to the Executive began with a recognition, articulated by James Madison, that "certain powers were in their nature Executive, and must be given to that department." Id. at 67. As that process went forward, the proposition that the power to enforce federal law was to reside with the Executive was rephrased from time to time, but no consideration was ever given to reposing that power outside the Executive Department. Thus, Madison proposed "[t]hat a national Executive ought to be constituted with power to carry into effect the national laws . . . ." Id. James Wilson, who seconded this language, had already stated his position that "the only powers he conceived strictly Executive were those of executing the laws, and appointing officers . . . ." Id. at 66. And under Alexander Hamilton's proposal, put before the Convention several weeks later, the Executive was to have the responsibility for "the execution of all laws passed . . . ." Id. at 292.

As the Convention proceeded toward the final version of what was to become the Constitution, additional specific powers to be exercised by the Executive were considered and adopted or rejected. But the power to execute the laws remained essentially unchanged. C. Thach, supra, at 116. Indeed, the power to execute the laws was the only power expressly identified by the Framers from the opening day of the business of the Convention on May 29, 1787, to its close on September 17, 1787, as a power to be vested exclusively in the Executive. 7/

Thus, from the very inception of our constitutional form of government, the irreducible responsibility and power of the President, as head of the Executive Branch, has been, and is, the duty to supervise the execution of the laws of the United States -- a duty that unquestionably includes the investigation and prosecution of criminal offenses. Decisions of the Supreme Court have repeatedly recognized as much. Thus, the Court has described the Attorney General as "the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offences be faithfully executed." Ponzi v.

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7/ The principle involved was so clear in the minds of the Framers that it was never even subjected to debate, unlike other powers such as the conduct of the new Nation's foreign affairs, C. Thach, supra, at 106, which were conferred on the President much later in the Convention and which are now accepted as being within the exclusive domain of the President. See generally United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). And as Alexander Hamilton was later to observe, no objection to the President's power of "faithfully executing the laws" was raised in the debates over ratification. The Federalist No. 77, at 463 (A. Hamilton) (C. Rossiter ed. 1961).

Fessenden, 258 U.S. 254, 262 (1922). See also Buckley v. Valeo,  
supra, 424 U.S. at 123. Indeed, in United States v. Nixon, 418  
U.S. 683, 693 (1974), a unanimous Supreme Court stated:

[T]he Executive branch has exclusive  
authority and absolute discretion to decide  
whether to prosecute a case, Confiscation  
Cases, 7 Wall. 454 (1869); United States v.  
Cox, 342 F.2d 167, 171 (CA 5), cert. denied,  
sub nom. Cox v. Hauberg, 381 U.S. 935 (1965)

. . . .

The lower federal courts have been unanimous in their  
concurrence with the proposition that the investigation and  
prosecution of criminal offenses is an inherently Executive  
function. In United States v. Cox, for example, the Fifth  
Circuit expressly held that the decision whether to initiate a  
prosecution belongs solely to the Executive Branch, and that  
neither Congress nor the courts (nor, indeed, the grand jury) may  
interfere in that decision. 342 F.2d at 171. As Judge Wisdom  
stated in his concurring opinion in Cox, "[t]he prosecution of  
offenses against the United States is an executive function  
within the exclusive prerogative of the Attorney General." Id.  
at 190. Cox is by no means an isolated case. Indeed, the cases  
are legion in which courts have refused to interfere with the  
exercise of prosecutorial discretion on the ground that  
prosecutorial power is solely committed to the Executive Branch;  
moreover, many of these holdings have come in the face of  
statutory language arguably constituting a legislative attempt to  
limit such discretion or to provide for judicial oversight of its  
exercise. See, e.g., United States v. Batchelder, 442 U.S. 114  
(1979); Bordenkircher v. Hayes, 434 U.S. 357 (1978); Dacey v.

Dorsey, 568 F.2d 275 (2d Cir.), cert. denied, 436 U.S. 906 (1978); United States v. Cowan, 524 F.2d 504 (5th Cir. 1975); Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973); United States v. Chanen, 549 F.2d 1306 (9th Cir. 1977); United States v. Brown, 481 F.2d 1035 (8th Cir. 1973); Peek v. Mitchell, 419 F.2d 575 (6th Cir. 1970); Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967) (Burger, C.J.); Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965), cert. denied, 384 U.S. 906 (1966); Moses v. Kennedy, 219 F. Supp. 762 (D.D.C. 1963), aff'd sub nom. Moses v. Katzenbach, 342 F.2d 931 (D.C. Cir. 1965).

In its recent decision in Bowsher v. Synar, supra, the Court reaffirmed these principles in holding that the duties assigned to the Comptroller General by the Balanced Budget and Emergency Deficit Control Act of 1985, which included "[i]nterpreting a law enacted by Congress to implement the legislative mandate," were functions "plainly entailing execution of the law in constitutional terms," id. at 3192, the responsibility for which is exclusively reserved to the Executive Branch. Mr. Seymour's breathtakingly broad investigative and prosecutorial power under 28 U.S.C. §594, which similarly entails the active "implement[ation of] the legislative mandate," is thus quintessentially Executive in nature.

2. Only The President Constitutionally May Appoint  
Officials Exercising Important And Exclusively  
Executive Powers

Article II, §2, cl.2 of the Constitution provides:

[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.

Mr. Seymour's appointment by three judges assembled for that purpose was in clear violation of this constitutional provision and the concepts of separation of powers that it embodies.

In Buckley v. Valeo, supra, the Supreme Court held that an "Officer of the United States" within the meaning of clause 2 of Article II, §2, is "any appointee exercising significant authority pursuant to the laws of the United States . . . ." 424 U.S. at 125-26 (citing United States v. Germaine, 99 U.S. 508, 509-10 (1879)). An independent counsel such as Mr. Seymour, wielding all the power and authority of the Attorney General and the Department of Justice, plainly fits within the Court's definition of an "Officer of the United States." The Court in Buckley further held that anyone who is an "Officer of the United States" "must, therefore, be appointed in the manner prescribed by §2, cl.2, of that Article." 424 U.S. at 126.

Buckley, of course, concerned the appointment of members of the Federal Election Commission, whom the Court deemed to be "at the very least . . . 'inferior Officers' within the meaning

of that Clause." Id. at 126. It would defy all logic, however, for anyone to conclude that an independent counsel, exercising all the power and authority of the Attorney General and the Department of Justice, was an inferior Executive officer within the meaning of that Clause; for in no meaningful sense does the independent counsel have a "superior." Like the Attorney General whose full power and authority he exercises, an independent counsel is plainly an important Executive official who may only be appointed by the President.

Even assuming, however, that an independent counsel were an "inferior Officer[]" under Article II, §2, cl.2, the further conclusion that Congress therefore might permit such an officer to be appointed by "the Courts of Law," rather than by the "President alone" or "the Heads of Departments" (Art. II, §2, cl.2), does not follow. <sup>8/</sup> If the Constitution could be so read, Congress could, under clause 2, dismantle 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. Dean Roger C. Cramton discussed at

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<sup>8/</sup> Moreover, although the point need not be reached, there is substantial doubt whether three judges from different circuits assembled in Washington for the sole purpose of appointing an independent counsel would, in any event, constitute a "Court of Law" having appointment power within the meaning of Article II, §2, cl.2. A judge or group of judges does not always sit or act as a "Court," a term that implies a functioning forum for the adjudication of cases and controversies, not an ad hoc group of judges gathered together for no other reason than to appoint an Executive official. See generally Article III, §1 of the Constitution (distinguishing between courts and judges).

length the proper interpretation of this clause in his statement to the House Subcommittee on Criminal Justice during hearings on the predecessor version of the Act. See Hearings on H.J. Res. 784 and H.R. 10937 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 338-68 (1973). See also Hearing Before the Senate Comm. on the Judiciary, 94th Cong. 2d Sess. \_\_\_\_ (1976) (testimony of then - Deputy Attorney General Harold R. Tyler, Jr.). Dean Cramton concluded that the purpose of the "inferior Officers" provision was clearly "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).<sup>9/</sup> That, however, is

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<sup>9/</sup> Ex Parte Siebold, 100 U.S. 371 (1880), is not to the contrary. The Court there upheld a statute authorizing federal courts to appoint officers to supervise elections, but as Dean Cramton pointed out, the officers in question were not clearly Executive officials since the function of making determinations relative to election fraud were akin to those in which courts have traditionally appointed masters.

Professor Tribe is in agreement that Siebold is not to be given a broad reading; he has written that the effect of Article II, §2, cl.2 is to "assur[e] that, with the possible exception of judicially-appointed court officers, 'any appointee exercising significant authority pursuant to the laws of the United States' will be selected by the President or by a department head answerable to the President." L. Tribe, American Constitutional Law §4-8, at 185 (1978).

This court's decision in Hobson v. Hansen, 265 F. Supp. 902 (D.D.C. 1967) is not to the contrary. In that case, a three-judge district court upheld against constitutional assault a statute empowering the District Court for the District of Columbia to appoint members of the D.C. Board of Education. Although the court relied in part on Article II, §2, cl.2 as authority for the proposition that appointment of such officers (Cont'd)

precisely the Act's effect. <sup>10/</sup>

by the court was permissible, the case does not command a similar outcome here. The decision rested heavily on the fact that the District Court was at that time an Article I court for the District of Columbia as well as an Article III court, and the court stressed Congress' plenary powers under Article I to legislate with respect to the District. Id. at 906-14. Similar reasoning cannot be applied here, for the District Court is now exclusively an Article III court, see Palmore v. United States, 411 U.S. 389, 406-07 (1973), and the independent counsel statute in no way concerns the governance of the District of Columbia. Indeed, it is our argument that Hobson cannot accurately be read as having any bearing at all on judicial power to appoint an Executive officer of the United States, for, as Judge Wright observed in his dissent, a District of Columbia school board member is merely a local official, and not an officer of the United States at all. Id. at 919 (Wright J., dissenting). And certainly, whatever his status, a school board member's duties are not core Executive functions, as are the investigation and prosecution of criminal offenses. Hobson thus cannot be read as authority for the intrusion of Executive power worked by the independent counsel statute. Even if it could, its validity would be fatally undermined by Bowsher v. Synar, U.S.     , 106 S.Ct. 3181 (1986), INS v. Chadha, 462 U.S. 919 (1983), and Buckley v. Valeo, 424 U.S. 1 (1976), in which the Supreme Court has reemphasized that entrenchment by the other Branches on Executive power (including the appointment power) is not to be tolerated.

<sup>10/</sup> In Springer v. Philippine Islands, 277 U.S. 189 (1928), the Supreme Court held that the legislature could have no hand in the appointment of the board of directors of a public corporation. See also Buckley v. Valeo, supra, 424 U.S. at 124. Although the activities of public corporations are hardly at the core of Executive functions, the Court nevertheless held that the Executive Branch could not be divested of control over such entities. It follows a fortiori that control over law enforcement activities cannot constitutionally be removed from the Executive Branch as the Act purports to do.

That is why 28 U.S.C. §546 lends no support to the Act. Under Section 546, when the office of United States Attorney is vacant, the district court may appoint "a United States attorney to serve until the vacancy is filled." The President, however, still retains the authority to remove such a temporary United States Attorney. See 28 U.S.C. §541(c). In United States v. Solomon, 216 F. Supp. 835, 842 (S.D.N.Y. 1963), the Court sustained the predecessor of section 546, but only because it "in no wise equates to the normal appointive power," is "only of a temporary nature," and "in no wise binds the executive." Former Solicitor General Erwin M. Griswold made a similar argument in a letter to the Senate Committee on Government Operations,  
(Cont'd)

The doctrine of separation of powers "is at the heart of our Constitution," Buckley v. Valeo, supra, 424 U.S. at 119. Indeed, as the Court reiterated in INS v. Chadha, supra, 462 U.S. at 946, "'[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers; it was woven into the document that they drafted in Philadelphia in the summer of 1787,'" (quoting Buckley v. Valeo, supra, 424 U.S. at 124). While the Executive, Legislative and Judicial Branches are not entirely separate, and were not intended to be so, Buckley v. Valeo, supra, 424 U.S. at 120-21, the Constitution charges each Branch of government with the task of preserving its own essential powers in order to prevent frustration of the Framers' basic design. Chief Justice Taft stated this principle for the Court in Hampton & Company v. United States, 276 U.S. 394 (1928):

[I]n carrying out that constitutional division into three branches it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power.

Id. at 406 (quoted with approval in Buckley v. Valeo, supra, 424

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distinguishing section 546 from the independent counsel legislation on several grounds, among which are that an appointment under section 546 can be made only during a vacancy; it is terminated whenever the President and Senate have completed the appointment process; it is only of an emergency nature "in order that the responsibilities of the office may be covered during a temporary period"; and what the district court has done can always be overridden by the President. Hearings on S.495 and S.2036 before the Senate Comm. on Government Operations, 94th Cong., 1st Sess. 235-36 (1975). In any event, although the point need not be reached, section 546 may itself be unconstitutional, in which case it obviously can lend no support to the constitutionally defective provisions of this statute.

U.S. at 121-22).

It is just as much a "breach of the national fundamental law" if Congress -- using the Judiciary as its agent -- divests the Executive branch of executive power and functions, and transfers these to persons independent of the Executive. By providing for judicial appointment of an officer exercising inherently Executive investigative and prosecutorial powers, the statute at issue here does just that. As Professor Tribe has stated, "It is through subordinates, and only through them, that the President can 'take care that the laws be faithfully executed. . . .'" L. Tribe, American Constitutional Law §4-8, at 185. By depriving the President of the power to appoint subordinates who will perform the core Executive task of law enforcement, the Act "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, 433 U.S. 425, 443 (1977). The Act's attempt to transfer to the Judicial Branch the purely Executive power of appointing Executive officials is thus plainly unconstitutional, as is Mr. Seymour's exercise of prosecutorial power pursuant thereto.

C. The Act Unconstitutionally Restricts The President's Removal Power, And By According To The Judiciary The Right To Terminate An Independent Counsel's Office, Constitutes A Per Se Violation Of The Constitution.

The Act restricts the President's power to remove an independent counsel "only for good cause, physical disability, mental incapacity, or any other condition that substantially

impairs the performance of such independent counsel's duties." 28 U.S.C. §596(a)(1). Further, the Act requires the Attorney General to submit a report to both the special division of the Court and to the House and Senate Judiciary Committees setting forth the reasons for any such removal, 28 U.S.C. §596(a)(2), and grants to the court that appointed the independent counsel the power to reinstate him or award other appropriate relief in the event it disagrees with the Attorney General's decision. 28 U.S.C. §596(a)(3). These restrictions on the Executive's power to remove an independent counsel -- and the concomitant loss of Executive control and supervision over that official -- are plainly unconstitutional.

As the Supreme Court held in Myers v. United States, 272 U.S. 52 (1926), the President's power to remove Executive officials cannot be restricted by Congress. In Myers, the Executive official involved was a postmaster, who by statute was secure from removal by the President without the advice and consent of the Senate. When he nevertheless was removed by the President without the advice and consent of the Senate, he brought suit for his salary from the date of his removal. In invalidating any limitation on the President's removal power over Executive officials, the Supreme Court noted the Framers' opposition to the mingling of the powers of the Executive, Legislative and Judicial Branches, 11/ and stated (id. at 122):

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11/ In the First Congress, James Madison aptly captured the essence of the concept of the responsibility and power of the President to supervise the execution of federal law in the debates over the President's power to remove federal officers, (Cont'd)

The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.

Although cases decided since Myers have allowed Congress to impose statutory restrictions on the removal of officers performing "quasi-legislative" or "quasi-judicial" duties, see, e.g., Humphrey's Executor v. United States, 295 U.S. 602 (1935) (Federal Trade Commissioners); Wiener v. United States, 357 U.S. 349 (1958) (members of the War Crimes Commission), the Court in those decisions has carefully preserved the President's unrestricted removal power with regard to officers, such as Mr. Seymour, who are performing purely Executive functions. Moreover, in its recent decision in Bowsher v. Synar, \_\_\_ U.S. \_\_\_, 106 S. Ct. 3181 (1986), the Supreme Court cited with approval the Myers Court's discussion of the "Decision of 1789," through which the Framers expressed their intention of vesting the President with unlimited removal power over important Executive officers. Id. at 3187-88. By hemming the President's

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the "Removal Debate" which led to the "Decision of 1789:"

If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence will be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.

1 Annals of Cong. 518 (J. Gales ed. 1789).

power to remove an independent counsel with both substantive and procedural impediments -- that is, the requirement of "cause" for removal, the requirement of reporting the reasons for removal, and the provision for judicial review -- the statutory scheme plainly runs afoul of the rule of Myers as reaffirmed in Bowsher v. Synar.

In addition to indicating the Supreme Court's continued adherence to Myers, Bowsher v. Synar makes clear that the statutory provisions for removal of an independent counsel bear yet another fatal flaw. While limiting the President's own removal power, the statute allocates unreviewable power to the special division of the court to terminate an independent counsel's office, on its own motion, whenever it is satisfied that the office is no longer needed. 28 U.S.C. § 596(b). Bowsher v. Synar stands for the categorical proposition that the grant of such power to terminate an Executive officer to non-Executive Branch officials is unconstitutional.

In Bowsher, the Supreme Court struck down the automatic deficit reduction process of the Balanced Budget and Emergency Deficit Control Act of 1985 because the power to remove the Comptroller General, who performed Executive functions under the Act, was held in part by Congress. The Court stated (106 S.Ct. at 3187):

The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts. The President appoints "Officers of the United States" with the "Advice and Consent of the Senate . . . ." Article II, §2. Once the appointment has been made and confirmed, however, the

Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment by the House of Representatives and conviction by the Senate. An impeachment by the House and trial by the Senate can rest only on "Treason, Bribery or other high Crimes and Misdemeanors." Article II, §4. A direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one is inconsistent with separation of powers.

The Bowsher Court held the retention by Congress of removal authority over the Comptroller General, to whom the Balanced Budget Act entrusted the exercise of executive powers, to be a per se violation of the Constitution. The Court stated (106 S.Ct. at 3192):

By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Reduction Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function.

It did not matter, in the Court's view, that "'[r]ealistic consideration' of the 'practical result of the removal provision' reveals that the Comptroller General is unlikely to be removed by Congress." Id. at 3190-91 (citation omitted). In underscoring its per se holding, the court observed (id. at 3191):

The separated powers of our government can not be permitted to turn on judicial assessment of whether an officer exercising executive power is on good terms with Congress. The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty. In constitutional terms, the removal powers over the Comptroller General's office dictate that he will be subservient to Congress.

For like reasons, the Judicial Branch's power to terminate the office of an independent counsel "dictate[s in constitutional terms] that he will be subservient to" the Judiciary, regardless of whether that power ever will be used in an attempt to influence an independent counsel's conduct. It is the potential for control over the Executive officer created by the judicial power of termination that fatally distorts the separation of powers. The Act's removal provisions thus constitute a per se violation of the Constitution.

D. The Act Unconstitutionally Assigns To The Judiciary The Responsibility For Defining The Independent Counsel's Investigative And Prosecutorial Jurisdiction, And Impermissibly Transfers To The Judicial And Legislative Branches Other Supervisory Authority Over An Independent Counsel.

The statute is invalid on still other, related grounds, for it divests the President of his exclusive power to ensure that the laws are faithfully executed by (1) assigning to the Judicial Branch the task of defining an independent counsel's investigative and prosecutorial jurisdiction; (2) depriving the Attorney General of investigative discretion prior to the filing of an application for the appointment of an independent counsel; (3) requiring an independent counsel to submit to the division of the court a report of his activities at the conclusion thereof; (4) requiring an independent counsel to submit reports on his activities to the appropriate committees of Congress; and (5) granting to the Legislative Branch oversight responsibility for the conduct of an independent counsel's office.

Each of these provisions on its face unconstitutionally violates the principle of separation of powers by divesting the President of his exclusive authority to supervise those who, like Mr. Seymour, are exercising Executive powers and functions. The inescapable import of the cases discussed above is that the discretion whether to initiate and continue an action to enforce federal law is not subject to the control of the Legislative or Judicial Branches because of the textual commitment of that power to the President under Art. II, § 1 and the Take Care Clause. Therefore, an attempt by Congress to divest the Executive Branch of such discretion, whether by attempting to exercise such power itself or by granting the power to officers of the United States beyond the control of the President, presumptively violates the Take Care Clause and the constitutionally mandated separation of powers. As this Circuit made clear in Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981):

The executive power under our Constitution, after all, is not shared -- it rests exclusively with the President. The idea of a "plural executive," or a President with a council of state, was considered and rejected by the Constitutional Convention.

If the power to prosecute is an Executive power in the constitutional sense, it cannot be shared, at the discretion of Congress, with officers beyond the control of the President; to share that power is to create the plural Executive Branch which was carefully considered and squarely rejected by the Framers.

In the Take Care Clause, the Framers ensured that the power to enforce federal law would be subject to political accountability by placing that power under the policy control of

the Chief Executive. As illustrated by the cases discussed above, such as United States v. Cox, the power to initiate and carry forward a federal criminal prosecution is a discretionary power that cannot appropriately be supervised by the Judicial Branch. Nor can Congress, in our constitutional system, act as a participant in the exercise of that power. If the exercise of the power to initiate and carry forward federal law enforcement actions is to be checked by one of the three Branches, that check must come through the supervisory control of the President over the prosecutorial function -- not by a sharing of Executive power.

If the power to enforce the law may be vested in officials beyond the power or responsibility of the President, but subject to the supervision of judges and congressmen, then the most fundamental check on the exercise of power established by the Constitution will have been overridden. This result cannot be reconciled with the understanding of the Framers which lay behind their decision to centralize the executive power in the President for the protection of the people:

[T]he plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, first, the restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and, secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it.

The Federalist No. 70, 428-29 (A. Hamilton) (C. Rossiter ed. 1961). The Framers of the Constitution did not contemplate the exercise of federal law enforcement power to go beyond the Executive's control. As the Court concluded in Chadha:

With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

462 U.S. at 959.

E. Congress Enacted The Independent Counsel Statute Fully Aware That It Was Unconstitutional, But Erroneously Believing It Was Justified By Political Exigencies.

In discussing why the Act and Mr. Seymour's actions pursuant to it are unconstitutional, we follow a well-marked path. As early as 1973, in the wake of the "Watergate Affair," proposed legislation was introduced specifying the terms and conditions for the appointment of a special prosecutor to investigate criminal allegations involving high level government officials. Extensive public hearings were held throughout this period until the Ethics in Government Act was finally passed in 1978, during which time respected legal scholars, <sup>12/</sup> prominent attorneys, <sup>13/</sup> leaders of Congress <sup>14/</sup> and at least one federal

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<sup>12/</sup> See, e.g., Statement of Roger C. Cramton, Dean, Cornell Law School in Hearings on H.J. Res. 784 and H.R. 10937 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 343-49 (1973).

<sup>13/</sup> See, e.g., Statement of Philip A. Lacovara (former Counsel to the Watergate Special Prosecutor) in Hearings on S. 495 and S. 2036 Before the Senate Comm. on Government Operations, 94th Cong., 1st Sess. 260-77 (1975).  
(Cont'd)

judge 15/ advised Congress of the proposed Act's unconstitution-  
ality. 16/

In 1973, the Senate Judiciary Committee split evenly on the constitutional issues; in 1976, after considering the bill that was eventually passed in 1978, the Committee decided, by a vote of 7-6, to retain the court-appointment aspect of the bill, but only on the condition that each independent counsel be confirmed by the Senate -- a feature, however, that was not incorporated in the Act. See S. Rep. No. 273, 95th Cong., 1st Sess. 2-3 (1977). 17/

In his testimony before the Senate Committee on the Judiciary in 1973, Senator Robert Taft, Jr. expressed his concern that the proposals before the Senate were subject to serious constitutional objections which not only could threaten the

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14/ See, e.g., Senator Howard H. Baker, Jr.'s Constitutional Objections to the Proposed Judicially-Appointed Independent Office of Public Attorney, id. at 47-63.

- 15/ See Letter to James O. Eastland, United States Senate, from Judge John J. Sirica, U.S. District Court, District of Columbia indicating his disapproval of a court appointed special prosecutor. 119 Cong. Rec. 41,019 (December 12, 1973).

16/ In addition, only yesterday Oliver L. North, a former National Security Council official under investigation by an independent counsel in connection with his alleged role in the so-called Iran-Contra Affair, filed suit in this Court against the independent counsel, Lawrence E. Walsh, and Attorney General Edwin Meese challenging the constitutionality of the independent counsel provisions of the Act. For the convenience of the Court, a copy of Mr. North's Memorandum In Support of his Motion for Summary Judgment is attached hereto as Exhibit C.

17/ The Committee explained that it had unanimously agreed to require Senate confirmation because a court-appointed special prosecutor "would create a Federal office with little accountability to anyone." Id. at 3.

existence of the proposed Office of Special Prosecutor, but might also create the risk of dismissal of indictments and reversal of convictions brought about through the efforts of a special prosecutor. Senator Taft further warned that creation of such an independent prosecutor "could precipitate one of the most severe constitutional crises which the fabric of our system of government has ever witnessed." Hearings on Special Prosecutor Before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 180 (1973) (hereinafter 1973 Senate Hearings). Senator Taft contended that vesting the powers of appointment and/or removal of a special prosecutor in the judiciary or the Congress was in direct conflict with the fundamental constitutional principle that such power must remain in the Executive branch.

Similarly, Dean Roger C. Cramton, Professor of Law at Cornell University, concluded in his testimony before the Senate Judiciary Committee in 1973 that vesting the appointment of an important executive officer in the judiciary deprived the President of "the control and removal of an officer engaged in a vital executive function, the enforcement of federal criminal laws." 1973 Senate Hearings at 344. Moreover, he warned against the dangers of departing from the Constitution in a time of crisis:

It can be argued that narrowly drawn legislation establishing a special prosecutor for the Watergate affair alone would not infringe on the executive function to the same extent as the creation of a permanent independent prosecutor. But this overlooks the historic tendency for governmental devices that have once proved handy to be called on again and again. The cumulative effect of modest departures from the constitutional framework,

as the Supreme Court constantly reminds us .  
. . . may be to erode the constitutional  
balance on which our system depends. . .

1973 Senate Hearings at 353.

The Executive Branch also had grave misgivings about the constitutionality of proposals for an unsupervised independent counsel appointed by a division of judges. Then-Acting Attorney General Robert H. Bork felt the proposal for court appointment created a number of serious constitutional questions. 1973 Senate Hearings at 449. He questioned whether the appointment of a special prosecutor outside the Executive Branch would be constitutionally valid and whether it would provide advantages significant enough to warrant such a constitutionally risky course.

During the hearings in 1975 on the proposal for court-appointment with the advice and consent of the Senate, Senator Howard H. Baker, Jr., argued that such an officer must constitutionally be appointed by the President, and warned against "[tearing] up the Constitution." Hearings on S. 495 and S. 2036 Before the Senate Comm. on Government Operations, 94th Cong., 1st Sess. 23, 37 (Part I 1975) (hereinafter 1975 Senate I Hearings). Senator Baker explained:

In our efforts to guard against Watergate, let us not rob the Presidency of its authority and its responsibility. After all, it is the President's responsibility to see to the enforcement of the law. Nothing is more fundamental than the enforcement of the laws to be effected by public officers holding public trust, particularly in the Department of Justice.

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The fundamental objection I have to the Judiciary appointment of a special prosecutor is its arguable unconstitutionality, but more importantly I am concerned that it diminishes the Presidential authority and defeats the separation of powers.

[I]t seems to me that in order to fulfill the basic tenet and requirement of article II, section 1, you have to have these functions: one, the appointed power, two, the power of discharge, and three, the authority to proceed.

1975 Senate I Hearings at 29, 31.

On behalf of the Department of Justice, then-Deputy Attorney General Harold R. Tyler, Jr., took the firm position that legislation to have independent counsel appointed by a court, to divest the Attorney General of prosecutorial jurisdiction, and to restrict the President's power of removal -- all now features of the Act -- would be unconstitutional. <sup>18/</sup>

In 1981, amendments to the Ethics in Government Act were proposed. At this time, almost three years after the original Act was adopted, the unconstitutionality of the independent counsel provision was again brought forcefully to the attention of Congress. In hearings before the Subcommittee on Oversight of Government Management, Rudolph W. Giuliani, then an Associate

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<sup>18/</sup> One year later, after the Carter Administration came into office, an Acting Assistant Attorney General testified that "on balance" the court-appointment feature of the bill might be constitutional. However, he found other features of the bill -- which are contained in the current Act -- unconstitutional in violation of the separation of powers, such as the provision allowing Congress to request the Attorney General to appoint an independent counsel, 28 U.S.C. §595(e). Statement of John Harmon, then-Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, in Hearings on S. 555 Before the Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess. 12, 16-23 (1977).

Attorney General, testified that the Department of Justice opposed any legislation mandating the appointment of a special prosecutor in particular cases or taking the power of appointment away from the Attorney General or President. Hearings on S. 2059 Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 97th Cong., 1st Sess. 6-7 (1981) (hereinafter 1981 Senate Hearings). Mr. Giuliani continued:

In effect, the special prosecutor provisions remove the responsibility for enforcement of the Federal criminal laws from the executive branch and lodge it in an officer who is neither appointed by, accountable to, nor save in extraordinary circumstances, removable by the Attorney General or the President.

This officer, moreover, may set his own prosecutive standards, investigate, try, and appeal any case and take any legal position in the name of the United States without the consent of the President, the Attorney General or the Solicitor General.

In form, the special prosecutor is an officer of the Department of Justice. In reality, he exercises executive functions in a manner wholly independent from the Department of Justice or the executive branch.

Such a role is difficult to square with the fundamental design of the Constitution. In effect, Congress has created a fourth branch of government without amending the Constitution.

Id. at 94.

Attorney General William French Smith voiced similar concerns about the Act's constitutionality:

After a careful review of the Act within the Department of Justice and an analysis of its practical effect over the past few years, I have serious reservations concerning the

constitutionality of the Act. In some or all of its application, the Act appears fundamentally to contradict the principle of separation of powers enacted by the Constitution.

1981 Senate Hearings at 130-31 (letter from William French Smith, Attorney General, to Michael Davidson, Senate Legal Counsel, dated April 17, 1981).

Thus, the Act's unconstitutionality was made known to the legislature each time it considered the proposals ultimately incorporated in the current statutory scheme. In enacting the independent counsel provisions in the face of these objections, Congress succumbed to its views of the political needs of the moment and fell into the trap -- warned against early in the process by a prominent scholar -- of "[enacting] unconstitutional legislation on the theory that the Supreme Court [would] bail it out if it behave[d] unconstitutionally." 19/

The Act's supporters justified the unprecedented distortion of the Constitution it brought about on the basis of the "Watergate" experience. See Report of the Senate Committee on Government Operations, S. Rep. No. 170, 95th Cong., 1st Sess. 6-7 (1978). But the argument that one cannot entrust (as the Constitution does) the President, through his Attorney General, with the duty of investigating and prosecuting members of the Executive branch must be rejected as a basis for holding the Act constitutional. The history of the Executive Branch's response to political scandals in this country belies any assertion that

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19/ 1973 Senate Hearings at 350 (testimony of Roger C. Cramton).

the President, the Attorney General, or special prosecutors subject to the President's control cannot be trusted faithfully to execute the nation's criminal laws against high-ranking Executive officials. Such officials have been successfully investigated and prosecuted during the administrations of President Grant (the so-called "Whiskey Ring" investigation), President Coolidge (the "Teapot Dome" affair), President Truman (charges of tax-fixing and corruption in making government loans), President Nixon (Spiro Agnew and the Watergate trials 20/), and President Carter (Bert Lance). 21/

More importantly, it simply does not matter whether there may be some argument that the independent counsel provisions serve a useful purpose, for such arguments cannot

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20/ It is worth recalling that the Watergate trials were brought about by a Special Prosecutor who remained within the Executive Branch and whose independence was safeguarded by that Branch's own regulations, not by improper augmentation of the authority of the Judicial and Legislative Branches or by the unconstitutional divestment of Presidential power. See United States v. Nixon, 418 U.S. at 692-97.

21/ The Act, moreover, does not ensure realization of its own objectives, for if it is assumed that the President and his Attorney General may under some circumstances wish to thwart the due administration of justice, they may easily do so under the Act by finding that there are no reasonable grounds to believe that further investigation or prosecution is warranted after the Attorney General concludes his preliminary investigation. See 28 U.S.C. §592(b)(1). Such a finding deprives the judges of any "power to appoint an independent counsel." Id. Moreover, as John Doar, former Special Counsel to the House Judiciary Committee pointed out, "it is difficult to rationalize the abuses of power with this solution that grants so very much power." Hearings on H.R. 14476 and Related Bills Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 174 (1976). Mr. Doar added that although the lawyer selected to be an independent counsel may be a fine gentleman, "there is still no safeguard to check upon the way he administers his office." Id.

justify deviations from our constitutional plan of government. As the legislature was warned repeatedly, "[n]o branch of the government should allow the hysteria of recent events to become the basis for an attempt to exercise supremacy over the other two branches." 22/. Dean Cramton stated the point in forceful terms:

Nor do extraordinary circumstances excuse legislative actions that would be unconstitutional in ordinary times. . . . The existence of an emergency does not create power where none exists; and our judgment concerning the constitutionality of proposed legislation should not be influenced by the exigencies of the moment.

1973 Senate Hearings at 353 (citations omitted). Similarly, in his testimony before the House Judiciary Committee, then-Acting Attorney General Bork warned:

It is particularly important in times of crisis and deep-seated unease that we adhere to the constitutional system that has sustained us so long. It is all too easy to say that this is an emergency and we will only violate the Constitution this one time. But that kind of expediency is habit forming. Bad precedents, once established, are easily used in the future.

- Hearings on H.J. Res. 784 and H.R. 10937 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 225 (1973).

Recent and dispositive precedents of the Supreme Court underscore the warnings, ignored by Congress, that special needs suddenly discovered after 200 years of experience under the Constitution cannot justify distortion of the system of separated

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22/ 119 Cong. Rec. 35, 731 (November 2, 1973); see also Memorandum of Law, Robert Taft, Jr., 1973 Senate Hearings at 209-21.

powers embodied in the Constitution. In Buckley v. Valeo, in which the Court held that members of the Federal Election Commission must be appointed in the manner provided by Article II, §2, cl.2 if they are to be vested with Executive functions, the Court acknowledged fears that if all members of the Commission were appointed by the President it could give the appearance of bias. "But," the Court responded, "such fears, however rational, do not by themselves warrant a distortion of the Framers' work." 424 U.S. at 134 (emphasis added).

Similarly, in Bowsher v. Synar, the Court recently observed that:

the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government . . . .

106 S.Ct. at 3193-94 (citing INS v. Chadha, 462 U.S. at 944).

Bowsher and Buckley v. Valeo make clear that the constitutional defects of the independent counsel provisions may not be overlooked simply because it is possible to argue that those defects advance some desirable policy.

F. Mr. Seymour's Investigation Of Mr. Deaver Illustrates The Dangers Of Divesting The President Of Control Over The Exercise Of Prosecutorial Power.

James Madison aptly summarized the dangers of transferring Executive power to the Judiciary when he echoed Montesquieu's admonition that, "were [the power of judging] joined to the executive power, the judge might behave with all the violence of an oppressor." The Federalist No. 47, at 303 (J.

Madison) (C. Rossiter ed. 1961). The investigation in this case provides ample proof of the need to heed Montesquieu's warning.

When Mr. Seymour was appointed independent counsel by the division of the court on May 29, 1986, his jurisdiction was defined by the court to include the matters that had been referred to it by the Department of Justice. Specifically, Mr. Seymour was instructed to investigate: 1) whether Mr. Deaver communicated with Robert C. McFarlane in connection with a proposal to amend section 936 of the tax code, in violation of 18 U.S.C. § 207(c); and 2) whether Mr. Deaver violated either 18 U.S.C. § 207(c) or 18 U.S.C. § 207(b)(ii) in attending a meeting on October 25, 1985, with Drew Lewis, the United States Special Envoy on acid rain. <sup>23/</sup>

On June 20, 1986, however, Mr. Seymour commenced his investigation by serving a subpoena duces tecum on Mr. Deaver for all of his firm's books and records, and for all documents relating to the representation of all of his firm's clients from the firm's start-up date to the date of the subpoena. <sup>24/</sup> From the very outset, therefore, Mr. Seymour signaled his intent to stray far and wide from the limits of his jurisdictional mandate. Mr. Seymour also quickly assembled a staff of nine other former prosecutors and at least four FBI agents to assist him in his investigation. Unable, however, to substantiate the allegations

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<sup>23/</sup> Mr. Seymour also was told to investigate "related matters" that developed during the course of the investigation.

<sup>24/</sup> No subpoena we have ever seen has presented such a clear and flagrant affront to the Fourth Amendment.

of wrongdoing that had been referred to him for investigation and possible prosecution, Mr. Seymour expanded his investigation to include all of Mr. Deaver's activities on behalf of all of his clients, and all of Mr. Deaver's business associates, each of whom was advised that he or she was a subject of the investigation. Indeed, seven months into his investigation, Mr. Seymour advised one of Mr. Deaver's associates that he was a target of the investigation, only to be shown that the statute under which he sought to move against him did not apply to him.

What was intended to be an investigation of two specific allegations of wrongdoing referred by the Department of Justice to the court thus quickly became a massive, roving investigation into virtually every meeting, conversation and telephone call by Mr. Deaver and by each of his associates -- whether with governmental officials or not -- from the time of their governmental service to the commencement of Mr. Seymour's investigation. Ironically, however, the investigation was expanded not because Mr. Seymour uncovered evidence of wrongdoing, but precisely because he failed to do so.

By now Mr. Seymour has called more than 150 witnesses before the grand jury. The witnesses have included Mr. Deaver and all of his associates; officers and employees of virtually all of Mr. Deaver's clients; everyone with whom Mr. Deaver and anyone in his firm has dealt anywhere in the government -- and many with whom they never dealt. Countless others have been interviewed by the FBI. Documents, moreover, have been subpoenaed from virtually all of Mr. Deaver's clients, as well as

from every governmental agency that had any contact with any representative of Mr. Deaver's firm on any subject matter from the date of the firm's inception. As Mr. Seymour was kept well apprised, with the service of each subpoena on Mr. Deaver's clients, and with each request for the officers and employees of those clients to testify before the grand jury -- the vast majority of whom had absolutely no connection with any of the matters Mr. Seymour was appointed to investigate -- Mr. Deaver's business was damaged by the loss of yet another client.

Seven months into Mr. Seymour's investigation, after repeated objections had been raised concerning his lack of jurisdiction, Mr. Seymour filed an ex parte request for a retroactive "clarification" of the court's original jurisdictional grant. Without a hearing, and with no evidentiary showing by Mr. Seymour to justify such an unprecedented expansion of his investigative and prosecutorial power, the division of the court approved Mr. Seymour's request without comment. (See Order dated May 26, 1986, a copy of which is attached hereto as Exhibit B). In doing so, the court acted without authorization under the Act, which contains no provisions for expansion of an independent counsel's prosecutorial jurisdiction absent a request by the Attorney General. <sup>25/</sup> The court's action underscores one of the critical problems of transferring the exercise of Executive power to another governmental Branch: the judiciary not only is not

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<sup>25/</sup> See 28 U.S.C. §593(c), which provides that the court, "upon request of the Attorney General . . . , may expand the prosecutorial jurisdiction of an existing independent counsel . . . ." (Emphasis added).

empowered (outside of a case or controversy) to oversee or direct the exercise of Executive power, but it also is unequipped to provide such supervision on an ongoing basis. Thus, whether the end product is ill-informed or ill-advised supervision of an independent counsel directing an oppressive result, or unfettered freedom on the part of an independent counsel to act without any meaningful supervision whatsoever, the Act promotes the very evil the Framers sought to avoid through insistence upon a governmental structure of separation of powers -- "the exercise of unchecked power." INS v. Chadha, supra, 462 U.S. at 966 (Powell, J., concurring).

Instances of prosecutorial abuse, of course, normally can be taken up with a prosecutor's supervisor, either at the appropriate U.S. Attorney's Office or at the Department of Justice. Here, however, the statute expressly deprives the Department of Justice of any investigative or prosecutorial authority with regard to any matters within the independent counsel's jurisdiction, and thus leaves persons subjected to an independent counsel's investigative tactics with no effective means of curbing such conduct. 26/

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26/ Certainly the Act contains no provisions through which an affected individual may approach the independent counsel's master -- the special division of the court -- with complaints about his conduct.

CONCLUSION

For all of the above reasons, as well as those set forth in our memorandum in support of Plaintiff's Application for a Temporary Restraining Order previously filed with this Court, plaintiff's Application for a Preliminary Injunction should be granted.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**FILED** MAY 29 1986

Division for the Purpose of  
Appointing Independent Counsels

**GEORGE A. FISH**  
CLERK

Ethics in Government Act of 1978, As Amended

In Re: Michael K. Deaver

**FILED**

Division No. 86-2

FEB 25 1987

Order Appointing  
Independent Counsel

CLERK, U. S. DISTRICT COURT

Before: MacKinnon, Presiding, Morgan and Mansfield, Senior Circuit Judges

Upon consideration of the application of the Deputy Attorney General pursuant to 28 U.S.C. § 592(c)(1) for the appointment of an Independent Counsel with authority to investigate and, if warranted, to prosecute allegations that the conduct of former Chief of Staff and Assistant to the President Michael K. Deaver concerning Mr. Deaver's lobbying business and possible resulting conflicts of interest, including inter alia Mr. Deaver's alleged representation of foreign governments, particularly Canada in the course of its acid rain negotiations with the United States, and any related matters developed in the course of the investigation, violated 18 U.S.C. § 207, or any other provision of federal criminal law; it is hereby

ORDERED, by the Court, that Whitney North Seymour, Jr., Esquire of the New York bar, with offices at 100 Park Avenue, New York, New York be and he is hereby appointed Independent Counsel to investigate and pursue the following questions:

1. whether Michael K. Deaver, with the intent to influence, communicated with Robert C. McFarlane in July or August 1985, in connection with a proposal involving section 936 of the Internal Revenue Code, a particular matter pending before, and of direct and substantial interest to, the White House Office (a possible violation of 18 U.S.C. § 207(c));

87-0477

2. whether Michael K. Deaver acted as a representative for the Government of Canada in an appearance October 25, 1985, before Drew Lewis, Special Envoy for the United States, in connection with a controversy between the United States and Canada about what action the United States should take in response to Canada's urging that the United States take action to eliminate or reduce acid rain (a possible violation of 18 U.S.C. § 207(a)); and

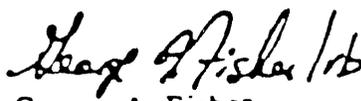
3. whether Michael K. Deaver aided and assisted Canadian officials by attending the October 25, 1986, meeting (a possible violation of 18 U.S.C. § 207(b)(ii)); and

4. whether any allegations presented in the above three referrals, or Mr. Deaver's post-federal employment representation of the Commonwealth of Puerto Rico and the Government of Canada, or any related matters developed in the course of the Independent Counsel's investigation violated 18 U.S.C. § 207, or any other provision of federal law; and it is further

ORDERED, by the Court, that the Independent Counsel shall have jurisdiction to investigate any related matters and other allegations or evidence of violation of any Federal criminal law by Michael K. Deaver developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation, and the Independent Counsel shall have jurisdiction to prosecute for any such violation.

The Independent Counsel shall have all the powers and authority provided by the Ethics in Government Act of 1978, as amended, and specifically by 28 U.S.C. § 594 (copy attached).

Per Curiam  
For the Court

  
George A. Fisher  
Clerk

§ 594. Powers and duties of a 1 independent counsel

(a) Notwithstanding any other provision of law, a 1 independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, 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, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include—

- (1) conducting proceedings before grand juries and other investigations;
- (2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such independent counsel deems necessary;
- (3) appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity;
- (4) reviewing all documentary evidence available from any source;
- (5) determining whether to contest the assertion of any testimonial privilege;
- (6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;
- (7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;
- (8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1954, and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General; and
- (9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case in the name of the United States; and
- (10) consulting with the United States Attorney for the district in which the violation was alleged to have occurred.

(b) A 1 independent counsel appointed under this chapter shall receive compensation at a per diem rate equal to the annual rate of basic pay for level IV of the Executive Schedule under section 5315 of title 5.

(c) For the purposes of carrying out the duties of the office of independent counsel, a 1 independent counsel shall have power to appoint, fix the compensation, and assign the duties of such employees as such independent counsel deems necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. No such employee may be compensated at a rate exceeding the maximum rate provided for GS-14 of the General Schedule under section 5332 of title 5.

(d) A 1 independent counsel may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such independent counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such independent counsel's duties.

(e) A 1 independent counsel may ask the Attorney General or the division of the court to refer matters related to the independent counsel's prosecutorial jurisdiction. A 1 independent counsel may accept referral of a matter by the Attorney General, if the matter relates to a matter within such independent counsel's prosecutorial jurisdiction as established by the division of the court. If such a referral is accepted, the independent counsel shall notify the division of the court.

(f) A 1 independent counsel shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws.

(g) The independent counsel shall have full authority to dismiss matters within his prosecutorial jurisdiction without conducting an investigation or at any subsequent time prior to prosecution if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED DEC 16 1986

Division for the Purpose of  
Appointing Independent Counsels

GEORGE A. FISHER  
CLERK

Ethics in Government Act of 1978, As Amended

In Re: Michael K. Deaver

Division No. 86-2

FILED  
FEB 25 1987

Supplemental Order

Before: MacKinnon, Presiding, Morgan and Mansfield, Senior Circuit Judges

Upon the petition of Independent Counsel Whitney North Seymour, Jr., appointed by order of this Court on May 29, 1986, it is hereby

ORDERED, by the Court, that the order of May 29, 1986 in the above entitled cause appointing Whitney North Seymour, Jr. as Independent Counsel is hereby amended and supplemented as follows:

With reference to the Court's filed order, page 2 paragraph 4. in the 5th line of said paragraph after the word "further" and before the word "ORDERED" in the next line, insert the following:

ORDERED, by the Court, that the jurisdiction of such Independent Counsel to investigate and prosecute any related matters developed in the course of his investigation shall include jurisdiction to investigate and prosecute any person or entity who

- (1) has unlawfully conspired with or aided and abetted Michael K. Deaver to violate 18 U.S.C. Section 207 or any other provision of federal criminal law;
- (2) has violated 18 U.S.C. Section 207 or any other provision of federal criminal law while acting as an officer or employee of Michael K. Deaver and Associates, Inc.; or
- (3) has obstructed the due administration of justice, given false testimony, or made any false statement in violation of the Federal criminal law in connection with the investigation conducted by the Independent Counsel pursuant to this Court's order of May 29, 1986 or the preliminary investigations leading up to such order; and it is further

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ORDERED, by the Court, that such Independent Counsel shall have jurisdiction to prosecute Michael K. Deaver for any willfully false material testimony given to the Subcommittee on Oversight and Investigation of the Committee on Energy and Commerce of the United States House of Representatives on or about May 16, 1986 relevant to any material matters within the jurisdiction of the Independent Counsel's investigation; and it is further

Per Curiam  
For the Court



George A. Fisher  
Clerk

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

OLIVER L. NORTH, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 LAWRENCE E. WALSH, Independent )  
 Counsel, )  
 )  
 and )  
 )  
 EDWIN MEESE III, Attorney )  
 General, )  
 )  
 Defendants. )

87-0477

Civil Action No. \_\_\_\_\_

FILED

FEB 25 1987

CLERK, U. S. DISTRICT COURT  
DISTRICT OF COLUMBIA

MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
THAT THE INDEPENDENT COUNSEL PROVISIONS OF THE  
ETHICS IN GOVERNMENT ACT ARE UNCONSTITUTIONAL

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

OLIVER L. NORTH, )  
 )  
 Plaintiff, )  
 )  
 v. ) Civil Action No. \_\_\_\_\_ )  
 )  
 LAWRENCE E. WALSH, Independent )  
 Counsel, )  
 )  
 and )  
 )  
 EDWIN MEESE III, Attorney )  
 General, )  
 )  
 Defendants. )  
 )

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
THAT THE INDEPENDENT COUNSEL PROVISIONS OF THE  
ETHICS IN GOVERNMENT ACT ARE UNCONSTITUTIONAL

On December 19, 1986, a special three-judge court named Lawrence E. Walsh to be independent counsel under the Ethics in Government Act and to conduct a criminal investigation into the activities of plaintiff Oliver L. North and other unnamed individuals. The court thereby purported to vest in Mr. Walsh the exclusive prosecutorial authority and discretion of the Attorney General of the United States<sup>1/</sup> with respect to a loosely described class of activities, and to divest the Attorney General

1/ The Act recognizes only one exception to the delegation of prosecutorial authority to the independent counsel. The Attorney General retains authority as to those matters requiring his personal action under 18 U.S.C. § 2516, the federal wiretap authorization provision.

of any power to participate in, guide or control any aspect of the investigation of plaintiff North. The Constitution grants the Executive the exclusive authority to prosecute offenses against the United States. Nonetheless, anointed by Congress, a special court has unconstitutionally granted Mr. Walsh the power to exercise all the authority and discretion of a prosecutor to decide whom to investigate, whom to subpoena, whom to prosecute, whom to let go free, what charges to bring, what arguments to make, and how to resolve the countless policy choices that go into each of these decisions. Mr. Walsh has unlimited resources under the Act, and he has already hired at least 19 attorneys to share in his exercise of this extraordinary Executive authority. Together they have free rein to turn all the investigative and prosecutorial strength of the Justice Department against plaintiff North.

Although the Constitution grants the Executive broad leeway in the conduct of foreign affairs, these private attorneys are also purportedly free to decide whether certain foreign policy activities of the President constitute an offense against the United States. They are equally at liberty to determine whether a particular prosecution will damage this nation's foreign affairs and, if so, whether the toll it takes is worthwhile -- all without any consultation with the State Department or any other Executive Officers knowledgeable about international affairs. As a result, in two areas in which the Constitution accords the Executive its broadest authority -- the prosecution

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of offenses and the conduct of foreign policy -- the court-appointed independent counsel may freely ignore the will of the Executive and pursue any course of his choosing.

Pleasing as this arrangement might be to Congress, it plainly violates Article II of the Constitution. For although the independent counsel's responsibilities bear all the hallmarks of exclusive Executive authority, Mr. Walsh and his staff are not Executive Officers. Mr. Walsh was appointed by Judges and not by the President or the Attorney General, as required for an Executive Officer with his authority. His staff was appointed by Mr. Walsh, and not in a manner prescribed by Article II, as required for even "inferior" Executive Officers. Mr. Walsh is removable only for good cause subject to review and reinstatement by the Judges who appointed him, not by the President at will, as required for an Executive Officer. And Mr. Walsh is subject to ongoing oversight by Congress and the Judges, not by the President and the Attorney General, as required for an Executive Officer. In short, although Mr. Walsh and his staff purport to be the Department of Justice with respect to plaintiff North and the other individuals whom they are investigating, they meet none of the constitutional criteria for the exercise of such prosecutorial authority.

Of equal significance, Mr. Walsh derives his authority and his mandate from a court exercising non-judicial power in direct violation of Article III of the United States Constitution. The court's completely unreviewable, non-judicial

acts include its selection of Mr. Walsh as independent counsel and its decision to define his prosecutorial jurisdiction in terms drastically more sweeping than those sought by the Attorney General. Confronted with an application from the Attorney General for an investigation limited to arms shipments to Iran and the transfer or diversion of proceeds therefrom since January 1985, the court unilaterally decided to engage Mr. Walsh as well to investigate all Executive Branch support for the contras in Nicaragua dating back to 1984. That it did so on the basis of a secret record and for unexplained reasons is troublesome. Even more extraordinary is the fact that it handed Mr. Walsh this mandate despite the fact that this very Circuit previously had held that the issue of Executive assistance to Nicaraguan contras is a nonjusticiable political question, and even though another federal appeals court previously had declined to order the Attorney General to initiate an investigation into the lawfulness of these same activities. The court thereby leapt into political affairs and, contrary to the request of the Executive, authorized an investigation into matters rife with sensitive foreign policy and national security issues. This surely is not the customary business of Article III courts.

In a series of recent decisions, the Supreme Court has vigorously reasserted the Constitution's fundamental separation-of-powers principles and has rejected congressional encroachment on the exclusive powers of the Executive Branch. See Bowsher v. Synar, 106 S. Ct. 3181 (1986); INS v. Chadha, 462 U.S. 919

(1983); Buckley v. Valeo, 424 U.S. 1 (1975). See also United States v. Nixon, 418 U.S. 683, 704 (1974). These cases reaffirm that a concentration of power in a single branch of government is unacceptable, and that any intrusion by one branch into the domain of another must be avoided. Thus, in holding unconstitutional the legislative veto, the Court declared: "The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." Chadha, 462 U.S. at 951. The Court continued: "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." Id. (emphasis added).

The Court's cautionary words in Chadha are especially apt when public controversy about activities of the Executive tests the structure of our government. That the independent counsel statute as written might be an expedient way for Congress to address a perceived problem does not render that statute constitutional, any more than the practical attraction of the legislative veto enabled that unconstitutional mechanism to withstand challenge. Congress has no authority to reorder the constitutional design to match its vision of a proper allocation of power. Under the Constitution as now written, the independent

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counsel statute is, without question, unconstitutional.<sup>2/</sup> In this instance, as in the case of the legislative veto, Congress's effort to adopt a solution at odds with the constitutional framework "must be resisted."

I. THE FUNCTION OF PROSECUTING OFFENSES AGAINST THE UNITED STATES BELONGS EXCLUSIVELY TO THE EXECUTIVE.

Article II of the Constitution vests all Executive power in the President and commands him to "take Care that the Laws be faithfully executed." This clause confers on the Executive Branch the "exclusive authority and absolute discretion . . . to prosecute a case." United States v. Nixon, 418 U.S. at 693.<sup>3/</sup> In Springer v. Philippine Islands, 277 U.S. 189, 202 (1928), the Supreme Court observed, "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of

<sup>2/</sup> Mr. Charles Cooper, Assistant Attorney General in charge of the Justice Department's Office of Legal Counsel, has been recently quoted as stating that "we have raised concerns that the [Independent Counsel] law is unconstitutional because it violates separation of powers," and that if the constitutionality of the law was "appropriately" challenged in the courts, the Department would join in a lawsuit to overturn it. "Congress Moves to Amend Special Counsel Law," Legal Times, Jan. 12, 1987, p. 4.

<sup>3/</sup> This authority to "execute the laws" -- and, in particular, to prosecute offenses -- belongs to the Executive alone. Alexander Hamilton wrote that "[t]he executive power is more easily confined when it is one; . . . It is far more safe there should be a single object for the jealousy and watchfulness of the people; and, in a word, . . . all multiplication of the executive is rather more dangerous than friendly to liberty." The Federalist Papers, No. 70 (citation omitted).

enforcing them. The latter are executive functions." (Emphasis added). Fifty years later, in Buckley v. Valeo, 424 U.S. 1, 138 (1976), the Supreme Court repeated this theme, asserting that "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take care that the laws be faithfully executed.'"

The Attorney General "is the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offences be faithfully executed." Ponzi v. Fessenden, 258 U.S. 254, 262 (1922). As the head of the Justice Department, "he has the authority, and it is made his duty, to supervise the conduct of all suits brought by or against the United States." United States v. San Jacinto Tin Company, 125 U.S. 273, 278-79 (1888). In exercising this duty, the Attorney General retains broad and virtually unfettered discretion in deciding whom to prosecute. As the Supreme Court noted recently,

[W]e recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict -- a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3.

Heckler v. Chaney, 470 U.S. 821, 832 (1985).

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The Fifth Circuit emphatically affirmed these principles in United States v. Cox, 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965), holding that the judiciary could not constitutionally encroach on the Executive Branch's discretion by ordering a prosecutor to prosecute a case in which the grand jury had returned an indictment. Sitting en banc, the Fifth Circuit observed that the Attorney General acts for the President in determining whether a prosecution shall be maintained, and that his decision may well depend on policy decisions wholly apart from probable cause. "It follows," the court said, "as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." Cox, 342 F.2d at 171.<sup>4/</sup>

The decision whether and how to prosecute is necessarily affected by a variety of policy considerations, and the

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4/ See Nathan v. Smith, 737 F.2d 1069, 1079 (D.C. Cir. 1984) (Bork, J., concurring) (the "principle of Executive control extends to all phases of the prosecutorial process," from initiation of investigation through prosecution of offense). See also United States v. Cowan, 524 F.2d 504 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976); United States v. Brown, 481 F.2d 1035, 1043 (8th Cir. 1973); Inmates of Attica v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973); Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967); Smith v. United States, 375 F.2d 243, 247 (5th Cir.), cert. denied, 389 U.S. 841 (1967); United States v. Greater Blouse, Skirt & Neckwear Contractors Assn., 228 F. Supp. 483, 489-90 (S.D.N.Y. 1964); Moses v. Kennedy, 219 F. Supp. 762 (D.D.C., 1963).

identification and weighing of competing policies and interests is committed to the exclusive discretion of the Executive. As the Court of Appeals for this Circuit has noted, "a prosecutor may lawfully take account of many factors other than probable cause in making such decisions." Nader v. Saxbe, 497 F.2d 676, 679 n. 18 (D.C. Cir. 1974). "That the balancing of these permissible factors in individual cases is an executive, rather than a judicial, function follows from the need to keep the courts as neutral arbiters in the criminal law generally, . . . and from Art II, § 3 of the Constitution, which charges the President to 'take care that the laws be faithfully executed.'" Id. (citing numerous cases).

Judgments as to the deterrence value of a prosecution, enforcement priorities, and the relationship of a given case to the government's overall enforcement plan are entrusted by the Constitution to the Executive alone. So, too, are decisions on the legal position to take on issues that transcend a particular case, involving such questions as searches, seizures, confessions, immunities, privileges and public perceptions of fairness. The Executive must also consider and resolve how particular investigations, subpoenas or other discovery requests, or prosecutions with international or national security ramifications might affect diplomatic relations, the lives of hostages, or the ability to develop and protect confidential intelligence

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sources or other informants.<sup>5/</sup> Decisions on whether to appeal adverse rulings in order to create more favorable precedent for the long term similarly are committed to the discretion of the Executive, who might seek particular facts in order to present an issue to a court in its best light, and in the process might choose not to appeal certain erroneous rulings to avoid the risk of loss. Each of these decisions -- and innumerable others -- must be made in the context of government operation as a whole. Not surprisingly, the decision not to prosecute, based as it necessarily is on an amalgam of policy judgments entrusted to the Executive, is not subject to judicial review. See Wayte v. United States, 470 U.S. 598, 607-08 (1985). The "[r]emedy for any dereliction of [a prosecutor's] duty . . . lies, not within the courts, but with the executive branch [of our government] and ultimately with the people." Pugach v. Klein, 193 F. Supp. 630 (S.D.N.Y. 1961).<sup>6/</sup>

<sup>5/</sup> Recognizing that issuance of a subpoena for overseas records might affect foreign relations, courts weigh the interests of this nation and the affected foreign state before issuing such a subpoena. In conducting this balance, the courts accord "deference to the determination by the Executive Branch -- the arm of the government charged with primary responsibility for formulating and effectuating foreign policy -- that the adverse diplomatic consequences of the discovery request would be outweighed by the benefits of disclosure." United States v. Davis, 767 F.2d 1025, 1035 (2d Cir. 1985) (citing cases).

<sup>6/</sup> Consistent with this rule, two courts of appeals, including this Circuit, have declined to review the Attorney General's alleged breach of a mandatory duty to comply with the independent counsel provisions of the Ethics in Government Act. See Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986) (Footnote Continued)

The Constitution squarely places in the Executive Branch, and in the Executive alone, the responsibility to conduct the prosecution of offenses against the United States as it deems proper. Subject only to constitutional restraints not relevant here,<sup>7/</sup> the President, and through him, the Attorney General, enjoys the discretion to decide whom to investigate, whom to indict, whom to prosecute, what criminal violations to charge, what evidence to present, what arguments to make, and what issues to appeal on behalf of the United States. The power to make these decisions is a crucial component of the constitutional duty to take care that the laws are faithfully executed. Any congressional action that threatens to dislocate this power, and to vest it in the separate branches of government, violates the most basic constitutional principle of separation of powers.

II. THE ETHICS IN GOVERNMENT ACT VESTS IN THE INDEPENDENT COUNSEL THE FULL AUTHORITY OF THE ATTORNEY GENERAL TO EXECUTE THE LAWS.

The Ethics in Government Act of 1978, 28 U.S.C. § 591 et seq.,<sup>8/</sup> provides that "the division of the court"<sup>9/</sup> shall appoint

(decision based on absence of congressional intent to permit private enforcement); Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984) (same); Nathan v. Smith, 737 F.2d 1069 (D.C. Cir. 1984).

<sup>7/</sup> See Wayte v. United States, 470 U.S. 598 (1985); United States v. Goodwin, 457 U.S. 368, 372 (1982).

<sup>8/</sup> The federal special prosecutor law first appeared in the Ethics in Government Act of 1978, P.L. 95-521, 92 Stat. 1824. On January 3, 1983, that Act was amended in part and extended for an additional five-year period. P.L. 97-409, 96 Stat. 2039 (1983).

<sup>9/</sup> Section 49 of Title 28 establishes the division of the court to which this Act refers. 28 U.S.C. § 593(a). Section (Footnote Continued)

"an appropriate independent counsel" whose prosecutorial jurisdiction the court shall define, § 593. Having been appointed by the court, Mr. Walsh purportedly enjoys the full investigative and prosecutorial powers of the Attorney General and the Department of Justice, and he is effectively immune from Executive Branch scrutiny in his exercise of them. On all matters within the jurisdiction defined by the appointing court, Mr. Walsh may exercise his investigative and prosecutorial power without any consideration of the policies or views of the Attorney General or the President.<sup>10/</sup>

49(a) provides:

Beginning with the two-year period commencing on the date of the enactment of this section, three judges or justices shall be assigned for each successive two-year period to a division of the United States Court of Appeals for the District of Columbia to be the division of the court for the purpose of appointing independent counsels.

<sup>10/</sup> The Court empowered Mr. Walsh to investigate and, if warranted, to prosecute LtCol Oliver L. North and other unnamed government and private individuals for violation of any criminal law relating in any way to the sale or shipment of arms to Iran, the diversion of any proceeds from such sale to any entity, and the provision of support for military insurgents in conflict with the government of Nicaragua. The court broadly empowered the independent counsel to investigate:

(1) The direct or indirect sale, shipment, or transfer since in or about 1984 down to the present, of military arms, materiel, or funds to the Government of Iran, officials of that government, persons, organizations or entities connected with or purporting to represent that government, or persons located in Iran;

(2) The direct or indirect sale, shipment, or transfer of military arms, materiel or funds to any government, entity, or person acting, or purporting to act as an

(Footnote Continued)

A review of the statutory scheme makes clear the great breadth of the independent counsel's powers. By statute, Mr. Walsh has "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice [and] the Attorney General," id. § 594. He is specifically empowered to conduct grand juries, engage in any necessary civil or criminal litigation, appeal any court

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intermediary in any transaction above referred to in Section (1);

(3) The financing or funding of any direct or indirect sale, shipment or transfer referred to in Section (1) or (2);

(4) The diversion of the proceeds from any transaction described in Section (1) or (2) to or for any person, organization, foreign government, or any faction or body of insurgents in any foreign country, including, but not limited to Nicaragua;

(5) The provision or coordination of support for persons or entities engaged as military insurgents in armed conflict with the Government of Nicaragua since 1984.

Order, In re Oliver L. North, et al., Div. No. 86-6 (D.C. Cir. Dec. 19, 1986).

The jurisdiction defined by the court is much broader than that sought by the Attorney General, who had requested only an investigation of conduct from in or around January 1985 to the present "in connection with the sale or shipment of military arms to Iran and the transfer or diversion of funds realized in connection with such sale or shipment". Id.

The independent counsel was further authorized by the court to expand his investigation to cover other allegations of the violation of any federal criminal law, by any of the persons generically referred to, that is developed during the independent counsel's investigation, and connected with or arising out of that investigation, and to prosecute any persons involved. Id.

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decision, review available documentary evidence, make determinations whether to contest any testimonial privilege, challenge any attempted withholding of evidence based on assertions of national security, apply to a court for immunity for witnesses, for subpoenas or for warrants, inspect tax returns, initiate prosecutions and sign indictments -- in short, to handle all aspects of any case within his jurisdiction in the name of the United States. Id.

In light of the special court's order empowering him, Mr. Walsh's jurisdiction is essentially unlimited. He may expand his investigation to cover any possible violations of any law by any of the people he chooses to investigate, as long as the evidence warranting such an investigation is connected with or arises out of the investigation defined by the court. See note 10, supra.<sup>11/</sup> He may, in sum, pick and choose from among all the possible cases in all the United States Attorneys' Offices nationwide, and he may pursue or decline to pursue

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11/ Within his broad area of authority, the independent counsel apparently also believes he may pick and choose which current Justice Department investigations he wishes to pursue and which he shall permit the Department to carry on. See, e.g., "Special Counsel Will Take Charge Of Some Justice Probes," Associated Press, Jan. 6, 1987 ("Walsh said 'the attorney general has turned over to me all of those matters which are within the scope of the [court] order appointing me and has agreed to receive back from me those matters which I think would be better handled in the regular course by him.'").

whichever cases he pleases as long as they fit within his broadly defined jurisdiction.

Mr. Walsh may additionally have access to records and files of the Department of Justice, and he has the entire staff of that department at his beck and call. He appears also to have both an unlimited budget and the discretion to appoint a staff of any size and composition to his liking.<sup>12/</sup>

Finally, unlike any United States Attorney or Assistant United States Attorney, Mr. Walsh is under no obligation to seek the approval of, or conform his actions to the policies of, the Attorney General. Rather, he enjoys the full authority of the Attorney General to make his own judgments and to set his own policies, no matter how they may conflict with those of the nation's other prosecutors.

Ostensible limits on this extraordinary power and elastic authority are inconsequential and meaningless. The statute states that the independent counsel "shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of

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<sup>12/</sup> The independent counsel's unlimited budget under the Act raises the possibility that Mr. Walsh is obligating public funds without specific appropriation. Depending on the source of the independent counsel's unlimited funding, his expenditures may amount to an unconstitutional delegation of congressional power and a violation of Article I, § 9.

the criminal laws." § 594(f) (emphasis added).<sup>13/</sup> Even if "written or other established policies" existed in any meaningful way, the statute by its terms invites the independent counsel to ignore them and provides no remedy for his failure to adhere to them.<sup>14/</sup> In any event, the "written or other established policies" of the Department of Justice cannot conceivably cover the numerous policy decisions that might affect the determination of whether or how to bring a particular prosecution -- in particular in a case like this one, which involves unusual and

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13/ Section 594(g) gives the independent counsel the authority, although not the duty, to dismiss matters within his jurisdiction at any time if to do so "would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws."

This provision was added to the Act in 1983 in light of claims that the Act was invoked twice for minor offenses that often are not investigated or prosecuted when the offender is a private citizen. See Staff of Subcomm. on Oversight of Gov't Management of Senate Comm. on Gov'tal Affairs, 97th Cong., 1st Sess., Report on the Special Prosecutor Provisions of the Ethics in Government Act of 1978 (Comm. Print 1981), at 12-15, 38, 47-50 (discussing investigations of Hamilton Jordan and Timothy Kraft for alleged cocaine use).

14/ The United States Attorney's Manual explicitly states that its guidelines are precatory only and confer no rights on individuals. See Title I, § 1-1.100 ("Purpose of the Manual"). It accordingly is unlikely that any individual would be permitted to challenge a violation of any policy included in the manual, or to defend against an indictment on that basis. See e.g., United States v. Welch, 572 F.2d 1359 (9th Cir.) (court has no authority to enforce in-house rules of Justice Department), cert. denied, 439 U.S. 842 (1978); United States v. Shulman, 466 F. Supp. 293 (S.D.N.Y. 1979).

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delicate issues of foreign policy and national security.<sup>15/</sup> Finally, the written guidelines that exist "are replete with qualifiers, modifiers, provisos, exceptions and limitations, intermixed with buzzwords" amounting to a "mere precatory exhortation to be good and to be fair . . . ." United States v. Shulman, 466 F. Supp. 293, 299 (S.D.N.Y. 1979) (discussing guidelines in United States Attorney's Manual). Because they are cast in such discretionary terms, they give tremendous leeway to any person attempting to adhere to them.<sup>16/</sup>

15/ One court has already ruled that the Department's policy not to prosecute alleged Neutrality Act violations by Executive officials, and not to construe the Act to cover paramilitary operations authorized by the President, is not legitimate under the Ethics in Government Act. Indeed, the court suggested that the Attorney General, and consequently the independent counsel, may not adhere to those policies when acting pursuant to the Act. See Dellums v. Smith, 577 F. Supp. 1449 (N.D. Cal. 1984), rev'd on other grounds, 797 F.2d 817 (9th Cir. 1986). The court indicated that the statutory obligation to follow written or established policies applies only to the extent necessary to prevent prosecution of government personnel when private citizens would not have been prosecuted. See note 13, supra.

16/ As the Shulman opinion noted:

The Department knows how to draft legislation conferring rights or imposing liabilities when it wants to do so. It cannot be done by paragraphs rife with limiting phrases such as "under normal circumstances"; "where no burden . . . or delay . . . is involved"; "reasonable requests"; "ordinarily"; "reasonable time"; "routine clear cases"; "might jeopardize"; "in appropriate cases"; or use of "encouraged" where "directed" would be more meaningful.

Shulman, 466 F. Supp. at 299.

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In short, the foregoing provisions make clear that the statute lodges the full investigative and prosecutorial power of the Executive in the private individual appointed by a special court to serve as independent counsel.

III. THE SPECIAL COURT'S EXERCISE OF THE POWER TO APPOINT, DEFINE JURISDICTION, AND SUPERVISE VIOLATES ARTICLE III.

Article III courts must "carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to [them] by the Constitution." Muskrat v. United States, 219 U.S. 346, 355 (1911)(citation omitted). The judicial power is defined as the adjudication of cases or controversies. Nothing in the Constitution authorizes courts to define the scope of a criminal investigation, oversee a criminal investigation, appoint a prosecutor, or assume responsibility for the conduct of a criminal investigation and prosecution. The special court nonetheless exercises these non-judicial duties under the independent counsel provisions of the Ethics in Government Act. Because Congress may not constitutionally vest in Article III courts powers beyond those "clearly confided" to them by the Constitution, the special court's acts are unconstitutional and void.

It is well-established that Congress may not assign to judges holding office under Article III executive or administrative duties of a non-judicial nature, and that the courts may not exercise such power if granted. See Buckley, 424 U.S. 1, 123

(1976); Muskra v. United States, 219 U.S. 346 (1911); Ex Parte Siebold, 100 U.S. 371, 398 (1879); United States v. Ferreira, 54 U.S. (13 How.) 40 (1852); Hayburn's Case, 2 Dall: 409 (1792).<sup>17/</sup> The judicial power of the courts is limited to cases and controversies. Muskra, 219 U.S. at 356. "Beyond this it does not extend, and unless it is asserted in a case or

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17/ Hayburn's Case concerned a statute vesting in the courts of appeals the power to settle pension claims of widows, orphans and invalids, subject to review and revision by the Secretary of War and Congress. A change in the law rendered the case moot, but the Supreme Court reporter included, with the opinion, the opinions of three circuit courts that had protested the act or refused to act under it. The opinions, by eminent jurists including Justices Iredell and Jay, concluded that the statute violated the separation of powers to the extent it required judicial officers, acting in that capacity, to perform tasks that formed no part of their Article III powers and subjected their decision to review by the Executive.

One court concluded that the power conferred could be exercised by its members acting individually as commissioners out of court; a second court refused to execute the law altogether, on the ground that the duty was conferred on it as a court and was not a judicial power; a third court held that it could not execute the statute in its capacity as a judicial body and took under advisement whether it could construe the statute to appoint the judges personally to carry out the statute's mandate as commissioners. See Ferreira, 54 U.S. (13 How.) at 49-51 (discussing Hayburn's Case).

The Supreme Court later decided that the statute conveyed power to the courts as courts, and that the courts could not construe the power given to them as a power given to judges sitting as commissioners out of court. Since the power delegated by statute was not judicial power within the meaning of the Constitution but nonetheless was intended by Congress to be executed as a judicial function, the statute conferring such power was unconstitutional. See United States v. Yale Todd, 54 U.S. (13 How.) 52 (1794) (note following Ferreira).

controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred." Id. A "case" is defined as a "suit instituted according to the regular course of judicial procedure." Id. (citing Marbury v. Madison, 1 Cranch 137 (1803)). A "controversy" is defined either to be the same as a "case" or less comprehensive. Muskrat, 219 U.S. at 356-57. Accordingly, the judicial exercise of any power other than to adjudicate a suit instituted according to the regular course of judicial procedure is outside the judicial power and void.<sup>18/</sup> See also Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U.S. 716, 724 (1929) ("The term [judicial power] implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.")

The package of non-judicial powers entrusted to the special court is substantial. On its own, the court compiles a list of possible candidates for the position of independent

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<sup>18/</sup> That judges might be permitted to assume certain nonjudicial functions as individuals, and not as members of a court, does not have any bearing on this issue, because the judges of the special court necessarily purport to act, under Article II, § 2, clause 2, as a "court of law." See In the Matter of President's Commission on Organized Crime Subpoena of Scarfo, 783 F.2d 370 (3rd Cir. 1986) (upholding constitutionality of judges' participation on President's commission, against separation of powers challenge, because judges do not serve or act in their capacity as members of court). It is, in fact, far from established that judges may assume such roles even in their non-judicial capacity. See In re Application of President's Commission on Organized Crime (Subpoena of Scaduto), 763 F.2d 1191 (11th Cir. 1985) (holding that inclusion of federal judges as members of President's Commission on Organized Crime violates separation of powers doctrine).

counsel, whom it no doubt must interview. It then appoints an independent counsel and, perhaps in consultation with him (the Act does not preclude such consultation by its terms), determines the scope of his investigation by defining his prosecutorial jurisdiction.<sup>19/</sup> The court is in no respect bound by the

<sup>19/</sup> Several Judges of this Court previously have stated that it would be improper for Judges to appoint special prosecutors. Writing in Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973), Judge Gesell considered the legality of the dismissal of Special Prosecutor Archibald Cox by Acting Attorney General Robert Bork and wrote,

The Court recognizes that this case emanates in part from congressional concern as to how best to prevent future Executive interference with the Watergate investigation. Although these are times of stress, they call for caution as well as decisive action. The suggestion that the Judiciary be given responsibility for the appointment and supervision of a new Watergate Special Prosecutor, for example, is most unfortunate. Congress has it within its own power to enact appropriate and legally enforceable protections against any effort to thwart the Watergate inquiry. The Courts must remain neutral. Their duties are not prosecutorial. If Congress feels that laws should be enacted to prevent Executive interference with the Watergate Special Prosecutor, the solution lies in legislation enhancing and protecting that office as it is now established and not by following a course that places incompatible duties upon this particular Court.

Id. at 109 (emphasis added). Judge Sirica thereafter commented that he believed Judge Gesell to be correct and that he did not know of any Judge "who thinks it's a good idea," Hearings on the Special Prosecutor Before the Committee on the Judiciary, United States Senate, 93rd Cong., 1st Sess (pt. 1) (1973) (hereafter "1973 Hearings") at 215, and that eight other active Judges with whom he had spoken each had remarked "that he disapproves of a procedure that would require this court to appoint a special

(Footnote Continued)

Attorney General in this regard. Exercising its own unreviewable discretion, the court may broadly expand the independent counsel's jurisdiction -- as it did in this matter -- beyond that requested by the Attorney General to encompass any matters the court believes should be investigated. See Order, In re Oliver L. North, et al., note 10, supra. In reaching its conclusion, it apparently is free to receive and consider ex parte submissions from politically interested individuals, such as Members of Congress, and to adopt their suggestions without affording interested parties an opportunity for rebuttal.<sup>20/</sup> The court thereby crosses a crucial line, moving from its Article III role as an impartial adjudicator to fulfill its assignment as Executive decisionmaker. In abandoning its traditional role, the court seriously jeopardizes both the appearance and the reality of judicial impartiality, which is a "central, constitutionally ordained, requirement[] of the federal judicial office." In re Application of President's Commission on Organized Crime (Subpoena of Scaduto), 763 F.2d 1191, 1197 (11th Cir. 1985).

prosecutor. Id., quoting Letter from John J. Sirica to Sen. James O. Eastland.

<sup>20/</sup> According to press reports, members of Congress asked the special court to broaden the scope of the independent counsel's jurisdiction beyond that requested by the Attorney General. The court did exactly that. See "Counsel Selected In Iran Arms Case; Given Wide Power," The New York Times, Dec. 20, 1986, p. 1, col. 6; "The Independent Counsel: Former Judge Given Broad Mandate To Investigate," Congressional Quarterly Weekly Report, Dec. 20, 1986, vol. 44, no. 25, at 3095; "Meese Contra Probe Plan Is Attacked in Congress," The Washington Post, Dec. 11, 1986, p. A25, col. 1.

In assuming its new role, the court breaches the most basic rules about encroachment on the powers of another branch. A close look at the special court's actions in defining Mr. Walsh's jurisdiction demonstrates the extraordinary incongruity of the role performed by the court.

On December 4, 1986, the Attorney General requested that the court appoint an independent counsel to look into a narrow issue: violations of law committed by individuals from January 1985 to the present "in connection with the sale or shipment of military arms to Iran and the transfer or diversion of funds realized in connection with such sale or shipment."<sup>21/</sup>

The special court's subsequent Order stretches this request in every direction. It expands the inquiry to cover organizations as well as individuals. It authorizes an inquiry beginning in 1984, not 1985. It additionally grants jurisdiction to investigate the sale, shipment or transfer of military arms, materiel or funds, and not only to the government of Iran but also to government officials, to persons or entities connected with the government, to persons located in Iran, or to any government, entity or person acting or purporting to act as an intermediary in such a transaction. The special court also empowered the independent counsel to consider the financing or

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<sup>21/</sup> Application of the Attorney General Pursuant to 28 U.S.C. §§ 592(c)(1) for the Appointment of an Independent Counsel Regarding Iranian Arms Shipments and Diversion of Funds (Dec. 4, 1986).

funding of any such transactions. And it extended the investigation to cover the diversion of proceeds from any of the enumerated transactions to any person or entity. - The basis for this expansion of the independent counsel's jurisdiction is known only to the court and was in no way explained in the court's Order.

Most boldly, unsolicited by the Attorney General and on its own initiative (although with the input of politically interested Congressmen, see note 20, supra), the special court authorized an investigation into "[t]he provision or coordination of support for persons or entities engaged as military insurgents in armed conflict with the Government of Nicaragua since 1984" -- whether or not in any way related to arms shipments to Iran. By statute, when he files an application for appointment, the Attorney General must provide to the court "sufficient information" to assist the court to define the independent counsel's prosecutorial jurisdiction, and it is on that record that the statute clearly contemplates jurisdiction to be defined. 28 U.S.C. § 592(d)(1). Attorney General Meese's application does not mention the word Nicaragua or in any way inform the court about any possible violations of law related to Nicaragua. Yet the application comprises the complete public record before the court. For reasons unknown and based on sources unknown, the

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court nonetheless chose to order a criminal investigation of Executive Branch dealings with another foreign state or entities.<sup>22/</sup>

What is extraordinary about this decision is not merely that an Article III court decided, for its own reasons, that the independent counsel should conduct a criminal investigation into the various forms of Executive Branch aid to the Nicaraguan contras. Even more startling is that the court decided to do so even though this very issue was ruled by this very Circuit to be a political question best left to resolution outside the Judicial Branch, see Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985), and even though another court of appeals previously had declined to order the Attorney General to seek appointment of an independent counsel on this very issue of Executive support for paramilitary operations in Nicaragua. See Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986). Undaunted, the division of the court ignored the Attorney General's previous decision not to initiate an investigation and authorized the independent counsel to look

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<sup>22/</sup> In expanding the independent counsel's jurisdiction, the court ignored public statements of the Attorney General to the effect that he intended to maintain under his own supervision an ongoing, Miami-based investigation into activities on the contra's behalf. See "Meese Contra Probe Plan is Attacked in Congress," The Washington Post, Dec. 11, 1986, at A25, A26, col. 1. The court's subsequent Order stripped the Attorney General of this jurisdiction.

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into possible prosecutions based on this very same "political" activity.<sup>23/</sup>

The special court's role in defining the independent counsel's jurisdiction thrusts the court into the political fray and forces it to make decisions based not on statutory provisions and case law, as courts characteristically do, but on political considerations. A better example could scarcely be found than the court's decision in this matter to extend the independent counsel's reach so far beyond the request of the Attorney General as to transform and refocus its purpose entirely.

It is clear that a court may not review the Attorney General's decision not to refer a case to an independent counsel. See Nathan v. Smith, 737 F.2d 1069 (D.C. Cir. 1984) (discussing statutory and constitutional obstacles to review). Yet the special court has in effect done exactly that, by deciding that the independent counsel should investigate matters that the Attorney General had deliberately decided not to refer to the court. The possibility that press accounts or partisan politicians led the special court to second-guess the decision of

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<sup>23/</sup> Indeed, in this Circuit, a panel has no authority to overrule the decision of another panel, but that is what this court effectively has done. See Center for Science in the Public Interest v. Regan, 802 F.2d 518, 524 n.10 (D.C. Cir. 1986); Irons v. Diamond, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981).

the Attorney General only highlights the impropriety of the role Congress prescribed for the court in this matter.<sup>24/</sup>

After defining the scope of the investigation and empowering the independent counsel to proceed -- and thereby usurping functions at the heart of the Executive's discretion to investigate and prosecute offenses -- the special court retains supervisory power over the independent counsel. Before terminating his office, the independent counsel must justify to the court why any matter within his jurisdiction was not prosecuted. He must submit to the court a full and complete description of his work, "including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel which was not prosecuted." § 595(b)(2). Given the scope of Mr. Walsh's mandate, this assignment is potentially monumental. Moreover, until the independent counsel is in "full compliance" with this section, his office cannot terminate, see § 596(b)(1). The court presumably has the authority to review the adequacy of his stated reasons for his decisions not to prosecute, to assure he is in "full compliance" with the

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<sup>24/</sup> The special court further authorized Mr. Walsh to investigate and prosecute any criminal activity he discovers arising out of his investigation -- even if that activity wholly unrelated to Iran, Nicaragua, or the provision of assistance to either. For example, if the independent counsel discovers a tax violation by a private individual, he may prosecute it, regardless of whether the Department Justice would have any conflict in doing so itself.

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statutory mandate. This role is in obvious conflict with the many cases holding Executive decisions not to prosecute to be unreviewable.

Finally, the court may then decide whether to release the independent counsel's report to Congress and the public -- in other words, it may determine to what extent the independent counsel it has appointed shall be accountable to the public and its representatives, and to what extent the public shall remain uninformed. See § 596(b)(3). The Act provides no criteria on which to base this decision on disclosure, and the court is required to establish none.

In the event of removal of the independent counsel by the Attorney General, the court shall promptly receive from the Attorney General "a report specifying the facts found and the ultimate grounds for such removal," § 596(a)(2), which it may make public in whole or in part, again, at its own discretion and for its own reasons. The independent counsel may obtain review of the removal before this same court that appointed him, and if the removal "was based on error of law or fact" may obtain reinstatement. In other words, the Act apparently authorizes the court to review, de novo, the removal decision, to substitute its own understanding of "good cause" for that of the Attorney

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General, and to reverse the Executive's decision as to Executive personnel.<sup>25/</sup>

Given the non-judicial nature of the court's work, it is hardly surprising that this court does not function like a court at all. Courts sit to decide cases or controversies, but this court rarely has held an adversarial proceeding. Courts are traditionally open to the public, but this court has never convened in public. It is not known to what extent there are hearings, motions, or rules of court because the proceedings

25/ That the courts do not comfortably play such a politically controversial role is obvious. Chief Justice Stone, in a letter refusing President Roosevelt's request that he serve on an investigating commission to resolve an especially rancorous dispute about the nation's rubber supply commission, explained that the exercise of the extrajudicial duties would impair the integrity of his office:

A judge, and especially the Chief Justice, cannot engage in a political debate or make public defense of his acts. When his action is judicial he may always rely upon the support of the defined record upon which his action is based and of the opinion in which he and his associates unite as stating the ground of decision. But when he participates in the action of the executive or legislative departments of government he is without those supports. He exposes himself to attack and indeed invites it, which because of his peculiar situation inevitably impairs his value as a judge and the appropriate influence of his office.

Mason, Extra-Judicial Work for Judges: The Views of Chief Justice Stone, 67 Harv. L. Rev. 193, 203-04 (1953). See note 19, supra, quoting the comments of Judges of this Court on the propriety of Judges participating in the selection of an independent counsel; see also infra at 39, quoting Judge Mansfield's televised comments on the appointment of Mr. Walsh and his mandate.

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routinely are conducted in secret. The court does, not even maintain a public docket. Finally, the court's discretionary decisions are completely unreviewable. Consideration of the criteria to use in such a review makes clear how plainly uncharacteristic, and non-judicial, the court's role has turned out to be.

A principal purpose of the "case or controversy" limit on judicial power is "to assure that the federal courts will not intrude into areas committed to the other branches of government." United States Parole Commission v. Geraghty, 445 U.S. 388, 396 (1980) (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968)). The Ethics in Government Act thrusts a panel of judges directly into the affairs of the Executive Branch and delegates to them duties that bear none of the indicia of cases or controversies.<sup>26/</sup> Instead, the Act authorizes the Judges to reward a private attorney of their personal choosing with the extraordinary assignment of acting as the Attorney General of the United States with respect to an extremely broad and loosely defined range of activities -- an individual who, unlike the real Attorney General, need not heed the advice or warnings of the President with respect to law enforcement. The Act further assigns the court to oversee Executive decisions -- particularly

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<sup>26/</sup> Indeed, since the court apparently is able to make certain decisions, such as those regarding disclosure of documents, based on its own policy judgments, a public challenge to a decision to withhold documents would likely render the court an adversarial party in a proceeding before another court.

the traditionally unreviewable decision not to prosecute -- and it empowers it to second-guess removal decisions of the Attorney General by a standard so amorphous as to be completely discretionary.

These activities constitute no less than the exercise of Executive power by a court and bear no relationship to the neutral resolution of adversarial proceedings contemplated by Article III. They are, quite plainly, not "judicial" within the constitutional meaning of the term, see also Ex Parte Siebold, 100 U.S. 371, 398 (1879) (certain decisional roles imposed on courts are not judicial and are therefore void), and are therefore null and void.

**IV. VESTING ULTIMATE RESPONSIBILITY FOR EXECUTIVE DECISIONS IN AN OFFICER APPOINTED BY A COURT VIOLATES ARTICLE II.**

The Framers of the Constitution recognized that the President's power and duty to execute the laws must carry with it the right to choose the Officers of government who would assist him in the task. As the Supreme Court has held:

"The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws."

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Buckley v. Valeo, 424 U.S. at 135-36 (emphasis added) (quoting Myers v. United States, 272 U.S. 52, 117 (1926) (citations omitted)).<sup>27/</sup> Article II, § 2 of the Constitution expressly gives the appointment power to the President. It provides that 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.

The President's authority to select the Officers of the United States who will administer the laws passed by Congress is at the very core of the power constitutionally entrusted to the President.

The appointment provision of the Ethics in Government Act conflicts directly with this basic principle and is therefore unconstitutional. First, ultimate responsibility for the execution of the laws cannot constitutionally be assigned to an

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<sup>27/</sup> This power of appointment is a fundamental attribute of the power to rule. "If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers. If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with great caution, it is that which relates to officers and offices." 1 Annals of Congress, 581 (quoted in Myers v. United States, 272 U.S. 52, 116 (1926)).

Officer who is appointed by a division of a court; such an Officer must be appointed by the President with the advice and consent of the Senate. Second, even assuming the independent counsel is an "inferior Officer" within the excepting clause of the provision quoted above, he must be appointed by the Attorney General or the President, not by a court.

A. Ultimate Responsibility for the Execution of the Laws Cannot be Assigned to an Officer Appointed Other Than By the President With the Advice and Consent of the Senate.

The Supreme Court's decision in Buckley v. Valeo, 424 U.S. 1, 126 (1976), establishes that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2 of [Article II]." In Buckley, the Court held that Federal Election Commissioners exercise "significant authority" and that Congress may not, consistently with the Constitution, appoint them itself. As the independent counsel clearly exercises "significant authority,"<sup>28/</sup> Article II, § 2, cl. 2, controls his appointment.

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<sup>28/</sup> If there could be doubt on this issue, the Supreme Court's decision in Buckley v. Valeo would remove it. In that case, the Court held that statutory provisions vesting in Federal Election Commissioners the authority to conduct civil litigation to vindicate public rights rendered the commissioners "officers": "Such functions may be discharged only by persons who are 'Officers of the United States' within the language of [Article II, § 2]." 424 U.S. at 146.

The appointments clause establishes two classes of Officers of the United States. Certain officers in the Executive Branch exercise sufficiently "significant authority" as to be "superior Officers" whom the President constitutionally is required to appoint with the advice and consent of the Senate; other "inferior Officers" operate in subordinate positions and fall within the province of Article II's "excepting clause."<sup>29/</sup> The crucial threshold inquiry therefore is whether the independent counsel is a "superior Officer" who must be appointed by the President with the advice and consent of the Senate, or whether he is an "inferior Officer" who may be otherwise appointed as provided in Article II's "excepting clause."<sup>30/</sup>

The "excepting clause" was added to Article II two days before adjournment of the Constitutional Convention, and the accompanying discussion, although brief, is illuminating. After the addition of the clause was proposed and seconded, James Madison observed:

It does not go far enough if it be necessary at all -- Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices.

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<sup>29/</sup> The "excepting clause" provides that "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." Art. II, § 2, cl. 2.

<sup>30/</sup> Employees, who are "lesser functionaries subordinate to officers of the United States," are outside the scope of Article II. Buckley, 424 U.S. at 126 n.162.

2 The Records of the Federal Convention of 1787, at 627 (Farrand rev. ed. 1937).<sup>31/</sup> This statement indicates that the Framers contemplated a category of "superior Officers" that included Department Heads and certain persons below them. As "superior" (as opposed to "inferior") Officers, these persons would not fall within the language of the excepting clause but instead were to be appointed by the President with the advice and consent of the Senate. Not surprisingly, the First Judiciary Act provided for presidential appointment (with the advice and consent of the Senate) not just of the Attorney General but also of the United States Attorneys.<sup>32/</sup>

The determination as to which category an appointee fits within -- whether he is a superior or inferior Officer or an employee -- turns on a substantive evaluation of the appointee's duties, his powers, and the extent of his independence from control by superiors, see Buckley, 424 U.S. at 126 and n. 162; see also id. at 269-70 (White, J., concurring and dissenting).

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<sup>31/</sup> Governor Morris responded that "[t]here is no necessity. Blank Commissions can be sent --". 2 The Records of the Federal Convention of 1787, at 627 (Farrand rev. ed. 1937). Thereafter, on an equal vote, the motion to add the clause was lost. It then apparently was urged that the clause was too important to be omitted and, on a second vote, it was passed. Id.

<sup>32/</sup> See Parsons v. United States, 167 U.S. 324, 337-44 (1897) (detailing history of appointment provisions regarding District Attorneys). See also 28 U.S.C. § 542 (appointment of United States Attorneys is by the President with the advice and consent of the Senate).

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The appointee's title, of course, is not dispositive; nor is the determination of Congress as to the method of appointment.

Although the paucity of case law and historical debate concerning the distinction between a "superior Officer" and an "inferior Officer" might in some cases impede resolution of this question, here the answer is simple. The independent counsel exercises the full authority of the Attorney General and therefore exercises the same "significant authority" with respect to a class of prosecutions as does the Attorney General. The Attorney General, as head of the Justice Department and a member of the President's Cabinet, is a superior Officer who must be appointed by the President. The independent counsel exercises equivalent authority in executing the laws and he, therefore, must also be a superior Officer appointed by the President.

As is set forth more fully below, in a broad range of areas the independent counsel exercises the same power to hire and remove officers and establish and execute Executive policy as is exercised in combination by the Attorney General and the more than two hundred Department of Justice officials who are appointed by the President with the advice and consent of the Senate.<sup>33/</sup> (Indeed, since he is delegated the authority to make decisions without any duty to confer with Executive Branch

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<sup>33/</sup> See 28 U.S.C. §§ 503 (Attorney General); 504 (Deputy Attorney General); 504(a) (Associate Attorney General); 505 (Solicitor General); 506 (ten Assistant Attorneys General); 541 (United States Attorney for each district); 561 (United States Marshal for each district).

officers or to abide by Executive Branch wishes, his power is perhaps more properly analogized to that of the President in this area than the Attorney General.) He must, therefore, be appointed as are these Officers. To hold otherwise would be to authorize Congress to divest the Attorney General -- or indeed the entire Cabinet -- of all authority and to vest in a court the power to appoint a new Attorney General, or Cabinet, with those very powers. Such a result would "be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government." Nixon, 418 U.S. at 704.

The vast discretion entrusted under the Act to the independent counsel is wholly different from that vested in Officers previously held to be "inferior Officers." Unlike a postmaster first class, see Myers, or a clerk of the district court, see Ex Parte Hennen, 38 U.S. (13 Pet.) 230 (1839), both of whom are "inferior Officers" of the United States, see Buckley, 424 U.S. at 126,<sup>34/</sup> who exercise no ultimate authority, the independent counsel is entrusted to investigate and prosecute even the President of the United States and other high Executive Officers. He is to make unreviewable judgments on a daily basis that strike at the core of the Executive function. In the matter currently under investigation, for example, Mr. Walsh already is

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<sup>34/</sup> See also United States v. Hartwell, 73 U.S. 385 (1868) (clerk in office of Assistant Treasurer of the United States is an inferior Officer).

making myriad decisions constitutionally entrusted to the Executive: whom to subpoena, for whom to seek immunity, which testimonial privileges to challenge, how long to investigate, what rulings to appeal, and against whom to direct the prosecutorial power of the state. Mr. Walsh is establishing and executing his own policy on a broad range of matters, some with only tangential bearing on the issues leading to his appointment. And he may do so without the slightest regard for Executive policy or the impact of his decisions on future prosecutions by the Executive Branch. Mr. Walsh is determining how the laws are executed in this case, and the precedents that result will affect how the laws are executed well into the future.

The independent counsel's Executive judgments in this case also will have a significant impact on foreign affairs and national security, two areas of decisionmaking that the Constitution largely commits to the discretion of the Executive.<sup>35/</sup> For example, Mr. Walsh must determine the extent to which the Executive Branch may invoke the constitutional authority of the Executive to justify actions in the foreign policy arena, and the limits of that authority, in assessing

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<sup>35/</sup> See e.g., Central Intelligence Agency v. Sims, 471 U.S. 159 (1985); Dames & Moore v. Regan, 453 U.S. 654 (1981); United States v. Reynolds, 345 U.S. 1 (1953); United States v. Pink, 315 U.S. 194 (1942); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982).

whether and how to investigate or prosecute Executive branch activities in possible contravention of congressional policy.<sup>36/</sup> On the day Mr. Walsh was appointed, Judge Mansfield said as much, commenting on the CBS Evening News that Mr. Walsh would have to investigate not only allegations of individual criminal conduct, but also broader issues involving "balance of power and whether there should be any restrictions placed on covert activity by the Executive Branch of the government."<sup>37/</sup> By vesting in Mr. Walsh this extraordinary power to define the limits of the Executive's foreign affairs powers, Congress and the court have divested the Executive of its well-recognized authority to decide in the first instance the limits of its own constitutional authority, see, e.g., INS v. Chadha, 462 U.S. 919, 951-52 (1983) (Executive Branch presumptively acts within constitutionally assigned sphere).

The Act also poses a serious threat to the authority of the Executive Branch to conduct foreign policy. The Constitution entrusts the Executive to determine whether an offense has been

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<sup>36/</sup> Thus, as an aspect of his execution of the laws, Mr. Walsh must likely resolve such issues as the extent of the Executive's constitutional authority to engage in intelligence activities without informing Congress, under 50 U.S.C. § 413(a); the extent to which presidential "findings" of the need for certain covert activities must be in writing; and the extent to which such "findings" may be effective retroactively.

<sup>37/</sup> The extraordinary appearance of a federal judge on television itself underscores the non-judicial nature of the court's action. See Part III, supra.

committed and whether it should be prosecuted -- or whether political, foreign policy, or other considerations counsel against enforcement in a particular case. Before launching investigations on foreign soil, or of foreign nationals, or of matters implicating international diplomacy, the Executive necessarily weighs the implications for its overall foreign policy -- an area for which it bears great responsibility. Mr. Walsh's jurisdiction necessitates investigations on foreign soil, of foreign nationals, and of matters implicating international diplomacy,<sup>38/</sup> and yet Mr. Walsh rather than the Executive is making these decisions -- and he may do so without the customary assistance of and consultation with contacts in the Department of State. No individual who is responsible or knowledgeable in any way for this nation's long-term foreign policy and security has the authority to control these activities, or even to know of them in order to counsel against them. One look at the broad mandate of the court's December 19, 1986 Order reveals the substantial possibility that foreign-relations and diplomatic crises might flow from a misguided decision to investigate, to issue a subpoena, or to prosecute. The transfer of this extraordinary power to one man evidences the breadth of his

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<sup>38/</sup> For example, members of Mr. Walsh's staff recently traveled to a French airport to search the aircraft of Adnan Khashoggi, a Saudi national. See "U.S. Team Searched Khashoggi Plane in France," The Washington Post, Feb. 14, 1987, p. A31, col. 1.

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Executive authority and belies any argument that the independent counsel is not a "superior Officer" of the Executive Branch.

Of equal significance, in deciding whether to prosecute, Mr. Walsh also will have to decide whether to risk disclosure of national security secrets at trial.<sup>39/</sup> He may decide whether to divulge thousands of secrets contained in classified reports and congressional testimony, or whether to forego prosecutions and thereby preserve those secrets. He makes such decisions, under the statute, without the guidance or oversight of any entity knowledgeable about the ramifications of disclosure on intelligence sources and diplomatic relations.<sup>40/</sup> It is readily apparent that the impact of such decisions extends well beyond the particular prosecution at issue to the welfare of the nation as a whole. To permit so many varied decisions, with such a broad and lasting impact on the Executive Branch, to be made by an individual not appointed by the President and confirmed by the

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<sup>39/</sup> See 18 U.S.C. App. IV § 6 (Classified Information Procedures Act provisions regarding Attorney General's determinations on use of classified information).

<sup>40/</sup> One example of the thousands of documents in this category appeared in The Washington Post on February 8, 1987. The document purportedly described a meeting between Vice-President George Bush and Amiram Nir, an Israeli official; it was classified "top secret," was reportedly omitted from congressional reports at the request of the State Department, and apparently remained classified until its appearance in The Washington Post. See "Bush Told U.S. Arms Deals Were With Iran Radicals," The Washington Post, Feb. 8, 1987, p. 1, col. 1.

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Senate, would wreak havoc with the affairs of this country and undermine the separation of powers created by the Constitution.

Finally, as discussed elsewhere in this brief, the independent counsel is appointing a staff of "inferior Officers" who work for him. See Part V infra. To do so constitutionally, the independent counsel must be a department head; to be even the equivalent of a department head, the independent counsel would have to be appointed by the President with the advice and consent of the Senate. For this reason as well, it is clear that the independent counsel is a "superior Officer" who must be appointed by the President with the advice and consent of the Senate.

In sum, if there are any "superior Officers" whose appointment Congress cannot remove from the President, Mr. Walsh must be in that category. The President is constitutionally entitled to appoint Department Heads and "superior Officers" beneath them. The independent counsel enjoys the full range of Executive responsibility entrusted to the Attorney General by the President. His independence from the President, in fact, exceeds that of the Attorney General. In this particular instance, the breadth and nature of Mr. Walsh's mandate render his power formidable indeed. To hold other than that these duties and responsibilities are those of a "superior Officer" would be to vest in Congress and the courts the means to usurp Executive control simply by creating a new office and transferring to it ultimate responsibility to exercise Executive power. The Constitution clearly forbids this. An Officer exercising the

power of the independent counsel must be appointed by the President, and the absence of such an appointment renders the actions of Mr. Walsh unconstitutional.

B. An Inferior Officer with the Extraordinary Executive Powers of the Independent Counsel May Not Be Appointed By a Court.

Even if the independent counsel could be deemed an "inferior Officer," the provision for his judicial appointment would still be unconstitutional.

The "excepting clause" of Article II, § 2, states that 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." Even if the independent counsel were considered an "inferior Officer,"<sup>41/</sup> Article II, § 2, would not empower Congress to provide for his appointment by a court. This clause gives Congress authority to vest the appointing power over "inferior Officers" in the branch or department to which the Officer belongs. It does not authorize Congress to disregard basic principles of separation of

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<sup>41/</sup> However, if the independent counsel is such an Officer, Congress may not constitutionally delegate to him the power to appoint a staff of inferior Officers, and Mr. Walsh's legal staff is not constitutionally empowered to act. See Part V, infra.

powers and instead vest the appointment power over Executive Branch officials in the Judicial Branch.<sup>42/</sup>

The basic purpose of the "excepting clause" is to allow the branches of government to appoint their own subordinate officials, to assure the compatibility of appointee, task and supervisor necessary to a functioning bureaucracy. For this reason, Congress may legitimately authorize the President to appoint any and all subordinate Executive Branch Officers, may vest in department heads the authority to appoint that department's subordinate Officers, and may grant federal judges the power to appoint Judicial Branch employees. See Rice v. Ames, 180 U.S. 371, 378 (1901) (judicial appointment of court commissioner); United States v. Eaton, 169 U.S. 331 (1898) (presidential appointment of vice-consuls); United States v. Hartwell, 73 U.S. 385 (1868) (Secretary of Treasury's appointment

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<sup>42/</sup> The role of the "court" in appointing Mr. Walsh is unconstitutional for an additional reason. Although the appointment was made by a purported "division" of the United States Court of Appeals for the District of Columbia Circuit, that "division" has no operational or functional relationship to the Court of Appeals. The Division is in reality a collection of three judges whose sole function is to appoint and supervise independent counsel; because that function is an Executive rather than a Judicial one, and because the judges perform none of the functions characteristic of a court of law, the division does not constitute a "court of law" within the meaning of the "excepting clause." Congress has not entrusted the power to appoint independent counsel to a properly constituted court that ordinarily decides cases and controversies, as the "excepting clause" permits in certain circumstances. Simply denominating the panel of three judges as a division of a functioning court should not render it a "court of law" when it otherwise does not act as one.

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of clerks within his department); Ex Parte Hennen, 38 U.S. (13 Pet.) 230 (1839) (judicial appointment of court clerks); Borak v. United States, 78 F. Supp. 123 (Ct. Cl.), cert. denied, 335 U.S. 821 (1948) (Attorney General appointment of Immigration and Naturalization Service examiners).

It defies logic to read the provision more broadly as allowing Congress to give one branch sole authority to appoint important, albeit "inferior," Officers of another branch. To do so would intermingle the branches of government in stark violation of the carefully crafted separation of powers. It would permit Congress to authorize the President or Attorney General to select law clerks for federal judges, or the Chief Justice to choose White House or State Department advisers. The result would be a subversion of the fundamental independence of the three branches of government. Thus, in testimony in 1973 before the Senate Judiciary Committee, then Acting Attorney General (now Judge) Robert Bork argued that this "excepting clause" must be read narrowly:

This provision was added with little or no debate toward the end of the Constitutional Convention. It is impossible to believe that as an afterthought, and without discussion, the Framers carelessly destroyed the principle of separation of powers they had so painstakingly worked out in the course of their deliberations.

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1973 Hearings at 452.<sup>43/</sup> Rather than read the clause to permit such a result, Acting Attorney General Bork concluded:

It seems as clear as such matters ever can be that the Framers intended to give Congress the power to vest in the courts the power to appoint "inferior officers" such as clerks, bailiffs, and similar functionaries necessary to the functioning of courts, just as they intended "Heads of Departments" to be able to appoint most of their subordinates without troubling the President in every case. The power is clearly one to enhance convenience of administration, not to enable Congress to destroy the separation of powers by transferring the powers of the Executive to the Judiciary or, for the matter of that, transferring the powers of the Judiciary to the Executive.

Id.

In its first look at this clause, the Supreme Court agreed that "the Constitution envisions rational and close relationships between the appointing branch and the nature of the function which the 'inferior officer' is to perform." Testimony of Dean Roger Cramton, 1973 Hearings, at 350. In Ex Parte Hennen, 38 U.S. (13 Pet.) 230, 258 (1839) (emphasis added), the Court upheld the authority of a federal judge to appoint and remove court clerks, observing that "[t]he appointing power . . . was no doubt intended to be exercised by the department of government to which the officer to be appointed most appropriately belonged. The appointment of clerks of courts properly belongs to the courts of law; and that a clerk is one of the

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43/ See discussion at pages 34-35, supra.

inferior officers contemplated by this provision in the Constitution cannot be questioned."

Subsequently, in Ex Parte Siebold, 100 U.S. 371 (1879), the Supreme Court upheld a statute vesting in circuit courts the authority to appoint federal election supervisors. Under the statute at issue, the supervisors were to do no more than witness elections (to assure that voting qualifications were applied fairly) and report irregularities to the House of Representatives. The court was to do no more than appoint the supervisors. In the course of a lengthy opinion, involving a major confrontation between federal and state governments over control of elections at which Congressional representatives are on the ballot, the Court devoted just two pages to the argument that "no power can be conferred upon the courts of the United States to appoint officers whose duties are not connected with the judicial department of the government." Id. at 397. The Court rejected this reading of Article II:

[T]he duty to appoint inferior officers, when required there to by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void. It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depository of official power capable of exercising it. Neither the President, nor any head of department, could have been equally competent to the task.

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Id. at 398 (emphasis added). The Court acknowledged, however, that the assignment to a court of certain adjudicatory or decisional responsibilities other than mere appointment would render judicial participation "incongruous."<sup>44/</sup>

Siebold therefore stands generally for the proposition that a court may appoint inferior Officers under the excepting clause where (1) there is no incongruity in the court's role as both appointing power and judicial officer, and (2) the appointment power could not have been assigned to either the President or a Department Head with greater propriety, or equal convenience or competence. It stands for no more, and provides no authority for judicial appointment of an Officer exercising purely Executive authority.

In hearings before Congress on the constitutionality of an earlier version of the independent counsel provision, two lower court opinions were proffered as support for the court's power to appoint. In fact, neither provides such support.

In United States v. Solomon, 216 F. Supp. 835 (S.D.N.Y. 1963), the court approved a statute vesting in federal district courts the power to appoint United States Attorneys to fill vacancies temporarily. The court stressed that the appointment was specifically made temporary by statute; that the statute did

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<sup>44/</sup> The Court distinguished the law of 1792, which would have required the court to examine claims of revolutionary war pensions; and the law of 1849, which attempted to empower a court to examine and rule on claims for injuries suffered by inhabitants at the hands of the Army. 100 U.S. at 398.

not oust the President's appointment power; and that the President could appoint a new U.S. Attorney or remove the temporary U.S. Attorney at any time, could direct his activities, and could replace him with an Officer of the President's own choosing. The appointment, in other words, met an administrative exigency without encroaching on the Executive's appointment powers.

In total contrast, the independent counsel statute does not give courts the power to fill temporary vacancies; all independent counsel are to be appointed by the Judicial Branch. Moreover, the Executive is completely divested of his power to appoint and is severely constrained in his ability to remove the independent counsel; any removal must be for good cause, must be justified in writing to Congress and the special court, and may be reversed by the special court. The Executive has no authority to direct the activities of Mr. Walsh or his staff; and the Executive may not replace them. As a result, the appointment of Mr. Walsh intrudes the court directly and incongruously into the Executive domain.

The second case cited in the legislative history is Hobson v. Hansen, 265 F. Supp. 902 (D.D.C. 1967), in which a court, by a 2-1 vote, upheld a statute authorizing the district court to appoint and remove members of the District of Columbia Board of Education. The court initially found the appointment authority to derive from Article I, § 8, cl. 17, giving Congress exclusive power to legislate for the District of Columbia, and

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the remaining discussion is therefore dicta. The court nevertheless went on to assert that Article II, § 2, cl. 2, gave the court authority to appoint the officers. The court expressly noted that the statute at issue, like that in Siebold, only authorized the court to appoint the members of the Board and in no way authorized the court to supervise the Board or administer the schools. Hobson, 265 F. Supp. at 913 n.14. "Were the judges authorized to administer the schools, . . . there would have been 'such incongruity in the duty required as to excuse the courts from its performance or to render their acts void.'" Id. (quoting Siebold, 100 U.S. at 398). The court further observed that the powers of judges in the District of Columbia, at that time granted under both Articles I and III, were broader than those of other federal judges and that District of Columbia judges could plainly and not "incongruously" act where others could not. Hobson, 265 F. Supp. at 915. The court's finding of no incongruity is therefore limited to an instance in which the court acts only as an appointing power, and in which the court in any event is vested with the broad powers of an Article I and Article III court.

The special court far exceeds the limits of Siebold when it appoints an Officer such as Mr. Walsh with ultimate responsibility for law enforcement decisions. That the Officer takes direction from nobody in the Executive Branch in exercising this exclusively Executive authority enhances the court's role in his selection. That the court may further review any Executive

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effort to remove this Officer ensures the court's ability to protect him in his position. In short, in selecting the person who is to serve as independent counsel, the court positions itself, through its appointee, to play a decisive role in the exercise of the Executive powers of investigation and prosecution. That this assignment places federal judges in an awkward -- and no doubt incongruous -- position is not surprising.<sup>45/</sup> As Judge Wisdom said in United States v. Cox, 342 F.2d at 192 (concurring opinion), "the functions of prosecutor and judge are incompatible." Whatever the outer bounds of the term "incongruous," this role falls squarely within it.

Read together, the Supreme Court's decisions in Siebold and Hennen bar judicial appointment of an Officer exercising duties that lie at the heart of the Executive's power to enforce the law. They further bar judicial appointment of an Officer if a court's exercise of the appointment power would be "incongruous." Judicial appointment of Mr. Walsh pursuant to the Ethics in Government Act fails on both counts and is therefore unconstitutional even assuming that he is an "inferior Officer."

V. THE APPOINTMENT OF ASSOCIATE COUNSEL IN THE OFFICE OF INDEPENDENT COUNSEL IS UNCONSTITUTIONAL.

In Buckley v. Valeo, the Supreme Court held that Officers of the United States must be appointed in the manner prescribed in Art. II, § 2. The associate counsel appointed by

45/ See notes 19, 25, supra.

the Independent Counsel are exercising the powers of Officers of the United States but were appointed by the independent counsel, not in the manner prescribed by Article II. This case is on all fours with Buckley v. Valeo, and the same result must follow: the associate counsel may not exercise the powers improperly assigned to them.<sup>46/</sup>

Section 594(c) authorizes the independent counsel to appoint, fix the compensation, and assign the duties "of such employees as such independent counsel deems necessary," and pursuant to this authority Mr. Walsh has appointed numerous attorneys and other personnel to assist him.<sup>47/</sup> These attorneys are for all intents and purposes Assistant U.S. Attorneys or their superiors. Although approximately eight of them are former government prosecutors, many of the others appear to have had no criminal law experience whatsoever.<sup>48/</sup> They are taking over

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<sup>46/</sup> See discussion of Buckley v. Valeo, supra, at 33-34.

<sup>47/</sup> To date, Mr. Walsh has announced the appointment of 19 attorneys. See Office of Independent Counsel Press Release (Jan. 7, 1987, Jan. 15, 1987, Feb. 4, 1987), attached heret as Exhibits A, B and C.

<sup>48/</sup> Although counsel do not intend to denigrate the experience of associate counsel, we note that few have had any experience that would reflect "appreciation of complex issues and principles in the areas of international relations, national security and defense, intelligence, counterterrorism, foreign aid, and foreign military sales, as well as a familiarity with the manner of execution of American foreign policy, the organization of the intelligence community, and procedures relating to classification of information, privileges, and authorizations." Application of the Attorney General Pursuant to 28 U.S.C. §§ 592(c)(1) for the Appointment of an Independent Counsel Regarding Iranian Arm Shipments and Diversion of Funds, Dec. 4, 1986, at 4.

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responsibility for complex, international investigations that have been conducted around the country by experienced Assistant United States Attorneys with the expert guidance and advice of attorneys in the Department of Justice and other Executive departments.<sup>49/</sup> It cannot therefore be disputed that Mr. Walsh's attorneys are at a minimum "inferior Officers" within the meaning of Article II; as the equivalent of Assistant U.S. Attorneys, they are exercising at least the degree of discretion and authority, in determining whom and what to subpoena and whom to prosecute, and in conducting grand jury and court proceedings, as the judicial clerks and third-class postmasters said to be inferior Officers in Buckley v. Valeo.

Under Article II, these Officers must be appointed by the President with the advice and consent of the Senate or, if Congress has so provided, by the President, a court of law, or department heads.<sup>50/</sup> Mr. Walsh is neither a President, a court of law, nor a department head. Other than the President, all individuals authorized to accept appointment duties from Congress under Article II are themselves appointed by the President with the advice and consent of the Senate; Mr. Walsh clearly was

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<sup>49/</sup> In apparent recognition of the fact that Assistant United States Attorneys are "inferior Officers," Congress has delegated their appointment and removal to the Attorney General in his capacity as department head. See 28 U.S.C. § 542.

<sup>50/</sup> For reasons noted in Part IV.B, supra, appointment by a court of law would be unconstitutional.

not.<sup>51/</sup> The parallel to Buckley v. Valeo is straightforward. Congress cannot empower a private individual to exercise the appointment power under the excepting clause of Article II any more than Congress itself can exercise such power. In Buckley, the improperly authorized exercise of power by the appointees had to cease. So must it here.

VI. THE REMOVAL PROVISIONS OF THE ETHICS IN GOVERNMENT ACT VIOLATE THE SEPARATION OF POWERS.

The President is "entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity . . . includ[ing] the enforcement of federal law . . . and management of the Executive Branch -- a task for which 'imperative reasons require an unrestricted power to remove the most important of his subordinates in their most important duties.'" Nixon v. Fitzgerald, 457 U.S. 731, 750 (1982) (quoting Myers v. United States, 272 U.S. 52, 134-35 (1926))(emphasis added). The President's unrestricted power to remove officers who are principally responsible for the administration of the laws was recognized by Congress in its earliest days and has been acknowledged ever since.

51/ It is notable that the Act nowhere provides for the removal of members of the independent counsel's staff. Presumably, he is empowered to remove them at will; it is far from certain whether the Attorney General may do so at all, or if so, under what circumstances.

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The Ethics in Government Act severely restricts the Executive's authority to remove the independent counsel and subjects any attempted removal to sweeping judicial review and congressional scrutiny. The Act provides that the Attorney General may personally remove him only "for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of his duties." 28 U.S.C. § 596(a)(1).<sup>52/</sup> Moreover, the Act requires that any attempted removal be accompanied by a written explanation to the court and to Congress, and gives the court jurisdiction to review the removal for any error of fact or law. These statutory provisions collide directly with basic separation-of-powers principles and are plainly unconstitutional.

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<sup>52/</sup> The "good cause" standard is a 1983 addition to the Act. Previously, the statute provided for removal for "extraordinary impropriety" or "any other condition that substantially impairs performance." In passing this amendment, the Senate subcommittee cautioned 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." Staff of Subcomm. on Oversight of Gov't Management of Senate Comm. on Gov'tal Affairs, 97th Cong. 1st Sess., Report on the Special Prosecutor Provisions of the Ethics in Government Act of 1978 (Comm. Print 1981) at 54.

The language of the "good cause" provision is ambiguous and may well indicate that "good cause" is limited to the next-mentioned reasons for removal. If this is the case, the Attorney General would in fact be precluded from offering serious policy differences, on issues unrelated to the politics of the independent counsel's investigation, as a reason for removing the independent counsel.

The First Congress considered the President's removal authority during debate on bills establishing the Executive Branch departments. The issue was whether the President should have absolute authority to remove Department Heads, without the advice and consent of the Senate. In the "Decision of 1789," Congress determined that under the Constitution the removal authority belongs to the President alone. Because this decision represents a nearly contemporaneous construction of the Constitution by a Congress composed of many members of the Constitutional Convention, it is entitled to great weight. See Parsons v. United States, 167 U.S. 324, 328-30 (1897); Myers, 27 U.S. 52, 111-32 (1926). The Supreme Court has described the Decision of 1789 as "[t]he settled and well-understood construction of the constitution," Ex Parte Hennen, 38 U.S. (13 Pet.) 258, 259-60 (1839).

In Myers v. United States, 272 U.S. 52 (1926), the Supreme Court first confronted the issue of the President's power to remove top Executive Branch Officials when asked to rule on a statute providing for the discharge of postmasters by the President with the advice and consent of the Senate.<sup>53/</sup> In a

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<sup>53/</sup> The Supreme Court's opinion in Myers recounts this history in depth. The reasons for Congress's decision are said to be contained in a series of speeches by James Madison, who urged rejection of a congressional role in the removal of Executive Branch Officers other than by impeachment. Madison maintained that the President must have removal power because he is responsible for the faithful execution of the laws and must have authority to remove those he does not trust, 272 U.S. at 120-22. Madison's position prevailed, and a congressional role in the removal process (Footnote Continued)

comprehensive opinion holding the statute unconstitutional, the Court ruled that Congress cannot interfere with the President's performance of his duty to take care that the laws be faithfully executed by limiting his control over his subordinates. For Congress to "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power . . . would be . . . to infringe the constitutional principle of the separation of governmental powers." Id. at 161.<sup>54/</sup>

A decade later, in Humphrey's Executor v. United States, 295 U.S. 602 (1935), the Court considered the power of Congress to limit the President's powers of removal of a Federal Trade Commissioner. The relevant statute provided for removal by the President but only for "inefficiency, neglect of duty, or malfeasance in office." The Court upheld the statute's restriction on the President's removal authority, holding that "illimitable power of removal is not possessed by the President [with respect to Federal Trade Commissioners]." Id. at 628-29 (quoted in Bowsher, 106 S. Ct. at 3188). The Court reasoned that the FTC

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was rejected. See Bowsher v. Synar, 106 S. Ct. 3181, 3187 (1986) (describing Decision of 1789).

<sup>54/</sup> Even though the postmaster in Myers was an inferior Officer whose appointment Congress could delegate under the excepting clause, Myers held that Congress could not participate in his removal. Thus, even if the independent counsel is an "inferior Officer" for appointment purposes, Myers nevertheless controls and limits any active encroachment into the President's removal authority, although not congressional enactment of statutory limits on the Executive's exercise of that authority.

exercises "quasi-judicial" and "quasi-legislative" powers, 295 U.S. at 624, and is "wholly disconnected from the executive department." Id. at 630. Although it carved out an exception for Officers who predominantly exercise non-executive functions, the Court reaffirmed the holding in Myers that congressional participation in the removal of "purely executive officers" is unconstitutional. Id. at 627-28.<sup>55/</sup>

Thus, "purely executive officers" are "inherently subject to the exclusive and illimitable power of removal by the Chief Executive." Id. at 627. Following this principle, in Morgan v. Tennessee Valley Authority, 115 F.2d 990 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941), the Sixth Circuit upheld the President's authority to remove at will the Chairman of the TVA's Board of Directors, despite a congressional effort to impose limits on the President's discretion.<sup>56/</sup> The court held: "As interpreted in the Humphrey case, or as narrowed thereby, the illimitable power of discretionary removal is confined to purely executive officers." Id. at 992. Because

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<sup>55/</sup> Thereafter in Wiener v. United States, 357 U.S. 349 (1958), the Court concluded that under Humphrey's Executor, the President did not have unrestrained removal authority over a member of the War Crimes Commission, in light of the "intrinsic judicial character of the task with which the commission was charged." Id. at 355. See United States v. Perkins, 116 U.S. 483 (1886).

<sup>56/</sup> Congress had sought to reserve to itself exclusive discretionary power to remove a director and had imposed on the President a mandatory duty to remove for stated causes, and for those causes only. Morgan v. Tennessee Valley Authority, 115 F.2d at 991.

administration of the TVA was an executive function and the chairman's powers were not adjudicative, the court held that the President was constitutionally empowered to remove the chairman at will and without congressional interference of any kind.

Most recently in Bowsher v. Synar, supra, the Supreme Court considered the constitutionality of direct congressional involvement in the decision to remove the Comptroller General. The Court held that the Comptroller General's exercise of executive functions under the Balanced Budget and Emergency Deficit Control Act of 1985 (known as the "Gramm-Rudman-Hollings Act") violates separation-of-powers principles because the Comptroller General is removable only by a Congressional Joint Resolution or by impeachment. Congress, the Court held, may not retain the power of removal over an Officer performing Executive functions, other than by impeachment. The Court stated:

To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a Congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress. This kind of Congressional control over the execution of the laws, [INS v. Chadha, 462 U.S. 919 (1983)] makes clear, is constitutionally impermissible.

Bowsher, 106 S. Ct. at 3189. Because the Comptroller General was assigned to interpret and implement the Gramm-Rudman-Hollings Act, he was held to be executing the law, and therefore could not be subject to congressional removal short of impeachment.

The statutory scheme for removal of the independent counsel violates these principles. First, the Act limits the

grounds on which the independent counsel may be removed by the Attorney General.<sup>57/</sup> Since the duties of the independent counsel epitomize the Executive function, Myers establishes that he must be removable at will by the Executive. The independent counsel, after all, does not merely execute the Ethics in Government Act, compare Bowsher, supra; he has the power to investigate violations of, and bring prosecutions under, all the criminal laws of the United States and to do so without any regulation by or guidance from the Executive Branch. That an Officer ultimately responsible for decisions about criminal investigations and prosecutions is principally an Executive Officer is beyond dispute. So, too, is the constitutional rule that such an Officer must be removable at will by the President.

Second, the Act intrudes both Congress and the Court into the removal process in clear contravention of Bowsher's admonition against the direct involvement of the other branches in the removal of Executive Officers. The Attorney General must submit a report to Congress and the special court detailing the facts found and ultimate grounds for removal. The special court may then review the removal, apparently de novo, and, if it was based on "error of law or fact," may reinstate the independent

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<sup>57/</sup> Section 596(a) provides that an independent counsel "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."

counsel. The result is to permit a judicial veto of the removal decision; the court could simply reinstate an Officer found by the Executive to be unsatisfactory for any number of policy reasons. Under the Constitution, however, the court, like Congress, has no business intruding itself into the execution of the laws.<sup>58/</sup>

Although Congress's role in the removal process is less blatantly intrusive, it too is excessive. The Attorney General must report to Congress on his reasons for removal, thereby intruding congressional oversight into the execution of the laws in a way Bowsher ruled offensive to the Constitution. Long-standing precedent vests in the President, as head of the Executive Branch, the power to control and remove at will an Officer engaged in a vital Executive function. By imposing limits on that power and requiring that the Executive justify itself to Congress, the Act deprives the President of this clear constitutional authority.

Supreme Court precedent establishes that the Executive must have the authority to remove certain high officers at will, and that no branch of government shall limit that authority or otherwise intrude into the process. The Ethics in Government Act violates these constitutional principles and cannot stand.

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<sup>58/</sup> Although the court cannot initiate the removal, as Congress could in Bowsher, the end result is the same: in both, another branch of government controls the offices of the Executive.

VII. THE STATUTORY SCHEME AS A WHOLE DEPRIVES THE EXECUTIVE OF HIS CONSTITUTIONAL AUTHORITY.

The constitutional infirmities of the independent counsel provisions take on particular significance when considered in combination. By providing for judicial appointment and supervision of the independent counsel, the Act confers unconstitutional powers upon an Article III court. By placing vital Executive functions in an Officer responsible to the Judicial and Legislative Branches, the Act divests the President of his constitutional powers. Through creation of a web of judicial and congressional supervision and direction, the Act deprives the President of control over an Officer entrusted to interpret, in the name of the United States, all the laws of the United States and to prosecute, also in the name of the United States, offenses against the United States.

That the independent counsel exercises vital Executive Branch functions need not be repeated. Mr. Walsh fills the shoe of the Attorney General -- indeed, of the President -- and exercises the full investigative and prosecutorial authority of the Executive with regard to a broad and ill-defined class of cases. In this matter in particular, that authority will include major decisions involving national security secrets and sensitive diplomatic and foreign-relations concerns.

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That Congress may not interfere in the execution of the laws is well-established. As the Supreme Court recently made clear, first in Chadha and then in Bowsher, "once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly -- by passing new legislation." Bowsher, 106 S. Ct. at 3192 (citing Chadha, 462 U.S. at 958).

That the Judicial Branch may not interfere in the execution of the laws is also well-established. Although the instances in which courts have directly tried to review the performance of the Executive are few, when such attempts have occurred they have been rebuffed. See, e.g., Cox, supra. As former Chief Justice (then Circuit Judge) Burger wrote:

Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.

[W]e are neither omnipotent so as to have our mandates run without limit, nor omniscient so as to be able to direct all branches of government. The Constitution places on the Executive the duty to see that the "laws are faithfully executed" and the responsibility must reside with that power.

Newman v. United States, 382 F.2d 479, 480, 482 n.9 (D.C. Cir. 1967) (footnote omitted). This immunity from judicial intervention is especially appropriate with respect to matters "intimately related to foreign policy and national security," which "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or

interference," and "rarely proper subjects for judicial intervention." Haig v. Agee, 453 U.S. 280, 292 (1981) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952)).<sup>59/</sup> See also Nathan v. Smith, 737 F.2d 1069, 1079-80 (Bork, J., concurring) (judicial review of Attorney General decision not to conduct preliminary investigation or seek appointment of special prosecutor "would raise serious constitutional questions relating to the separation of powers"). One need look no farther than the political question doctrine to see that courts ought not, and constitutionally cannot, inject themselves into certain core Executive decisions.<sup>60/</sup>

The Ethics in Government Act violates these basic rules by intruding both congressional and judicial control into the heart of the Executive Branch's decision-making process. Because the court emasculates the Attorney General's control over the independent counsel -- by appointing him, enabling him to

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<sup>59/</sup> Notably, the Court of Appeals in this Circuit already has ruled that courts may not interfere in a dispute between Congress and the President about aid to the Nicaraguan insurgents -- one of the precise issues on which the court authorized the independent counsel to conduct a criminal investigation. In Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985), then-Judge Scalia considered the claims of Congressmen that through assistance to the Nicaraguan contras, the President and other Executive Officers had deprived them of their right to participate in the decision to declare war, in violation of the Constitution's War Powers Clause. The court ruled that the claim presented a non-justiciable political question.

<sup>60/</sup> The political question doctrine has been developed to ensure that courts demonstrate appropriate concern for the separation of powers under the tripartite system of government. See Baker v. Carr, 369 U.S. 186, 217 (1962).

establish an agency independent of the Executive Branch, delineating his investigative and prosecutorial authority, and reviewing any decision to remove him -- the independent counsel is thereby protected from the Attorney General and is, at bottom, under the control of the court, not the Executive Branch.

Congress, moreover, has "oversight jurisdiction," and the independent counsel "shall have the duty to cooperate with the exercise of such oversight jurisdiction." 28 U.S.C. § 595(d) (emphasis added). This congressional power is stated in sweeping terms. Congress additionally receives periodic reports from the independent counsel, § 595(a), and is entitled to receive from the independent counsel -- here acting as its agent -- any substantial and credible information that may constitute grounds for impeachment. § 595(c).

While the special court and Congress exercise significant control over the independent counsel in his exercise of Executive functions, the Executive Branch retains virtually none. The Attorney General's ability to define the scope of the independent counsel's investigation is subject to expansion, from day one, by the special court. The independent counsel exercises the full investigative and prosecutorial powers of the Department of Justice, plus the power to challenge in court executive assertions of national security or other privileges, the power to appoint a staff of unlimited size with an unlimited budget, the power to call on the resources and personnel of the Justice Department for assistance, the power to allow the Justice

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Department to continue investigations otherwise within his control and to divest Justice of other investigations, and the power to seek assistance from Justice Department personnel at will, regardless of other demands on their time. The Attorney General's statutorily constrained ability to remove the independent counsel is subject to judicial review with apparent no deference, and to reversal. In short, within the scope of his office, this Executive Officer is effectively immune from control of the Executive, while he builds and then operates an agency of his very own.

In the case of Mr. Walsh, the independent counsel provision has had an especially pernicious effect because it has divested the Executive Branch of prosecutorial discretion in areas in which it traditionally is accorded special deference -- national security and diplomatic and foreign affairs. As then-Judge Scalia observed in declining to recognize a private right of action under the Neutrality Act,

It would be doubly difficult to find a private damage action within the Neutrality Act, since this would have the practical effect of eliminating prosecutorial discretion in an area where the normal desirability of such discretion is vastly augmented by the broad leeway traditionally accorded the Executive in matters of foreign affairs.

Sanchez-Espinoza v. Reagan, 770 F.2d 202, 210 (D.C. Cir. 1985) (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)). In precisely the same way, the independent counsel statute in this case eliminates prosecutorial discretion

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in the area of foreign affairs and is therefore "doubly difficult" to countenance.

To approve such a scheme is to overlook 200 years of development of separation of powers principles, culminating in the Supreme Court's recent efforts to cabin the powers of the respective branches. This is not a case in which appointment but not removal, or removal but not appointment, of an Executive Officer is located outside the Executive Branch of government, thereby diminishing the ability of the Executive to control the execution of the laws. On the contrary, this is a case in which the President and Attorney General are divested of virtually all control over the exercise of power in an area of government that is constitutionally entrusted to them, and in which two branches of government seek to exercise control over matters that are beyond their constitutional power. Mr. Walsh surely exercises the power of an Executive Officer, but he is neither appointed nor held accountable as an Officer with such power must be.

"If the execution of the laws is lodged by the Constitution in the President, that execution may not be divided up into segments, some of which courts may control and some of which the President's delegate may control. It is all the law enforcement power and it all belongs to the Executive." Nathan, 737 F.2d at 1079 (Bork, J., concurring). In attempting to carve up the Executive's law enforcement power and purporting to hand a healthy slice to the independent counsel, Congress ignored this constitutional doctrine.

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A perceived political exigency does not justify Congress's disruption of the constitutional balance of power. The Framers were necessarily aware that a high Executive Officer might commit an offense against the state. They accordingly provided means, in addition to the President's authority to enforce the laws, by which Congress might hold the Executive accountable to the people -- as by congressional investigations and censure, the power of the purse, and impeachment. They did not empower Congress to divest the Executive of his authority to execute the laws. There is absolutely no basis to believe that existing, constitutional processes are unworkable.<sup>61/</sup> Indeed,

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<sup>61/</sup> History teaches the opposite. Several times public and congressional pressure has led to appointment of an independent counsel, or some equivalent, by the Executive Branch. This was true of the investigation of the Teapot Dome Scandal, see "Uncovering a Cover-Up on Teapot Dome," The Washington Post, June 9, 1977, at A27; The New York Times, May 1, 1973, at 32 col. 6; the Watergate investigations, see id; The New York Times, May 8, 1973, at 26 col. 3; and the investigation of President's Carter's family peanut warehouse, see "Civiletti and Justice Staff Find Themselves on the Defensive," The Washington Post, Sept. 2, 1979, at A3. Moreover, the Justice Department and United States Attorney's Offices have demonstrated that they are quite capable of investigating and prosecuting, when appropriate, both high Executive Officials, as in the case of Vice President Spiro Agnew, and presidential relatives, as in the case of Billy Carter.

Finally, the Justice Department's Office of Professional Responsibility, which was established by former Attorney General Edward H. Levi in the mid-1970s, has broad powers to investigate the ethical conduct of government employees and a reputation for independence from presidential pressure. See, e.g., "Justice Widens In-House Probe of Billy Carter," The Washington Post, Aug. 8, 1980, at A1. In the Billy Carter affair, the office demonstrated a willingness to challenge both the Attorney General and the President, thereby casting further doubt on the claimed need for an

(Footnote Continued)

the ever-expanding number of congressional and other investigations into the sale of weapons to Iran and the alleged diversion of proceeds to Nicaraguan insurgents confirms the ability of our government to investigate itself.<sup>62/</sup>

The Constitution entrusted the execution of the laws to the President, and with him it must lie. The Ethics in Government Act's rearrangement of the powers of government is unconstitutional, and the actions of Mr. Walsh thereunder are consequently void.

#### CONCLUSION

For the numerous reasons stated herein, Plaintiff's Motion for Summary Judgment should be granted. This Court should declare the independent counsel provisions of the Act

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independent counsel who is isolated from the Executive Branch. See "Excerpts from Justice Department Report on Inquiry About Billy Carter," The Washington Post, Nov. 2, 1980, at Section 1, p. 43, col. 1.

<sup>62/</sup> In addition to the independent counsel, two select congressional committees are investigating the Iran-contra affair, the General Accounting Office is examining the transfer of funds to the contras, and the President's Special Review Board ("The Tower Commission"), the Customs Service, the Justice Department, and the Federal Bureau of Investigation all are looking into aspects of the case. See "Contras Are Focus in 7 Investigations," The New York Times, January 30, 1987, A1 col. 4; Exec. Order 12575, 51 Fed. Reg. (no. 232) 43718 (Dec. 3, 1986).

Added evidence of the government's ability to investigate itself is the proliferation of recent government attorneys in the ranks of Mr. Walsh's staff. See Exhibits A, B and C. If these attorneys' previous assignments do not establish a conflict of interest, it is far from certain that the conflict of their former offices would be so great as to preclude location of any investigation in those offices.

unconstitutional and should enjoin all further activity by any person taken under color of those provisions.<sup>63/</sup>

Respectfully submitted,

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February 24, 1987

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63/ For the reasons stated in this memorandum, plaintiff North submits that the independent counsel statute is unconstitutional both on its face and as applied by the special court. Because there can be no dispute as to such facts as the court's expansion of the independent counsel's mandate far beyond that requested by the Attorney General, plaintiff is entitled to summary judgment on his as-applied challenge, if not on his facial attack.

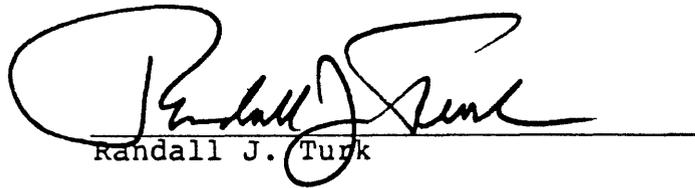
If, however, the Court is not prepared to strike down the statute on its face or on the basis of undisputed facts already established, plaintiff will seek to conduct appropriate discovery in order to present the Court with a full factual record illustrating in detail the manner in which the operation of the independent counsel statute has departed from separation-of-powers principles.

- 70 -

LAW OFFICES  
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AREA CODE 202  
331-5000

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that he has served the foregoing Application for a Preliminary Injunction and accompanying Memorandum in support thereof to defendant, Whitney North Seymour, Jr., by hand, at his office located at Suite 6400, United States Courthouse, One Marshall Place, Washington, D.C., 20001, this 25th day of February, 1987.

  
Randall J. Turk

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MICHAEL K. DEAVER,  
4521 Dexter Street, N.W.,  
Washington, D.C. 20007,

Plaintiff,

v.

WHITNEY NORTH SEYMOUR, JR.,  
as Independent Counsel,  
United States Courthouse  
One Marshall Place, N.W.  
Suite 6400  
Washington, D.C. 20001,

Defendant.

Civil Action No. 87-0477

FILED

FEB 25 1987

CLERK, U.S. DISTRICT COURT  
DISTRICT OF COLUMBIA

PLAINTIFF'S APPLICATION FOR  
A TEMPORARY RESTRAINING ORDER

Plaintiff Michael K. Deaver, through undersigned counsel, hereby applies to this Court for a Temporary Restraining Order restraining defendant Whitney North Seymour, Jr., and Mr. Seymour's staff, from proceeding further in the investigation or contemplated prosecution of Mr. Deaver, and specifically from seeking to obtain an indictment against Mr. Deaver pending this Court's ruling on plaintiff's application for a preliminary injunction because of the alleged unconstitutionality of Title VI of the Ethics in Government Act, 28 U.S.C. §§ 591-598. Mr. Deaver's counsel were advised yesterday that Mr. Seymour would present his case to the grand jury today at 1:30 p.m.

Any further action by Mr. Seymour should be restrained because the legislation pursuant to which he is acting in this matter divests the President of important and exclusively Executive power and authority, and places the exercise of that power and authority in an "independent" office under the control of the Legislative and the Judicial Branches. These features of the statute violate the constitutional principle of separation of powers and render the statute unconstitutional. Further, the public interest in preserving our constitutional system of separation of powers and the immense harm to Mr. Deaver inflicted by Mr. Seymour's unconstitutional exercise of Executive power far outweigh any harm that might result from a stay of Mr. Seymour's investigation.

The grounds for this Application are set forth in full in the accompanying Memorandum of Law, and in the related papers being filed simultaneously with that Memorandum. A certificate of counsel in compliance with Local Rule 205(a) also accompanies this Application.

Respectfully submitted,

  
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February 25, 1987

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MICHAEL K. DEEVER,  
4521 Dexter Street, N.W.,  
Washington, D.C. 20007,

Plaintiff,

v.

WHITNEY NORTH SEYMOUR, JR.,  
as Independent Counsel,  
United States Courthouse  
One Marshall Place, N.W.  
Suite 6400  
Washington, D.C. 20001,

Defendant.

Civil Action No. \_\_\_\_\_

MEMORANDUM IN SUPPORT OF APPLICATION  
FOR A TEMPORARY RESTRAINING ORDER

INTRODUCTION

On May 29, 1986, three judges, <sup>1/</sup> constituting a special division of the United States Court of Appeals for the District of Columbia Circuit, issued an order vesting in a private attorney -- Whitney North Seymour, Jr., of New York City -- all the power and authority of the Attorney General of the United States for the purpose of investigating and prosecuting Michael K. Deaver. Mr. Seymour thus ascended to an important Executive

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<sup>1/</sup> The judges were Senior Circuit Judge George E. McKinnon of the United States Court of Appeals for the District of Columbia Circuit, the late Senior Circuit Judge Walter R. Mansfield of the Second Circuit and Senior Circuit Judge Lewis R. Morgan of the Eleventh Circuit.

position without being either nominated by the President or confirmed by the Senate, and without being appointed by the head of any Executive Department. Since being appointed, Mr. Seymour has wielded the immense power and authority of the Attorney General without the slightest input from, or supervision by, the Executive Branch. His investigative and prosecutorial decisions with respect to Mr. Deaver are not subject to review by anyone at any level in any federal law enforcement agency, and, unlike any other similar Executive official, he is virtually immune from removal by the President from his appointed task.

At the same time, however, the scope and exercise of Mr. Seymour's Executive power is subject to the direct supervision and control of the Legislative and Judicial branches. The Judiciary is assigned the responsibility of "defining the independent counsel's prosecutorial jurisdiction." 28 U.S.C. § 593(b). The independent counsel is required to submit statements or reports to the Congress on his activities, 28 U.S.C. § 595(a), as well as to submit a formal report to the three-judge court at the conclusion of his investigation. 28 U.S.C. § 595(b)(i). His official conduct is subject to the oversight jurisdiction of the House and Senate Judiciary Committees, 28 U.S.C. § 595(d), and he is subject to plenary removal by the Judiciary on its own motion. 28 U.S.C. § 596(b)(2).

As we demonstrate below, the Act violates the Constitutional principle of separation of powers in three major respects. First, it provides for the appointment of independent

counsel by the judiciary, rather than by the President, in violation of the Appointments Clause of the Constitution.

Second, it unconstitutionally limits the President's removal power over a high-ranking Executive official, and by reserving to the Judicial Branch unfettered authority to terminate an independent counsel's office, dictates that an independent counsel will be subservient to the judiciary. Third, the statute divests the President of his authority and duty to ensure that the laws be faithfully executed by assigning to the judiciary, rather than the Executive Branch, the task of defining the independent counsel's jurisdiction, and by transferring to the Judicial and Legislative Branches other supervisory authority over the independent counsel's exercise of exclusively Executive powers.

I.

The Independent Counsel Statute Is Unconstitutional Because It Divests The President Of Important And Exclusively Executive Power, And Transfers That Power To The Judicial And Legislative Branches In Violation Of Separation Of Powers.

As the independent counsel appointed in this matter, Mr. Seymour has, in effect, become the Attorney General of the United States, with Mr. Deaver and his associates as his sole and exclusive targets. Mr. Seymour acquired this extraordinary position through the independent counsel provisions of the Ethics in Government Act ("the Act"), 28 U.S.C. §§ 49, 591-598, as amended. That Act requires the Chief Justice of the United States to assign three judges or justices to a special division

of the Court of Appeals for the District of Columbia Circuit to appoint "independent counsel." 28 U.S.C. §49. The persons against whom such independent counsel are to direct their investigative and prosecutorial powers are the hundreds of members of the Executive Branch listed in 28 U.S.C. §591(b). The offenses covered are all federal criminal laws except petty crimes. 28 U.S.C. §591(a).

Under the Act, the appointment of independent counsel is triggered by the Attorney General's "preliminary investigation" of allegations that any of the persons covered by the Act has committed a federal offense. 28 U.S.C. §§ 591(a), 592(a). If the Attorney General finds "reasonable grounds to believe that further investigation or prosecution is warranted," or if he fails to come to a conclusion within the ninety-day period, the Attorney General has no choice but to apply to the judges of the division for the appointment of an independent counsel. 28 U.S.C. §592(c)(1).

Upon receiving an application for the appointment of an independent counsel, the special division of the court has virtually unfettered discretion to appoint whomever it chooses. 28 U.S.C. §593(b). The only qualifications for the office are that the appointee must not hold or recently have held any office of profit or trust under the United States. 28 U.S.C. §593(d). Neither the President, nor any other Executive Branch official, has any voice whatsoever in the selection process.

In addition to appointing an independent counsel, the judges are assigned the responsibility of "defining that independent counsel's prosecutorial jurisdiction." 28 U.S.C. §593(b). The Act itself supplies no standards regarding how broadly or narrowly the judges should define this jurisdiction. There is nothing in the Act, for example, that requires the judges to limit the independent counsel's jurisdiction to the individual or the offenses that were the subjects of the Attorney General's preliminary investigation.

The Act makes clear, moreover, that the Attorney General, the Department of Justice and all of its officers and employees are deprived of power to investigate or prosecute any matter within the jurisdiction of the independent counsel as defined by the court. 28 U.S.C. §597. In the sphere of his jurisdiction, whatever its scope, the independent counsel is supreme. He acquires the full power and authority of the Attorney General to exercise all investigative and prosecutorial functions and powers of the Department of Justice, 28 U.S.C. §594(a), and he may, as he alone deems proper, create his own mini-Department of Justice by exercising his power to "appoint, fix the compensation, and assign the duties, of such employees as [he] deems necessary." 28 U.S.C. §594(c). He may conduct proceedings before grand juries; he may bring and handle all aspects of actions in the name of the United States, and engage in any other litigation that he deems necessary; he may appeal adverse decisions without the approval of the Solicitor General;

and he may review documentary evidence from any source, contest assertions of privilege, including those based on national security, apply for grants of statutory immunity, and initiate and conduct prosecutions in any court of competent jurisdiction. See 28 U.S.C. §594.

Whenever he alone deems it appropriate, the independent counsel may issue public reports on his activities, containing such information as he alone deems appropriate. 28 U.S.C. §595(a). He is required, however, to submit statements or reports to the Congress on his activities, id., as well as to submit a final report to the three-judge court before the termination of his office, 28 U.S.C. §595(b)(i). His official conduct is subject to the oversight jurisdiction of the House and Senate Judiciary Committees, with which he is required to cooperate. 28 U.S.C. §595(d).

There is no time limit on the independent counsel's term of office: he does not descend to the status of private citizen until he determines that he has completed his duties and files a report with the court, or until the division of the court concludes that he has completed his duties. 28 U.S.C. §596(b). The independent counsel may not be removed from office by the Attorney General or any other agent of the President except for good cause or because of a condition that substantially impairs his performance. 28 U.S.C. §596(a)(1). Moreover, if the independent counsel objects to his ouster by the Attorney General, he has the right to bring an action for judicial review

before the judges that appointed him, and may obtain reinstatement "or other appropriate relief" if the judges believe the Attorney General's removal of their appointee was based on a factual or legal error. 28 U.S.C. §596(a)(3). In contrast to the Attorney General's circumscribed power of removal, the court itself possesses unreviewable discretion to terminate an independent counsel's office on its own motion at any time the court feels that no further purpose is served by an independent counsel's exercise of his powers. 28 U.S.C. §596(b)(2).

We turn now to demonstrate how these statutory provisions are fatally defective under our constitutional form of government.

A. Mr. Seymour's Appointment By A Three-Judge Panel Violates Article II, §2, Cl.2 Of The Constitution.

Article II, §1 of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America" who, under the Take Care Clause, "shall take Care that the Laws be faithfully executed . . . ." U.S. Const., Article II, §3. Both the history of these constitutional provisions and the judicial decisions interpreting them demonstrate that the enforcement of federal criminal law against private persons constitutes the very essence of Executive power in the constitutional sense.

As one commentator has noted, participants at the Federal Convention of 1787 viewed the Executive "problem" as:

primarily one of law enforcement, the institution of a department well enough equipped with power to see to it that the laws were faithfully executed in distant Georgia and individualistic western Pennsylvania and western Massachusetts as well as in the commercial centers of the seaboard.

C. Thach, The Creation of the Presidency, 1775-1789: A Study in Constitutional History, 77 (1969 ed.) (hereinafter "C. Thach").

Decisions of the Supreme Court have repeatedly recognized as much. Thus, the Court has described the Attorney General as "the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offences be faithfully executed." Ponzi v. Fessenden, 258 U.S. 254, 262 (1922). See also Buckley v. Valeo, supra, 424 U.S. at 123. Indeed, in United States v. Nixon, 418 U.S. 683, 693 (1974), a unanimous Supreme Court stated:

[T]he Executive branch has exclusive authority and absolute discretion to decide whether to prosecute a case, Confiscation Cases, 7 Wall. 454 (1869); United States v. Cox, 342 F.2d 167, 171 (CA 5), cert. denied, sub nom. Cox v. Hauberg, 381 U.S. 935 (1965)  
. . . . 2/

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<sup>2/</sup> The lower federal courts have been unanimous in their concurrence with the proposition that the investigation and prosecution of criminal offenses is an inherently Executive function. In United States v. Cox, for example, the Fifth Circuit expressly held that the decision whether to initiate a prosecution belongs solely to the Executive Branch, and that neither Congress nor the courts (nor, indeed, the grand jury) may interfere in that decision. 342 F.2d at 171. As Judge Wisdom (Cont'd)

Thus, Mr. Seymour's breathtakingly broad investigative and prosecutorial power under 28 U.S.C. § 594 is quintessentially Executive in nature. But under the Constitution, only the President may appoint an official to exercise such important and exclusively executive powers. Article II, §2, cl.2 of the Constitution provides:

[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.

In Buckley v. Valeo, supra, the Supreme Court held that an "Officer of the United States" within the meaning of this clause is "any appointee exercising significant authority pursuant to the laws of the United States . . . ." 424 U.S. at 125-26 (citing

- stated in his concurring opinion in Cox, "[t]he prosecution of offenses against the United States is an executive function within the exclusive prerogative of the Attorney General." Id. at 190. See also United States v. Batchelder, 442 U.S. 114 (1979); Bordenkircher v. Hayes, 434 U.S. 357 (1978); Dacey v. Dorsey, 568 F.2d 275 (2d Cir.), cert. denied, 436 U.S. 906 (1978); United States v. Cowan, 524 F.2d 504 (5th Cir. 1975); Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973); United States v. Chanen, 549 F.2d 1306 (9th Cir. 1977); United States v. Brown, 481 F.2d 1035 (8th Cir. 1973); Peek v. Mitchell, 419 F.2d 575 (6th Cir. 1970); Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967) (Burger, C.J.); Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965), cert. denied, 384 U.S. 906 (1966); Moses v. Kennedy, 219 F. Supp. 762 (D.D.C. 1963), aff'd sub nom. Moses v. Katzenbach, 342 F.2d 931 (D.C. Cir. 1965).

United States v. Germaine, 99 U.S. 508, 509-10 (1879)). An independent counsel such as Mr. Seymour, wielding all the power and authority of the Attorney General and the Department of Justice, plainly fits within the Court's definition of an "Officer of the United States." The Court in Buckley further held that anyone who is an "Officer of the United States" "must, therefore, be appointed in the manner prescribed by §2, cl.2, of that Article." 424 U.S. at 126.

Buckley, of course, concerned the appointment of members of the Federal Election Commission, whom the Court deemed to be inferior Officers' within the meaning of that Clause." Id. at 126. It would defy all logic, however, for anyone to conclude that an independent counsel, exercising all the power and authority of the Attorney General and the Department of Justice, was an inferior Executive officer within the meaning of that Clause; for in no meaningful sense does the independent counsel have a "superior." Like the Attorney General whose full power and authority he exercises, an independent counsel is plainly an important Executive official who may only be appointed by the President. <sup>3/</sup>

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<sup>3/</sup> For example, in Springer v. Philippine Islands, 277 U.S. 189 (1928), the Supreme Court held that the legislature could have no hand in the appointment of the board of directors of a public corporation. See also Buckley v. Valeo, supra, 424 U.S. at 124. Although the activities of public corporations are hardly at the core of Executive functions, the Court nevertheless held that the Executive Branch could not be divested of control over such entities. It follows a fortiori that control over law enforcement activities cannot constitutionally be removed from the Executive Branch as the Act purports to do.

As Professor Tribe has stated, "It is through subordinates, and only through them, that the President can 'take care that the laws be faithfully executed. . . .'" L. Tribe, American Constitutional Law §4-8, at 185. By depriving the President of the power to appoint subordinates who will perform the core Executive task of law enforcement, the Act "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, 433 U.S. 425, 443 (1977). The Act's attempt to transfer to the Judicial Branch the purely Executive power of appointing Executive officials is thus plainly unconstitutional, as is Mr. Seymour's exercise of prosecutorial power pursuant thereto.

**B. The Act Unconstitutionally Restricts The President's Removal Power, And By According To The Judiciary The Right To Terminate An Independent Counsel's Office, Constitutes A Per Se Violation Of The Constitution.**

The Act restricts the President's power to remove an independent counsel "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. §596(a)(1). Further, the Act requires the Attorney General to submit a report to both the special division of the Court and to the House and Senate Judiciary Committees setting forth the reasons for any such removal, 28 U.S.C. §596(a)(2), and grants to the court that appointed the independent counsel the power to reinstate him in the event it disagrees with the

Attorney General's decision. 28 U.S.C. §596(a)(3). These restrictions on the Executive's power to remove an independent counsel -- and the concomitant loss of Executive control and supervision over that official -- are plainly unconstitutional.

As the Supreme Court held in Myers v. United States, 272 U.S. 52 (1926), the President's power to remove Executive officials cannot be restricted by Congress. In Myers, the Executive official involved was a postmaster, who by statute was secure from removal by the President without the advice and consent of the Senate. When he nevertheless was removed by the President without the advice and consent of the Senate, he brought suit for his salary from the date of his removal. In invalidating any limitation on the President's removal power over Executive officials, the Supreme Court noted the Framers' opposition to the mingling of the powers of the Executive, Legislative and Judicial Branches, and stated (id. at 122):

The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.

In its recent decision in Bowsher v. Synar, \_\_\_ U.S. \_\_\_, 106 S. Ct. 3181 (1986), the Supreme Court cited with approval the Myers Court's discussion of the "Decision of 1789," through which the Framers expressed their intention of vesting the President with unlimited removal power over important Executive officers. Id.

at 3187-88. By hemming the President's power to remove an independent counsel with both substantive and procedural impediments -- the requirement of "cause" for removal, the requirement of reporting the reasons for removal, the provision for judicial review and the judicial option to reinstate the independent counsel -- the statutory scheme plainly runs afoul of the rule of Myers as reaffirmed in Bowsher v. Synar.

In addition to indicating the Supreme Court's continued adherence to Myers, Bowsher v. Synar makes clear that the statutory provisions for removal of an independent counsel bear yet another fatal flaw. While limiting the President's own removal power, the statute allocates unreviewable power to the special division of the court to terminate an independent counsel's office, on its own motion, whenever it is satisfied that the office is no longer needed. 28 U.S.C. § 596(b). Bowsher v. Synar stands for the categorical proposition that the grant of such power to terminate an Executive officer to non-Executive Branch officials is unconstitutional.

In Bowsher, the Supreme Court struck down the automatic deficit reduction process of the Balanced Budget and Emergency Deficit Control Act of 1985 because the power to remove the Comptroller General, who performed Executive functions under the Act, was held in part by Congress. The Court stated (106 S.Ct. at 3187):

The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts. The President appoints

"Officers of the United States" with the "Advice and Consent of the Senate . . . ." Article II, §2. Once the appointment has been made and confirmed, however, the Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment by the House of Representatives and conviction by the Senate. An impeachment by the House and trial by the Senate can rest only on "Treason, Bribery or other high Crimes and Misdemeanors." Article II, §4. A direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one is inconsistent with separation of powers.

The Bowsher Court held the retention by Congress of removal authority over the Comptroller General, to whom the Balanced Budget Act entrusted the exercise of executive powers, to be a per se violation of the Constitution. The Court stated (106 S.Ct. at 3192):

By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Reduction Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function.

- It did not matter, in the Court's view, that "'[r]ealistic consideration' of the 'practical result of the removal provision' reveals that the Comptroller General is unlikely to be removed by Congress." Id. at 3190-91 (citation omitted). In underscoring its per se holding, the Court observed (id. at 3191):

The separated powers of our government can not be permitted to turn on judicial assessment of whether an officer exercising executive power is on good terms with Congress. The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving

liberty. In constitutional terms, the removal powers over the Comptroller General's office dictate that he will be subservient to Congress.

For like reasons, the Judicial Branch's power to terminate the office of an independent counsel "dictate[s in constitutional terms] that he will be subservient to" the Judiciary, regardless of whether that power ever will be used in an attempt to influence an independent counsel's conduct. It is the potential for control over the Executive officer created by the judicial power of termination that fatally distorts the separation of powers. The Act's removal provisions thus constitute a per se violation of the Constitution.

**C. The Act Unconstitutionally Assigns To The Judiciary The Responsibility For Defining The Independent Counsel's Investigative And Prosecutorial Jurisdiction, And Impermissibly Transfers To The Judicial And Legislative Branches Other Supervisory Authority Over An Independent Counsel.**

The statute is invalid on still other, related grounds, for it divests the President of his exclusive power to ensure that the laws are faithfully executed by (1) assigning to the Judicial Branch the task of defining an independent counsel's investigative and prosecutorial jurisdiction; (2) depriving the Attorney General of investigative discretion prior to the filing of an application for the appointment of an independent counsel; (3) requiring an independent counsel to submit to the division of the court a report of his activities at the conclusion thereof; (4) requiring an independent counsel to submit reports on his

activities to the appropriate committees of Congress; and (5) granting to the Legislative Branch oversight responsibility for the conduct of an independent counsel's office.

Each of these provisions on its face unconstitutionally violates the principle of separation of powers by divesting the President of his exclusive authority to supervise those who, like Mr. Seymour, are exercising Executive powers and functions. The inescapable import of the cases discussed above is that the discretion whether to initiate and continue an action to enforce federal law is not subject to the control of the Legislative or Judicial Branches because of the textual commitment of that power to the President under Art. II, § 1 and the Take Care Clause.

Therefore, an attempt by Congress to divest the Executive Branch of such discretion, whether by attempting to exercise such power itself or by granting the power to officers of the United States beyond the control of the President, presumptively violates the Take Care Clause and the constitutionally mandated separation of powers. As this Circuit made clear in Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981):

The executive power under our Constitution, after all, is not shared -- it rests exclusively with the President. The idea of a "plural executive," or a President with a council of state, was considered and rejected by the Constitutional Convention.

If the power to prosecute is an Executive power in the constitutional sense, it cannot be shared, at the discretion of Congress, with officers beyond the control of the President; to

share that power is to create the plural Executive Branch which was carefully considered and squarely rejected by the Framers.

In the Take Care Clause, the Framers ensured that the power to enforce federal law would be subject to political accountability by placing that power under the policy control of the Chief Executive. As illustrated by the cases discussed above, such as United States v. Cox, the power to initiate and carry forward a federal criminal prosecution is a discretionary power that cannot appropriately be supervised by the Judicial Branch. Nor can Congress, in our constitutional system, act as a participant in the exercise of that power. If the exercise of the power to initiate and carry forward federal law enforcement actions is to be checked by one of the three Branches, that check must come through the supervisory control of the President over the prosecutorial function -- not by a sharing of Executive power.

If the power to enforce the law may be vested in officials beyond the power or responsibility of the President, but subject to the supervision of judges and congressmen, then the most fundamental check on the exercise of power established by the Constitution will have been overridden. This result cannot be reconciled with the understanding of the Framers which lay behind their decision to centralize the executive power in the President for the protection of the people:

[T]he plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, first, the

restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and, secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it.

The Federalist No. 70, 428-29 (A. Hamilton) (C. Rossiter ed. 1961). The Framers of the Constitution did not contemplate the exercise of federal law enforcement power to go beyond the Executive's control. As the Court concluded in Chadha:

With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

462 U.S. at 959.

In sum, the doctrine of separation of powers "is at the heart of our Constitution," Buckley v. Valeo, supra, 424 U.S. at 119. Indeed, as the Court reiterated in INS v. Chadha, supra, 462 U.S. at 946, "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers; it was woven into the document that they drafted in Philadelphia in the summer of 1787," (quoting Buckley v. Valeo, supra, 424 U.S. at 124). While the Executive, Legislative and Judicial Branches are not entirely separate, and were not intended to be so, Buckley v. Valeo, supra, 424 U.S. at 129-21, the Constitution charges each Branch of government with the task of preserving its own essential powers in order to prevent

frustration of the Framers' basic design. Chief Justice Taft stated this principle for the Court in Hampton & Company v. United States, 276 U.S. 394 (1928):

[I]n carrying out that constitutional division into three branches it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power.

Id. at 406 (quoted with approval in Buckley v. Valeo, supra, 424 U.S. at 121-22). Indeed, as the Court noted in INS v. Chadha, 462 U.S. 919, 951 (1983), "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." The Court most recently reaffirmed these principles in its decision last term in Bowsher v. Synar, \_\_\_ U.S. \_\_\_, 106 S.Ct. 3181 (1986). Here, application of the separation of powers doctrine is, as in the Buckley, Chadha and Bowsher cases, necessary to prevent the Judicial and Legislative Branches from exceeding the outer limits of their constitutionality-defined power.

II.  
PLAINTIFF MEETS THE STANDARDS  
FOR GRANTING A TEMPORARY RESTRAINING ORDER

The standard for the granting of a temporary restraining order was recently reiterated by this Court in Electronic Data Systems Federal Corp. v. General Services Administration, 629 F. Supp. 350, 352 (D.D.C. 1986):

To determine whether a temporary restraining order should issue in this case, the Court must consider (1) the plaintiff's likelihood of prevailing on the merits, (2) whether plaintiff will suffer irreparable injury absent preliminary relief, (3) the possible harm to other interested parties if injunctive relief is granted, and (4) wherein lies the public interest. Virginia Petroleum Jobbers Assoc. v. F.P.C., 259 F.2d 921, 925 (D.C. Cir. 1958). In the context of the limited purpose of a temporary restraining order, the Court's analysis of these factors seeks principally to ensure preservation of the status quo.

See also Washington Metropolitan Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977), Dresser Industries, Inc. v. Baldrige, 549 F. Supp. 108 (D.D.C. 1982); Jews for Urban Justice v. Wilson, 311 F. Supp. 1158 (D.D.C. 1970). Here, each of the relevant factors strongly supports Mr. Deaver's request for a temporary order restraining Mr. Seymour from proceeding further against them pending a hearing on a motion for preliminary injunctive relief.

-           A. This Motion Raises Serious Questions of Constitutional Law

As the discussion in Part II has demonstrated, this action involves important issues of constitutional law, the resolution of which in plaintiffs' favor is commanded by long-established principles of separation of powers that have recently been reaffirmed, in the strongest possible terms, by the United States Supreme Court. This demonstration of probable success on the merits goes far beyond the showing of a "serious question"

that is the minimum required to justify an order preserving the status quo. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., supra, at 844. Where there is such a powerful showing of likely success, a mere possibility of irreparable injury suffices to justify temporary relief. See id. (quoting Charlie's Girls, Inc. v. Revlon, Inc., 483 F.2d 953, 954 (2d Cir. 1973)). In this case, however, we need not rely on a mere possibility of injury; rather, as we demonstrate below, the balance of hardships tilts sharply and decidedly in favor of Mr. Deaver's request for relief.

B. The Balance of Hardships Is Clearly In Plaintiff's Favor.

Little, if any, harm will be inflicted upon Mr. Seymour if he is held in place by a temporary restraining order while these legal issues are adjudicated; if plaintiffs' arguments ultimately do not prevail, Mr. Seymour may simply pick up where he left off in investigating Mr. Deaver and attempting to obtain an indictment against him. Moreover, from the point of view of the public interest, a temporary restraining order is clearly warranted. The public obviously has a strong and compelling interest in the preservation of the constitutionally mandated principle of separation of powers that the plaintiffs seek to vindicate in this action. The public has an equally compelling interest in ensuring that a prosecutor acting without constitutional authority does not fruitlessly expend public resources and fatally taint the case he is seeking to build.

Weighed against these interests, any public interest in avoidance of the delay necessary to allow adjudication of the constitutional issues tendered by the plaintiffs is vanishingly slight.

By contrast, Mr. Deaver will continue to suffer immediate and irreparable harm -- including the continuing destruction of his business, injury to his reputation and dignity, and the expenditure of substantial resources in his defense, <sup>4/</sup> -- unless Mr. Seymour's activities are halted. These injuries, which are attributable to Mr. Seymour's unconstitutional assumption of prosecutorial power, could in no way be redressed through remedies at law even if Mr. Deaver were indicted and tried, for the essence of the injury here is not only that Mr. Deaver may be wrongly accused (an injury that may be remedied through the trial itself), but also that he is being forced to defend himself at the behest of one who has no proper authority to proceed against him at all. Mr. Deaver is legally entitled not to have to answer to Mr. Seymour (or to any indictment he may purport ultimately to obtain from the grand jury), and the only means of protecting this entitlement is an order restraining Mr. Seymour's continuing unconstitutional

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<sup>4/</sup> Significantly, for these purposes, the mere return of an indictment against Mr. Deaver by a grand jury acting at Mr. Seymour's behest will, in and of itself, apparently eliminate forever Mr. Deaver's statutory right to seek reimbursement of the substantial attorney's fees he has incurred as a result of the independent counsel's investigation of him. See 28. U.S.C. § 593(g).

intrusions into Mr. Deaver's personal and business affairs pending the adjudication of the constitutional claims tendered herein. <sup>5/</sup>

Such irreparable injuries may appropriately be remedied through an injunction against criminal prosecution. In Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), for example, the Supreme Court upheld a preliminary injunction preventing enforcement against the plaintiff of an ordinance forbidding topless dancing, on the ground that enforcement of the ordinance would irreparably injure the plaintiff by destroying its business. Id. at 932. Similarly, in Wooley v. Maynard, 430 U.S. 705 (1977), the Court held an injunction against criminal prosecution justified by the effect of the threatened prosecution on the plaintiffs' "ability to perform the ordinary tasks of daily life." Id. at 712. The similarly irreparable impact upon Mr. Deaver and his firm of the ongoing, illegal investigation and the threatened unlawful prosecution by Mr. Seymour justifies equitable relief here as well. <sup>6/</sup> See generally Dombrowski v. Pfister, 380 U.S. 479 (1965); Ex Parte Young, 209 U.S. 714 (1908); Mesa Petroleum Co. v. Cities Service Co., 715 F.2d 1425 (10th Cir. 1983).

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<sup>5/</sup> Cf. Mitchell v. Forsyth, 105 S.Ct. 2806, 2816 (1985) (recognizing that "an entitlement not to stand trial or face the other burdens of litigation" cannot be vindicated if a case is permitted to go to trial).

<sup>6/</sup> It should be emphasized that the injunctions in Wooley and Doran were issued against prosecution by state officials, and thus raised serious federalism concerns that are absent here. If injunctive relief was appropriate even in the face of those concerns, it is all the more appropriate in this case.

It is, of course, true that a plaintiff does not show irreparable injury where it "appear[s] from the record that [he has not] been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith." Younger v. Harris, 401 U.S. 37, 47 (1971) (quoting Douglas v. City of Jeannette, 319 U.S. 157, 164 (1943)) (emphasis added). However, where a plaintiff establishes "irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith," injunctive relief is appropriate. Id. at 48. Here, the plaintiffs face precisely such an injury "above and beyond" that incidental to an ordinary proceeding "brought lawfully and in good faith." The proceedings against Mr. Deaver are in their very essence unlawful, for they have been initiated by one who has no proper authority even to compel a response from Mr. Deaver. It cannot be denied that a citizen may be obliged to suffer the burden of defending himself when he is criminally charged (even though wrongfully charged) by authorities legitimately cloaked with the power to prosecute; but when the prosecutorial function is assumed by one utterly without power to exercise it -- as when such power is exercised in "bad faith" by its legitimate possessors, see id. -- the prosecution itself becomes a legally cognizable injury not remediable through the ordinary trial process, and the "extraordinary circumstances" justifying injunctive relief are present. See id. at 53-54.

C. Factors Normally Necessitating Judicial Restraint Are Absent

The federal courts, while recognizing their own power to issue injunctions against federal criminal investigations and prosecutions, have stressed that the power is a limited one to be exercised only in extraordinary circumstances. See, e.g., Olagues v. Russoniello, 770 F.2d 791, 799-801 (9th Cir. 1985); Reporters Committee for Freedom of the Press v. ATT, 593 F.2d 1030, 1065 (D.C. Cir. 1978) cert. denied, 440 U.S. 949 (1979); Jett v. Castaneda, 578 F.2d 842, 845 (9th Cir. 1978); LaRouche v. Webster, 566 F. Supp. 415, 417 (S.D.N.Y. 1983); Schwartz v. United States Department of Justice, 494 F. Supp. 1268, 1273 (E.D. Pa. 1980); Levinson v. Attorney General, 321 F. Supp. 984 (E.D. Pa. 1970). The rationale for judicial reticence in this area, however, is entirely inapplicable to this case, for the case law makes plain that it is respect for Executive prerogative that is responsible for the general judicial unwillingness to interfere with the exercise of the prosecutorial function. See Reporters Committee for Freedom of the Press v. ATT, supra, 593 F.2d at 1065; accord Olagues v. Russoniello, supra, 770 F.2d at 799-801. Or, as the District Court for the Southern District of New York put it when refusing to enjoin the FBI and the Attorney General from investigating a suspected crime, "The constitutional separation of powers prevents the courts from interfering with the exercise of prosecutorial discretion except under the rarest of circumstances." LaRouche v. Webster, 566 F. Supp. at 417.

In the present case, the equitable relief sought by plaintiffs would not constitute an interference with Executive prerogatives; rather, it would vindicate the Executive Branch's exclusive authority to investigate and prosecute crime. Thus, the separation of powers concerns that ordinarily counsel restraint when a plaintiff seeks to enjoin a federal criminal investigation or prosecution actually support plaintiffs' prayer for relief. Redressing the irreparable injury to Mr. Deaver and restoring the system of separation of powers are objectives that go hand in hand.

CONCLUSION

For all of the above reasons, plaintiffs' Application  
For a Temporary Restraining Order should be granted.

Respectfully submitted,



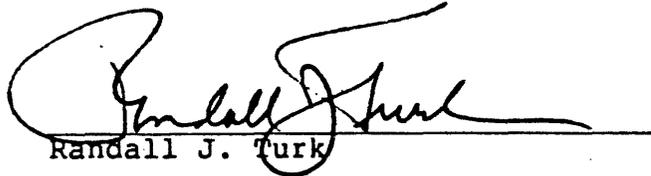
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Dated: February 25, 1987

CERTIFICATE OF COUNSEL

Pursuant to Local Rule 205(a), undersigned counsel hereby certifies that he has this 25th day of February, 1987, provided the defendant with actual notice of the time of making the Application for a temporary restraining order and with copies of all pleadings and papers filed in the action to date, including the foregoing Application For A Temporary Restraining Order and the accompanying Memorandum in support thereof. The above information and materials were supplied to the defendant by hand at his office, Suite 6400, United States Courthouse, One Marshall Place, Washington, D.C., 20001. Undersigned counsel also certifies that he will immediately advise defendant by telephone of the hour and location of the hearing to be held on Plaintiff's Application.

  
Randall J. Turk