Morrison v. Olson

487 U.S. 654 (1988)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents us with a challenge to the independent counsel provisions of the Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591 *et seq.* We hold today that these provisions of the Act do not violate the Appointments Clause of the Constitution, Art. II, § 2, cl. 2, or the limitations of Article III, nor do they impermissibly interfere with the President's authority under Article II in violation of the constitutional principle of separation of powers.

I

Briefly stated, Title VI of the Ethics in Government Act allows for the appointment of an "independent counsel" to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws. The Act requires the Attorney General, upon receipt of information that he determines is "sufficient to constitute grounds to investigate whether any person [covered by the Act] may have violated any Federal criminal law," to conduct a preliminary investigation of the matter. When the Attorney General has completed this investigation, or 90 days has elapsed, he is required to report to a special court (the Special Division) created by the Act "for the purpose of appointing independent counsels." 28 U. S. C. § 49.[3] If the Attorney General determines that "there are no reasonable grounds to believe that further investigation is warranted," then he must notify the Special Division of this result. In such a case, "the division of the court shall have no power to appoint an independent counsel." § 592(b)(1). If, however, the Attorney General has determined that there are "reasonable grounds to believe that further investigation or prosecution is warranted," then he "shall apply to the division of the court for the appointment of an independent counsel." *** Upon receiving this application, the Special Division "shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction." § 593(b).

With respect to all matters within the independent counsel's jurisdiction, the Act grants the counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice." § 594(a). The functions of the independent counsel include conducting grand jury proceedings and other investigations, participating in civil and criminal court proceedings and litigation, and appealing any decision in any case in which the counsel participates in an official capacity. §§ 594(a)(1)-(3). Under § 594(a)(9), the counsel's powers include "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." ***

Two statutory provisions govern the length of an independent counsel's tenure in office. The first defines the procedure for removing an independent counsel. Section 596(a)(1) provides:

"An independent counsel appointed under

[3] The Special Division is a division of the United States Court of Appeals for the District of Columbia Circuit. 28 U. S. C. § 49 (1982 ed., Supp. V). The court consists of three circuit court judges or justices appointed by the Chief Justice of the United States. ***

> this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."

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The other provision governing the tenure of the independent counsel defines the procedures for "terminating" the counsel's office. Under § 596(b)(1), the office of an independent counsel terminates when he or she notifies the Attorney General that he or she has completed or substantially completed any investigations or prosecutions undertaken pursuant to the Act.

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The proceedings in this case provide an example of how the Act works in practice. In 1982, two Subcommittees of the House of Representatives issued subpoenas directing the Environmental Protection Agency (EPA) to produce certain documents relating to the efforts of the EPA and the Land and Natural Resources Division of the Justice Department to enforce the "Superfund Law." At that time, appellee Olson was the Assistant Attorney General for the Office of Legal Counsel (OLC), appellee Schmults was Deputy Attorney General, and appellee Dinkins was the Assistant Attorney General for the Land and Natural Resources Division. [Citing executive privilege, the Executive Branch withheld the documents. This prompted a lawsuit. The case was resolved when the Administration decided to give the House limited access to the documents.]

The following year, the House Judiciary Committee began an investigation into the Justice Department's role in the controversy over the EPA documents. During this investigation, appellee Olson testified before a House Subcommittee on March 10, 1983. Both before and after that testimony, the Department complied with several Committee requests to produce certain documents. Other documents were at first withheld, although these documents were eventually disclosed by the Department after the Committee learned of their existence. In 1985, the majority members of the Judiciary Committee published a lengthy report on the Committee's investigation. *** The report not only criticized various officials in the Department of Justice for their role in the EPA executive privilege dispute, but it also suggested that appellee Olson had given false and misleading testimony to the Subcommittee on March 10, 1983, and that appellees Schmults and Dinkins had wrongfully withheld certain documents from the Committee, thus obstructing the Committee's investigation. The Chairman of the Judiciary Committee forwarded a copy of the report to the Attorney General with a request, pursuant to 28 U. S. C. § 592(c), that he seek the appointment of an independent counsel to investigate the allegations against Olson, Schmults, and Dinkins.

The Attorney General [investigated and then applied] to the Special Division for the appointment of an independent counsel ***. [O]n May 29, 1986, the Division appointed appellant Morrison ***.

*** [I]n May and June 1987, appellant caused a grand jury to issue and serve subpoenas *ad testificandum* and *duces tecum* on appellees. All three appellees moved to quash the subpoenas, claiming, among other things, that the independent counsel provisions of the Act

were unconstitutional and that appellant accordingly had no authority to proceed.

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III

[The Court first held that the independent counsel is an "inferior officer," rather than a principal officer, for purposes of Article II, § 2. In making that determination, the Court applied an analysis that it has since abandoned. Today, under *Edmond v. United States*, 520 U.S. 651 (1997), the Court would simply ask whether the person reports to someone other than the President. (That's the question that Justice Scalia proposed here in his *Morrison v. Olson* dissent.) If he or she does report to someone other than the President, and if he or she is indeed an officer and not a mere employee, then he or she is an inferior officer. That analysis would lead to the same conclusion that the Court reached here regarding Alexia Morrison—she was an inferior officer.]

IV

[The Court then held that Article III does not bar federal judges from selecting the independent counsel.]

V

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

A

Two Terms ago we had occasion to consider whether it was consistent with the separation of powers for Congress to pass a statute that authorized a Government official who is removable only by Congress to participate in what we found to be "executive powers." *Bowsher* v. *Synar*, 478 U.S. 714, 730 (1986). We held in *Bowsher* that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment." *Id.* at 726. A primary antecedent for this ruling was our 1926 decision in *Myers* v. *United States*, 272 U.S. 52. *Myers* had considered the propriety of a federal statute by which certain postmasters of the United States could be removed by the President only "by and with the advice and consent of the Senate." There too, Congress' attempt to involve itself in the removal of an executive official was found to be sufficient grounds to render the statute invalid. As we observed in *Bowsher*, the essence of the decision in *Myers* was the judgment that the Constitution prevents Congress from "draw[ing] to itself . . . the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of the [Appointments Clause] and to infringe the constitutional principle of the separation of governmental powers." *Myers, supra*, at 161.

Unlike both *Bowsher* and *Myers*, this case does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction. The Act instead puts the removal power squarely in the hands of the Executive Branch; an independent counsel may be

removed from office, "only by the personal action of the Attorney General, and only for good cause." § 596(a)(1).[23] *** In our view, the removal provisions of the Act make this case more analogous to *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), and *Wiener* v. *United States*, 357 U.S. 349 (1958), than to *Myers* or *Bowsher*.

In *Humphrey's Executor*, the issue was whether a statute restricting the President's power to remove the Commissioners of the Federal Trade Commission (FTC) only for "inefficiency, neglect of duty, or malfeasance in office" was consistent with the Constitution. 295 U.S. at 619. We stated that whether Congress can "condition the [President's power of removal] by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office." *Id.* at 631. Contrary to the implication of some dicta in *Myers*, the President's power to remove Government officials simply was not "all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution." 295 U.S. at 629. At least in regard to "quasi-legislative" and "quasi-judicial" agencies such as the FTC, "[t]he authority of Congress, in creating [such] agencies, to require them to act in discharge of their duties independently of executive control . . . includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime." *Ibid.* In *Humphrey's Executor*, we found it "plain" that the Constitution did not give the President "illimitable power of removal" over the officers of independent agencies. *Ibid.* Were the President to have the power to remove FTC Commissioners at will, the "coercive influence" of the removal power would "threate[n] the independence of [the] commission." *Id.* at 630.

Similarly, in *Wiener* we considered whether the President had unfettered discretion to remove a member of the War Claims Commission, which had been established by Congress in the War Claims Act of 1948, 62 Stat. 1240. The Commission's function was to receive and adjudicate certain claims for compensation from those who had suffered personal injury or property damage at the hands of the enemy during World War II. Commissioners were appointed by the President, with the advice and consent of the Senate, but the statute made no provision for the removal of officers, perhaps because the Commission itself was to have a limited existence. As in *Humphrey's Executor*, however, the Commissioners were entrusted by Congress with adjudicatory powers that were to be exercised free from executive control. In this context, "Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing." 357 U.S. at 356. Accordingly, we rejected the President's attempt to remove a Commissioner "merely because he wanted his own appointees on [the] Commission," stating that "no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute." *Ibid.*

Appellees contend that *Humphrey's Executor* and *Wiener* are distinguishable from this case because they did not involve officials who performed a "core executive function." They argue that our decision in *Humphrey's Executor*

[23] As noted, an independent counsel may also be removed through impeachment and conviction. In addition, the Attorney General may remove a counsel for "physical disability, mental incapacity, or any other condition that substantially impairs the performance" of his or her duties. § 596(a)(1).

rests on a distinction between "purely executive" officials and officials who exercise "quasi-legislative" and "quasi-judicial" powers. In their view, when a "purely executive" official is involved, the governing precedent is *Myers*, not *Humphrey's Executor*. See *Humphrey's Executor, supra*, at 628. And, under *Myers*, the President must have absolute discretion to discharge "purely" executive officials at will. See *Myers*, 272 U.S. at 132-34.

We undoubtedly did rely on the terms "quasi-legislative" and "quasi-judicial" to distinguish the officials involved in *Humphrey's Executor* and *Wiener* from those in *Myers*, but our present considered view is that the determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as "purely executive." The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II. *Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some "purely executive" officials who must be removable by the President at will if he is to be able to accomplish his constitutional role. See 272 U.S. at 132-34. But as the Court noted in *Wiener*:

> "The assumption was short-lived that the *Myers* case recognized the President's inherent constitutional power to remove officials no matter what the relation of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure." 357 U.S., at 352.

At the other end of the spectrum from *Myers*, the characterization of the agencies in *Humphrey's Executor* and *Wiener* as "quasi-legislative" or "quasi-judicial" in large part reflected our judgment that it was not essential to the President's proper execution of his Article II powers that these agencies be headed up by individuals who were removable at will.[30] We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.

Considering for the moment the "good cause" removal provision in isolation from the other parts of the Act at issue in this case, we cannot say that the imposition of a "good cause" standard for removal by itself unduly trammels on executive authority. There is no real dispute that the functions performed by the independent counsel are "executive" in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch. As we noted above, however, the independent counsel is an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative

[30] The terms also may be used to describe the circumstances in which Congress might be more inclined to find that a degree of independence from the Executive, such as that afforded by a "good cause" removal standard, is necessary to the proper functioning of the agency or official. It is not difficult to imagine situations in which Congress might desire that an official performing "quasi-judicial" functions, for example, would be free of executive or political control.

authority. Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.

Nor do we think that the "good cause" removal provision at issue here impermissibly burdens the President's power to control or supervise the independent counsel, as an executive official, in the execution of his or her duties under the Act. This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the "faithful execution" of the laws. Rather, because the independent counsel may be terminated for "good cause," the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act. Although we need not decide in this case exactly what is encompassed within the term "good cause" under the Act, the legislative history of the removal provision also makes clear that the Attorney General may remove an independent counsel for "misconduct." See H. R. Conf. Rep. No. 100-452, p. 37 (1987). Here, as with the provision of the Act conferring the appointment authority of the independent counsel on the special court, the congressional determination to limit the removal power of the Attorney General was essential, in the view of Congress, to establish the necessary independence of the office. We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.

B

The final question to be addressed is whether the Act, taken as a whole, violates the principle of separation of powers by unduly interfering with the role of the Executive Branch. Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches. *** As we stated in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Id.* at 122. We have not hesitated to invalidate provisions of law which violate this principle. See *id.* at 123. On the other hand, we have never held that the Constitution requires that the three branches of Government "operate with absolute independence." *United States* v. *Nixon*, 418 U.S., at 707 ***. In the often-quoted words of Justice Jackson:

> "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (concurring opinion).

We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch. *** Unlike some of our previous cases, most recently *Bowsher* v. *Synar*, this case simply does not pose a "dange[r] of congressional

usurpation of Executive Branch functions." 478 U.S. at 727; see also *INS* v. *Chadha*, 462 U.S. 919, 958 (1983). Indeed, with the exception of the power of impeachment -- which applies to all officers of the United States -- Congress retained for itself no powers of control or supervision over an independent counsel. ***

Similarly, we do not think that the Act works any *judicial* usurpation of properly executive functions. As should be apparent from our discussion of the Appointments Clause above, the power to appoint inferior officers such as independent counsel is not in itself an "executive" function in the constitutional sense, at least when Congress has exercised its power to vest the appointment of an inferior office in the "courts of Law." ***

Finally, we do not think that the Act "impermissibly undermine[s]" the powers of the Executive Branch, *Schor, supra*, at 856, or "disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions," *Nixon* v. *Administrator of General Services, supra*, at 443. It is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity. *** Nonetheless, the Act does give the Attorney General several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel. Most importantly, the Attorney General retains the power to remove the counsel for "good cause," a power that we have already concluded provides the Executive with substantial ability to ensure that the laws are "faithfully executed" by an independent counsel. No independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request appointment if he finds "no reasonable grounds to believe that further investigation is warranted" is committed to his unreviewable discretion. ***

VI

In sum, we conclude today that it does not violate the Appointments Clause for Congress to vest the appointment of independent counsel in the Special Division; that the powers exercised by the Special Division under the Act do not violate Article III; and that the Act does not violate the separation-of-powers principle by impermissibly interfering with the functions of the Executive Branch. The decision of the Court of Appeals is therefore

Reversed.

JUSTICE SCALIA, dissenting.

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Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

IV

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Since our 1935 decision in *Humphrey's Executor* v. *United States*, 295 U.S. 602 -- which was considered by many at the time the product of an activist, anti-New Deal Court bent on reducing the power of President Franklin Roosevelt -- it has been established that the line of permissible restriction upon removal of

principal officers lies at the point at which the powers exercised by those officers are no longer purely executive. Thus, removal restrictions have been generally regarded as lawful for so-called "independent regulatory agencies," such as the Federal Trade Commission, see *ibid.*; 15 U.S.C. § 41, the Interstate Commerce Commission, see 49 U.S.C. § 10301(c) (1982 ed., Supp. IV), and the Consumer Product Safety Commission, see 15 U.S.C. § 2053(a), which engage substantially in what has been called the "quasi-legislative activity" of rulemaking, and for members of Article I courts, such as the Court of Military Appeals, see 10 U.S.C. § 867(a)(2), who engage in the "quasi-judicial" function of adjudication. It has often been observed, correctly in my view, that the line between "purely executive" functions and "quasi-legislative" or "quasi-judicial" functions is not a clear one or even a rational one. See *Bowsher* v. *Synar*, 478 U.S. 714, 761, n. 3 (1986) (WHITE, J., dissenting); *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting). But at least it permitted the identification of certain officers, and certain agencies, whose functions were entirely within the control of the President. Congress had to be aware of that restriction in its legislation. Today, however, *Humphrey's Executor* is swept into the dustbin of repudiated constitutional principles. "[O]ur present considered view," the Court says, "is that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'" What *Humphrey's Executor* (and presumably *Myers*) really means, we are now told, is not that there are any "rigid categories of those officials who may or may not be removed at will by the President," but simply that Congress cannot "interefere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed.'"

One can hardly grieve for the shoddy treatment given today to *Humphrey's Executor*, which, after all, accorded the same indignity (with much less justification) to Chief Justice Taft's opinion 10 years earlier in *Myers* v. *United States*, 272 U.S. 52 (1926) -- gutting, in six quick pages devoid of textual or historical precedent for the novel principle it set forth, a carefully researched and reasoned 70-page opinion. It is in fact comforting to witness the reality that he who lives by the *ipse dixit* dies by the *ipse dixit*. But one must grieve for the Constitution. *Humphrey's Executor* at least had the decency formally to observe the constitutional principle that the President had to be the repository of *all* executive power, see 295 U.S., at 627-28, which, as *Myers* carefully explained, necessarily means that he must be able to discharge those who do not perform executive functions according to his liking. As we noted in *Bowsher*, once an officer is appointed "'it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.'" 478 U.S. at 726, quoting *Synar* v. *United States*, 626 F. Supp. 1374, 1401 (DC 1986) (Scalia, Johnson, and Gasch, JJ.). By contrast, "our present considered view" is simply that *any* executive officer's removal can be restricted, so long as the President remains "able to accomplish his constitutional role." There are now no lines. If the removal of a prosecutor, the virtual embodiment of the power to "take care that the laws be faithfully executed," can be restricted, what officer's removal cannot? This is an open invitation for Congress to experiment. What about a special Assistant Secretary of State, with responsibility for one very narrow area of

foreign policy, who would not only have to be confirmed by the Senate but could also be removed only pursuant to certain carefully designed restrictions? Could this possibly render the President "[un]able to accomplish his constitutional role"? Or a special Assistant Secretary of Defense for Procurement? The possibilities are endless, and the Court does not understand what the separation of powers, what "[a]mbition . . . counteract[ing] ambition," Federalist No. 51, p. 322 (Madison), is all about, if it does not expect Congress to try them. As far as I can discern from the Court's opinion, it is now open season upon the President's removal power for all executive officers, with not even the superficially principled restriction of *Humphrey's Executor* as cover. The Court essentially says to the President: "Trust us. We will make sure that you are able to accomplish your constitutional role." I think the Constitution gives the President -- and the people -- more protection than that.

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The notion that every violation of law should be prosecuted, including -- indeed, *especially* -- every violation by those in high places, is an attractive one, and it would be risky to argue in an election campaign that that is not an absolutely overriding value. *Fiat justitia, ruat coelum*. Let justice be done, though the heavens may fall. The reality is, however, that it is not an absolutely overriding value, and it was with the hope that we would be able to acknowledge and apply such realities that the Constitution spared us, by life tenure, the necessity of election campaigns. I cannot imagine that there are not many thoughtful men and women in Congress who realize that the benefits of this legislation are far outweighed by its harmful effect upon our system of government, and even upon the nature of justice received by those men and women who agree to serve in the Executive Branch. But it is difficult to vote not to enact, and even more difficult to vote to repeal, a statute called, appropriately enough, the Ethics in Government Act. If Congress is controlled by the party other than the one to which the President belongs, it has little incentive to repeal it; if it is controlled by the same party, it dare not. By its shortsighted action today, I fear the Court has permanently encumbered the Republic with an institution that will do it great harm.

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The ad hoc approach to constitutional adjudication has real attraction, even apart from its work-saving potential. It is guaranteed to produce a result, in every case, that will make a majority of the Court happy with the law. The law is, by definition, precisely what the majority thinks, taking all things into account, it *ought* to be. I prefer to rely upon the judgment of the wise men who constructed our system, and of the people who approved it, and of two centuries of history that have shown it to be sound. Like it or not, that judgment says, quite plainly, that "[t]he executive Power shall be vested in a President of the United States."