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The Independent Counsel in Violation of
Separation of Powers

A Thesis
submitted in partial fulfillment of the requirements
for the degree of
Bachelor of Arts in Liberal Studies

By

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Abstract

Constitutions have been the basis of national legal systems for centuries. Governments of nations have held that any act of the legislature repugnant to that constitution is void. Historically the framers of the United States' Constitution have agreed to a set of rules that provides for a balance of powers among the three branches of government which guarantees individual liberty. Today, the Independent Counsel Provision enacted by the legislature provides for an imbalance of powers by taking some power from the Presidency.

The Independent Counsel Provision violates the separation of powers. It is repugnant to the Constitution and therefore is void. It is incumbent upon the Presidential veto and Congressional elimination of the act to ensure that America is governed by the Supreme Law of the land so liberty and Democracy remain open for all.
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CHAPTER I

INTRODUCTION

First, Congress has reestablished the independent counsel statute that expired in December 1992, which states that there is a conflict of interest in the Executive Branch when it investigates its own high ranking officials. The Office of Independent Counsel may have served a needed purpose and may be a very efficient way of checking up on public officials in regard to executive malfeasance, but the office is out of the web of accountability. This is especially true as the Counsel relates to the Executive Branch which is constitutionally responsible for the execution and enforcement of the laws. In other words, the Independent Counsel has power without accountability, which puts him in violation of the separation of powers. Therefore, he is going to affect those checks and balances which are in the Constitution to provide for separation of powers. This office, in its independence, can create a good deal of havoc in the system—especially for the President.

Second, Stephen A. Wolf, Assistant Professor of Political Science, Buena Vista College, in In the
Pursuit of Power without Accountability: How the Independent Counsel Statute Is Designed and Used to Undermine the Energy and Independence of the Presidency, South Dakota Law Review [Vol. 35] claims "the independent counsel statute is designed by Congress to be used to undermine the energy and independence of the Executive" (pp. 1-4). The energy and independence of the executive is undermined by Congress because of the independent counsel's office. In the U.S. Supreme Court case of Morrison vs. Olson, U.S. Supreme Court Reports, 101 L Ed 2d 569, Justice Antonio Scalia argues in his dissent that, "Congress ... besides weakening the president by reducing the 'zeal' of his staff, 'enfeebles' him more directly by 'eroding' his public support" (p. 620). In plain words, this means that Congress can weaken the executive by using the independent counsel to prosecute high ranking officials in the executive branch. The independent counsel is not supervised by the executive branch; therefore, he can choose whom he wants to investigate and so tear apart the zeal or enthusiasm of the Presidency. Besides weakening the President's staff, Congress can "enfeeble" the President more
directly by breaking down his public support. The independent counsel can make long and lengthy investigations which in due time reduce the President's public opinion ratings. The President must put a "high premium" on public opinion because he depends upon the people for his support.

Third, Congress is undermining the energy and independence of the President. Justice Scalia writes, "The courts are specifically prevented from reviewing the Attorney General's decision not to seek appointment. Yes, but Congress is not prevented from reviewing it. The context of this statute is acrid with the smell of threatened impeachment" (Op. Cit. Morrison vs. Olson p. 613). The majority's opinion in the Morrison case supports the fact that the courts are prevented from reviewing the Attorney General's decision of whether he wants to seek the appointment of an independent counsel or not. But, the Congress can review the Attorney General's decision. Scalia's point is that a request for an independent counsel has come from Congress, and the Attorney General must explain to Congress why, if he decides not to ask for the appointment of an independent counsel. In other words,
the independent counsel must report to Congress information that may "constitute" grounds to impeach select members of the executive branch.

Finally, Congress's threat to impeach the executive puts it in violation of the Constitution. Congress, by its use of the independent counsel's office as a threat to impeach the President is in violation of the Constitution because the lack of accountability for an independent counsel provides for an imbalance of powers in the government. The Constitution provides for separation of powers between the three branches of government. The independent counsel who has power and is without accountability can affect those checks and balances which are put in the Constitution to provide for separation of powers. Separation of powers in our government provides for a balance of powers.

The significance of my argument is that the independent counsel statute poses a threat to American democracy and liberty. The lack of accountability for an independent counsel allows for an imbalance of powers in the government. For example, Professor Wolf warns that:
If a single individual were to assume power to enact the law and enforce it, tyranny would be the result. Alternatively, if a large body such as Congress were to assume the power to enforce the law, weakness and anarchy would be the result. (Op. Cit. Independent Counsel p. 3)

In other words, the lack of balance of powers in the Constitution would produce bad government.

A veto helps maintain the separation of powers and checks and balances; in my opinion, the president should have used his veto power to discourage the renewal of the independent counsel statute in 1994. Since the beginning of the independent counsel statute, very few presidents have exercised their veto power to provide for the Executive Branch’s defense so it may remain equal in power with the Congressional Branch.

In other words, as Alexander Hamilton notes in Federalist No. 73, "... the presidential veto is a constitutional means and a personal motive given to the Executive to resist the encroachments of the other branches" (Carey & McClellan, p. 379).

Since President Bill Clinton did not veto the 1994 enactment of the independent counsel statute, Congress needs to consider not reauthorizing it the next time.
As Terry Eastland argues in his recent book *Ethics, Politics and the Independent Counsel*, "The Framers made it hard to dislodge a President, and it should be hard. The process should force deliberation, and it should be a public deliberation, not one inside the office of some court-appointed independent counsel" (p. 136). Therefore, Congress should do away with the independent counsel statute. Executive malfeasance should be prosecuted by the traditional means of the appointment of special prosecutors appointed by the President, i.e. the Executive Branch should be totally responsible for the enforcement of the law.

In this paper, I will examine the means by which the independent counsel statute has become a violation of separations of powers. In the next chapter, I will analyze how the independent counsel statute came about in Watergate. In the third chapter, I will explain the principle of separation of powers and how it is being violated by the independent counsel statute. In the fourth chapter, I will show that it is the President's fault that the statute has become as powerful as it is now, and I will offer some reasons why the President should have opposed the reauthorization of the statute.
by the use of his veto power. Finally, I will offer some suggestions as to what Congress should do about the independent counsel statute; (1) Congress must stop all legislation that provides for the independent counsel statute; (2) Congress must realize that the Executive Branch is totally responsible for the enforcement of the law; and any other branch that takes that power away from the President violates the Constitution's Separation of Powers; (3) Congress must remember Watergate and Teapot Dome. The "traditional" means of due process, deliberation and public opinion as a means of prosecuting executive malfeasance worked. The Framers were aware of executive malfeasance but they did not want to make it so easy to bring down a President.

The independent counsel should not have been reauthorized in 1994 because the independent counsel has power without accountability, which puts the counsel in direct violation of separation of powers. The office is designed by Congress to be used to undermine the energy and independence of the Executive which imposes a threat of impeachment to the
Presidency—to "threaten impeachment" is in violation of the Constitution.
CHAPTER II

THE ORIGIN OF THE INDEPENDENT COUNSEL STATUTE

History of Other Countries

First, before I venture into the heart of my main discussion of the "Independent Counsel," I would like to touch briefly upon some history concerning the functions of the executive and legislative branches of other countries and examine how their traditional ways and means of responding to allegations of malfeasance by high officials are employed.

The reference material that forms my discussion which follows is a working paper titled The Written Views of Reform of the Law Reform Commission of Canada [Vol.62] which when it is completed will be published for the public's review and comment. The Commission's final views will be presented to the Minister of Justice and Parliament when the Commission has considered public comments. The Commission consists of Mr. Justice Allen M. Linden, President of the Commission, et. al.

The Commission first described the role of the Attorney General
whose task of running the prosecution service has great potential for conflict of interest. Situations have arisen on many occasions, such as the resignation of British Columbia’s Attorney General, --in which the need to have someone act independently and free of political pressure or other conflicts has been made apparent. (Controlling Criminal Prosecutions, The Attorney General and the Crown Prosecutor pp. 1-2)

The above footnote raises the matter of B.C.’s Attorney General, Brian Smith, who resigned in 1988 because he thought the Cabinet had attempted to interfere with his investigation by directing him where to lay charges. Brian Smith firmly believed that he should be independent in making decisions regarding charges.

The Canadian response to executive and high official criminal prosecutions is similar to that in the United States, i.e., it is essential that a person of integrity be appointed to the position of Attorney General, because the running of the prosecution service is a task with a great potential for conflict of interest among members of the executive branch who are of the same political party and have common goals and interests. When one member who has the same goals and
interests as his partner suddenly has to investigate or prosecute his partner, there can arise partisanship in criminal prosecutions.

The Commission spoke briefly about the history of Canada's prosecutorial institution which was based upon England's:

In the earliest times the "King's Attorney," or Attorney General, was merely the barrister [British trial lawyer] entrusted with supervision of the King's legal interests throughout the country.... During the sixteenth century ... the Crown, through its personal representative, on occasion instituted and conducted proceedings. Since most prosecutions were nominally in the name of the Sovereign, the Crown had the right, through its representative, to terminate the proceedings prior to completion.... The two most important powers of the Attorney General in England ... were the right to initiate and to terminate prosecutions. (Op. Cit. Controlling Criminal Prosecutions p. 3)

Historically, Canada's Office of Attorney General, has had the same powers and duties as the Attorney General of England. Through conferences, Canada has exchanged views with England that have helped to shape the powers and duties of Canada's present Attorney General.
Dating back to the sixteenth century in England, the King entrusted his representative with the oversight of his legal affairs. The powers and duties of the Attorney General of England in the sixteenth century were almost the same as the Attorney General's of Canada today. The Crown through his representative, the Attorney General, could initiate or terminate prosecutions.

Here again, we see a similarity between the powers of the Attorneys General of the United States, England, and Canada. Attorneys General in the U.S. have the power and duty to initiate and terminate prosecutions within the Justice Department.

These important powers exercised by the Attorneys General demonstrate the importance of the Executive Branch in the execution of the laws. This idea of criminal prosecution sheds light on the fact that if the President through the Justice Department is responsible for the execution of the laws, the power to initiate and terminate criminal prosecutions by the Attorney General should not be subjected to some outside and unaccountable office such as the Independent Counsel. "Unaccountable" means that
another office, not at all affiliated with the Attorney General, can come into the Attorney General's office and reduce his power to initiate and terminate criminal prosecutions.

The major difference between the United States Government's Executive Branch and Canada's Executive Branch, in regard to criminal investigations and prosecutions, is that the functions assigned to the Attorney General in Canada remain today as they were in 1868 (with the exception of a few minor changes). Around 1863-68 Canada adopted law enforcement systems similar to those of the U.S. In contrast, our Congress has created an independent counsel working outside of the Executive Branch and reducing the two most important powers of the Attorney General--the right to initiate and terminate prosecutions.

In regard to institutional arrangements concerning the responsibilities of the Canadian Attorney General and Director of Public Prosecutions, the Commission, Controlling Criminal Prosecutions [Vol. 62] writes:

Formal responsibility for criminal prosecutions is given to the Attorney General, who has the power to take over private prosecutions, and to terminate them.... The Attorney General is not a member of
The relationship between the Cabinet and the Attorney General in England is based upon an understanding that the formal responsibility for criminal prosecutions belongs to the Attorney General. The Attorney General is not a member of the Cabinet and must not be directed by the Cabinet in making his decisions about prosecutions. The United States can appoint an independent counsel not supervised by the Attorney General to conduct investigations and prosecutions within the executive branch.

The Commission explains the understanding between the Cabinet and the Attorney General in making decisions about prosecutions:

The independence of Crown counsel from political influence is protected for the most part, but nevertheless significantly, by tradition ... the Attorney General will not act from partisan political motives, and the Cabinet will not attempt to dictate the appropriate course of action to the Attorney General. (Op. Cit. Controlling Criminal Prosecutions pp. 43-44)
The independence of England’s Attorney General from political influence is also protected by tradition. The actual prosecutors working under the Attorney General are protected by the supervision of the Director of Public Prosecutions. It is understood that the Attorney General will not, under normal conditions, interfere with the Director of Public Prosecutions in his supervision over the actual prosecutors. If the Attorney General has to interfere with the prosecutors then it is understood that the Attorney General will not act from partisan or political motives, and that the Cabinet will not influence the Attorney General in his interference.

The significance that tradition plays in protecting the Attorney General and his staff from political interference is that there has never been an incident when the Cabinet or the legislature has criticized an English Attorney General on his decision to prosecute or not causing him to be dismissed or to resign. The Attorney General has no obligation to report to the Cabinet or the legislature. The Attorney General is accountable to the Prime Minister of Canada; however, the Independent Counsel is not accountable to
the President of the United States (Law Reform Commission, *Controlling Criminal Prosecutions* [Vol. 62]
Stenning, footnote p. 44).

This means not that the Cabinet or the public has such distrust in its Justice Department that they might believe there is a conflict of interest when the Justice Department does a private investigation or when it investigates itself. Instead, tradition is followed. England follows the same system, custom, and belief that the Crown and its staff should be independent and totally responsible for the enforcement of the law. The people trust that the Attorney General's integrity allows him to act free from partisan political motives, and that the Cabinet will not dictate courses of action to the Attorney General.

The Commission made the following points about public opinion being the final authority and the measure of accountability that keeps the Attorney General and his subordinates honest in their law enforcement:

... the distinction between partisan and non-partisan political considerations cannot always be drawn clearly. In such circumstances, public opinion must act as the ... measure of
accountability that one has acted [High executive officials] ... in the public interest. (Op. Cit. Controlling Criminal Prosecutions p. 53)

The distinction between partisan and non-partisan political considerations cannot always be drawn clearly in a Justice Department that is responsible for the execution of the laws, especially when it is responsible for investigating itself. In other words, it is hard to tell whether fairness and honesty are given consideration when one political party must investigate a member of that same party.

The importance of any institutional system is that if public officials fail to perform their duties with integrity and uprightness, the system must be able to bring these to light. In other words, public officials are dependent on the people and responsible for their actions. Any neglect or malfeasance on their part will come to the public view and public criticism keeps the parties accountable. In the next section on Watergate I will give some examples of how public opinion worked to keep the special prosecutors investigating President Nixon accountable.

The Independent Counsel: A "Child" of Watergate
"Watergate" refers to the incident on June 17, 1972 when five men burglarized the Democratic national headquarters of the Watergate apartment complex in Washington, D.C.

Terry Eastland, author and political commentator, describes the investigation and prosecution of the Watergate Scandal in three phases. The first phase begins in June 1972 and ends in March of 1973. In the first phase of Watergate came the first "response" to the investigation and prosecution of the scandal from the United States Justice Department and Congress. The Executive Branch had already begun its investigation, while Congress was just beginning to establish the Watergate Committee (Op. Cit. Independent Counsel p. 17).

The second phase took place beginning March 23 and ended the latter part of October when Watergate defendant, James McCord, gave court testimony of a possible cover-up in the Watergate scandal. The cover-up described by McCord revealed that more than the seven accused were involved in the scandal, and that the culprits included high public officials. McCord's testimony led Congress to believe that someone outside
of the Justice Department (Special Prosecutor) should enter the investigation (Eastland, *Independent Counsel* pp. 17-18).

On April 30, 1973 Attorney General Richard G. Kleindienst resigned. Nixon replaced Kleindienst with Defense Secretary Elliot J. Richardson. Then Richardson appointed former Solicitor General Archibald Cox as special prosecutor to investigate the Justice Department (Op. Cit. p. 18). The same day Congress began its investigation and discovered that White House Counsel John Dean and the President were involved in the cover-up--that Nixon had in his possession tape recorded conversations that could verify it (Eastland, *Independent Counsel* p. 18).

Later that summer, Special Prosecutor Cox and Congress pursued the White House tapes. Nixon refused to give up the tapes but he offered summary transcript of them, which Cox rejected (Op. Cit. p. 19).

The "Saturday Night Massacre" brought about the third phase of the "response". The "Saturday Night Massacre," so named by the media, made the Executive Branch look scandalous in its investigation: President Nixon ordered Attorney General Richardson to fire
Archibald Cox. Richardson refused and resigned, and his Deputy, William Ruckelshaus also refused to fire Cox, and he was fired (Eastland, Independent Counsel p. 19). Then came Solicitor General Robert Bork who obeyed the President and fired Archibald Cox (Op. Cit. p. 19).

Leon Jaworski succeeded Cox as Justice Department Special Prosecutor without a conflict of interest (Nixon did not attempt to stop Jaworski’s investigation). The President released the tape transcripts, and on August 8 resigned (Eastland, Independent Counsel p. 19).

As a result of "Watergate" and the "Saturday Night Massacre," Eastland made the following observations

... Watergate ... resulted in the first-ever resignation of a President of the United States. Watergate also paved the way for the enactment of the special prosecutor law in 1978. (Op. Cit. Independent Counsel p. 17)

... It is enough to warrant two observations. The first is that the traditional means of responding to allegations of executive misconduct were employed in Watergate. The second is this: The traditional means worked. (Independent Counsel p. 19)
The traditional ways and means of responding to allegations of executive criminal conduct means that the Executive Branch (President, Attorney General, and Special Prosecutors) was solely responsible for the enforcement of the law, not some independent counsel. President Nixon, through his Attorney General or representative, appointed and terminated special prosecutors as he saw need, not some independent counsel.

The traditional means worked because Due Process and deliberation took place in the way the executive branch investigated itself. The President tried to cover up criminal evidence within the executive branch by terminating some special prosecutors, but public pressure caused him to step aside and let the investigation continue. The end resulted in President Nixon's resignation.

Watergate was the first time in American history in which an investigation resulted in the resignation of a President of the United States. Watergate also gave birth to Congressional enactments which led to the special prosecutor law in 1978, and the special prosecutor law evolved and matured into the
"Independent Counsel Provision." In other words, before Watergate, except for the Teapot Dome Affair in 1924, there had never been any serious concerns from Congress concerning institutional change to strengthen law enforcement.

The "Saturday Night Massacre" (Cox's termination) was the precipitator that gave serious concerns to Congress to implement provisions for "institutional" change. Eastland points out that "... it was in the wake of that firing that the first-ever bills calling for a court-appointed special prosecutor were introduced into Congress (Op. Cit. Independent Counsel p. xii).

The first-ever bills, cited by Eastland, were sponsored by Senator Sam Ervin and Senator Alan Cranston. As Eastland notes:

Neither the Ervin nor the Cranston bill progressed beyond committee... but the proposals represented a point of transition for Congress, from a focus on the Nixon presidency to a focus on the presidency in general. It commenced a period... during which the Congress searched for nothing less than a rescusal statute, a formal means of requiring the Justice Department to disqualify itself in criminal cases involving
Although the Ervin and Cranston bills never passed their committees, Congress became bent on finding a means to prove that the Justice Department was not qualified to investigate itself; in short, from 1973 to 1976 it searched for a permanent prosecutor law. Eastland concludes this "... was a 'signal event' in the history of the special prosecutor (Op. Cit. Independent Counsel p. xii)." In summary, these bills, the offspring of Watergate, paved the way for the contemporary independent counsel statute.

Two things happened in the Watergate prosecution: The first is that the American traditional means of responding to executive malfeasance were put to work in Watergate; and the second is that these means worked. I must make note that the "traditional means" did not involve any outside prosecutor (An office unaccountable to the Executive Branch)--regular special prosecutors, law enforcement offices, and public opinion prevailed. For example, as Eastland analyzes, "the reaction to the Cox firing had been a thundering negative, including calls for impeachment by the AFL-CIO, deans of some prominent law schools, and the head of the
American Bar Association, among many (Independent Counsel pp. 19-20).

Not only did Congress raise objections about the Saturday Night Massacre, so, too, did "public opinion". The whole country was in an uproar. According to Eastland:

The uproar by the American people gave proof that the people believed that Nixon wanted the prosecution to end.... The politics of the situation persuaded, or rather forced, Nixon to reverse course ... because he is directly dependent on the people and solely responsible for his actions and must put a high premium on public opinion. (Op. Cit. Independent Counsel pp. 19-20)

The key phrases used in supporting the traditional means of responding to allegations of executive misconduct were that the President is "dependent on the people" and "solely responsible for his action." In other words, for the President of the United States to be successful he must base many of his decisions on what the public thinks. In this case, if President Nixon had ignored "public opinion" i.e., completely shut down the Watergate investigation, he would not have been "dependent on the people" nor "solely
responsible for his actions"—the President would have lost popularity and the people's support.

Finally, the "traditional means" that were put into action to prosecute Watergate worked. The regular prosecutors, Congress, and "public opinion" played their regular roles in the investigation and when Nixon tried to stop the investigation, "public opinion" persuaded him to let the investigation continue. The final result was Nixon's resignation.

I must make one small observation at this point on a contemporary issue: Congress' investigation of President Bill Clinton's Whitewater finances. The investigation started with the Justice Department's Special Prosecutor Robert B. Fisk, and is now in the hands of Independent Counsel Kenneth W. Starr, appointed under the newly enacted (June, 1994) independent counsel statute.

President Bill Clinton, unlike President Richard Nixon, does not have full power and control of the Executive Branch. President Nixon exercised full authority and power to appoint and terminate special prosecutors to investigate Watergate, but President Clinton cannot terminate Independent Counsel Starr.
The independent counsel can investigate members of the executive branch and so tear apart the Presidency. This makes for an imbalance of power between Congress and the President because the independent counsel has taken some of the President's power to enforce the law. This imbalance of power can be said to provide for bad government.

I think my observation supports Eastland's point: Under the traditional politics of malfeasance, the concern was not about the legal fate of high officials but accountable presidents and high officials and their political fate. (Independent Counsel p. 14)

In summary, Eastland concludes:

... When the third special prosecutor in our history was fired, ... many in Congress believed that the traditional tool of prosecution by regular or special prosecutors, appointed by either the President or the Attorney General and removal by them for any reason, was no longer adequate.... What must be probed is not simply a matter of law enforcement but a political matter that includes law enforcement. THE QUESTION IS NOT MERELY WHETHER ALLEGED WRONGDOERS GET WHAT THEY DESERVE BUT WHETHER THE AMERICAN PEOPLE GET WHAT THEY DESERVE IN THE WAY OF GOOD GOVERNMENT. (Op. Cit. Independent Counsel pp. 14-16)
CHAPTER III

THE PRINCIPLE OF SEPARATION OF POWERS

Massachusetts Constitution, 1780

Justice Scalia in *Morrison vs. Olson* (101 L Ed 2d 569) begins the introduction of his dissenting opinion with the words:

> It is the proud boast of our democracy that we have 'a government of laws and not of men.' Many Americans are familiar with that phrase; not many know its derivation. It comes from Part the First, Article XXX of the Massachusetts Constitution of 1780 ...

(p. 609)

What does it mean that we Americans have a government of laws and not of men? What does Scalia mean when he says that the phrase, "a government of laws and not of men," comes from Massachusetts' Constitution of 1780?

The idea of separation of powers connects with the idea of a government of laws. In the United States there are three branches of government: The legislative branch, the executive branch; and the judicial branch. The legislature in a lawmaking body. The executive branch enforces the law. The judicial
branch interprets the law. In other words, only by organizing these powers of government in separate branches can our government of laws exist.

Our Founding Fathers structured our government with separation of powers to provide for individual liberty. The structure of separation of powers protects the individual citizen against those legislators in offices of power who can impose their powers upon the individual. Before a law is enacted at the federal level it must go through the political process. The judges interpret the law to ensure that it is constitutional; the legislative body (Congress) makes the law, and the President enforces the law. Our government is, then, a government of laws and not of tyrannical men.

Scalia reminds us that the idea of separation of powers, and the phrase "government of laws, not men," came from the Massachusetts' Constitution of 1780. When the framers wrote the Constitution, they adopted that same principle of separation of powers from the Massachusetts' Constitution of 1780.

Ronald M. Peters, Jr., in his text on The Massachusetts' Constitution of 1780 explains how
Article XXX came to be a part of Massachusetts' Constitution. Peters writes:

The great advantage of constitutional government derives not from the ultimate sanctity that it bestows upon individuals, but rather from the very real protections that it affords to individuals against other individuals, particularly against those who have political power. By defining the rules of political action, by establishing procedures by which fixed laws will be established and executed, and by reserving certain important decision-making powers to people, constitutional government is intended to provide for the liberties of individuals the maximum security that can be achieved within a social framework. This is what constitutional government can accomplish, and this is what the people of Massachusetts tried to accomplish in adopting the Constitution of 1780. (pp. 155-56)

The advantage of a government that is governed by a constitution is not the maximum protection it provides for a citizen, but the protection that it gives to the individual from those politicians who have power. A constitutional government cannot protect an individual from all harm. For example, the executives, legislators, and judges who are in political power, and
who can abuse that power, are the real protection for the citizen.

In order for a constitution to protect the individual from those who abuse power, the constitution must provide ways of defining the rules of political action, establishing the procedures by which law is made and executed, and by giving some decision-making powers to the people. Only in this way can a constitution provide liberty to individuals. In other words, what the people of Massachusetts tried to accomplish in adopting the Constitution of 1780 was a government that is governed by laws and not by men.

How did the people of Massachusetts achieve a government that is governed by laws and not by men? The answer lies in the principle of separation of powers. In the words of Peters:

> But due process of law must be embodied in law itself, either written, as in a bill of rights, or unwritten, as in the English Common Law. And, like any other sort of law, the procedural safeguards that due process provides for individuals are, in the end, parchment barriers: Laws describe actions, but it is men who must act, and men may ignore the prescriptions of law. (Massachusetts Constitution 1780 p. 163)
The people of Massachusetts, long before 1780, had governed themselves by due process of law. Examples of due process of law include the right to a speedy and public trial, the right to face one's accuser, and others. Many of these laws were derived from the English common law.

The problem the people of Massachusetts had with due process of law is that due process, such as that written in a bill of rights, would only prohibit specific types of government abuse. Peters claims, "it is natural to suppose that the provisions of a bill of rights would be primarily substantive, i.e., that it would prohibit [only] specific actions (Massachusetts Constitution 1780 p. 160)." He gives the example of Article XXI of the Massachusetts Declaration of Rights which reads: The freedom of deliberation, speech and debate, in either house of legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever (Massachusetts Constitution 1780 p. 200).

Second, the procedural safeguards that due process provides for individuals are, in the end, parchment
barriers. Parchment barriers are just plain written laws which have no means or rules of being enforced.

Laws are guidelines to be followed but this does not always happen. Peters concludes:

Indeed, the primary fear of the people of Massachusetts, as we have seen, was precisely that those men who have the power to make or enforce laws, might be the most inclined to disobey them. For the people of Massachusetts, it was not enough merely to demark the limits of authority substantively and procedurally. In addition, the political system itself must be structured in such a way so as to prevent the abuse of power by those whose duty it is to enact and execute laws. (Massachusetts Constitution 1780 p. 163)

At this point, Peters has established that majority rule, fundamental law, statutory law, the Bill of Rights, procedures, and procedural due process, were only written laws that guaranteed only some maximum security and protection from those politicians in power; they did not, however, guarantee maximum security and protection for the individuals in the state of Massachusetts. Therefore, the primary fear of the people of Massachusetts was that those politicians in power who made and enforced the laws might be the ones tempted to ignore them, and thereby deprive the
people of individual freedom. In other words, the written laws only put limits on power, substantively as in a Bill of Rights, and procedurally, as in due process of law.

What the political system was lacking was structure. It was lacking structure between those legislators, judges, and the executives who had power and could abuse that power upon the people. The political system itself must be structured in such a way that it will prevent abusive power. In other words, the political system must be structured so that it disperses power in ways that protect individual freedom. The people's need for this type of political system led them to discover the principle of "Separation of Powers."

The idea of Separation of Powers connects with the idea of a government of laws and not of men. In the words of Peters, "Only by organizing the powers of government correctly can a government of laws exist in fact, as well as in name. The initial mechanism for insuring government by law ... for the people of Massachusetts, the idea of a proper system of government reduced to a single principle: the
separation of powers (Massachusetts Constitution 1780 p. 163)."

How does the idea of Separation of Powers connect with the idea of government by law and not of men? Peters answers this question with the following analysis: "In Article XXX of the Declaration of Rights, the framers of the Constitution posited a causal connection between a principle of separation of powers and the concept of government by law."

(Massachusetts Constitution 1780 p. 163) Article XXX reads:

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men. (Peters, Massachusetts Constitution 1780 p. 163)

Article XXX implies that the legislative department has a particular type of power of its own, and it should exercise that particular power and no other; the executive department has a particular type of power of its own, and it should exercise that particular power
and no other; and the judiciary has a particular type of power of its own, and it should exercise that particular power and no other (Peters, Massachusetts Constitution 1780 p. 64).

The objective is a government of laws, and not men. In other words, government by law means government by rules which are designed to prevent abuses of power by public officials. The power of these public officials has been allocated among the legislative department, the executive, and the judiciary in such a fashion so as to preserve the balance of powers between these public officials. Within this structure of power resides an equilibrium upon which rests the rights of individual citizens (Peters, Massachusetts Constitution 1780 p. 168).

In the words of Peters:

The objective is a government of laws, and not of men; the means is the separation of powers clause, which we now understand to mean a separation of persons ... Government by law is designed to prevent the abuse of power. It is not principally a mechanism to limit the scope of power, but on the contrary, it is a means of implementing a power which is virtually limitless. How can the abuse of power be prevented without limiting power itself? The answer
is that if power cannot be limited, and if its abuse must be prevented, then power must be dispersed and balanced so that it can act as a check on its own potential abuse. Give some power to a number of people, make them independent of each other, set their powers on a collision course, and a balancing of power will be achieved. Within this structure of power resides an equilibrium upon which rests the rights of individual citizens. This is the rationale behind the principle of separation of persons, and this is the reason why the separation of persons is causally related to the concept of government by law. Law will prevail because the dispersal of power will operate to contain individual political actors within the bounds of law. It is therefore, the dispersal of power which is of primary importance to government by law, and not the particular way in which power is dispersed. In this reasoning we see again the heavy emphasis procedure and structure play in the theory of republican government. The only claim that the individual can legitimately advance against the state is a claim to fair treatment, which means fair procedure. But fair procedure can itself only be achieved if institutions are structured properly. (Massachusetts Constitution 1780 p. 168)

This is what Scalia means when he says in our democracy we have a government of laws, and not of men; and that it comes from Part the First, Article XXX of
the Massachusetts Constitution of 1780. As can be seen in the next section, when the Framers of the United States Federal Constitution set out to write our Constitution, they adopted views similar to the principle of separation of powers in Article XXX of the Massachusetts Constitution of 1780.

Articles I, II, III of the Federal Constitution

As a result of Article XXX of the Massachusetts’ Constitution of 1780, Scalia offers a strong argument for the Principle of Separation of Powers that was adopted by the Framers for the United State’s Federal Constitution:

The framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just government. In No. 47 of the Federalist, Madison wrote that ’[N]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty.’ The Federalist Papers No. 47, p. 301 (C. Rossiter, ed. 1961) (hereinafter Federalist). Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours (Op. Cit. Morrison vs. Olson p. 610).
The framers of our Federal Constitution took the same principle of separation of powers that the State of Massachusetts had constructed, and applied it to Articles I, II, and II of the United States Constitution. James Madison in *Federalist Papers* No. 47, January 30, 1788 wrote, in so many words, that the principle of separation of powers would guarantee individual liberty. Second, Madison wrote that our Bill of Rights would have no value if we did not have a firm and rigid structure of separation of powers. Madison strongly believed in this secure structure of separation of powers because he said that the same would hold true for Nations of the world that patterned their government after ours. In other words, the same way that the Bill of Rights for the State of Massachusetts' was worthless in 1780 without separation of powers, so would the United States Constitution be worthless without separation of powers.

How is the principle of separation of powers expressed in our Constitution? As Scalia has noted:

The principle of separation of powers is expressed in our Constitution in the first section of each of the first three Articles. Article 1, Section 1 provides that 'all legislative
powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Article III, Section 1 provides that 'the judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts that Congress may from time to time ordain and establish.' And the provision at issue here, Art II, Section 1, Clause 1 provides that 'the executive power shall be vested in a President of the United States of America.' (101 L Ed 2d 569 *Morrison vs. Olson* p. 610)

The principle of separation of powers that is expressed in our Constitution implies that all legislative power shall be vested in a congress and no other; the judicial power shall be vested in a supreme court and no other; and the executive power shall be vested in a president of the United States and no other of the branches.

The provision at issue here in Justice Scalia's dissent in *Morrison vs. Olson* is the principle of separation of powers. Justice Scalia maintained that the Independent Counsel statute of 1978 violated separation of powers. The independent counsel was set up by Congress to investigate the Executive Branch's high ranking officials because Congress thought that
Watergate had demonstrated that the executive branch has a conflict of interest when it investigates its own high ranking officials.

Justice Scalia points out:

This is what this suit is about. Power. The allocation of power among Congress, the President and the Courts in such fashion as to preserve the equilibrium the Constitution sought to establish—so that 'a gradual concentration of the several powers in the same department,' (Federalist Papers No. 51, p. 321 J. Madison) can effectively be resisted. (Op. Cit. Morrison vs. Olson pp. 610-11)

The idea behind separation of powers was that each branch of government was to maintain a balance of powers that was germane to the particular department. But, Scalia says, Madison wrote in Federalist Paper No. 51, pp. 322-323 that "... it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates" (101 L Ed 2d 569 Morrison vs. Olson p. 610). The Framers established a veto for the executive and they divided the legislative body into different branches. The judicial branch, the least dangerous branch, they gave life tenure. In other words the Framers gave to each department a
constitutional means or check to resist the encroachment of the others, so that a gradual concentration of the several powers in the same department could be effectively resisted. In the next section, I shall show that the independent counsel can be a means for Congress to encroach upon the Presidency.

The Reenactment of Title VI: June 1994

Congress has recently reenacted Title VI of the Ethics in Government Act, the independent counsel statute, that expired in December 1992. The Office of Independent Counsel may have served a needed purpose because it investigates persons inside the executive branch. It may be a very efficient way of checking up on public officials in regard to executive malfeasance, because the independent counsel in its independence can avoid conflicts of interest in the Presidency when the executive branch investigates itself. For example, if the executive or a high ranking official of the Presidency commits a crime, then the independent counsel can investigate this crime fairly; whereas, if the executive branch does the investigation, it may show favoritism among its members. But, the Office of
Independent Counsel, whatever the good it may accomplish, is not accountable within the Executive Branch. In other words, the independent counsel is not fully subject to the Presidency, and is therefore not fully accountable to the President who is constitutionally responsible for the execution and enforcement of the laws of the United States.

This is especially true as the independent counsel relates to the Executive Branch which is constitutionally responsible for the execution and enforcement of the laws. Justice Scalia in *Morrison vs. Olson* proves that the independent counsel statute is in violation of the constitutional principle of separation of powers. Scalia wrote:

... Art. II, Section 1, clause 1 of the Constitution provides: 'The executive power shall be vested in a President of the United States.'... this does not mean some of the executive power, but all of the executive power. (Op. Cit. *Morrison vs. Olson* p.614)

Scalia has just established the constitutional premise of the President's constitutionally appointed function. Not some of the executive power, but all of the executive power shall be vested in a President of the United States. Scalia, in so many words, says if the
following questions cannot be answered in the affirmative, then the independent counsel statute is in violation of the constitutional principle of separation of powers:

(1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power?
(2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power? (101 L Ed 2d 569
Morrison vs. Olson pp. 614-15)

The Majority Opinion in Morrison vs. Olson

The first question that the Supreme Court considered in its interpretation of whether the independent counsel statute is in violation of the constitutional principle of separation of powers was

whether the provision of the Act [independent counsel statute] 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. (Op. Cit. Rehnquist, Morrison vs. Olson p. 602)

The majority’s opinion delivered by Chief Justice Rehnquist ruled that the provision of the independent
counsel statute that restricts the Attorney General’s power to remove the independent counsel from the executive’s office unless for good cause does not interfere with the President’s constitutionally appointed functions (101 L Ed 2d 569 Morrison vs. Olson pp. 606-7). If the Attorney General proves that the independent counsel is unfit for office because of illness or misconduct, then, only, can he remove him. Before the independent counsel statute was enacted, the President and the Attorney General had complete authority over whether to appoint or to remove a special prosecutor working on behalf of the executive branch. The Supreme Court now has ruled in favor of the independent counsel statute which says in so many words that the President or the Attorney General can only remove the independent counsel for good cause.

Therefore, the conduct of a criminal investigation, and of an investigation to decide whether to prosecute is not the exercise of purely executive power because the independent counsel is not supervised by the executive branch. In other words, the President or the Attorney General can only remove the independent counsel for good cause.
Justice Scalia’s Dissent in Morrison vs. Olson: The Independent Counsel in Violation of Separation of Powers

Scalia says, "... the statute vests some purely executive power in a person who is not the President of the United States ..." (Op. Cit. Morrison vs. Olson p. 615). That person who is not a member of the Executive Branch is the Independent Counsel.

Scalia answers the second question of the Court:

As for the second question, whether the statute before us deprives the President of exclusive control over that quintessentially executive activity: The Court does not, and could not possibly, assert that it does not. That is indeed the whole object of the statute. Instead, the Court points out that the President, through his Attorney General, has at least some control [The President can remove the counsel for good cause.] That concession is alone enough to invalidate the statute ... (101 L Ed 2d 569 Morrison vs. Olson p. 615)

The point that Justice Scalia makes is that this independent counsel’s office has power but not accountability. Therefore, the independent counsel is going to affect those checks and balances which are in the Constitution to provide for separation of powers. This office of independent counsel is invested with
power because Scalia writes: She [Alexis Morrison] the independent counsel is vested with the "full power and independent authority" to exercise all investigative and prosecutorial functions and powers of the Department of Justice. Governmental investigation and prosecution of crimes is a quintessentially executive function (Op. Cit. *Morrison vs. Olson* p. 615). This independent counsel is without accountability because she cannot be supervised by the executive branch. These functions performed by the independent counsel violate separation of powers because she is, plainly and simply, taking power from the President of the United States in order to execute the law.

I have established that the independent counsel has power because he is vested with full power and independent authority to investigate and prosecute within the executive branch; and this office is unaccountable to the President because the independent counsel can only be removed by the executive branch for good cause.

Next, I will establish that since this office has power but is without accountability to the Presidency, it affects those checks and balances which are in the
Constitution to provide for separation of powers.

Scalia points out:

The Court also makes much of the fact that the Courts are specifically prevented from reviewing the Attorney General's decision not to seek appointment, ... yes, but Congress is not prevented from reviewing it. The context of this statute is acrid with the smell of threatened impeachment. Where, as here, a request for appointment of an independent counsel has come from the Judiciary Committee of either House of Congress, the Attorney General must, if he decides not to seek appointment, explain to that Committee why (101 L Ed 2d 569 Morrison vs. Olson, pp. 612-13).

As Scalia just stated, the independent counsel's appointment clause requires that the Attorney General apply for the appointment of an independent counsel within 90 days after he receives a request from Congress to do so. If the Attorney General determines within those 90 days that there are no reasonable grounds to believe that further investigation or prosecution is needed to convict a criminal of the executive branch then he must report this information to the Special Division (Court). In such cases, the Special Division does not have power to appoint an independent counsel.
The Special Division is prevented from reviewing the Attorney General's decision not to appoint an independent counsel, but Congress can review the Attorney General's decision not to seek the appointment of an independent counsel. The reason that this statute is acrid and a threat to the President is because the request for an independent counsel has come from Congress and the Attorney General must report back to Congress and explain why he did not seek the appointment of an independent counsel. If the independent counsel is appointed, he can investigate and report back information to Congress that could impeach the President.

Scalia says, "Although the Court's opinion asserts that the Attorney General had no duty to comply with the [congressional] request [of why the Attorney General did not seek appointment of an independent counsel] that is not entirely accurate" (Op. Cit. Morrison vs. Olson p. 612). Scalia gives an example of why this is not accurate. The case at present here is Morrison vs. Olson which Congress had requested that the Attorney General appoint an independent counsel to investigate Theodore Olson (Asst. Attorney General for
President Reagan) for possible false statements that he may have made to one of the Congressional Committees during the early stages of their investigation of the Executive Branch for withholding information from Congress, Scalia says that

As a practical matter, it would be surprising if the Attorney General had any choice ... but to seek appointment of an independent counsel to pursue the charges against the principle object of the congressional request, Mr. Olson. Merely the political consequences (to him and the President) of seeming to break the law by refusing to do so would have been substantial. (101 L Ed 2d 569 Morrison vs. Olson p. 612)

In other words, Scalia is saying that the independent counsel’s appointment clause states that, after the Attorney General has determined that there are no reasonable grounds to believe that further investigation of Mr. Olson is warranted, then the Special Division has no power to appoint an independent counsel, even if Congress wants to question the Attorney General on why he did not seek the appointment. The Attorney General has no duty to comply with the Congressional request that he do so. But the political consequences for the Attorney General
and the President would be substantial because the public would ask the Attorney General why a 2 1/2 year indictment and investigation would give no reason or grounds to believe that Mr. Olson had committed a crime.

The prior examples show how the independence of the independent counsel is going to affect those checks and balances which are put into the Constitution to provide for separation of powers. The independent counsel’s office in its independence can create a good deal of havoc in the system especially for the President. Congress is threatening to impeach the President.

The independent counsel is designed by Congress to be used to undermine the energy and independence of the executive. In the words of Justice Scalia:

It deeply wounds the President, by substantially reducing the President’s ability to protect himself and his staff. That is the whole object of the law, of course and I cannot imagine why the Court believes it does not succeed. Besides weakening the Presidency by reducing the zeal of his staff, it must also be obvious that the institution of the independent counsel enfeebles him more directly in his constant confrontations with Congress, by eroding his public

The President's overall job approval ratings dropped recently not only because of Whitewater but because the public is suspicious of the Clinton administration. The independent counsel can make involved and lengthy investigations which in due time can reduce the President's public opinion ratings. This can deeply wound the President because the executive must place a high premium on public opinion. He depends upon the people for his support.

The significance of my argument is that the independent counsel poses a threat to American democracy and liberty. "The purpose of the separation and equilibration in general, and of the unitary executive in particular was not merely to ensure effective government but to preserve individual freedom" (Scalia, 101 L Ed 2d 569 *Morrison vs. Olson* p. 628).

The most dangerous part of prosecuting lies in the fact that a prosecutor can pick some person, or a group of persons whom he dislikes or who has opposing political concepts and then prosecute them. The important part of prosecuting lies in finding the right
person or groups to prosecute because there is hardly anyone who has not committed some kind of crime. The important part is to pick the one or ones who have committed the most dangerous crime. The point is that the prosecutor has large numbers of people to choose from. This can be dangerous because if the prosecutor picks one whom he dislikes, then law enforcement becomes personal, and the prosecutor finds criminal action on the part of the person he wants to prosecute (Op. Cit. qtd. in Justice Robert Jackson, Morrison vs. Olson, Scalia p. 629). I think this is what is happening in President Clinton’s Whitewater. The institution of the independent counsel has enabled the Congress to deprive individual liberty. Congress seems to be seeking prosecution of whom they wish, instead of whom they should.

Scalia continues:

Under our system of government the check on prosecutorial abuse is a political one. The President selects and removes the prosecutors as he sees fit. Then when crimes are not prosecuted fairly the President pays a political cost by the damage he receives to his administration. (101 L Ed 2d 569 Morrison vs. Olson p. 630)
President Nixon and his administration paid the political cost because of the damage he received due to the "Saturday Night Massacre." This is the political check that the Founding Fathers were writing about.

That is what the Founders meant when they said all executive power rests in an executive. In other words, "the President is held responsible because the people will hold him responsible," claims Scalia (Op. Cit. *Morrison vs. Olson*, p. 630).

I must conclude this section with Justice Scalia’s final words in his dissent:

I fear the Court has permanently encumbered the Republic with an institution that will do it great harm .... Worse than what it has done, however is the manner in which it has done it. A government of laws means a government of rules. Today’s decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law....

The President’s need to control the exercise of the [Subject Officer’s] discretion is so central to the functioning of the Executive Branch as to require complete control.’

--All purely executive power must be under the control of the President....
Like it or not that ... says, quite plainly that "(t)he executive Power shall be vested in a President of
the United States.' (101 L Ed 2d 569 *Morrison vs. Olson* pp. 632-33)
CHAPTER IV

THE FEEBLE EXECUTIVE and the AGGRESSIVE CONGRESS

The Feeble Executive

The purpose of this chapter is to persuade the reader that Congress should adhere to the separation of powers principle that the Founding Fathers set up in the Constitution in order to promote liberty and freedom within our society. The President must exercise a constitutional means of balancing the power of the Presidency so that all executive power except that given by the Constitution to the other branches as a part of checks and balances remains in the Executive Branch. This Constitutional means is the Presidential veto. On the other hand, according to Solicitor General Charles Fried in After the Independent Counsel Is Separation of Powers Dead? (American Law Journal [Vol. 26]), "Congress must decrease in congressional ascendancy or domination of the executive branch and increase in the coherence and responsibility which is to represent a more coherent expression of democratic will for the people of the United States" (pp. 1678-71).
Unfortunately, President Bill Clinton did not veto legislation authorizing the new independent counsel statute, under which Kenneth W. Starr was appointed to replace Special Counsel Robert B. Fiske Jr. on August 5, 1994. He could have used the executive veto to defeat the renewal of the independent counsel statute in order to maintain the balance of powers provided in the Constitution but he did not. Since the Executive did not veto the independent counsel enactment of 1994, Congress can use the new independent counsel to attack the President, therein producing an imbalance of powers between the Executive and Legislative branches.

Stephen A. Wolf, In The Pursuit of Power Without Accountability: How The Independent Counsel Statute Is Designed and Used to Undermine the Energy and Independence of the Presidency, (South Dakota Law Review [Vol. 35]) claims:

An independent and energetic office of the President is the central element of the American constitutional order. As Alexander Hamilton remarked in Federalist No. 70: 'Energy in the executive is a leading character in the definition of good government .... A feeble execution, and a government ill executed, whatever it may be in
theory, must be, in practice, a bad
government.' (p. 1)

Wolf provides an historical example of the
consequences of a government that has a feeble
executive (South Dakota Law Journal [Vol. 35]). The
deleagtes to the Constitutional Convention had
experienced twenty years under a feeble government
headed by a feeble executive when they wrote the
Articles of Confederation. Executive power was first
exercised during the Confederation Congress. One
delegate from each of the states, "a committee of the
States," exercised the executive power when the
Confederate Congress was not in session. Most
executive functions were left to congressional
committees. During the Revolutionary War, the central
government's taxing power was so weak that it could
hardly afford to provide supplies to soldiers (Op. Cit.
Independent Counsel, p. 2).

Professor Wolf in the South Dakota Law Journal
[Vol. 35] concludes with a quotation from Federalist
Paper No. 71:

It was in this context of
congressional supremacy and
administrative ineptitude that the
separation of powers and the
unitary presidency were developed...
The tendency of the legislative authority to absorb every other has been fully displayed and illustrated... In government purely republican, this tendency is almost irresistible. The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter, as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments; and as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the Constitution. (Independent Counsel p. 2)

The tendency of the legislative authority to take power from the Executive Branch is the reason why the Founders developed the unitary Presidency. When the time comes to renew the next independent counsel statute the President must remember Hamilton in Federalist Paper No. 73, "... the presidential veto is a constitutional means and a personal motive given to
the executive to resist the encroachments of the other ... [branches]" (Scalia, *Morrison vs. Olson* p. 610).

The Aggressive Congress

Even though President Clinton did not veto the 1994 enactment of the independent counsel statute, Congress should consider not reauthorizing it. Terry Eastland argues in *Ethics, Politics and the Independent Counsel* that, "The Framers made it hard to dislodge a President, and it should be hard. The process should force deliberation, and it should be a public deliberation, not one inside the office of some court-appointed independent counsel" (p. 135).

In Watergate, traditional and constitutional means of appointing special prosecutors to investigate executive malfeasance worked successfully. Since all power was vested in the President to execute and enforce the laws, President Nixon had full power to supervise the Executive Branch’s investigation of the Watergate scandal. The American people put pressure on Congress to investigate a cover up in the Watergate scandal when special prosecutors were fired. In the end, Watergate resulted in the first-ever resignation of a President of the United States. Watergate proves
that Separation of Powers and the executive’s having full power to execute the laws will work. The independent counsel deprives the American people, the President, and his staff, of Due Process of law.

Congress must remember the Teapot Dome example. Burl Nogge in Oil and Politics in the 1920’s writes, "that the Teapot Dome was about an oil deposit set aside in 1915 for the United States Naval Oil Reserve. Due to decreasing oil supplies, an investigation was launched which uncovered a scandal wherein government employees leased Naval oil reserve to private citizens (p. 64)."

Thomas J. Walsh, a democratic Senator from Montana who was in command of the Senate’s investigation of the Teapot Dome scandal on February 11, 1924, helped the Senate pass a bipartisan resolution that requested Calvin Coolidge to order Edwin Denby, Secretary of the Navy to resign because of his involvement in the leasing of the Naval oil reserves. President Coolidge first refused to obey the Senate’s request because he knew that the dismissal of an officer of the government, other than by impeachment, was exclusively a President’s function. In other words, full power
resides in the Executive Branch to enforce the law.

Noggle writes:

[Thomas] Walsh disclaimer of partisanship aside, the Senate on February 11, 1924 by a quite partisan vote, passed a ... resolution that Coolidge demand Denby's resignation, because of his complicity in the leasing of the reserves. Coolidge declined to obey the Senate's request. Four hours ... passed [then came] a statement from Coolidge: As soon as Special Counsel had advised him on the legality of the leases, ... the President would ... not hesitate to call for the resignation of any official whose conduct ... warrants such action, 'but dismissal of an officer of the government other than by impeachment was exclusively an executive function.' Coolidge quoted James Madison and Grover Cleveland on the necessity of the executive maintaining his rights inviolate and of the three branches of government remaining separate and distinct.... He would 'deal thoroughly and summarily with every kind of wrong doing,' but he did not propose to 'sacrifice any innocent man' for his own welfare. (Teapot Dome p. 109)

The Senate has no authority or power to force the dismissal of a member of the Executive Branch except through impeachment. President Coolidge notified the Senate that he would not call for any resignations until his special prosecutor had advised him that the
conduct of Edwin Denby or any other government official indicated involvement in the crime. In other words, President Coolidge was maintaining the full power of the Presidency to execute the law. Coolidge reminded the Senate of the necessity of the legislative, executive, and judicial branches remaining distinct and separate. President Coolidge's actions in maintaining the full power of the Presidency helped to preserve freedom and a balance of powers in government. Coolidge said he did not want to sacrifice an innocent man for his own welfare. Later evidence was produced by the special counsel connecting Denby and others to the scandal and they were dealt with accordingly by the President.

Congress must remember the main point that comes from the Teapot Dome scandal: That long before the independent counsel was provided, the traditional means of responding to executive malfeasance by the use of special prosecutors prevailed. Full power in the Presidency demonstrated by Calvin Coolidge shows that he was independent. In other words, he maintained a balance of powers in the government. The President had as much power as the Congress, or the Judiciary. The
Executive could control this power because there was no independent counsel to undermine his energy and independence. To this day we do not know whether Calvin Coolidge was involved in the scandal, but his action to appoint a special counsel to investigate and prosecute the criminals involved in the Teapot Dome scandal showed strength in the Executive.

Congressional aggressiveness is affecting federalism as an example of divisions of power.

Charles Fried in *After the Independent Counsel Decision: Is Separation of Powers Dead?* wrote:

> What there is, however, is the organization of the document [Constitution] itself and the fact that Articles I, II, and III begin with the phrases 'All Legislative Powers herein granted shall be vested in a Congress.' 'The executive Power shall be vested in a president.' 'The judicial power ... shall be vested in one Supreme Court.' To my mind that expresses an idea. It is an idea very close to the idea of federalism. The idea is that in this new nation which was being constituted there is to be no such thing as governmental power at large. (Op. Cit. p. 1669)

The general idea of federalism is the division of power. The idea of federalism as it applies to the United States Constitution means the constituting of a
government with power distributed between a central authority (Federal Government) and constituent units. The American idea of federalism is the division of power that is divided between the federal, state, local, and community governments.

Charles Fried saw that the organization of the Constitution’s Articles I, II, and III articulated divisions of power among the Legislative, Executive, and Judiciary branches. These articles delineated an idea that in these divisions of power there is to be a balance of power among these three branches of government. Separation of powers is a horizontal division of power. Federalism is a vertical division of power.

Charles Fried thinks the idea of balance of powers among the three branches of government is revolutionary because the United States departed from the ideals of other nations which believed that the state is sovereign and has all power to govern. For example, at the time the U.S. Constitution was being formed, Russia, China, and some other nations of the world held to the idea that sovereignty rests with the state; whereas, America developed the idea that Sovereignty
resides in the people who divide the powers in
government horizontally and vertically rests at
different levels of government. These other nations
strove for governmental power at large and there was a
fight between the founders of their constitutions about
who was going to have certain powers and who was going
to exercise certain other powers, as there was with the
American framers.

In contrast to fighting about who is going to have
power and who is going to exercise that power, the
United States was bent on putting limits on power,
claims Fried in the American Law Journal [Vol. 26]:

That is the idea which I think our
Constitution denies. Instead it
says there are three powers. There
is the legislative power. There is
the executive power. There is the
judicial power. There is not power
at large. Those three powers then
are distributed to identified
organs of government. (Separation
of Powers p. 1670)

Congress must heed the fact that our Constitution
denies power at large. Congress must realize that it
is an organ of government with power of its own, and it
should stay within its boundaries. When Congress
extends beyond its boundary, it becomes power at large.
Charles Fried believes that the majority in the Morrison case in favor of the independent counsel was a direct result of the corrupt leadership in Watergate and the deterioration of Congress:

I think what we saw in 1976 and what the Court was responding to, perhaps, was a combination of two factors: A tremendous increase in congressional ascendancy as a response to the Watergate and Vietnam era troubles, plus a tremendous deterioration in the coherence and responsibility which Congressional power represented. That was the result of a number of political forces with which you are all familiar: for example, the decline of the seniority system, the rise of the political action committees, the destruction of party coherence. So that what you had was a Congress which was at once much more assertive and much less coherent representing a much less coherent expression of democratic will. (Op. Cit. p. 1672)

The Congressional committees that helped to establish the Ervin and Cranston bills following Watergate and the Saturday Night Massacre gave tremendous impetus to Congressional ascendancy relative to the Executive Branch. Congress believed that it is a conflict of interest for the Executive Branch to investigate itself so it provided for the Special

Second, Congressional response to Watergate was accompanied by a tremendous deterioration in the coherence and responsibility of Congress. For example, Congress got so wrapped up in monitoring the Presidency that it forgot its own function. Simultaneously, Congress saw the decline of the seniority system, the rise of the power of committee chairmen, and the destruction of party coherence.

The decline in the seniority system of Congress brought aboard less experienced and maybe less qualified congressional leaders to represent the people's will. Hamilton in *Federalist Paper*, No. 71 supports my idea when he wrote: "The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter ..." (Carey and McClellan, p. 2).

All of this led to the destruction of congressional party coherence and so what was left was a much more assertive Congress representing a much less
coherent expression of democratic will. Therefore, Congress must become less assertive and more coherent in representing and expressing the people's will. In other words, Congress must bring back the seniority system, deter the rise of Congressional committees, and reconstruct party coherence.

I think Congress should do this but: (1) Congress does not have a compelling interest in limiting its authority. (2) The judiciary cannot rule on something unless it is brought before them. Unless Congress or the President brings something before the judiciary it is effectively silenced. (3) Because a President wants to vindicate himself he is not going to veto the statute. So, Congress should eliminate its aggressiveness but ultimately this is not going to happen unless conditions create a compelling interest so that the President is willing to veto, the Judiciary is asked to rule, or Congress is pressed by the American people.
CHAPTER V

CONCLUSION

I hope that I have established that the Independent Counsel Statute is in violation of the United States constitutional principle of Separation of Powers.

First, the Office of Independent Counsel is a constitutional violation because Article II of the Constitution states that the executive power shall be vested in a President of the United States; however, the independent counsel in its independence is not supervised by the President so the Executive does not have full power to enforce the laws.

Second, the independent counsel poses a threat to American democracy and liberty. The principle of separation of powers came from the Massachusetts' Constitution of 1780 and was adopted by the Framers of the United States Constitution. The intent of the Framers in writing Articles I, II, and III was to ensure liberty and freedom to the individual citizen which meant that the United States government is a government of laws, not men. This means that our
nation is to be governed by a set of rules to prevent tyranny and anarchy.

The independent counsel violates these laws or rules because it takes power from the President. Hence, the individual is deprived of freedom because the system of government no longer is in balance. The system is therefore ungoverned by rule, and ungoverned by law, as Justice Scalia wrote in his dissent in *Morrison vs. Olson* (101 L Ed 2d 569 p. 632).

Third, the President must veto any legislation that provides for an independent counsel so that he may maintain full power and control over the Executive Branch. The President must listen to Justice Scalia's dissent: The context of this statute is acrid with the smell of impeachment (Op. Cit. *Morrison vs. Olson* p. 613).

Fourth, Congress must stop all legislation that provides for the independent counsel statute. Congress must realize the importance of separation of powers in that it provides for liberty. "While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty," as Scalia asserts in *Morrison vs. Olson*, 101
L Ed 2d 569 p. 618. There are members of Congress as well as the Executive Branch who abuse power. That is why the Framers put checks on that abuse: The Executive can veto unconstitutional laws, the Congress can impeach the President, and the people can replace those who abuse power in office at the polls at election time.

Congress must remember Watergate and Teapot Dome: The traditional means of due process, deliberation and public opinion as a means of searching out executive malfeasance worked. Watergate was the first time ever a President of the United States was forced to resign.

Congress must stop assertiveness and aggressiveness towards the Executive Branch and represent more coherently the will of the people. In other words, let Congress represent the will of the people and let the President enforce the law.

Finally, a lesson can be learned from the history of the independent counsel. The undermining of the principle of separation of powers as a result of Congress' use of the independent counsel causes one to fear a future in which the independent counsel statute becomes permanent law. I see the United States
government becoming more weak, inefficient, and corrupt. In other words, anarchy will prevail; there will be no power in the Presidency because Congress will have the unmitigated power of the independent counsel to intimidate every executive who comes into office. Slowly, the central government will deteriorate to the point that it can no longer function. Remember, Stephen Wolf wrote that in the Articles of Confederation the executive power was exercised by the Confederate Congress, and the central government was so feeble that it could not support its soldiers at war.

It was in this context of Congressional power that the separation of powers and the unitary executive was established. Not some, but **ALL** of the Executive powers should be vested in the President of the United States.
WORKS CITED


