The Separation of Powers Cases: Not Really a Mess*

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In the last few years—and twice in the last year—the Supreme Court was confronted with the necessity of determining the scope of the doctrine of separation of powers.[1] Each case addressed the extent to which Congress could constitutionally permit, or require, one of the three branches of the federal government to exercise functions which allegedly belonged to another branch.

In 1953, Robert W. Ginnane, then a colleague of mine in the Solicitor General's Office, wrote an article [2] which reviewed the constitutional history of the doctrine of separation of powers and concluded that the Constitution permitted Congress only to exercise its powers legislatively, that is by both houses and subject to presidential veto, not by a single house or its committees. I was then convinced that he was clearly right, but no one else seemed to pay much attention. During the next three decades, procedures permitting a single house of Congress to veto acts of administrative agencies were incorporated in several hundred laws.[3] In 1983, in *Immigration and Naturalization Service v. Chadha*,[4] the Supreme Court was confronted with the question whether Congress could empower either of its houses to veto an order of an immigration judge (to whom authority had been delegated by the Attorney General) that an alien not be deported. Congress seemed surprised

* This essay and its title were motivated by the article by Professor Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988), as well as by Profesor Gerard V. Bradley's *Law Enforcement and the Separation of Powers*, 30 ARIZ. L. REV. 801 (1988).

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1. This paper was completed in March 1989. The cases referred to are: *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983), *see infra* note 4 and accompanying text; *Bowsher* v. *Synar*, 478 U.S. 714 (1986), *see infra* note 8 and accompanying text; *Morrison* v. *Olson*, 108 S. Ct. 2597 (1988), *see infra* note 16 and accompanying text; *Mistretta* v. *United States*, 109 S. Ct. 647, 4102 (1989), *see infra* note 44 and accompanying text.

2. Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953).

3. *See Chadha*, 462 U.S. at 944, 957-68, 1003-13. For examples of some laws allowing single house veto see: Executive Salary Cost of Living Adjustment Act of 1975, 2 U.S.C. § 31 (Supp. V 1975); Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified in 2, 5, 18, 26 & 47 U.S.C.); Government Organization and Employees Act of 1966, Pub. L. No. 89-554, 80 Stat. 378, 396 (1966).

4. 462 U.S. 919 (1983).

when the Court agreed with Mr. Ginnane, citing his article,[5] and held the law invalid. Only Justice White dissented from this portion of Chief Justice Burger's opinion;[6] Justice Rehnquist dissented on another ground.[7]

Three years later, in *Bowsher v. Synar*,[8] the Court invalidated provisions of the Gramm-Rudman-Hollings Budget Control Act of 1985 which permitted the Comptroller General to determine when the federal budget was imbalanced by more than a specified amount and to require the budget of every agency to be reduced in an amount specified by him. The Comptroller General, though appointed by the President with the consent of the Senate, has always been regarded as an officer of Congress, not the executive branch. Only Congress, by joint resolution or impeachment can remove him, though in 67 years it never has. The Court, speaking through Chief Justice Burger for five Justices, held that:

> To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in any fashion found to be unsatisfactory to Congress. This kind of congressional control over the execution of the laws, *Chadha* makes clear, is constitutionally impermissible.[9]

Justice Stevens, with whom Justice Marshall concurred, agreed that *Chadha* was controlling in requiring Congress to act only through its power to legislate. They, however, regarded the retention by Congress of the power to remove the Comptroller General as a factor which supported that conclusion but "not necessarily [as] an adequate reason"[10] in and of itself to invalidate the law.

Justice White again dissented, questioning "the wisdom of the Court's willingness to interpose its distressingly formalistic view of separation of powers as a bar to the attainment of governmental objectives through the means chosen by the Congress and the President in the legislative process established by the Constitution."[11] The question should be, he insisted, "whether there is a genuine threat of encroachment or aggrandizement of one branch at the expense of the other,"[12] which the unexercised power to remove was not. Justice Blackmun dissented separately[13] on the ground that the difficult constitutional question could be avoided by holding that the provision for congressional removal could be held separable from the remainder of the statute. All four opinions in *Bowsher* were persuasive, at least to me. The case obviously was a difficult and close one.

Bowsher and the pendency a year and a half later of a group of cases questioning the validity of a statute permitting a special court of appeals to appoint independent prosecutors in special circumstances led Professor Ge-

5. *Id.* at 955 n.18 (citing Ginnane).
6. *Id.* at 968 (White, J., dissenting).
7. *Id.* at 1014 (Rehnquist, J., dissenting).
8. 478 U.S. 714 (1986).
9. *Id.* at 726-27.
10. *Id.* at 740.
11. *Id.* at 759 (White, J., dissenting).
12. *Id.* at 770 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976)).
13. *Id.* at 776 (Blackmun, J., dissenting).

rard V. Bradley of the University of Illinois College of Law to write a long and scathing attack on *Bowsher* in 1988.[14] Characterizing *Bowsher* as an "unpardonable sin,"[15] Professor Bradley expressed the view that it embodied an unduly verbal and formalistic approach to the doctrine of separation of powers which might imperil the independent prosecutor statute. His article contains an enlightening and detailed study of the history of the related doctrines of separation of powers and checks and balances. Those concepts, he asserted, were explicitly written into a number of provisions of the Constitution, where the Framers thought they should be given effect. He makes a strong case for going no further than that, and is critical of *Bowsher* for going too far in the other direction.

All but the last page and a half of Professor Bradley's article was completed before the Supreme Court sustained the independent prosecutor statute in *Morrison v. Olson*.[16] That part of the Ethics in Government Act of 1978[17] calls upon the Attorney General, when he believes reasonable grounds exist to investigate or prosecute certain high ranking government officials in the Department of Justice or elsewhere, to apply for the appointment of independent counsel by a Special Division of the United States Court of Appeals for the District of Columbia selected by the Chief Justice. In *Morrison*, Assistant Attorney General Olson, who was being investigated by Special Prosecutor Morrison, contended that prosecution is a function of the executive branch of the government, not the judiciary, and that the statute therefore violated the separation of powers principle. The Supreme Court rejected the argument and sustained the validity of the statute, with only Justice Scalia dissenting.

After *Morrison* was decided, Professor Bradley appended a postscript to his article.[18] Although he agreed with the Court's holding, he caustically attacked its reasoning, pessimistically concluding that "separation of powers principles remain about where [*Bowsher*] left them."[19] Professor Bradley's target was the last portion of the *Morrison* opinion, which pointed out that the statute permits the Attorney General not only to initiate the appointment of a special counsel but also to remove him for "good cause."[20] The Court concluded that: "these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties."[21] The Court's opinion characterizes that as "most important,"[22] which Professor Bradley thought "overstates the matter, by far."[23] I tend to agree, but I am not so sure that

14. Bradley, *Law Enforcement and the Separation of Powers*, 30 ARIZ. L. REV. 801 (1988).
15. *Id.* at 884.
16. 108 S. Ct. 2597 (1988).
17. 28 U.S.C. §§ 49, 591 et. seq. (1983).
18. Bradley, *supra* note 14, at 887.
19. *Id.* at 887-88.
20. *Morrison* 108 S. Ct. at 2619. *See also* 28 U.S.C. § 596(a)(1). This statute permits the Attorney General to remove a special prosecutor "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."
21. *Morrison*, 108 S. Ct. at 2622.
22. *Id.* at 2621.
23. Bradley, *supra* note 14, at 888.

in future cases the Court will require the President to retain really substantial powers, or that *Morrison* will be read as impeding the power of Congress to provide for independent prosecutors where there is good reason to do so. As appears from the Court's subsequent opinion in *Mistretta v. United States*,[24] Professor Bradley's fears have not been realized.

At about the same time as Bradley's article, an article by Professor Stephen L. Carter of Yale Law School, entitled *The Independent Counsel Mess*,[25] took the opposite position, expressing surprise that the Court departed from its recent decisions in the *Chadha* and *Bowsher* cases. The article's title reflects Professor Carter's belief that the *Morrison* opinion made a mess of the law relating to the separation of powers.

The issue in the *Morrison* case, however, was not nearly as complicated, nor the answer nearly as messy, as Carter's article suggests. Prior to the *Morrison* decision, I listened to a television debate in which former Congresswoman Elizabeth Holtzman repeatedly stated that the validity of the independent counsel statute was clearly established by the language of the Constitution. I had participated in or studied enough constitutional litigation to be highly suspicious of such a simplistic suggestion. I remember turning to a copy of the Constitution, reading the Appointments Clause,[26] and saying to my wife: "By golly, I think she is right." The issue was almost that simple.

I thereupon told a number of skeptical friends who discussed the subject with me that the statute would be sustained by the Supreme Court in an opinion by Chief Justice Rehnquist with no more than one dissenting vote—and I mentioned Justice Scalia to some of them. Seldom have I been so accurate.[27]

The Rehnquist opinion began its analysis with the language of the Constitution. With respect to the executive branch of the federal government, the first and third sections of article II provide:

> Section 1: The executive Power shall be vested in a President of the United States. . . .
> Section 3: He shall take care that the Laws be faithfully executed.

Neither section, of course, is very explicit as to who shall make appointments. The second paragraph of section 2, however, is explicit. It provides that the president may appoint ambassadors, judges, "and all other Officers of the United States, whose Appointments are not herein otherwise provided for. . . ." The section then states:

> [B]ut the Congress may by Law vest the Appointments of such inferior Officers, as they think proper, in the President alone, *in the Courts of Law*, or in the Heads of Departments. (emphasis added).

24. 57 U.S.L.W. 4102 (U.S. Jan. 18, 1989).
25. 102 HARV. L. REV. 105 (1988).
26. U.S. CONST. art. II, § 2, cl. 2.
27. Shortly after the TV debate, in my capacity as a member of the American Bar Association Committee on Amicus Briefs, I was called upon to review the ABA's amicus brief which took the position that delegating to a court the power to appoint special prosecutors to inquire into charges against high government officials was not unconstitutional. Perhaps not entirely by coincidence, the ABA brief and the Supreme Court's subsequent opinion adopted the same general line of reasoning and came to the same conclusion.

The critical language is the phrase—"in the Courts of Law"—to which I had been referred by Elizabeth Holtzman.

The remarkable feature of Professor Carter's criticism of the validity of the statute authorizing a court of law to appoint a special prosecutor is that he never discusses that phrase. He does quote the above passage in a footnote, but does not mention the phrase otherwise, although he does purport to favor an "originalism" approach to constitutional interpretation.[28]

Another significant phrase in the sentence, "as they think proper," gives *Congress* the discretion to determine which appointments should be made by the President, the heads of departments, or the "Courts of Law." The general references to executive power in sections 1 and 3 of article II must be regarded as limited by the more specific language of section 2 of the same article.

The power of Congress to permit particular positions not to be appointed by the President subject to Senatorial approval is limited to "inferior officers." Chief Justice Rehnquist's opinion for the Court in *Morrison* recognized that "the line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance."[29] Although the officers appointed by the President are of high rank, "inferior" officers also include persons who have substantial responsibilities. The Court's opinion emphasized that an independent counsel's authority relates only to a narrowly defined area of litigation, that it does not extend to the formulation of policy, and that the counsel may still be removed for cause by the Attorney General.[30]

Nor does "inferior" necessarily connote that the officer must be subordinate in all respects to a higher official. Finally power to determine a limited number of matters does not necessarily take an official out of the "inferior" category for constitutional purposes. At the time the Framers were drafting the Constitution, "inferior" commonly meant less exalted in rank, power or status as well as subordinate.[31] A century ago, and a century nearer the writing of the Constitution, the Supreme Court in *Ex parte Siebold*[32] held that under the Appointments Clause Congress could vest in the district courts the power to appoint for their areas federal supervisors of elections who were not subordinate to any other officer. No case has suggested anything to the contrary, and *Siebold* has been frequently cited, most recently in *Morrison*. The Court there was not unreasonable in concluding that:

> We need not attempt here to decide exactly where the line falls between the two types of officers, because in our view appellant clearly falls on the 'inferior officer' side of that line.[33]

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28. Carter, *supra* note 25, at 110 n.17; *see infra* text accompanying notes 45-47.
29. *Morrison*, 108 S. Ct. at 2608 (J. Rehnquist is referring to J. Story's, COMMENTARIES ON THE CONSTITUTION § 1536, pp. 397-98 (3rd ed. 1858)).
30. *Id.* at 2608-09.
31. *See* S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE IN WHICH THE WORDS ARE DEDUCED FROM THEIR ORIGINALS (1979) (reprint of 1755) (defining "inferior," in order of preference, as "lower in place, station, rank of life, value or excellency as well as subordinate.").
32. 100 U.S. (10 Otto) 371 (1880).
33. *Morrison*, 108 S. Ct. at 2608.

As noted above, the power to determine whether the President, the courts, or the heads of departments appoint inferior officers is vested by the Constitution in *Congress*, not the courts or even in law school professors. That means that Congress has room for discretion, although the Supreme Court, of course, has ultimate authority to decide whether Congress has gone too far.

The Supreme Court recognized that the power of Congress to delegate the appointing power to the courts is not unlimited. The Court assumed in *Morrison*, and no one has suggested otherwise, that the courts of law could not be authorized to fill positions having no relation to the functioning of the judiciary, as to which judges have "no special knowledge or expertise."[34] Judges could not be authorized to appoint officers of the army, or to use the Supreme Court's examples in *Morrison*, "officers in the Department of Agriculture or the Federal Energy Regulatory Commission."[35] The Court applied the test suggested in *Siebold*, that the courts could not be vested with appointive power "if there was some incongruity between the functions normally performed by the courts and the performance of their duty to appoint."[36] The Court reasonably concluded that there is no such incongruity insofar as special prosecutors are concerned. Prosecutors can be regarded as officers of both the judicial and executive branches; they have responsibilities toward both, even if they normally are attached to the executive branch.

In addition, the propriety of judicial appointments of prosecutors has been recognized in several circumstances, as when courts "appoint private attorneys to act as prosecutor for judicial contempt judgments,"[37] or to fill temporary vacancies in the positions of United States Attorneys,[38] or in appointing counsel to prosecute claims of indigents.[39]

In *Morrison*, Chief Justice Rehnquist reviewed the history of the Appointments Clause, referring in part to James Madison's notes on the Constitutional Convention.[40] The opinion concluded that the language finally adopted did not appear until on or near the last day, and that "there was little or no debate on the question whether the Clause empowers Congress to provide for interbranch appointments, and there is nothing to suggest that the Framers intended to prevent Congress from having that power."[41]

Indeed, in the First Congress, the Senate Committee for Organizing the Judiciary, whose members included three of the Framers, initially proposed to authorize the district courts, not the executive branch, to appoint prosecutors.[42] While this provision was ultimately deleted from the bill before it

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34. *Id.* at 2611 n.13.

35. *Id.*

36. *Id.* at 2611.

37. *Id. See also Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987).

38. *United States* v. *Solomon*, 216 F. Supp. 135 (S.D.N.Y. 1963). *See also* 28 U.S.C.A. § 546(d)(Supp. 1988).

39. 28 U.S.C. 1915(d)(1983).

40. *Morrison*, 108 S. Ct. at 2610.

41. *Id.* at 2611.

42. Bradley, *supra* note 14, at 864-66; Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 108-09 (1923); 1 J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNING TO 1801, at 490 (1971). As to

was enacted, there seems to have been no discussion, nor any suggestion that the proposal to place such power in the courts was unconstitutional.

Professor Carter, who does not advert to the understanding of the members of the First Congress, criticized the reliance on Madison's notes as only "the third best evidence of the original understanding."[43] He failed to point out, however, any particular error or any other material that would have been more accurate or helpful. Indeed, both Chief Justice Rehnquist's opinion in *Morrison* and Justice Blackmun's opinion for the Court six and a half months later in *Mistretta v. United States*,[44] relied on Madison's writings. In *Mistretta*, the Court held that permitting a commission composed in part of federal judges selected by the President to prepare guidelines for criminal sentences does not contravene the separation principle. In addition to relying on Madison's convention notes, which though published after his death in 1836 are still the closest there is to a transcript of the convention's proceedings, the *Morrison* and *Mistretta* opinions referred to his contributions to *The Federalist*, Nos. 47 and 51.

Nevertheless, Professor Carter argues: "The best evidence of the original understanding is a comprehensive review of the political science and practical concerns that motivated the Founders."[45] This, he explained, goes further than "insisting in an intentionalist way on evidence of what the Founders thought the answer was. There is more to originalism than intentionalism."[46] The "different question" to be answered should be: "[i]s independence of this kind consistent with the values underlying the scheme of balanced and separated powers or not?"[47] So far as appears from his article, this is apparently to be determined without any regard for what the Founders actually intended, if they manifested any intent at all, or for the language of the Constitution—although it is hard to believe that Professor Carter meant to go that far. To say that such an approach would be of little help to judges or lawyers trying to figure out what the Constitution means would be a gross understatement.

A literal reading of the words of the Appointments Clause, combined with the interpretation by the Court in the few cases which come closest to the point, plus whatever history there is, supports the constitutionality of permitting a court of law to appoint special prosecutors. The Court should not, and should not be expected to, consider departing from the constitutional language in such circumstances unless following it would make little sense and clearly be inconsistent with national policy. In *Morrison* the contrary was true. Unless its language so requires, the Constitution should not be read as committing prosecution of high public officials solely to themselves or their close colleagues. Fair and unbiased enforcement of the law is clearly more likely if unbiased prosecutors can be selected by impartial per-

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the composition of the First Congress, see also *Bowsher*, 478 U.S. at 714 (citing *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983)).

43. Carter, *supra* note 25, at 111.
44. 109 S. Ct. 647 (1989).
45. Carter, *supra* note 25, at 111 n.21.
46. *Id.* at 124.
47. *Id.*

sons, the most obvious and knowledgeable of whom would be members of the judiciary.

Professor Carter's argument seems to assume that the Constitution rigidly bars any departure from a strict separation of the three departments. Fortunately the Supreme Court has not so construed the Constitution. In the oft-quoted words of Justice Robert H. Jackson, which are repeated in the *Morrison* and *Mistretta* opinions, the Constitution does not merely separate or diffuse power; "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."[48] Certainly rigidity is not called for when the constitutional language itself creates an exception.

Chief Justice Rehnquist's opinion for the Court in *Morrison* endorses the statements in earlier decisions recognizing that "the system of separated powers and checks and balances" does not require that the three branches "operate with absolute independence."[49] It was "regarded by the Framers as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[50]

Professor Carter suggests that Congress and the force of public opinion will protect the public against the failure of the leaders of the executive department to prosecute each other. That may sometimes be true, as it turned out to be after Watergate, when President Nixon eventually resigned before he was impeached. But there can be no assurance that anything that unusual will always occur. And more importantly, justice is not advanced if high public officials who violate the criminal law escape criminal prosecution, even if they are forced to resign by congressional and public opinion. They are much more likely to be subjected to a fair investigation by prosecutors who are not chosen by members of the administration of which they are a part.[51]

Professor Carter believes that special prosecutors are not really "independent of the will of Congress," that the "very purpose of the statute is to remove prosecutorial discretion" not to indict unless the facts clearly so require, and that they cannot be counted on to be as fair as attorneys of the Department of Justice charged with prosecuting their superiors. With due deference to the Department, of which I was long a member, there is no basis for assuming that Department lawyers are likely to be more objective or impartial than independent counsel chosen by a panel of appellate judges. Some Department lawyers are able and non-political, others are not.

The special panel of the Court of Appeals is unquestionably unbiased. It receives recommendations from other judges and members of the bar, and is thus likely and able to select lawyers of distinction, integrity, and ability. The appointments challenged in the current litigation demonstrate that that

48. *Mistretta,* 109 S. Ct. at 659; *Morrison,* 108 S. Ct. at 2620. Both cases quote J. Jackson in *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 579, 635 (1952).

49. *Morrison,* 108 S. Ct. at 2620 (quoting United States v. Nixon, 418 U.S. 683, 707 (1974)).

50. *Id.* at 2620 (quoting *Buckley* v. *Valeo,* 424 U.S. 1 (1976)).

51. It should not be overlooked that Nixon was pardoned by President Ford, whom he appointed Vice-President.

has been the case. The prosecutors chosen to investigate members of the Reagan administration included Lawrence E. Walsh, a former federal judge, Deputy Attorney General, president of the American Bar Association, and a Republican; Whitney North Seymour, Jr., a former distinguished Republican United States Attorney; and James C. McKay and Alexia Morrison, able members of the District of Columbia bar. McKay's decision not to indict Attorney General Edwin Meese, and Morrison's not to indict Theodore Olson after the Supreme Court upheld the validity of her appointment,[52] confirmed their objectivity. Indeed, only three of the eight investigations by independent prosecutors between 1982 and 1987 have resulted in indictments.[53]

Justice Blackmun's opinion for the Court in *Mistretta*, from which only Justice Scalia dissented,[54] further indicates that the Court is not committed to the Carter approach to the separation doctrine. Separation of powers jurisprudence, Justice Blackmun emphasized, is concerned with "the encroachment or aggrandizement of one branch at the expense of the other." In the absence of such a danger, "we have upheld statutory provisions that to some degree commingle the functions of the Branches."[55] Justice Blackmun's opinion declared:

> [w]e have recognized, as Madison admonished at the founding, that while our Constitution mandates that 'each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others' . . . the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct. . . . Separation of power, he wrote, 'does not mean that these [three] departments ought to have no *partial agency* in, or no *controul* over the acts of each other,' but rather 'that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted.[56]

This reasoning, in which eight Justices concurred, embodies what was said in the separate opinions of Justices White and Stevens in prior cases as well as the Court's opinions. It seems designed to state authoritatively the principles that the Court will apply to separations cases in the future. The Court is concerned over serious impairments of the power of the separate branches, as in *Chadha* and arguably in *Bowsher*, but not at sensible efforts by Congress to induce the branches to coordinate their activities with little effect on other branches, as in *Morrison* and *Mistretta*.

That probably means that the Court will not treat the last portion of the

52. Morrison had been in the Department of Justice for eight years as an Assistant United States Attorney and in the Enforcement Division of the Securities and Exchange Commission for four years before entering private practice. The Olson case is described in detail in Frankel, *Ted Olson's Five Years in Purgatory*, American Lawyer 68 (December 1988).

53. S. REP. No. 123, 100th Cong., 1st Sess. 7-8 (1987) (discussing Independent Counsel Reauthorization Act of 1987).

54. *Mistretta, 109 S. Ct. at 675 (Sealia, J., dissenting).*

55. *Id.* at 659-60 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976).

56. *Id.* at 659.

Morrison opinion as restrictively as Professor Bradley fears. It certainly means that the Court does not construe the doctrine of separation of powers as rigidly as would Justice Scalia and Professor Carter. It recognizes that the functions of the three branches often overlap. I submit that on the whole the Court's approach is the proper one, not merely because it will most likely result in sensible solutions of the Nation's current problems, but because it is more consistent with the language and history of the Constitution.