tion and powers normally vested only in Article III courts; the origin and importance of the rights to be adjudicated; and the concerns that drove Congress to depart from the requirements of Article III.[27] *Bowsher*, the Court said, was not contrary, because, "[u]nlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch."[28] The test was a balancing one—whether Congress had impermissibly undermined the role of another branch without appreciable expansion of its own power.

Although the Court has never directly indicated its standards for choosing one analysis over the other, it has implied that the formalist approach was proper when the Constitution clearly committed a function or duty to a particular branch and the functional approach was proper when the constitutional text was indeterminate and a decision must be made on the basis of the likelihood of impairment of the essential powers of a branch. Still, the overall result has been to offer a strenuous protection of executive powers and a concomitant relaxed view of incursions into the powers of the other branches. It was thus a surprise when, in *Morrison v. Olson*, the independent counsel case, the Court, again without stating why it chose that analysis, used the functional standard to sustain the creation of the independent counsel and that officer's exercise of prosecutorial authority[29]

The independent-counsel statute, the Court emphasized, was not an attempt by Congress to increase its own power at the expense of the executive nor did it constitute a judicial usurpation of executive power. Moreover, the Court stated, the law did not "impermissibly undermine" the powers of the Executive Branch nor did it "disrupt the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions."[30] The Court acknowledged that the statute undeniably reduced executive control over what it had previously identified as a core executive function—the execution of the laws through criminal prosecution—through its appointment provi-

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[27] *Schor*, 478 U.S. at 851.

[28] 478 U.S. at 856.

[29] 487 U.S. 654 (1988). To be sure, the Appointments Clause (Article II, § 2) specifically provides that Congress may vest in the courts the power to appoint inferior officers, 487 U.S. at 670–677),, making possible the contention that, unlike *Chadha* and *Bowsher*, *Morrison* is a textual commitment case. But the Court's separate evaluation of the separation-of-powers issue does not appear to turn on that distinction. Id. at 685–96. Nevertheless, the existence of this possible distinction should make one wary about lightly reading *Morrison* as a rejection of formalism when executive powers are litigated.

[30] 487 U.S. at 695 (quoting, respectively, *Schor*, 478 U.S. at 856, and Nixon v. Administrator of General Services, 433 U.S. at 443).