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# Judicial Vigilantism: Inherent Judicial Authority to Appoint Contempt Prosecutors in *Young v. United States ex rel Vuitton Et Fils S.A.*

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# Article

## Judicial Vigilantism: Inherent Judicial Authority to Appoint Contempt Prosecutors in *Young v. United States ex rel Vuitton Et Fils S.A.*

BY NEAL DEVINS\*  
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### INTRODUCTION

Inherent executive authority and the separation of powers have been issues at the forefront of Supreme Court rulings these past few years.<sup>1</sup> Flagship cases such as *Immigration and Naturalization Service v. Chadha*,<sup>2</sup> *Bowsher v. Synar*,<sup>3</sup> and *Morrison v. Olson*<sup>4</sup> have ruled on such monumental issues as the "legislative veto," the delegation of budget-cutting authority to the Comptroller General, and the appointment of special counsel to

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<sup>1</sup> See generally Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Rabkin & Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203 (1987); Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779.

<sup>2</sup> 462 U.S. 919 (1983).

<sup>3</sup> 106 S. Ct. 3181 (1986).

<sup>4</sup> 108 S. Ct. 2597 (1988).

investigate and prosecute charges of criminal wrongdoing by government officials. Among these sequoias of constitutional law, the Supreme Court quietly resolved a conflict that pitted executive prosecutorial discretion against the judiciary's inherent power to vindicate its own authority. Arising in a trademark infringement case, the Court ruled in *Young v. United States ex rel Vuitton Et Fils S.A.*<sup>5</sup> that federal courts have inherent power to appoint private counsel to prosecute an alleged contemnor for violation of a court order.<sup>6</sup>

Only Justice Scalia took issue with this aspect of the Court's holding.<sup>7</sup> Characterizing the majority's inherent power argument as inconsistent with the judiciary's passive role, Justice Scalia

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<sup>5</sup> 107 S. Ct. 2124 (1987).

<sup>6</sup> Because our concern is this aspect of the Court's ruling, this Article will not address court authority in "direct" contempt. Direct contempt is distinct from "indirect" in that the former takes place within the court's presence. See 8 FED. R. CRIM. P. 42(a); 8B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 42.02[3] (2d ed. 1987). Direct contempt generally involves the disruption of courtroom proceedings, yet indirect contempt is the out-of-court violation of a court order. Because direct contempt proceedings are summary, court appointment of a prosecutor is unnecessary and the judicial appointment power is not implicated. Summary procedure, however, still gives the judiciary authority to initiate prosecution.

Separation of powers problems are not raised by "direct" contempt. The immediate need to quell court disruption justifies the limited ability of the judiciary to "initiate prosecution" for direct contempt. In fact, Justice Scalia recognized that each branch of government "must each possess those powers necessary to protect the functioning of its own processes." *Young*, 107 S. Ct. at 2145 (Scalia, J., concurring). Consequently, *Young* does not call into question "direct contempt" prosecutions against those who interfere with the orderly conduct of judicial proceedings.

This Article, moreover, is concerned solely with criminal contempt. Criminal contempt differs from civil contempt both in purpose and execution. Criminal contempt is punitive in nature. Criminal contempt sentences are for definite periods of time because the goal is deterrence of future violations. Civil contempt is remedial in nature; sentences may last only as long as the trial involved but are indeterminate, because the object is to force the contemnor to comply with a court's order. Once the civil contemnor complies, the penalty is removed. J. MOORE, *supra*, at ¶ 42.02[2]. Jailing a recalcitrant witness until he testifies is an example of civil contempt. Imprisoning someone who once violated an injunction for two years is an example of criminal contempt.

<sup>7</sup> Justice Scalia agreed with the *Young* majority that the district court committed error when it sought to excuse the enforcement of the original order by appointing the plaintiff's attorney in the underlying trademark suit. This appointment of an interested party created a conflict of interest undermining the contempt prosecution. See *Young*, 107 S. Ct. at 2135-38. Justices Powell, O'Connor, White, and Chief Justice Rehnquist, however, indicated that the majority erred in assuming that plaintiff's counsel *could not* serve as a disinterested prosecutor. *Id.* at 2147-48 (Powell, Rehnquist, & O'Connor, J.J., concurring in part and dissenting in part); *id.* at 2148 (White, J., dissenting).

asserted that the enforcement of court orders is a task reserved to the executive.<sup>8</sup> In our view, Justice Scalia is right. Because of the traditionally jealous reservation of prosecutorial discretion to the executive and the similarity between criminal contempts and regular crimes, the *Young* majority's "necessity" rationale does not override valid separation of powers concerns.

This Article will be divided into three sections. Section I will set out the conflict resolved in *Young*—contrasting the court's criminal contempt power with traditional prosecutorial discretion. Sections II and III will consider possible justifications for this divergence. Section II will consider whether contempts are innately different from crimes in a way that reduces separation of powers concerns. Section III will address the possibility that the judicial branch has a unique, inherent, and overriding need for a power of self-vindication. It is our conclusion that neither of these rationales support the abandonment of traditional prosecutorial discretion.

## I. CRIMINAL CONTEMPT AND THE SEPARATION OF POWERS

The Supreme Court has long held that the judiciary has an inherent power to punish contempts.<sup>9</sup> This power has been construed by lower courts to imply an authority to initiate proceedings, which in turn supports judicial appointment of prosecutors.<sup>10</sup>

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<sup>8</sup> An analogous controversy has recently emerged with respect to the civil contempt power of bankruptcy judges. See *Feder & Feder, Judges' Disputed Contempt Power Supported by High Court Rulings*, NAT'L L.J., April 25, 1988, at 26-29.

<sup>9</sup> See, e.g., *Green v. United States*, 356 U.S. 165 (1958); *Michaelson v. United States ex rel. Chicago, St. P., M. & O. Ry.*, 266 U.S. 42 (1924); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911); *United States v. Shupp*, 203 U.S. 563 (1906); *Ex parte Terry*, 128 U.S. 289 (1888); *Ex parte Robinson*, 86 U.S. 505 (1873); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821).

<sup>10</sup> See, e.g., *In re Brown*, 454 F.2d 999 (D.C. Cir. 1971); *United States v. Conole*, 365 F.2d 306 (3d Cir. 1966), *cert. denied*, 385 U.S. 1025 (1967); *In re Fletcher*, 216 F.2d 915, 917 (4th Cir. 1954), *cert. denied*, 348 U.S. 931 (1955); *United States ex rel. Brown v. Lederer*, 140 F.2d 136, 138 (7th Cir.), *cert. denied*, 322 U.S. 734 (1944); *Western Fruit Growers, Inc. v. Gotfried*, 136 F.2d 98, 100-01 (9th Cir. 1943); *O'Malley v. United States*, 128 F.2d 676 (8th Cir. 1942), *rev'd on other grounds sub. nom. Pendergast v. United States*, 317 U.S. 412 (1943); *McCann v. New York Stock Exch.*, 80 F.2d 211 (2d Cir. 1935), *cert. denied*, 299 U.S. 603 (1936). See generally *Recent Developments, Criminal Contempt: Federal Courts Power to Dismiss Proceeding Before Trial*, 66 COLUM. L. REV. 182 (1966).

While the Supreme Court has recognized that Congress may regulate this power,<sup>11</sup> the Court has never suggested that the legislature may abrogate it.<sup>12</sup> Indeed, both the majority and Justice Scalia agreed in *Young v. United States ex rel Vuitton Et Fils S.A.*<sup>13</sup> that perceived inherent judicial authority underlies the *Federal Rules of Criminal Procedure's*<sup>14</sup> assumption that a judge may appoint private counsel to prosecute an indirect contempt.<sup>15</sup> The fact that a United States Attorney had previously declined to prosecute the alleged contemnor is irrelevant to this formulation.<sup>16</sup>

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<sup>11</sup> See *Bloom v. Illinois*, 391 U.S. 194, 196 n.1 (1968); *Michaelson*, 266 U.S. at 65-67.

<sup>12</sup> In *Michaelson*, the Court recognized that Congress could prohibit Court initiated contempt "where the act or thing constituting the contempt is also a crime in the ordinary sense." *Michaelson*, 266 U.S. at 66. *Michaelson*, however, emphasized that this legislative restriction in 18 U.S.C. § 401 did not question federal court authority to punish a person for disruptive behavior in the courts' presence, for official misbehavior by a court officer, or for disobedience of a lawful order. In subsequent decisions, the Supreme Court has likewise held that, despite the courts' inherent power, § 401 imposes binding limits on court authority. See *Bloom*, 391 U.S. at 203 (§ 401 "narrowly confined" the contempt authority); *In re Bradley*, 318 U.S. 50 (1943) (section's prohibition against both fine and imprisonment is binding on all courts); *Nye v. United States*, 313 U.S. 33 (1941) (courts' inherent contempt power is limited to punishing conduct proscribed by § 401).

<sup>13</sup> See 107 S. Ct. 2124, 2130 (1987); *id.* at 2142 n.10 (Scalia, J., concurring). A congressional attempt to authorize this appointment authority would raise issues identical to the ongoing controversy over federal appointments of independent counsel under the Ethics in Government Act. In fact, *Morrison* distinguished *Young* precisely on these grounds. See *infra* notes 143-57 and accompanying text.

<sup>14</sup> The Federal Rules of Criminal Procedure are promulgated by the Supreme Court. They become law unless Congress rejects them within 90 days. 18 U.S.C. § 3771 (1982).

<sup>15</sup> Federal Rule of Criminal Procedure 42 sets out the procedure for prosecution of a criminal contempt. Section (a) provides for summary disposition of direct contempt, and Section (b) provides for notice and hearing for indirect contempt. Section (b) requires notice to take the form of a judge's oral announcement, or, "on application of the United States attorney or of an attorney appointed by the court for that purpose," an order to show cause. FED. R. CRIM. P. 42(b) (1982) (emphasis added). See generally Note, *Private Prosecutors in Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure*, 54 FORDHAM L. REV. 1141 (1986).

<sup>16</sup> In *Young*, the plaintiff's counsel, at the district court's suggestion, had contacted the United States Attorney's Office. The Criminal Division Chief, however, expressed no interest beyond wishing him luck. *Young*, 107 S. Ct. at 2129. The *Young* majority disapproved of this approach, suggesting that "[judicial] restraint" suggests that a court "ordinarily" should seek assistance from the "appropriate prosecuting authority." *Id.* at 2134. At the same time, *Young* clearly recognizes that a private prosecutor may be appointed if that request is denied. *Id.*



Judicial criminal contempt power is on the surface at odds with traditional prosecutorial discretion. The Supreme Court has continued to emphasize the constitutional grounding of executive discretion in law enforcement. In *United States v. Nixon*,<sup>17</sup> the Court insisted that the executive branch retains "absolute discretion to decide whether to prosecute a case,"<sup>18</sup> citing earlier decisions tracing prosecutorial discretion to "the constitutional separation of powers."<sup>19</sup> Indeed, in the *Confiscation Cases*, the Court flatly stated that public prosecutions are "within the *exclusive* direction of the district attorney."<sup>20</sup> Only evidence of flagrant bias or discrimination in the pattern of prosecution seems to justify judicial review of decisions not to prosecute.<sup>21</sup> Moreover, only those prosecuted or threatened with prosecution could file such claims because "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."<sup>22</sup>

Just as private litigants cannot force prosecutions to occur, lower federal courts have also ruled that Congress has no valid

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<sup>17</sup> 418 U.S. 683 (1974).

<sup>18</sup> *Id.* at 693 (citing *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868)).

<sup>19</sup> *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965), *cert. denied sub. nom. Cox v. Hauberg*, 381 U.S. 935 (1965). Thus, "[i]t follows, as an incident to the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." *Id.* at 171 (emphasis added); see *United States v. Kilpatrick*, 821 F.2d 1456, 1463 (10th Cir. 1987) (a judge may not even add by implication an essential element to an indictment), *cert. denied*, 108 S. Ct. 699 (1988); *Community for Creative Nonviolence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) ("[t]he power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws").

<sup>20</sup> *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1868) (emphasis added).

<sup>21</sup> In general, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler v. Boles*, 368 U.S. 448, 456 (1962). But judicial review is available when a litigant shows that a prosecutor has discriminated on the basis of "race, religion, or other arbitrary classification," *id.*, or when a prosecutor vindictively exercises his discretion for "retaliatory use." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984).

Judicial review can also become available when an executive officer refuses to perform a purely ministerial duty. *Kendal v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838). Ministerial duty is defined as "one in respect to which nothing is left to discretion." *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 607-08 (D.C. Cir. 1974) (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498 (1867)).

<sup>22</sup> *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973); see *Leeke v. Timmerman*, 454 U.S. 83, 86-87 (1981) (*per curiam*), *reh'g denied*, 454 U.S. 1165 (1982).

interest "in having laws executed properly."<sup>23</sup> Unlike private litigants, Congress can influence enforcement discretion through the enactment and modification of statutes. Nevertheless, some room for executive judgment and discretion regarding issues such as the sufficiency of evidence, the availability of alternative enforcement mechanisms, and the competing claims of other cases on enforcement resources will generally remain.<sup>24</sup>

The Supreme Court's 1985 decision in *Heckler v. Chaney*<sup>25</sup> exemplifies these concerns. Concluding that the Food and Drug Administration presumptively has irreversible discretion to decline to challenge the safety and efficacy of particular drugs, the Court in *Chaney* did not hesitate to draw the parallel between these aspects of administrative discretion:

An [administrative or regulatory] agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution "to take care that the laws be faithfully executed."<sup>26</sup>

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<sup>23</sup> *American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303, 305 (D.C. Cir. 1982); see *Ameron, Inc. v. United States Army Corps of Eng'rs*, 787 F.2d 875, 888 (3d Cir. 1986) (Congress' interest in enforcing a constitutional law is "no more than that of the average citizen"), *cert. granted*, 108 S. Ct. 1218 (1988); *Barnes v. Kline*, 759 F.2d 21, 25 (D.C. Cir. 1984) (Bork, J., dissenting), *cert. granted, sub nom.*, *Burke v. Barnes*, 475 U.S. 1044 (1986), *judgment vacated*, 479 U.S. 361 (1987). The District of Columbia Circuit, however, has said that Congress has an interest in "the process by which a bill becomes law" and thus could sue over executive veto "nullification." *Moore v. United States House of Representatives*, 733 F.2d 946, 951 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985); see *Pierce*, 697 F.2d at 305. The Third Circuit, however, allows the House or Senate to intervene in cases where the executive either declines to defend a statute or declares it unconstitutional. *Ameron, Inc.*, 787 F.2d at 888 n.8. For commentary, see McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981) (arguing for prudential doctrine of equitable discretion); Case Comment, *Moore v. House of Representatives: A Possible Expansion of Congressmen's Standing to Sue*, 60 NOTRE DAME L. REV. 417 (1985) (arguing for denial of standing on constitutional grounds).

<sup>24</sup> One apparent exception is the Ethics in Government Act provisions for the appointment of special counsel in place of Justice Department officials. See *infra* notes 143-57 and accompanying text.

<sup>25</sup> 470 U.S. 821 (1985).

<sup>26</sup> *Id.* at 832 (citation omitted). Commentators have debated the ultimate precedential significance of *Chaney*. Compare Sunstein, *Reviewing Agency Inaction After*

The Court further noted that an agency generally is "far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."<sup>27</sup> Applying this logic to federal criminal prosecutions, one would imagine that the Department of Justice is the office in government best equipped to determine which actions will best further the rule of law.

Recent Supreme Court decisions on separation of powers also reenforce the propriety of leaving prosecutorial discretion matters in the executive's hands. The Court has stated that "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial"<sup>28</sup> and "this system of division and separation of powers was deliberately so structured to assure full, vigorous and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power."<sup>29</sup> Plainly, both the constitutional emphasis on tripartite division of the federal government and the delicate balance it creates would be seriously undermined by arrangements blurring the line between executive and judicial powers. At the very least, the assumption of executive functions by the judiciary obscures the parameters of executive discretion in the implementation of the laws.

*Young* runs contrary to the growing recognition of the inviolability of executive enforcement discretion. *Young* demonstrates that the judicial branch has an interest, not only in general enforcement of court orders, but also in directing prosecution in *individual cases*. What justifies such an aberration from traditional notions of prosecutorial discretion?<sup>30</sup> There are

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Heckler v. Chaney, 52 U. CHI. L. REV. 653 (1985) (suggesting possible availability of implied rights of action and other devices to secure judicial review of agency inaction) with Rabkin & Devins, *supra* note 1, at 238-39 (*Chaney* conforms to agency recognition of propriety of executive enforcement discretion). Whatever its precedential significance, *Chaney* clearly invokes prosecutorial discretion as a shibboleth of inherent executive prerogatives.

<sup>27</sup> *Chaney*, 470 U.S. at 831-32.

<sup>28</sup> *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983).

<sup>29</sup> *Bowsher v. Synar*, 106 S. Ct. 3181, 3187 (1986).

<sup>30</sup> Troubled by similar concerns, some circuit court cases have questioned the authorization of court-appointed private prosecutors under Rule 42(b) prior to the *Young*



two possible answers: either contempts are innately different from crimes in a way that reduces separation of powers concerns, or the judicial branch has a unique, inherent, and overriding need for a power of self-vindication. Each of these answers will be examined in turn.

## II. CONTEMPT AS CRIME

What are the attributes of a crime? Is it the prospect of a criminal penalty? Is it the mandate of procedural safeguards to ensure the protection of constitutional rights? Does it matter whether the purpose of the proceeding is to vindicate the authority of a branch of government rather than punish conduct the legislature prescribes as harmful? Is it significant that the procedures are triggered by noncompliance with a court order rather than noncompliance with a legislative mandate?

The Supreme Court answered these questions in *Young*, either directly or by inference. In the Court's view, prior holdings recognizing "criminal contempt as 'a crime in the ordinary sense' "<sup>31</sup> are inconsequential to the determination of whether "prosecution of contempt must now be considered an execution of the criminal law "<sup>32</sup> In other words, criminal penalties and concomitant procedural safeguards alone do not make a crime. Instead, the *Young* Court emphasized that a criminal contempt is not "conduct prescribed as harmful by the general criminal laws."<sup>33</sup> It is "conduct that violates specific duties imposed by

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decision. For example, the Fifth Circuit, in *Brotherhood of Locomotive Firemen and Enginemen v. United States*, 411 F.2d 312 (5th Cir. 1969), vacated a contempt conviction where the prosecutor was the private counsel for opposing party in the underlying action on the grounds that "the National Sovereign, through its chosen officers, should be in control of criminal contempt proceedings." *Id.* at 319. The court remanded with the instruction that "the District Court, if it determines that the prosecution should go forward, should designate the United States Attorney and his Assistants." *Id.* at 320. The court did not address what would happen if the United States Attorney declined to prosecute. In a later case, it was argued that the *Brotherhood* decision demanded that government attorneys prosecute criminal contempts. A decision was unnecessary to a resolution of the case, however, and the court explicitly reserved the issue. *United States v. McKenzie*, 735 F.2d 907, 910 n.11 (5th Cir. 1984).

<sup>31</sup> *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124, 2133 (1987) (quoting *Bloom v. Illinois*, 391 U.S. 194, 201 (1968)).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

the court itself, arising directly from the parties' participation in judicial proceedings" and its "fundamental purpose [therefore] is to preserve respect for the judicial system itself."<sup>34</sup> Source, specificity, and purpose, under this formulation, are critical components to the determination of what constitutes a crime.

This formulation is unsatisfactory. Upon closer examination, source, specificity, and purpose seem irrelevant to the question of whether a judicial prosecuting power is somehow mandated by the separation of powers. In addition, both the history and modern practice of contempt proceedings make any significant distinction from criminal proceedings untenable.

#### A. *History and Contemporary Practice*

Rather than highlighting differences, history and modern practice generally illustrate the identity between "general crimes" and indirect criminal contempt proceedings. Prior to 1821,<sup>35</sup> English common law treated violations of court orders in the same manner as normal crimes.<sup>36</sup> For example, Sir John Fox's seminal work on contempt shows no distinction in procedures utilized in contempt and criminal cases from 1253 to 1720.<sup>37</sup>

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<sup>34</sup> *Id.* at 2134.

<sup>35</sup> In 1821, Wilmot's opinion became an authoritative part of English law. *Rex v. Clement*, 106 Eng. Rep. 918, 923 (1821); see *infra* notes 38-41 and accompanying text; see also *Bloom*, 391 U.S. 194, 198 n.2 (1968).

<sup>36</sup> See *Green v. United States*, 356 U.S. 165, 201-13 (1958) (Black, J., dissenting); *Gompers v. United States*, 233 U.S. 604, 610-11 (1914) (citing Solly-Flood, 3 Transactions of the Royal Historical Society, N.S. p. 147 (1885)); Beale, *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161, 169-70, 174 (1907-08); Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1042-52 (1924). See generally J. FOX, *THE HISTORY OF CONTEMPT OF COURT* (1927). While these authorities are concerned with the summary nature of contempt proceedings, they nonetheless maintain that contempt proceedings were generally identical to ordinary criminal proceedings under the early common law.

<sup>37</sup> See J. Fox, *supra* note 36, at Appendix, 227-42; Frankfurter & Landis, *supra* note 36, at 1042, 1046. In *Bloom v. Illinois*, 391 U.S. 194 (1968), the Supreme Court simply may have found no basis for summary punishment of out-of-court contempt by a stranger to the proceedings. *Id.* at 198 n.2, 200. Although there is language in Fox's treatise to that effect, the entirety of the work suggests otherwise. For example, on the same page that he asserts that a contempt by a "stranger out of court was proceeded against like any other trespass," he also writes that no summary proceeding for "contempts out of court" occurred before the seventeenth century. J. Fox, *supra* note 36,

The turning point in the difference in treatment between crime and contempt came with an erroneous and unreported King's Bench opinion, *The King v Almon*, written by Judge Wilmot in 1765.<sup>38</sup> Improperly relying on the "immemorial usage" of the common law, Wilmot—like the Supreme Court in *Young*—spoke of the courts' inherent power to use contempt proceedings as a means to vindicate judicial authority.<sup>39</sup> Although the opinion misstated the common law, Blackstone, a friend of Wilmot's, used the opinion in his *Commentaries*,<sup>40</sup> where it has "bedevilled the law of contempt both in England and in this country ever since."<sup>41</sup>

American respect for Blackstone's *Commentaries* "bore this Almon-phenomenon of England to the United States, where it was early inculcated as a rule of law."<sup>42</sup> By the twentieth century, "the law of Wilmot had, like fine wine, aged to the point of unquestioning respect."<sup>43</sup> Early in this century, the Supreme Court characterized contempts as *sui generis*, not strictly criminal in nature.<sup>44</sup>

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at 4. Furthermore, after summarizing that strangers to the proceedings were punished "in the ordinary course of law," he notes that "parties to proceedings were governed by the rules which applied to strangers." *Id.* at 116. Finally, his Appendix lists cases where resisters to the King's writ were tried in the ordinary manner. *Id.* at 227-42.

Frankfurter and Landis, citing Fox but adding their own research, conclude that up to the "early part of the eighteenth century," contempts committed by persons not "officially connected with the court" were "dealt with by the ordinary course of law," except where the offense occurred in the actual view of the court. Frankfurter & Landis, *supra* note 36, at 1042. For other works reaching the same conclusion, see also *Green*, 356 U.S. at 205-07 (Black, J., dissenting); *Bloom*, 233 U.S. at 610-11 (citing the work of the British commentator Solly-Flood); Beale, *supra* note 36, 169-70.

<sup>38</sup> Because of a procedural error, the proceeding had to be abandoned, and the court issued no opinion. Wilmot, who had already written his opinion by this point, included it in his memoirs. J. Fox, *supra* note 36, at 5-6. Fox criticizes the opinion as without foundation and contrary to the common law at the time. *Id.* at 4, 11-15.

<sup>39</sup> *Id.* at 7-8.

<sup>40</sup> Frankfurter & Landis, *supra* note 36, at 1047 n.128.

<sup>41</sup> *Id.* at 1047. Justice Black, in his *Green* dissent, criticized the case's "baleful influence on the law of contempt both in this country and in England." *Green*, 356 U.S. at 203 (Black, J., dissenting).

<sup>42</sup> R. GOLDFARB, *THE CONTEMPT POWER* 19 (1963).

<sup>43</sup> *Id.*

<sup>44</sup> *Myers v. United States*, 264 U.S. 95, 103 (1924); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911); *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 326 (1904).

Remarkably, since the Judiciary Act of 1789 and until the *Young* opinion, the Supreme Court and Congress have increasingly returned to the original common law moorings by insisting that criminal contempt be treated like other crimes.<sup>45</sup> While the Court has never ruled that indirect contempt is indistinguishable from other crimes, this shift in emphasis bespeaks the fundamental identity between contempt and "general crimes."

Numerous Court decisions have equated contempts with general crimes.<sup>46</sup> As stated by Justice Holmes:

These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech.<sup>47</sup>

In fact, in *Bloom v Illinois*, the Court concluded that "the role of criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of our government and enforcement of their mandates."<sup>48</sup> Finally, several Supreme Court rulings recognize the especially strong need to provide procedural protections in contempt actions because contempt

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<sup>45</sup> With respect to Congress, after dissatisfaction with judicial abuse under the 1789 Judiciary Act's unrestricted grant of contempt power, Congress restricted the contempt powers to "misbehavior in the presence of the court or so near thereto as to obstruct justice; misbehavior of court officers in their official transactions; and disobedience of or resistance to the lawful writ, process, order, or decree of the court." *Bloom*, 391 U.S. at 202-03; see *Green*, 356 U.S. at 168-72.

<sup>46</sup> See *Young*, 107 S. Ct. at 2133 ("[c]riminal contempt is a crime in the ordinary sense") (quoting *Bloom*, 391 U.S. at 201); *Michaelson v. United States ex rel. Chicago, St. P., M. & O. Ry.*, 266 U.S. 42, 66 (1924) ("[t]he fundamental characteristics of both [crimes and criminal contempts] are the same"); *O'Neal v. United States*, 190 U.S. 36, 38 (1903) (an adjudication for contempt is "in effect a judgment in a criminal case"); *New Orleans v. The Steamship Co.*, 87 U.S. (20 Wall.) 387, 392 (1874) ("[c]ontempt of court is a specific criminal offense").

<sup>47</sup> *Gompers*, 233 U.S. at 610; see also *Green*, 356 U.S. at 201 (Black, J., dissenting): As it may now be punished criminal contempt is manifestly a crime by every relevant test of reason or history. It possesses all the earmarks commonly attributed to a crime. A mandate of the Government has allegedly been violated for which severe punishment, including long prison sentences, may be exacted—punishment aimed at chastising the violator for his disobedience.

<sup>48</sup> *Bloom*, 391 U.S. at 201.



"strikes at the most vulnerable and human qualities of a judge's temperament."<sup>49</sup>

Over the course of this century, the Supreme Court has said that criminal contempt is an "offense" for statute of limitations purposes<sup>50</sup> and the Constitution's pardon clause;<sup>51</sup> that due process requires a reasonable doubt standard and the self-incrimination privilege;<sup>52</sup> that accused contemnors be given prior notice, a hearing, defense counsel, and the opportunity to present witnesses;<sup>53</sup> that courts adhere to the normal rules of evidence;<sup>54</sup> that the accused contemnor has a right to a public trial before an impartial judge<sup>55</sup> and to confront and cross-examine witnesses;<sup>56</sup> and that the accused contemnor has a right to a jury trial.<sup>57</sup> Today, aside from the appointments power recognized in *Young*, criminal proceedings differ from indirect criminal contempt only in the need for grand jury indictments.<sup>58</sup> Indeed, the

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<sup>49</sup> *Id.* at 202; see *Sacher v. United States*, 343 U.S. 1, 12 (1952) (contempt is an offense against a judge's "dignity and authority"), *reh'g denied*, 343 U.S. 931 (1952); *Locke v. United States*, 267 U.S. 517, 539 (1925) (contempt may involve personal attack on judge); *Ex parte Terry*, 128 U.S. 289, 313 (1888) (a contemnor insults a court's "dignity").

<sup>50</sup> *Gompers*, 233 U.S. at 610-13.

<sup>51</sup> *Ex parte Grossman*, 267 U.S. 87, 89 (1925).

<sup>52</sup> *Gompers*, 221 U.S. at 418.

<sup>53</sup> *Cooke v. United States*, 267 U.S. 517 (1925).

<sup>54</sup> See generally *Nilva v. United States*, 352 U.S. 385 (1957), *reh'g denied*, 353 U.S. 931 (1957).

<sup>55</sup> *Offutt v. United States*, 348 U.S. 11 (1954).

<sup>56</sup> *In re Oliver*, 333 U.S. 257 (1948).

<sup>57</sup> *Bloom*, 391 U.S. at 202.

<sup>58</sup> *United States v. Nunn*, 622 F.2d 802, 804 (5th Cir. 1980); *United States v. Bukowski*, 435 F.2d 1094, 1099-1102 (7th Cir. 1970), *cert. denied*, 401 U.S. 911 (1971). See Kuhns, *Limiting the Criminal Contempt Power: New Roles for the Prosecutor and the Grand Jury*, 73 MICH. L. REV. 483, 492-93 (1974-75) (advocating that contempts be treated like crimes in all respects). Because federal grand juries are technically a part of the executive branch, the failure to convene a grand jury is consistent with court-initiated contempt proceedings. For a recent discussion of federal grand juries, see Note, *The Attorney-Client Privilege in Congressional Investigations*, 88 COLUM. L. REV. 145 (1988).

Two other minor differences arise between crimes and contempts. First, while violation of an invalid statute is not punishable under criminal law, violation of a court order is criminal contempt regardless of the order's validity. *Maness v. Meyers*, 419 U.S. 449, 458-59 (1975). This procedural difference, however, hardly justifies a judicial contempt appointment power. Because it affords court orders even more respect and efficacy under the law than the status that statutes enjoy, it actually reduces the need for judicial self-enforcement. It thus makes a contempt appointment power even less

Court in *Young* construed the contemporary practice to be to treat criminal contempt like other crimes.<sup>59</sup> *Young*, however, finds support for the judicial appointments power. It points to the unique source, specificity, and purpose of indirect contempt, which distinguish contempt from "general crimes."<sup>60</sup> *Young* also speaks of the essentially passive nature of judicial proceedings, which makes the contempt power "necessary" to the judiciary's ability to function as a coequal branch.<sup>61</sup> We shall first consider source, specificity, and purpose.

### *B. Source, Specificity, and Purpose*

**SOURCE:** It is hard to fathom why the *Young* Court finds significant the fact that indirect criminal contempt is triggered by refusal to comply with a court order, rather than by legislatively enacted criminal law.<sup>62</sup> Because both types of malfeasance are subject to criminal penalty, no intuitive reason exists to claim that a violation of the criminal law is a crime whereas nonacquiescence to a valid court order is a noncrime subject to criminal penalty. In both cases, the court is punishing criminally a breach of socially acceptable conduct. Common sense suggests that the punishability of the breach defines the crime, not the source of the norm that is subject to punishment upon violation. Undoubtedly, one would be hard pressed to explain to the criminal contemnor awaiting sentencing that his conduct was noncriminal.<sup>63</sup>

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compelling.

Second, judges have plenary discretion regarding dismissal of contempt prosecutions: a federal judge may dismiss an otherwise valid contempt prosecution if she finds in her discretion that no public interest would be served by continuation of the proceeding. *United States v. Barnett*, 346 F.2d 99 (5th Cir. 1965). This power, of course, is merely the other side of the *Young* power to initiate indirect contempt prosecutions. Our critique of *Young* is therefore applicable to this practice.

<sup>59</sup> *Young*, 107 S. Ct. at 2133 ("Our insistence on the criminal character of contempt prosecutions has been intended to rebut early characterizations of such actions as undeserving of the protections normally provided in criminal proceedings.").

<sup>60</sup> *Id.* at 2133-34; see *infra* notes 62-72 and accompanying text.

<sup>61</sup> *Young*, 107 S. Ct. at 2131-34; see *infra* notes 73-79 and accompanying text.

<sup>62</sup> *Young*, 107 S. Ct. at 2133 (distinguishing contempt from "conduct proscribed as harmful by the general criminal laws").

<sup>63</sup> This is especially true in *Young*, where one of the contemnors received a five year "nonsentence." *Id.* at 2128 n.1.

The source argument also falters because contempts *are* violations of the general criminal law. 18 U.S.C. section 401 makes "[d]isobedience or resistance to . . . [a court's] lawful writ, process, order, rule, decree, or command" punishable by fine or imprisonment.<sup>64</sup> Although section 401 can be characterized as merely codification of an inherent judicial power,<sup>65</sup> it is nonetheless a congressional statute applicable to all individuals within the jurisdiction of the United States. Indeed, in *Bloom v Illinois*,<sup>66</sup> the Supreme Court characterized this provision as "the basis for the general power to punish criminal contempt."<sup>67</sup>

**SPECIFICITY** The *Young* Court's emphasis on the fact that—unlike other criminals—the criminal contemnor "violates specific duties imposed by the court itself"<sup>68</sup> can mean one of two things, neither of which justifies the conclusion that criminal contempt is not a crime. First, the Court might view a court order as distinct from a law of general applicability because it only binds the participants in a judicial proceeding. With respect to those participants, however, the court order is as much a legal mandate as any legislative provision. Furthermore, legislative enactments do not truly apply to all; anti-pollution measures only affect those who might pollute, and the restraint of trade prohibition only affects those who might restrain trade. Contempt as a consequence of noncompliance with a court order therefore seems as much a rule of general applicability as the penalties associated with violations of environmental or antitrust laws.

Second, the Court might consider criminal contempt as an internal bookkeeping measure thereby not implicating the broader concerns of legislatively enacted criminal law. In fact, *Young* places significant weight on the fact that a "parties' participation in judicial proceedings" is a prerequisite to an indirect contempt prosecution.<sup>69</sup> This distinction is unsatisfactory. It restates the "source" argument, *i.e.*, criminal contempt is not a crime be-

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<sup>64</sup> 18 U.S.C. § 401 (1982).

<sup>65</sup> See *supra* note 9 and accompanying text.

<sup>66</sup> 391 U.S. 194 (1968).

<sup>67</sup> *Id.* at 203-04.

<sup>68</sup> *Young*, 107 S. Ct. at 2134.

<sup>69</sup> *Id.*

cause crimes are a legislative statement of social mores. In other words, even if one views indirect contempt as essentially an internal matter, the availability of a criminal penalty necessarily means that contempt—like other crimes—is a breach of socially acceptable conduct.

Specificity concerns, moreover, extend beyond judicial action. For example, administrative agencies make determinations just as specific as court orders, binding on specific parties, and yet the agencies have no power to institute criminal prosecutions for violations of their rulings. *Young* surely does not intimate that they should be able to do so,<sup>70</sup> rather than refer such violations to the United States Attorney as they now do?

PURPOSE: *Young* also distinguishes indirect contempt from “the *general* criminal laws” because contempt prosecutions “serve the *limited* purpose of vindicating the authority of the court.”<sup>71</sup> Yet, do not violations of “general” laws challenge the authority of the legislature? How then can one distinguish between general law prosecutions from limited contempt prosecutions? It seems far-fetched to argue that the object of the contemnor’s offense is court authority (rather than the court order she seeks to evade) whereas the object of the “general” law violator is the substantive law (rather than the legislative body which enacts it).<sup>72</sup> Considering the implausibility of this argument, this rationale seems little more than a naked statement that the judiciary is institutionally less able to withstand noncompliance than the other branches of government. Even if this necessity argument is true, however, it speaks only to judicial authority in contempt actions. It does not suggest that indirect contempt is not a crime.

The notion that, in light of this purpose, contempt is inherently different from other crimes is troubling on another count. Under this formulation, all laws seem fundamentally different from each other for they all concern different areas and serve different purposes. Contempt concerns judicial authority just as the Ethics in Government Act concerns executive branch corrup-

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<sup>70</sup> See R. GOLDFARB, *supra* note 42 at 128-61 (arguing that such a power should exist).

<sup>71</sup> *Young*, 107 S. Ct. at 2133 (emphasis added).

<sup>72</sup> The *Bloom* Court makes precisely this point. See *supra* note 48 and accompanying text.



tion. Yet *Young* certainly does not counsel that the executive's special interest in internal corruption justifies plenary executive control of Ethics in Government Act enforcement. It therefore seems incomprehensible that a law's purpose should serve as the initial reference point for gauging the applicability of traditional criminal enforcement.

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The failure of source, specificity, and purpose to justify distinct treatment for contempt leaves only the "necessity" rationale. We shall now turn our attention to this justification.

### III. THE NECESSITY RATIONALE

The *Young* Court also grounded its opinion in necessity. The Court warns that, without the contempt appointment power, the judiciary would be dependent on the executive to vindicate its authority, thereby rendering the courts "mere boards of arbitration whose judgments and decrees would be only advisory."<sup>73</sup> *Young* further supports this assumption of "quasi-executive" power by highlighting the passivity of the judicial function. Unlike the other branches of government whose jurisdiction "would include the entire population,"<sup>74</sup> a judicial contempt authority extends "only" over those whose obligations spring from an earlier court proceeding.<sup>75</sup> Consequently, rather than extending the judiciary into the executive sphere, the contempt power merely prevents the transformation of the judicial power into a "mere mockery."<sup>76</sup>

Justice Scalia took issue with this reasoning, arguing that the judicial power is limited to "the power to decide, in accordance with law, who should prevail in a case or controversy."<sup>77</sup> Furthermore, claiming that the separation of powers presupposes that each branch is somewhat dependent on other branches to put into effect their judgments,<sup>78</sup> Justice Scalia accuses the ma-

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<sup>73</sup> *Young v. United States ex rel. Vuitton Et Fils S.A.*, 107 S. Ct. 2124, 2132 (1987) (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911)).

<sup>74</sup> *Id.* at 2134 n.10.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 2131 (quoting *Gompers*, 221 U.S. at 450).

<sup>77</sup> *Id.* at 2142 (Scalia, J., concurring).

<sup>78</sup> *Id.* at 2143.

majority of validating a tyrannical regime in which judges make the laws, prosecute their violation, and sit in judgment of their prosecution [sic].<sup>79</sup>

In our view, Justice Scalia makes the better argument. Our system of checks and balances presupposes interdependence. This seems especially true in the case of the judiciary, "the least dangerous branch." Consequently, unless institutional necessity mandates some deviation from executive prosecutorial discretion, the executive should bring forward criminal contempt cases. A review of the law of congressional contempt and an assessment of indirect criminal contempt's impact on core judicial functions convinces us that *Young's* "necessity" rationale is without merit. This section shall detail our reasoning on this matter.

#### *A. Judicial Independence and the Separation of Powers*

The dependence on one branch to carry out the will of another is fundamental to the separation of powers. From President Jackson's infamous response to *McCulloch v. Maryland*<sup>80</sup> ("John Marshall has made his decision, let him enforce it")<sup>81</sup> to Justice Jackson's astute recognition in *Youngstown Sheet & Tube Co. v. Sawyer* that "[w]hile Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command"<sup>82</sup> to the current controversy over the independent counsel,<sup>83</sup> it is axiomatic that each branch plays a critical role in the other branches' effectiveness. Congress depends on the executive to enforce the laws, and the judiciary and the executive both depend on Congress to support their operations. The judiciary also depends on Congress and the executive to pass legislation and undertake enforcement mechanisms that will make its decisions meaningful.<sup>84</sup> Even within

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<sup>79</sup> *Id.* at 2145.

<sup>80</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>81</sup> The phrase is reputed. See J. AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* 90 (1984).

<sup>82</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring).

<sup>83</sup> *Morrison v. Olson*, 108 S. Ct. 2597 (1988).

<sup>84</sup> School desegregation is a prime example. The Supreme Court's mandate in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), was little more than a false promise

the area of contempt, judges depend on executive officials to arrest and jail convicted contemnors. No principle of necessity gives Congress the power to prosecute and jail law violators if the executive fails to do so or gives the executive the authority to support itself when Congress fails to appropriate funds.

Recognizing the sanctity of separation of powers, the Supreme Court has repeatedly ruled that no branch may exercise a function reserved to a coordinate branch. Executive efforts to exercise lawmaking functions were declared invalid in *Youngstown*<sup>85</sup> as were executive efforts to control the judiciary's adjudicatory power in *United States v. Nixon*<sup>86</sup> and *Northern Pipeline Co. v. Marathon Pipe Line Co.*<sup>87</sup> Congressional efforts to exercise executive/administrative functions have been rejected in *Buckley v. Valeo*,<sup>88</sup> *Immigration and Naturalization Service v. Chadha*,<sup>89</sup> and *Bowsher v. Synar*.<sup>90</sup> Finally, in *United States v. Brown*,<sup>91</sup> the Court ruled that the Bill of Attainder Clause was intended as a "safeguard against legislative exercise of the judicial function."<sup>92</sup> All of these cases speak to the same proposition, namely, "that individual freedoms will best be preserved

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until Congress and the executive took steps to desegregate public schools. In fact, with the advent of executive and legislative programs, more actual desegregation of southern schools occurred in 1965 than in the decade following *Brown*. See Devins & Stedman, *New Federalism in Education: The Meaning of the Chicago School Desegregation Cases*, 59 NOTRE DAME L. REV. 1243, 1246-51 (1984); Kirp, *School Desegregation and the Limits of Legalism*, 47 PUB. INTEREST 101 (Spring 1977); see also T. BECKER & M. FEELY, *THE IMPACT OF SUPREME COURT DECISIONS* 69-76 (1973) (discussing delays in the enforcement of school desegregation decisions).

<sup>85</sup> *Youngstown*, 343 U.S. at 579 (executive may not exercise article I lawmaking powers granted to Congress).

<sup>86</sup> 418 U.S. 683 (1974) (executive may not exercise article III adjudicatory power granted to judiciary).

<sup>87</sup> *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (executive appointment of bankruptcy judges violates article III adjudicatory power).

<sup>88</sup> 424 U.S. 1, 125 (1976) (per curiam) (Congress may not retain power to remove officials exercising executive authority).

<sup>89</sup> 462 U.S. 919 (1983) (Congress may not utilize single-house veto to control administrative agencies).

<sup>90</sup> 106 S. Ct. 3181 (1986) (executive powers cannot be entrusted to officials who can be removed by Congress).

<sup>91</sup> 381 U.S. 437 (1965).

<sup>92</sup> *Id.* at 442; see *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871) (Congress improperly exercises executive authority when it interferes with agency rulemaking).

through a separation of powers and division of functions among the different branches and levels of government.”<sup>93</sup>

In the case of the judiciary, the necessity of prohibiting courts from assuming the responsibilities of the other branches becomes especially clear. In *The Federalist*, Alexander Hamilton has set forth the classic statement on the limits of judicial power:

The judiciary has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.<sup>94</sup>

Ascribing to this view of the judiciary as “the weakest of the three departments of power”<sup>95</sup> makes life tenure for judges acceptable. The courts are given the power of judicial review completely insulated from outside influence precisely because their opinions are only as valid as they are persuasive. Indeed, for Hamilton, “there is no liberty if the power of judging be not separated from the legislative and executive powers.”<sup>96</sup>

All of this is not to say that the judiciary is absolutely forbidden from performing nonjudicial acts. As the Supreme Court has recognized, the separation of powers does not require “a hermetic sealing off of the three branches of Government from one another,”<sup>97</sup> but judicial encroachment into the executive sphere must be justified by true “necessity.” In other words, the rhetoric of *Young*—that without the power to initiate indirect criminal contempt, the judiciary will be a “mere mockery”—must be close to correct. We shall now explore the veracity of the *Young* argument.

#### *B. Direct Versus Indirect Contempt: Towards an Understanding of Essential Judicial Functions*

The *Young* Court, pointing to a long line of precedents, held that the contempt power speaks both to the disruption of court

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<sup>93</sup> *United States v. United States Dist. Court for the E. Dist. of Michigan*, 407 U.S. 297, 317 (1972).

<sup>94</sup> *THE FEDERALIST* No. 78, at 522-23 (A. Hamilton) (J. Cooke ed. 1961).

<sup>95</sup> *Id.* at 465-66.

<sup>96</sup> *Id.* at 466.

<sup>97</sup> *Buckley*, 424 U.S. at 121.



proceedings and the enforcement of court orders.<sup>98</sup> Consequently, *Young* views the distinction between in-court and out-of-court contempts as pertinent only to procedural matters, rather than inherent judicial authority.<sup>99</sup> Justice Scalia takes issue with this depiction of prior Court decisions. In his view, the most recent of these prior precedents—*Bloom v. Illinois*<sup>100</sup>—“specifically rejected [earlier decisions’] rationale that courts must have self-contained power to punish disobedience of their judgments.”<sup>101</sup>

We need not resolve whether Justice Scalia or the *Young* majority is the better reader of precedent. In our view, indirect criminal contempts cannot be supported by a “necessity” rationale and therefore are violative of the separation of powers scheme.<sup>102</sup>

*Young*’s necessity argument is of two parts, namely: (1) without indirect criminal contempt, “‘a party can make himself a judge of the validity of orders which have been issued’”<sup>103</sup> and (2) intrusion into the other branches spheres of authority is de minimis because the criminal contempt power is limited to those whose legal obligations result from prior court proceedings.<sup>104</sup> Neither of these arguments adequately supports indirect criminal contempt.

The first argument, necessity, appears incorrect on at least two counts. The use of criminal sanctions to deter future viol-

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<sup>98</sup> *Young*, 107 S. Ct. at 2132 (citing *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 333 (1904); *Ex Parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821)).

<sup>99</sup> *Young*, 107 S. Ct. at 2132-33.

<sup>100</sup> *Bloom v. Illinois*, 391 U.S. 194 (1968).

<sup>101</sup> *Young*, 107 S. Ct. at 2145 (Scalia, J., concurring).

<sup>102</sup> See also Cohen, *Self-love and the Judicial Power to Appoint a Special Prosecutor*, 16 HOFSTRA L. REV. 23 (1987) (criticizing necessity rationale in *Young*).

<sup>103</sup> *Young*, 107 S. Ct. at 2132 n.8 (citing *Gompers*, 221 U.S. at 450). In a May 1988 decision, the Supreme Court clarified this necessity holding. *United States v. Providence Journal Co.*, 108 S. Ct. 1502 (1988). Upholding the Solicitor General’s power to authorize all certiorari filings by the United States, the *Providence Journal* Court dismissed a writ of certiorari filed by a court-appointed prosecutor. In distinguishing *Young*, the Court claimed that the executive’s plenary authority in this area does not implicate necessity concerns. *Id.* at 1507-10. Since a court-appointed prosecutor can only seek certiorari if her contempt prosecution has already failed, the Court reasoned that “the necessity that required the appointment of an independent prosecutor has faded and, indeed, is no longer present.” *Id.* at 1508.

<sup>104</sup> *Id.* at 2134 n.10.

ations of court orders seems an executive function. The judicial role is the resolution of cases or controversies. Consequently, it appears that the judiciary need only the authority to punish direct contempts or at most an additional coercive civil contempt power for out-of-court obstructions of judicial proceedings. The logic underlying the doctrine of absolute judicial immunity for the violation of constitutional rights supports this reasoning.<sup>105</sup> Judicial immunity springs from the notion that principled and fearless decisionmaking is a prerequisite to the effective exercise of the judicial function. This concern of the judicial function, however, is with the right to decide a case, not with the rightness or wrongness of the decision. Concern over compliance with a court order, in our view, speaks more to the correctness of a decision than to the decisionmaking process and is therefore not an integral element of the judicial function.

The "necessity" argument has another fault. Necessity presupposes that criminal contempt is the *only* mechanism that will instill needed respect in the judiciary. Civil contempt, however, can be quite effective.<sup>106</sup> For example, the United States Catholic Conference was recently subject to a civil contempt penalty of over \$100,000 per day for its failure to comply with a discovery order.<sup>107</sup> *Young* neither can nor does address this issue.

*Young's* second argument, scope, is also unsupportable. The contempt power is not *always* limited to the parties before the court.<sup>108</sup> Moreover, parties do not necessarily "assume the risk"

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<sup>105</sup> See generally *Stump v. Sparkman*, 435 U.S. 349 (1978), *reh'g denied*, 436 U.S. 951 (1978); Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879; Note, *Liability of Judicial Offices Under Section 1983*, 79 YALE L.J. 322 (1969).

<sup>106</sup> While it is of course true that the executive enforces civil as well as criminal law, separation of powers concerns are less acute here. Civil contempt proceedings are considered a part of the original cause of action whereas criminal contempt is a collateral proceeding "between the public and the defendant." *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418, 445 (1911).

<sup>107</sup> See Brief for Petitioners, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, at 8 (arguing, in part, that a court without article III power cannot issue a subpoena or coerce compliance through civil contempt). The Supreme Court—accepting the petitioners' argument—recently overturned this award. *United States Catholic Conference v. Abortion Rights Mobilization*, 108 S. Ct. 2268 (1988).

<sup>108</sup> See, e.g., *Seymour v. United States*, 373 F.2d 629 (5th Cir. 1967) (affirming the contempt conviction of a television news photographer who took photographs in the hallway outside a courtroom in violation of a standing order). Admittedly, the objection here is more analytical than practical because cases of this type are not very common.

by coming before the court voluntarily. Because anyone can be sued, the "parties *potentially subject to*"<sup>109</sup> the court's contempt authority do, in fact, "include the entire population."<sup>110</sup> For this very reason, *Young's* attempt to distinguish a judicial contempt power from a congressional enforcement power is strained.<sup>111</sup>

A host of pragmatic reasons also supports rejection of *Young's* "necessity" "nonintrusiveness" rationale. The indirect criminal contempt power that *Young* gives the judiciary is far from harmless. From a functional perspective, the criminal contempt power presents a very real problem of institutional bias.<sup>112</sup> Judges are more likely to perceive insults to their authority than are United States Attorneys, and therefore are more likely to initiate proceedings in borderline cases. Indeed, the anticipated standards for prosecution *must* be lower for a judge than for a prosecutor because *Young* envisions cases where a judge will go forward after a prosecutor has declined.<sup>113</sup> Thus, an unintended consequence of *Young* may be the establishment of a dual criminal justice system—one for violators of the "general" law enforced by the United States Attorney, the other—possibly utilizing a lower threshold for actionable wrongdoing—for violators of court orders enforced by the judiciary

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<sup>109</sup> *Young*, 107 S. Ct. at 2134 n.10.

<sup>110</sup> *Id.*

<sup>111</sup> See *supra* notes 68-70 and accompanying text.

<sup>112</sup> See generally Komesar, *Back to the Future—An Institutional View of Making and Interpreting Constitutions*, 81 NW U.L. REV. 191 (1987) (advocating a "comparative institutional" approach to separation of powers, wherein the resources, abilities, and biases of each branch are considered when assigning powers and functions among the branches).

<sup>113</sup> The D.C. Circuit raised such fundamental concerns in *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988), *rev'd sub nom.*, *Morrison v. Olson*, 108 S. Ct. 2597 (1988). In invalidating the special counsel law, the court suggested that a lower standard for prosecution existed for subjects of an independent counsel investigation, and thus "fundamental fairness" problems might arise. *Id.* at 510. In reversing this decision, the Supreme Court did not comment on this concern.

Functional concerns did play a part in *Morrison*, however. In defense of the special counsel provision, the Court argued that judges are "especially well qualified" to appoint prosecutors. *Morrison*, 108 S. Ct. at 2611 n.13 (1988). This proposition is troublesome. Although the Court was merely contrasting the judiciary's qualifications in appointing legal counsel with the qualifications of non-legal officials, the Court was more accurate in its 1985 recognition that enforcement decisions are "peculiarly within [the] expertise" of the executive. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

As the "injured party," moreover, a judge is precisely the worst person to make the decision to prosecute, because she is an interested participant. Indeed, in *Bloom v. Illinois*, the Court recognized the "potential for abuse"<sup>114</sup> in summary contempt because "[m]en who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir."<sup>115</sup>

These dangers are heightened under the existing federal rules, because in criminal contempt cases not involving "disrespect to or criticism of a judge," the presiding judge makes the complaint, decides whether to prosecute, appoints the prosecutor, presides over the trial, and, upon conviction, sentences the defendant.<sup>116</sup> Justice Scalia therefore raised no idle concern when he complained in *Young* of "judges' [sic] in effect making the laws, prosecuting their violation, and sitting in judgment of those prosecutions."<sup>117</sup>

Aside from the inherent bias of the courts, executive officials' innate experience with prosecutorial discretion makes assignment of this duty to article II officials desirable from a functional perspective. Enforcement decisions require the weighing of a large number of factors, including the sufficiency of evidence, the availability of alternatives, the allocation of scarce resources, and others. The consideration of these factors by the executive is "peculiarly within its expertise," and thus the executive "is far better equipped than the courts to deal with the many variables involved."<sup>118</sup>

On the most practical level, the appointment power is simply *not* necessary to protect the judiciary from impotence. Courts in civil law countries do not enjoy such a power, but they nonetheless maintain their efficacy.<sup>119</sup> The Supreme Court has

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<sup>114</sup> *Bloom v. Illinois*, 391 U.S. 194, 202 (1968).

<sup>115</sup> *Id.* at 202, n.4 (quoting *Sacher v. United States*, 343 U.S. 1, 12 (1952)).

<sup>116</sup> Rule 42(b) provides for disqualification of the "injured" judge from presiding at the contempt trial only when the "contempt charged involves disrespect to or criticism of a judge." Federal courts have held that the same judge whose order was disobeyed can sentence the contemnor. *United States v. Prugh*, 479 F.2d 611 (8th Cir. 1973); *United States v. Conole*, 365 F.2d 306 (3d Cir. 1966), *cert. denied*, 385 U.S. 1025 (1967). *But see* *United States v. Combs*, 390 F.2d 426 (6th Cir. 1968).

<sup>117</sup> *Young*, 107 S. Ct. at 2145 (Scalia, J., concurring).

<sup>118</sup> *Heckler*, 470 U.S. at 831-32.

<sup>119</sup> R. GOLDFARB, *supra* note 42, at 22.



used its contempt power only once,<sup>120</sup> and yet it is by no means a "mere board of arbitration."<sup>121</sup>

Courts can depend on the executive to enforce contempt judgments, just as they already depend on the executive to enforce liens and imprison individuals whom the courts adjudicated as criminals. As noted earlier, even in the contempt context, courts trust the executive to arrest and punish those judged to be in contempt.<sup>122</sup>

Prosecutors simply will not refuse judges' requests to prosecute contemnors. A study of federal prosecutors on this subject showed that they uniformly initiate proceedings against recalcitrant witnesses.<sup>123</sup> One federal district has adopted a policy of initiating criminal contempts by indictment. Prosecutors there have not refused judges' requests to seek contempt indictments. The Chief Judge considered such a refusal unlikely in light of the close working relationship between the court and the prosecutors.<sup>124</sup> Indeed, given attorneys' natural eagerness to keep themselves in the judge's good graces, *any* refusal of a valid request seems unlikely, and refusals on a level sufficient to undermine respect for the judiciary seem wildly improbable.

The majority in *Young* acknowledged this:

In practice, courts can reasonably expect that the public prosecutor will accept the responsibility for prosecution. Indeed, the United States Attorney's Manual § 9-39 -318 (1984) expressly provides: "In the great majority of cases the dedication of the executive branch to the preservation of respect for judicial authority makes the acceptance by the U.S. Attorney of the court's request to prosecute a *mere formality*"<sup>125</sup>

The majority used the likelihood of executive compliance to minimize the effect of its decision. Analytically, that likelihood undercuts the rationale for the decision. There is simply no reason to disrupt the separation of powers when the executive is likely to pursue indirect contempt violations.

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<sup>120</sup> *United States v. Shipp*, 203 U.S. 563 (1906).

<sup>121</sup> *Young*, 107 S. Ct. at 2132 (quoting *Gompers*, 221 U.S. at 450).

<sup>122</sup> *Id.* at 2143 (Scalia, J., concurring).

<sup>123</sup> Kuhns, *supra* note 58, at 512-13 & n.134.

<sup>124</sup> *Id.* at 503 n.98.

<sup>125</sup> *Young*, 107 S. Ct. at 2134.

These pragmatic concerns, combined with the unpersuasiveness of *Young's* "necessity" and "scope" rationales, convince us that indirect criminal contempt is not essential to the integrity of the judicial system. Consequently, this deviation from separation of powers is unsupportable.

### *C. Lessons from Other Places*

#### *1. Contempt of Congress*

Contempt of Congress' actions<sup>126</sup> buttress our conclusion that indirect contempt prosecutions are not an essential judicial attribute. In fact, while "necessity" does not justify inherent congressional power to punish criminal contempt, the "necessity" argument here is much stronger than the necessity argument accepted by *Young* for indirect criminal contempt.

Congress has no inherent power to punish for criminal contempt.<sup>127</sup> In contrast to Britain, where legislative contempt is immune from judicial review,<sup>128</sup> Congress has inherent power only to "coerce" by civil contempt. This power is inherent because without it Congress could not effectively undertake its legislative mission but instead would be left "exposed to every indignity and interruption, that rudeness, caprice, or even conspiracy, may mediate against it."<sup>129</sup> Dissatisfied with the narrow scope of its inherent power, Congress enacted legislation in 1857 providing for criminal contempt.<sup>130</sup> In *In re Chapman*,<sup>131</sup> the Court validated this provision as "an act necessary and proper for carrying into execution the powers vested in Congress and

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<sup>126</sup> See generally *United States v. Fort*, 443 F.2d 670, 676-78 (D.C. Cir. 1971), cert. denied, 403 U.S. 932 (1971); L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 184-220 (1985); Moreland, *Congressional Investigations and Private Persons*, 40 S. CAL. L. REV. 189 (1967).

<sup>127</sup> The Constitution does explicitly vest Congress with a number of judicial powers, including the power to punish members. *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880).

<sup>128</sup> L. FISHER, *supra* note 126, at 187.

<sup>129</sup> *Anderson*, 19 U.S. (6 Wheat.) at 228.

<sup>130</sup> Act of January 24, 1857, ch. 19, 11 Stat. 155 (codified as amended at 2 U.S.C. § 192 (1982)).

<sup>131</sup> 166 U.S. 661 (1897).

in each House thereof."<sup>132</sup> Critical to this holding was the Court's recognition that the object of contempt prosecutions was the "disclosure of evidence" essential to Congress' legislative function.<sup>133</sup> Congress' contempt power thus aids its investigative function, which is central to its constitutional role.

Criminal contempt of Congress is different from indirect criminal contempt in two critical respects. First, congressional contempt is undertaken pursuant to a "general" law because the legislature's inherent contempt power extends only to coercion, not punishment. Unlike indirect criminal contempt, contempt of Congress reenforces the maxim that the legislature specifies that which is criminal. Second, congressional contempt speaks only to conduct that directly impedes the legislative function. Unlike indirect criminal contempt, this requirement ensures that the contempt mechanism is narrowly tailored to essential legislative functions.

Procedures governing the filing of a congressional contempt action are also instructive. Under 2 U.S.C. section 194, the House Speaker or Senate President shall certify facts constituting a contempt of Congress "to the appropriate U.S. attorney, whose duty it *shall* be to bring the matter before the grand jury for its action."<sup>134</sup> Because "shall" does not necessarily mean "must,"<sup>135</sup> it is possible that the statute preserves prosecutorial discretion.<sup>136</sup> In fact, the Reagan administration adopted this view in its handling of contempt of Congress charges against EPA Administrator Anne Gorsuch.<sup>137</sup>

Even if section 194 mandates executive action,<sup>138</sup> the intrusion on executive prerogatives may be minimal in practice. The pros-

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<sup>132</sup> *Id.* at 671.

<sup>133</sup> *Id.* (quoting *Chapman v. United States*, 5 App. D.C. 122, 130-31 (D.C. Cir. 1895)).

<sup>134</sup> 2 U.S.C. § 194 (1982) (emphasis added).

<sup>135</sup> See generally Sutton, *Use of "Shall" in Statutes*, 4 JOHN MARSHALL L.Q. 204 (1938).

<sup>136</sup> But cf. *Ex parte Frankfeld*, 32 F. Supp. 915, 916 (D.D.C. 1940) (U.S. Attorney has no discretion with contempts of Congress but must submit the facts to the grand jury).

<sup>137</sup> See 129 Cong. Rec. H6441-47 (1983); L. FISHER, *supra* note 126, at 211-12.

<sup>138</sup> In our view, because the executive retains complete discretion over the manner in which it should bring a contempt of Congress case, any obligation to present the case before the grand jury is no more than a "ministerial" task.

ecutor would still retain discretion to handle the case in a manner she deemed appropriate.<sup>139</sup> This "safety valve" is unavailable in *Young*, where executive prosecutorial discretion may be turned over to a judicial appointee.<sup>140</sup> Moreover, legislative initiation may well be consistent with the separation of powers. Because the criminal contempt power appears a necessary corollary to the investigative function<sup>141</sup> and because the executive retains discretion in handling the case, neither of the two principal infirmities of *Young* prosecutions are present. In addition, the failure of the executive to initiate contempt proceedings is a more realistic concern with congressional contempt than with the violation of court orders because resistance to congressional subpoenas may come from administration officials.<sup>142</sup>

The analogy between congressional contempt and directed criminal contempt cuts against the *Young* decision. Congressional contempt may well preserve prosecutorial discretion. Congressional contempt, moreover, is a narrowly tailored means of protecting Congress' investigative function.

## 2. *Independent Counsel*

Another, more obvious analogy is the Ethics in Government Act provisions allowing for the court appointment of independent counsels by "Special Division" panels.<sup>143</sup> While serious sep-

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<sup>139</sup> R. GOLDFARB, *supra* note 42, at 42.

<sup>140</sup> In fact, court control over both the appointment of the prosecutor and the sentencing of the contemnor make it likely that the court-appointed prosecutor will do little else than help put into effect the appointing court's preference.

<sup>141</sup> This, of course, is the critical question. On the one hand, criminal contempt of Congress enhances legislative investigations by deterring noncompliance. On the other hand, as with judicial contempt, a long line of decisions recognizes its equivalence to ordinary crime for procedural purposes. *Russell v. United States*, 369 U.S. 749, 755 (1962); *Deutch v. United States*, 367 U.S. 456, 471 (1961); *Flaxer v. United States*, 358 U.S. 147, 151 (1958); *Sacher*, 356 U.S. at 577; *Watkins v. United States*, 354 U.S. 178, 208 (1957); *Sinclair v. United States*, 279 U.S. 263, 291-92 (1929). Consequently, except for in-the-chambers disruption of proceedings, congressional contempt is analytically and functionally indistinguishable from ordinary crime; as a result, any reservation of prosecutorial discretion by Congress is an impermissible intrusion into executive prerogatives and an unwarranted arrogation of power, plagued by the same potential for institutional bias as the judiciary's discretion to prosecute insults to its own authority.

<sup>142</sup> See, e.g., *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983); L. FISHER, *supra* note 126, at 211-13.

<sup>143</sup> 28 U.S.C.A. §§ 49, 591 *et seq.* (Supp. 1988).



aration of powers concerns are raised by this practice,<sup>144</sup> problems presented by court-appointed special prosecutors are simply not of the same magnitude as *Young*-approved indirect criminal contempt.

Ethics Act procedures are less intrusive on prosecutorial discretion than the judicial appointment power approved in *Young*. The Act gives the Attorney General a role in the decision whether to prosecute. He decides initially whether to conduct a preliminary investigation.<sup>145</sup> After any such investigation, he decides whether an independent counsel is needed at all.<sup>146</sup> Neither of these decisions is judicially reviewable.<sup>147</sup> Thus, if the executive feels that prosecution is unwarranted or detrimental, it can block prosecution—a prerogative unavailable to the executive in *Young*. Further, the appointments have express statutory authorization, something not enjoyed by contempt appointments.<sup>148</sup>

The Attorney General also defines the scope of the investigation. As the Court construed the Act in *Morrison*, the Special Division may not expand this scope.<sup>149</sup> Any post-appointment duties it possesses, held the Court, are merely “ministerial.”<sup>150</sup> The Attorney General, finally, is empowered to remove the special counsel. Although removal must be for “good cause”<sup>151</sup>

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<sup>144</sup> See Rabkin and Devins, *supra* note 1 at 223-24. This essay will not assess the correctness of *Morrison*. In our view, whether or not *Morrison* was rightly decided, indirect criminal contempt is both an improper self-aggrandizement of judicial power and an unjustifiable limit on executive prosecutorial discretion.

<sup>145</sup> The Attorney General is not compelled to act unless he determines that the information presented to him is “sufficient to constitute grounds to investigate.” 28 U.S.C.A. at § 591(a) (Supp. 1988).

<sup>146</sup> *Id.* at § 592(b)(1).

<sup>147</sup> See *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984); *Nathan v. Smith*, 737 F.2d 1069 (D.C. Cir. 1984). *Accord Morrison v. Olson*, 108 S. Ct. 2597, 2621 (1988) (“the Special Division has no power to appoint an independent counsel *sua sponte*; it may only do so upon the specific request of the Attorney General, and the courts are specifically prevented from reviewing the Attorney General’s decision not to seek appointment”).

<sup>148</sup> *Morrison* emphasized this statutory attribute. Noting that the appointments clause authorizes Congress to vest appointment of “inferior officers” “in the Courts of Law,” the Court effectively concluded that appointments clause concerns were satisfied. *Morrison*, 108 S. Ct. at 2608-11.

<sup>149</sup> *Id.* at 2613 nn. 17 & 18.

<sup>150</sup> *Id.* at 2613-14. Although the Special Division is authorized to terminate the special counsel’s office when her investigation is clearly over, the Court found this authority insignificant. *Id.*

<sup>151</sup> 28 U.S.C.A. at § 596(a)(1) (Supp. 1988). The special counsel can also be removed for any “condition that substantially impairs the performance of [her] duties.” *Id.*

(thereby ensuring that the special counsel possesses "a degree of independent discretion"<sup>152</sup> to exercise her powers), this removal power guards against court-sponsored prosecutions based either in malice or vindictiveness.

The necessity rationale that supports the Ethics Act, moreover, is much weightier than that advanced in *Young*. The Watergate experience is only the most dramatic example of possible abuse when executive officers are charged with policing themselves.<sup>153</sup> In contrast, conflict-of-interest considerations work for the opposite result in *Young*. A judge who feels slighted may first select a champion to vindicate his authority and then sit in judgment over the person who offered the slight. Meritless prosecutions, overzealous execution, and disproportionate sentences are a likely consequence of such a scheme.

Most significant, judicial aggrandizement concerns which plague indirect criminal contempt are less significant here.<sup>154</sup> The Ethics Act places severe limits on the Special Division. The Attorney General first determines the need for an independent counsel and then defines the scope of her investigation.<sup>155</sup> Whether and how the independent counsel brings forward her case are also nonreviewable decisions.<sup>156</sup> Finally, Division members are

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<sup>152</sup> 108 S. Ct. at 2608.

<sup>153</sup> An identical argument can be made with respect to contempt orders directed against the executive. If Justice Department officials have sole authority over the prosecution of such digressions, real conflict-of-interest problems are present. Consequently, the necessity justification for indirect criminal contempt is much stronger in such cases.

At the same time, the D.C. Circuit argued that there is a significant institutional bias within the independent counsel's office: "The need to justify an office dedicated solely to one goal," and "the success of the office itself, in the public's eyes," are "unique incentives" to go forward and seek indictments where they may not otherwise be appropriate. *In re Sealed Case*, 838 F.2d 476, 509-10 (D.C. Cir. 1988), *rev'd sub nom.*, *Morrison v. Olson*, 108 S. Ct. 2597 (1988). *Morrison*, however, found that Ethics Act procedures are designed to avoid a conflict of interests. The Court concluded that, since the Special Division has no power to review actions taken by either the Attorney General or independent counsel, its actions will not be biased. *Morrison*, 108 S. Ct. at 2615. The Court also found significant the Act's prohibition against Division member participation in independent counsel prosecutions. *Id.*

<sup>154</sup> Act procedures do allow for the stripping of power from the executive, however. *Morrison* found this depletion too insignificant to disrupt core executive functions. We do not endorse this conclusion.

<sup>155</sup> See *supra* notes 145-52 and accompanying text.

<sup>156</sup> See *supra* note 153.

prohibited from participating in special counsel prosecutions.<sup>157</sup>

Each of these limitations stands in stark contrast to the procedures approved in *Young*. While the special counsel provision does take responsibilities from the executive, it does not give those responsibilities to another branch. In indirect criminal contempt actions, on the other hand, initiation, supervision, and sentencing are all controlled by the offended jurist.

Neither the independent counsel provisions of the Ethics Act or the Supreme Court's recent validation of this practice reaffirms *Young*. The appointment of independent counsels infringes on executive prerogatives less, increases only slightly the power of article III courts, poses fewer threats of injustice in individual cases, and rests on a more compelling rationale than the appointment of private contempt prosecutions.

#### CONCLUSION

*Young* hinges on two false premises. Claiming that criminal contempt is a noncrime subject to criminal penalty, the Court ducks the issue of traditional prosecutorial discretion. The source, scope, and purpose of criminal contempt, however, refute this suggestion. *Young* views the enforcement of court orders as a judicial function, as opposed to an executive one. But indirect criminal contempt does not speak to essential judicial functions, nor is it a nonobtrusive means to preserve judicial authority. Instead, it is an open invitation to the judiciary to extend its authority into the legislative sphere whenever it feels a litigant has been unduly disrespectful.

At a time in the Court's history when great emphasis is placed on the need for the executive and Congress to stay within their respective spheres of authority, *Young* is a remarkable, unjustifiable, and unnecessary aggrandizement of judicial power.

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<sup>157</sup> See *id.*