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The Independent Counsel Act: A Good Time to End a Bad Idea

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When Dr. Samuel Johnson said "Patriotism is the last refuge of a scoundrel,"[1] he apparently had not heard of reform. Reform, *in vacuuo*, is a wonderful idea, but reform in application can sometimes be awful for the people who are affected by it. The changes effected by the adoption of the independent counsel statute provide an example of the awful, if unintended, consequences of failing to understand the ramifications of reform.

The independent counsel statute was born out of a legitimate concern following the Watergate affair that the Justice Department might not be able to investigate serious crimes involving the President of United States, the Vice President, or the Attorney General, as well as other high-level officials, due to inherent conflicts of interest. In a paroxysm of reaction, President Carter proposed the Ethics in Government Act (the "independent counsel statute"), one of the purposes of which was to remove the "appearance of impropriety" when the Department of Justice investigates high officials in the executive branch.[2] To accomplish this purpose, the independent counsel statute included a provision establishing an Office of the Special Prosecutor, with various mechanisms through which a prosecutor is appointed and his jurisdiction is established.

At the time, I was one of those who believed that this provision was pure folly. There were many and varied reasons: it was bad public policy; it contorted the constitutional structure and was therefore unconstitutional; and it would ultimately lead to grievous abuses of the prosecution function because of the over-politicized nature in which these investigations often begin. The subsequent experience under the independent counsel provisions has proved these criticisms to be essentially correct.

In 1988, the Supreme Court upheld the constitutionality of the independent counsel provisions of the Ethics in Government Act in *Morrison v. Olson*.[3] Justice Antonin Scalia dissented[4] from the majority in what became the siren song of Republicans who did not like the application of the statute back then, and has now become the siren song of Democrats who do not like the applica-

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1. John Bartlett, Familiar Quotations 316 (Justin Kaplan ed., 1992) (quoting from JAMES BOSWELL, LIFE OF JOHNSON, at Apr. 7, 1775 (G.B. Hill ed. & L.F. Powell, rev. ed. 1934) (1791)).

2. *See, e.g.*, S. REP. No. 95-170, at 6 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4222.

3. 487 U.S. 654 (1988).

4. *Id.* at 697 (Scalia, J., dissenting).

of the statute now. Everything that he predicted in that dissent has come

stice Scalia laid out several grave scenarios that the statute has created: y the application of this statute in the present case, Congress has effectively pelled a criminal investigation of a high-level appointee of the President in ection with his actions arising out of a bitter power dispute between the dent and the Legislative Branch."[5] Justice Scalia was concerned that as a t of the independent counsel statute's limitations on the discretion of the ney General to appoint a prosecutor, Congress would be in a position to tively "compel" a criminal investigation any time "the Attorney General ot affirm, as Congress demands, that there are *no reasonable grounds to ve* that further investigation is warranted."[6]

stice Scalia was not only concerned with the limited discretion that the te left the Attorney General, he was also troubled by the fact that certain mittees in the House and the Senate had the right to initiate an investigation nerely sending a letter to the Attorney General. Justice Scalia seriously oted whether any Attorney General would have the political fortitude to stand the scrutiny after failing to recommend an independent counsel ointment: "Merely the political consequences (to [the Attorney General] and President) of seeming to break the law by refusing to [appoint an indepen- t counsel] would have been substantial."[7] As a result, in Justice Scalia's id, the Attorney General is caught in a Catch-22. If she fails to recommend independent counsel appointment, she provides political fodder to her adver- es who will contend that her failure to do so is a cover-up; she will be fied by opponents in Congress and will become politically damaged goods. on the other hand, she succumbs to the political pressure to recommend the ependent counsel appointment, she gives credence to the accusations of the ministration's enemies, no matter how unjustified.

The loss of an effective check on the powers of the independent counsel also rried Justice Scalia. Justice Scalia discussed this shortcoming in the context separation of powers,[8] but it is equally applicable when discussing the ependent counsel statute as a matter of effective policy. Justice Scalia was abled by the fact that because the independent counsel was not under the hority of the Attorney General or subject to other control by the President, independent counsel had prosecutorial discretion that is unchecked by any t of our system of checks and balances: "[T]he balancing of various legal, ictical, and political considerations, none of which is absolute, is the very ence of prosecutorial discretion. To take this away is to remove the core of

5. *Id.* at 703 (Scalia, J., dissenting).
6. *Id.*
7. *Id.* at 702 (Scalia, J., dissenting).
8. Here I am referring to Justice Scalia's criticism of the removal of executive control over a osecutor, which he stated was essentially an executive function. *See id.* at 705-10 (Scalia, J., ssenting).

the prosecutorial function, and not merely 'some' Presidential control."[9] Prosecutorial discretion, in Justice Scalia's analysis, involves a "balancing" of executive interests: whether or not, in the interests of justice, particular acts are worthy of devoting resources and time to prosecute; whether or not a prosecution is worth the disclosure of national security secrets;[10] and whether or not prosecution is worth damaging sensitive international interests.[11] Under the independent counsel statute the balancing is removed from the control of the executive, and prosecutions that might not be in the best interests of the republic are without any political check.

This unfettered discretion also ignores (in fact denies) the powerful checks on executive powers already present under our Constitution: the checks and balances of a Congress that will impeach executives who fail to enforce the law and the political check of the people who "will replace those in the political branches . . . who are guilty of abuse."[12] What a dangerous creature we have now loosed upon our system of checks and balances: an independent counsel, removable only for cause, who in a real sense does not answer to Congress, the executive, or the judiciary, and, worst of all, is in no way accountable to the people.

Such scenarios that Justice Scalia identified are cause for alarm. The danger is that Congress, a body that is inherently partisan in nature, has granted itself a tool that it can use for partisan purposes against its political enemies. One need not think hard to come up with numerous instances when various factions in Congress have raised the cry for an independent counsel to probe an officer. And, to borrow a phrase from Chief Justice Marshall in *McCulloch v. Maryland*,[13] the power to prosecute is the power to destroy, and the power to investigate is the power to maim, if not destroy.[14]

Once an independent counsel is appointed, political enemies enjoy the added effect of avoided consequences—it is far easier for partisan Members of Congress to have an independent counsel carry out its investigations than it would be for the Congress itself. According to Justice Scalia, "instead of accepting the political damage attendant to the commencement of impeachment proceedings against the President on trivial grounds . . . [Congress may simply] trigger a debilitating criminal investigation of the Chief Executive under [the independent counsel] law."[15] The independent counsel, therefore, provides partisan members of Congress with good "cover": they can blame the independent

9. *Id.* at 708 (Scalia, J., dissenting).
10. *See id.*
11. An independent counsel had subpoenaed the former ambassador of Canada, creating an embarrassing international incident. *See id.* I cannot believe this subpoena would ever have been issued by a Justice Department prosecutor.
12. *Id.* at 711 (Scalia, J., dissenting).
13. 17 U.S. 316 (1819).
14. *Id.* at 431 ("the power to tax involves the power to destroy").
15. *Morrison*, 487 U.S. at 713 (Scalia, J., dissenting).

el for excessive or unmerited investigations, investigations for which the bers of Congress may themselves have called.

e statute ultimately reflects a whole notion of "reform" that has led to the lization of ethics in the nation's capital and the trivialization of criminal n general. Because of repeated calls for independent counsel investigations ie supposed controversy after another, an atmosphere has developed in "everything is a crime, so that therefore nothing is a crime." As a result, ndependent counsel statute has debased the currency of the criminal law ed to an awful run of instances that have led the American people to lose image of this statute as being something that is "special."[16] Its routine use ebased its original currency: it was to be reserved for those rare instances a constitutional crisis confronted the nation.

though it may be true that the Espy, Cisneros, and HUD cases are all y of federal criminal investigation, it is abundantly obvious that they were orthy of an appointment of an independent counsel. These are all investiga- that the U.S. Department of Justice (DOJ) could easily have conducted. An icit assumption of the independent counsel statute is that the DOJ cannot be ed to investigate such matters. This assumption is ingrained into the minds ie American people, reinforcing a negative assumption that eventually ts the public's perception of impartiality of the DOJ as a whole in everyday ers.

he net effect of these problems is the numbing of the public conscience n it comes to morality, ethics, and conduct in the nation's capital. As a lt, the level of cynicism in America has increased and people feel discon- ted from their government. Americans have less incentive to participate and e incentive to distrust. It is no minor irony that such effects work counter to actual goals of the "reform," namely to ensure to the people the integrity of r government and their belief in it.

s there any solution?

rom the outset, I have believed that Congress would never change this law nificantly and that it would never repeal it. Therefore, I have often suggested e changes which would in some measure address these concerns: 1) narrow covered persons under the law, making any future version applicable only to President, Vice President, and Attorney General; 2) eliminate the require- nt that the Attorney General proceed with a preliminary investigation if she not determine whether the information is specific and from a credible rce;[17] and 3) remove the restrictions placed on the Attorney General's ability conduct a preliminary investigation.[18] But I have now concluded that even

6. Indeed, the term "special prosecutor" was replaced by the term "independent counsel" through- the act. Although the reason was to remove any negative connotations of the Watergate era, perhaps change also reflects the fact that such appointments are no longer "special."

7. 28 U.S.C. § 591(d)(2).

8. These restrictions include the inability to grant immunity, convene a grand jury, or even issue poenas. *See id.* § 592(a)(2)(A). In addition, the statute prohibits the Attorney General from basing

these amendments would be unwise. Instead, I have come to the conclusion that what I believed earlier, when the statute was first proposed by President Carter, is truer now than it ever was before—*we do not need the independent counsel statute*. Indeed, we cannot *afford* to have the independent counsel statute because the damage to our institutions (the presidency, the Congress, the courts, and the body politic) is too grave to be permitted.

My own experience as independent counsel has convinced me that the statute is a bad idea that—unlike a good wine—has not gotten better with age. This is a wine that has turned to vinegar and can never be returned to a vintage state. Far too many independent counsels have been appointed since the statute was first passed in 1978. By the time I was appointed in 1992, thirteen independent counsels had been appointed to investigate allegations ranging from cocaine use by a Carter aide to lying about a mistress by a cabinet nominee. In the end, my investigation identified no criminal violations, just political stupidity in the administration. But the accusations that led to my appointment surfaced during an election year, and partisans used the low "appearance of impropriety" standard to bring about my appointment, undoubtedly to embarrass the President.

The statute is compromised at its very core. It cannot be nit-picked and amended into a satisfactory form. The statute's mere presence in any form politicizes the entire process by which we accuse people, investigate them, and eventually charge them with crimes or exonerate them. The initiation process under this statute invites all the elements that should not be involved when deciding to initiate a criminal investigation of any person, namely personal and political motivations.[19]

The targets of such investigations are also severely disadvantaged. The statute has led to a situation in which rather than being equal under the law, high level public officials in the executive branch are given fewer rights than the average citizen. It is one of those rare instances in which the "big-shots" actually are treated unfairly and are at a disadvantage as compared to the average citizen because of the hair-trigger mechanism for the invocation of the statute. Part of the reason for this disadvantage is the nature of white collar criminal investigations today. It is widely known among defense lawyers that white collar criminal investigations are lengthy and intrusive by their very nature. Various techniques, including undercover stings and surveillance, are now commonplace in such investigations. When you combine the already lengthy and intrusive federal criminal investigative process with the low trigger-

her decision that the information is not specific or credible or that there are no reasonable grounds for further investigation by an independent counsel on the fact that the target lacked the state of mind for a violation of criminal law 28 U.S.C. § 592(a)(2)(B)(i)-(ii).

19. "Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naive, ineffective, but, in all probability, 'crooks.' And nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better, prosecution." *Morrison*, 487 U.S. at 713 (Scalia, J., dissenting).

mechanism and politically oriented accusatory process of the independent
ısel statute, you end up with a horrific amalgam which truly threatens the
l liberties of high level government officials.
urthermore, the costs for the target or subject of such probes are substantial.
eers are put on hold or ended, legal expenses pile up, and a mere misstate-
ıt could result in criminal prosecution:

> How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile . . . . [a]nd to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment.[20]

)f course, it goes without saying that the psychological effects of the
:stigation on the target are difficult to bear. Public scrutiny of the defendant
ne thing when an indictment against a target is obtained by a U.S. Attorney.
. when an independent counsel is appointed *merely* to initiate an investiga-
ı of an executive official, the public scrutiny that the official receives is
)lerable. Families are torn apart or severely strained. I cannot conceive of a
)d public policy reason to continue the statute's existence.
For all these shortcomings, the independent counsel statute provides abso-
ely no assurances whatsoever that the American people, the Congress, or the
:ss will be satisfied with the result. In a real sense, the independent counsel is
countable to no one. Any failure of the independent counsel to obtain an
lictment when merited or to conclude when the investigation is going no-
iere cannot be reviewed. Voters, Congress, the President, and the courts do
t have control over the *quality* of the outcome. The irony here is that the
pointment of an "independent" counsel was supposed to obviate any such
ncerns. But the hlghly politicized nature of the accusatory process under the
ıtute has ripened into cynicism about who is appointed independent counsel
)d by whom and how. The statute has been consumed by itself.
There are all sorts of proposals floating around now about how to amend the
ıtute to try to make it work: allow the Attorney General to recommend three
dependent counsel candidates to the Special Division of judges which appoint
e independent counsel, and require the panel to select from that list; allow a
)mmittee of the American Bar Association to keep a "corral" of available
dependent counsels which they can recommend to the court; or establish a
:rmanent Office of Independent Counsel, which would be in place and ready
) go on a moment's notice. All of these suggestions really do not deal with the
ndamental problem of the statute: its mere existence.
It is readily apparent to anyone who has studied the statute, watched its
)plication, and followed the evolution of its application from constitutional

20. *Id.* at 708 (Scalia, J., dissenting).

crises to trivial criminal allegations, that the statute cannot be fixed or mended in a way that changes its fundamental flaw: it is an extra-constitutional,[21] fourth branch[22] of government that does not perform a useful role in our constitutional scheme. Rather, it may be doing irreparable damage to the political and governmental institutions of this country, including all three of our branches which are intimately involved in the application of the independent counsel statute.

It is very important to remember that in Watergate, a President of the United States was forced from office and named an unindicted co-conspirator in a criminal case, all without the benefit of this statute. A *true* constitutional crisis was handled without this flawed statute being in existence, and the crisis ended exactly the way it should have: a disgraced president leaving office.

I think that the lesson of Watergate is that when a true constitutional crisis does exist, the American people, the Congress of the United States, the media of this country, and the body politic as a whole will rise up and demand an independent inquiry of anything involving the President, Vice President, or the Attorney General. And that is the way it ought to happen. Resort to such mechanisms ought to be reserved for those moments in history when the enforcement of the Constitution is at issue. We do not need a statute for that.

In addition, we do not need a statute to investigate members of the cabinet if they are alleged to have done something wrong. We need to restore confidence in the DOJ and its ability to handle cases of this nature when they do not involve the President, a Vice President, or the Attorney General. The integrity of the government requires it: if the American people are to have faith in the way the DOJ does its job with average Americans every day, their faith in its ability to investigate the government must be restored.

If we get to a point where a President, a Vice President, or an Attorney General appears to have done something wrong and it needs to be investigated, we will once again rise to the occasion and force the legal and political process to require an independent investigation. But this statute is not necessary for that to happen.

21. Even if it is constitutional under *Morrison*.
22. Or a fifth branch depending on how you view independent regulatory agencies.