The University of Kansas Law Review

A Brief History of the Independent Counsel Law*

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It is an honor and pleasure to open this conference. I want to begin this afternoon by attempting a brief history of some of the forces that have brought us to this moment—when the Senate, for only the second time in its history, is sitting in judgment over whether to remove from office a President twice elected by the people. How could this happen? I believe that a decent understanding of this story requires a basic understanding of our constitutional structure, with its three branches of government, plus the functioning of two institutions not clearly the creature of any branch—the Office of Independent Counsel and the press. In addition, I think to understand what is going on now, it is incredibly helpful, maybe necessary, to look at the one event that most affected the present role of the independent counsel, that set out standards for impeachment, and that helped create the modern press, not to mention the very language of modern political scandal, Watergate.

I. THE SEPARATION OF POWERS

Let us start with the basics. What is happening now could not happen in Europe or most other parliamentary democracies. In any other system, the 1994 election would have produced a Republican President, and the issue of whether he was having an inappropriate relationship, and the political consequences that would be imposed, would presumably be a matter to be decided by the party majority. Our system of separation of

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* This lecture was presented at a forum entitled “A Dialogue on the Impeachment Process,” which was held at the University of Kansas School of Law on January 29, 1999.

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powers, therefore, is the first thing one has to understand to figure out the current process.

We are not a parliamentary democracy in which the people, through the legislature, are sovereign. Instead, we are a constitutional republic. The individuals who framed our Constitution were concerned about the concentration of power in a single branch of government and therefore designed a system with three independent branches: the executive, legislative and judicial. Each branch has a degree of independence from the other. There are specific limits imposed by the Constitution on the right of one branch of government to usurp the power of another. Indeed, there are even prohibitions on one branch voluntarily relinquishing power to another.¹

The legislative power in the United States is granted to Congress, which is itself divided into the Senate and House of Representatives. As a separate branch, our executive power, the power to enforce and carry out laws, is vested in the person of the President.² Unlike European parliamentary systems, that person need not be of the same political party of the opposition; indeed, in the last generation, the President has most often been of a different political party.

And Congress’s power to remove the President is limited. The less important of the limitations, the one that Professors Kissam and McAllister will discuss, is that impeachment occur only upon proof of High Crimes and Misdemeanors. Perhaps, the more important of the limitations, but one that is not really subject to debate, is the requirement that conviction in the Senate occur only with a two-thirds vote.³

Not only is the President protected from removal by Congress, but he is also protected from judicial interference. Although the Constitution is less explicit, the assumption of most scholars is that the President also is protected against criminal conviction, while he is in office, for violations of federal law.⁴ This conclusion is practically compelled if you think

2. See U.S. CONST. art. II, § 1, cl. 1.
3. One of the hazards of the Clinton scandals is their tendency to confound predictions. In preparing my remarks, I made at least two assumptions that were proven wildly incorrect. The first was that there was nothing really controversial about the requirement that conviction occur upon a two-thirds majority of the Senate. In fact, at the time the forum was conducted, members of the Senate were discussing whether that body might issue “findings of fact,” upon a majority vote, concerning the President’s conduct. One of the objections lodged by at least some observers to such an undertaking is that it would have violated the Constitution’s two-thirds requirement. See Anthony Lewis, The Rule of Law, N.Y. TIMES, Feb. 2, 1999, at A1.
4. See Ruth Marcus, The Legal Implications: Allegations Against Clinton Could Lead to Impeachment, WASH. POST, Jan 22, 1998, at A12. Of course, this was my second incorrect assumption. The very day after my weighing in about the “consensus” that the President cannot be indicted, the New York Times reported an intense debate within the Independent Counsel’s Office
back to 1860; it really would not have done to have allowed a federal prosecutor and judge in South Carolina to have prosecuted Abraham Lincoln.

In our government of divided power, the power to investigate and prosecute crimes is a quintessentially executive function. But the fact that the power to prosecute crime in the United States is lodged solely within the executive branch of the government involves one obvious problem. If the misconduct is caused by the President, who will prosecute the prosecutors? Impeachment is a difficult process, and, while the President is ultimately accountable to the people, it may be years until the next election. More importantly perhaps, it is often the institutions of the criminal prosecutor that uncover crime in the first place. Even if we believe that impeachment is adequate protection once crime is uncovered, how do we have confidence that serious presidential crime will be discovered in the first place? Can we really put our trust in the press to uncover Presidential misconduct? The felt need to have prosecutorial power separate from the President's control produced the serious constitutional crisis a generation ago that was a part of Watergate, and led to the enactment of the independent counsel law. Because Watergate is the prelude to the issues we discuss today, it is my next step.

II. WATERGATE

On June 17, 1992, five individuals were apprehended after attempting to commit a burglary at the Democratic National Committee Headquarters in the Watergate building in Washington, D.C. The burglars were part of a group funded by the Committee to Re-Elect President Nixon, and the burglary was one of a series of illegal acts committed by members of the Committee. The burglars were constituted to perform acts of sabotage on the opposing party by the head of the Committee, former Attorney General John Mitchell, and other high committee staff. In addition to these activities by the Nixon campaign committee, the Nixon White House itself had, for a period of several years, been involved in misuse of both the FBI and the IRS to monitor, harass, and audit political opponents.

The five burglars and two others were charged in local district court with burglary. Within days, the White House, at the behest of the President, sought to conceal the connection between the burglars and the former Attorney General. The President authorized an effort to get the CIA to stop the FBI investigation of the burglary. He also authorized

over the very question. See Don Van Natta Jr., Starr Is Weighing Whether to Indict Sitting President, N.Y. TIMES, Jan. 31, 1999, § 1 (Magazine), at 6.
hundreds of thousands of dollars of hush money, and he instructed aides to perjure themselves. 5

The initial efforts to cover the burglary were relatively successful. The indictment was restricted to the five burglars and two others who were caught almost immediately thereafter. Neither the U.S. Attorney’s Office nor the grand jury initially concerned themselves with how the burglars were paid or whether they were part of a larger illegality. Although the Washington Post ran a number of articles, the incident did not garner much other publicity. One estimate was that in late 1972 to early 1973, there were only a dozen or so reporters working extensively on the story. 6

In January 1973, the original seven defendants were convicted of the burglary. 7 The decisive break in the case, however, occurred approximately two months later. On March 19, 1973, James W. McCord, one of the convicted burglars, wrote a letter to the sentencing judge, John Sirica. McCord charged that the government witnesses had committed perjury and that the trial had failed to uncover others involved in the operation. McCord’s letter prompted a number of administration officials to revisit the grand jury. Throughout April, news accounts based on reopening the grand jury as well as accounts of some of the actors themselves began to unravel the conspiracy. By the end of April, the reports had become so pronounced that the President’s Chief of Staff, the Director of the FBI, the Attorney General, and the Counsel to the President, among others, were all forced from office. 8 In order to deal with this political crisis, the President appointed a new Attorney General who agreed to appoint a “special prosecutor” from outside the United States Department of Justice. The Special Prosecutor was given a charter promising complete independence in the conduct of his investigation. 9 During the Summer of 1973, a witness testifying before the Senate committee that was examining Watergate disclosed that President Nixon had installed and operated an audio-taping system in the White House. All of a sudden, Congress and the Special Prosecutor were presented with a relatively foolproof way of determining “what the President knew, and when the President knew it.” 10 The Special Prosecutor therefore sought

8. See id. at 4.
9. See id. at 5.
10. The answer to this question, now a standard part of talk-television, was claimed by Senator Howard Baker, among others, as a goal of the Senate Watergate hearings.
almost immediately to obtain the tapes of meetings between the President and his advisors.11

The President resisted turning over the tapes. Eventually, the President and Special Prosecutor contested the issue in court. The district court rejected the President’s claim of executive privilege, and the order was affirmed by the United States Court of Appeals for the District of Columbia Circuit.12

On October 19, 1973, the last day on which the President had to appeal the Court of Appeals’s ruling to the Supreme Court, the President announced he would not appeal and he would not comply with the court order. He ordered the Special Prosecutor to desist from requesting the tapes and to desist from any further requests for taped information. The next day, the Special Prosecutor held a press conference in which he stated he would not obey the President’s order. What followed were the events known as the “Saturday Night Massacre.” The President ordered the Attorney General to fire the Special Prosecutor. The Attorney General resigned rather than carry out the order. The President then ordered the Deputy Attorney General to carry out the order, and he resigned as well. Finally, Solicitor General Bork dismissed the Special Prosecutor. That night, FBI agents dispatched by the President occupied the Offices of the Special Prosecutor, the Attorney General, and the Deputy Attorney General.13

The events provoked an incredible, and almost completely unanimous outcry. By the following Monday, the move to start an impeachment inquiry began in earnest. By the following Friday, the President had reversed course and agreed to the appointment of another Special Prosecutor, with the additional provision that he could be dismissed only upon the concurrence of a bipartisan group of congressional members.14 The tapes initially requested by the Special Prosecutor proved sufficiently damning to President Nixon to result in bipartisan agreement by the House Judiciary Committee to recommend his impeachment. Shortly after the House Judiciary Committee’s vote, the President released the transcript of the so-called “smoking gun” tape, which demonstrated his culpability in planning the cover-up of the burglary. With his approval ratings in the twenty percent range, with support in the House having completely eroded, and with few sure votes in the Senate, the President resigned as an alternative to impeachment and conviction.15

11. See WATERGATE: SPECIAL PROSECUTION FORCE REPORT, supra note 7, at 8.
12. See id.
13. See id. at 9.
14. See id. at 11.
15. See id. at 16.
III. THE INDEPENDENT COUNSEL STATUTE

The Saturday Night Massacre and the crimes that had been proved within the executive branch convinced many Americans that criminal investigations of the executive branch by executive branch officials posed a significant conflict of interest problem that had not been adequately addressed by our system of checks and balances. As a result, several years after Watergate, Congress passed and the President signed the Ethics in Government Act.\textsuperscript{16} This Act provides for the appointment of an “independent counsel.”\textsuperscript{17} It requires the Attorney General to apply for the appointment of an independent counsel within ninety days after receiving a request to do so from Congress, unless the Attorney General determines within that period that “there are no reasonable grounds to believe that further investigation is warranted.”\textsuperscript{18} If the Attorney General determines that “there are no reasonable grounds to believe that further investigation is warranted,” the Attorney General must notify the court of this determination.\textsuperscript{19} In such a case, “the division of the court shall have no power to appoint an independent counsel.”\textsuperscript{20} If, however, the Attorney General determines that there are “reasonable grounds to believe that further investigation is warranted,” the Attorney General must apply for the appointment of an independent counsel.\textsuperscript{21} The Attorney General’s application to the court must contain sufficient information to define the independent counsel’s prosecutorial jurisdiction.\textsuperscript{22} Upon receiving this application, the special division “shall appoint an appropriate independent counsel and shall define that independent counsel’s prosecutorial jurisdiction.”\textsuperscript{23}

Once that jurisdiction is defined, the Act grants the independent counsel “full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General and any other officer or employee of the Department of Justice.”\textsuperscript{24} The functions of the independent counsel include conducting grand jury proceedings and investigations, participating in court and

\textsuperscript{17} 28 U.S.C. § 593(b)(1).
\textsuperscript{18} Id. § 592(a)(1).
\textsuperscript{19} Id. § 592(b)(1).
\textsuperscript{20} Id.
\textsuperscript{21} See id. § 592(c)(1)(A).
\textsuperscript{22} See id. § 592(d).
\textsuperscript{23} Id. § 593(b)(1).
\textsuperscript{24} Id. § 594(a).
litigation, initiating and conducting prosecutions, and, when the President is involved, preparing a report to the Congress for possible impeachment proceedings.

Critically, the Act provides only two means for removal of the independent counsel. Counsel may be removed only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacitation, "or any other condition that substantially impairs the performance of such independent counsel’s duties." The counsel also may terminate upon a notification by the counsel that she has completed investigation or prosecution pursuant to the counsel’s jurisdiction. Unlike most prosecutions within the United States, prosecutions by the independent counsel are limited to particular subject matter and often to particular individuals. Moreover, the prosecutions are not subject to the oversight of the United States Department of Justice. The President has no power to decide whether proceedings or indictments may be brought by the independent counsel.

In the case of Morrison v. Olson, the Supreme Court upheld the constitutionality of this independent counsel statute. Only Justice Scalia dissented from the conclusion of the Court. Justice Scalia’s position was that it was a violation of separation of powers to lodge the power to prosecute in an organization that was so completely outside of the Department of Justice. The conclusion of the majority, however, was that the independent counsel’s office did not so significantly impair the executive branch that it should be declared unconstitutional.

In his dissenting opinion, Justice Scalia spent a good deal of time talking about the abuses of power that could be committed by the special prosecutor. He noted that “[o]ne of the greatest difficulties in the position of prosecutor is that [a prosecutor] must pick [her] cases.” Prosecutors have the power to target unpopular individuals, to use their vast resources to go after unpopular groups. When that power is exercised within the Department of Justice, there is at least some check

25. See id. § 594(a)(1)-(9).
26. See id. § 595(c).
27. Id. § 596(a)(1).
28. See id. § 596(b)(1)(A).
29. See id. § 593(b)(3).
30. See id. § 595(a)(1).
33. Id. at 696-97.
34. See id. at 732-33 (Scalia, J., dissenting).
35. See id. at 696 (majority opinion).
36. Id. at 727 (Scalia, J., dissenting) (quoting Justice Robert Jackson when he was Attorney General under President Franklin Roosevelt).
on prosecutorial decisions—the President who exercises executive power is subject to removal in election. Justice Scalia contrasted the political responsibility of prosecutors in the Department of Justice with that of the special counsel.37 He asked: “What if the judges who appoint the individual are partisan and select a prosecutor antagonistic to the administration or even to the particular individual who has been selected” for investigation?38 “There is no remedy for that, not even a political one.”39 Justice Scalia also warned that the very manner of selection could produce a staff predisposed to find guilt. He asked: “Can one imagine a less equitable manner of fulfilling the executive responsibility to investigate and prosecute” than to advertise for individuals willing to investigate a particular individual?40 He also warned that a special prosecutor could turn into an all-purpose investigator of an individual, free to continue until he found something that the individual had done wrong.41 Whether these predictions have in fact become embodied in the investigation of President Clinton will be discussed by the speakers that follow. Before they do, I shall provide a brief history of our current situation.

The investigation of President Clinton began several years ago. The original crimes being investigated began in a real estate deal that occurred in 1978.42 In that year, then-Arkansas Attorney General Bill Clinton and his wife, Hillary, joined a partnership with two individuals to buy 220 acres of river-front land and form Whitewater Development Corporation. The goal was to sell lots for vacation homes, but the partnership did poorly and dissolved in 1992, leaving the Clintons with a net loss of more than $40,000.

One of the principal questions that the special prosecutor was asked to decide was whether the President had been involved in any fraud via loans to the corporation or in other transactions dealing with this development company. In the first of the series of trials, which ended in 1996, a number of individuals were convicted of involvement in land fraud.43 The President was not one of them. President Clinton testified on videotape about one of the fraudulent loans but was not accused of any wrongdoing in the action. Congressional hearings about the

37. See id. at 728-32.
38. Id. at 730.
39. Id.
40. Id.
41. See id.
Whitewater transactions, which went on for thirteen months, also uncovered no evidence of illegal conduct on the part of President Clinton. 44

The first Whitewater prosecutor was Robert Fiske, who was appointed by the Attorney General at a time when the Independent Counsel Act was in abeyance. Upon reauthorization of the Act, Mr. Fiske was succeeded by Kenneth Starr. During 1996 and 1997, Independent Counsel Starr obtained authority to expand his jurisdiction into two other areas. The first, so-called "Travelgate," 45 involved the firing of seven members of the White House travel office in 1993, possibly to make room for friends of the President. 46 That firing was followed by an FBI investigation of the travel office, allegedly under pressure from the White House to justify the firings. During this period of time, the President was also alleged to have collected hundreds of confidential FBI files on prominent Republicans. The files were ordered by a minor White House operative in 1993 and 1994. The questions of whether the President was involved in obtaining these files, which would have been illegal, has also been investigated by the Independent Counsel's Office. These issues are referred to in the United States as "Filegate," and the special counsel obtained jurisdiction to investigate whether crimes were committed by the President for those acts as well. 47

The special counsel also obtained the authority to investigate the 1993 suicide of White House counsel, Vincent Foster, and whether the President's wife engaged in illegal conduct during her service as a partner in a law firm in the state of Arkansas. The various cases have so far involved a number of separate trials, but none of those trials implicated the President in any wrongdoing. 48

In January of last year, Independent Counsel Starr suddenly requested and received permission to expand his investigation yet again. The new area of inquiry concerned whether the President and his close friend, Vernon Jordan, encouraged a White House intern, Monica Lewinsky, to

44. See generally id.
45. Because the so-called Watergate scandal was the most serious political corruption prosecution of modern times, there has been an irresistible pressure from the media and opposition to paint any succeeding scandal as comparable to Watergate. This explains the American need to append the word "gate" to every scandal. Thus, a possible scandal at the White House travel office becomes "Travelgate" and the possibly improper obtaining of files becomes "Filegate." On our television shows, the legal investigation of President Clinton's allegedly adulterous relationship with Monica Lewinsky has been referred to as "Zippergate."
46. See generally Whitewater Time Line, supra note 42.
47. See generally id.
lie under oath whether she had had an affair with the President. The investigation of those offenses, of course, is what has brought us to the first impeachment trial of an elected President in our history.