

Opposing Counsel*

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My task today is to speak in opposition to the independent counsel. Let me confess at the outset that I approach this task with some ambivalence. As someone who came of political age in the late sixties and early seventies, I regarded Richard Nixon as an evil man, and Watergate as conclusive evidence of the need for vigorous and vigilant independent oversight of the President. I agreed with the Supreme Court in *Morrison v. Olson*¹ when it upheld the independent counsel law.

As I have become increasingly convinced that the independent counsel is wrong as a matter of policy and unconstitutional as a matter of separation of powers, I recognize that my conversion may have something to do with the shoe being on the other foot from the perspective of my generally liberal political leanings. But while it is difficult to separate one's views of the independent counsel law from the political context in which it operates, I believe that even a neutral observer would recognize that the actual results of the independent counsel law have demonstrated that the cure is worse than the disease.

As "Monicagate" shows, the independent counsel law,² coupled with other legal developments concerning the constitutional privileges and immunities of the President, has for all practical purposes given the President's enemies the legal means of forcing open the darkest recesses of the executive branch. The goals of the independent counsel law are certainly laudable: To prevent, expose, and punish corruption, abuse of power, and other misconduct and thereby preserve the rule of law and restore public trust in government.³ But on balance the independent counsel law's contribution to these goals is marginal, and it is becoming increasingly clear that the law's costs outweigh its benefits.

I want to develop this thesis in the context of two key points. First, and fundamentally, the independent counsel is not, for practical purposes

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1. 487 U.S. 654, 696-97 (1988).

2. 28 U.S.C. §§ 591-599 (1994 & Supp. II 1996).

3. See generally Senator Carl Levin, *The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance*, 16 HOFSTRA L. REV. 11 (1987) (discussing historical context and purposes of the independent counsel statute).

“independent,” but rather must be regarded as “opposing” the President and the executive branch. By this I do not mean to say that the independent counsel is necessarily politically partisan, although that may be the case. Instead, my point is that by virtue of the context and the role of a prosecutor, the independent counsel will, in practice, be the legal adversary of the executive. Second, when the independent counsel’s role is understood in the broader legal context of the Supreme Court’s decisions on presidential immunity and executive privilege, it becomes clear that placing the full authority of the legal system at the disposal of the President’s political enemies interferes with the essential functions of the executive branch.

I. WHY THE INDEPENDENT COUNSEL IS OPPOSING COUNSEL

Let me first explain how I think the law changed the dynamics of investigating the executive branch, and placed the independent counsel in opposition to the President. Before the independent counsel law, it was difficult, but not impossible, to investigate and expose wrongdoing within the executive branch. We may assume that most of the time most Presidents, if apprized of criminal misconduct by their subordinates, would “faithfully execute the laws” and investigate the misconduct thoroughly. The independent counsel law is not directed at such a situation, however, but rather at those cases in which the thoroughness of an investigation might be doubted; that is, where exposure of wrongdoing would be politically damaging because high level officials, close advisors, or even the President are implicated in the wrongdoing. The idea is that leaving the investigation of such cases to the complete control of the President is leaving the fox to guard the chickens.

But even before the independent counsel law, the President did not in practice have complete control over the investigation of executive branch misconduct. The press played an active and independent role in investigating the executive branch, and Congress also had substantial power to investigate. When sufficient evidence of misconduct was exposed through these means, political pressure often forced a thorough, independent investigation by a special prosecutor, even though the prosecutor was not legally independent of the executive branch.

Indeed, this is the true lesson of Watergate. Far from demonstrating the need for an independent counsel law, Watergate demonstrated that the system worked without one. Notwithstanding President Nixon’s efforts to thwart the investigation of Watergate, the truth came out and Nixon was forced to resign. In particular, the politics of the situation forced President Nixon to appoint a special prosecutor, and when the first one, Archibald Cox, proved to be too aggressive and was fired, the political outcry forced the appointment of another vigorous prosecutor, Leon

Jaworski. Thus, even without an independent counsel law in place, investigatory reporting, congressional hearings, and executive branch investigation eventually brought the misconduct of high-level Nixon administration officials, and President Nixon himself, to light.

Of course, the independent counsel law makes it easier to uncover misconduct in the executive branch, but the point is that this is a marginal benefit; that is, it is a question of increased efficacy rather than absolute necessity. I am not so sure that this marginal benefit is worth the cost. In this context, it is important to understand how the independent counsel law has changed the political dynamic of investigating the executive branch. Before the independent counsel law, the vigorous pursuit of an investigation into the inner workings of the executive branch depended in significant measure on the development of a broad consensus that it was necessary. Lengthy and wide-ranging investigations by the press or congressional bodies required significant public interest and support to sustain them. At the very least, it was impossible for the President's political opponents to force the appointment of a special prosecutor without some broader political support, which effectively required the emergence of substantial evidence of significant misconduct.

The independent counsel law, however, makes it possible for the President's opponents to force a relentless investigation based on even the slightest hint of misconduct. As Justice Scalia predicted in his dissenting opinion in *Morrison v. Olson*, it has proven very difficult in practice for the Attorney General to resist the appointment of an independent counsel when called upon loudly by the opposition to do so.⁴ In most cases where the appointment of an independent counsel has been requested, one has been appointed, and in the exceptional cases where an Attorney General has refused to do so, he or she has often paid a heavy political price, as in the case of Attorney General Reno's resistance to appointing an independent counsel to investigate campaign finance violations by the Clinton/Gore campaign.

Once appointed, the independent counsel becomes opposing counsel. Make no mistake about it—notwithstanding its name, the independent counsel is a prosecutor, and a prosecutor's job is to investigate and prosecute. Our system is an adversarial system that pits parties and lawyers against each other in the context of legal proceedings. A prosecutor would violate his or her ethical obligations if he or she were not a zealous advocate. Notwithstanding the principle that the state wins when justice is done, and the idea that prosecutors are more neutral seekers of truth than are attorneys representing private parties in private actions, it is inherent in human nature that prosecutors will come to

4. 487 U.S. at 701-02 (Scalia, J., dissenting).

believe in the merits of their position, regard the targets of investigations as guilty, and act as adversaries. This is certainly the reality of most prosecutions. The inherent tendency to believe in one's own position is reinforced by the need to justify the time and expense of any investigation with successful prosecutions—and here success is measured by convictions.

This tendency is magnified by the fact that the office of independent counsel is not subject to the usual constraints placed on prosecutors. With a single case and unlimited budget, the independent counsel does not have to weigh the time and resources put into an investigation and prosecution against other potential cases to investigate and prosecute. Thus, for example, the independent counsel might continue an investigation based on scanty or unreliable evidence or prosecute relatively minor offenses, where an ordinary prosecutor would consider those resources better used to pursue other matters. Thus, once an independent counsel is appointed, even a nonpartisan one, he or she will inherently become a vigorous and relentless opponent to the executive branch officials under investigation.

This new political dynamic has led to a proliferation of independent counsels pursuing wide-ranging and lengthy investigations into high-level executive branch officials. More wrongdoing may have been exposed, but this has hardly produced greater public confidence in government. The appointment and activities of independent counsel are themselves newsworthy, and fuels the public perception of widespread corruption. Even if the independent counsel does not prosecute or the target of the investigation is acquitted, the public is notoriously more likely to remember the suspicion attached to public figures than their exoneration. At the same time, the partisan context of the appointment of independent counsel means that the outcome of an investigation is unlikely to satisfy opposing political forces—convictions can be characterized as political, and exonerations as cover-ups. In the end, the independent counsel law creates as many problems as it was supposed to solve.

II. IMPACT ON THE EXECUTIVE BRANCH

More fundamentally, even if the independent counsel produces a marginal benefit in the investigation and prosecution of executive branch misconduct, its negative impact on the essential functions of the executive branch far outweigh any such benefits and violate the separation of powers. This impact must be assessed in the broader context of other separation of powers principles related to the protection of the executive branch from interference, in particular executive privileges and immunities. For when viewed as a whole, the Supreme Court's decisions in

Morrison v. Olson,⁵ *Clinton v. Jones*,⁶ and the executive privilege cases have left the executive branch essentially without protection against politically motivated efforts to use the legal system to embarrass the President. This situation can only result in a significant impairment of the essential functions of the presidency.

The President's political opponents now have sweeping power to use the legal system to force testimony and disclosure concerning the inner reaches of the executive branch. It should be clear in light of *Monicagate* that the grand jury is a powerful tool at the hands of the independent counsel. Grand jury proceedings are notoriously one-sided: there is no opposition to the prosecutor, the usual adversarial procedures do not apply, and other procedural safeguards are also unavailable. It can be used to subpoena witnesses and documents. Witnesses can be compelled to testify (and with grants of immunity, cannot invoke even the privilege against self-incrimination). There is little external check on the scope and direction of a grand jury investigation. In addition, the independent counsel currently operates with an unlimited budget, for an unlimited period of time, and with a virtually unlimited ability to follow the investigation in whatever direction appears promising, all without the normal institutional constraints that, as described above, inherently limit prosecutorial zeal. Here the Supreme Court's assumptions in *Morrison v. Olson* regarding the character of the independent counsel's office are simply counterfactual.

As if this were not enough, the power of the independent counsel and the grand jury are now supplemented by the powerful tool of civil discovery. In *Clinton v. Jones*, the Supreme Court denied even temporary presidential immunity from civil suit based on conduct before taking office.⁷ This unanimous ruling was based on another questionable factual assumption—that the conduct of a civil suit would not unduly interfere with the President's performance of his or her duties. It is well-understood by private attorneys, however, that discovery under the Federal Rules of Civil Procedure is virtually unlimited and can be used to harass and intimidate the opposing party. Rules of materiality and relevance are applied loosely, and the presumption is in favor of compelled disclosure, with the idea that irrelevant or immaterial evidence can be weeded out later. This presumption is particularly unsuited, however, to the internal workings of the executive branch. One can certainly expect that, given the impact of the *Jones* litigation, private lawsuits will be manipulated by future Presidents' political opponents as

5. 487 U.S. 654 (1988).

6. 520 U.S. 681 (1997).

7. 520 U.S. at 705-06.

a means of gaining embarrassing information that can be used against the President.

To compound these problems, the doctrine of executive privilege has been eviscerated to the point where it offers little or no protection to the executive branch. In *United States v. Nixon*,⁸ the Supreme Court recognized that the essential functions of the presidency required that the President receive candid advice from executive branch officials, and that executive privilege was thus a necessary implication from separation of powers principles.⁹ The Court, however, held that the privilege was not absolute, but rather must be balanced against the needs of the other branches of government.¹⁰ Indeed, the Court concluded that the privilege did not apply on the facts of the case because the need for "every man's evidence" in the context of a criminal prosecution of an executive branch official outweighed the modest intrusion on the executive branch which would be caused by in camera inspection of documents that did not contain specifically identified national security matters.¹¹ A subsequent case, *Nixon v. Administrator of General Services*,¹² also recognized Congress's need for information for purposes of its legislative function and the public's "right to know" as sufficient to override claims of executive privilege in the absence of national security considerations to the contrary.¹³

In practice, this means that assertions of executive privilege in politically driven investigations will be ineffective. Under the balancing formula, the need for privilege has been consistently minimized, and the countervailing justifications for disclosing information will be present in virtually every case. Indeed, since misconduct in office is not part of the essential functions of the executive branch, the assumption seems to be that no discussion related to potential misconduct is privileged. Independent Counsel Starr even argued in his report to the House of Representatives that the *mere assertion* of executive privilege constituted an impeachable offense. In addition, executive branch officials do not even get the benefit of the attorney-client privilege when they speak to government attorneys who represent the executive branch, on the theory that their "client" is the government or the people, not the official who consults them. If they are the targets of an investigation, or are called upon to testify, they must seek private legal representation at their own expense if they wish to confer confidentially with an attorney.

8. 418 U.S. 683 (1974).

9. *See id.* at 708-09.

10. *See id.*

11. *See id.* at 709-11.

12. 433 U.S. 425 (1977).

13. *See id.* at 453-55.

III. CONCLUSION

In sum, the executive branch must now operate under the shadow of intrusive criminal and civil investigations, backed by the full power of the legal system, that can be initiated and driven by the President's enemies, and executive branch officials have no privileges or immunities that can be effectively interposed to prevent disclosure of damaging information. In some cases, of course, this may be necessary to uncover presidential wrongdoing. Indeed, that may well have been the case with the Espy investigation as well as Monicagate. The question is whether it is worth the cost. For not only Presidents who engage in wrongful conduct are subject to this kind of intrusive investigation. All Presidents are. In the future, those seeking careers in public service, especially executive branch appointments, will have to consider the likelihood that their service, however honorable, will be rewarded by investigation, grand jury testimony and depositions, and embarrassing innuendo. They will have to consider the staggering financial costs of defending themselves from such investigations, or even becoming peripherally involved. And they will have to temper their advice to the President with the understanding that anything they say may be disclosed and used by the President's enemies. This situation is hardly conducive to the effective functioning of the executive branch.

