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Kenneth W. Starr

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The Independent Counsel Act

transcribed remarks of
THE HONORABLE KENNETH W. STARR*

By virtue of three snow storms and the shoveling of an enormous quantity of snow, I am before you mindful of Rory [Little]'s suggestion that we are here to find our voice, and I am very much in search of a voice. If this raspy voice will hold up, I want not only to express thanks to the wonderful people who put this symposium together, but to Rory for being such a wonderful and gracious host.

My comments this morning are addressed to Watergate's wake, aptly characterized by Suzanne Garment in her simply-entitled book, *Scandal*, as "The Culture of Mistrust in American Politics." As we who lived through Watergate know, that culture found expression in a variety of initiatives in Congress immediately following the firing of Professor Cox, and culminated, of course, several years later in the Independent Counsel provisions of the Ethics in Government Act.

What is illuminating in reflecting on that earlier period of Congressional activity stimulated by the firing—the Saturday Night Massacre—was the proliferation of bills directed quite specifically at public integrity investigations of high-level officials. This had become for Congress an extraordinarily high matter of great moment. As recounted by Terry Eastland in his informative book, *Ethics, Politics and the Independent Counsel*, no fewer than eight separate bills were introduced in the fall of 1973 alone. More were to come.

Their approach in that initial phase varied. Some called for presidential appointment subject to Senate confirmation, as in Teapot Dome, but others proposed—for the first time in our nation's history—the power to appoint and to remove a special prosecutor being vested in the federal judiciary. This was another dimension of what Reid [Weingarten] referred to as Watergate's creation of a "volcano of change."

And this, it seems to me, spawned one of Watergate's less-observed but truly baleful effects: embroiling the federal judiciary, previously neutral, at least in theory and almost always in practice—

* Former Solicitor General for the Bush Administration; Judge for the D.C. Circuit; appointed Independent Counsel to investigate President Clinton.

in the ever-constant two-branch warfare between the Congress and the Executive. That is the nature of our system. But the Judiciary found itself embroiled in the politics of ethics, forcing upon the federal judiciary an operational role that tugged at the integrity and purity of the Article III function. Historically, the Judiciary's role in such matters was quite limited in form by a common sense operational rule of necessity, such as appointing interim United States Attorneys until the President, typically an incoming President, could select a permanent replacement. But the President enjoyed absolute power to remove any such interim United States Attorney.

The point is that the practice on the part of the federal judiciary in our history tended to be entirely ministerial, nonpolitical and quite uncontroversial as the judges would invariably elevate, temporarily, the First Assistant in the office or another senior career prosecutor. But these post-Watergate initiatives represented an entirely different, very visible, and inevitably divisive and controversial task being thrust upon an unwelcoming judiciary.

It should be said that this role was seen as anathema by thoughtful and experienced federal judges. One great judge with whom I was privileged to serve, Gerhard Gesell—may he rest in peace—lamented in the judicial literature that the idea of a court appointment of a special prosecutor was (and he understated this) “most unfortunate.” These lamentations were seconded by none other than the soon-to-be-legendary Chief Judge in Washington, John Sirica. He wrote the Senate Judiciary Chairman that eight—that was virtually all—of his fellow judges shared his sense of hearty disapprobation: “Keep the judges out of the pig sty.”

Congress was, of course, of an entirely different mind. The burden of Watergate—and in particular, the Saturday Night Massacre—was too heavy to bear. Independence of the prosecutor became the familiar watchword, even more intensely than had been the case during the difficult confirmation process of Elliot Richardson—may he rest in peace—when, as the Attorney General-designate, he announced the well-received appointment of Archibald Cox. In that very difficult time, and in that troubling colloquy with the Senate, Mr. Richardson stood firm on what he viewed as bedrock constitutional principle, that the Executive could, in the exercise of its discretion, appoint an outsider, a special prosecutor. This had been done for well over a century at the time, going back to the rather untidy administration of Ulysses S. Grant. But it was the Executive's prerogative, for the exercise of which it would and should be held accountable. And so too, in Mr. Richardson's view, final authority had to remain in the Attorney General himself or herself, or elsewhere within the Executive, but it could not be stripped from the President.

Congress was likewise unmoved by powerful submissions of Edward Levi, a renowned scholar, who was occupying with great dignity the post of Attorney General. He urged Congress not to do it. The protest of the distinguished former federal judge, Harold Tyler, as Deputy Attorney General about the inappropriate erosion of Separation of Powers principles was simply turned aside by Democrats and Republicans alike. In short, Congress deliberately, knowingly, aggressively, and after due notice, intruded into territory that had historically been viewed as belonging to the President and the Executive Branch more generally, and in the process, ordered the federal judiciary, through a newly created special division, to march in as well to this politically-charged zone.

Now, it may be said by the constitutional lawyers and scholars here that these self-interested plaintive views were misguided lamentations, as revealed by the ringing seven-to-one decision in *Morrison v. Olson*, upholding the statute's constitutionality against exactly, or in the face of exactly, these kinds of submissions. Far be it from me to suggest that the Supreme Court could somehow have been wrong, and that Justice Scalia's lone voice in dissent—in a masterful piece of judicial literature—could somehow have gotten it right. We know full well, as the late Robert Jackson taught us, that the Supreme Court is not final because it is infallible—to the contrary, it is infallible because it is final, and that is it. And the Court, let's not be too petty, has shown a muscular willingness to defend bedrock structural principles as it sees them in our constitutional framework; as we see in the arresting decisions marching under the banner of federalism. Sara [Sun Beale] referred to, at least obliquely, the VAWA case now pending. But the Court has not, more pertinently, been shy about enforcing Separation of Powers principles, and we can glean this from a very quick review of a number of decisions (including some quite recent). And so *Morrison* stands, and Congress was thus allowed, in the late 1980s, to continue the post-Watergate experiment under the Ethics in Government Act for another—count them—eleven years. And Reid tells us there's more to come.

So let me turn rather—in anticipation of some future misguided Congress suggesting that we resurrect such a mechanism—to the policy embodied in the Statute and assume that the Supreme Court knew what it was doing in *Morrison*. I will thus set aside the rich questions of constitutional legitimacy.

The value at stake was that which Elliot Richardson spoke of, independence, but that was the foundational principle. Others were at play, and Reid suggested some of them. And it is these, call them “subsidiary,” principles, that eventually led the Congress at a policy level to say, “Enough. The twenty-one year experiment born of

Watergate is ended.”

The first sub-principle was specialization of focus. Reid lamented this—or at least I took it, Reid, as a lamentation—and when you said those investigations are different, I took that not to be a compliment. An Independent Counsel will be given (this was Congress’ design) a particular charge, set forth in writing as to a particular identified individual, and possibly (as we saw in what my family and I refer to as “the recent unpleasantness”), the rather open-ended category of “others.” Now that is unusual, but it’s obviously not unknown in prosecutorial history; it has been suggested over our history that different persons have been the subject of a careful prosecutorial focus, say, Al Capone. But that prosecutorial focus represents at its best an ultimate judgment born of facts, of experience, of information, of a body of evidence, possibly of prior grand jury investigations, guiding an existing prosecutorial office which may even be subject to the kinds of accountability that Judge Jensen just reminded us of. And for that office to husband its resources and dedicate time and energy to a particular investigation, a sort of prosecutorial counterpart to the FBI’s Ten Most Wanted.

Now it may be that, in assessing the state of law enforcement, the officer in charge—be that the Office of the Attorney General, or Jim Robinson when he was U.S. Attorney, or Lowell Jensen in his capacity as District Attorney—will say, “My top priority in this administration or in this office is public integrity investigations,” and proceed accordingly, including quite narrowly and specifically and in a targeted manner.

And so where is the difference? The Independent Counsel statute upon study will be seen, I believe, as a horse of an entirely different color. There, individuals only in the Executive Branch are, in effect, put on a Most Closely Watched list. One becomes a suspect as a matter of law. Let’s call it Congress’ Megan’s law. And then whenever triggering information is brought to the Attorney General about these Executive Branch actors, the Attorney General must seek the appointment by three federal judges of an Independent Counsel who will then at some cost start up a brand new office from scratch. Economies of scale were completely ignored by Congress. But once appointed, his or her duties as Independent Counsel are not only to investigate and possibly bring prosecutions; the Independent Counsel must give an account in a final report of the work of the office. This was unique. Congress hadn’t previously required this. But, it did here.

By tradition, prosecutors make decisions, and they either go to court with indictments or they close the case and they move on. It should come as no surprise that individuals named in various reports filed over the history of the law, even with the statutory right to reply,

have viewed the prosecutor's report, the Independent Counsel's report, as profoundly unfair and horribly damaging to their reputations. Most remarkably, Congress saw fit to give an Independent Counsel—unprotected by the rest of the Executive Branch, which enjoys incentives to stand in the way of an Independent Counsel—the responsibility of producing a referral to Congress on the possible impeachment of a sitting President.

Now, that is truly an unprecedented job description, and we of course have lived once—and I believe, Reid, that we will only live once—through that process of an inferior officer being called upon to undertake that kind of task. Now, lawyers well know, and law students do as well, that there are two sides to every case, or virtually every case—judges certainly feel that way, and so too here. Let's not be too monochromatic. Congress clearly intended for almost a generation for allegations of potential wrongdoing to be given the most searching exacting scrutiny. No cover-ups, get to the bottom of the matter.

After all, sad to say the Justice Department itself was compromised during Watergate. We've been talking about Mr. Dean's eloquent comments, and about White House officials and asterisks representing lawyers in the White House. But that list also undoubtedly included senior officials of my beloved Justice Department. The Department was compromised in a profound way, and moreover, since public integrity cases are inherently sensitive and controversial, even an honest Justice Department might not be especially energetic or vigilant. The concern is obvious on Congress' part. The attitude within the Department might be, "Why rock the boat? Someone—maybe someone very important—will get angry. They'll call the prosecutor some very unpleasant names, and it will otherwise be rather unpleasant to walk around town." And of course these are, as Professor Beale has reminded us, cases that involve statutes that typically involve illusive questions of intent, and a good prosecutor can always find some imperfection, some blemish. So, if it's not cold on the docks, let it go, don't bring it. As every informed observer and participant in the criminal justice system knows, potential cases, even relatively strong cases, can be killed, and reasonable minds obviously can always differ. But it may also be, as one federal judge put it, in describing the attitude of the United States Attorney's office in that particular jurisdiction (a jurisdiction that is not in California, I hasten to note), "The United States Attorney's office here doesn't go chasing after important people."

Congress wanted Executive Branch public integrity cases, or possible federal criminal wrongdoing more generally, to have a remarkable priority. That's a policy choice, but it's not an inevitable choice (it's certainly not a necessary choice), it's simply a choice that

Congress made after Watergate. And it was a choice that, in my judgement, threatened the Founders' structure embodied in balanced government. That is, the Independent Counsel statute, as I testified before Senator Thompson's committee, undid the balance. Even though honest men and women of ability—leaving present company aside, other than Reid—were called upon to take this responsibility and worked diligently at it, the structural imbalance became, with the searing light of two controversial investigations of sitting Presidents, increasingly evident.

And so my own solace is two-fold. First, I was privileged in my own experience as Independent Counsel to serve with men and women mostly from the Justice Department and the United States Attorney's Offices, with the excellent support of Jim Robinson and the able men and women of his division—men and women of high ability and of character who labored under at times very difficult circumstances. And my second source of solace is that it was my privilege to advise Attorney General William French Smith, under whom both Lowell and I served back in the 1980s, to oppose the reauthorization of the statute at that time. Bill Smith—may he rest in peace—did not need my advice. That was carrying coals to Newcastle. He urged Congress in the strongest terms, as did his successors, until recently, to allow the statute to expire on grounds of law and policy and our beloved Constitution.

I leave you with this pre-luncheon query. Would history, both in the 1980s and more recently, have been different if Congress had seen fit in 1982 and 1983 to follow William French Smith's advice?