Learning the Right Lesson from Watergate: The Special Prosecutor and the Independent Counsel

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The Saturday Night Massacre, in which Watergate Special Prosecutor Archibald Cox was dismissed on orders of President Richard Nixon, provided the impetus for the creation of the independent counsel as part of the Ethics in Government Act of 1978.[1] The gravity of the situation was reflected in the resignations on principle of Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus, both of whom refused direct orders to fire Special Prosecutor Cox.[2] Supporters of the independent counsel law contended that we needed to avoid another opportunity for the executive branch to squelch sensitive criminal investigations.[3]

The Supreme Court upheld the constitutionality of the independent counsel provisions in *Morrison v. Olson*,[4] but the law had a meandering life. Congress periodically amended and renewed the measure until 1992, when Republican opposition to various investigations of GOP officials led to its expiration.[5] The independent counsel law was renewed in 1994 as a response to the Whitewater investigation.[6] This in turn led to the appointment of Kenneth Starr, but the controversy over Starr's investigation of President Clinton led to the expiration of the law in 1999.[7]

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1 Pub. L. No. 95-521, tit. VI, 92 Stat. 1824, 1867–75 (1978) (amended 1983, 1987, and 1994; expired 1999).

2 STANLEY I. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON 407 (1990); *see also* ELIZABETH DREW, WASHINGTON JOURNAL: THE EVENTS OF 1973–1974, at 52, 54 (1975) (noting initial uncertainty over whether Ruckelshaus had resigned or been fired).

3 *See*, *e.g.*, S. REP. NO. 95-273, at 2–3 (1977) (summarizing congressional proposals responding to the dismissal of Archibald Cox as Watergate Special Prosecutor); S. REP. NO. 95-170, at 2–7 (1977) (summarizing immediate and subsequent congressional responses to the Saturday Night Massacre).

4 487 U.S. 654 (1988).

5 KEN GORMLEY, THE DEATH OF AMERICAN VIRTUE: CLINTON VS. STARR 95–96 (2010); KATY J. HARRIGER, THE SPECIAL PROSECUTOR IN AMERICAN POLITICS 7 (2d ed. 2000).

6 *See* Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732.

7 GORMLEY, *supra* note 5, at 655–56.

Many of Starr's critics thought that his efforts vindicated Justice Scalia's denunciation of the independent counsel law in his *Morrison* dissent.[8]

This paper will examine the debate over the independent counsel law in light of its origins in the Watergate scandal. It will suggest that both sides of the independent counsel debate have missed important points. Proponents of the independent counsel overlooked the real lesson of the Saturday Night Massacre because they focused on what happened to Cox rather than on what happened to Nixon.

Critics, on the other hand, have conflated arguments about the constitutionality of the statute with concerns about its wisdom as a matter of policy. Perhaps most notably, Justice Scalia, dissenting in *Morrison*, invoked the political process that led to the appointment of the Watergate special prosecutor as more acceptable than the statutory provisions in the Ethics in Government Act.[9] Yet it is far from clear that the ground rules under which the Watergate special prosecutor operated were constitutionally preferable to those provided in the independent counsel law.

There is a defensible, if not airtight, argument for the constitutionality of the independent counsel law that draws heavily on the Watergate experience. But even if the arrangement is consistent with the Constitution, it is entirely possible to conclude that the independent counsel law was a well-intentioned reform that went awry. The questions posed by the Watergate special prosecutor, however, underscore the inherent difficulty of crafting sound institutional responses to problems of high-level political corruption.

I

Let us begin with those who believe that the Saturday Night Massacre demonstrated the need for some sort of standing institutional mechanism to investigate executive wrongdoing. Adherents to this view emphasize what happened to Special Prosecutor Cox. Of course, being dismissed in such a public way was unfortunate for him, but this was hardly a career-ending event. After all, Cox had taken a leave of absence from his faculty position at Harvard Law School to become special prosecutor, and he took up a prestigious visiting professorship at the University of Cambridge.[10] After that he returned to Harvard as a University Professor, one of the highest honors available to a member of the faculty of the nation's oldest university.[11]

8 *See, e.g.*, David Broder, *Fool's Law*, WASH. POST, Sept. 12, 1999, at B7; Jeffrey Rosen, *Steele Trap*, NEW REPUBLIC, Apr. 26, 1999, at 44.

9 *See Morrison*, 487 U.S. at 711.

10 KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 393 (1997).

11 *Id*. at 396.

The situation looks very different if we focus instead on what happened to President Nixon. Faced with what his own aides described as a "firestorm" of criticism that badly undermined his credibility following the Saturday Night Massacre,[12] the chief executive had to acquiesce in the appointment of Leon Jaworski as the new special prosecutor.[13] Jaworski's persistence led to the Supreme Court's ruling in *United States v. Nixon*,[14] which resulted in the release of the so-called "smoking gun" tape of June 23, 1972, which in turn led to Nixon's forced resignation.[15]

II

Congress eventually responded to the Saturday Night Massacre by enacting the independent counsel law.[16] Its provisions required the Attorney General to conduct a preliminary investigation of information suggesting that high-level executive officials had violated federal criminal laws.[17] That investigation could last no more than 90 days.[18] If, at the end of this period, the Attorney General found no reasonable grounds to believe that a crime had been committed, the matter ended.[19] Otherwise, the Attorney General was required to refer the matter to a special court that would appoint an independent counsel who could be removed only by the Attorney General and only for good cause.[20]

Critics, perhaps most notably Justice Scalia dissenting in *Morrison v. Olson*, argue that the law was unconstitutional because it allowed judges, rather than the President, to appoint an independent counsel and not only barred the chief executive from removing such an official, but also limited the grounds on which the Attorney General could dismiss an independent counsel.[21] Indeed, Justice Scalia lamented the demise of what he called "our former constitutional system"[22] in attacking the ruling upholding the independent counsel law, and specifically invoked the Watergate special prosecutor to illustrate what he viewed as an acceptable political response to allegations of executive wrongdoing.[23] A closer look at the institutional

12 DREW, *supra* note 2, at 66; KUTLER, *supra* note 2, at 411.

13 DREW, *supra* note 2, at 91; KUTLER, *supra* note 2, at 426.

14 418 U.S. 683 (1974).

15 *See generally* DREW, *supra* note 2, at 332–413; KUTLER, *supra* note 2, at 513–50.

16 Ethics in Government Act of 1978, Pub. L. No. 95-521, tit. VI, 92 Stat. 1824, 1867–75 (amended 1983, 1987, and 1994; expired 1999). Because the statute has expired, the following summary of the independent counsel law is taken from *Morrison v. Olson*, 487 U.S. 654, 660–64 (1988). The various versions of the independent counsel law differed in certain particulars, but not in any way that detracts from the summary provided in text.

17 Morrison v. Olson, 487 U.S. 654, 660 (1988).

18 *Id*. at 660–61.

19 *Id*. at 661.

20 *Id*. at 661–63. The requirement of a referral to the special court applied both when the Attorney General concluded that there were reasonable grounds to believe that a crime had been committed and when the Attorney General could not determine whether such grounds existed. *Id*. at 661 n.4.

21 *Id*. at 705–09 (Scalia, J., dissenting).

22 *Id*. at 715 (Scalia, J., dissenting).

23 *Id*. at 711 (Scalia, J., dissenting).

arrangements relating to the second Watergate special prosecutor, Leon Jaworski, suggests that Justice Scalia's invocation of those arrangements as preferable to those in the independent counsel law might have been misguided.

Both the Watergate special prosecutor and the independent counsel were effectively insulated from the day-to-day supervision of the Attorney General. That was, of course, the point of both arrangements. Let us consider the provisions for removing these officials. As noted above, an independent counsel could be removed only by the Attorney General—not by the President—and only for cause. The Watergate special prosecutor, on the other hand, could be removed by the President—but only for "extraordinary improprieties" and, even then, only after the chief executive had "first consult[ed] the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertain[ed] that their consensus [was] in accord with [the President's] proposed action."[24] The Supreme Court quoted this regulation in a footnote in the Watergate tapes case but attached no substantive significance to the removal mechanism.[25] Perhaps this provision was overlooked because President Nixon's lawyers did not attack the requirement of congressional approval of the removal of the special prosecutor. Whatever the explanation, this arrangement raised significant separation of powers concerns under the law as it existed in 1974 and as it exists today.

The 1926 decision in *Myers v. United States*[26] remains the leading case on the removal power. In *Myers*, the Supreme Court, in an opinion by Chief Justice Taft, ruled unconstitutional a statute that required the Senate to give its consent to the removal of a local postmaster before the expiration of the postmaster's four-year term of office.[27] Although subsequent cases have addressed different aspects of the removal power and suggest that Congress may limit the grounds for removal of certain officers,[28] the Supreme Court has made clear that the legislative branch may not reserve for itself any formal role in the actual process of removing federal officials beyond the constitutionally authorized impeachment mechanism.[29]

It is not as though Nixon's lawyers ignored *Myers*. Their brief on the merits invoked that precedent as exemplifying the centrality of separation

24 Office of Watergate Special Prosecution Force, 28 C.F.R. § 0.38 app. (1974).

25 *See* United States v. Nixon, 418 U.S. 683, 695 n.8 (1974).

26 272 U.S. 52 (1926).

27 *Id*. at 107, 176.

28 *See, e.g*., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) (dual for-cause limitation on removal of interior officers); Wiener v. United States, 357 U.S. 349 (1958) (implied for-cause requirement for removing members of the War Claims Commission); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (for-cause requirement for removing members of the Federal Trade Commission).

29 *See* Bowsher v. Synar, 478 U.S. 714, 726–27 (1986); *Myers*, 272 U.S. at 172–73.

of powers and supporting the notion that the President is immune from compulsory process.[30] The brief went on to mention, almost in passing, that "the specific holding of the *Myers* case was narrowed to some extent" in a subsequent case, although "*that narrowing was on a point that does not bear on the present issue*."[31]

From a contemporary perspective, this seems like a legal gaffe. After all, *Myers* held that requiring Senate consent for the removal of a postmaster unconstitutionally impinged on presidential power.[32] The subsequent case to which Nixon's brief referred, *Humphrey's Executor v. United States*,[33] upheld a statutory provision requiring that the President have cause to remove a member of the Federal Trade Commission.[34] But the regulation requiring the President to consult with and obtain consensus approval from the leadership of both houses of Congress before discharging the Watergate special prosecutor goes well beyond the cause requirement upheld in *Humphrey's Executor*, and that arrangement might pose even greater constitutional problems than the postmaster provision that *Myers* rejected. In *Myers* the full Senate had to act, whereas the Watergate regulation empowered a handful of influential senators and representatives to prevent the President from discharging the special prosecutor.[35]

Before dismissing Nixon's failure to invoke *Myers* as a basis for challenging the removal restrictions in the special prosecutor regulation, we should put matters into historical and intellectual context. Although *Myers* suggests that the President has unfettered power to remove all appointed officials who exercise any part of the executive power, the notion that the removal power provides the basis for an expansive theory of the unitary executive is a more recent phenomenon.[36] Whatever this might suggest about the actual importance of the removal power, at the least it implies that President Nixon and his lawyers did not believe that attacking the requirement of congressional consent to the dismissal of the Watergate special prosecutor was a promising line of argument.[37]

30 Brief for Respondent and Cross-Petitioner Richard M. Nixon, President of the United States at 73, United States v. Nixon, 418 U.S. 683 (1974) (Nos. 73-1766, 73-1834).

31 *Id*. at 74 (citing *Humphrey's Ex'r*, 295 U.S. 602) (emphasis added).

32 *Myers*, 272 U.S. at 176.

33 295 U.S. 602 (1925).

34 *Id*. at 620, 632.

35 *Compare Myers*, 272 U.S. at 107, *with* Office of Watergate Special Prosecution Force, 28 C.F.R. § 0.38 app. (1974).

36 *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 723–27 (1987) (Scalia, J., dissenting); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

37 Even if the Supreme Court invalidated this aspect of the regulation, it is not at all clear that the Court would have ruled in Nixon's favor. Perhaps the Court would have excised the objectionable portion of the removal section of the regulation on the theory that this provision was severable and left the remaining aspects of the regulation intact. *Cf*. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161–62 (2010) (severing the objectionable dual-cause provision and allowing the agency to exercise its statutory functions). Whether and to what extent the severability doctrine might

Regardless of the explanation for ignoring the removal procedures applicable to the Watergate special prosecutor, the larger point remains valid. Under contemporary doctrine, as well as the precedents in place during the Watergate litigation, the constitutional propriety of the removal provisions was questionable at best. For this reason, it is not clear that the arrangements relating to the Watergate special prosecutor were in fact less problematic than the independent counsel law that has come under such harsh constitutional criticism.

Justice Scalia attacked the independent counsel law starting from first principles: the Constitution divides and separates federal power such that any incursion on presidential authority was presumptively impermissible.[38] Chief Justice Rehnquist's opinion for the Court in *Morrison v. Olson* never really joined issue with Justice Scalia, but there is another first principle under which the independent counsel law might have been supported: the checks and balances view that the executive branch could not be trusted to investigate itself and therefore a carefully structured institutional mechanism such as the independent counsel might serve important constitutional values.[39]

From a checks and balances perspective, the independent counsel law gave the executive branch complete control over the initiation of proceedings involving covered officials, who were either high-level executive officers or close political allies of the President.[40] Moreover, the major features of the statute kept the appointment and removal of an independent counsel out of congressional hands.[41] If the Attorney General concluded, after a preliminary investigation, that there were no reasonable grounds to believe that a targeted person had committed a federal crime, the matter was closed and that decision was not subject to judicial review.[42] If the Attorney General could not close the matter at that point (either because there were reasonable grounds to believe that a federal crime had occurred or because it was not clear whether such grounds existed), the matter went to a special court that was authorized to appoint an independent counsel.[43] The independent counsel took on all of the investigative and prosecutorial authority of the Attorney General, who

apply to regulations of the sort at issue in *United States v. Nixon* as opposed to statutory provisions is beyond the scope of this essay. For criticism of the severability doctrine, see generally Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495 (2011).

38 *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting) ("Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident . . . . But this wolf comes as a wolf.").

39 This was the approach taken by the dissenting opinion in the lower court in *Morrison*. *See In re* Sealed Case, 838 F.2d 476, 518 (D.C. Cir. 1988) (Ginsburg, J., dissenting), *rev'd sub nom.* Morrison v. Olson, 487 U.S. 654 (1988).

40 *See Morrison*, 487 U.S. at 660–61.

41 *See id*. at 660–64.

42 *Id*. at 660–61.

43 *Id*.

could remove the counsel only for cause.[44] In other words, an executive official determined whether an independent counsel would be appointed and whether an independent counsel could be removed. The cause requirement, of course, limited executive power, but the limitation was for the purpose of checking abuses of executive discretion in situations where the executive branch has a conflict of interest and therefore might need to face some kind of institutional check. Indeed, the Solicitor General in *Myers* conceded that Congress might permissibly require cause for removal of executive officials.[45]

Perhaps the most challenging aspect of this argument is characterizing the independent counsel as an inferior officer, as the *Morrison* Court did,[46] in light of more recent rulings suggesting that inferior officers must report to a superior official.[47] Nevertheless, those decisions do not purport to undermine the continuing vitality of *Morrison*.

Justice Scalia added one more structural objection to the independent counsel law: the measure was unfair to the object of the investigation because the independent counsel has a single target and operates free from many of the practical and political constraints that limit the ability of ordinary prosecutors to rein in their efforts.[48] Whatever the validity of these concerns, Justice Scalia did not explain how the arrangements under which the Watergate special prosecutor operated alleviated them. To be sure, the regulations under which both Archibald Cox and Leon Jaworski functioned gave them "the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice,"[49] whereas an independent counsel had "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."[50] At least in theory, then, the special prosecutor was more accountable to the Attorney General than an independent counsel.

Nevertheless, the response to the Saturday Night Massacre suggests that the distinction was more apparent than real. The special prosecutor, like an independent counsel, focused on a limited number of targets in

44 *Id*. at 662–63.

45 *See* Myers v. United States, 272 U.S. 52, 90, 96 (1926) (oral argument for the United States); Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699, 744–45 (1987).

46 *Morrison*, 487 U.S. at 671.

47 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3162 (2010); Edmond v. United States, 520 U.S. 651, 662–64 (1997).

48 *Morrison*, 487 U.S. at 727–32 (Scalia, J., dissenting).

49 Office of Watergate Special Prosecution Force, 38 Fed Reg. 14688, 14688 (June 4, 1973) (Cox); Office of Watergate Special Prosecution Force, 38 Fed. Reg. 30738, 30739 (Nov. 7, 1973) (Jaworski).

50 *Morrison*, 487 U.S. at 662.

connection with a defined series of events. The special prosecutor, like an independent counsel, had no need to consider how much priority to attach to a particular investigation relative to other criminal matters or how aggressively to pursue one or a few potential targets compared with others in unrelated matters because the special prosecutor, like an independent counsel, had no other unrelated targets or matters to address. These similarities have less to do with the mechanisms by which the Watergate special prosecutor and the independent counsels were appointed and removed than they do with the peculiar characteristics of sensitive investigations of high-level executive officials. In this sense, the problem is more institutional than constitutional. We should not pretend otherwise.

III

The Saturday Night Massacre led to the enactment of the independent counsel law. Although that measure seemed like a necessary prophylactic measure, today there seems to be bipartisan consensus that the independent counsel law did not work out very well. But whatever its defects, the disillusionment that many people of diverse political outlooks share does not make the law unconstitutional. We should not conflate wisdom with constitutionality. Just because some arrangement turns out to be of dubious wisdom does not make it unconstitutional.[51]

The Watergate special prosecutor was a political response to a political crisis.[52] President Nixon was forced to accept the appointment of Archibald Cox as the first special prosecutor and, when he concluded that Cox had to go, had to acquiesce in the appointment of Leon Jaworski. The largely unnoticed but constitutionally dubious requirement that the congressional leadership in both houses approve of any dismissal of Jaworski reflected the widespread dismay over Cox's sacking.[53] Because President Nixon had lost the confidence of important segments of the polity, the addition of the congressional leadership seemed to be a necessary element for allowing the investigation to proceed.

The independent counsel law sought to avoid the necessity for improvisation that characterized the Watergate situation. It did so by establishing a limited number of high-level executive officials and close

51 *See* Jonathan L. Entin, *Congress, the President, and the Separation of Powers: Rethinking the Value of Litigation*, 43 ADMIN. L. REV. 31, 56 (1991).

52 So was the appointment of special prosecutors to investigate the Teapot Dome scandal. *See* S.J. Res. 54, ch. 16, 68th Cong., 43 Stat. 5 (1924); *see generally* BURT NOGGLE, TEAPOT DOME: OIL AND POLITICS IN THE 1920's 91–115 (1962). Justice Scalia also cited this example approvingly in his *Morrison* dissent. *Morrison*, 487 U.S. at 711 (Scalia, J., dissenting). Unlike either the Watergate special prosecutor or the independent counsel, the President appointed the Teapot Dome prosecutors with the advice and consent of the Senate. S.J. Res. 54, 43 Stat. at 6; NOGGLE, *supra*, at 114–15.

53 The regulation that initially created Cox's position as special prosecutor provided that he could be removed only "for extraordinary improprieties on his part." Office of Watergate Special Prosecution Force, 38 Fed. Reg. 14688, 14688 (June 4, 1973). A court later determined that Cox's dismissal violated this regulation. *See* Nader v. Bork, 366 F. Supp. 104, 108 (D.D.C. 1973).

political advisors to the President whose suspected involvement in serious federal crimes might create too many conflicts of interest for the normal investigative procedures of the Department of Justice to engender public confidence. As a result, partisans on both sides of the political aisle and many other Americans concluded that the independent counsel law did more harm than good. It seems highly unlikely that such a measure could be adopted in the foreseeable future.

Perhaps it is difficult to reconcile some of the specific details of both the Watergate special prosecutor and the independent counsel with both a strictly formal reading of the Constitution and some ideal political theory. Institutional design is a formidable challenge even when political comity is in greater supply than it has seemed to be in recent times. Beyond that, however, the difficulties inherent in both the Watergate special prosecutor arrangements and the independent counsel law suggest that reliance on purely legal responses to problems that are fundamentally political inevitably will lead to frustration.[54]

54 *See* HARRIGER, *supra* note 5, at 215–32.