



1988

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Recommended Citation

Rochvarg, Arnold (1988) "The Independent Special Prosecutor Case," *University of Baltimore Law Forum*: Vol. 19: No. 1, Article 4.
Available at: <http://scholarworks.law.ubalt.edu/lf/vol19/iss1/4>

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The Independent Special Prosecutor Case

By Professor Arnold Rochvarg

In its June 1988 decision, *Morrison v. Olson*,¹ the United States Supreme Court decided the most politically significant case since *United States v. Nixon*.² In *Morrison v. Olson*, the Court by a lopsided 7-1 vote³ rejected the view that the independent special prosecutor established by the Ethics in Government Act of 1978⁴ ("Ethics Act") is an unconstitutional infringement upon the office of the President. By rejecting the arguments of the Reagan administration and the various targets of criminal investigations, the Court affirmed Congress' ability to control any possible criminal behavior within the executive branch.

The Ethics Act was a result of the Watergate experience, especially the dismissal of Special Prosecutor Archibald Cox. The powers of the Watergate Special Prosecutor, however, were created by a Justice Department regulation.⁵ This regulation was subject to revocation by the Attorney General either on his own initiative or in response to presidential directive.⁶ The Ethics Act was enacted to remove from the Attorney General and the President the plenary authority over the special prosecutor, and thus make the special prosecutor independent.

The Ethics Act only applies to the criminal investigation and prosecution of certain officials within the executive branch, e.g., the President, Vice President, cabinet members, and certain officials of the CIA, Justice Department, and Office of the President, and some campaign officials of the President's campaign committee.⁷ The Ethics Act is premised on the belief that investigation of these officials by the Justice Department, which is under the President's direct control, creates an intolerable conflict of interest.⁸

Although the Ethics Act removes the investigation and prosecution of certain cases from the Justice Department, the Attorney General does have a pivotal role under the Ethics Act. If the Attorney General is provided with information "sufficient to constitute grounds to investigate," the Attorney General is required to begin an investigation.⁹ If the Attorney General determines that there are no reasonable grounds for further investigation, the matter ends there.¹⁰ On the other hand, if the Attorney General finds reasonable grounds to believe further investigation is warranted, he is required to refer the matter to a special judicial panel of the United States Court of Appeals for the District of Columbia Circuit. The special judicial panel is then required to appoint someone as the independent special prosecutor. This panel also defines the jurisdiction of the independent special prosecutor.¹¹

The independent special prosecutor remains in office until the investigation and any prosecution are complete. Until such time, the independent special prosecutor can only be removed for good cause.¹² This good cause determination is made by the Attorney General.

The Ethics Act has been called into play on various occasions during both the Carter and Reagan administrations. At times, the matter ended with the Attorney General and no special prosecutor was selected. At other times, however, special prosecutors have been appointed, and have obtained convictions. The most famous investigation under the Ethics Act involves the Iran-Contra affair. The controversy in *Morrison v. Olson*, however, concerned the involvement of Justice Department officials in a dispute over the Environmental Protection Agency's re-

fusal to grant Congress access to documents pertaining to clean up of hazardous waste sites.

In *Morrison*, there was a two-fold argument against the validity of the Ethics Act. First, it was argued that the manner in which the Act provides for the appointment and removal of the independent special prosecutor was unconstitutional. Second, it was argued that the Ethics Act violated the separation of powers doctrine in that it impermissibly interfered with the President's constitutional duty to take care that the laws be faithfully executed.

Appointment

The first argument was that the unique appointment process involving the Attorney General and the special judicial panel violates the Appointments Clause of the United States Constitution in Art. II, § 2, cl.2. This clause requires all "principal" officers of the federal government to be nominated by the President and confirmed by the Senate, but permits "inferior" officers to be appointed without Senate consent by "the President, the Courts, or the Heads of Departments."¹³ The Court of Appeals for the District of Columbia had ruled that the independent special prosecutor was a principal officer whose appointment violates the Appointments Clause.¹⁴ The court of appeals reasoned that the independent special prosecutor is a principal officer because her power to investigate and prosecute was "unchecked" by the President.¹⁵ The Supreme Court, however, held that the independent special prosecutor "clearly falls"¹⁶ within the category of inferior officers. Although the Court did not draw any exact lines between principal and inferior officers,¹⁷ the Court viewed the independent special prosecutor as infe-

rior because she is subject to removal by the Attorney General, has no power to formulate policy, and has a limited jurisdiction and tenure fixed by the special judicial panel.¹⁸

The next issue that needed to be resolved under the Appointments Clause was whether an inferior officer of one branch can be appointed by officials of another branch. The challengers of the Ethics Act argued that the Appointments Clause only permits inferior officers to be appointed by superiors in the same branch and, therefore, the selection of an executive official by a judicial panel is improper. The Supreme Court, however, held that Congress can grant to one branch the power to appoint inferior officers of another branch. The Ethics Act therefore did not violate the Appointments Clause.¹⁹

The Supreme Court's analysis of the Appointments Clause is significant for two reasons. First, in over two hundred years of constitutional history, this is the first case where the Court "closely" construed the clause.²⁰ Secondly, by giving Congress the power to provide for inter-branch appointments, the Court gave Congress a potentially powerful tool in its power struggle with the executive branch. The Court did recognize that Congress' power to provide for inter-branch appointments was "not unlimited" if such an appointment would create an "incongruity"²¹ (e.g., if Congress gave a court the power to appoint the Secretary of Agriculture).²² Still, Congress' power to create executive officials not appointed by the executive branch could become a significant method of exerting influence over the executive branch.

Removal

The Ethics Act provides that the independent special prosecutor can be removed from office only for good cause.²³ It was argued that this good cause requirement unconstitutionally infringed upon the President's power to carry out his executive functions. This argument was based on *Myers v. United States*²⁴ in which the Supreme Court in 1926 held that Senate approval for the removal of a postmaster improperly infringed upon the President's duty to take care that the laws be faithfully executed. One explanation of this case, suggested by the Supreme Court in its 1935 *Humphrey's Executor*²⁵ opinion which upheld a good cause limitation for removal of a Federal Trade Commissioner, was that the President's discretion to remove "purely executive" officials could not be limited by Congress. In *Morrison v. Olson*, however, the Supreme Court backed away from this explanation, and wrote that "our

present considered view"²⁶ is that the constitutionality of any limitation on the President's ability to remove government officials is not whether they are purely executive, but whether the removal restriction impedes the President's ability to perform his constitutional duties.²⁷ Here, although the independent special prosecutor is clearly executive, the Court ruled that because the independent special prosecutor has no policy making functions and has limited jurisdiction, the good cause restriction on removal does not "unduly trammel" on the President's authority.²⁸

The Court's holding that any executive official's removal can be restricted by Congress as long as the President still is able to accomplish his constitutional duties is another victory for Congress in its power struggle with the executive branch. Moreover, as with the Appointments Clause analysis, because the Court's decision offers no bright lines, uncertainty as to which executive officers can be removed only for specified cause can result in additional tensions between the two branches.

"separation of powers . . . is a system of checks and balances."

Separation of Powers

In general, the separation of powers doctrine is violated when one branch interferes with another branch's constitutionally assigned functions.²⁹ The court of appeals had ruled that the Ethics Act was unconstitutional because it interfered with the executive branch's obligation to execute the criminal laws. This was true because the Ethics Act gave the power of criminal prosecution to someone not accountable to the President, and gave an Article III court the power to appoint and define the jurisdiction of an executive officer.³⁰

The Supreme Court did not agree that the Ethics Act violated the separation of powers doctrine. The Court downplayed the role of the special judicial panel concluding that, because the judicial panel can appoint an independent special prosecutor only if the Attorney General authorizes the appointment, there is no judicial usurpation of executive functions. The Court found the judicial panel's other

functions under the Ethics Act to be sufficiently limited. Although the power of the judicial panel to terminate the independent special prosecutor's tenure was "more doubtful,"³¹ the Court narrowly interpreted this power to mean that the special judicial panel could only terminate the independent special prosecutor if the investigation had been completed. By narrowly interpreting this power, the Court concluded that there was not significant judicial involvement in executive branch functions.³² The Court also pointed out that unlike other instances where there was a separation of powers violation,³³ there was no attempt in the Ethics Act by Congress to usurp any executive power. The Attorney General's critical role in the Ethics Act also illustrates that the executive branch retains control over the criminal prosecution function.

The Court's analysis in *Morrison* of the separation of powers issue is a clear rejection of a strict interpretation of the separation of powers doctrine. The Court adopted a flexible approach which accepts the view that separation of powers under the federal constitution is not one of the separation and isolation of each branch, but rather a system of checks and balances.³⁴ The goal is not to avoid blending powers within one branch, but rather to avoid the submission of one branch to another. Only the sole dissenter, Justice Scalia, believed that the Constitution requires that all executive power belongs to the President, and that any sharing is improper.³⁵ The other justices, however, adopted a balancing test which permits some exercise of executive functions outside the executive branch. Although Justice Scalia calls this "totality of the circumstances approach," a "revolution in our constitutional jurisprudence,"³⁶ it seems consistent with other Supreme Court decisions such as *CFTC v. Schor*³⁷ which upheld the power of an independent agency to decide state law counterclaims as part of an agency adjudicatory proceeding. *Schor* rejected the argument that such authority could not be vested outside an Article III court. *Morrison* is also consistent with *Humphrey's Executor*³⁸ which implicitly upholds the power of the Federal Trade Commission, another independent agency, to exercise executive, legislative, and judicial functions. Recent arguments that independent agencies are unconstitutional³⁹ because of their blending of powers or because of their independence from presidential control should surely be rejected in light of *Morrison*.

Conclusion

The Supreme Court rejected the Reagan

administration's position that the independent special prosecutor unconstitutionally infringes upon presidential power. The Supreme Court thus affirmed Congress' power to control criminal activity within the executive branch. If Congress will attempt to extend the reasoning of *Morrison v. Olson* to further limit executive power, this will lead to further battles between the legislative and executive branches.

Footnotes

- ¹ _____ U.S. _____, 108 S. Ct. 2597 (1988).
- ² 418 U.S. 683 (1974).
- ³ Justice Kennedy took no part in the consideration or decision of the case. Justice Scalia dissented.
- ⁴ 28 U.S.C. §§49, 591-598 (Supp. 1988).
- ⁵ See *United States v. Nixon*, 418 U.S. 683, 694 n.8 (1974).
- ⁶ *Id.* at 696.
- ⁷ 28 U.S.C. § 591.
- ⁸ See *In re Sealed Case*, 838 F.2d 476, 527 (D.C. Cir. 1988) (Ginsburg, J., dissenting).
- ⁹ 28 U.S.C. § 592.
- ¹⁰ 28 U.S.C. § 592(b)(1). See S. Rep. No. 170, 95th Cong., 1st Sess. 72 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 4216, 4288. Such a decision is not subject to judicial review. See also Independent Counsel Reauthorization Act of 1987, H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. 22 (1987).
- ¹¹ 28 U.S.C. § 593(b).

- ¹² 28 U.S.C. § 596(a)(1).
- ¹³ The full text of the Appointments Clause, Art. II, § 2, cl. 2 is as follows: [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
- ¹⁴ *In re Sealed Case*, 838 F.2d at 486.
- ¹⁵ *Id.*
- ¹⁶ _____ U.S. at _____, 108 S. Ct. at 2608.
- ¹⁷ *Id.*
- ¹⁸ *Id.* at _____, 108 S. Ct. at 2608-09.
- ¹⁹ *Id.* at _____, 108 S. Ct. at 2609-11.
- ²⁰ *In re Sealed Case*, 838 F.2d at 481.
- ²¹ _____ U.S. at _____, 108 S. Ct. at 2611.
- ²² _____ U.S. at _____, 108 S. Ct. at 2611 n.13.
- ²³ 28 U.S.C. § 596(a)(1).
- ²⁴ 272 U.S. 52 (1926).
- ²⁵ 295 U.S. 602 (1935).
- ²⁶ _____ U.S. at _____, 108 S.Ct. at 2618.
- ²⁷ *Id.* at _____, 108 S. Ct. at 2619.
- ²⁸ *Id.*
- ²⁹ See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976).

- ³⁰ 838 F.2d at 503-18.
- ³¹ _____ U.S. at _____, 108 S. Ct. at 2614.
- ³² *Id.*
- ³³ See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986); *Myers v. United States*, 272 U.S. 52 (1926).
- ³⁴ See, *In re Sealed Case*, 838 F.2d at 527 (Ginsburg, J., dissenting).
- ³⁵ _____ U.S. _____, 108 S. Ct. 2597, 2641 (Scalia, J., dissenting).
- ³⁶ *Id.* at _____, 108 S. Ct. 2597, 2628 (Scalia, J., dissenting).
- ³⁷ _____ U.S. _____, 106 S. Ct. 3245 (1986).
- ³⁸ 295 U.S. 602 (1935).
- ³⁹ See, e.g., *FTC v. American Nat'l Cellular, Inc.*, 810 F.2d 1511 (9th Cir. 1987); *Hospital Corp. v. FTC*, 807 F.2d 1381 (7th Cir. 1986), cert. denied, _____ U.S. _____, 107 S. Ct. 1975 (1987).

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