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The Ugly History of Special Prosecutors

"While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty," said the late Supreme Court Justice Antonin Scalia in his lone dissent in the case *Morrison v. Olson*, arguing against the constitutionality of the 1978 Independent Counsel statute, which had been enacted in the aftermath of the Watergate scandal.

In 1999, then-Attorney General Janet Reno specifically cited Scalia's dissent in support of the decision of Congress to allow the law to expire. She said, "I have come to believe — after much reflection and with great reluctance — that [it] is structurally flawed and that those flaws cannot be corrected within our constitutional framework." In her opinion, which she credited to Scalia's dissent, the law violated the principle of separation of powers found in the Constitution in that independent counsels were unaccountable and were exercising powers that are plainly within the province of the executive.

Despite the law's demise, Reno's Justice Department nevertheless developed procedural regulations to govern the appointment of special counsels, and these regulations remain in the Code of Federal Regulations. The regulations restrict the power of the president to either name or fire the special counsel, leaving that authority in the hands of the attorney general, who must cite a "good cause" to terminate the appointment.

Under this arrangement, many of the same constitutional problems of infringing upon the authority of the president remain, and multiple other problems create an unhealthy situation in our constitutional republic.

The History of U.S. Special Prosecutors

The first presidential administration to use a "special prosecutor" was that of President Ulysses S. Grant in 1875, when it was used to investigate a whiskey ring scandal. Presidential frustration with a special prosecutor is not new with President Donald Trump, because Grant eventually fired Special Prosecutor John Henderson when Henderson began investigating Grant's personal secretary. Other presidents appointed special prosecutors when it appeared the president might have a conflict of interest. Presidents James Garfield and Theodore Roosevelt were the next to name special prosecutors.

Congress mandated, via a joint resolution, that President Calvin Coolidge name a special counsel to investigate the Teapot Dome scandal, which had originated during the tenure of his predecessor, Warren Harding. (Although there is no indication that Harding was involved in any wrongdoing, his secretary of the interior, Albert Fall, eventually went to prison for taking bribes in exchange for leasing federal lands to two oil tycoons.) No other federal special prosecutor has been named under a similar congressional mandate, which is of dubious constitutionality.

A scandal involving the Internal Revenue Service during the administration of Harry Truman led to the naming of another special prosecutor (known as a "special assistant" to the attorney general). The

prosecutor was eventually fired, and the investigation was turned over to normal Justice Department officials.

It was the Watergate scandal involving President Richard Nixon that elevated the power and public notoriety of the special prosecutor position. Attorney General Elliott Richardson tapped Archibald Cox as "special prosecutor" to look into possible Nixon administration involvement in the Watergate affair, but Cox was eventually fired when he obtained a subpoena for the secret recordings that Nixon had made within the Oval Office. Since both Richardson and the deputy attorney general had promised Congress not to fire the special prosecutor, it was left to Solicitor General Robert Bork to terminate Cox, in what was dubbed the "Saturday Night Massacre." Nixon then named Leon Jaworski as special prosecutor, who simply continued Cox's pursuit of the tapes — eventually obtaining them after the Supreme Court sided with Jaworski after Nixon initially refused to surrender the tapes.

Apparently in response to Watergate, Congress crafted the Independent Counsel Act in 1978, which created a rule for the naming of a special prosecutor, which would now be titled an "independent counsel." Previously, the decision to name a special prosecutor had been in the hands of the attorney general — now it would be up to a three-judge panel of circuit court judges. Since the expiration of the statute, these figures have been dubbed "special counsels."

Scalia's Lone Dissent in *Morrison v. Olson*

Some at the time did raise questions as to the constitutionality of the statute, and in 1988, a case on this question finally reached the Supreme Court. When President Ronald Reagan ordered the administrator of the Environmental Protection Agency to withhold certain documents, arguing they contained "enforcement sensitive information," the House Judiciary Committee asked the attorney general to investigate Assistant Attorney General Theodore Olson and two others. When Independent Counsel Alexia Morrison obtained subpoenas, Olson sued Morrison, arguing that the statute violated the Constitution by taking executive powers away from the president, essentially creating a "fourth branch" of government, not answerable to anyone.

Photo: AP Images

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Unfortunately, in *Morrison v. Olson*, the Supreme Court held, in an 8-1 decision, that the statute did not violate the Constitution because the special counsel was technically a member of the executive branch. This precipitated Scalia's dissent, in which he argued the law was unconstitutional because criminal prosecution is an exercise of "purely executive power," and the law deprived the president of "exclusive control" of that power.

"I fear the Court has permanently encumbered the Republic with an institution that will do it great harm," Scalia wrote in his dissent. He later told *New York* magazine, "To take away the power to prosecute from the president and give it to somebody who's not under his control is a terrible erosion of presidential power."

Noting what had occurred since the statute went into effect in 1978, Scalia's dissent said, "In the 10 years since the institution of the independent counsel was established by law, there have been nine highly publicized investigations, a source of constant political damage to two administrations." In addition, he noted that justice had taken a back seat to political considerations. "The mini-Executive

that is the independent counsel … is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide."

Scalia's concerns have proven to be prophetic, as well, as the office of special counsel, by whatever name, has been used repeatedly as a political weapon against presidents of both parties, largely because, once appointed, the special counsel invariably continues his investigation until he finds someone to prosecute and can therefore claim a scalp. Instead of investigating whatever allegations have been made, special counsels tend to target individuals.

Finding a "Crime"

This is Stalinist. As Lavrentiy Beria, the ruthless head of Joseph Stalin's NKVD (later the KGB), bluntly put it, "Show me the man and I'll find you the crime."

Thus, we have had special counsels, such as Ken Starr, charged with investigating President Bill Clinton's alleged involvement in the Whitewater land scandal in Arkansas, who wound up investigating Clinton's involvement with White House intern Monica Lewinsky and trapping him in a lie under oath. While Clinton's sexual affairs were certainly beneath the dignity of the office, it was not the crime that Starr was originally tasked with investigating. Also, there were other, far more serious crimes, such as Clinton's allegedly taking bribes from the Communist Chinese, that should have been investigated. As it was, Starr spent four years and $40 million to finally produce the infamous blue dress.

Lawrence Walsh, named special counsel to investigate the Iran-Contra affair, brought forth a transparently political indictment of former Defense Secretary Caspar Weinberger only four days before the 1992 presidential election.

During President George W. Bush's administration, Special Counsel Patrick Fitzgerald was given the task of investigating who had released the name of covert CIA agent Valerie Plame to journalist Robert Novak. Fitzgerald continued his "investigation," despite learning almost immediately that it was State Department officer Richard Armitage who had told Novak about Plame's CIA status. No one was ever charged with uncovering her status, but Fitzgerald did obtain a conviction against Lewis "Scooter" Libby, top aide to then-Vice President Dick Cheney, for lying to investigators.

This is the "process crime" that prosecutors — not just "special prosecutors" — use when they want to "get" someone in their investigation. It is the same "crime" that Special Counsel Robert Mueller used against General Michael Flynn during his interminable "Russia collusion" investigation.

Some might object that Mueller has turned over unrelated alleged criminal investigations to regular federal attorneys — such as someone allegedly lying in obtaining a loan — rather than using his special counsel status to pursue such charges. This is a distinction without a difference, and seems very close to the attitude expressed by Stalin's man Beria.

A partisan Democrat who well understands this is retired Harvard Law professor Alan Dershowitz, who does not agree with most of the policies of President Trump, but has been a longtime critic of the use of "special counsels" generally, and the recent Mueller investigation of the Trump administration specifically. Dershowitz argued this past summer on *Fox & Friends*, "All of this could have been done through the Justice Department, regular lawyers. You don't need to bring in a multi-million-dollar group of people with a target on the back of specific individuals. That's not the way justice should operate."

For months Dershowitz has argued that Special Counsel Mueller has attempted to turn actions by the

Trump White House that are clearly constitutional into criminal actions. “The president is entitled to fire the head of the FBI. The president is entitled to direct his attorney general who to investigate, who not to. I don’t see that the prosecutor should have a right to turn a constitutionally protected act of the president into a crime by speculating on what his motive might have been.”

Why Special Counsels Are Unconstitutional

Even beyond that, the question is whether there should even be a special counsel appointed by anyone other than the president of the United States.

Article II, Section 2 of the U.S. Constitution clearly states that the president shall have the power to appoint “other officers of the United States, whose appointments are not herein [in the Constitution] provided for, and which shall be established by law.” In other words, the selection of a special counsel was not properly made by the Assistant Attorney General Rod Rosenstein, nor even by the attorney general at the time, Jeff Sessions. Any such appointment was actually within the constitutional jurisdiction of the president of the United States — Donald Trump.

Oversight of the executive branch is properly in the hands of the legislative branch, rather than in the hands of a special counsel who’s not appointed by the president and is a law unto himself. The proper remedy for presidential misconduct is an inquiry by the Congress, with members elected from districts across America. They can hold hearings, issue subpoenas, and demand testimony under oath. If they feel it is warranted, they can use the impeachment process to deal with executive branch officers, including the president, as the Constitution provides.

If the public decides that members of Congress have overstepped their bounds, then the voters can punish them at the ballot box. But in the case of independent special counsels, with huge budgets at their command, prosecutorial overreach and political posturing is far too tempting.

The wise words that the late Antonin Scalia wrote in his dissent in *Morrison v. Olson* are amazingly prescient: “That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish — so that [quoting James Madison] ‘a gradual concentration of the several powers in the same department’ can be effectively resisted.”

Scalia concluded, “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, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.”

It is time to kill this wolf.

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