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By L. Gordon Crovitz

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This is an ideal time to discuss the twin issues of the "Imperial Congress" and its creation, the independent counsel. No one in Congress could have imagined a decade ago, as Congress passed the first special prosecutor law, that in 1989 the Speaker of the House himself would be under attack for "ethics" violations. Certainly no one forecast that, by creating a special prosecutor to investigate high-ranking members of the executive branch, Congress would be opening itself up for closer scrutiny. The irony is that the "sleaze factor" issue, which Congress has used against every President since Richard Nixon, is now turned against Congress.

Indeed, President Bush has recommended that Congress pass legislation to cover itself by independent counsel. It is highly unlikely that Congress will ever do any such thing. Congress knows only too well the dangers Members would face. These prosecutors have turned out to be highly zealous, pursuing allegations of wrongdoing often so spurious or technical that no normal federal prosecutor would ever pursue them. Congress understands this – indeed, Congress intended that independent counsel would harass executive branch officials with trivial or even trumped-up charges.

The Imperial Congress thus is faced with its own creation. As The Heritage Foundation book of that title argues, the highly entrenched Congress, dominated by one party for the past 35 years, practices the arrogance of power. One of the most dangerous acts of arrogance has been what I would call the "criminalization of policy differences" most notably by a liberal-dominated Congress against a conservative White House.

Indictment Bait. This took the separation-of-powers battle into a new and politically dangerous dimension. What was started as a tool to cripple the Jimmy Carter presidency was developed and perfected by Congress during the eight years of the Reagan Administration into the art of transforming political differences into potentially indictable offenses. What better way to intimidate executive branch officials than to threaten them with jail? Even though President Reagan made good on his pledge to strengthen the nation's economy and defenses, it is indeed ironic that he left the office itself even weaker than he found it, largely because defending the presidency and the President's policies became indictment bait – loyal officials were often falsely accused of crimes, when the only crime was pursuing policies opposed by liberals in Congress.

This prosecutorial politics could constrain the presidency in ways that would soon make the government increasingly ineffective. The risk is paralysis in the branch that the Founders intended would have the energy to ensure effective government. Excessive legal controls, extending to possible criminal indictment, will naturally tend to divert attention from substantive policy issues to the formalities of legal compliance. The results already include less of the discretion that is necessary to carry out executive branch functions, a

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long list of officials made victims of irresponsible criminal investigations, and continued weakening of a branch of government in decline.

INDEPENDENT COUNSEL

The modern era of criminalizing of policy differences dates from the 1978 Ethics in Government Act. Passed as post-Watergate legislation of "good government," the law has actually led to a demeaning of politics by transforming what are often entirely innocent events and activities into "ethical" concerns, some of which also become legal matters. The law mandated new financial disclosures that were so complex and cumbersome that innocent mistakes became almost inevitable. These completed forms served as time bombs, primed to go off when an official's political opponents decided the timing was right.

The law is entirely hypocritical. Only executive branch officials are subject to the law's most threatening innovation, the institution of the independent counsel, originally given the more accurate title of special prosecutor. In cases from the Iran-Contra affair to an infamous dispute over executive privilege during congressional testimony, these specially appointed lawyers investigated and prosecuted Reagan Administration officials with a vengeance.

Recipe for Aggressive Prosecutions. These counsel are unique prosecutors in many ways. They do not investigate "ethics" in "government," but only alleged breaches of law that may or may not have anything to do with common conceptions of ethics and are committed only by executive branch officials. The most notable characteristic of these prosecutors is that they are the only ones in the federal system who are not under the control and supervision of the Department of Justice. Also unlike other prosecutors, they are given the names of officials they must investigate, not merely events that might be crimes, committed by suspects unknown. They have unlimited resources; indeed, the independent counsel investigation and prosecution of Oliver North by Lawrence Walsh, including staff borrowed from other parts of the government, cost some $40 million in taxpayer funds. For independent counsel, there are thus no other cases against which to balance otherwise limited prosecutorial resources. This is a recipe for extremely aggressive prosecutions, and even the most widely respected private lawyers have been guilty of prosecutorial indiscretions once anointed as independent counsel.

Congress wrote the Ethics in Government Act to force the appointment of an independent counsel with a very low threshold of evidence of a crime. The hair-trigger appointment of an independent counsel occurs under the law, in its words, "whenever the Attorney General receives information sufficient to constitute grounds to investigate," and he then has 90 days to consider whether a crime might have been committed. The law expressly gives a majority of either the minority or majority members on the Judiciary Committee of either House of Congress the power to request the appointment of an independent counsel. In this case, the attorney general then has 30 days to explain in writing the results of his investigation.

Limiting the Attorney General. The only way for the attorney general to avoid naming an independent counsel is if "upon completion of the preliminary investigation,... [he] finds that there are no reasonable grounds to believe that further investigation or prosecution is warranted." This is well below the standard for asking for an indictment, which is the standard of probable cause. It is also below the standard used by the House Ethics Committee in the Jim Wright case, which was "reason to believe" the acts violated House

rules. In addition, unlike the usual procedure in alleged federal crimes, the attorney general is expressly prohibited from using the most important investigative tools. The law says that, during this preliminary investigation to determine whether an independent counsel must be appointed, the attorney general "shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas."

Threats to Civil Rights. Every President and attorney general has opposed independent counsel on constitutional and practical grounds. The Supreme Court has upheld independent counsel as constitutional, but the policy question of whether there should be such freelance prosecutors remains very much open. These independent counsel have created serious threats to the civil rights of their targeted executive branch officials. This was the theme of the amicus brief that former Attorneys General Edward H. Levi, Griffin B. Bell, and William French Smith filed in the Supreme Court in *Morrison v. Olson*, the independent counsel case. Their argument was simple, yet compelling. They noted that criminal prosecutors have great power over their targets, and their decisions can affect other government interests, such as foreign policy considerations. The principal checks on prosecutors are supposed to come from the executive branch, but independent counsel are intentionally freed of such constraints. The former attorneys general concluded by showing the link between their constitutional and pragmatic concerns about independent counsel:

> These internal checks and balances are the direct result of the Framers' decision to establish a unitary Executive Branch. They function precisely as the Framers intended the system of check and balances to function: they prevent a prosecutor from being overtaken by an excess of zeal or ambition, or by the loss of perspective caused by too narrow a focus on one case.

This argument against an overly aggressive prosecutor should appeal to the civil libertarians. It is hard to imagine any governmental power over individual rights greater than the power to prosecute.

Long-Time Concerns. Indeed, concerns about overly aggressive prosecutors prompted by political considerations predated the establishment of independent counsel. Back in 1940, when he was attorney general, Supreme Court Justice Robert H. Jackson warned the federal prosecutors under his supervision that, "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous." The modern independent counsel is the creation of a single-minded, single-tasked prosecutor, which Justice Jackson considered the greatest domestic threat to civil rights.

Justice Jackson warned:

> Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff will be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

> If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm – in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

The problem becomes entirely political in the case of independent counsel because Congressmen often choose the targets of investigation. Justice Jackson's fear as applied to independent counsel might be as follows: It is here that law enforcement becomes political, and the real crime becomes that of being unpopular with the predominant group in Congress, being attached to wrong political views, or being personally obnoxious to or in the way of the legislative branch itself.

INDEPENDENT COUNSEL INVESTIGATION CASE STUDIES

There have been serious problems with nearly all ten independent counsel investigations, starting with the ones against Jimmy Carter's top aides, Hamilton Jordan and Timothy Kraft. They were investigated for alleged cocaine use at New York's Studio 54. This was certainly the first and only time the entire resources of federal law enforcement were brought to bear on alleged drug use. Both men were eventually cleared. Then there was the outrageous case of Ray Donovan, who was forced to resign as Ronald Reagan's Labor Secretary to undergo independent counsel investigations based on false charges. He eventually was cleared of all charges, and left to ask the poignant question, "Which office do I go to to get my reputation back?" Edwin Meese suffered through several independent counsel investigations, cleared each time of any criminal wrongdoing. The criminalizing of the battle over the President's ability to pursue foreign policy independent of Congress is reaching a crescendo in a criminal court room this week. The federal government has spent the $40 million investigating and prosecuting Oliver North, among other things for an alleged "illegal gratuity" in the form of a security fence at his home to keep Abu Nidal out.

I would like to spend some time, however, on a leading illustration of the independent counsel as a political tool of Congress: the investigation of former Justice Department official Theodore Olson, arising from his 1983 congressional testimony, which led to the case that reached the Supreme Court.

The relatively low profile of this case highlights the personal risks that all executive branch officials now face when they dare to do their jobs, perhaps especially when this means defending the Presidency against legislative usurpations.

Mr. Olson's "crime" was trying to protect the executive privileges of President Reagan against an overreaching Congress. His reward was six years under the threat of indictment first by Congress and later by independent counsel Alexia Morrison. His case has special resonance. As Assistant Attorney General for the Office of Legal Counsel, Theodore Olson was the chief adviser on issues of separation of power for the President. Previous occupants of the position include Chief Justice William Rehnquist and Associate Justice Antonin Scalia. And his case, *Morrison v. Olson*, was the challenge to the constitutionality of independent counsel in the Supreme Court.

The Olson controversy began when two subcommittees in the House of Representatives issued broadly worded subpoenas in 1982 for volumes of documents from the Environmental Protection Agency and the Land and Natural Resources Division of the Department of Justice. These documents concerned Superfund, the big budget, hazardous waste removal program. Most of the documents were produced, but President Reagan sent a memorandum to the Administrator of the EPA, Anne Burford, that many of the subpoenaed files were covered by executive privilege. These were the documents "generated by attorneys and other enforcement personnel within the EPA in the development of potential civil or criminal enforcement actions against private parties," which are traditionally kept confidential between investigators and possible violators. The Reagan memorandum concluded that "dissemination of such documents would impair my solemn responsibility to enforce the law."

Embattled Administrator. This assertion of executive rights sparked fireworks in the House of Representatives. There had been a history of budget battles with the Reagan Administration urging limits to increased budgets for the EPA generally and the Superfund program in particular, which had made Mrs. Burford a frequent target of Democratic complaints. The documents themselves came to seem less important than the battle over them. In mid-December 1982, the House passed a resolution finding Mrs. Burford in contempt for invoking executive privilege and refusing to turn over the documents. The executive branch tried to sue the House over the matter, but the case was dismissed as nonjusticiable. A deal was struck that gave Congress restricted, nonpublic access to some of the controversial documents. The House purged its contempt resolution. The embattled Mrs. Burford resigned on March 9, 1983.

This set the scene for Olson's testimony to Congress on March 10, 1983, the day after the Burford resignation. Olson was called to testify in a previously scheduled hearing on the Department of Justice authorization – a budget hearing. Olson testified without being sworn, voluntarily, not in response to any subpoena, and without any forewarning that the authorization hearing would become largely a hearing on the Superfund matter. The tone of the hearing was extremely hostile with most of the accusations concerning Olson's role in defending the executive privilege claim.

During the hearing, Olson was asked about the extent of the release of subpoenaed documents. He said that his office had delivered all such "finalized" documents that "were relevant to the questions that you have asked and to the formal advice that we have given." He emphasized that not all the documents had been made public, which reflected the

compromise struck between the two branches of government. Several Congressmen urged that more documents be turned over. His testimony, despite the contentiousness, was not considered important enough even to be printed by the subcommittee.

Partisan Report. The next time Theodore Olson heard about the Superfund matter from Congress was December, 11, 1985, when the House Judiciary Committee released a highly critical 1,300-page report on the Department of Justice role in the executive privilege claim. This was the result of a more than two-year investigation by Democratic committee staff members who held informal interviews and reviewed the documentary records. It was approved by a party-line vote.

This report would have been dismissed as simply another case of the legislative branch taking umbrage at executive branch officials who dare to question the appropriateness of congressional subpoenas, except for the charge that the Department of Justice officials had committed crimes in the process. The report charged that Mr. Olson's March 10, 1983, testimony at the authorization hearing was false and misleading.

Political Hatchet Job. The report itself was controversial from the start, with thirteen dissenting Congressmen dismissing it as sensationalized. Indeed, the dissenters noted that there was no committee or subcommittee meeting to discuss the objective of the investigation and no vote to authorize what looked from the start like a political hatchet job. The Republican dissenters said that the report was "solely the work of three majority staff counsels." No case could be clearer than this: Democratic staffers crafted a report to criminalize the political differences between the liberal majority on the House committee and representatives of a conservative administration.

The next step came the following day, December 12, 1985, when the chairman of the House Judiciary Committee sent a copy of the report to Attorney General Edwin Meese with a demand under the Ethics in Government Act that he appoint an independent counsel to investigate the three Department of Justice officials. So, based on a dubious staff report, Congressmen criminalized the matter by making the request provided under the ethics law for appointment of a prosecutor. Without being able to conduct any investigation because of the prohibitions against subpoenas or a grand jury, Attorney General Meese was forced to ask the special court panel to appoint an independent counsel to investigate Theodore Olson for his 1983 testimony.

$1 Million Defense Bill. Alexia Morrison was appointed and then investigated Olson for about half a year, and in November 1986, issued a preliminary report. She acknowledged that Mr. Olson had done nothing wrong. In her request to expand her jurisdiction to other Justice Department officials, she stated that "standing in isolation...Mr. Olson's testimony of March 10, 1983 probably does not constitute a prosecutable violation of any federal criminal law." Despite this affirmation of Mr. Olson's innocence, she continued her investigation. Theodore Olson and his family lived for several years with the constant threat of criminal indictment over his head.

It was not until after the Supreme Court case on independent counsel that Morrison finally announced that she would not seek any indictment on any charge against Olson. She finally released a report clearing him a few months ago. Alexia Morrison managed to spend about $1.5 million of taxpayer funds. She caused Theodore Olson to run up legal bills for his defense also of more than $1 million.

PRESIDENTIAL ACQUIESCENCE TO PROSECUTORIAL POLITICS

There is a political lesson in the suffering of individual executive branch officials. The system of checks and balances obligates each branch of government to use its constitutional authority to properly limit the powers the other branches exercise. This control on government officials is the leading protection for limited government and, ultimately, for our political freedom. Thus, the prime responsibility of each branch must be to protect its own powers and privileges so that it is not powerless to stop the abuses of the other branches. The greatest failure of the Reagan Administration may have been this failure to guard the powers of the executive branch.

There almost certainly will be more victims of prosecutorial politics in coming administrations. President Reagan contributed to this risk when he failed to veto the renewal of the Ethics in Government Act, despite the recommendations of the Department of Justice. He signed the bill, adding that he thought independent counsel were unconstitutional, yet expressing the vain hope that the courts would eventually invalidate them. The Supreme Court would have been more likely to help a branch of government that at least tried to help itself.

CONCLUSION

The abuses of prosecutorial politics led to some of the most vicious attacks against the Reagan Administration. By the end of the second term, the nature of this new, low level of politics became clear to many political observers. For some, the question was not simply Democrat versus Republican, liberal versus conservative. It was whether highly qualified individuals would risk serious dangers to their reputations by coming to Washington to serve in the government. It also became an issue of what the demeaned tenor of our political debate would do to the substance of that debate. Only an ultra-safe and risk-averse individual could be completely confident of avoiding prosecutorial politics. How many more Ray Donovans or Theodore Olsons will come to Washington to implement policy changes, knowing how great the personal price has become?

One of the most eloquent criticisms of this phenomenon came from an unlikely source, one of the most liberal members of the Congress that passed the original Ethics in Government Act. Father Robert Drinan spoke at a bipartisan conference of lawyers and ethicists on ethics in government sponsored last year by the Administrative Conference of the United States. He said,

> I'm going to suggest that maybe the day has come for a little bit of deregulation....[I] would like to have something come out of this conference that suggests a cautious note that maybe we've gone too far in some things. Regardless of who is elected, I can foresee some government bureaucrats saying, 'We don't want any scandals in this new administration,' and they are going to put on the form, 'Have you ever smoked pot, yes or no?' Question two: 'Have you ever been unfaithful to your wife? If so, how many times?' Three: 'Do you have any homosexual tendencies?' I think we've come to a point where a group like this should say quietly that enough is enough.

The John Tower fight showed that Father Drinan's forecast may have been an understatement.

Equalizing Treatment. So, finally, what to do about the problem? The answer from President Bush is to bring Congress under independent counsel. This would equalize treatment. Congress should ask itself how long Speaker Wright could last with an Alexia Morrison investigating *Reflections of a Public Man*. Or how long many Members would last with a Lawrence Walsh investigating the relationship between PAC contributions and the Savings and Loan crisis.

But appealing as it might be to give Congress some of its own bitter medicine, having even more public officials subject to prosecutors, who are not bound by the usual federal guidelines of prosecutorial discretion, does not seem the best solution. Instead, Congress should equalize treatment of the two branches by abolishing independent counsel for everyone. Congress should recognize that independent counsel were a mistake. If Washington wants to debate issues of ethics, it should by all means do so – but it should not in the process criminalize the political battle over separation of powers.