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By Benjamin R. Civiletti

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By Benjamin R. Civiletti

I appreciate the opportunity to speak to you this afternoon about a matter that many prosecutors, and former prosecutors, like myself, find troublesome to the fair and effective administration of criminal justice. I am referring to the recent Department of Justice policy shift permitting congressional staff investigators to question career prosecutors of the environmental crimes unit about their prosecutorial decisions. This policy change raises serious separation of powers concerns. But perhaps the graver casualty is the perceived and actual fairness of the prosecutorial process itself. I will address both of these issues, separation of powers and prosecutorial discretion, after briefly summarizing the factual scenario in which this policy change came about.

The House Energy and Commerce Committee has for some time been attempting to gain access to career Justice Department attorneys in the environmental crimes unit.[1] It has raised questions about the prosecutorial decisions of these attorneys, and as part of its "legislative oversight inquiry" has determined that congressional investigators have a need to question these line attorneys.

The previous Administration rejected requests for access to career attorneys, based on a time-honored Department of Justice policy shielding the prosecutorial decisionmaking process from pressures from the political process.[2] The Administration made presidential appointees available to answer the Committee's questions; however, the Committee found this offer to be unacceptable.[3]

Just two days after the new Administration assumed office, this issue was pressed again.[4] Ultimately, after several months and repeated efforts to make other arrangements satisfactory to Congress had failed, and after Congress authorized the issuance of subpoenas to compel the testimony of the attorneys,[5] the Administration agreed in late May[6] to permit congressional investigators to interview as many as fifteen line attorneys in the environmental crimes unit.[7] Although the interviews were not to be public nor under oath,[8] the targeted attorneys would be

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1 *BNA Daily Report for Executives*, May 23, 1993.
2 *The Washington Times*, June 25 and June 28, 1993.
3 *BNA Daily Report for Executives*, May 26, 1993.
4 *The Washington Times*, June 28, 1993.
5 *BNA Daily Report for Executives*, May 26, 1993.
6 *Ibid.*
7 *National Law Journal*, July 12, 1993.
8 *BNA Daily Report for Executives*, July 12, 1993.

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questioned about their handling of some twenty prosecutions during the previous Administration.[9]

It is this change in policy, exposing career prosecutors to interrogation about the prosecutorial process in regard to specific cases, to which I will direct my remarks today.[10]

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Our country, still young and learning the lessons of history, was founded upon the principle that through democratic processes the people can govern themselves. Nonetheless, the framers of our constitution, wise to the temptations of absolute power, concluded that citizens could enjoy the greatest liberty if the power of government, even though democratically elected, were disbursed into three coordinate branches: a legislature to make the laws, an executive to enforce the laws, and a judiciary to interpret the application of the laws in individual cases. As James Madison, quoting Montesquieu, wrote in *The Federalist* No. 47,

> When the legislative and executive powers are united in the same person or body... there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should enact tyrannical laws to execute them in a tyrannical manner....

Thus, our Constitution carefully divided government power into three co-equal branches.

However, like most constitutions, ours provides guidance, but not many specifications, for how government is to work. The constitutional charge that the Executive is to "take Care that the Laws be faithfully executed," has necessitated some judicial interpretation; nevertheless, it is now well settled that the prosecutorial function lies exclusively with the Executive Branch, and it has the absolute discretion to prosecute, or not prosecute, a case.[11]

As the Fifth Circuit Court of Appeals recognized in 1967,[12]

> The Attorney General is the President's surrogate in the prosecution of all offenses against the United States.... The discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute....
>
> This discretion is required in all cases....
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> We emphasize that this discretion, exercised in even the lowliest and least consequential cases, can affect the policies, duties, and

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9 *National Law Journal*, July 12, 1993. I do not know which cases are among the list of twenty. However, two of my partners are former heads of the Environmental Crimes Unit and currently represent subjects of cases or investigations. My remarks go to general principles and in no way are directed to specific cases of any type or category.

10 I direct no criticism at Congress or congressional committees. Congress has the right and expectation to exercise its powers to the fullest and even to enlarge them, if possible. My concern rests with the Executive Branch and the preservation and protection of its critical executive powers to see that the law is faithfully executed.

11 *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

12 *Smith v. United States*, 375 F.2d 243, 246-7 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967).

> success of a function placed under the control of the Attorney General by our Constitution and statutes.

Therefore, there is no room for argument that criminal prosecution is solely the province of the Executive. Yet, here we stand today, directing our attention to congressional inquiries into specific prosecutorial details and decisions.

Of course, Congress too has important constitutional duties and privileges, one of which is legislative oversight, and the Supreme Court has confirmed that the power of Congress to conduct oversight investigations in aid of the legislative process is broad, encompassing inquiries into the administration of the laws, social and economic problems, as well as government waste and corruption.[13] Consequently, there is also no room for argument that Congress has the power to investigate the enforcement of the laws.

So there you have it, seemingly an irresistible force (Congress) meeting an immovable object (the Presidency). And therefrom springs a prickly separation of powers issue: where to draw the line between Congress's right to know and the Executive's duty to preserve the prosecutorial process in an atmosphere as untainted by partisan politics as is possible in our system.

Congressional inquiry into applicable prosecution standards and statistics is appropriate. Furthermore, congressional inquiry directed to supervisory presidential appointees regarding major closed cases may be appropriate, where there is a showing of substantial reason to believe wrongdoing occurred. But the line should be drawn to shield line attorneys, who make the day-to-day prosecutorial decisions on behalf of the Attorney General, from outside influence, political or otherwise. And based on recent Supreme Court precedent, I think the Justices would back me up on this.

In *INS v. Chadha* and *Morrison v. Olsen*, the Supreme Court had the opportunity to pass on the constitutionality of two statutes that shifted, or restructured, certain powers between the Congress and the Presidency. In *Chadha*, the Court struck down the legislative veto as an impermissible method of avoiding the constitutional requirement that legislative acts be passed by both Houses of Congress and presented for the President's approval. In *Morrison*, the Court upheld the validity of the special prosecutor law, which permits the Attorney General to terminate a special prosecutor only for "good cause." Each of these cases provides support for the proposition that inquiry into specific prosecutorial decisions is beyond the legitimate scope of Congress's powers.

Chadha involved an Indian student who remained in this country after his visa had expired. Pursuant to his authority under the Immigration and Nationality Act, the Attorney General, through his designated representatives, had determined that deportation of Chadha would present an extreme hardship to him, and therefore suspended his deportation. As required by the Act, the INS reported its actions, with regard to Chadha and many other aliens, to Congress. Later, by exercise of the legislative veto permitting the House of Representatives to overturn by resolution the decision of the Attorney General, the House overruled the Attorney General, in essence requiring that Chadha be deported. Chadha brought suit.

In deciding Chadha's case, the Supreme Court was presented with a separation of powers question that cut to the very core of the balance of power between Congress and the Executive Branch. The legislative veto developed out of the ever-increasing demand placed upon Congress to remedy societal and economic ills, and the need to retain some control over the administrative

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13 *Watkins v. United States*, 354 U.S. 178, 187 (1957).

bureaucracy set up to handle those problems. Not wanting to completely turn over the reins of its lawmaking power, Congress fashioned the legislative veto to retain some control over its benevolent creations.

As efficacious and logical as this mechanism may have seemed, the Court found that it violated established separation of powers doctrine. The Court specifically held that the exercise of the veto, by resolution of one House, was a legislative act, and that legislative acts may be carried out by Congress only as established in the Constitution—that is—by votes of both Houses, and presentation to the President for his approval.

There are two aspects of *INS v. Chadha* which are important to today's issue. First, the Court focused on the nature of the legislative veto, and characterized the type of power Congress was exercising when it used the veto. This focus on the type of power being exercised—lawmaking versus executing versus judging—suggests that the Court remains focused on the principal function of each branch, and the proper constitutional method and manner by which those functions are to be carried out. Just as the Court has consistently restricted the judiciary to exercising the judicial function only with respect to cases and controversies, so must Congress remain true to bicameralism and presentment in regard to legislative functions.

The second significant aspect of *Chadha* is that the Court readily struck down the legislative veto, despite its widespread use by Congress for decades in hundreds of statutes. The Court's willingness to wipe out such a deeply entrenched mechanism affecting the balance of power indicates that preserving the constitutionally established methods of exercise of power is more compelling that the expediency or force of logic that may suggest a little governmental tinkering is in order.

In *Morrison*, the Supreme Court addressed the constitutionality of the Ethics in Government Act. The statute provided for the appointment of a special prosecutor to investigate and, if appropriate, prosecute certain high-ranking government officials for federal criminal violations. Under the Act, the Attorney General makes the determination whether further investigation or prosecution is warranted, and if it is, he must apply to a Special Division of the United States Court of Appeals for the District of Columbia Circuit for appointment of an independent prosecutor. The Special Division appoints the prosecutor, who can be removed by the Attorney General only for good cause, physical or mental incapacity, or inability to carry out the functions of the office.

In 1987, certain high-ranking government officials were subpoenaed by a grand jury convened by an independent prosecutor appointed pursuant to the Act. The officials moved to quash the subpoenas, arguing that the Act was unconstitutional. The Supreme Court disagreed.

In upholding the statute on separation of powers grounds, the Court ruled that the limitations placed on the President's power of removal were not so drastic as to violate settled separation of powers doctrine. More important, the Court held that the Act did not unduly interfere with the role of the Executive Branch. In reaching this conclusion, three factors were of particular concern to the Justices: first, the Act did not increase the powers of Congress nor pose a threat of congressional usurpation of Executive Branch functions; second, the Act did not involve any transfer of executive power to the Judicial Branch; third, the Act did not impermissibly undermine the powers of the Executive Branch.

Morrison provides guidance with respect to the topic today because of the Court's attention to the shift of powers between the branches, and the extent to which the Act impinged upon the traditional role of the executive. Notably, the prosecutorial power, even though exercised by the special prosecutor and not the Attorney General directly, was not transferred to either Congress or the judiciary, but remained under the control, albeit limited, of the Attorney General.

It is true, the Act gives Congress oversight jurisdiction over the special prosecutor, who is required to cooperate with Congress, and who may report to Congress about his or her activities. Remember, however, that the special prosecutor is appointed only to investigate or prosecute specified high-ranking government officials suspected of criminal violations, some of whom could be subject to impeachment. Consequently, he or she has a limited prosecutorial role, both temporally and jurisdictionally, and is insulated from political pressure from either Congress or the Executive. These factors, and the House of Representatives' constitutionally established role in initiating impeachment proceedings makes the congressional oversight of the special prosecutor very different than such oversight of line Department of Justice attorneys in criminal law enforcement.

Applying the principles of *Chadha* and *Morrison* to the congressional subpoena of career prosecutors, one is compelled to focus on three questions:

1) **Does congressional subpoena of career prosecutors undermine the power of the Executive Branch to carry out its constitutionally assigned role?**

2) **Is the prosecution of specific cases the proper subject of congressional oversight inquiry?**

3) **Does Congress's use of its subpoena power to compel testimony from career prosecutors threaten a usurpation of Executive Branch functions by Congress?**

I will answer these questions at the conclusion of my remarks. Now I would like to focus momentarily on the concept of prosecutorial discretion.

Prosecutorial discretion is a direct, and necessary, outgrowth of the President's constitutional mandate to "take care that the laws be faithfully executed." As I mentioned a moment ago, the Supreme Court has concluded that prosecutorial discretion lies exclusively with the Executive Branch.

But what exactly is prosecutorial discretion, and what is its role in the constitutional framework of our government?

When the framers divided governmental function into three co-equal branches, they effectively gave the citizens of this country a three-step safety check on arbitrary use of power. First, citizens may petition their legislature to pass or repeal laws affecting the rights and responsibilities of all citizens; second, if a person is targeted for investigation into a violation of criminal law, he or she can attempt to persuade the prosecutor not to prosecute the case; third, upon indictment, the defendant has the opportunity to persuade the judge or jury of his or her innocence. Not until the entire process is exhausted can any individual be deprived of their liberty.

Thus, the discretion entrusted to the prosecutor is a vital component in the system safeguarding individual liberty. And though, like any other form of discretion, it may be abused, in the vast majority of cases, prosecutorial discretion fulfills its important and honorable role in the criminal justice process.

Imagine a scenario, if you would, in which an individual is targeted for investigation into alleged violations of federal criminal law. This individual is not a lawyer, but believes his actions were proper under the law, and so attempts to persuade the prosecutor not to indict. This kind of situation occurs daily for prosecutors.

Now, imagine that our hapless individual, to be heard by the prosecutor, has to shout over the loud protestations of Members of Congress urging indictment of this very individual; or that Members of Congress are standing ready to chastise the prosecutor if no indictment is brought.

To imagine such a scenario is to understand why congressional involvement in prosecutorial decisions can be perilous to civil liberty.

Perhaps recognizing this danger, the framers specifically forbade Congress from enacting bills of attainder—laws that inflict punishment upon specific persons without the benefit of a judicial trial.

There are other good policy reasons for protecting prosecutorial discretion. The prosecutor reviews hundreds of potential cases each year, and is familiar with the current level of lawbreaking or compliance, the differences in severity of criminal conduct, the state of the applicable law, and the success of prosecution for different types of cases. Consequently, the prosecutor is in the best position to determine which cases warrant the most attention in the public interest, and which prosecutions will most likely result in conviction. Therefore, the prosecutor can effectively use the government's finite resources to most efficiently advance the government's law enforcement plan.

The Executive Branch has historically recognized the importance of preserving prosecutorial discretion from congressional oversight. In 1941, the House Committee on Naval Affairs requested FBI and Department of Justice documents related to investigations of labor strikes and subversive activity at businesses with naval contracts.

Attorney General Robert Jackson, who would later become Justice Jackson, denied the document request, saying:

> It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the laws be faithfully executed," and that congressional or public access to them would not be in the public interest.[14]

Attorney General Jackson cited several compelling reasons for his denial of the request: 1) that defendants would like nothing more than to know the extent of the government's information, and its witnesses and documentary evidence; 2) that investigation often relies on information received from confidential informants whose identities must remain secret for their benefit and the benefit of future investigations; and 3) that disclosure could result in gross injustice to innocent individuals who, though investigated, have been exonerated by the investigation.

Attorney General Jackson also pointed out that this policy could be traced back to at least 1904, when Attorney General Knox declined to produce investigative files concerning the Northern Securities case.

Finally, the Attorney General addressed the argument, often raised, that the committee chairman would keep the information confidential. He said,

> A policy cannot be made anew because of personal confidence of the Attorney General in the integrity and good faith of a particular committee chairman. We cannot be put in the position of discriminating between committees or of attempting to judge

14 40 Opinions of the Attorney General 45 (1941).

> between them, and their individual members, each of whom has access to information once placed in the hands of the committee.

The policy articulated by Attorney General Jackson has been followed by every subsequent Administration. As another Justice official once said,

> the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation.[15]

These concerns apply with equal, if not greater, force to congressional questioning of line attorneys. In this case, even greater danger exists because the Energy and Commerce Committee has already expressed its displeasure with the actions of the prosecutors. Thus, there is substantial danger that such congressional pressure may influence the actions of these and other prosecutors, one way or the other.

Although some of the concerns expressed by Attorney General Jackson will not apply to closed investigations, which seem to be the subject of the current inquiry, the interference with prosecutorial discretion remains just as troublesome. As former acting Assistant Attorney General Barry Hartman told reporters for the Bureau of National Affairs, staff attorneys will be faced with the dilemma, "If I do this, this side will come after me. If I do that, the other side will come after me. It destroys the insulation they have enjoyed from political pressure."[16]

Recognize also that this chilling effect will not be isolated to just those attorneys who were actually interviewed. It will undeniably affect all career prosecutors at the Justice Department who make the day-to-day prosecutorial decisions on behalf of the Attorney General. Anyone could be called next for questioning, discretion is weakened, and the bureaucratic way to proceed would be to indict in all cases. This qualifies as substantial inference with the prosecutorial process.

Congress may legitimately be displeased with the general enforcement of a particular law, and Congress's oversight powers certainly enable it to inquire into such matters. Congress is entitled to know the facts and figures regarding the number of prosecutions brought or pending, the number of convictions, and the length of sentences and amount of fines collected. Congress would also be entitled to know the amount of time spent prosecuting various types of cases, the standards for prosecution, the basis on which the prosecutor weighs certain factors in deciding to prosecute, and the cost of prosecution. Finally, Congress is entitled to learn about difficulties encountered in prosecution—for example—ambiguity in the language of a statute.

All of this information is within the legitimate scope of congressional oversight inquiry, and all can be provided by a presidential appointee of the Department designated by the Attorney General. However, Congress simply has no legitimate "oversight" basis for questioning line attorneys about specific cases.

Therefore, I'd like to backtrack, and answer the separation of powers questions regarding this matter that I posed earlier.

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15 Memorandum from Thomas Kauper, deputy Assistant Attorney General, Office of Legal Counsel, to Edward Morgan, Deputy Counsel to the President (Dec. 19, 1969)(cited in 6 Opinions of Ofc. Legal Counsel 31 (1982).

16 *BNA Daily Report for Executives*, June 17, 1993.

1) **Does congressional subpoena of career prosecutors undermine the power of the Executive Branch to carry out its constitutionally assigned role?**

The answer is yes. The Attorney General cannot effectively and fairly enforce the laws when career prosecutors are receiving pressure from Congress.

2) **Is the prosecution of specific cases the proper subject of congressional oversight inquiry?**

The answer is no. Congress can collect all the information it needs to carry out its legislative function without questioning line attorneys or inquiring into specific cases.

3) **Does Congress's use of its subpoena power to compel testimony from career prosecutors threaten a usurpation of Executive Branch functions by Congress?**

The answer to this final question is yes. Line attorneys would in essence be forced to answer to Congress as well as the Attorney General. This dual pressure endangers the effectiveness of prosecutorial discretion as a safety check in the criminal justice process, thus diminishing the role of the Executive Branch.

For all these reasons, if the Supreme Court were faced with the question, it would probably disallow congressional subpoenas of career Department of Justice prosecutors regarding specific cases. If the role of prosecutorial discretion in our constitutional framework is to be preserved, the Court could do no less.