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The real problem with independent counsels

By Einer Elhauge

Conventional wisdom has it that the independent counsel statute should be allowed to lapse because independent counsels have run amok rather than exercising true prosecutorial discretion. This view unites Democrats annoyed about Ken Starr with Republicans still annoyed about the Iran-Contra investigation. Even the American Bar Association and the Department of Justice, once dedicated supporters of the statute, now support letting it expire.

Let's grant their premise that independent counsels have failed to exercise appropriate prosecutorial discretion. Does it really mean we should return to the days when investigations could only be conducted by agencies accountable to the president, which at a minimum discouraged, and often precluded, legitimate inquiry into serious wrongdoing by the executive branch?

That would be an overreaction — in the interests of the Democratic and Republican parties because they each expect to hold the executive branch at some point — but not in the interests of the people. Moreover, the argument for it is based on the internally inconsistent logic that independent counsels cannot be trusted because they lack political accountability but the Department of Justice can be trusted because it is politically insulated.

And yet there is a serious problem with the current independent counsel statute. It omits the key factor that normally drives prosecutorial discretion: scarcity of resources.

Normally, prosecutors must exercise discretion about how to use scarce prosecutorial resources and have no bias in how they exercise that discretion. The combination provides our guarantee that they will not pursue trivial crimes, for what unbiased prosecutor would when doing so would mean being unable to pursue bigger cases?

The independent counsel statute solved a bias problem but ignored the scarcity issue. It properly recognized that executive agencies have a conflict of interest in exercising prosecutorial discretion to investigate the executive branch. But it gave that prosecutorial discretion to independent counsels that, while unbiased, face no scarcity that would ever cause them to use it. Open-ended budgeting provides whatever resources are necessary to prosecute any trivial crime. And such prosecution does not preclude prosecution of any bigger cases when you are an independent counsel because you have no other cases.

Take the independent counsel decision to spend $17 million unsuccessfully prosecuting former Agriculture Secretary Mike Espy for improperly accepting gifts by, for example, attending a football game with chicken company executives. Surely one reason this decision seemed sensible to independent counsel Donald Smaltz was that doing so precluded no bigger cases, for he was assigned no others.

But suppose the budgetary choice was between pursuing such chicken feed cases or prosecuting cases against Mafia kingpins? The latter sort of tradeoff motivates routine true prosecutorial discretion, but is never faced by independent counsels.

So pity poor Janet Reno. She knows that, under current law, to refer a matter to an independent counsel is to have him prosecute it. The inevitable tendency is to provide the missing prosecutorial discretion at the point of the decision to refer.

This appears to be the case with the alleged campaign finance violations by Messrs. Gore and Clinton. Many have deplored Miss Reno's decisions not to refer these matters to independent counsels. They argue that these non-referrals were based more on a substantive decision that the case should not be prosecuted rather than on an honest assessment that there was not sufficient evidence for someone else to exercise prosecutorial discretion.

This subjected her to vociferous criticism that she was not following the independent counsel statute. Worse, her decision not to refer was hampered by the very sort of conflict of interest in exercising prosecutorial discretion that the statute is meant to avoid. But what is an attorney general to do when she knows independent counsels have no incentive to really exercise prosecutorial discretion, but simply prosecute anything they can?

A structural solution is needed to spare the attorney general, and the country, from these delegitimizing decisions. An Agency of Independent Counsel could be created, with a limited multi-year budget to investigate wrongdoing by any lawmakers — executive, legislative, or judicial. It would thus have an unbiased incentive to allocate that budget to the lawmakers who most need investigating.

Oddly enough, some of the reform proposals being touted amount to the same thing under a more politically saleable name. They would give such cases to the Office of Public Integrity within the Department of Justice, but give the Office of Public Integrity added independence from the president by creating longer terms. If such reforms really create a completely independent agency with a fixed budget, then it is just an Office of Independent Counsel under a different name. But if they create only pseudo-political insulation, and ultimately leave the agency accountable to the president, then they fail to solve the problem that motivated the statute.

In any event, the lesson should not be to repeal the independent counsel statute and render the executive branch less accountable to the rule of law than the rest of us. The lesson should be to introduce scarcity to the independent counsel, so that the executive branch faces the same unbiased prosecutorial discretion as the rest of us.

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