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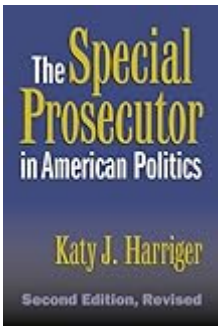

Katy J. Harriger. *The Special Prosecutor in American Politics.* Lawrence, Kansas: University Press of Kansas, 2000. 336 pp. $35.00 (cloth), ISBN 978-0-7006-1020-4.

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Politicized Justice

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Senator Bob Dole was angry. At the height of the 1976 presidential contest, his running mate, President Gerald Ford, suddenly found himself under investigation by Watergate special prosecutor Charles Ruff. Allegations that Ford had mishandled campaign contributions more than a decade earlier prompted the probe. But Dole insisted that it was "nothing but election year politics." Democratic Party Chair Robert Strauss countered that Dole's remarks reminded him of those made by "Nixon, Agnew and Dole in 1972, covering up the Watergate scandal until after the election."[1] For three months, Ruff's investigation continued, prompting charges of political manipulation of the theoretically apolitical special prosecutor. Although short-lived and terminated due to a lack of evidence, the Ford probe illustrated the problematic nature of the special prosecutor: it has never been, nor can it be, completely divorced from the political realm in which it operates.

Unfortunately, this story does not appear in Katy J. Harriger's *The Special Prosecutor in American Politics.* But readers will find Harriger's study a well-crafted and thoughtful discussion of the use of the special prosecutor in the last quarter of the 20th century. This is the second edition of her 1992 work, *Independent Justice: The Federal Special Prosecutor in American Politics.* Much has happened with regard to the special prosecutor since her first edition (published while Lawrence Walsh's Iran-Contra investigation was underway). Now Harriger, associate professor of politics at Wake Forest University, reassesses the role and significance, as well as the pitfalls, of the special prosecutor. She has not changed the basic framework from her book's first edition, but she has included an additional chapter on Iran-Contra and Whitewater.

In the 1992 edition, Harriger argued in favor of the special prosecutor law as created by the 1978 Ethics in Government Act. She supported the law as a symbolically imperative and politically wise "auxiliary precaution" by which to resolve conflict of interest and executive malfeasance when the normal checks and balances fail to do so.[2] The statute's purpose, she argued, was to avoid the "kind of politicized justice" that can result from presidential influence over the investigator. This, of course, is correct. But there is another form of "politi-

cized justice" of which we should be wary. It's what Bob Dole was worried about in 1976, and what others after him would argue–that the special prosecutor statute was open to manipulation for political purposes. This charge overshadowed many of the investigations conducted under the statute.[3]

That was certainly the case during Kenneth Starr's investigation of President Clinton. Indeed, Harriger's recent edition comes in the wake of Clinton's impeachment. But unlike those who worry that Starr's investigation underscored the potential for prosecutorial abuse, Harriger concludes that it revealed the law's inherent limitation in "addressing cases of profound political importance" (p. 215). In short, she wants to dispel the notion that the Whitewater probe revealed the special prosecutor to be either an "abuser of powerÃout to destroy the president," or an "earnest defender of the rule of law" (p. vii).

Harriger seeks a more nuanced understanding of the statute than either of these polar simplifications. She offers a sound and at times provocative assessment of the law from its inception to its 1999 demise. She comes to three major conclusions. First, the statute was a legacy of Watergate and must be seen in that light. Second, it is best understood within what she calls a "flexible view of the separation of powers" (p.13). Third, the special-prosecutor mechanism used from 1978 through 1999 was "neither so dangerous as its critics suggested nor so beneficial as its supporters contended" (p. 233).

She comes to these conclusions by way of an analysis of the statute's evolution, implementation, and constitutionality. Before the Ethics in Government Act of 1978, the special prosecutor was an *ad hoc* measure used only a handful of times in the nation's history. Archibald Cox, appointed by Attorney General Elliot Richardson to conduct the Watergate investigation, served in just this kind of *ad hoc* arrangement. On 20 October 1973, President Richard Nixon ordered Cox fired and the Watergate Special Prosecution Force disbanded. The so-called Saturday Night Massacre that resulted became the "focusing event," Harriger argues, as Congress reacted swiftly to consider how best to replace Cox and how to avert another such crisis (p. 41). At the same time, however, Harriger downplays the significance of the interaction between Nixon and Cox. "If we look beyond the events of Cox's firing," she argues, "we can see that a special prosecutor appointed within the traditional separation of powers framework can be sufficiently independent" to carry out a full and effective investigation (p. 22). This argument presumes that the political framework within which the special prosecutor works necessitates interaction with the press, interest groups, the judiciary, and the legislature. U.S. District Judge John Sirica, for example, "provided invaluable support" to Cox's investigation, she reminds us (p. 25). Harriger also makes a compelling case about the extent to which members of Cox's team interacted with Congress. But to conclude that these forces were therefore able to ensure an independent investigation is a mistake, as the Saturday Night Massacre so strikingly revealed. Nixon's termination of Cox illustrated that the investigator had utterly insufficient independence from the executive branch. It was to this problem that Congress was reacting in subsequent years of debate surrounding the creation of a statutory investigator.

Harriger's discussion of the Saturday Night Massacre and its aftermath is concise and thoughtful. She defines Congress's heightened vigilance, and its attempts to curtail the autonomy of the president, as the "Watergate legacy" (p. 41).[4] She then analyzes that legacy within a "flexible" separation of powers framework, arguing that the prosecutor is limited because he or she must interact with other political actors.[5] Harriger deftly summarizes proposals considered in both houses of Congress during 1975 and 1976, demonstrating the influence on the legislative process of "external actors," including Common Cause and the American Bar Association (p. 62). Although these other actors are indeed important, a more complete discussion of the formative stages of the statute would seem to be warranted. By analyzing the arguments made against the special prosecutor mechanism, for example, Harriger could provide some important insights into the consistencies advancing them, and into the prescience of their arguments. Critics such as Philip Kurland contended that a statutory prosecutor was both unnecessary and unwise. Kurland warned of potential McCarthyite investigations in which "frivolous" charges would take on a life of their own. Even if such charges proved false, the target would "nevertheless have been blighted," he cautioned.[6] The charge of McCarthyism resurfaced during the most controversial investigations of the 1980s and 1990s, and reflected the inescapable political nature of investigation as conducted under the statute.

The partisan political context also deserves more attention than it receives in this discussion. What William C. Berman has called the "volatile domestic scene" of the Vietnam era changed the tenor of American politics. The struggle to maintain the balance of power between the

executive and legislative branches took on added urgency in the early 1970s.[7] This rift between the branches also intensified due to the period of divided government in which it occurred.[8] Surely the creation and use of the special prosecutor apparatus reflects this trend. Given Congress's overwhelming desire to enact reform legislation, it is also important to note that the special prosecutor was institutionalized only in 1978 under Democrat Jimmy Carter. We need to hear more about how Carter and his predecessor Gerald Ford greeted reform proposals. In addition, the various special prosecutor bills were considered in the midst of congressional elections and a presidential election. These are all highly important contextual elements that could shed light on why and in what form the statute was finally adopted.

These larger questions of context are equally important to a discussion of the earliest investigations under the statute, which were plagued by charges of partisanship. The first investigations–of Carter administration officials Hamilton Jordan and Timothy Kraft for alleged cocaine use at Studio 54–were so far afield of the law's purpose that even some Carter foes decried them. One such detractor derided the investigations as the "first and only time the entire resources of federal law enforcement were brought to bear on alleged drug use."[9] Similar charges of political motivation punctuated subsequent investigations.

To the extent that she does treat the political context of those decades, Harriger characterizes Congress as attempting to reconcile "competing values" of prosecutorial "independence and accountability" (p. 73). A series of changes made in the early 1980s reflected these competing values. The 1982 amendments demonstrated congressional attempts to limit the "Watergate stigma" of investigation (for example, substituting the term "independent counsel" for "special prosecutor"), and to increase the influence of the Attorney General (p. 77). Despite these changes, Harriger concludes, the desire to balance independence and accountability was "too fraught with political difficulties to succeed" (p. 73).

In addition to questions of political abuse, the special prosecutor statute has been the subject of intense constitutional scrutiny. Harriger tackles this issue in an excellent chapter on challenges to the constitutionality of the law, with a special emphasis on the charged debate of the 1980s. Staunch opponents, including Robert Bork, argued that the law unduly usurped executive law-enforcement responsibilities and violated the separation of powers. A series of legal challenges to the statute, including *Deaver v. Seymour* and *North v. Walsh*, argued just that.[10] But in the 1988 case of *Morrison v. Olson*, the U.S. Supreme Court upheld the statute as constitutional, supporting the appointment of the investigator as an "inferior officer" as mandated in the appointments clause in Article 2 of the Constitution.[11] The lone dissent came from Justice Antonin Scalia, who warned that the Court's rejection of a "formalist approach to the separation of powers" spelled disaster for executive autonomy (p. 113). Scalia cautioned against the political ramifications of the law: "The context of this statute," he warned, "is acrid with the smell of threatened impeachment" (p. 113). Harriger disagrees, hailing *Morrison* as a return to a "pragmatic, flexible approach to the separation of powers," and a rejection of the "slippery slope of formalism" (p. 119).[12]

Next Harriger turns her attention to what is perhaps the only issue that provokes as much controversy as the constitutional question–that of prosecutorial discretion. She contends that, although "there is cause for concern over the lack of formal constraints," there were practical, "meaningful constraints" on the prosecutor's power (p. 148). Here she makes a strong argument that the interaction between the prosecutor and other "relevant actors" mitigated the discretion and autonomy of the investigator in the 1980s and 1990s. The Justice Department, for example, traditionally worked with the special prosecutor because the "barrage of criticism leveled at the department for its role in the Watergate scandal remains in its institutional memory" (p. 153). Also, she argues, special prosecutors "have recognized the need to use agents of the FBI to conduct their investigations" (p. 155). In some cases, the Justice Department actually interfered with investigations, as it did during Donald Smaltz's probe of Secretary of Agriculture Mike Espy in the mid-1990s. And the press has also affected the work of the prosecutor: Lawrence Walsh "considered the press to be an important source of support," whereas Kenneth Starr "saw the media as complicitous in undermining the credibility of his investigation" (pp. 176-77).

Harriger argues that the Iran-Contra probe, one of the few truly controversial and high-profile investigations in the twenty-one years of the statute's existence, demonstrated the law's limits and the potentially negative impact of the special prosecutor's interaction with other political actors. Just weeks before leaving office, President George Bush pardoned six defendants whose testimony would likely have implicated him in the scandal. And Congress's grant of immunity to Oliver North and John Poindexter constrained Walsh's investigation,

causing "substantial delays ... and, ultimately, call[ing] into question the whole point of the lengthy and expensive criminal investigation" (p. 219). In this discussion Harriger makes her strongest argument about the constraints on the special prosecutor. She effectively demonstrates that the Reagan administration shut out Walsh, including limiting the evidence to which he would have access (p. 221).

Kenneth Starr's lengthy and wide-ranging investigation, Harriger argues, also revealed the statute's "inadequacies in addressing the enduring problem of official misconduct"> (p. vii). This implies that the law in some way was not strong enough, although Harriger does not say so explicitly. Perhaps more convincing is the assessment of the statute offered by Professor Ken Gormley of Duquesne University Law School. Starr's probe, he argues, "revealed serious, previously invisible flaws" in the arrangement. By "co-opting" the prosecutor "into performing certain political functions" the law usurped congressional prerogatives including "the purely political process of impeachment," Gormley contends.[13]

Harriger herself concedes that the law was problematic. She agrees that it did little to remove the conflict of interest in any meaningful way, was triggered far too easily, and "raised false expectations about what an independent prosecutor can accomplish in a system of dispersed power" (p. 234). She acknowledges that partisanship also affected the law's implementation, as "policy disputes" were "easily transformed into charges and countercharges of unethical, and sometimes criminal, behavior." Moreover, Starr's investigation illustrated the potential for the special prosecutor to "become caught up in the partisan distrust and politicization of these cases" (p. 235). Harriger concludes that "it is naÃve to think that politics can be removed from the case by introducing an independent investigator" (p. 224).

"Can we learn to live without the independent counsel? Should we?" Harriger asks (p. 10). The answer to her question is yes: we not only can live without it, but we must. The office lacked constraint of time or expense, and arguably was manipulated for political ends. In the aftermath of the Starr investigation, however, Harriger seems unwilling to acknowledge the validity of the arguments made against the problematic special prosecutor investigation. Her stated ambivalence about the law is therefore troubling; for although she provides an important and necessary survey of the two decades of the statute's existence, she fails to assess fairly its political ramifications.

NOTES

[1]. Carl Bernstein and Bob Woodward, "No Evidence Found of Mishandling of Funds," *The Washington Post*, 15 Oct. 1976, A-1, A-4.

[2]. Katy J. Harriger, *Independent Justice: The Federal Special Prosecutor in American Politics* (Lawrence, KS: University Press of Kansas, 1992), 217. The phrase "auxiliary precaution" comes from James Madison's *The Federalist No. 51*.

[3]. Of course, charges of politicization cut both ways, as Julie O'Sullivan has shown. O'Sullivan contends that the "favored means by which to blunt the political damage posed by an IC investigation is to attack as biased the IC, or the judges that appoint him." She recognizes the inherently political nature of the statute, contending that public confidence that justice will triumph over partisanship can seriously be hindered when political partisans attack the integrity of the investigator. Her belief that Kenneth Starr was thus perhaps the "victim" in the controversy surrounding his appointment to head the Whitewater investigation may be far-fetched, but her larger point is well taken. Julie O'Sullivan, "The Independent Counsel Statute: Bad Law, Bad Policy," *American Criminal Law Review* 33 (Spring 1996): 463-509, at 464 and 473. Herbert J. Miller, Jr. and John P. Elwood provide another, somewhat humorous account of the statute's failure to engender public confidence. They recount a stunt by political satirist Michael Moore and a group of cohorts who "staked out" Kenneth Starr's house dressed as Puritans. The message to Starr, Moore contended, was that there was a "cheaper way to conduct his witch-hunt." Herbert J. Miller, Jr., and John P. Elwood, "The Independent Counsel Statute: An Idea Whose Time Has Passed," *Law and Contemporary Problems* 62 (Winter 1999): 111-129, at 111.

[4]. For a brief but well-argued overview of the life of the statute from a non-American perspective, see Robert Williams, "The Persecution of the Presidency? The Role of the Independent Counsel," *Parliamentary Affairs* 52 (April 1999): 291-305. Williams argues that congressional consideration of special prosecutor legislation was swift because without John Dean's testimony and the White House tapes, "the cover-up might have held. It was too close for comfort," members of Congress believed. *Id.*, at 293. He also suggests that the statutory special prosecutor presented a threat to the presidency itself. It was constituted to "bring Presidents and their executive branch associates to book for any possible infractions of federal law." "The criminal investigation of the presi-

dency," Williams concludes, was "institutionalized in the Ethics in Government Act." *Id.*, at 291.

[5]. In a 1994 article Harriger suggested the term "interdependent counsel" for the investigator, so important does she find the interaction between the investigator and other political actors. Katy J. Harriger, "Separation of Powers and the Politics of Independent Counsels," *Political Science Quarterly* 109 (Summer 1994): 261-86, at 286.

[6]. Letter, Philip B. Kurland to Senators Ribicoff and Percy, 8 July 1976, Watergate Reorganization and Reform Act - Memoranda and Correspondence, box 66, Philip Buchen Papers, Gerald R. Ford Library. From the vantage point of 2001, it is clear that Kurland's concern was on the mark. Kenneth Starr's investigation of Bill Clinton illustrated the inherent dangers in having a prosecutor always at the ready. *See*, for example, Richard Posner, *An Affair of State: The Investigation, Impeachment and Trial of President Clinton* (Cambridge, MA: Harvard University Press, 1999); and Jeffrey Toobin, *A Vast Conspiracy: The Real Story of the Sex Scandal That Nearly Brought Down a President* (New York: Random House, 1999).

[7]. William C. Berman, *America's Right Turn: From Nixon to Bush* (Baltimore: Johns Hopkins University Press, 1994), 6.

[8]. For a discussion of the relationship between divided party government and increased congressional oversight of the executive see David Mayhew, *Divided We Govern: Party Control, Lawmaking and Investigation, 1946-1990* (New Haven & London: Yale University Press, 1991).

[9]. L. Gordon Crovitz, *Ethics as Politics: Congress Versus the Executive Branch* (Washington, D.C.: The Heritage Foundation), 4.

[10]. Deaver v. Seymour, 822 F.2d 66 (DC Cir. 1987); *North v. Walsh*, 881 F.2d 1088 (DC Cir. 1989).

[11]. *Morrison v. Olson*, 487 U.S. 654 (1988).

[12]. Former Independent Counsel Joseph diGenova disagrees. He contends that "everything that [Scalia] predicted in that dissent" came true. Among the most prescient of Scalia's warnings, according to diGenova, were that the special prosecutor would have "unfettered discretion," and that powerful congressional committees could "initiate an investigation by merely sending a letter to the Attorney General." Joseph E. diGenova, "The Independent Counsel: A Good Time to End a Bad Idea," *Georgetown Law Journal* 86 (July 1998): 2299-2305, at 2300-2301.

[13]. Ken Gormley, "Impeachment and the Independent Counsel: A Dysfunctional Union," *Stanford Law Review* 51 (1999): 309-355, at 309 and 313.

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