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The Law of Unintended Results: The Independent Counsel Law

Warren B. Rudman

THE LAW OF UNINTENDED RESULTS: THE INDEPENDENT COUNSEL LAW

*The Honorable Warren B. Rudman**

After that introduction, I'm glad that I never got into a situation where Frank Coffin was appointed an independent counsel investigating me! Talk about doing your homework! I want to say to the Judge and to the Dean how grateful I am for the invitation. I have to say to Frank Coffin that, of course, he was not only on the First Circuit, but chief of that Circuit for a number of years during which I was privileged to serve my state as Attorney General. We in New England have been extraordinarily fortunate with that Circuit. Anyone who goes back and studies the history of that Circuit as it sits within the federal system knows that it's a gem. Frank Coffin was the luster on that gem for many years.

I know there are many judges here tonight. I want to say something at the outset; I've said this many times. I wish that public officials today would think carefully about the selection of judges when they get elected, particularly to federal office. There is nothing more important than the caliber of people whom we appoint to the judiciary at all levels. It is vital. With a country that is increasingly cynical, with cause, in many of its institutions, the courts of this country, state and federal, still are held in high esteem, and that is because over the years, and I would stress particularly here in northern New England, governors and senators have taken great care with those appointments. I received a call from the Senate Historian's office some time ago. He told me that they were doing some research and had come across a very interesting fact. He told me, "You are the only United States Senator who appointed or nominated to the President every federal district court judge sitting in your state at this time, the judge who's sitting on the First Circuit at this time, and a member of the United States Supreme Court." I reflected on it afterwards and I thought to myself, that's wonderful, because it is so important to the people of New Hampshire and to the people of this country that those who mete out justice and sit in judgment be exceptional. The American people must continue to believe that when they go to a court they will get justice, be they rich, be they poor, be they black, be they white; whatever they are, justice must be equal for all.

I am going to talk about the Independent Counsel tonight, but as most of you know, I am the co-author of Gramm-Rudman.[1] In fact, most people think my first name is Gramm.

Today is a historic day. Today is the first day of the new fiscal year, and the fiscal year that ended yesterday was the first fiscal year in almost forty years in

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* The Author, a former United States Senator from New Hampshire, is currently a partner in the international law firm of Paul, Weiss, Rifkind, Wharton & Garrison.

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1. The Balanced Budget and Emergency Deficit Control (Gramm-Rudman-Hollings) Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (codified as amended at 2 U.S.C. §§ 900-922 (1994)). Enacted in 1985, the Gramm-Rudman-Hollings Act was passed by Congress in an effort to eliminate the federal budget deficit.

which we did not have a deficit. Now, you would be greatly disappointed if Billy Graham came to Portland tonight and did not talk about the Lord. And people who know me know that I cannot pass the opportunity with an audience like this to talk about that issue. I think that the Congress and the President deserve great credit for putting us on the right kind of a glide path, but make no mistake, the light at the end of the tunnel is an oncoming train. We have trillions of dollars of unfunded liabilities for Social Security and Medicare. This country is aging very rapidly, and it is very important that we take steps now, lest our children and our grandchildren have a standard of living that will be totally unlike ours. The tax burden that will be imposed on them will be enormous. So, whenever I speak to a group on any subject, I always say, "Keep your eye on the crystal ball because it is terribly important that we do something about that now." I speak tonight not as a Republican or a Democrat, but as somebody who cares about this country. When I hear some of my former colleagues talking about tax cuts, when this country owes 5.3 trillion dollars—forty percent of it overseas, so the interest flows out of our economy and into foreign economies—I say, wait a minute. There's a lot that we can do in this country before pandering to the people who want tax cuts when most Americans care more about their children's future than they care about some small tax cut in their pocket today. So I hope that you will pass on that message to your representatives from this state.

I want to talk about the Independent Counsel tonight, and the timing could not be better. When I first was invited, it crossed my mind that the subject would be not only current, but in all likelihood, of great timeliness. I don't intend during these remarks to talk much about President Clinton's problems directly. I will only say that I think it's a very unfortunate and, frankly, a squalid situation. What will happen to it, I don't know. What should happen to it, I have some views. I'll probably talk about them later, but that is really not what I want to talk about.

You know, the wonderful thing about the Internet, even to people of my age who have learned how to use it, is you can dial up the University of Maine and you can go into the Maine Law Review and find out some interesting things. I recently read three speeches that were given here as the Coffin lecture. One by Judge Wald,[2] one by Drew Days,[3] and one by Alvin Bronstein.[4] They were very learned and intellectual addresses. I do not intend to do that tonight. I am not sure I could do that tonight. I hope that what I have to tell you tonight is informative and makes you think a bit about a public policy issue that I have cared deeply about long before the current situation.

In the fall of 1990, I was a member of the Senate Government Operations Committee, and we had before us the re-authorization of the Independent Counsel Law.[5] It was about to expire. I had, of course, sat on Iran-Contra. And I had watched what Judge Walsh had done as Independent Counsel, including indicting

2. *See* Patricia M. Wals, *Whose Public Interest Is It Anyway?: Advice for Altruistic Young Lawyers*, 47 ME. L. REV. 4 (1995).

3. *See* Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 181 (1996).

4. *See* Alvin J. Bronstein, *Representing the Powerless: Lawyers Can Make a Difference*, 49 ME. L. REV. 1 (1997).

5. 28 U.S.C. §§ 591-599 (1994).

Casper Weinberger on the eve of a presidential election. It occurred to me that there was a great deal wrong with that statute and that it wouldn't make much difference whether you were a Republican or a Democrat—everybody's ox was going to get gored one of these times, and we ought to fix it. It occurred to me that we ought to fix it in a way that would at least respond to some of the criticisms that had been made, some of them as far back as 1988 by Justice Scalia. I'll talk more about that later.

As I go through my discussion of that law, particularly through the eyes of Justice Scalia in his dissenting opinion in the case of *Morrison v. Olson*,[6] the case in which, by a seven-to-one margin, the Supreme Court upheld the constitutionality of the Independent Counsel Law, I want you to keep in mind three amendments[7] that I tried to attach to the re-authorization of that bill and wonder, in terms of today's events, what they would have meant.

My motivation to amend the Independent Counsel Law came from my feeling that we had a revolution in this country in 1776, and one of the things I thought we decided was that we didn't want a king, and we didn't want anybody who was totally unaccountable to the people. We didn't want anyone who could not be removed from office with cause—really removed from office, not just an authority to be removed from office. I saw abuses during the Iran-Contra Independent Counsel investigation that troubled me deeply; thus, I proposed three amendments. Let me start with my favorite one first because it is one that will immediately trigger thoughts in all of your minds, unless you have been on Mars lately. That amendment stated that the scope that the court shall give to the Independent Counsel shall be narrow and well-defined, and that it shall specify the crime that may have occurred under the factual situation alleged. Further, in the event that other matters involving the same respondent (i.e., the person being investigated) should come to the attention of the Independent Counsel, then they must immediately be referred to the United States Attorney General for forwarding to the United States Attorney for the district in which that offense was alleged to have occurred. If there was a conflict, then another United States Attorney from another district would be brought in to prosecute that case.

Here, in the case of the President, we had Whitewater, and then Travel-gate, and then File-gate, and finally, Monica-gate. Thus, the original jurisdiction of Whitewater was so expanded that it guaranteed what I have referred to in the past as the "eternal" Independent Counsel.

The second amendment I proposed required that in order to be named an Independent Counsel one should have been an active practicing prosecuting attorney, state or federal, or an active defense attorney within the previous fifteen years. I say this on the theory that if I have a brain tumor tonight, I don't want to go to the Maine Medical Center and have the operation performed by a doctor who last performed surgery in 1962, which is exactly what happened in Iran-Contra. And might I point out that in the case of the President's Independent Counsel, Ken Starr, he has never, to my knowledge, tried or defended a case in a trial court.

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6. 487 U.S. 654 (1988) (Scalia, J., dissenting).

7. The three amendments posed to the Independent Counsel Law were presented to the bill managers for their consideration but were not formally offered.

The third amendment created a statute of limitations on the Independent Counsel. He or she could only be re-authorized or extended by the Congress after two years from the time of appointment. I was a prosecutor; give me the resources of the FBI, and I can probably indict almost anybody in this room in two years. Those are the three amendments that I proposed in 1990.

I recently had lunch in the Senate dining room with Senator Carl Levin, Democrat of Michigan, who opposed me along with another senator named Bill Cohen, who is one of my closest friends. The reason they opposed the amendments was not that they didn't agree with them, but rather that the legislative process in the United States Senate sometimes requires that if a bill has any chance of passing, it must be "clean." In other words, a multitude of amendments offered on one bill would jeopardize the bill's passage. Thus, I elected not to stand in the way of that re-authorization of the Independent Counsel Law. I wish I had.

Most people in this room are old enough to remember Watergate. Most Americans think there was an Independent Counsel in Watergate; of course, there wasn't. There has always been in the United States Attorney General's office, and in any state Attorney General's office, the authority in case of conflict to appoint a special counsel, particularly when the appointing authority is a suspected person in a particular matter. You could bring in a special counsel, a person of high regard, great reputation, great integrity, great experience, and deputize him and direct him to find out if something went wrong. That is what happened with Archibald Cox, and, of course, his successor, Leon Jaworski. When you study the history of Watergate, you know that it worked the way it was supposed to work because there was no way it couldn't have worked if the allegations were truly serious. Unfortunately, we are saddled with a law which, in my view, ought to be repealed or substantially changed. In preparing for tonight I went back and read Justice Scalia's predictions in his dissenting opinion in *Morrison v. Olson*[8] in 1988. They are remarkable. I recommend that anyone who has not read the case to read it, and, if you have read it, read it again. Scalia either had a crystal ball in that case or has superhuman powers. Here are the things Justice Scalia said in 1988: that we can't have an unaccountable person with this kind of power,[9] and that this is not what America is all about.[10] He stated clearly his view that the Independent Counsel would be uncontrollable, and, on the question of removal, he said that allowing removal of the Independent Counsel for good cause is really no limit at all.[11] "[L]imiting removal of power to 'good cause' is an impediment to, not an effective grant of, Presidential control."[12] He got that right, right on target.

Second, he said that the Independent Counsel statute would let Congress shirk full responsibility over the impeachment process by delegating discretion to the Independent Counsel.[13] "How much easier is it for Congress, instead of accepting the political damage attended to the commencement of impeachment proceedings against the President on trivial grounds . . . simply to trigger a debilitating criminal

8. 487 U.S. 654 (1988) (Scalia, J., dissenting).
9. *See id.* at 729-31.
10. *See id.* at 733-34.
11. *See id.* at 706.
12. *Id.*
13. *See id.* at 713.

investigation of the Chief Executive under this law."[14] Think about that. Think about where we are today.

Third, Scalia said that the brooding omnipresence of the Independent Counsel would intimidate the White House staff and prevent them from serving the President effectively.[15] In Scalia's own words:

> [A]s for the President's high level assistants, who typically have no political base of support, it is as utterly unrealistic to think that they will not be intimidated by this prospect, and that their advice to him and their advocacy of his interests before a hostile Congress will not be affected, as it would be to think that Members of Congress and their staffs would be unaffected by replacing the Speech or Debate Clause with a similar provision. It deeply wounds the President, by substantially reducing the President's ability to protect himself and his staff.[16]

That has happened. It is obvious that it has happened. This White House, for better or for worse, right or wrong, has been traumatized by the events of the last seven months. Scalia went on:

> [I]t must also be obvious that the institution of the independent counsel enfeebles [the President] more directly in his constant confrontations with Congress.... Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naive, ineffective, but, in all probability, "crooks."...The present statute provides ample means for that sort of attack, assuring that massive and lengthy investigations will occur, not merely when the Justice Department in the application of its usual standards believes they are called for but whenever it cannot be said that there are "no reasonable grounds to believe" they are called for.[17]

A double negative, but that's exactly what has happened and what is happening now with the Attorney General under enormous pressure to appoint not two, but three more Independent Counsels. The only thing that can be said for it is that the gross income of lawyers in Washington is probably up forty percent this year.

Justice Scalia went all the way back to former Attorney General and former Supreme Court Justice Robert Jackson for his next criticism. Quoting a speech given by Jackson, Scalia describes the vast power and discretion of a prosecutor with respect to the object of his investigation; power and discretion that, when unchecked by politics, could lead to prosecutorial abuse.[18] In the case of the Independent Counsel Law, Scalia suggested that granting prosecutorial power without a political check turned around the age-old law enforcement maxim.[19] Instead of being told "there's your crime, now find the man," the Independent Counsel is told "there's your man, now go find his crime."[20] Scalia went on to say, quoting Jackson, that

> [t]herein 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.... In such a case, it is not a question of discovering the commission of a crime and

14. *Id.*
15. *See id.*
16. *Id.*
17. *Id.* at 713-14.
18. *See id.* at 727-28.
19. *See id.*
20. *See id.* at 728.

> 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 here that law enforcement becomes personal, and the real crime becomes that of...being personally obnoxious to or in the way of, the prosecutor himself.[21]

In New Hampshire it is a very interesting authority. It's a state-wide authority. The Attorney General in New Hampshire is the only person who can convene a jury statewide,[22] the only person that can ask a court for a wire tap,[23] and the only person who can investigate serious crimes. It is a very powerful position, and I have seen in that state going back thirty years terrible abuses of that position. No one is in a position to argue with a prosecutor, particularly a prosecutor who is not removable. The Attorney General of New Hampshire is removable for cause.

Allow me to continue with Justice Scalia's predictions. I don't know how closely you have been following this one, but it is perhaps his most uncanny prediction—Scalia essentially suggested that the Independent Counsel statute would create incentives for the counsel staff to be comprised of bloodthirsty partisan hounds.[24] As Scalia wrote in his dissent:

> The independent counsel thus selected proceeds to assemble a staff. As I observed earlier in the nature of things this has to be done by finding lawyers who are willing to lay aside their current careers for an indeterminate amount of time, to take on a job that has no prospect of permanence and little prospect for promotion. One thing is certain, however: it involves investigating and perhaps prosecuting a particular individual. Can one imagine a less equitable manner of fulfilling the executive responsibility to investigate and prosecute? What would be the reaction if, in an area not covered by this statute, the Justice Department posted a public notice inviting applicants to assist in an investigation and possible prosecution of a certain prominent person?[25]

Justice Scalia then predicted what I believe to be the fatal flaw in the whole statute. He said that the Independent Counsel's jurisdiction could expand infinitely.[26] "[S]hould the independent counsel or his or her staff come up with something beyond that scope, nothing prevents him or her from asking the judges to expand his or her authority or, if that does not work, referring it to the Attorney General, whereupon the whole process would recommence."[27] Scalia went on to point out that the Independent Counsel's isolation from the rest of the Justice Department would lead him to pursue and prosecute offenses that ordinary prosecutors probably would not.[28] The Independent Counsel

> is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide. What would normally be regarded as a technical violation (there are no rules defining such things),

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21. *Id.* (quoting R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940).
22. *See* N.H. REV. STAT. ANN. § 600-A:1 (1986 & Supp. 1998).
23. *See* N.H. REV. STAT. ANN. § 570-A:9(X) (1986 & Supp. 1998).
24. *See* Morrison v. Olson, 487 U.S. at 730.
25. *Id.*
26. *See id.*
27. *Id.*
28. *See id.* at 731.

> may in his or her small world assume the proportions of an indictable offense. What would normally be regarded as an investigation that has reached the level of pursuing such picayune matters that it should be concluded, may to him or her be an investigation that ought to go on for another year.[29]

Written in 1988 by the most conservative member, and, in my view, one of the most brilliant and obviously prescient members of the United States Supreme Court.

What troubles me most is that in the last two Independent Counsel investigations I have watched, there appears to be a lack of something that is absolutely essential not only for judges, but I think, particularly for prosecutors. That is balance. I do not believe the investigation of this President has had balance. Much of it he has arguably brought upon himself, but I do not think this investigation has been measured. The result of this lack of balance is that we have gotten into a situation in which Members of the Judiciary Committee of the House of Representatives, in my belief, have not only shot themselves in the foot, they have blown off their feet. I find it inconceivable that grand jury testimony and grand jury videotapes would be put in the public domain before being presented to a congressional hearing. If that isn't trying to fix the jury, I don't know what is. But that is exactly what the Independent Counsel apparently has the right to do, and under the statute, under his recommendation, the Congress had the full right to do exactly what it did. I believe that this President should have been investigated for the Whitewater matter, which is what this was all about. Were there anything else, it should have been referred to someone else. To build an organization of thirty or forty lawyers, anybody in the FBI whom they want, smacks to me of the kind of oppressions against any citizen, never mind if it's the President, any individual, that the Bill of Rights is supposed to guarantee against. We have learned something very interesting from this statute. We learned two hundred years ago that we didn't want anyone over us who was unaccountable. We only wanted people who were accountable and who were removable by the people. We have now created by this statute, in my view, a nightmare that the founding fathers would have found incomprehensible. We have a class of federal officers appointed under this statute who are essentially responsible to no one except themselves and can be removed only under the most extraordinary of circumstances. A class of federal officers who have pursued people for years at a cost of untold millions of dollars.

If the Congress finds a President or a federal judge (as I had the misfortune to have to sit on the impeachment of two federal judges) in a situation where this person is totally out of line, the Congress has all the power to do what needs to be done. We don't need Independent Counsels doing the work of the United States Congress.

I abhor what has gone on in the last several months; I don't think it's good for the country. I think it has torn the country apart, and it's going to tear the country apart even more. Whatever they do in Washington, let them follow the process, let them do it with due process, let them do it swiftly, let them vote and lets be done with it, because we have major problems facing America now and they are not limited to the things we see on the news every night.

Thank you very much.

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29. *Id.* at 732.