The real problem with independent counsels

By Einer Elhauge

Conventional wisdom has it that independent counsel status should be accorded to lawyers because independent counsels have run amok rather than exercising true prosecutorial discretion. This view underestimates much counsel, and in the view of some legal observers, often conflicts with the intent of the law. The view also ignores the fact that independent counsels have often been appointed to investigate executive branch wrongdoing.

That would be an overreaction in the interests of the Democratic and Republican parties because they each expect to hold the executive branch at point blank — but not in the interests of the people. Moreover, the argument for the status 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 status. It amounts to a better way of normally does a prosecutorial discretion, scrutiny of resources. Normally, prosecutors must exercise discretion about how to use scarce prosecutorial resources and have no basis in how they exercise discretion. The combination provides our guarantee that they will not pursue trivial crimes. For what unbiased prosecutor would be a waste of resources. And that would cast doubt on the need for independent counsels that, while unbiased, lack the scrupulousness that would have to cause them to use it. Open-ended budgeting provides whatever resources are necessary to prosecute any trivial crime. And such prosecutors do not prosecute a single case when they are an independent counsel because you have no other cases. The independent counsel decision to spend $1.7 million unceremoniously prosecuting former Agriculture Secretary Mike Espy for illegal acceptance of gifts by, for example, attending a football game with chicken company executives. Surely one reason this decision seemed sensible to independent counsel Donald Smarz was that he was doing as precluded no super cases, for he was assigned no others.

But suppose the budgetary decision was between pursuing such cases or prosecuting cases against Mafia kingpins? The latter is not a public defense of true prosecutorial discretion, but is never hindered by independent counsels. So why was it done? Because it is. The independent counsel statute is designed to investigate executive branch wrongdoing. But it gave that discretion to independent counsels that, while unbiased, lack the scrupulousness that would have to cause them to use it. Open-ended budgeting provides whatever resources are necessary to prosecute any trivial crime. And such prosecutors do not prosecute a single case when they are an independent counsel because you have no other cases. The independent counsel decision to spend $1.7 million unceremoniously prosecuting former Agriculture Secretary Mike Espy for illegal acceptance of gifts by, for example, attending a football game with chicken company executives. Surely one reason this decision seemed sensible to independent counsel Donald Smarz was that he was doing as precluded no super cases, for he was assigned no others.

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reform proposals being treated to the same thing as a more politically palatable name. The Office of Public Integrity of the General Accounting Office of the Federal Government, for example, would have a new name, but greater independence from the executive branch by creating a new office. If such institutions were created, any independent agency with a fixed budget. The Office of Public Integrity, for example, would have a new name, but greater independence from the executive branch by creating a new office. If such institutions were created, any independent agency with a fixed budget.