

## From Morrison to Starr

SEPARATION OF POWERS, THE SPECIAL PROSECUTOR @ THE COURT

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Theodore B. Olson, of *Morrison v. Olson* fame, served as Assistant Attorney General, Office of Legal Counsel, under President Ronald Reagan. He later represented President Reagan in the Iran-Contra investigation, and has more recently been an outspoken defender of Independent Counsel Kenneth Starr. Today, as a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher LLP, Mr. Olson has a thriving Supreme Court and appellate litigation practice, and also chairs the Federalist Society's Separation of Powers Practice Group. He spoke with Contributing Editor Tom Dupree on July 29.

*The Supreme Court has just concluded a term featuring several high-profile separation-of-powers cases. If Morrison v. Olson had been decided by today's Court, would we have seen a significantly different opinion?*

Well, there are a couple of assumptions implicit in your question. In the first place, I think the Court probably has moved somewhat on its separation-of-powers doctrine. We have a different Court; we have different Justices. Justice Kennedy had just been appointed at the time of *Morrison v. Olson* [487 U.S. 654 (1988)] and he did not participate in the decision. And Justice Thomas, during his confirmation hearings, said that *Morrison* was one of the Court's most important cases, and I think he implied that he tended to agree with Justice Scalia rather than with the majority. And there have been Justices Souter, Gins-

burg and Breyer appointed since then, so you have a different Court. Of course, Justice Ginsburg had voted to uphold the independent counsel law in the court below in my case, so her vote would probably not change.

The Court that decided *Printz v. United States* [117 S. Ct. 2365 (1997)] this most recent term had a five-vote majority, which held that there was a constitutional defect in a law that vested temporary executive authority to enforce a federal law in officials – sheriffs – who couldn't be controlled by the President. It seems inconsistent with *Morrison v. Olson* for five Justices to come to that conclusion.

Also, the Court has learned a lot more about how the independent counsel law actually operates. When Chief Justice Rehnquist wrote the majority opinion in *Morrison*, he talked about the temporary nature of the position of independent counsel. He didn't have

the facts of a Lawrence Walsh conducting an investigation that lasted longer than eight years – longer than President Reagan’s tenure in office, longer than the tenure of all the Attorneys General in the United States except one. So some people have speculated that the Court might now realize that the independent counsel exercises a lot more authority, and with a lot less control, than the Court assumed at the time it rendered that decision.

*You said that parts of Printz were inconsistent with Morrison v. Olson. Has Morrison been overruled in some sense?*

It would be an overstatement to say that it was overruled, or implicitly overruled, or called into question or anything like that. I think it simply raises an interesting question. Justice Scalia’s Article II discussion in *Printz* was different than the previous Tenth Amendment cases such as *New York v. United States* [505 U.S. 144 (1992)], in that *New York* went off mostly on the commandeering of the resources and policymaking apparatus of the states. That was mentioned in the *Printz* case, but then Justice Scalia launched into this other thing about the fact that Article II was violated because federal power was vested in sheriffs whom the President could not control. Well, the President has very little control over independent counsels. So at least that issue is a little bit more on the table than one might have expected.

*Is it fair to say that this is a Court that is more sensitive to the separation of powers than the Court of, say, a decade ago?*

I can’t say that. It’s very difficult to say because the separation-of-powers decisions are almost *ad hoc* with the Court. Sometimes the Court seems very sensitive to separation-of-powers concerns like it was this term, not just in *Printz*,

but in the RFRA case [*City of Boerne v. Flores*, 117 S. Ct. 2157 (1997)] and the line-item veto case [*Raines v. Byrd*, 117 S. Ct. 2312 (1997)], and so forth. In other terms the Court doesn’t seem nearly as worried about separation of powers. And the Court frequently goes off on whether or not it feels that one branch’s power is being encroached by another branch, particularly the judicial power. This year, the Court seemed to be pretty strong on separation of powers, not only among the coordinate branches of the federal government, but between the federal government and the states. The Court has been relatively consistent on the latter subject. But as far as the three branches of the federal government, the Court has been, I think, less than completely consistent, so it’s hard to draw those kinds of conclusions.

*The American Bar Association is considering revising its position on the independent counsel statute. What is driving this reconsideration?*

One could be cynical and say that the American Bar Association, which is very liberal, doesn’t mind the independent counsel law when the independent counsel investigates Republicans, but doesn’t like it very much when independent counsels are sent out to investigate Democrats and officials of a Democratic administration. Certainly it is true that a lot of the things wrong with the independent counsel law that a lot of people have been talking about for years suddenly have managed to reach the sensitivities of people that were impervious to them before. Now the ABA is considering – and will have considered, by the time this is published – a resolution that would limit the independent counsel provisions to the President, Vice President and Attorney General, would allow the Attorney General to consider state of mind, and would eliminate the final report requirement. [The resolution was actually withdrawn.] That

state-of-mind provision is something that the Congress added because it didn't like Attorney General Meese taking into consideration the state of mind of two people in the Justice Department when he decided not to appoint an independent counsel way back in the mid-eighties. So Congress came along and said the Attorney General couldn't consider that. Now the ABA is proposing ask Congress to reverse itself.

I think that the provisions that are being considered would result, to a substantial extent, in the elimination of the independent counsel law. We now see an Attorney General that seems to be refusing to invoke the independent counsel provisions even though the facts are fairly clear that the law should be invoked here – exercising her unreviewable discretion. If you further limit the act in this way, that would suggest that even in Watergate or Iran-Contra, the statute might not have been invoked, because although the President and Vice President are covered persons, no one got to the charges against the President or Vice President in those investigations until there had been an independent counsel who had mowed through these various different other allegations. So the ABA resolution may be a *de facto* proposal to repeal the section. But it's impossible to say exactly what the motivations of individuals are.

*You've emerged as one of Kenneth Starr's most prominent defenders. Is there a certain irony in your role here, given your long criticism of the statute?*

Perhaps. But there are other factors. One, the independent counsel law has been upheld by the United States Supreme Court, so it is the law. There is no question that a constitutional law must be executed and enforced by the President and the Attorney General. Thus, Ken Starr was appointed lawfully. And the Attorney General of the United States – Bill

Clinton's Attorney General – repeatedly sought an expansion of Ken Starr's jurisdiction. What's happening with Ken Starr is that he's trying to do his job. Yet, people are taking the Fifth Amendment, going to jail rather than testifying, hiding documents or allowing them to disappear. He's facing obstruction of an investigation and a coordinated – I'm convinced, a *coordinated* – attack by the White House on him, and on him personally. He is a personal friend, I should admit. He is someone who started his career here at Gibson, Dunn & Crutcher and became a partner in this law firm in 1981, just before he went to the Justice Department. We served in the Justice Department together. I know him to be a man of integrity, and it seemed to me incumbent upon us – those of us who know him, and know his integrity – to get out there and combat the attacks that the White House is consistently unleashing against him. So I don't think it's inconsistent with my opposition to the provisions of the law itself that I've expressed repeatedly. I don't like the independent counsel law but it does exist, and Ken Starr is an honest person who is trying to do his job under that statute.

*Is there any effective way to police executive branch wrongdoing short of an independent counsel statute?*

We didn't have an independent counsel statute at the time of Watergate. We didn't have an independent counsel statute during every other controversy that's come along with respect to the executive branch until 1987 or 1988. So the Republic got along for 190 years without the independent counsel statute. We have a free press in this country, we have a Justice Department, which in most cases, I think, can be relied upon to conduct a fair investigation, and we have the impeachment powers in the House of Representatives and the Senate. And I think that the framers of the Constitu-

tion knew that there might not be perfect people in the executive branch and that there might be some occasions where the President or an executive branch official was corrupt, but that the mechanisms that existed in the Constitution, including a free press and the political process, were enough to take care of those things. It seems to me that we can't keep inventing improvements to the Constitution every time someone does something wrong. There are self-correcting mechanisms in the Constitution, and I think that the Constitution we have had for two hundred years is pretty good without these extra-constitutional measures like the independent counsel law.

*Is it still possible to challenge the independent counsel law on separation-of-powers grounds? Rehnquist's opinion seemingly left the door open to a challenge along the lines of, this particular independent counsel has acted so intrusively that he is interfering with the president's constitutional duty to take care that the laws are faithfully executed.*

I suppose, but it would be difficult. You would probably have to wait, it seems to me, until there had been a conviction under the statute. We challenged the independent counsel law through the mechanism of a subpoena by refusing to comply with the subpoena, being found in contempt, and contesting it in that way. I think it would be very difficult to get much of a hearing now, given the 7-1 decision in *Morrison v. Olson*. So you would probably have to wait until there was a conviction. And then you would have to say, as applied in this case, it was unconstitutional and give the Court another chance to look at it in light of what has happened since then. I'm not very confident that the Supreme Court is willing to look at this again. I think it's an area that the Court doesn't want to get involved in, and it would take a very egregious situation for the Court to look at the issue again. I would like

to see that happen, but I don't think it is going to happen in my lifetime.

*Certainly in the context of the independent counsel, legal considerations are often subordinated to political concerns. Over the time you have been in practice, has constitutional law become more politicized?*

I don't think that constitutional law *per se* has become more politicized. They say in other countries that the Constitution is talked about in the United States to an extent that no one else in any other country would quite understand. We seem obsessed with it in this country, and that's probably for a good reason. The independent counsel statute invokes political impulses because it's a mechanism by which political disputes can be turned into legal disputes, and transformed into a criminal process. People can accuse their opponents of not complying with the law and use their demands for the appointment of an independent counsel to cause headlines. So those types of issues easily become politicized. And I felt it was very politicized during the Reagan Administration when the Democratic Congress was using the independent counsel law all the time. But I don't think that necessarily applies to other constitutional questions any more today than it always has. If you read the history of the Thirties, certainly constitutional issues played very heavily in the political arena. I suspect that that's been true all along.

*The considerable number of law review articles on constitutional law sometimes seems inversely proportional to the number of folks who actually practice constitutional law. Do you, as a practicing constitutional lawyer, often read or rely on legal scholarship published in the law reviews?*

Oh yes. It's very helpful if you find something that discusses an issue that bears upon an is-

sue that you are actually litigating. You get ideas from those law review articles. Many of them aren't terribly good. But many of them are quite good, and I find it very helpful to see a constitutional issue discussed in the context of a law review article as opposed to a particular case, where someone has tried to look at a series of cases and make some sense of them or advance some new ideas – I can think of lots of examples.

*Could you offer a few?*

The one that comes to my mind immediately wasn't so much a constitutional issue, but we were recently examining administrative procedures in the courts and the extent to which administrative agencies, by making decisions without complying with rulemaking provisions, under either the Federal Administrative Procedures Act or State Administrative Procedures Act, could allow administrative agencies to make laws in ways in which they were not intended to be made. This was a big case involving administrative decisions in New York and the reorganization of the electric industry and so forth. And I found several very interesting law review articles on that.

We were also looking recently at a question of whether a state administrative official could, consistent with the Commerce Clause, prevent or impose restrictions on a merger between two corporations that were domiciled in other states. In other words, could the state of *x* prevent a merger of two Nevada corporations, for example, because that corporation did business in state *x*. And there were some very good law review articles on that which we found very helpful. Our job frequently is, when we have a constitutional question, to find out what's been written out there and what's been said and get ideas from any place we can. And law review articles are good sources.

*Over the years, there has been a marked decrease in Supreme Court decisions in any given term. Has there been a corresponding increase in quality? What's driving the shift?*

I don't know what's driving the shift. I suspect – and I have speculated – that Chief Justice Rehnquist feels that the Court can do a better job with 75 to 85 to 90 cases than it can with 140 to 150 cases. How he himself could influence that case load, I don't quite know, because each Justice has one vote, and if there are four votes to grant cert, there are four votes. On the other hand, I think that the Chief Justice is someone whose views and thoughts are respected by the other Justices on such matters and that may be the reason. Some people think it's because of the change in appellate jurisdiction, some because of the departure of Justice White – who was always voting for cert in a case where there was a conflict among the circuits, whereas some of the other Justices are less consumed by that. I don't know exactly why it is, but it certainly has occurred. We are consistently seeing 80 or so cases a year rather than 150. Has it improved the quality of the decisionmaking? Everybody has their own opinion on that. I certainly don't think there's any direct correlation between either the quality of the writing or the quality of the decisionmaking and the number of cases.

*The confirmation process for judicial nominees has come under heavy criticism from a number of quarters. Do you agree with the critics that the process is too political?*

I think the confirmation process for Supreme Court nominees has become highly politicized. But that's a phenomenon that started, I think, in the Twenties, and has increased. The high level – or low level – mark of that was the Robert Bork confirmation process and the

Clarence Thomas confirmation process. It is going to be a politicized process: the Senate is a political body, and – whether individual Senators admit this or not – Senators exercise political power when they vote for confirmation. They may disguise it, and they may not use it if they don't think they can get away with it; that's why we hear talk about judicial temperament or sexual harassment, or any other surrogate for the exercise of what is purely a political choice.

I don't think it's been terribly politicized as

far as the nominees outside of the Supreme Court are concerned. Most of those nominees get confirmed; most of them get confirmed on a voice vote; there's some controversy now about the pace of confirmations, but the fact is that President Clinton has a lot of vacancies for which he hasn't even submitted nominations. And so there is a little political fight going on between the Administration and the Senate about the pace of this confirmation process, but I think – so far at least – it's much ado about nothing. *g*