cial solicitude has been extended to hitherto excluded or underrepresented groups. Rather, the tragedy is that leftist ideologues have been so successful in seizing upon the openings accompanying these developments. This has thrown up daunting challenges for conservatives, both within and outside the academy, as well as for old-fashioned liberals who still comprise the "Vital Center" on most campuses. Although the outcome is by no means yet foretold, the conservative response has to date been disappointingly inadequate. This book is certainly not unhelpful or beside the point, but falls short of the quality of analysis and proposed reformulation so urgently needed.

ETHICS, POLITICS AND THE INDEPENDENT COUNSEL: EXECUTIVE POWER, EXECUTIVE VICE 1789-1989. By Terry Eastland.[1] Washington, D.C.: National Legal Center for the Public Interest. 1989. Pp. xii, 189. Paper, $10.95.

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The independent counsel statute, enacted in 1976 in the aftermath of Watergate and modified somewhat in 1983 and 1987, is one of the innovations of our apparently permanent regime of divided government. As Terry Eastland notes in passing, the statute reflects the belief on the part of a Congress controlled by Democrats that an executive branch controlled by Republicans cannot be trusted to investigate allegations of misconduct by highly placed officials in that branch. Eastland questions the need for an independent counsel statute, its wisdom on balance even if there is some problem of "conflict of interest," and its constitutionality (notwithstanding the Supreme Court's decision, over the lone dissent of Justice Scalia, that the statute is constitutional).

Eastland properly locates the independent counsel statute in the history of what he felicitously calls "the politics of ethics." Examining notable instances of alleged wrongdoing by high executive officials from 1789 to Watergate, he argues that ordinary pressures of politics have always been strong enough to produce forthright and vigorous investigations where they were warranted. Even Watergate itself, the impetus for the enactment of the statute, con-

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firms Eastland's argument. Richard Nixon's attempt to constrain the independence of the investigation that the Department of Justice had begun produced such a strong political reaction that the investigation went forward unimpaired. Although Eastland does not direct much of his argument to the Iran-contra investigation, I believe that he could have argued just as forcefully that even in the absence of an independent counsel statute, the political atmosphere of the time would have forced the Department of Justice to pursue the allegations of wrongdoing almost as vigorously as the independent counsel has done.[3]

Obviously, not every well-founded allegation of wrongdoing attracts as much attention as Watergate and Iran-contra, and one might argue that sometimes the political heat will not be hot enough to make it politically costly for the Department of Justice to forgo an investigation or prosecution. One might use the prosecution of Michael Deaver for perjury as an example. Concerning such cases, though, Eastland argues that the bureaucratic dynamics of an independent counsel's investigation will too often lead to unjustifiable prosecutions. The point is not that innocent people will often be prosecuted but rather that the usual policies of a regular prosecutor's office incorporate notions of sensible discretion to decline prosecution even where convictions might be obtained, whereas the independent counsel, whose sole task is to investigate one—or at most a few—allegations of wrongdoing, is likely to see his or her job as prosecuting rather than as exercising prosecutorial discretion.

For highly visible cases, then, an independent counsel statute is unnecessary, while for less visible ones it is likely to lead to unjustifiable prosecutions. Eastland is, I believe, clearly correct about the highly visible cases, although, as I will argue, he does not fully comprehend the constitutional implications of the argument he makes. Concerning the less visible investigations, however, I am not persuaded. Contrary to Eastland's supposition, the track record of the independent counsels suggests that they have not interpreted their job as requiring prosecutions. Before the statute was amended in 1983, there were three referrals of allegations to independent counsels, none of which resulted in prosecutions. To 1987, where Eastland ends his account, there were eight. Several resulted in no

3. The "almost" is important. At the conclusion of the congressional hearings on the matter, Oliver North, if no one else implicated in the affair, was politically popular, and perhaps a professional prosecutor might have found his popularity sufficient to overcome the natural inclination to investigate. Yet, it is worth noting that North was *convicted* not of a large conspiracy but of lying to Congress and of accepting an illegal gratuity, both of which offenses he essentially admitted; perhaps a professional prosecutor would have pursued these "easy" charges anyway.

indictments, including the investigation of Theodore Olson which led to a Supreme Court decision.

Eastland questions the length of the Olson investigation, and he may be correct (though I have no independent reason to accept his characterization), but for present purposes the key fact is that the independent counsel ultimately decided not to prosecute. Eastland also raises questions about the prosecution of Lyn Nofziger, which resulted in a conviction that was overturned on appeal. The court of appeals found that the statute under which Nofziger was prosecuted required a mens rea of deliberate wrongdoing. The independent counsel had convinced the trial court that the government did not have to make such a showing. Perhaps the independent counsel was a bit aggressive in this reading of the criminal statute, but, I would think, no more so than most professional prosecutors are when interpreting a statute that can be read, albeit with some strain, to support prosecutions, at least in a case of comparable notoriety. In addition, Eastland notes that the independent counsel in the Deaver case attempted to subpoena the Canadian ambassador. The Department of State supported the ambassador's claim of diplomatic immunity, and the trial court agreed. Eastland points out that the Department of Justice, unlike the independent counsel, probably would not have pursued the subpoena once it heard from the State Department. Finally, in connection with the Iran-contra investigation, Eastland criticizes the independent counsel's unsuccessful effort to prosecute Joseph Fernandez, an employee of the Central Intelligence Agency. The prosecution was aborted when the Attorney-General, acting under the "greymail" statute, refused to allow the independent prosecutor to use evidence that would have required that the defense be allowed to introduce classified information from the CIA.

In all of these instances, which involve relatively low-visibility charges, the independent counsels took somewhat aggressive pro-prosecution positions, well within the range of reasonable policy choices. If, as Eastland contends, the Department of Justice would not have taken equally aggressive positions, then, it seems to me, the case *for* the independent counsel is strengthened: In low visibility cases it might be useful to have an independent counsel whose moderate pro-prosecution aggressiveness might counter the moderate pressures against prosecution that arise in situations of moderate conflict of interest.

Even if there are some cases where the politics of ethics would not impel the Department of Justice to investigate vigorously and prosecute where the facts warranted, Eastland argues that the in-

dependent counsel mechanism is unwise. His primary concern is that the mechanism allows everyone to avoid responsibility by passing the buck: the president can wash his hands of wrongdoing by members of the administration by saying that the matter is in the hands of an independent counsel and it would be inappropriate to say or do anything until the investigation is concluded; Congress can similarly avoid the political risks of conducting an aggressive oversight investigation. The result is, in effect, government by no one.

There is some force to this argument, though it must be qualified more carefully than Eastland does. The argument about the politics of ethics establishes that something is likely to happen—either a prosecution by the Department of Justice or a legislative investigation—in high visibility cases. For those cases, though, the political dimensions do not disappear when cases are referred to an independent counsel: Democrats will still run against "the sleaze factor" even while investigations are pending. As I have suggested, the independent counsel statute is easiest to justify for low visibility cases. Yet buck-passing and "government by no one" are not, I would think, so serious a problem there. Precisely because there is little political loss or gain in connection with such cases, there is likely to be little buck-passing; in a sense, these are cases for which no one was going to take responsibility anyway.

Eastland also argues that the independent counsel statute is unwise because of its impact on the targets and potential targets of investigations. Because independent counsels are likely to be somewhat more aggressive than professional prosecutors, Eastland argues, targets will probably have to spend more in their defense than they would if the Department of Justice handled the investigations using ordinary prosecutorial standards. The financial costs have been alleviated somewhat by a provision added to the statute in 1983 which authorizes the payment of attorneys' fees to targets who are not indicted. The emotional costs might still be high, and for indicted targets who are not convicted—of whom there has as yet been only one (Nofziger)—the financial costs remain.

Eastland's argument here rests on his admirable loyalty to his friends who have been targets, yet I cannot escape the sense that it is somewhat overstated. In part, I think, the overstatement is typical of comments about investigations of white-collar crime in general: The tone of the comments is that these are basically good people who do not deserve to undergo the emotional and financial costs of investigations of what are at most technical crimes. I think it notable in this connection that Eastland refers to the independent

counsel statute as one "that could be used to criminalize American politics," without noting the irony that Michael Deaver was convicted of the non-political crime of perjury and that Oliver North was convicted of the non-political crime of accepting a gift in connection with the performance of his government service.

We are talking about the marginal costs to targets of being investigated by an independent counsel rather than by the Department of Justice. One possibility is that the marginal costs will be small, in which case, I would think, there is not much to worry about. Another possibility is that the marginal costs will be large, in which case there is some tension between the cost-to-defendants argument and the argument about the politics of ethics. For if the marginal costs are large, that must be because either Congress or the Department of Justice will not investigate nearly as vigorously as an independent counsel would. As I have suggested, I am impressed by Eastland's argument that political considerations—the fear that the Department of Justice and through it the President will be criticized for playing favorites—will lead to relatively vigorous investigations. But if that is so, then the marginal costs of the independent counsel statute to targets are indeed relatively small.

Eastland also expresses concern about costs to the public in the performance of the work of those in the now approximately seventy positions governed by the statute. Here too Eastland's loyalty comes through in an extraordinary passage in which he addresses the reader in the second person, as if many of us were likely to occupy covered positions at some point in our lives. The concern is with the chilling effect of the statute: People in covered positions may "steer clear" of the line between wrongful conduct and permissible conduct, thereby depriving the public of actions that, though permissible, are close enough to the line to make officials concerned about the risk that someone will think, erroneously, that they crossed the line. I have two difficulties with this argument. The first concerns "chilling effect" arguments in general. Such arguments presuppose that there is a line that divides the permissible from the wrongful, and that everything on the permissible side of the line, no matter how close to it, is equally permissible. My sense of things, though, is that if an official's action is barely justified, lying very close to the line, the chances are pretty good that the public would be better off if the official found something to do that was more clearly permissible—farther from the line. But, even if that argument is wrong, and deterring permissible action close to the line is rather costly, still I wonder whether the behavioral assumptions that justify "chilling effect" arguments actually describe

the people who occupy high positions in the national government. Low-level bureaucrats might shade their decisions out of fear of unjustifiable prosecution, but the high officials who are covered by the statute, I think, get so much pleasure out of being "players" that it strikes me as simply unrealistic to make the same motivational assumptions about them.

Finally, there is the constitutional question. Eastland is not a lawyer, and his chapter on constitutionality does little more than recount the Court's decision in *Morrison v. Olson* and approve the points Justice Scalia made in his dissent. Embedded in Eastland's account, though, are views of the constitutional order that deserve special attention, because they raise fundamental issues more clearly than the opinions in *Morrison* did. Eastland opens his book with a discussion of the politics of ethics, and characterizes the independent counsel statute as a weapon wielded by Democrats controlling Congress against Republicans controlling the presidency. One might, therefore, consider the independent counsel statute as simply another episode in the politics of ethics, and conclude that, to the extent that other political weapons can be wielded in that contest, so can this one. If a vigorous congressional investigation of political wrongdoing does not disturb the constitutional order, the argument would go, a statute passed by Congress and signed by the president can hardly do so. In this connection it is worth noting that Ronald Reagan twice signed amendments extending the independent counsel statute. This is not to make a "waiver" argument, but it is to suggest that the political contours of the struggle between Congress and the president have not changed, with respect to this issue, since Watergate, and that it would be surprising to find that the politics of ethics would be much different without an independent counsel statute.

An image of the constitutional order is generated by talking about the politics of ethics. It is one version of the notion of "checks and balances." According to that version, the constitutional order, with respect to issues of organization, consists of institutions operating through ordinary political means to combat each other's ambitions. Applied to the independent counsel statute, that version would find the statute constitutional, just as it would find any other institutional arrangement that emerged from the political process constitutional. One might say that, just as Eastland accepts the ordinary politics of ethics, the Constitution, according to this version of the "checks and balances" idea, accepts a "meta"-politics of ethics: The statute no less than a congressional investigation is

part of the constitutional order conceived of as embodying politics at its core.

Eastland appreciates the force of this version of the "checks and balances" idea, and expresses discomfort at using what he calls a "balance of powers" analysis in a "separation of powers" case. The language of separation of powers generates a different image of the constitutional order, one in which there are divisions of authority between the branches and in which it is therefore important to determine precisely "where" some authority is lodged. In this image, "government by no one" is plainly unconstitutional.

Eastland also tries to use the language of checks and balances, suggesting at one point that the politics of ethics is one of "delicate balances." In a system of delicate balances, innovations that change the balance only a little can have large consequences. So, for example, the mere existence of an independent prosecutor statute that alters the motivation of public officials on a narrow margin may nonetheless be unconstitutional.

I do not know how one could demonstrate that, as I believe, the constitutional order is one of crude rather than delicate balances. One point that Eastland makes, however, suggests that even he is not fully committed to the idea of delicate balances. At the same time that he argues that the independent counsel statute weakens both congressional and presidential responsibility for dealing with wrongdoing, Eastland argues that the independent counsel statute strengthens Congress's hand vis-à-vis the President, or at least strengthens the Democrats who control Congress vis-à-vis the Republicans who control the Presidency. Perhaps the independent counsel statute does weaken both branches, but it weakens the presidency more than the Congress, thereby improving the relative position of Congress. The fact that the argument must get rather complicated at this point, though, suggests that Eastland has actually identified the kind of adjustments of rough balances that are more compatible with the crude rather than the delicate balance theory.

In the end, Eastland shows that the independent counsel statute is less necessary, and less wise, than many have supposed. He also shows how the statute fits into the contemporary politics of ethics in a divided government. I believe, however, that Eastland's own arguments, taken together, provide support for the conclusion that the statute is constitutional, because the Constitution creates a crude checks and balances system and then validates whatever the system produces.