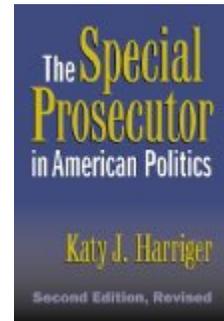


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Katy J. Harriger. *The Special Prosecutor in American Politics*. Lawrence, Kansas: University Press of Kansas, 2000. 336 pp. \$35.00 (cloth), ISBN 978-0-7006-1020-4.

Reviewed by Keith E. Whittington (Department of Politics, Princeton University)
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It Didn't Start with Kenneth Starr

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This is a revised edition of Katy Harriger's 1992 book, *Independent Justice: The Federal Special Prosecutor in American Politics*. Given how much has happened in this area over the past eight years, including the completion of the Iran-Contra investigations, the Clinton administration's many run-ins with independent counsels and the expiration of the law itself, a revised edition of the earlier book is most justified and welcome. Harriger provides a careful and multi-faceted analysis of our experience with special prosecutors and draws valuable lessons from that experience.

Harriger is most concerned with placing the special prosecutor within the framework of the separation of powers. Her goal is not only to address the legal challenges to the constitutionality of the independent counsel legislation and the Supreme Court's rejection of them in the 1988 case of *Morrison v. Olson*, but also to examine how the independent counsel has in fact interacted with other political actors and the complicated ways in which concerns for independence and accountability have been balanced. The tension between independence and accountability is in many ways irresolvable and special prosecutors have often found themselves trapped between conflicting demands. In examining the case of the special prosecutor, Harriger provides both a fine critical analysis of the operation of the independent counsel statutes and a useful window into the workings of the American constitutional system of separated powers.

The first chapter lays out some of that framework and

provides an introduction to the independent counsel and the theoretical and empirical problems raised by the institution. In keeping with the primary thrust of postwar academic analyses and judicial opinions, Harriger adopts a relatively flexible view of the separation of powers that "allows for the ebb and flow of power between president and Congress" and in which the three formal branches of government must be situated within a complex political environment composed of numerous actors (p. 12). This framework helps clarify why "the independent counsel is neither so bad as its critics paint it nor so good or necessary as its supporters believe it to be. Its flaws and strengths derive from the realities of the process that created it and within which it must operate" (p. 14).

The second chapter provides a brief historical overview of twentieth century experience with the ad hoc appointment of federal special prosecutors prior to the 1978 passage of the Ethics in Government Act and its provisions for the independent counsel. Harriger notes three primary instances in which special prosecutors were appointed by the president: Teapot Dome, a tax scandal in the twilight of the Truman administration, and Watergate. In each case, Harriger is concerned with the degree of and forces for independence and accountability in non-statutory special prosecutors. She finds that these special prosecutors readily found both "a source of support" and "a check on their power" in the various political actors who were aroused by the very scandals that led to the appointment of the prosecutor in the first place (p. 22). These prosecutors stepped into charged political environments in which presidents were already under fire

from their opponents. Regardless of their formal authority, these prosecutors found ready-made allies and critics in the executive branch, Congress, the judiciary, and the press that both empowered and constrained them. They neither had to be nor even could be mere presidential puppets.

Chapter Three examines the origins of the Ethics in Government Act and the specific provisions for the appointment of an independent counsel. The chapter provides a brief history of the Act and a political explanation for congressional action and the specific terms of the eventual legislation. Chapter Four carries the story through the final expiration of the independent counsel provisions in 1999. This chapter charts the course of the various revisions of the Act over its two-decade history in response to the problems perceived to have been exposed by the actions of particular counsels. It also traces the activities of the several interested actors in the legislation from its origins in Watergate through its demise after the Clinton impeachment, and the Act's gradual loss of support in Congress, in the Department of Justice and the White House, as well as in the organizations that helped create it, Common Cause and the American Bar Association.

The subsequent chapters provide a series of investigations into particular aspects of the independent counsel system. Chapter Five considers the litigation that led to the Supreme Court's endorsement of the independent counsel provisions, the constitutional issues at stake in that decision, and the consequences of it for reform efforts. Chapter Six explores the relationship between the several attorneys general who have had to implement the Ethics Act and the independent counsel investigations that they have triggered or blocked, including the problem of prosecutorial discretion. Chapter Seven examines the institutional environment of the independent counsel and the "interdependent" relationship between special prosecutors and the numerous independent actors with which they must deal. In this specific consideration of the accountability and independence of the independent counsel, Harriger concludes that "many of the abuses of prosecutorial power by an independent counsel are not different from exercises of power by regular prosecutors. The real difference is the amount of scrutiny given their actions, and thus, our ability to know that power has been exercised in the way that it has" (p. 148).

Chapter Eight examines the possible support of various constituencies for the independent counsels. In particular, the chapter considers the possibilities of mass

public and elite support for the special prosecutor and ways in which different levels of support might be triggered and contested. Chapter Nine addresses the two most challenging tests of the independent counsel framework: Iran-Contra and Whitewater. These cases are most like Watergate in that they directly involved the president and attracted substantial and sustained public and political attention. In doing so, they seemed to test the ability of the independent counsel and the larger political system to ensure that the "rule of law" would triumph over "politics." Harriger's conclusions in this chapter are subtle: "What has been manifestly revealed is not the triumph of law over politics but the limits of law in addressing cases of profound political importance" (p. 215).

It is not the case that "law" failed us in these instances, but rather that the criminal law model adopted in the wake of the Watergate scandal may not have been the most appropriate one for securing public ethics, recovering public trust in government, and maintaining constitutional structures. "We have to put more faith in constitutional structures and democratic politics and less in criminal law strategies" (p. 231). The final chapter provides a brief conclusion of the informed case for and against the special prosecutor and a number of recommendations for possible reform of the system. Harriger is moderate in her conclusions; the independent counsel experiment was neither a clear success nor a clear failure. But in the end, she leans more toward ending rather than mending the experiment given its apparent costs and dubious benefits.

The Special Prosecutor in American Politics is tremendously useful. It provides a comprehensive analysis of the actual operation of the independent counsel over its two-decade history. It seriously examines the common public complaints about an important and controversial political institution and provides reliable and accessible assessments of those concerns, usually demonstrating that they are exaggerated and that our common knowledge of the independent counsel needs to be corrected. It expertly exploits a treasure trove of personal interviews with many of the players involved in the special prosecutor experience, primary source material, and relevant secondary literatures. It deftly combines the analytical tools and broad substantive knowledge of political science with the particular history and politics of these cases. It is in many ways a model of how serious scholarship can contribute to our understanding of political matters of immediate interest and importance.

One might, of course, wish that the book had done

even more. Harriger spends relatively little time on the pre-Watergate history of special prosecutors, ethics investigations, and political scandals. Given that her conclusions point us away from the independent counsel solution to these problems, it is unfortunate that there is relatively little information in the book about the alternatives. The book is really designed to explain the operation of the independent counsel, not to explore the best possible mechanisms for addressing the problem of criminal, ethical, and constitutional lapses in government.

In many ways, Justice Antonin Scalia's lone and formalistic dissent from the Court's opinion in *Morrison* frames Harriger's analysis. She wants to show that in practice the independent counsel was more constrained and accountable than Scalia's opinion assumed, and she is clearly successful in that task. At the same time, however, Harriger really assumes rather than defends the appropriateness of her flexible framework of the separation of powers. For the purposes of empirical political science, there is a great deal of utility in that assumption. For the purposes of constitutional law and theory, there may still be advantages to the more formalist notions and unitary executive model that the Court has occasionally adopted. But the point about constitutional law is a minor theme of Harriger's work.

Somewhat more striking is the fact that Harriger's starting point in *Morrison* deflects her from the issues that seem most important to us now about the independent counsel, notably the possibility of prosecutorial abuses. Although Harriger includes an informative

chapter on the Iran-Contra and Whitewater investigations, and assures us elsewhere that special prosecutors are not that special in their behavior, she does not systematically explore or explain the prosecutorial practices of the independent counsels and the degree to which they are similar to or different from the normal practices of local and federal prosecutors. Even the Clinton administration's complaints about Kenneth Starr being a rogue prosecutor (and implicit lack of accountability) could have used greater discussion by Harriger (though she does an admirable job of briefly summarizing the course of Starr's investigation). Although academic books are rarely timely, the Starr situation and the specific concerns about the independent counsel raised during the Whitewater and Lewinsky investigations could have been more extensively addressed in this revised edition. The relatively abbreviated analysis of the Starr case is particularly unfortunate given that it seems to largely confirm Harriger's critique of the independent counsel framework.

It is precisely the comprehensiveness and quality of the book that elicits such regrets that it did not do even more. Harriger has provided a fine example of the institutional and political analysis of modern legal and political history and valuable substantive knowledge of the independent counsel and national politics.

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