
BIAS, CORRUPTION & OBSTRUCTION,
OH MY!: THE DUE PROCESS “SHOCKS THE
CONSCIENCE” LIMIT ON INVESTIGATIVE &
PROSECUTORIAL CONDUCT

SYMPOSIUM DISCUSSION: FOLEY

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DRAKE UNIVERSITY LAW SCHOOL

John Reitz: Well, you give a very strong attack on the special counsel, but I would observe that we have a problem as a democracy and we see this around the world—problems of dealing with the violation of law by top officials, particularly the top leader, the President. Korea just convicted their last President. I think they’ve convicted every one of their last Presidents or gotten them into jail somehow. So it’s not just an American problem, so I wonder Elizabeth, how you would feel about dealing with the constitutional issues raised by simply adopting, if we could, Professor Ginsburg’s idea that we could have an audit branch or something like that? Would that be a way out of this dilemma?

Elizabeth Foley: You know, it’s a good question. I do subscribe to the view of the unitary executives, so I do believe that putting things outside of the reach of the established branches of the Constitution without direct lines of political accountability is troubling. So no, I would not think that would be the answer. I actually think the answer is in the structure of the Constitution. If you look at Iran-Contra for example and the fruits that were born of that or the fruits of the Whitewater investigation, there was very little of significance in terms of the functioning of the government. Ultimately, there were some political embarrassments along the way. A lot of rhetoric was used. Both sides of the political aisle used that rhetoric to their advantage; but at the end of the day, everything moved along somewhat nicely, and there was nothing that led straight to the top. And I have a feeling that’s the road that we’re going down again. I think we should have learned our lesson with that. And I think that works well because it means that the pushback is political. It means that we, the people, decide these matters through both the midterm national elections and ultimately, of course, the Presidential elections. The President would have to pay the price if the

American public thought that he or she had some ultimate involvement in something that was nefarious.

Ginsburg: So as you might guess, I disagree as a matter of policy and Constitutional design. I mean *Morrison v. Olson* is good law. You talk about *Meyers*, you don't talk about *Humphrey's Executor*. We have lots of systems in this country which insulate officers in order to perform their functions. From my very abstract point of view, it's a matter of competing risks at this point. The risk of a real prosecutor is subject to an entire legal infrastructure, and by the way, I think that risk has to be balanced against the vision of the unitary control of the prosecutorial power of the United States by a single individual. That to me seems, given what's happened to other democracies around the world, a very grave risk, and you say, "Well, the political accountability process will work." The electoral process is, of course, subject to manipulation by the forces of prosecutorial power. So, I consider it a very grave risk, the unitary executive in general and particularly when it comes to prosecutorial power. I will just say that in a lot of this discussion people say Iran-Contra. They say Kenn Starr and Whitewater. The model use of the independent counsel statute was not an outrageous rogue prosecutor. There are lots of ways to deal with rogue prosecutors other than simply saying, "Well there's no possibility of any kind of investigatory power outside the power of the President to fire."

Foley: If I could just respond to that, I do believe, for example, the current Supreme Court, if asked, would overrule *Morrison*. I think you see shades of that in the *Free Enterprise* case from 2010, and the Supreme Court just granted cert. on the *Lucia* case which is going to be heard next Monday. So I think it's pretty clear that the current Court does not look favorably, for example, on good cause entrenchment. I actually think eventually it may go further to reach into the bowels of the ordinary civil service, and I think that's a good thing.

Stebenne: I've got a question actually on this. I have personal trainers for a variety of issues because I don't understand them fully. Among my personal trainers is a very brainy federal judge who is a lifelong Republican, who was a George W. Bush appointee to the federal bench, but a very fair-minded guy. He ruled in favor of the constitutionality of the Affordable Care Act. In other words, he's a lot like the Chief Justice of the U.S. Supreme Court in that sense. He's not a very partisan, political thinker, and so I asked him quietly over coffee: "Is there something wrong with the way Mr. Mueller is doing his work?" And what he said to me was, "If you look at the senior people he's hired to help with his staff, they're all liberal Democrats." His point is not that the President hasn't done anything wrong. What Mueller

should have done is hire a fair number of prominent Republicans to help him because it makes it clear to the outside world that this is not some sort of inappropriately partisan investigation of the President and his associates. And he didn't do that, and that showed bad judgement on his part. So Elizabeth, would you like to comment on that?

Foley: Actually it's a really good point. I'm glad you raised it because if you listen carefully to my remarks, what I was actually trying to say is it's not so much Mueller. Although I do agree with your friend's comment that if you want to have an appearance of objectivity, you would've endeavored to have a balanced group of people working for you. I think that's always a good idea in any kind of organization that you run—whether it's a law school or in this case—but the concerns are actually deeper than that. For me, looking into some of the Supreme Court's due process case law, the concept is sort of a fruit of a poisonous tree. That if, in fact, the genesis of the investigation is poisoned because of investigatory activities, I think that's a deeper problem that has really almost nothing to do with Bob Mueller himself or his staff.

Audience Member: You make the point that one check against corruption would be for the President to be able to fire lower Executive branch officials, and you're basically implying that Article II gives the President pretty broad power to do that. But doesn't Article II, Section Two also give the Congress the ability to vest power to hire inferior officers in the department head, and isn't there a built-in limitation on the President's ability to fire people directly?

Foley: No, what you're talking about is the Appointments Clause, which has principal and inferior officers. Certainly the Supreme Court, in *Humphrey's Executor* for example, has allowed some sort of good cause and entrenchment at least in multi-member bodies and that's a principal body. But for inferior officers there have, at least historically, been even dual layers of good cause entrenchment. That was just overturned. The dual layer of good cause entrenchment for inferior officers was just overturned in the *Free Enterprise Fund* case. That's why I'm saying it's starting to erode and that's why I'm saying the next step is potentially the *Lucia* case, which will look at a higher level and figure out whether good cause entrenchment is ever consistent with the concept of Article II, Section One—which is that all executive power shall be vested in the President. The Supreme Court has said repeatedly, including in *Humphrey's Executor*, that the power to be an executive and to appoint officers, whether principal or inferior, inherently includes the power to fire them for any reason or no reason whatsoever.

Audience Member: How do you define the term *corruption*? And who gets to make that definition?

Foley: That's why I tried to give examples of what I think corruption could be. That's also why I suggested that if you tried to look at it objectively, even if those facts are true and pan out (some of them have panned out and some of them have not), I think we ought to all be concerned. Because if the political tables were turned, I'm sure people would be screaming on the other side. I would really like to get to a world where we're not so politically divided. Look, I'm a Libertarian. I'm a Libertarian with conservative constitutional leanings, which means I believe very strongly in the structural part of the Constitution, both in the vertical separation of powers and the horizontal separation of powers. I'm not really sure I've got a dog in the political race, so to speak, but I do think because of my conservative constitutional leanings, this is pointing me in one direction in this particular issue. But if the tables were turned and it was being done to the administration of the opposite political party, I'd be giving the same speech.

Audience Member: Corruption has to be defined in the practical example and by the reaction to it.

Foley: No. I don't think so. For example that's why I went on, and I talked about the Supreme Court's due process jurisprudence. Because if you think about due process, it has preset the fundamental fairness, including also the understanding of a lack of bias. That's why I went through those cases to talk about how the Supreme Court considers the objectively reasonable potential for bias to be troubling in a due process sense. And that's a form of corruption bias.

Audience Member: The point I'm trying to flush out is I don't see precisely what's wrong with special counsel being appointed and investigating. And then the same political check—just like the pardon power—of it is impeachment. The political check against firing special counsel is that the President then says impeach me or don't. This political question—of whether he decides that is worth impeachment and the conversation about whether that is impeachable—is intolerably corrupt. It is essentially political and that discourse has to take place.

Foley: I completely agree, but that's a different speech and not the speech I gave. The speech I gave was what do we do if there's evidence that warrants an investigation. The genesis of an investigation itself is biased and corrupt. What remedies can we provide as lawyers? One possible remedy is the Due Process Clause through litigation. Of course you still have a client who has standing of counsel at a firm in D.C. called BakerHostetler. We've

labored over this, but I think there is a way to potentially raise these issues of litigation if you have the right, just as you will controversy.

Audience Member: One issue related, or that comes up in the press a lot, is the likening to the Saturday Night Massacre with Nixon. Is that relevant at all?

Foley: Well, again, I mean look, the Saturday Night Massacre was politically unpopular, and I know the first article in the impeachment articles of Nixon was obstruction. We never had any legal determination that it was obstruction, and I suspect it wasn't for all the reasons I gave. But that means the remedy is political; it's not legal, so it's interesting when you hear people on TV—you know talking heads. I'm a talking head on TV from time to time, but I like to hear that when I'm a talking head. I just go, and I talk about the law. I don't consider myself an expert on politics. It's not my training and it's not my interest. If it were, I'd teach political science. But I don't think what Nixon did was obstruction. I certainly don't think that the firing of FBI Director Comey was obstruction, but I do think there is a serious and reasonable conversation about whether or not that kind of behavior has political consequences—the chief one of which would be impeachment.

Audience Member: What might be of interest because you're in Iowa, in the 1998 impeachment of President Clinton, our Senator, Senator Harkin, kind of proved your point a little bit in an objection on the floor of the Senate when one of the House managers had kept referring to the Senators as jurors. Senator Harkin raised an objection with the Chief Justice stating we are Senators. And the Chief Justice said yes you are and ordered that the term *juror* not be used when answering a political question but the bonafide legal outcome relative to the conviction.

Foley: It's actually a really good point because we talk about the trial by the Senate of Impeachment, so I think we use words like that too loosely. But I agree with you it's purely a political exercise.

Audience Member: I see some conflict between the idea of the President having complete power to fire anyone in the Executive Branch, which at some level really politicizes and ensures political control, right? And the argument that political influence is corrupting? Because that's essentially what you're saying. In the past I kind of thought of corruption as money, right, rather than politics. And if we say that politics is corrupting and party politics is corrupting, then we have a corrupt system.

Foley: I guess all that I'd say in response to that is that I think it's a little bit of a strawman in the sense that I don't see that any President of any political persuasion could come into office, even though he does have constitutional plenary authority to fire, I think, would fire everybody. It would be very difficult to run the railroad, and the railroad needs to run. I mean the railroad has things it has to do; it has places to go, people to see. And I don't see that happening. I do see that the President would and does routinely ask for the resignations i.e., fire, all the political appointees, right? The very structure of the Executive Branch is hierarchical, that way there is sort of the "run of the mill" civil servants who do their job day in and day out—hopefully not even thinking much about what political party they belong to they're too busy. And there's the people who sort of are the conductors, who are the political appointees. They routinely get fired with every single administration. And again, I think that's how it should be because the idea of electing a President who is the head of the Executive Branch, the unitary head of the Executive Branch, is that we want. What we're looking for is that President to come into office and carry out the vision that he has convinced us as an American people. And I don't think that the fears that it's going to filter down into mass firings of civil servants is going to ever happen. I think if any President did that, of any political persuasion, he would pay the political price for it—his party would at the midterm elections. So, I'm not going to stay up at night worrying about that and the idea that the President can sort of, en masse, fire the high-ranking political appointees also doesn't bother me.