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Prosecuting Executive Branch Wrongdoing

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PROSECUTING EXECUTIVE BRANCH WRONGDOING

Julian A. Cook, III*

ABSTRACT

Attorney General William Barr's handling of Robert Mueller's Report on the Investigation into Russian Interference in the 2016 Presidential Election was undeniably controversial and raised meaningful questions regarding the impartiality of the Department of Justice. Yet, Barr's conduct, which occurred at the conclusion of the Mueller investigation, was merely the caboose at the end of a series of controversies that were coupled together from the outset of the investigation. Ensnared in dissonance from its inception, the Mueller investigation was dogged by controversies that ultimately compromised its legitimacy.

Public trust of criminal investigations of executive branch wrongdoing requires prosecutorial independence. To further this critical objective, an investigative and prosecutorial structure must be implemented that grants a prosecutor sufficient latitude to pursue independent investigations while reigning in the exercise of runaway discretion. Indeed, at no time since Watergate has there been such a clear need for reform.

This Article will explain why many of the controversies that beset the Mueller investigation can be sourced to the Special Counsel regulations—the rules that governed his appointment, as well as his investigative and prosecutorial authority. And it will explain why many of these ills can be ameliorated by enacting a modified and innovative version of the expired Independent Counsel Statute.

TABLE OF CONTENTS

INTRODUCTION.....	402
I. THE INDEPENDENT COUNSEL LAWS AND SPECIAL PROSECUTOR REGULATIONS	408
A. <i>Independent Counsel Laws</i>	408
B. <i>Special Counsel Regulations</i>	412

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II. MUELLER INVESTIGATION CONTROVERSIES AND PROPOSAL FOR REFORM	414
A. <i>Relevant Factual and Legal Landscapes</i>	415
B. <i>Special Counsel Appointment and Removal</i>	419
C. <i>Subpoena and Indictment of a Sitting President</i>	425
D. <i>Proposal to Modify the Expired Independent Counsel Statute</i>	431
1. Justice Manual Overview.....	432
2. Subpoenaing Targets.....	432
3. Individual Targets.....	434
4. Specific Criminal Investigations and Prosecutions	437
CONCLUSION	439

“[Robert Mueller’s] work concluded when he sent his report to the attorney general. At that point, it was my baby.”

– William Barr,
Testimony before the Senate Judiciary Committee
(May 1, 2019).

INTRODUCTION

On March 22, 2019, Special Counsel Robert Mueller (Mueller or Special Counsel) delivered to United States Attorney General William Barr (Barr) his much-anticipated *Report on the Investigation into Russian Interference in the 2016 Presidential Election* (the Report).¹ Two days later, on March 24, 2019, Barr sent a letter to members of the Senate Judiciary Committee.² The stated intent of the letter was to provide a summary of the Report’s “principal conclusions” as well as the status of Barr’s “initial review of the report.”³ The letter noted, inter alia, that (1) the Report did not recommend addition-

1. Sharon LaFraniere & Katie Benner, *Mueller Delivers Report on Trump-Russia Investigation to Attorney General*, N.Y. TIMES (Mar. 22, 2019), <https://www.nytimes.com/2019/03/22/us/politics/mueller-report.html> [<https://perma.cc/8Z6C-WR58>].

2. See Letter from William Barr, Att’y Gen., Dep’t of Just., to Lindsey Graham, Chairman, Senate Comm. on the Judiciary, Jerrold Nadler, Chairman, House Comm. on the Judiciary, Dianne Feinstein, Ranking Member, Senate Comm. on the Judiciary, and Doug Collins, Ranking Member, House Comm. on the Judiciary (Mar. 24, 2019), <https://www.justice.gov/ag/page/file/1147981/download> [<https://perma.cc/P6Z4-DHR7>].

3. *Id.*; see also Mark Mazzetti & Katie Benner, *Mueller Finds No Trump-Russia Conspiracy, but Stops Short of Exonerating President on Obstruction*, N.Y. TIMES (Mar. 24, 2019), <https://www.nytimes.com/2019/03/24/us/politics/mueller-report-summary.html> [<https://perma.cc/A9RP-XPQA>].

al indictments; (2) there were no sealed indictments; (3) the Report “did not find that the Trump campaign or anyone associated with it conspired or coordinated with Russia in its efforts to influence the 2016 U.S. presidential election;” and (4) the Report failed to reach a conclusion regarding whether President Donald Trump (Trump) obstructed justice.⁴ As to obstruction, Barr noted that while the Report “does not conclude that the President committed a crime, it also does not exonerate him.”⁵

Though Mueller failed to reach a conclusion on the question of obstruction, Barr announced his own judgment: namely, that there was insufficient evidence to establish the President’s guilt.⁶ Barr asserted that his opinion was not influenced by the open question regarding a president’s indictability.⁷ Instead, he referenced the absence of sufficient evidence linking Trump to an underlying crime relating to Russian interference.⁸ This void, Barr argued, bore upon the President’s intent to obstruct.⁹ Finally, Barr addressed the public release of the Report.¹⁰ He acknowledged the intense public interest in the Report but cautioned against its precipitous release, citing the existence of grand jury protected material that necessitated redactions.¹¹

Three days later, on March 27, 2019, Mueller sent a letter to Barr in which he expressed his belief that Barr’s letter was misleading and had produced public uncertainty regarding the investigation.¹² According to Mueller, this confusion “threatens to undermine a central purpose for which the Department [of Justice] appointed the Special Counsel: to assure full public confidence in the outcome of the investigations.”¹³ In addition, Mueller submitted documents to the Department of Justice (DOJ), suggesting that their public release would provide context that would enhance public understanding of the work of Mueller’s team.¹⁴

4. Barr, *supra* note 2; *see, e.g.*, Mazzetti & Benner, *supra* note 3.

5. Barr, *supra* note 2.

6. *See* Barr, *supra* note 2.

7. *E.g., id.*; Jan Wolfe, *Can a Sitting U.S. President Face Criminal Charges?*, REUTERS (Feb. 26, 2019), <https://www.reuters.com/article/us-usa-trump-russia-indictment-explainer/can-a-sitting-us-president-face-criminal-charges-idUSKCN1QF1D3> [<https://perma.cc/8LSR-68ZR>] (“[T]he Constitution is silent on whether a president can face criminal prosecution in court, and the U.S. Supreme Court has not directly addressed the question”).

8. *See* Barr, *supra* note 2.

9. *See* Barr, *supra* note 2.

10. *See id.*

11. *E.g., id.* (citing FED. R. CRIM. P. 6(e), “which imposes restrictions on the use and disclosure of information relating to ‘matter[s] occurring before [a] grand jury’”).

12. *See* Letter from Robert Mueller, Special Couns., Dep’t of Just., to William Barr, Att’y Gen., Dep’t of Just. (Mar. 27, 2019) (on file with author).

13. *Id.*

14. *Read: Mueller’s Letter to Barr*, THE HILL (May 1, 2019), <https://thehill.com/policy/national-security/441547-read-muellers-letter-to-barr> [<https://perma.cc/WNF8-EXXY>].

On April 18, 2019, Barr released a redacted version of the Report.¹⁵ The redacted Report—which exceeded 400 pages—detailed, *inter alia*, ten instances of potential obstruction of justice committed by President Trump (e.g., several attempts by Trump to fire Mueller himself and also Attorney General Jeff Sessions), as well as “multiple links” between Russian officials and the Trump campaign (though it did not ultimately find sufficient evidence to support a criminal conspiracy).¹⁶ On May 1, 2019, Barr appeared before the Senate Judiciary Committee.¹⁷ During his five hour-long testimony, Barr defended his own conclusion that President Trump did not obstruct justice, expressed surprise that Mueller failed to reach a conclusion on the obstruction question, defended his summary of Mueller’s report, and claimed that the subsequent release of the redacted report rendered Mueller’s objections moot.¹⁸ Perhaps his most notable testimony came during an exchange with Senator Sheldon Whitehouse,¹⁹ when Barr made the following statements regarding his decision to make the Mueller report public:

Bob Mueller is the equivalent of a U.S. attorney. He was exercising the powers of the attorney general subject to the supervision of the attorney general. He’s part of the Department of Justice. His work concluded when he sent his report to the attorney general. At that point, it was my baby. And I was making a decision as to whether or not to make it public. . . . It was my decision how and when to make it public, not Bob Mueller’s.²⁰

On the one hand, Barr’s testimony was technically correct. Under the Special Counsel Regulations as it then operated and still

15. Sarah Mervosh, *‘Redacted’ Is Word of the Day as the Mueller Report Lands*, N.Y. TIMES (Apr. 18, 2019), <https://www.nytimes.com/2019/04/18/us/politics/redacted-mueller-report.html> [<https://perma.cc/8BPX-VM73>].

16. Stefan Becket, Kathryn Watson, Will Rahn, Camilo Montoya-Galvez & Grace Segers, *Mueller Report Outlines Trump’s Attempts to Assert Control over Russia Probe*, CBS NEWS (Apr. 18, 2019), <https://www.cbsnews.com/live-news/mueller-report-release-william-barr-report-conference-today-full-report-download-read-2019-04-18/> [<https://perma.cc/JZ2V-SVH4>]; see also OFF. OF THE SPECIAL COUNS., DEP’T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019).

17. See, e.g., Chris Megerian & Del Quentin Wilber, *Attorney General Barr Refuses to Testify to House Panel After Contentious Senate Hearing*, L.A. TIMES (May 1, 2019), <https://www.latimes.com/politics/la-na-pol-attorney-general-william-barr-senate-hearing-20190501-story.html>.

18. See *id.*

19. A Democratic Senator from Rhode Island.

20. Dylan Stableford, *Barr Says Mueller Report ‘Was My Baby,’ Justifying Summary*, YAHOO!NEWS (May 1, 2019), <https://news.yahoo.com/barr-on-the-mueller-report-it-was-my-baby-163856879.html> [<https://perma.cc/FBS2-JF3Z>].

operates, Mueller *was* the equivalent of a U.S. Attorney so that all of his actions *were* subject to the supervision of the Attorney General.²¹ Further, the decision of whether to make the Report public rested with Barr, not Mueller.²²

Even so, Barr's comments were widely panned—and understandably so. To critics, Barr's remarks, and the context in which they were made, represented an explicit example of a key presidential appointee being far too willing to stray into the investigative territory assigned to the Special Counsel precisely because of the special characteristics of the case.²³ Barr's arguable manipulation of the contents of the Mueller Report fed the perception among many that the DOJ had effectively undermined the integrity of the work of the Office of Special Counsel both in reality and in appearance.²⁴ Indeed, a POLITICO/Morning Consult poll released approximately one week after Barr's testimony before the Senate Judiciary Committee indicated that only twenty-nine percent of respondents believed that Barr handled the Mueller Report properly.²⁵ Notably, perceptions regarding the propriety of Barr's conduct around the release of the report were divided according to party affiliation.²⁶ Indeed, fifty-eight percent of Democrats believed that Barr acted to benefit Trump, while fifty-six percent of Republicans believed that Barr simply sought to inform the public

21. See generally General Powers of Special Counsel, 28 C.F.R. § 600 (2019) (promulgating the duties, roles, and rules associated with the Special Counsel).

22. *Id.*

23. See Lisa de Moraes, "I'm the Captain," *Bill Barr Tells Senators, Calling Robert Mueller Report "My Baby,"* DEADLINE (May 1, 2019), <https://deadline.com/2019/05/senators-grill-bill-barr-robert-mueller-report-letter-democrats-1202605207/> [<https://perma.cc/F4D6-J9EA>] (quoting Senator Kamala Harris's statement that, "[t]his attorney general lacks all credibility and has compromised the American public's ability to believe he is a purveyor of justice").

24. See, e.g., Jacob Heilbrunn, *Donald Trump Is Dining Out on the Soul of William Barr,* SPECTATOR (May 1, 2019), <https://spectator.us/donald-trump-soul-william-barr> [<https://perma.cc/GN2K-2HAQ>] ("Barr fought a battle with an invisible Robert Mueller for possession, claiming that his old pal's letter to him complaining about 'public confusion' as a result of the rollout of the report was, in fact, 'snitty.' You'd probably be in a snit, too, if you had labored for months to deliver the precious object, only to have it snatched away from you by the duo of Barr and Donald Trump, manhandled and shielded, as far as possible, from public view."); Lauren Gambino, *William Barr Defiant Amid Calls to Resign over His Handling of Mueller Report,* GUARDIAN (May 1, 2019), <https://www.theguardian.com/us-news/2019/may/01/william-barr-defiant-amid-calls-to-resign-over-his-handling-of-mueller-report> [<https://perma.cc/76H4-ZP9M>] (noting that several Democratic lawmakers urged Barr to resign); see also Dana Milbank, Opinion, *Barr Reminds Mueller: If You Want a Friend in Washington, Get a Dog,* MAIL TRIB. (May 5, 2019), <https://mailtribune.com/opinion/columns/dana-milbank-barr-reminds-mueller-if-you-want-a-friend-in-washington-get-a-dog> [<https://perma.cc/R5V6-SPMP>] ("Barr rejected Mueller's requests to release more of the report to clear up the confusion . . . [i]t was his baby, and he smothered it—thus allowing Barr's misrepresentation of Mueller's report (characterized by Trump as "total exoneration") to harden.").

25. Steven Shepard, *Poll: Little Support for Barr's Handling of Mueller Report,* POLITICO (May 8, 2019), <https://www.politico.com/story/2019/05/08/poll-little-support-for-barrs-handling-of-mueller-report-1309713> [<https://perma.cc/K337-57AH>].

26. *Id.*

of the Report's findings.²⁷ Independents were evenly divided on the question.²⁸

I concur with the sentiments expressed by many of Barr's critics. But irrespective of the merits of anyone's beliefs regarding the propriety of Barr's actions, there are certain truths about prosecutorial conduct that are indisputable. Prosecutors are bound to perform their functions within certain ethical boundaries. They are required to pursue justice in a manner that is fair in fact and in appearance.²⁹ American Bar Association guidelines instruct prosecutors "to seek justice within the bounds of the law" and not act simply to obtain a conviction.³⁰ Moreover, prosecutors must "act with integrity and balanced judgment," pursue and decline to pursue criminal charges when appropriate, and "avoid an appearance of impropriety in performing the prosecution function."³¹

Barr's handling of the Report was undeniably controversial and raised serious questions regarding whether the actions of the DOJ were consistent with these ethical dictates. But the propriety of Barr's conduct, which occurred at the conclusion of the Mueller investigation, was merely the caboose at the end of a long train of controversies that moved through the entirety of the investigation. Ensnarled in dissonance from its inception, the Mueller investigation was beset by controversies that ultimately compromised its legitimacy.³²

Virtually any high-profile criminal investigation will generate controversies—some real and others feigned. And when a high-profile investigation involves a prominent political figure, the potential for political entanglements creates an added complication. Such was the case during the Mueller investigation. In high-profile, intensely polarized cases of this kind, there is no easy answer to this problem. No "magic bullet" solution that exists. There are, however, ways in which difficulties and controversies can be substantially reduced.

Historically, the objective of establishing an independent counsel system³³ has been to provide a "permanent statutory scheme for appointing an officer, independent from the supervision and control of the President, to investigate and prosecute crimes by high-

27. *Id.*

28. *Id.*

29. *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 3-1.2(b)-(c) (4th ed. 2017).

30. *Id.*

31. *Id.*

32. *See infra* Part II.

33. "Independent Counsel" is used here and throughout this Article interchangeably with "Special Counsel" and "Special Prosecutor."

level federal officials.”³⁴ A prosecutor truly independent of the executive branch can vitally strengthen—and in the current political climate, perhaps restore—the public’s faith and confidence in the government’s ability to investigate itself.³⁵ But the absence of genuine independence can give rise to an appearance, if not the reality, of impropriety that inevitably frays the public’s trust.³⁶

The Mueller probe exemplifies this problem. This Article will explain why many of the controversies that beset the Mueller investigation can be sourced to the Special Counsel Regulations³⁷—the rules that governed both Mueller’s appointment and the scope of his investigative and prosecutorial authority.³⁸ In addition, this Article will explain how many of these ills can be ameliorated by enacting a modified version of the Independent Counsel Statute.³⁹ Part I of this Article is foundational and will detail at length the pertinent provisions of the Special Counsel Regulations and the Independent Counsel Statute. It will be a study in contrasts—Special Counsel Regulations that effectively hamstring prosecutorial independence, and an Independent Counsel Statute that had struggled to restrain it.

Part II of this Article is analytical and will identify and discuss four prominent matters that stirred controversy during the Mueller investigation: Mueller’s appointment to the position of Special Counsel, uncertainty about the President’s authority to remove Mueller from this position, Mueller’s decision not to subpoena the President, and debate over Mueller’s ability to indict a sitting president. During the course of this discussion, this Article will propose that federal lawmakers put the expired Independent Counsel Statute back in place, albeit with significant modifications. Foremost among the modifications is a requirement that Independent Counsels adhere to the provisions of the Justice Manual⁴⁰ prior to

34. Benjamin J. Priester, Paul G. Rozelle & Mirah A. Horowitz, *The Independent Counsel Statute: A Legal History*, 62 L. & CONTEMP. PROBS. 7, 9 (1999).

35. *E.g., id.*; see also Julian A. Cook, III, *Mend It or End It? What to do with the Independent Counsel Statute*, 22 HARV. J.L. & PUB. POL’Y 279, 280 (1998) (“[T]he independent counsel statute was designed to remove politics from the prosecution of executive branch officials and to foster public confidence in the prosecutorial process.”).

36. Cook, III, *supra* note 35, at 280 (noting the “conflict-of-interest problems inherent in internal executive branch prosecutions”).

37. See General Powers of Special Counsel, 28 C.F.R. pt. 600 (2020). It is important to note that the Special Counsel Regulations derive their authority from 5 U.S.C. § 301 and 28 U.S.C. §§ 509–10, 515–19. See also 28 U.S.C. § 543.

38. 28 C.F.R. § 600 (2019).

39. The 1978 Ethics in Government Act, the Ethics in Government Act Amendments of 1982, the Reauthorization Act of 1987, and the Reauthorization Act of 1994 are collectively referred to here as the “Independent Counsel Statute.” See *infra* Part I for further discussion regarding the historical development of these statutes.

40. See generally DEP’T OF JUST., JUSTICE MANUAL (2018). At its core, the Justice Manual addresses procedures federal prosecutors must comply with in an array of investigative and

instigating certain investigative and prosecutorial actions. Also incorporated into the new statute would be a provision that permits the Independent Counsel to seek judicial review of DOJ determinations with which the Independent Counsel disagrees. This re-fashioning of the Independent Counsel Statute will enhance investigative integrity by effectively granting the Special Counsel sufficient autonomy to pursue investigative and prosecutorial strategies while constraining the exercise of undue discretion.

I. THE INDEPENDENT COUNSEL LAWS AND SPECIAL PROSECUTOR REGULATIONS

A. *Independent Counsel Laws*

As an outgrowth of the Watergate scandal, President Jimmy Carter signed into law the Ethics in Government Act of 1978.⁴¹ The Act was designed, in part, to address potential conflicts of interests among executive branch officials, to ensure their accountability, and to promote governmental integrity.⁴² Among the Act's principal features were special prosecutor provisions that subjected a multitude of executive branch officials⁴³ to its jurisdiction.

To trigger a prosecution, the Attorney General would have to receive specific information indicating that one of the Act's covered officials had violated a federal criminal law (excluding petty offenses).⁴⁴ Upon receipt of such information, a preliminary investigation was initiated.⁴⁵ If a determination was made that the allegation was unsubstantiated, then the Attorney General was required to inform the Division of the Court⁴⁶ of this conclusion.⁴⁷ On the

prosecutorial situations. For an in-depth discussion of the Justice Manual, see *infra* notes 187–94 and accompanying text.

41. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 28 U.S.C. §§ 591–599).

42. *Id.*; cf. Delaney Marsco, *At 40 Years Old, the Ethics in Government Act Is in Need of a Tune-up*, CAMPAIGN LEGAL CTR. (Oct. 26, 2018), <https://campaignlegal.org/update/40-years-old-ethics-government-act-need-tune> [<https://perma.cc/WV2X-MDVL>]; Walter M. Shaub, Jr., *35th Anniversary of the Ethics in Government Act*, U.S. OFF. OF GOV'T ETHICS (Nov. 8, 2013), <https://oge.gov/Web/oge.nsf/Resources/35th+Anniversary+of+the+Ethics+in+Government+Act> [<https://perma.cc/2CL3-2PZN>]; Jim Mokhiber, *A Brief History of the Independent Counsel Law*, PBS FRONTLINE (May 1998), <https://www.pbs.org/wgbh/pages/frontline/shows/counsel/office/history.html> [<https://perma.cc/CTF7-VTUA>]; Paul Francis Laughlin, *Ethics in Government Act*, 28 AM. CRIM. L. REV. 789 (1989).

43. These officials included the President, Vice President, the Secretaries of State, Defense, Commerce, Treasury, Interior, Agriculture, Labor, Energy, Housing and Urban Development, Transportation, and Education.

44. 28 U.S.C. § 591(a) (1978).

45. *Id.*

46. The Act required that the chief justice of the United States Supreme Court appoint three members from the United States Court of Appeals for the District of Columbia to

other hand, if further investigation or prosecution was warranted, then the Attorney General was required to request that the Division of the Court appoint a Special Prosecutor.⁴⁸ The Division of the Court would, in turn, define the Special Prosecutor's investigative jurisdiction.⁴⁹ The Attorney General could seek an expansion of the original grant of jurisdiction for matters related to the initial authorization.⁵⁰

The Special Prosecutor had access to all the traditional methods of investigation available to DOJ prosecutors (e.g., grand jury, civil and criminal trials, appeals, or immunity grants) and could access DOJ resources (e.g., pertinent records, files, personnel).⁵¹ Compliance with DOJ policies was also expected, though the statute's language granted the Special Prosecutor discretion to disregard such policies in certain circumstances.⁵²

The submission of a final report to the Division of the Court was also expected prior to the conclusion of the Special Counsel's activities.⁵³ It was required that the report describe the work of the Special Counsel, including the status of investigations pursued as well as reasons underlying decisions not to prosecute.⁵⁴ The Division of the Court was also vested with discretion regarding the public release of the report.⁵⁵ If the Special Prosecutor received "substantial and credible information" that may form the basis for impeachment, however, he was *required* to share this information with the House of Representatives.⁵⁶

Removal of the Special Counsel was limited to "extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impair[ed] the performance of such special prosecutor's duties."⁵⁷ A Special Prosecutor could then

serve as members of the Division of the Court. Each member served a two-year term, and the panel was responsible for selecting a Special Prosecutor and defining his or her jurisdiction. *Id.* §§ 49, 591–598.

47. *Id.* § 592(b)(1).

48. *Id.* § 592(c)(1). In addition, a majority of the Democratic or Republican members of the Judiciary Committees in the House of Representative or in the Senate could also request that the attorney general seek the appointment of a Special Prosecutor. *See Id.* § 595(e).

49. *Id.* § 592(d)(1).

50. *Id.* § 593(c).

51. 28 U.S.C. §§ 594(a) & 594(d) (1982 & Supp. III 1985).

52. *Id.* § 594(f).

53. 28 U.S.C. § 595(b)(1) (1978).

54. *Id.* § 595(b)(2).

55. *Id.* § 595(b)(3).

56. *Id.* § 595(c).

57. *Id.* § 596(a)(1). The Supreme Court specifically addressed this removal standard in the Act's later version, the Independent Counsel Reauthorization Act, and upheld it as constitutional in its 1988 *Morrison* decision. The Court explained that this limitation on the Attorney General's removal power did not "sufficiently deprive[] the President of control over the independent counsel [as] to interfere impermissibly with his constitutional obligation"

promptly seek review of her removal by filing a civil action before the Division of the Court.⁵⁸

Conclusion of a Special Counsel's operation could come by virtue of a notification by the Special Prosecutor to the Attorney General that the office's work had been completed or substantially completed.⁵⁹ Termination could also be instigated by the Division of the Court, pursuant to its own initiative or by virtue of a request by the Attorney General.⁶⁰

Congress reauthorized the Special Prosecutor Statute in 1982, 1987, and 1994. Notably—if only for symbolic value—in 1982, the term “independent counsel” supplanted “special counsel” throughout the Statute.⁶¹ And in 1987, the Statute was renamed the Independent Counsel Reauthorization Act.⁶² It lapsed in 1992 but was reinstated in 1994 as the Independent Counsel Reauthorization Act of 1994.⁶³

The 1994 statute was reauthorized only until 1999.⁶⁴ It differed from the original Act in several notable respects. One such difference concerned the scope of individuals subject to independent counsel investigation. In contrast to the 1978 statute, the 1994 version extended coverage to members of Congress.⁶⁵ Additionally, coverage was expanded to situations in which a political, personal, or financial conflict prevented a proper investigation by the DOJ.⁶⁶

Congress also instituted several changes regarding the Attorney General's investigative parameters. The 1978 statute required a preliminary investigation upon receipt by the Attorney General of specific information of a violation of federal law and a referral to the Division of the Court unless the information was unsubstantiated. In contrast, the 1994 statute limited the criterion upon which the Attorney General could determine whether a referral should be made, namely, 1) whether specific information was received,

and that the act as a whole did not violate separation of powers principles “by unduly interfering with the role of the Executive Branch.” *Morrison v. Olsen*, 487 U.S. 654, 693 (1988) (emphasizing that Congress did not retain any control in the appointment nor removal of the independent counsel and thus did not increase its own power at the expense of the executive branch).

58. 28 U.S.C. § 596(a)(3) (1978).

59. *Id.* § 596(b)(1)(A).

60. *Id.* § 596(b)(2).

61. See Mokhiber, *supra* note 42.

62. 28 U.S.C. § 599 (1987).

63. 28 U.S.C. § 599 (1994).

64. *Id.*

65. *Id.* § 591(c)(2) (providing that the Attorney General, if it was deemed in the public interest, could conduct a preliminary investigation if “information sufficient to constitute grounds to investigate a Member of Congress” regarding a violation of Federal criminal law (other than certain misdemeanors or infractions) was received.)

66. *Id.* § 591(c)(1) (allowing for a preliminary investigation in such circumstances when sufficient information is received by the Attorney General suggesting a violation of Federal criminal laws (other than certain misdemeanors and infractions)).

and 2) the credibility of the source.⁶⁷ The Attorney General had 90 days to complete the investigation.⁶⁸

As in the original Act, the Independent Counsel Statute empowered the Division of the Court to establish the prosecutor's investigative jurisdiction.⁶⁹ The court could also expand this jurisdictional grant upon request of the Attorney General.⁷⁰ The Independent Counsel was additionally required to submit annual reports to Congress discussing the status of investigations,⁷¹ as well as a final report when her work was completed.⁷²

The Attorney General was authorized to seek removal of an Independent Counsel for "good cause, physical or mental disability . . . or any other condition that substantially impairs the performance of such Independent Counsel's duties."⁷³ If removed, the Attorney General was required to submit a report to the Division of the Court.⁷⁴ An Independent Counsel could then challenge a removal action in the United States District Court for the District of Columbia.⁷⁵

The Independent Counsel was required to follow DOJ policies, "except to the extent that to do so would be inconsistent with the

67. *Id.* § 591(d)(1) (stating that the Attorney General could consider "only" these two criteria).

68. *Id.* § 592(a)(1). However, a 60-day extension could be granted by the Division of the Court. *Id.* § 592(a)(3) ("The Attorney General may apply to the division of the court for a single extension, for a period of not more than 60 days, of the 90-day period referred to in paragraph (1). The division of the court may, upon a showing of good cause, grant such extension.").

69. *Id.* § 593(b)(3) ("[T]he division of the court shall assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter."). The jurisdictional grant included matters that "may arise out of the investigation or prosecution of the matter with respect to which the Attorney General's request was made, including perjury, obstruction of justice, destruction of evidence and intimidation of witnesses." *Id.*

70. *Id.* § 593(c)(1). If the Attorney General received an expansion request from the Independent Counsel, the Attorney General was required to perform a preliminary investigation and "give great weight to any recommendations of the independent counsel." *Id.* § 593(c)(2)(A).

71. *Id.* § 595(a)(2).

72. *Id.* § 594(h)(1)(B) (requiring that the final report provide a complete description of the counsel's work and detail the disposition of the cases litigated).

73. *Id.* § 596(a)(1) (providing that the authority to remove was vested "only" with the Attorney General).

74. *Id.* § 596(a)(2). The Attorney General was also required to submit a report to the House and Senate Judiciary Committees. *Id.* ("The committees shall make available to the public such report, except that each committee may, if necessary to protect the rights of any individual named in the report or to prevent undue interference with any pending prosecution, postpone or refrain from publishing any or all of the report. The division of the court may release any or all of such report in accordance with section 594(h)(2).").

75. *Id.* § 596(a)(3) (providing that no member of the division of the court could "hear or determine any such civil action" or appeal, and that the district court could order an independent counsel's reinstatement).

purposes of this chapter.”⁷⁶ This was a slight modification from the 1978 language that required “[compliance] to the extent that such special prosecutor deem[ed] appropriate.”⁷⁷

B. *Special Counsel Regulations*

To the surprise of few, the Independent Counsel Statute finally lapsed in 1999. Independent counsel investigations into the Ronald Reagan, George H. Bush, and William (Bill) Clinton administrations, as well as concerns regarding costs, investigation duration, and inadequate constraints on the exercise of prosecutorial discretion, left many in Congress with “a profound sense of fatigue.”⁷⁸

In its place, the Special Counsel Regulations—still in effect today—were promulgated, and require the Attorney General to appoint a special prosecutor in instances where the DOJ has a conflict of interest or where it is in the public interest to make such an appointment.⁷⁹ The regulations empower the Attorney General to appoint a Special Counsel or perform an investigation “[w]hen matters are brought to the attention of the Attorney General that might warrant consideration of appointment of a Special Counsel.”⁸⁰ The Special Counsel selected must not be employed by the federal government,⁸¹ and his investigative jurisdiction is determined solely by the Attorney General.⁸² The jurisdictional grant in-

76. *Id.* § 594(f)(1).

77. 28 U.S.C. § 594(f) (1978).

78. Helen Dewar, *Independent Counsel Law Is Set to Lapse*, WASH. POST, June 5, 1999, at A2.

79. 28 C.F.R. § 600.1(a)–(b) (2019) (allowing also for the appointment of a Special Counsel by the Acting Attorney General in instances where the Attorney General has been recused).

80. *Id.* § 600.2(a)–(b). This section details the alternatives available to an Attorney General when pertinent information is received. It lists three options: 1) “[a]ppoint a Special Counsel;” 2) “[d]irect that an initial investigation, consisting of such factual inquiry or legal research as the Attorney General deems appropriate, be conducted in order to better inform the decision; and 3) “[c]onclude that under the circumstances of the matter, the public interest would not be served by removing the investigation from the normal processes of the Department, and that the appropriate component of the Department should handle the matter. If the Attorney General reaches this conclusion, he or she may direct that appropriate steps be taken to mitigate any conflicts of interest, such as recusal of particular officials.” *Id.*

81. *Id.* § 600.3(a) (also requiring that the “Special Counsel . . . be a lawyer with a reputation for integrity and impartial decisionmaking, and with appropriate experience to ensure both that the investigation will be conducted ably, expeditiously and thoroughly, and that investigative and prosecutorial decisions will be supported by an informed understanding of the criminal law and Department of Justice policies”). In addition, the Special Counsel’s responsibilities “shall take first precedence in their professional lives, and that it may be necessary to devote their full time to the investigation, depending on its complexity and the stage of the investigation.” *Id.*

82. *Id.* § 600.4(b).

cludes authority to investigate crimes committed during the course of, and with intent to interfere with, the investigation, such as perjury, witness intimidation, and obstruction of justice.⁸³ The Special Counsel can request that his jurisdictional authority be expanded, but the decision rests exclusively with the Attorney General.⁸⁴

The regulations effectively equate the Special Counsel with a United States Attorney,⁸⁵ and require compliance with all DOJ practices, policies, rules, and regulations.⁸⁶ In the event of a circumstance requiring an “extraordinary” decision, the Special Counsel may consult with the Attorney General.⁸⁷ Further, the Attorney General can seek explanations from the Special Counsel regarding certain investigative practices and may conclude that such actions are inappropriate and should not be undertaken.⁸⁸ The regulations require, however, that the Attorney General give “great weight” to the perspective of the special prosecutor.⁸⁹

The Attorney General is also permitted to remove the Special Counsel.⁹⁰ The regulations provide that removal is authorized “for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies.”⁹¹ If the Special Counsel is removed, the Attorney General is merely required to notify—and need not submit a report to—the Chairman and Ranking Minority Member of the Judiciary Committee in the House of Representatives and the Senate.⁹²

83. *Id.* § 600.4(a) (noting that the Special Counsel is to be provided with a “specific factual statement” describing the matter to be investigated, and that the Special Counsel can also pursue appeals of adverse judicial determinations encountered during the investigation and/or prosecution).

84. *Id.* § 600.4(b).

85. *See id.* § 600.6 (“[T]he Special Counsel shall exercise . . . the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney. Except as provided in this part, the Special Counsel shall determine whether and to what extent to inform or consult with the Attorney General or others within the Department about the conduct of his or her duties and responsibilities.”).

86. *Id.* § 600.7(a) (requiring Special Counsel consultation with appropriate Department divisions for guidance in regards to “established practices, policies and procedures,” as well as ethical and security matters).

87. *Id.* (detailing the process that a Special Counsel should follow when seeking to evade compliance with Department policies and practices).

88. *Id.* § 600.7(b) (“The Special Counsel shall not be subject to the day-to-day supervision of any official of the Department. However, the Attorney General may request that the Special Counsel provide an explanation for any investigative or prosecutorial step, and may after review conclude that the action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued.”).

89. *Id.* Note, however, that this regulatory requirement is relatively vague.

90. *Id.* § 600.7(d) (stating that removal authority is vested exclusively with the Attorney General and that in the event a Special Counsel is removed a written explanation must be provided detailing the reason underlying the decision).

91. *Id.* While this is similar to the standards in the Independent Counsel Statute, the review process is eliminated in the Special Counsel Regulations.

92. *Id.* § 600.9(a). Such notification must also be provided when a Special Counsel is appointed and when the investigation performed by the Special Counsel is concluded. *Id.*

Upon the conclusion of the Special Counsel's work, he must prepare a confidential report, to be submitted to the Attorney General, that details "the prosecution or declination decisions reached by the Special Counsel."⁹³ It is within the discretion of the Attorney General whether to release the report to the public.⁹⁴

In the end, several notable differences exist between the Special Counsel Regulations and the Independent Counsel Statute. Whereas the Independent Counsel Statute placed meaningful limitations upon the Attorney General, the Special Counsel Regulations did not. The most significant differences pertain to the extent of attorney general oversight, which is plainly more extensive under the Special Counsel Regulations.⁹⁵

II. MUELLER INVESTIGATION CONTROVERSIES AND PROPOSAL FOR REFORM

This Part argues that adopting a modified version of the expired Independent Counsel Statute will effectively address the inherent problems associated with internal executive branch criminal investigations and prosecutions. In making this argument, I examine various legal subjects and controversies associated with the Mueller investigation: the appointment and removal processes, the authority to indict a sitting president, and the power to issue a grand jury subpoena *ad testificandum*. I then explain why certain provisions in the 1994 Independent Counsel Act effectively address some of these controversies. Others, however, can only be addressed sufficiently through statutory modification. As to this latter claim, I propose an innovative reform that effectively mandates independent counsel adherence with DOJ policies, yet enables investigations of alleged executive branch corruption to proceed largely independent of undue executive branch influence. A blend of prosecutorial independence and constraint can restore much of the public confidence lost in the current structure.

93. *Id.* § 600.8(c).

94. *Id.* § 600.9(c) (noting that the Attorney General's decision whether to release the report should be guided by whether such release would be in the public interest). This is another departure from the Independent Counsel Statute, where the Division of the Court (and in some circumstances, Congress) had discretion regarding the public release of the independent counsel's report. *See supra* note 74 and accompanying text.

95. JACK MASKELL, CONG. RSCH. SERV., R43112, INDEPENDENT COUNSELS, SPECIAL PROSECUTORS, SPECIAL COUNSELS, AND THE ROLE OF CONGRESS 3–4 (2013).

A. Relevant Factual and Legal Landscapes

Controversies plagued the Mueller investigation since its inception. Shortly after Mueller's appointment as Special Counsel on May 17, 2017, President Trump complained that Mueller was biased, citing several purported conflicts.⁹⁶ Trump referenced Mueller's friendship with former Federal Bureau of Investigation (FBI) Director James Comey,⁹⁷ Mueller's alleged interest in serving as FBI director during the Trump Administration,⁹⁸ Mueller's membership in a law firm associated with Trump affiliates, and an alleged dispute between Mueller and a Trump-owned golf club over membership fees.⁹⁹ As the investigation progressed, speculation mounted regarding Mueller's possible removal from his position as Special Counsel—specifically, there were persistent rumors that President Trump might fire Mueller.¹⁰⁰ Accompanying these rumors was considerable concern, including among some Republicans, that protective congressional legislation was becoming imperative.¹⁰¹

96. See Hope Yen & Eric Tucker, *AP Fact Check: Trump Falsely Says Mueller Appointment Biased*, ASSOCIATED PRESS (Mar. 21, 2019), <https://apnews.com/87c52ad4f7a84eb59c1d587befcc1ae2> [<https://perma.cc/Q8GD-YM92>].

97. See *id.*; Kyle Cheney, *GOP Congressman to Trump: Mueller Probe 'Infected with Bias,' POLITICO* (Dec. 12, 2017), <https://www.politico.com/story/2017/12/12/matt-gaetz-trump-mueller-russia-investigation-292731> [<https://perma.cc/V7LM-J42X>] (illustrating later claims by Republican congressmen that the Mueller investigation was "infected with bias"); cf. Brett Samuels, *Gohmert Presses Mueller on Comey Friendship, Handling of FBI Agents*, THE HILL (July 24, 2019), <https://thehill.com/homenews/house/454488-gohmert-presses-mueller-on-comey-friendship-handling-of-fbi-agents> [<https://perma.cc/NG9V-PSZL>]. These later articles represent a shift in the attitudes of conservative politicians toward Mueller's perceived bias against Trump—indeed, several Republicans had initially supported the choice to name Mueller as Special Counsel, viewing him as credible. See Austin Wright, *Republicans Jump on Special Prosecutor Bandwagon*, POLITICO (May 17, 2017), <https://www.politico.com/story/2017/05/17/special-prosecutor-republicans-mueller-238527> [<https://perma.cc/Q7QN-W35G>].

98. Eric Tucker, Michael Balsamo & Chad Day, *Trump: Robert Mueller Is a "Never Trump-er," Who Led a Biased Probe*, DENVER POST (May 30, 2019), <https://www.denverpost.com/2019/05/30/trump-robert-mueller-probe/> [<https://perma.cc/A626-SS3W>].

99. Robert Farley & Eugene Kiely, *Debunking Mueller's 'Conflicts'*, FACTCHECK.ORG (Apr. 19, 2010), <https://www.factcheck.org/2019/04/debunking-muellers-conflicts/> [<https://perma.cc/9GW9-Q6C8>].

100. See Caitlin Oprysko, *Trump Disputes McGahn Testimony on Attempts to Fire Mueller*, POLITICO (June 14, 2019), <https://www.politico.com/story/2019/06/14/trump-mcgahn-testimony-mueller-1364873> [<https://perma.cc/7NM4-LSLQ>] (noting White House counsel Don McGahn's testimony that Trump wanted him to fire Mueller); Michael S. Schmidt & Maggie Haberman, *Trump Ordered Mueller Fired, but Backed Off when White House Counsel Threatened to Quit*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/us/politics/trump-mueller-special-counsel-russia.html> [<https://perma.cc/YB3P-S5AZ>] (noting that Trump "wavered for months" on the question of whether to fire Mueller).

101. See, e.g., Rebecca Shabad, *Trump Would Be Barred from Firing Mueller Under Bipartisan Bill*, NBC NEWS (Apr. 11, 2018) <https://www.nbcnews.com/politics/congress/bipartisan-group-senators-merge-bills-protect-mueller-n864926> [<https://perma.cc/PBG2-PPQJ>]; see also Michael D. Shear & Eileen Sullivan, *Senate Democrats Seek to Protect Mueller from Being Fired*,

In addition, there was significant and vociferous public debate regarding Mueller's authority to indict a sitting president and to issue him a grand jury subpoena *ad testificandum*.¹⁰² Regarding the indictment question, the law is not settled. Views expressed in government memorandums and by academic scholars have varied throughout history and continue to differ.¹⁰³ Trump and his legal team, however, steadfastly maintained that Mueller as Special Counsel retained no such authority,¹⁰⁴ while some prominent Democrats insisted otherwise.¹⁰⁵ Indeed, even Kenneth Starr, the former Independent Counsel who investigated Bill Clinton in the 1990s, suggested that it is possible to indict Trump.¹⁰⁶ Starr conceded, however, that doing so would be contrary to established DOJ policy, that it is thus unlikely to occur, and that he disagrees with the policy.¹⁰⁷ In the end, Mueller declined to indict President Trump. In his final report, Mueller, despite citing ten instances where the President arguably obstructed justice, relied on a DOJ Office of Legal Counsel memorandum that concluded that a sitting president could not be indicted.¹⁰⁸

N.Y. TIMES (Jan. 26, 2018), <https://www.nytimes.com/2018/01/26/us/politics/trump-mueller-fired-special-counsel.html> [<https://perma.cc/3MBD-3FRP>].

102. In other words, a subpoena commanding oral testimony as opposed to document production (i.e., *subpoena duces tecum*).

103. E.g., Garrett Epps, *The Only Way to Find Out if the President Can Be Indicted*, THE ATLANTIC (May 23, 2018), <https://www.theatlantic.com/ideas/archive/2018/05/presidential-indictment/560957/> [<https://perma.cc/XR3U-LG9S>]; see also Mark Medish, *President Donald Trump Can Be Indicted—And Here's the Constitutional Proof*, NBC NEWS (Mar. 21, 2019), <https://www.nbcnews.com/think/opinion/president-donald-trump-can-be-indicted-here-s-constitutional-proof-ncna985586> [<https://perma.cc/V5WW-ED9X>]; Salvador Rizzo, *Can the President Be Indicted or Subpoenaed?*, WASH. POST (May 22, 2018), <https://www.washingtonpost.com/news/fact-checker/wp/2018/05/22/can-the-president-be-indicted-or-subpoenaed/> [<https://perma.cc/8YQD-2LRP>].

104. See Sean Illing, *Trump's Lawyer Says He Can't Be Prosecuted. I Asked 16 Legal Experts if That's True*, VOX (Oct. 24, 2019), <https://www.vox.com/2019/5/29/18644304/trump-fifth-avenue-mazars-vance-constitution>.

105. E.g., Susan Davis, Ari Shapiro & Jessica Taylor, *Pelosi Says Congress Should Pass New Laws so Sitting Presidents Can Be Indicted*, NPR (Sept. 20, 2019), <https://www.npr.org/2019/09/20/762594886/pelosi-says-congress-should-pass-new-laws-so-sitting-presidents-can-be-indicted> [<https://perma.cc/9KRC-CGRR>] (noting Representative Nancy Pelosi's claim that sitting presidents are subject to indictment); see also Tara Golshan, *Elizabeth Warren Says She Wants to Make It Legal to Indict Presidents*, VOX (May 31, 2019), <https://www.vox.com/2019/5/31/18647042/elizabeth-warren-trump-indictment-mueller> (describing Senator Elizabeth Warren's campaign pledge to change DOJ policy regarding presidential indictments).

106. *Starr: Yes, a Sitting President Could Be Indicted* (CNN television broadcast Mar. 8, 2019).

107. See *id.*

108. See, e.g., Ramsey Touchberry, *OLC Opinion Explained: Why Robert Mueller Couldn't Indict Trump, Despite 10 Obstruction Incidents*, NEWSWEEK (July 24, 2019), <https://www.newsweek.com/olc-opinion-mueller-doj-memo-indict-trump-sitting-president-1450896> [<https://perma.cc/D56A-SA9V>].

Also unsettled is the grand jury subpoena issue.¹⁰⁹ Again, Trump and the Democrats had contrasting viewpoints. Trump unsurprisingly insisted that he was not subject to subpoena as President,¹¹⁰ while Democrats maintained that he was. Mueller ultimately did not issue a subpoena for Trump, but instead agreed to allow the President to answer written questions.¹¹¹ Mueller later testified before the House Judiciary Committee that the reasons underlying his decision not to subpoena Trump were to avoid protracted litigation and to expedite the conclusion of the investigation.¹¹²

These controversies, without more, are powerful indicia of the need to reform the process of investigating alleged executive branch corruption. The widespread allegations of bias from both political parties, the uncertainty regarding Mueller's tenure, the unsettled questions of law, and the omnipresent oversight of the DOJ, among other concerns, fed a persistent and unhealthy perception regarding the integrity of the Mueller investigation. Remarkably, in the months following the conclusion of the Mueller investigation, concerns regarding the executive branch's ability to criminally investigate itself became even more pronounced.

In February of 2020, President Trump declared himself the nation's chief law enforcement officer and insisted that he had the right to intervene in federal criminal prosecutions.¹¹³ That same month, the President expressed his view, via Twitter, that a sentencing memorandum recommendation submitted by DOJ prosecutors in a federal case involving Roger Stone—a case initiated by Robert Mueller—was too harsh.¹¹⁴ Trump also attacked the federal

109. See Douglas W. Kmiec, Opinion, *Trump Can't Be Indicted. Can He Be Subpoenaed?*, N.Y. TIMES (June 4, 2018), <https://www.nytimes.com/2018/06/04/opinion/trump-lawyers-indict-subpoena.html> [<https://perma.cc/XH83-UTBC>].

110. E.g., Jon Greenberg & Louis Jacobson, *Can Robert Mueller Subpoena Donald Trump? A Look at the Legal Precedents*, POLITIFACT (May 9, 2018), <https://www.politifact.com/article/2018/may/09/can-robert-mueller-subpoena-donald-trump/> [<https://perma.cc/XR3B-3GAF>].

111. See Alan Neuhauser, *Mueller Explains Why He Didn't Subpoena Trump*, U.S. NEWS & WORLD REP. (July 24, 2019), <https://www.usnews.com/news/national-news/articles/2019-07-24/robert-mueller-explains-why-he-didnt-subpoena-donald-trump>.

112. See *id.*

113. See Edward Helmore, *Trump Claims He Has 'Legal Right' to Intervene in Criminal Cases*, GUARDIAN (Feb. 14, 2020), <https://www.theguardian.com/us-news/2020/feb/14/trump-claims-legal-right-intervene-criminal-cases-william-barr-plea-not-tweet> [<https://perma.cc/9XVK-C6JX>] (“The move prompted a crisis of credibility for the US justice system, as top lawyers warned it could undermine the integrity of federal prosecutors . . . and ultimately threaten democracy itself.”); Noah Bierman & Del Quentin Wilber, *Trump Claims 'Legal Right' to Intervene in Justice Department Cases*, L.A. TIMES (Feb. 14, 2020), <https://www.latimes.com/politics/story/2020-02-14/trump-claims-legal-right-to-intervene-in-justice-department-cases>; Peter Baker & Michael D. Shear, *How Trump's Relationship with Barr Got So Complicated*, N.Y. TIMES (Feb. 14, 2020), <https://www.nytimes.com/2020/02/14/us/politics/trump-william-barr.html> [<https://perma.cc/74EW-NY6F>].

114. See sources cited *supra* note 113.

judge presiding over the Stone case,¹¹⁵ questioned the impartiality of the jury foreperson,¹¹⁶ and eventually commuted Stone's sentence.¹¹⁷ Attorney General Barr responded in a televised interview that the President's frequent public statements regarding DOJ criminal matters made "it impossible for [him] to do [his] job."¹¹⁸ In addition, the Federal Judges Association, which describes itself as a "national voluntary organization of United States federal judges . . . whose mission is to support and enhance the role of its members within a fair, impartial and independent judiciary,"¹¹⁹ held an emergency meeting presumably to discuss matters related to the President's extraordinary public commentaries.¹²⁰

Irrespective of the merits of these various claims and counterclaims, what is inescapable is that the appearance of investigative impartiality regarding alleged executive branch wrongdoing has been severely compromised. At no time since Watergate has there been such a clear need for reform. Admittedly, no set of proposals could ever effectively preempt all cries of foul during federal criminal investigations, especially in high-profile cases involving political figures. Yet, in this context, substantive reforms could be enacted that would meaningfully pacify concerns regarding investigative impropriety and thereby ultimately enhance the public trust.

115. See Justin Wise, *Judges' Association Calls Emergency Meeting in Wake of Stone Sentencing Reversal*, THE HILL (Feb. 17, 2020), <https://thehill.com/homenews/administration/483398-judges-association-calls-emergency-meeting-in-wake-of-roger-stone> [<https://perma.cc/X9E7-5LW9>].

116. Edward Helmore, *Trump Complains of Roger Stone Trial 'Bias' After Head Juror Speaks Out*, GUARDIAN (Feb. 13, 2020), <https://www.theguardian.com/us-news/2020/feb/13/trump-roger-stone-trial-jury> [<https://perma.cc/526V-CKTE>].

117. Peter Baker, Maggie Haberman & Sharon LaFraniere, *Trump Commutes Sentence of Roger Stone in Case He Long Denounced*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html> [<https://perma.cc/WG49-6MU9>].

118. Anne Flaherty, *Barr Blasts Trump's Tweets on Stone Case: 'Impossible for Me to Do My Job'*, ABC NEWS (Feb. 13, 2020), <https://abcnews.go.com/Politics/barr-blasts-trumps-tweets-stone-case-impossible-job/story?id=68963276> [<https://perma.cc/52HZ-CEPH>]. In excess of 1,100 former federal prosecutors signed a letter urging Barr to resign. See Jacob Knutson, *Over 1,100 Former DOJ Officials Call for Barr's Resignation*, AXIOS (Feb. 16, 2020), <https://www.axios.com/justice-department-statement-barr-stone-case-14c8880c-6f07-460f-a190-6f2a2f7e78e8.html> [<https://perma.cc/6K7Q-ADQ4>]; Katie Benner, *Former Justice Dept. Lawyers Press for Barr to Step Down*, N.Y. TIMES (Feb. 16, 2020), <https://www.nytimes.com/2020/02/16/us/politics/barr-trump-justice-department.html> [<https://perma.cc/T3P5-ECEM>]; *DOJ Alumni Statement on the Events Surrounding the Sentencing of Roger Stone*, MEDIUM (Feb. 16, 2020), <https://medium.com/@dojalumni/doj-alumni-statement-on-the-events-surrounding-the-sentencing-of-roger-stone-c2cb75ae4937> [<https://perma.cc/LH9L-TLLP>].

119. *Who We Are*, FED. JUDGES ASS'N, <https://www.federaljudgesassoc.org/section/index.php?structureid=17> [<https://perma.cc/8VWU-AYXC>] (last visited Mar. 1, 2020).

120. Wise, *supra* note 115.

B. *Special Counsel Appointment and Removal*

Initially, Mueller's appointment as Special Counsel was met with strong bipartisan support.¹²¹ But Trump was critical from the outset, claiming that Mueller was conflicted.¹²² In time, however, the perception among congressional Republicans of Mueller as an impartial investigator began to wane as allegations of bias became increasingly common.¹²³ Indeed, by the time of Mueller's testimony before the House Judiciary Committee on July 24, 2019, there was little daylight between Trump and congressional Republicans regarding the integrity (or lack thereof) of the Mueller investigation.¹²⁴

As the investigation progressed, rumors were steadfast that Trump wanted to remove Mueller from his position.¹²⁵ The threats were visible and fears palpable that Trump's impulsivity might lead

121. See Wright, *supra* note 97; Josh Gerstein, Matthew Nussbaum, Darren Samuelsohn & Josh Dawsey, *Justice Dept. Names Mueller Special Counsel for Russia Probe*, POLITICO (May 17, 2017), <https://www.politico.com/story/2017/05/17/justice-dept-to-appoint-special-prosecutor-for-russia-probe-238524> ("The move also met bipartisan approval—or at least acceptance—on Capitol Hill, where even Republicans who had resisted the call for a special prosecutor lauded Mueller."); Jordain Carney, *Special Counsel Appointment Gets Bipartisan Praise*, THE HILL (May 17, 2017), <https://thehill.com/blogs/floor-action/senate/333963-lawmakers-cheer-decision-to-name-special-prosecutor-for-russia> [<https://perma.cc/4U7X-ZLNT>] (noting that Senator Burr (R-NC) referred to the appointment as "a positive move"; Senator Susan Collins (R-ME) stated that Mueller was an "excellent choice"; Senator Dianne Feinstein (D-CA) described the appointment as "a good first step"; and Senator Chris Coons (D-DE) stated that Mueller was "a very strong choice").

122. See *supra* notes 96–99 and accompanying text.

123. See, e.g., Manu Raju & Jeremy Herb, *Republicans Ratchet Up Mueller Criticism*, CNN (Dec. 13, 2017), <https://www.cnn.com/2017/12/13/politics/bob-mueller-criticism/index.html> [<https://perma.cc/H7BV-HGT6>] ("Republicans in Congress are sharpening their criticism of Robert Mueller and his team of prosecutors, a sign that the special counsel investigating the President Donald Trump's campaign is increasingly losing GOP support on Capitol Hill."); Cheney, *supra* note 97 (illustrating later claims by Republican congressmen that the Mueller investigation was "infected with bias"); cf. Samuels, *supra* note 97.

124. See, e.g., Sarah N. Lynch, *Ahead of House Hearing, Republicans Sharpen Knives for Mueller*, REUTERS (July 23, 2019), <https://www.reuters.com/article/us-usa-trump-mueller-conservatives/ahead-of-house-hearing-republicans-sharpen-knives-for-mueller-idUSKCNIUI2O9> [<https://perma.cc/E3E3-XY8W>] ("Robert Mueller stayed mum for nearly two years in the face of repeated verbal attacks on his integrity by President Donald Trump and his conservative Republican allies in Congress.")

125. See sources cited *supra* note 100. There were also reports that Rod Rosenstein, the Deputy Attorney General who oversaw the Mueller investigation, would be fired by Trump. See Jerry Dunleavy, *Scapegoat: Democrats Turn on 'Partisan' William Barr Who Was 'Handpicked' by Trump*, WASH. EXAM'R (Mar. 25, 2019), <https://www.washingtonexaminer.com/news/scapegoat-democrats-turn-on-partisan-william-barr-who-was-handpicked-by-trump>. Trump had earlier generated considerable controversy when on May 9, 2017, he fired FBI Director James Comey. See Philip Bump, *Timeline: What We Know About Trump's Decision to Fire Comey*, WASH. POST (Jan. 5, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/01/05/timeline-what-we-know-about-trumps-decision-to-fire-comey/> [<https://perma.cc/62YB-K6NP>] (detailing the timeline that ultimately led to Comey's firing); Eric Tucker, *The Comey Firing, as Retold by the Mueller Report*, ASSOCIATED PRESS (Apr. 23, 2019), <https://apnews.com/4ff1ecb621884a728b25e62661257ef0> [<https://perma.cc/T4KT-QZEE>] (noting that Comey's firing caused "chaos" within the administration).

to another “Saturday Night Massacre.”¹²⁶ To some, Trump had previously demonstrated his propensity for such behavior when on May 9, 2017, he fired former FBI Director James Comey.¹²⁷ And there were leaked reports—later affirmed in detail in Mueller’s final report—that Trump had ordered White House Counsel Don McGahn to have Mueller fired.¹²⁸ In response to this concern, bipartisan members of Congress introduced various House and Senate bills designed to safeguard Mueller from removal.¹²⁹ None of the bills, however, were voted on.¹³⁰

Public trust was the primary rationale underlying Mueller’s appointment.¹³¹ The appointment came on the heels of the Comey firing, Trump’s subsequent admission during a television interview with Lester Holt of NBC News that the Russia investigation was a factor in that decision, and Democratic demands that a Special

126. David A. Graham, *The Saturday Night Massacre That Wasn’t*, THE ATLANTIC (Jan. 25, 2018), <https://www.theatlantic.com/politics/archive/2018/01/the-saturday-night-massacre-that-wasnt/551543/> [<https://perma.cc/3FF4-3NE9>] (“For months after Special Counsel Robert Mueller was appointed, President Trump openly flirted with firing him . . .”).

127. See, e.g., Tucker, *supra* note 125; see also Ron Elving, *FBI Director James Comey’s Firing Resembles the Saturday Night Massacre*, NPR (May 9, 2017), <https://www.npr.org/2017/05/09/527674347/fbi-director-james-comes-firing-resembles-the-saturday-night-massacre> [<https://perma.cc/5S2K-RKHU>] (noting the comparison of Comey’s firing to the infamous Saturday Night Massacre); cf. Catherine Lucey, *Comey Firing Compared to Nixon’s ‘Saturday Night Massacre’*, ASSOCIATED PRESS (May 10, 2017), <https://apnews.com/d670df686d8d43c9a54d743f7127d6d7> [<https://perma.cc/X4U8-U4DA>]. Notably, Douglas Brinkley, a presidential historian at Rice University, called the comparison “apt.” *Id.*

128. See Schmidt & Haberman, *supra* note 100 (describing Trump’s efforts to direct McGahn to have Mueller fired and McGahn’s subsequent threat to resign); Editorial, *What the Mueller Report Says About Trump’s Efforts to Remove the Special Counsel*, WALL ST. J. (Apr. 25, 2019), <https://www.wsj.com/articles/how-trump-allegedly-ordered-mcghahn-to-remove-mueller-11556202296> [<https://perma.cc/37JY-ENZY>] (noting McGahn’s claim that Trump twice instructed him to have Mueller fired).

129. See, e.g., H.R. 3654, 115th Cong. (2017); S. 1735, 115th Cong. (2017); S. 1741, 115th Cong. (2017) (proposing various statutory protections for Special Counsels, particularly with respect to removal in light of Trump’s threats to fire Mueller); see also S. 71, 116th Cong. (2019); H.R. 197, 116th Cong. (2019) (outlining more recent proposals for judicial review of special counsel investigations and removal procedures).

130. E.g., Marianne Levine, *Senate GOP Blocks Mueller Protection Bill for Third Time*, POLITICO (Dec. 19, 2018), <https://www.politico.com/story/2018/12/19/senate-republicans-block-for-a-third-time-mueller-protection-bill-1070781> [<https://perma.cc/3EGG-KERM>]; Lauren Gambino, *McConnell Says He Will Not Allow Vote on Bill Protecting Mueller from Firing*, THE GUARDIAN (Apr. 17, 2018), <https://www.theguardian.com/us-news/2018/apr/17/mitch-mcconnell-robert-mueller-donald-trump-firing-bill> [<https://perma.cc/EP6U-3UQM>]; Eliza Collins & Bart Jansen, *Senate Again Blocks Senate Bill that Would Protect Special Counsel Robert Mueller*, USA TODAY (Nov. 28, 2018), <https://www.usatoday.com/story/news/politics/2018/11/28/mueller-probe-senate-again-rejects-vote-protect-special-counsel/2136466002/> [<https://perma.cc/6MZB-7H8G>]; see also CYNTHIA BROWN, CONG. RSCH. SERV., WSLG1861, LEGISLATIVE PROPOSALS SEEK STATUTORY PROTECTIONS RELATED TO REMOVING A SPECIAL COUNSEL (2017), <https://fas.org/sgp/crs/misc/legprop.pdf> [<https://perma.cc/TQF4-4WFS>].

131. Devlin Barrett, Sari Horwitz & Matt Zapotosky, *Deputy Attorney General Appoints Special Counsel to Oversee Probe of Russian Interference in Election*, WASH. POST (May 18, 2017), https://www.washingtonpost.com/world/national-security/deputy-attorney-general-appoints-special-counsel-to-oversee-probe-of-russian-interference-in-election/2017/05/17/302c1774-3b49-11e7-8854-21f359183e8c_story.html [<https://perma.cc/2LYG-CARA>].

Counsel be appointed.¹³² Rod Rosenstein, who was the acting Attorney General at the time of the appointment, stated that “based upon the unique circumstances the public interest requires me to place this investigation under the authority of a person who exercises a degree of independence from the normal chain of command.”¹³³

As noted, Mueller’s appointment was initially met with bipartisan praise before perception of the Special Counsel splintered along party lines.¹³⁴ But, irrespective of the merits of his selection, and the team ultimately assembled, Mueller’s tenure was destined to be hampered by controversy and public doubt regarding its legitimacy. Certainly, such outcomes were partly attributable to the nature of the investigation. Fairness questions and vociferous complaints will inevitably accompany any criminal investigation involving a high-profile executive branch official, particularly a president.¹³⁵ But these legitimacy questions can also be traced to the Special Counsel Regulations themselves—regulations that vest the Attorney General with overarching influence over the selection and removal of special counsels, as well as the investigations they may pursue.

Regarding appointments, the Attorney General’s discretion is largely unencumbered, hindered only by the requirement that the counsel selected not be employed by the government. The Attorney General enjoys similar latitude with respect to removal.¹³⁶ While the regulations identify specific instances where removal is authorized (e.g., misconduct, dereliction of duty, incapacity, conflict of interest, deviation from departmental policies), it also contains a removal provision (“other good cause”) that is bereft of defined limitations.¹³⁷ That the regulations are devoid of language suggesting the Attorney General’s decisions regarding appointment and removal are reviewable complicates matters even fur-

132. See Jessica Taylor & Carrie Johnson, *Former FBI Director Mueller Appointed as Special Counsel to Oversee Russia Probe*, NPR (May 17, 2017), <https://www.npr.org/2017/05/17/528846598/former-fbi-director-mueller-appointed-special-counsel-to-oversee-russia-probe> [https://perma.cc/Q9QW-KV3B].

133. Barrett et al., *supra* note 131.

134. Taylor & Johnson, *supra* note 132 (citing various Democratic and Republican leaders who praised Mueller’s selection); see also *supra* notes 101, 124 and accompanying text.

135. For a discussion about high-profile criminal justice matters and scrutiny from outside sources, see ANTHONY W. BATTS, MADDY DELONE & DARREL W. STEPHENS, U.S. DEP’T OF JUST., NAT’L INST. OF JUST., POLICING AND WRONGFUL CONVICTIONS 1 (2014), <https://www.ncjrs.gov/pdffiles1/nij/246328.pdf>, which discusses the “notorious case of the Central Park Five” and comments that “[f]ew events subject the criminal justice system to as intense scrutiny from policymakers, elected officials, the media and the general public as the exoneration of a wrongfully convicted defendant.” And adding that “this and other high-profile wrongful convictions continue to spark controversy.” *Id.*

136. 28 C.F.R. § 600.7(d) (2019).

137. *Id.*

ther.¹³⁸ Thus, the “degree of independence” Rosenstein envisioned with the Mueller appointment was simply divorced from the reality of the Special Counsel Regulations.

The appointment and removal provisions contained in the Independent Counsel Statute effectively mitigate the intrinsic problems associated with executive branch appointment and removal decisions. When the executive branch investigates alleged criminal wrongdoing within its ranks, there are unavoidable and inherent conflicts. The conflicts are perceptible, they are real, and they erode the public trust. The Supreme Court elaborated on these conflicts in *Young v. United States ex rel. Vuitton et Fils S.A.*¹³⁹ There, the Court stated that “[p]rosecution by someone with conflicting loyalties ‘calls into question the objectivity of those charged with bringing a defendant to judgment.’”¹⁴⁰ Further, the Court added that “an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general,” that “justice must satisfy the appearance of justice,” and that a conflicted prosecutor “presents the appearance of precisely the opposite.”¹⁴¹ The Court further commented that such appointments produce “pervasive” errors and “call[] into question, and therefore require[] scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision.”¹⁴²

These inherent conflicts, and the resulting public distrust, are credited with the birth of the Independent Counsel Statute. Professor Julie O’Sullivan explains that the Statute was the outgrowth of

public opinion polls and the elections of 1974 and 1976 [indicating] that some action should be taken to help restore public confidence in government after Watergate.” Bolstering public credibility in the entire government being beyond the power of legislation, Congress addressed the particular problem Watergate presented by drafting legislation whose “basic purpose . . . is to promote public confidence in the impartial criminal investigation of alleged wrongdoings by government officials.”¹⁴³

138. *Id.*

139. 481 U.S. 787 (1987).

140. *Id.* at 810 (citing *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986)).

141. *Id.* at 788, 811–12.

142. *Id.* at 789, 812.

143. Julie O’Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 468–69 (1996).

The structure of the resulting Independent Counsel Statute—a creative balance between prosecutorial independence and constitutional adherence—was an attempt to address these innate issues. The Statute included an appointments provision that wrested authority away from the Attorney General and vested it instead with a three-person judicial panel.¹⁴⁴ As noted by Professor Katy Harriger, by “creating the court panel and giving it the power of appointment, Congress clearly sought to guarantee that the actual conduct of an investigation and prosecution (if necessary) would be done by an agent largely independent of the Attorney General.”¹⁴⁵ And though the Attorney General retained removal authority under the Independent Counsel Statute,¹⁴⁶ this power was tempered by two meaningful limitations. First, the Attorney General could only act to remove for “good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel’s duties.” Second, the Independent

144. The constitutionality of this appointment clause was upheld in *Morrison*. See *Morrison v. Olson*, 487 U.S. 654, 671 (1988) (reasoning, in part, that Morrison was “subject to removal by a higher Executive Branch official” and was, thus, “to some degree, ‘inferior’ in rank and authority,”; that she was “empowered . . . to perform only certain, limited duties” [investigative and prosecution functions]; that her office had a limited investigative jurisdiction; and that the tenure of her office was “limited” and “ ‘temporary’ in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over, the office is terminated, either by the counsel herself or by action of the Special Division”).

145. Katy J. Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 *MERCER L. REV.* 489, 505 (1998).

146. *Morrison* upheld the constitutionality of two provisions under the Independent Counsel Statute that impact the duration of an independent prosecutor’s tenure. First, the Court considered the constitutionality of § 596(a)(1)’s good cause limitation and found that this clause did not “unduly trammel” upon the president’s exercise of his executive authority. *Morrison*, 487 U.S. at 691–93. *Morrison* also upheld the constitutionality of a separate provision, § 596(b)(2), which allows for termination of an independent counsel’s activities pursuant to a request by the Attorney General or by the Division of the Court (or “Special Division”). The Court noted that the authority of the Division of the Court to terminate an independent prosecution presented a more difficult issue. Yet, in upholding this provision, the Court reasoned that the Special Division’s role in this process did not constitute “a significant judicial encroachment upon executive power or upon the prosecutorial discretion of the independent counsel.” *Id.* at 657. The Court found it significant that a Division of the Court could terminate *only when the office’s duties have either been completed or are virtually completed*. *Id.* at 682 (emphasis added). The Court declared,

as we see it, ‘termination’ may occur only when the duties of the counsel are truly ‘completed’ or ‘so substantially completed’ that there remains no need for any continuing action by the independent counsel. It is basically a device for removing from the public payroll an independent counsel who has served his or her purpose but is unwilling to acknowledge the fact. So construed, the Special Division’s power to terminate does not pose a sufficient threat of judicial intrusion into matters that are more properly within the Executive’s authority to require that the Act be invalidated as inconsistent with Article III.

Id. at 682–83.

Counsel could seek prompt judicial review of any such removal decision in the U.S. District Court for the District of Columbia.¹⁴⁷

The codification of a judicial role produced an appointments and removal process that, at a minimum, was perceptively more impartial. By limiting attorney general influence¹⁴⁸ and introducing more neutral arbiters, the Statute effectively mitigated the impartiality concerns that were the impetus for its creation. Naturally, members of the judiciary are human and thus subject to biases.¹⁴⁹ And no proposal can completely immunize any appointment or removal decision from criticism. Even if Mueller (or any other individual) had been appointed or removed pursuant to these processes, allegations of bias would have likely persisted from either political party. But what is undeniable is that the appointment and removal processes under the Independent Counsel Statute are perceptibly more deliberate and evenhanded than under the current regulations.

Moreover, the Statute's inclusion of a judicial review mechanism effectively safeguarded the Independent Counsel from capricious and unjustified removal actions. Instructive in this regard are insulating measures pursued by members of Congress during Mueller's tenure. As indicated, persistent fears of Mueller's removal caused concerned senators to introduce various bills designed to protect the Special Counsel. Notably, *every* Senate bill contained judicial review provisions,¹⁵⁰ thus exhibiting fidelity to the spirit of the version contained in the Independent Counsel Statute.

147. See *supra* notes 74–75 and accompanying text.

148. Admittedly, my proposal does not preclude the exercise of all attorney general discretion. The current Special Counsel Regulations and the old Independent Counsel Statute grant the Attorney General discretion to refuse to appoint (or seek the appointment of) a Special Prosecutor. Attorney General Janet Reno faced blistering criticism from Republican lawmakers when she refused to seek the appointment of an Independent Counsel in 1997 “to investigate the financing of President Clinton’s re-election campaign.” David Johnston, *Reno Rejects Call to Name a Counsel Over Fund-Raising*, N.Y. TIMES (Apr. 15, 1997), <https://www.nytimes.com/1997/04/15/us/reno-rejects-call-to-name-a-counsel-over-fund-raising.html> [<https://perma.cc/H7TL-Z9CX>] (noting that Reno stated she had “no specific, credible evidence that any covered White House official may have committed a Federal crime in respect of any of these issues”).

149. See Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715, 722 (2008); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 782 (2008) (presenting empirical data suggesting that judges’ political preferences influence their review of agency decisions); Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853, 854 (2008).

150. The proposed Special Counsel Integrity Act (Sen. Thom Tillis (R-NC) and Sen. Chris Coons (D-DE)), called for an independent three-judge panel review within 14 days of any removal action. S. Res. 1741, 115th Cong. § 2 (2017). It further allowed for an immediate appeal to the Supreme Court. In the event of a judicial finding that removal was unjustified, the Act required that the Special Counsel be immediately reinstated. Another bill, the Special Counsel Independence Protection Act (Sen. Lindsey Graham (R-SC), Sen. Cory

As noted in *Young*, it is critical, in light of the significant power yielded by prosecutors, that “we . . . have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.”¹⁵¹ Adoption of the appointment and removal provisions of the lapsed Independent Counsel Statute would better achieve this critical objective than the current Special Counsel Regulations. The following Section considers two additional controversies from the Mueller investigation—whether the Special Counsel has the authority to subpoena and indict a sitting President—and discusses how the existing regulations hamstringing a special counsel’s ability to pursue these and related measures. It then introduces a novel remedial approach which encourages adherence to DOJ policies, yet grants special prosecutors sufficient autonomy to pursue independent investigations.

C. *Subpoena and Indictment of a Sitting President*

Mueller sought to interview Trump and engaged in protracted negotiations on the subject that extended for more than a year.¹⁵² During the pendency of these negotiations, many speculated that Mueller might seek to issue Trump a subpoena *ad testificandum*.¹⁵³ Whether a sitting president can constitutionally be subpoenaed to testify before a grand jury is an unsettled legal issue.¹⁵⁴ Nevertheless, Supreme Court precedent arguably hints at the possible outcome if the question were to be litigated.

Booker (D-NJ), Sen. Sheldon Whitehouse (D-RI), and Sen. Sidney Blumenthal (D-CT)) required that removal be preceded by a filing of an action by the Attorney General in the United States District Court for the District of Columbia, as well as the filing of “a contemporaneous notice of the action with the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives.” S. Res. 1735, 115th Cong. § 2 (2017). Like the Special Counsel Integrity Act, it required a three-judge panel to adjudicate the propriety of any removal action. Finally, a consolidated measure—the Special Counsel Independence and Integrity Act (Sen. Graham, Sen. Coons, Sen. Tillis and Sen. Booker)—was proposed and set forth protective measures that included both the three-judge panel as well as the 14-day judicial review provision. H.R. 197, 116th Cong. § 2 (2019).

151. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987).

152. Neuhauser, *supra* note 111.

153. See, e.g., Glenn Kirschner, *Why Hasn't Robert Mueller Subpoenaed Trump? Three Theories About the Russia Investigation*, NBC NEWS (July 19, 2018), <https://www.nbcnews.com/think/opinion/why-hasn-t-robert-mueller-subpoenaed-trump-three-theories-about-ncna892591> [https://perma.cc/9VWU-PE64].

154. E.g., Sean Illing, *Can Mueller Subpoena Trump?*, VOX (May 2, 2018), <https://www.vox.com/2018/3/15/16997474/mueller-subpoena-trump-russia-probe> (noting the opinions of various academics regarding whether a subpoena to provide verbal testimony is enforceable against the president); Kmiec, *supra* note 109 (explaining that there are valid competing arguments on each side of the subpoena question).

In *United States v. Nixon*, the Supreme Court unanimously held that President Richard Nixon had to comply with a subpoena *duces tecum* for the production of White House tapes and documents.¹⁵⁵ And in *Clinton v. Jones*, President Bill Clinton was subjected to a civil deposition¹⁵⁶ after an unsuccessful attempt to stay a sexual harassment action filed against him by Paula Jones.¹⁵⁷ Independent Counsel Kenneth Starr had also issued a subpoena to Clinton seeking his grand jury testimony as part of the Monica Lewinsky criminal investigation. A negotiated resolution of the matter precluded the constitutional testing of the Starr subpoena, however.¹⁵⁸ Mueller ultimately elected against the issuance of a subpoena, instead opting to allow Trump to provide written responses to questions formulated by the Mueller team.¹⁵⁹ During his testimony before the House Judiciary Committee, Mueller explained that his decision not to issue a subpoena was motivated by a desire to avoid a protracted legal battle, which would have compromised the expeditious conclusion of the investigation.¹⁶⁰

There was also considerable speculation regarding whether Mueller might indict Trump, as well as meaningful debate on whether such an act would be constitutional.¹⁶¹ As to the constitutional question, opinion is predictably divided. An array of academics have concluded that sitting presidents *are* subject to indictment.¹⁶² On the other hand, Trump's legal team and others in

155. *United States v. Nixon*, 418 U.S. 683 (1974) (rejecting Nixon's claims of executive privilege and separation of powers).

156. Associated Press, *Chronology of the Paula Jones vs. Bill Clinton Lawsuit*, N.Y. TIMES (Apr. 2, 1988), <https://archive.nytimes.com/www.nytimes.com/library/politics/040298-clinton-jones-chronol.html> [<https://perma.cc/XF45-S3MT>] (noting that on January 17, 1997, then-President Clinton had provided deposition testimony in the Paula Jones suit).

157. *Clinton v. Jones*, 520 U.S. 681, 705–06 (1997) (“We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office.”).

158. Starr and Clinton agreed the subpoena would be withdrawn in exchange for Clinton's testimony under certain, specified conditions. Peter Baker, *When the President Testified: People in the Room Recall Clinton's 1998 Interrogation*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/us/politics/clinton-testimony-grand-jury.html> [<https://perma.cc/FB78-RXEW>] (describing the events on the day that President Clinton provided his grand jury testimony).

159. See Neuhauser, *supra* note 111.

160. E.g., David Willman, *Mueller Decided Not to Subpoena Trump to Avoid a Lengthy Court Fight*, L.A. TIMES (Apr. 18, 2019), <https://www.latimes.com/politics/la-na-mueller-subpoena-20190417-story.html> (noting Mueller's testimony that although he and his team had viewed as “inadequate” Trump's written answers, “[w]e . . . weighed the costs of potentially lengthy constitutional litigation, with resulting delay in finishing our investigation, against the anticipated benefits for our investigation and report”).

161. See Rizzo, *supra* note 103 (discussing speculation regarding whether Mueller had the authority to subpoena or indict Trump).

162. E.g., Illing, *supra* note 104 (noting opinions by various academics). Compare Laurence H. Tribe, *Yes, the Constitution Allows Indictment of the President*, LAWFARE (Dec. 20, 2018), <https://www.lawfareblog.com/yes-constitution-allows-indictment-president> [<https://perma.cc/U8XB-HDVS>] (arguing that Trump should not be shielded from indictment),

the legal academy, insist that sitting presidents are immune from any and all prosecution.¹⁶³ Notably, Trump recently broached a related issue before the Supreme Court. *Trump v. Vance* stemmed from a subpoena issued by the Manhattan District Attorney to Trump's accounting firm seeking ten years of the President's tax returns.¹⁶⁴ Before the Second Circuit, Trump argued unsuccessfully that the subpoena should be blocked given the absolute immunity from criminal process he enjoys while in office.¹⁶⁵ A unanimous court found that "presidential immunity does not bar the enforcement of a state grand jury subpoena directing a third party to produce non-privileged material, even when the subject matter under investigation pertains to the President."¹⁶⁶ The court did not pass judgment on the breadth of the immunity claim advanced by Trump, however.¹⁶⁷

Before the Supreme Court, Trump advanced the same broad immunity claim. Trump argued, in part, that he could not "effectively discharge his vast domestic and international duties under the cloud created by a local prosecutor demanding his personal records and threatening criminal prosecution."¹⁶⁸ He further submitted that to allow a president to be subject to state and local prosecution would "risk that politics will lead [such] prosecutors to

with Walter Dellinger, *Indicting a President Is Not Foreclosed: The Complex History*, LAWFARE (June 18, 2018), <https://www.lawfareblog.com/indicting-president-not-foreclosed-complex-history> [<https://perma.cc/N8L3-UWYD>] (emphasizing that the question of whether a sitting president can be indicted is "complicated").

163. See Illing, *supra* note 104; Nikki Schwab, *Giuliani: Trump Couldn't Be Indicted Even if He Shot Comey*, N.Y. POST (June 3, 2018), <https://nypost.com/2018/06/03/giuliani-trump-couldnt-be-indicted-even-if-he-shot-comey/> [<https://perma.cc/YAD7-K7DM>] (noting Rudy Giuliani's comment that "I don't know how you can indict while he's in office"); David R. Lurie, *Trump Makes the Argument for an Imperial Presidency*, SLATE (Sept. 26, 2019), <https://slate.com/news-and-politics/2019/09/trump-imperial-presidency-investigation-immunity-nixon.html> [<https://perma.cc/M6AX-3MR7>] ("Trump's lawyers argued that prosecutors cannot review his financial records in connection with a criminal investigation so long as he is in office."); Kmiec, *supra* note 109 (arguing that a president cannot be criminally indicted while in office).

164. *Trump v. Vance*, 140 S. Ct. 2412 (2020). There were two separate but related cases that were also decided by the Supreme Court on the same day as *Vance*. The two consolidated cases—*Trump v. Mazars USA, LLP* and *Trump v. Deutsche Bank*—pertained to the enforceability of subpoenas issued by House committees for Trump financial records held by third-party entities. 140 S. Ct. 2019 (2020). See Amy Howe, *Symposium: Justices to Tackle Disputes over Access to Trump Financial Records*, SCOTUSBLOG (Mar. 9, 2020), <https://www.scotusblog.com/2020/03/symposium-justices-to-tackle-disputes-over-access-to-trump-financial-records/> [<https://perma.cc/793G-2JLE>].

165. *Trump v. Vance*, 941 F.3d 631, 644–46 (2d Cir. 2019), *aff'd*, 140 S. Ct. 2412 (2020) (holding unanimously that "any presidential immunity from state criminal process does not bar the enforcement of such a subpoena"); see also Lurie, *supra* note 163; Schwab, *supra* note 163.

166. *Vance*, 941 F.3d at 640.

167. *Id.* at 646.

168. Reply Brief of Petitioner on Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 6, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-635), 2019 WL 6465020.

relentlessly harass the President.”¹⁶⁹ The Supreme Court rejected Trump’s immunity argument, holding “that the President is neither absolutely immune from state criminal subpoenas seeking his private papers nor entitled to a heightened standard of need.”¹⁷⁰

Mueller ultimately did not seek an indictment against Trump. With respect to Russian meddling, Mueller found that the Russians did interfere with the 2016 election, and that there were several individuals within the Trump campaign with Russian affiliations. Yet, in the end, Mueller determined that there was insufficient evidence of a coordinated conspiracy.¹⁷¹ On the issue of obstruction, however, Mueller’s finding was inconclusive. As noted, the final Report detailed ten instances of possible obstruction by the President.¹⁷² But Mueller did not reach a definitive conclusion regarding whether sufficient evidence existed to warrant an indictment.¹⁷³ Many questioned why Mueller, after such an extensive investigative effort, did not reach a conclusion on the obstruction issue.¹⁷⁴ In a news conference held on May 29, 2019, Mueller cited two primary

169. Howe, *supra* note 164.

170. Trump v. Vance, 140 S. Ct. 2412, 2431 (2020).

171. *Mueller Finds No Collusion with Russia, Leaves Obstruction Question Open*, AM. BAR ASS’N NEWS (Mar. 25, 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/03/mueller-concludes-investigation/> [<https://perma.cc/P9MP-ELZW>] (noting Mueller “found that Russia did interfere with the election, but ‘did not find that the Trump campaign, or anyone associated with it, conspired or coordinated with the Russian government in these efforts, despite multiple efforts from Russian-affiliated individuals to assist the Trump campaign.’”).

172. See *supra* notes 16, 108 and accompanying text.

173. Following the Report’s release, Mueller publicly stated that, “[a]s set forth in the report, after that investigation, if we had had confidence that the president clearly did not commit a crime, we would have said so. We did not, however, make a determination as to whether the president did commit a crime.” *Full Transcript of Mueller’s Statement on Russia Investigation*, N.Y. TIMES (May 29, 2019), <https://www.nytimes.com/2019/05/29/us/politics/mueller-transcript.html> [<https://perma.cc/HYG2-5P5Z>] [hereinafter *Full Transcript*].

174. Randall D. Eliason, *Why Didn’t Barr Order Mueller to Make the Call on Obstruction?*, WASH. POST (May 2, 2019), <https://www.washingtonpost.com/opinions/2019/05/02/why-didnt-barr-order-mueller-make-call-obstruction/> [<https://perma.cc/6LUM-7BYC>] (stating that Barr should have instructed Mueller to make a finding on obstruction prior to the submission of the final report); see also Andrew Prokop, *Mueller’s Punt Keeps Looking Worse*, VOX (May 31, 2019), <https://www.vox.com/policy-and-politics/2019/5/31/18645173/mueller-report-barr-trump-obstruction> (noting that Mueller’s indecision “took some constitutional scholars and Justice Department veterans by surprise”); David A. Sklansky, *Stanford Law’s David Sklansky on Mueller Report and AG Barr Conclusions*, STAN. L. SCH. LEGAL AGGREGATE (Apr. 18, 2019), <https://law.stanford.edu/2019/04/18/stanford-laws-david-sklansky-on-mueller-report-and-ag-barr-conclusions/> [<https://perma.cc/XQE3-47SZ>] (asserting that the evidence of obstruction was “pretty damning”). Compare Christina Pazzanese, *Parsing the Mueller Report*, HARV. GAZETTE (Apr. 18, 2019), <https://news.harvard.edu/gazette/story/2019/04/harvard-professor-mueller-found-substantial-evidence-of-obstruction-of-justice/> [<https://perma.cc/GV89-63MS>] (arguing that Mueller’s indecision on the obstruction question is “defensible” despite there being sufficient evidence of obstruction) with Jack Goldsmith, *The Mueller Report’s Weak Statutory Interpretation Analysis*, LAWFARE (May 11, 2019), <https://www.lawfareblog.com/mueller-reports-weak-statutory-interpretation-analysis> [<https://perma.cc/XH7G-45JA>] (arguing that Trump did not obstruct justice and thus did not commit any crimes).

reasons, fairness to the President and DOJ policy, which prohibits the indictment of a sitting president:

[U]nder longstanding department policy, a president cannot be charged with a federal crime while he is in office. That is unconstitutional. Even if the charge is kept under seal and hidden from public view, that, too, is prohibited. A special counsel's office is part of the Department of Justice, and by regulation, it was bound by that department policy. Charging the president with a crime was therefore not an option we could consider . . . And beyond department policy, we were guided by principles of fairness. It would be unfair to potentially . . . accuse somebody of a crime when there can be no court resolution of the actual charge.¹⁷⁵

As an employee of the Justice Department, Mueller was bound to follow DOJ policies. DOJ policies disallow the indictment of a sitting president and, as will be briefly discussed later, discourage the issuance of a subpoena to an investigative target.¹⁷⁶ In the end, Mueller's investigative and prosecutorial hands were proverbially tied. There was little wiggle room. Unable to act beyond the strictures of DOJ rules and regulations, the Mueller investigation was hardly independent. This was Mueller's reality, and actions undertaken by the DOJ since the conclusion of the Mueller investigation (e.g., Barr's four-page summary of the Mueller report, Barr's appointment of prosecutors to investigate the Michael Flynn prosecution and the FBI's probe of the Trump campaign, and the Department's revised sentencing recommendation in the Roger Stone case) only reinforced the perception among many that the DOJ was functioning as an advocate for the President.¹⁷⁷

175. See *Full Transcript*, *supra* note 173 (providing the complete transcript of Mueller's statement after the release of the final report).

176. See discussion *infra* Section II.D.2.

177. E.g., Katie Benner & Sharon LaFraniere, *Justice Dept. Moves to Drop Charges Against Russian Firms Filed by Mueller*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/us/politics/concord-case-russian-interference.html> [<https://perma.cc/Y9K2-96HY>] ("Democrats in Congress have accused Attorney General William P. Barr of trying to undo the work of the special counsel. They cite Mr. Barr's appointment of a prosecutor to investigate whether the F.B.I. abused its power in investigating the Trump campaign, his intervention in the sentencing of the Trump associate Roger J. Stone Jr. and his installation of an outside prosecutor to review the case against Michael T. Flynn, President Trump's former national security adviser."); see also Mark Sumner, *William Barr Officially Becomes Trump's Personal Attorney—With Power to Persecute or Pardon Anyone*, DAILY KOS (Feb. 12, 2020), <https://www.dailykos.com/stories/2020/2/12/1918652/-William-Barr-officially-becomes-Trump-s-personal-attorney-with-power-to-persecute-or-pardon-anyone> [<https://perma.cc/9VDC-LC4X>] ("Barr has taken 'control of legal matters of personal interest to President Donald Trump.' That includes persecution of Trump's enemies, such as former acting FBI Director Andrew McCabe. That includes protecting Trump allies such as Roger Stone and Michael Flynn. Barr isn't turning the Justice Department into a political instrument—he's already

Public trust in criminal investigations of executive branch wrongdoing requires prosecutorial independence. To further this critical objective, an investigative and prosecutorial structure must be implemented that grants a prosecutor sufficient latitude to pursue independent investigations, while reigning in the exercise of runaway discretion. As noted by former Senators Robert Dole and George Mitchell, “[t]he challenge of any system for independent or special counsel is to strike the right balance between sufficient independence and sufficient accountability, so the public is assured that an inquiry is both credibly and responsibly resolved.”¹⁷⁸ It is this balance that has thus far been elusive. This Article’s proposal fills the gap.

Whereas the current Special Counsel Regulations strictly enforce compliance with DOJ policies, the Independent Counsel Statute’s restrictions on activity were comparatively toothless. For example, § 594(f) required an Independent Counsel to comply with DOJ policies, “except to the extent that to do so would be inconsistent with the purposes of this chapter.”¹⁷⁹ The section, however, was devoid of any meaningful oversight or enforcement mechanism. Indeed, former Special Prosecutor Robert Fiske observed that

there are no such checks or balances in the case of the independent counsel who, once appointed, has all of the authority of the Attorney General and the independent counsel doesn’t have to seek authority from anybody to do anything. He or she can do whatever they feel is appropriate, without any review by anyone.¹⁸⁰

done that. He’s using his role to create revisionist history and to actively support and generate nothing less than corruption.”).

178. ROBERT DOLE & GEORGE J. MITCHELL, AM. ENTER. INST. & BROOKINGS INST., PROJECT ON THE INDEPENDENT COUNSEL STATUTE REPORT AND RECOMMENDATIONS V (May 1999), <https://www.brookings.edu/wp-content/uploads/2016/06/icreport.pdf> [<https://perma.cc/T4UQ-9A3F>] (this report was prepared by the former senators at the behest of the American Enterprise Institute and the Brookings Institution, reviewing the Independent Counsel Statute and setting forth various recommendations for reform).

179. 28 U.S.C. § 594(f) (1994).

180. J. Harvie Wilkinson, III & T.S. Ellis, III, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, 54 WASH. & LEE L. REV. 1515, 1546 (1997). Fiske was appointed as Special Prosecutor by Attorney General Janet Reno to investigate President Clinton and his wife Hillary’s relationship with the Whitewater Development Corporation and Madison Guaranty Savings and Loan. See Susan Schmidt, *Judges Replace Fiske as Whitewater Counsel*, WASH. POST (Aug. 6, 1994), <https://www.washingtonpost.com/archive/politics/1994/08/06/judges-replace-fiske-as-whitewater-counsel/4ca08c66-62cd-4ef3-a44f-9835399ed0ee/> [<https://perma.cc/BJF6-YHUJ>].

Such concerns ultimately contributed to the demise of the Independent Counsel Statute.¹⁸¹ In 1997, Fiske expressed a preference that the Independent Counsel Statute be amended but opined that attaining the delicate balance between prosecutorial accountability and independence might be impractical.¹⁸² This Article submits that this delicate balance can be achieved through statutory modification. By keeping the existing structure and adding a judicial function consistent with the dictates of *Morrison v. Olson*,¹⁸³ the Independent Counsel Statute can effectively restrain wayward prosecutorial activity within the context of an independent investigation.

D. *Proposal to Modify the Expired Independent Counsel Statute*

Specifically, this Article proposes that Independent Counsels be required to abide by the following two-pronged procedure. First, whenever an Independent Counsel seeks to pursue a course of action that implicates a reporting, consulting, or approval provision contained in the Justice Manual,¹⁸⁴ the Independent Counsel must abide by those policies and procedures.¹⁸⁵ If approval is obtained, then the Independent Counsel may proceed with the proposed course of action. If, on the other hand, the proposed action is not approved, then the Independent Counsel has two options: either abide by the DOJ determination or present the request to the Division of the Court. In the event the Independent Counsel pursues a review with the Division of the Court, the DOJ would be afforded the opportunity to appear and present its arguments in opposition.

181. *E.g.*, CYNTHIA BROWN & JARED P. COLE, CONG. RSCH. SERV., R44857, SPECIAL COUNSEL INVESTIGATIONS: HISTORY, AUTHORITY, APPOINTMENT AND REMOVAL 8 (2019), <https://fas.org/sgp/crs/misc/R44857.pdf> [<https://perma.cc/7Q6P-J837>] (“[C]oncerns over whether the independent counsel possessed too much power, which arose after the extensive independent counsel investigations of the Iran-Contra affair and the Whitewater controversy, resulted in the law’s ultimate expiration and nonrenewal in 1999.”).

182. *See* Wilkinson, III & Ellis, III, *supra* note 180, at 1550.

183. *See generally* *Morrison v. Olson*, 487 U.S. 654, 671 (1988). *See supra* note 57 for a brief discussion of *Morrison*.

184. My proposal also extends to DOJ policies not delineated in the Justice Manual, such as the Department’s policy against indicting sitting presidents. For more information on the Justice Manual, see *infra* notes 187–94 and accompanying text.

185. My proposal does not intend to subject the Special Counsel to every provision of the Justice Manual. Rather, only those Justice Manual criminal provisions that are consistent with *Morrison* would require the Special Counsel’s compliance. Thus, a Special Counsel should be subject to only those Justice Manual provisions that impose obligations that can be classified as “passive,” “ministerial,” “directly analogous to functions that federal judges perform in other contexts,” and that do not “unduly interfer[e] with the role of the Executive Branch.” *Morrison*, 487 U.S. at 681 (1988); *see also, e.g.*, U.S. DEP’T OF JUST., JUSTICE MANUAL § 9-11.140 (2018) [hereinafter J.M.] (requiring DOJ approval prior to “initiating any process to obtain testimony or evidence from abroad”). It is beyond the scope of this Article to develop a comprehensive listing.

If the Independent Counsel's request is approved, then he could proceed accordingly.¹⁸⁶

1. Justice Manual Overview

The Justice Manual contains the internal policies and procedures of the DOJ and delineates the guidance requirements that Department prosecutors must abide by in certain situations.¹⁸⁷ Formerly known as the United States Attorneys Manual, the Justice Manual serves as “a valuable means of improving efficiency, promoting consistency, and ensuring that applicable Department policies remain readily available to all employees as they carry out the Department's vital mission.”¹⁸⁸ DOJ prosecutors enjoy discretion with regard to investigative, prosecutorial, and appellate matters that are comparatively routine.¹⁸⁹ For such matters, the provisions of the Justice Manual merely provide guidelines. But for matters that are less routine or implicate significant interests or concerns, DOJ prosecutors must consult with the Justice Manual prior to undertaking the proposed action.¹⁹⁰

2. Subpoenaing Targets

Consider, for example, section 9-11.150, Subpoenaing Targets of the Investigation.¹⁹¹ This provision recognizes the government's well-established authority to issue grand jury subpoenas to investi-

186. Cook, III, *supra* note 35, at 330–31 n.276.

187. J.M., *supra* note 185, at §§ 1-1.100–.200.

188. Press Release, Dep't of Just., Off. of Pub. Affs., Department of Justice Announces the Rollout of an Updated United States Attorneys' Manual (Sept. 25, 2018), <https://www.justice.gov/opa/pr/departments-justice-announces-rollout-updated-united-states-attorneys-manual> [<https://perma.cc/J6UB-SMXV>] (quoting Deputy Attorney General Rod Rosenstein).

189. J.M., *supra* note 185, at § 9-2.001.

190. See *supra* notes 40, 187 and accompanying text.

191. J.M., *supra* note 185, at § 9-11.150. Section 9-11.150 is just one of an array of Justice Manual provisions that require DOJ approval or consultation with respect to pretrial investigative strategies of federal prosecutors. A sampling of others include section 9-13.410, which requires DOJ approval prior to issuing a grand jury subpoena “to an attorney for information relating to the representation of a client”; section 9-13.400, which requires approval from the Attorney General for “the use of certain law enforcement tools to obtain information from, or records of, a member of the news media”; section 9-2.136(H), which “presumptively require[s] DOJ approval] for certain court actions involving the international terrorism-focused . . . statutes,” such as submitting a search warrant application or seeking an indictment; section 9-7.200, which requires department approval for “video surveillance . . . when there is a constitutionally protected expectation of privacy requiring judicial authorization”; section 9-11.260, which requires department approval prior to seeking the release of grand jury materials; and finally, sections 9-16.010 and 9-16.015, which require department approval prior to the entry of pleas of *nolo contendere* and Alford pleas.

gative targets.¹⁹² It also acknowledges, however, the perceptive risks and the futile outcomes¹⁹³ that often accompany such subpoenas. Though the section plainly encourages caution, it does not foreclose the practice altogether. Instead, it sets forth a process requiring clearance from either “the United States Attorney or the responsible Assistant Attorney General.” The pertinent part of the section provides:

[I]n the context of particular cases such a subpoena may carry the appearance of unfairness. Because the potential for misunderstanding is great, before a known “target” . . . is subpoenaed to testify before the grand jury about his or her involvement in the crime under investigation, an effort should be made to secure the target’s voluntary appearance. If a voluntary appearance cannot be obtained, the target should be subpoenaed only after the United States Attorney or the responsible Assistant Attorney General have approved the subpoena. In determining whether to approve a subpoena for a “target,” careful attention will be paid to the following considerations:

- The importance to the successful conduct of the grand jury’s investigation of the testimony or other information sought;
- Whether the substance of the testimony or other information sought could be provided by other witnesses; and
- Whether the questions the prosecutor and the grand jurors intend to ask or the other information sought would be protected by a valid claim of privilege.¹⁹⁴

Given Trump’s intransigence, there was considerable speculation regarding why Mueller did not opt to simply issue a subpoena.¹⁹⁵ After all, for over a year, the Mueller and Trump teams en-

192. *Id.*

193. See Kirschner, *supra* note 153 (“[A] guiding principle of grand jury practice is that prosecutors generally do not subpoena targets. This is because it would be futile to subpoena a target only to have that witness refuse to testify by invoking the Fifth Amendment. This principle is a corollary to the bedrock trial principle that a defendant has an absolute right not to testify at his own trial. Prosecutors generally avoid trying to force defendants to incriminate themselves via a grand jury.”).

194. J.M., *supra* note 185, at §9-11.150.

195. Kirschner, *supra* note 153 (offering various theories to explain Mueller’s failure to issue a subpoena); Philip Rucker, Carol D. Leonnig, Josh Dawsey & Matt Zapposky, *How Trump Dodged a Special Counsel Interview—And a Subpoena Fight*, CHI. TRIB. (Mar. 28, 2019), <https://www.chicagotribune.com/nation-world/ct-trump-mueller-interview-subpoena-2019>

gaged in negotiations that ultimately failed to secure a voluntary interview.¹⁹⁶ During the course of these conversations, an agreement was reached for Trump to provide written responses to Mueller's inquiries.¹⁹⁷ In testimony before the House Judiciary Committee, however, Mueller expressed his dissatisfaction with Trump's responses, and his final report indicated that Trump failed to respond to any of Mueller's questions that pertained to the issue of obstruction.¹⁹⁸

Publicly, Mueller stated that he had the authority to issue a subpoena but that he elected against doing so given his desire to avoid protracted litigation and further extending the investigation.¹⁹⁹ Maybe so. Yet, it is not unreasonable to wonder why under these circumstances Mueller elected to fold his tent rather than pursue a subpoena strategy. Perhaps Mueller's decision was influenced by the section 9-11.150 review process. Maybe it was directly or indirectly communicated that the DOJ disfavored this approach and that securing a voluntary commitment for a Trump interview was his best alternative under the circumstances. After all, during this period, Rosenstein, who was Mueller's superior, "was under intense political pressure."²⁰⁰ Like Mueller, Rosenstein had been the subject of persistent dismissal rumors.²⁰¹ And he was also a target of House Republicans who had openly discussed the possibility of Rosenstein's impeachment.²⁰² All speculation aside, what is clear is that Mueller did not have the option of judicial review—an option that could have potentially influenced the direction of his subpoena strategy.

3. Individual Targets

The Justice Manual contains a host of provisions that cover the gamut of situations that a prosecutor may encounter. Some ad-

0328-story.html ("[T]he decision not to subpoena the president is one of the lingering mysteries of Mueller's 22-month investigation.").

196. *Full Text of Mueller's Questions and Trump's Answers*, ASSOCIATED PRESS (Apr. 18, 2019), <https://apnews.com/98f22511be924ced895ce5c0bfedfe37> [<https://perma.cc/PKN9-CMHW>].

197. *Id.*

198. *Id.*; Eric Lach, *Robert Mueller Let Donald Trump Duck Direct Questions About Obstruction*, NEW YORKER (Apr. 18, 2019), <https://www.newyorker.com/news/current/robert-mueller-let-donald-trump-duck-direct-questions-about-obstruction> [<https://perma.cc/5J49-F2U7>].

199. *See supra* note 160 and accompanying text.

200. Rucker et. al, *supra* note 195 ("Rosenstein himself was under intense political pressure: Trump mused about firing the onetime George W. Bush appointee . . . whom he derided at one point as 'the Democrat from Baltimore.' And House conservatives threatened to impeach Rosenstein, accusing him of withholding information about the Russia probe.").

201. *Id.*

202. *Id.*

dress specific categories of individuals and detail the consultation or approval processes that must be followed before certain investigative and prosecutorial strategies can be pursued. For example, section 9-85.110 requires consultation with the Public Integrity Section in “all investigations involving a Member of Congress or congressional staff member.”²⁰³ The provision provides that consultation is required prior to interviewing or subpoenaing such individuals or applying for certain search warrants.²⁰⁴ Section 9-16.110 requires prior approval from the Public Integrity Section before plea agreements can be entered into “with defendants who are candidates or members of Congress or federal judges.”²⁰⁵

Additionally, section 9-7.302 provides that requests to monitor oral communications (in the absence of the consent of all parties) “when it is known that the monitoring concerns an investigation into an allegation of misconduct committed by a Member of Congress, a federal judge, a member of the Executive Branch at Executive Level IV or above (as defined in 5 U.S.C. §§ 5312–5315), or a person who has served in such capacity within the previous two years” must be approved by a Deputy Assistant Attorney General.²⁰⁶ And subsection (A)(2) requires the same consultation when the monitoring pertains to “the Governor, Lieutenant Governor, or Attorney General of any State or Territory, or a judge or justice of the highest court of any State or Territory, and the offense investigated is one involving bribery, conflict of interest, or extortion relating to the performance of his or her official duties.”²⁰⁷

There is no Justice Manual provision that specifically addresses the propriety of indicting a current U.S. President. As noted, however, a DOJ policy nevertheless exists that prohibits such indictments.²⁰⁸ Thus, no indictment against Trump was forthcoming on a possible conspiracy charge, obstruction charge, or anything else. It was never in the cards. The most aggressive posture Mueller could

203. J.M., *supra* note 185, at § 9-85.110.

204. *Id.* (“In particular, the Public Integrity Section must be consulted prior to taking any of the following steps: (1) interviewing a Member of Congress or congressional staff member; (2) subpoenaing a Member of Congress or congressional staff member; or (3) applying for a search warrant for a location or device in which legislative materials are likely to be found. In addition, consensual monitoring in an investigation involving allegations of misconduct by a Member of Congress requires approval by a Deputy Assistant Attorney General.”).

205. *Id.* § 9-16.110 (stating that the concern underlying the prior approval mandate is “[t]o assure uniformity and fairness.”).

206. *Id.* § 9-7.302 (providing that monitoring of oral communications “[i]n all *other* investigations involving a Member of Congress or congressional staff” requires consultation with the Public Integrity Section) (emphasis added).

207. *Id.* § 9-7.302(A)(2) (requiring that prior “authorization to monitor an oral communication without the consent of all parties to the communication must be approved in writing by the Director of the Office of Enforcement Operations” of the Criminal Division).

208. *See, e.g.,* Touchberry, *supra* note 108.

theoretically have taken would have been to prepare a final report with a firmly stated conclusion regarding the President's criminality. But Mueller felt constrained from even doing that much given the Department's policy and fairness considerations to the President.

Attorney General Barr expressed surprise that Mueller failed to reach a decision on the obstruction question.²⁰⁹ But Mueller's nuanced approach to Trump's criminal culpability was certainly defensible in light of the circumstances of the report's preparation. Mueller's subtlety certainly had its virtues.²¹⁰ In the end, however, the Mueller probe was adversely influenced by a binding policy that inevitably compromised its final product. After a nearly two-year investigation, the public was provided with a partly inconclusive final report that was summarized shortly after its release by an Attorney General "who, before his appointment, called Mueller's obstruction-of-justice theories 'fatally misconceived.'"²¹¹ It was a conclusion that yearns for a rewrite.

The proposal set forth in this Article affords future Independent Counsels freedoms that are nonexistent in the current Special Counsel Regulations. And in so doing, it provides prosecutors who conclude that a president has committed an indictable offense the

209. Alan Neuhauser, *Barr Surprised Mueller Didn't Decide on Obstruction*, U.S. NEWS & WORLD REP. (May 1, 2019), <https://www.usnews.com/news/national-news/articles/2019-05-01/attorney-general-william-barr-surprised-robert-mueller-didnt-decide-on-obstruction> (noting Barr's claim that he and others at the DOJ were surprised when Mueller did not reach a conclusion on the obstruction matter); see also Katie Benner, *Barr Escalates Criticism of Mueller Team and Defends Trump*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/2019/05/31/us/politics/barr-mueller-team.html> [<https://perma.cc/R7XZ-J53G>] ("Mr. Barr also said that Mr. Mueller was wrong to not make a decision . . . [regarding] criminal obstruction of justice, echoing his statement to Congress that Mr. Mueller 'shouldn't have investigated' the president if he was not willing to 'go down the path of making a traditional prosecutive decision.'").

210. See, e.g., Daniel W. Drezner, *In Defense of Robert Mueller*, WASH. POST (Nov. 19, 2019), <https://www.washingtonpost.com/outlook/2019/11/19/defense-robert-mueller/> [<https://perma.cc/4VUS-A94Q>] ("Mueller perfectly fits the mold of public servants that [are] 'generally not all that interested in partisan politics but are deeply committed to the process and substance of good government.' Indeed, Mueller proved himself to be far better at draining the swamp than Trump ever was."); Renato Mariotti, *Actually, Robert Mueller Was Awesome*, POLITICO (July 25, 2019), <https://www.politico.com/magazine/story/2019/07/25/robert-mueller-hearing-was-awesome-227478> [<https://perma.cc/3TLN-WAJE>] ("Mueller famously said that he was 'unable' to state that Trump 'clearly did not commit obstruction of justice,' and thus his report 'does not exonerate' Trump. This . . . is a very careful approach that permitted Mueller to be as fair as possible to Trump under the circumstances.").

211. Eliason, *supra* note 174 ("Instead, the public was left with the opinion of the president's attorney general—a man who . . . had Mueller's report for only a brief time, and who, according to his testimony on Wednesday, did not review the underlying evidence."); see also Eli Watkins, *Barr Authored Memo Last Year Ruling Out Obstruction of Justice*, CNN (Mar. 26, 2019), <https://www.cnn.com/2019/03/24/politics/barr-memo-mueller/index.html> [<https://perma.cc/Q7ZQ-SQME>] ("Nearly a year before his letter Sunday telling lawmakers he did not believe President Donald Trump committed obstruction of justice, Attorney General William Barr authored a memo saying he thought the obstruction investigation was 'fatally misconceived.'").

opportunity to argue constitutionally related questions before the Division of the Court.²¹² The liberty to possibly venture outside the sanctum of DOJ policies not only enhances the public trust, but it furthers the likelihood of the impartial exercise of prosecutorial practice.

4. Specific Criminal Investigations and Prosecutions

In addition to Justice Manual provisions and departmental policies that address specified classes of individuals, there are also a myriad of provisions directed to specific criminal investigations and prosecutions. In these instances, a government prosecutor—or an Independent Counsel pursuant to this proposal—must obtain prior approval before she can undertake certain actions. For example, department approval is required “prior to seeking an indictment for a capital-eligible offense,”²¹³ prior to filing charges under the Economic Espionage Act,²¹⁴ and prior to seeking an indictment alleging Airport Sabotage.²¹⁵ In addition, “prior concurrence of the [Associate Attorney General is required] before entering into a plea agreement in a torture, war crimes, [or] genocide . . . matter,”²¹⁶ and the Human Rights and Special Prosecutions Section of the Criminal Division must be notified prior to “open[ing] any torture, war crimes, genocide, child soldiers matter, or female genital mutilation” investigation.²¹⁷

Another such provision—notable for its arguable connection to President Trump—is section 9-85.210, which requires consultation “in all federal criminal matters that focus on violations of federal or state campaign finance laws, federal patronage crimes, and cor-

212. To date, the constitutional question regarding the indictability of a sitting president remains unsettled. Whenever the issue is determined, it will not be on account of a persuasive internal DOJ policy memorandum. Rather, it will be settled by the judiciary. Deciding matters regarding the propriety of indictments is a function that is routinely performed by the judiciary (e.g., bills of particulars; vindictive prosecution; selective prosecution; improper joinder of parties; improper joinder of persons, etc.).

213. J.M., *supra* note 185, at § 9-10.060 (mandating submission of a case for review at least 90 days prior to the submission of its notice to seek the death penalty, but allowing for extenuating circumstances (e.g. speedy trial compliance, public safety concerns, need for additional information)—that may excuse prior approval).

214. *Id.* § 9-59.000 (requiring approval of the Assistant Attorney General for the National Security Division).

215. *Id.* § 9-63.221 (requiring prior authorization from the Assistant Attorney General of the Criminal Division).

216. *Id.* § 9-2.139(F) (allowing for the Deputy Attorney General to resolve disagreements in the event the Assistant Attorney General does not concur with the plea proposal).

217. *Id.* § 9-2.139(C) (requiring that the notification “include the names and identifiers, if known, of the subjects of the investigation and a general overview of the investigation”).

ruption of the electoral process.”²¹⁸ Consider the case of Michael Cohen, who was a personal attorney for President Trump, and pled guilty and is serving a sentence for, inter alia, violating federal campaign finance laws.²¹⁹ In 2016, Cohen made monetary payments to two women who claimed to have had affairs with Trump.²²⁰ The purpose of the payments were to keep the women quiet so as to not jeopardize Trump’s election chances.²²¹ Before Congress, Cohen testified that he made the payments at the behest of the President.²²² The U.S. Attorney’s Office for the Southern District of New York, which had been investigating the matter, recently terminated its investigation without bringing charges.²²³ Had an Independent Counsel, as opposed to the Southern District, been charged with this campaign finance investigation, he would have been subject to section 9-85.210’s consultation requirements but, under this Article’s proposal, would have also had the option to obtain a review by the Division of the Court.

The Justice Manual thus provides a comprehensive catalog of provisions that effectively regulate federal prosecutorial conduct. It details policies and procedures that guide prosecutor behavior in a myriad of contexts. And in the manner set forth in this Article’s proposal, the Justice Manual can also be used as a critical check upon the investigative and prosecutorial discretion exercised by

218. *Id.* § 9-85.210 (mandating consultation with the Public Integrity Section “before any inquiry or preliminary investigation is requested or conducted.” The section further requires consultation prior to “instituting grand jury proceedings, filing an information, or seeking an indictment charging a campaign financing crime.”).

219. Matt Zapotosky, *Prosecutors Have ‘Concluded’ Michael Cohen Campaign Finance Probe, Judge Says*, WASH. POST (July 17, 2019), https://www.washingtonpost.com/national-security/prosecutors-have-concluded-michael-cohen-campaign-finance-probe-judge-says/2019/07/17/733391a0-a8b1-11e9-9214-246e594de5d5_story.html [https://perma.cc/5LLC-MZMR] (noting Cohen’s guilty plea and sentence of three years in prison).

220. *Id.*

221. *Id.*

222. David A. Sklansky, *Cohen, Trump, and Campaign Finance Violations*, STAN. L. SCH. LEGAL AGGREGATE (Aug. 22, 2018), <https://law.stanford.edu/2018/08/22/cohen-trump-and-campaign-finance-violations/> [https://perma.cc/4DMY-PTKE] (“Trump is directly incriminated. Cohen said in court that he made the payments at Trump’s direction. Actually, what Cohen said was that he arranged the payments ‘in coordination with and at the direction of a candidate for federal office,’ but it’s clear that the candidate was Trump.”); see also Michael D. Shear, *Testimony from Cohen Could Compound Legal Issues for Trump*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/politics/congressional-testimony-cohen.html> [https://perma.cc/3LLP-G4ZQ] (discussing Cohen’s congressional testimony); Ben Protess, William K. Rashbaum & Benjamin Weiser, *Investigation into Trump Campaign Finance Violations Is Over, Judge Says*, N.Y. TIMES (July 17, 2019), <https://www.nytimes.com/2019/07/17/nyregion/michael-cohen-trump-investigation.html> [https://perma.cc/ZU4P-FJBH] (indicating that federal prosecutors had concluded their investigation into the campaign finance allegations but that there was no indication whether the prosecutors intended to file additional charges).

223. Kevin Breuninger & Dan Mangan, *Feds End Probe of Hush Money that Trump Lawyer Michael Cohen Directed to Stormy Daniels, Karen McDougal*, CNBC (July 17, 2019), <https://www.cnn.com/2019/07/17/feds-end-probe-of-hush-money-that-trump-ex-lawyer-michael-cohen-directed.html> [https://perma.cc/A5YL-Y844].

Independent Counsels. But it is the availability of judicial review in constitutionally appropriate contexts that will allow Independent Counsels the freedom to pursue practices and strategies that are lacking in the current Special Counsel Regulations. Without such independence, the public's trust in criminal investigations of executive branch wrongdoing cannot be restored.

CONCLUSION

What is imperative in a criminal justice system is the administration of impartial justice. To obtain the public's trust, the administration of justice must be fair in appearance and in fact. In this regard, the actions of the judiciary,²²⁴ the litigants—the prosecution in particular²²⁵—and federal and state legislatures are of inestimable influence. This country's extensive struggle with these issues has manifested itself in countless forms, including, but not limited to, judicial rulings²²⁶ and an array of legislative reforms that have addressed racial, ethnic, and gender inequities in the system.²²⁷

224. For an extensive academic discussion of the critical influence of the judiciary in the impartial administration of justice, see Peter David Blanck, *The Appearance of Justice*, 86 J. CRIM. L. & CRIMINOLOGY 887, 890–91 (1996) (“Courts have also recognized that in a criminal jury trial due process requires the absence of actual judicial bias toward the defendant. Professors Redish and Marshall have suggested that the appearance or ‘perception’ of fairness in the courtroom is perhaps the most important or ‘core’ value of procedural due process. . . . Due process not only requires, therefore, that trial judges be fair and impartial, but it also demands that they ‘satisfy the appearance of justice.’ Simply put, a trial judge’s appearance, conduct, and behavior in a criminal jury trial must never indicate to the jury that the judge believes the accused to be guilty.”). See generally U.S. COURTS, CODE OF CONDUCT FOR UNITED STATES JUDGES ch. 2, Canon 2A (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [<https://perma.cc/G5DV-T9J5>] (admonishing judges to “respect and comply with the law and . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”).

225. See notes 29–31 and accompanying text; J.M., *supra* note 185, at §9-5.001 (instructing prosecutors to provide discovery beyond what is constitutionally required, adding that “[b]y doing so, prosecutors will ensure confidence in fair trials and verdicts”). For commentary questioning the ability of prosecutors to carry out these ethical prescriptions, see Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?* 14 GEO. J. LEGAL ETHICS 355, 382 (2001) (“[P]rosecutors are in the business of *judging*, of upholding standards, of exacting penance. To prosecutors, luck is irrelevant. People make choices. The humility and liberation that defenders experience when they connect with a client may be antithetical to what prosecutors need to do. Compassion, while laudable, may not be something prosecutors can afford on a regular basis.”).

226. The Fourteenth Amendment’s Equal Protection Clause has been at the heart of many of these decisions. See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986) (prohibiting the exercise of peremptory challenges to strike prospective jurors on account of race).

227. Recent legislative reforms include the First Step Act of 2018 that contains various provisions related to sentencing reform and, inter alia, eased the application of mandatory minimum penalties. See NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW (2019).

In addition, many states have recently implemented reforms to their cash bail systems. See generally *The State of Bail Reform*, MARSHALL PROJECT: THE SYS. (Oct. 30, 2020),

In the context of alleged executive branch corruption, the Watergate saga gave rise in 1978 to the Independent Counsel Statute, which was an attempt to attain a more impartial investigative and prosecutorial process.²²⁸ Today, the Mueller investigation and the persistent and various interventions by President Trump and Attorney General Barr in executive branch criminal matters counsel a similar response. In essence, history has repeated itself and it is essential that Congress, once again, be mindful of this fact and respond with appropriate legislation.

Public trust demands that our country continuously strive to rid our criminal justice system of its many imperfections. It is something we must do and never stop trying to achieve. Yet, I suspect that in the limited context of this Article, it is impossible to craft a process that is free of controversy or close to perfect in execution. The Independent Counsel Statute was an imperfect solution,²²⁹ and the idea this Article proposes—a return to the Statute with modifications—does not correct, or even intend to address, all of the ills associated with it. Discretion still exists with respect to appointment. The Division of the Court may still select Independent Counsels with biases. Members of Congress will still urge investigations that are unjust. Attorney Generals may refuse to investigate and appoint Independent Counsels when the allegations of misconduct are meritorious. Discretion still exists in terms of what to charge, whom to charge, and which plea packages to offer. And there is still the problem of investigative duration and associated costs.

Yet the Independent Counsel Statute, with all its shortcomings, was better than the system that preceded it, and it is superior to the one currently in existence. When the executive branch is tasked with the charge of investigating criminal activity within its own ranks, the process, at a minimum, is perceptively unfair. Though not a cure-all, a return to the Independent Counsel Statute with the modifications suggested in this Article will significantly mitigate the problems embedded in the Special Counsel Regulations. It protects against the exercise of runaway prosecutorial discretion, grants Independent Counsels the latitude to periodically pursue practices beyond those authorized by the DOJ, and ultimately creates a more legitimate process both in appearance and in fact.

www.themarshallproject.org/2020/10/30/the-state-of-bail-reform [<https://perma.cc/LT9V-YMN3>] (detailing the reform efforts of various states).

228. See notes 41–42 and accompanying text; Cook, III, *supra* note 35, 291–93 (detailing the events predating the Independent Counsel Statute).

229. Julian A. Cook, III, *The Independent Counsel Statute: A Premature Demise*, 1999 BYU L. REV. 1367, 1384–87 (1999) (noting various objections to the statute).