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## The Efficacy of the Independent Counsel Law: Holding Presidents to Account from Nixon to Trump

Joseph Casey Carbone  
*Bard College*

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The Efficacy of the Independent Counsel Law: Holding Presidents to Account from Nixon to  
Trump

Senior Project Submitted to  
The Division of Social Studies  
of Bard College

by  
Joseph Carbone

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## Introduction

The Special Prosecutor has emerged at the most consequential times in American history. A position designed to combat conflicts of interest has become the centerpiece of the most politicized of recent Presidential scandals. Nixon's Watergate scandal, the Clinton-Lewinsky scandal, and, most recently, the Trump-Russia probe were the most high-profile such cases. The treatment and behavior of the Special Prosecutor in these high-stakes scenarios exposed the structural deficiencies of the position. The debate surrounding the Special Prosecutor has developed throughout the years as the office has been modified. All Special Prosecutors appointed before Watergate were under the direct supervision of the Department of Justice, meaning that the Executive had significant influence over investigations that usually implicated their own administration. After the dramatic conclusion of Richard Nixon's presidency came the enactment of the Independent Counsel Law. The law gave the Independent Counsel a degree of separation from the DOJ which in turn provided the Counsel with free rein over their investigations. Such a scenario has led scholars to argue that the law was inherently flawed insofar as it significantly reduced the accountability of the Independent Counsel's office and opened up the office to abuse. Any position with enough authority to remove the President from office has the potential to abuse its power. As the Ethics and Government Act worked to insulate the Special Prosecutor from political pressures, it necessarily reduced the mechanisms by which that office was accountable to political officeholders. The reverse is also true, however; if you make the Special Prosecutor subject to political accountability then you risk undermining the integrity of their investigations. This yields a fundamental question, one explored in the project

below: How can we hold the Independent Counsel accountable without obstructing their ability to do the job?

The recent institutional history of Independent Counsels and Special Prosecutors can be understood as a series of attempts to respond to that fundamental challenge. It is perhaps the analogy of a swinging pendulum that best illustrates the shift from the pre-Nixon framework to the Independent Counsel Law and ultimately returning back to the original structure. Under the Independent Counsel statute of the Ethics in Government Act, the Prosecutor was appointed by a three-judge Circuit Court panel. Overwhelming criticism of the statute prompted its abandonment and the implementation of a new set of DOJ guidelines at the turn of the century which required the Attorney General to have more supervision over these investigations. This shift brought a whole new series of conflicts. The new Special Prosecutor allegedly has full authority over their investigations, however, the office is under the administration of the Department of Justice, an Executive agency run by the President. We have seen with the most recent Mueller investigation that the current Department of Justice guidelines sway too far back in the other direction from the Independent Counsel statute — allowing any attempt at the investigation of the Executive to be impacted, and perhaps impeded, by the President. The modern era of the Special Prosecutor has brought to the fore the question of whether it is possible to create a truly Independent Prosecutor - and indeed whether that goal is desirable in itself. In what follows, I trace the history and role of the Special Prosecutor across the modern era of American politics in an attempt to think through, and offer an answer to, those questions. To begin though, I offer a brief background on the history of the office of the Special Prosecutor.



## **Chapter 1: Literature Review**

### **The Origins Of The Special Counsel**

Prior to Nixon, there were a few Special Prosecutor appointments. The first appointment was under President Ulysses S. Grant in 1875 (Smaltz 1998). He appointed John B. Henderson to investigate the Whiskey Ring Scandal. Henderson began to change the course of the investigation and looked into the misconduct of a close Grant ally and crony, Orville Babcock. While giving his closing argument for the trial of a Treasury Official affiliated with the Whiskey Ring, Henderson alluded to the fact that Grant interfered with the discharge of the Treasury Secretary's duties and Grant fired him. He quickly appointed James Broadhead to handle the remaining indictments in the case. The third-ever Special Prosecutor was appointed in 1881 by President Garfield. Prosecutor William Cook was appointed to investigate the bribery scandal between prominent Congressmen and senior Post Office figures. Garfield ran his platform on government transparency and anti-corruption and Cook had an impeccable reputation (Smaltz 1998). In 1903, President Theodore Roosevelt appointed two prosecutors to investigate another scandal involving the Post Office and bribery. The officials accused were eventually acquitted but two years later, a third Special Prosecutor was appointed to investigate a scandal involving Congressmen and the United States Land Office. No Special Prosecutors were appointed again until the Coolidge administration in 1923. Among other things, President Coolidge inherited the infamous Tea Pot Dome scandal from the Harding administration. Harding's Secretary of Interior, Albert Fall, accepted bribes from private oil companies in exchange for drilling rights on U.S. Navy petroleum reserves. There were many public hearings held by Congress to

investigate but the discourse became increasingly partisan. At the request of President Coolidge, Congress passed a law allowing him to appoint two Special Prosecutors contingent on their confirmation by the Senate. This was the first time a Special Prosecutor has ever needed to be confirmed by the Senate. Coolidge announced the appointment of figures “of high rank drawn from both political parties to bring such actions for the enforcement of the law” (Smaltz 1998). The appointed prosecutors, a former Democratic Senator and a Republican lawyer were unable to indict Fall but he was later convicted by the U.S. Attorney’s office in New York.

The last Special Prosecutor appointed before Watergate was under President Truman in 1950, but the episode was suggestive of the tensions around accountability that would mark the Special Prosecutors of the later Twentieth century. This scandal involved tax fixing and bribery charges against numerous IRS officials. While Congress called for the appointment of a Special Prosecutor in this instance, it was the President, Harry Truman, who initially entrusted Attorney General McGrath with a mandate to “clean up” the scandal and establish trust in the DOJ. Truman was then coerced to appoint Newbold Morris as the Special Prosecutor after the House Judiciary Committee announced that they would launch an investigation into McGrath’s handling of the department. Morris requested 596 questionnaires be distributed to DOJ officials and he began to pursue McGrath in his investigation. He was then fired by Truman and replaced by Judge McGranery. Ultimately, one Justice Department official was removed from office and the inquiry was considered complete.

As this pre-Watergate history suggests, the Special Prosecutor used to be appointed on an ad-hoc basis by the President. Most of these Special Prosecutor appointments involved individuals part of or close to the President’s administration. With the exception of the Grant and

Truman investigations, the Executive did not allow politics to seep into these fragile inquiries. Nonetheless, as I show in later chapters, it was the precedents of the Grant and Truman investigations that would most inform the investigations of Watergate and beyond. With the New Deal reforms beginning in 1933, the power of the Executive and the federal government grew rapidly. The Nixon Presidency symbolized the peak of the imperial presidency and set a precedent of maximal Executive power. The inability to reign in the Executive under Nixon prompted calls to shift Special Prosecutor appointments from an ad hoc to a legislated office as part of the strong efforts to renew faith in government. In 1978, as part of the series of Sunshine laws that sought to foster transparency in government, Congress passed the Ethics in Government Act (Devoy 2011, viii). Among the many statutes regarding financial disclosure was the hotly debated facet of the law – the Independent Counsel Law. This statute created the Office of the Independent Counsel, an office intended to be autonomous from the Department of Justice and Attorney General. Supporters of the law, including Katy J. Harriger, have argued that this position was necessary to serve as an “auxiliary precaution” or keep the Executive in check when conventional checks and balances failed to do so (Devoy 2011, 4). Others also contended that this act balanced power between the Executive and Legislative branches and helped reign in the power of the Presidency. This law sought to create a cushion of separation between the Executive and an investigation to obstruct any kind of “politicized justice” (Devoy 2011, 5).

The Independent Counsel is tasked with investigating and prosecuting cases of suspected wrongdoings by high-ranking administration officials, campaign officials, and Presidents. This position was created to ensure a politically insulated, fair system of accountability for people who hold public office. There were many modifications to the Special Counsel framework that

gave the Independent Counsel freedom. Under the relevant statute of the Ethics and Government Act, the Attorney General is expected to conduct a preliminary investigation to decide whether the Independent Counsel shall be appointed. Within ninety days of the preliminary investigation, the Attorney General is required to decide whether a further inquiry is necessary. If so, they must make a referral to the Special Division of the Federal Court to appoint the Independent Counsel (Cohen 1982, 279). The statute gives the Independent Counsel expansive powers: conducting grand jury proceedings, reviewing documentary evidence, challenging the use of testimonial privilege, receiving national security privileges, seeking immunity for court orders, and most importantly filing indictments (Brown 2019, 6). The law allows for the removal of the Independent Counsel “only by the personal action of the Attorney General and only for good cause, physical or mental disability” (Brown 2019, 7). The Attorney General must then file a report to the panel outlining the reasons for the dismissal which will then be subject to judicial review.

The Independent Counsel statute would go on to be reauthorized in 1983 and 1987 and remained in effect until 1992. The law was then reauthorized in 1994 during the interim years of the Whitewater controversy but was then not renewed in 1999 following worries of excess power from the Iran-Contra affair and Whitewater scandal (Brown 2019, 8). Following the expiration of the infamous Independent Counsel statute, the Department of Justice implemented new guidelines allowing the Attorney General to assume the authority of hiring the Special Counsel. The Department commented that this new policy was meant to generate a “strik[ing] a balance between independence and accountability in certain sensitive investigations” (Brown 2019, 8). In addition to the appointment of the prosecutor, the Department of Justice holds the authority to

determine the scope of jurisdiction of the investigation and is responsible for the removal process. The Independent Counsel inquiries are entirely funded by the Justice Department and attorneys must communicate any major developments to DOJ leadership officials. At the conclusion of the inquiry, the Independent Counsel is required to file a confidential report to the Department.

All of these reforms under the new guidelines were meant to rebalance the distribution of power. However, this shift in the opposite direction prompted a whole new set of considerations within this debate. Under the Independent Counsel statute, many critics felt that the “insulation” of the Prosecutor made it increasingly difficult to hold them accountable if they were to abuse their power. Under the Nixon and DOJ guidelines, the oversight burden is placed on the Executive. With all of the appointment and dismissal privileges being held by the President, the office is far more susceptible to political interference. This is dangerous because the President and their appointees ought not to have influence over investigations involving their own administration officials. Furthermore, the credibility of Special Counsel investigations is grounded in the prosecutor’s impartiality. President Trump commonly referred to the Mueller investigation as a “witch hunt”—implying that the investigation was unfair and politically motivated. Given the public nature of Special Counsel Investigations, these comments are aimed at diminishing any incriminating evidence that points to the President. In addition, Trump via Barr was able to impede the publication of the investigation's findings. This structure does however make room for political accountability because a President firing a Special Prosecutor may indicate guilt and is an act of obstruction of justice. With these events being public, voters have the power to draw their own conclusions from the investigation and hold the Executive

accountable at the polls. This principle may not be reliable because it relies on informed, rational voters and does not allow the President to be criminally sanctioned for their actions. Historically, then, the development of the office of the Special Prosecutor has been informed by an evolving debate over how best to balance powers in pursuit of meaningful executive branch accountability.

### **The Conceptual Debate Regarding the Special Counsel Framework**

The Independent Counsel section of the 1978 Ethics and Government Act was criticized from the outset on the basis of its failure to adequately balance the needs of prosecutorial empowerment and executive autonomy. Executive accountability is essential, especially in an age where Congress has become increasingly ineffective at oversight, but the ability of a Special Prosecutor to drain attention from an Executive or to engage in spurious, politicized, and/or disruptive investigations presents a threat to effective governance. This possibility quickly became apparent a year after the enactment of the law, when the first Independent Counsel appointment looked into the alleged cocaine use of Jimmy Carter's Chief of Staff, Hamilton Jordan (Cohen 1982, 278). He was later exonerated. Another investigation occurred four months after looking into the cocaine use of President Carter's re-election campaign manager. On the basis of these and other actions, commentators across the political spectrum have expressed concern over the powers wielded by Special Prosecutors, as well as support for the aims of accountability that the office's existence serves.

One of the sustained critiques of the law was that it was trivialized to pursue such negligible offenses and held those in office to an unfair standard (Cohen 1982, 279). Scholar and

Former Secretary of Defense William Cohen argues that the law has the right intention; however, there are intense inequities and deficiencies. First, he says that the preliminary investigation should only be initiated when “specific information sufficient to constitute reasonable grounds to investigate” (Cohen 1982, 280). Further, the Attorney General must consider two important factors with the information they receive: the degree of specificity and the credibility of the source (Cohen 1982, 280). Once the Attorney General has enough to pursue an investigation, there must be a heightened appointment standard that follows the prosecutorial guidelines of the Department of Justice. These Special Counsel investigations receive so much public attention that even an exoneration comes at an expensive political cost. To Former Secretary Cohen, the statute needed to be amended to encompass only the most flagrant conflicts of interest.

Richard Posner is a retired U.S. Circuit Court Judge who has been very vocal about his reservations regarding the Independent Counsel statute. In his book *Affair of State*, he reviews the conduct of the Special Prosecutor in the Clinton investigation, Kenneth Starr. He explains why Starr embodied everything that an Independent Counsel is not supposed to be. In Posner’s narrative, he argues that Starr was not pursuing this case as an unbiased, objective investigator. He contends that the trouble began during the appointment process. Robert Fiske was the first Prosecutor appointed to investigate Whitewater but was removed by the Circuit Court panel for “pretty feeble” reasons (Posner 1999, 65). Although Starr was not particularly far-right in his politics, he served under the Bush administration and was appointed as Special Prosecutor by an overwhelmingly conservative panel. Starr was the Solicitor General under Bush who was beaten out of his re-election campaign by Clinton (Posner 1999, 66). Starr had many ties to the Republican party and yet was still appointed to investigate the following administration’s

President. Posner challenged the partiality of Starr's report on three points. First, the report should have contained an analysis of what conduct rises to the level of an impeachable offense (Posner 1999, 78). Second, it was too sexually explicit in its content. Lastly, it was blatantly one-sided against the President (Posner 1999, 79). Throughout his writing, Posner alludes to the idea that Starr fabricated the Lewinsky scandal from the legitimate investigation into Whitewater and argues that the grounds for investigating the Lewinsky affair were unconvincing.

Not all commentators have been so critical, however. Gergana Dimova conducted a study on the impact of government media scandals in Germany and Russia to put the Mueller probe into perspective. She was particularly interested in the impact of the allegations on democracy and political risk. Ultimately, she found that the appointment of the Special Prosecutor was healthy and necessary for American Democracy. She argues this point through what she calls "accountability pyramids." In Russia, there are very few modes of accountability. This allows power to be monopolized by the President. The United States' pyramid resembles Germany's — there are far more modes of accountability and the pyramid is flatter (Dimova 2017). Dimova argues that the appointment of Mueller diversifies the available accountability measurements, making it less likely that one is manipulated (Dimova 2017). In Trump's case, she outlines six options: Senate Committees, Congressional Committees, Midterm Elections, Trump's approval rating, Congressional approval ratings, and the Special Prosecutor. Dimova says "The rationale that adding one more accountability mechanism has an intrinsic democratic value reflects the reasoning of the Founding Fathers, who wanted to build a system of checks and balances, which creates a *safety net*, in case one of branches malfunctions" (Dimova 2017). American democracy relies on consensus to create changes and if enough accountability actors behave in unison, there

will be a fair distribution of accountability. Dimova does, however, share the concern of those who believe that the integrity of the investigation is entirely based on the impartiality of the so-called “independent” prosecutor. The professional reputation of the appointed official is paramount for the legitimacy of the accountability instrument (Dimova 2017). Throughout the numerous case studies, the objectivity of the Special Counsel has been challenged and used to discredit the various investigations.

The criticisms of the Independent Counsel Statute were echoed in the case of *Morrison v. Olson*, wherein the Supreme Court ruled overwhelmingly to uphold the Ethics in Government Act 1988. The decision explores many of the tensions surrounding the role of the Special Prosecutor discussed above, reframing them in terms of constitutional disputes over the separation of powers and the power of appointment. The Justices voted 7 to 1 to uphold the Independent Counsel statute. On the question of appointment powers, Chief Justice Rehnquist ruled that this law was constitutional and that the Independent Counsel did not need to be appointed by the President and confirmed by the Senate (Brown 2019, 24). There were three principal reasons why an appointment by the Attorney General was permissible, each related to the limited scope of the appointment. First, the law allowed for the removal of the prosecutor by the Attorney General with just cause. Second, there was a limited scope of duties. Lastly, the prosecutor’s jurisdiction was limited in the eyes of the Court (Brown 2019, 24). On questions related to the separation of powers, the majority confirmed that this statute did not violate the separation of power clause of Article II. Although there was a degree of independence from the Executive branch, the Court believed that the statute gave sufficient control to the Executive (Brown 2019, 24). Justice Scalia wrote the sole dissent in the case, offering a formalist argument

that the Independent Counsel clause plainly violates Article II. Noting that the Executive enjoys exclusive power over criminal investigations and prosecution under the Constitution, Justice Scalia found the statute's denial of the President's authority over the Special Counsel to be unconstitutional (Brown 2019, 24). After citing the separation of power clause in Article I, Scalia carried on to say "That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish — so that "a gradual concentration of the several powers in the same department," Federalist No. 51, p. 321 (J. Madison), can effectively be resisted" (*Morrison v. Olson* 1988, 699). Scalia's deep respect for the institution of separation of powers and his formalist interpretation of the Constitution makes his position clear; the right to oversee prosecutions and investigations is reserved only for the Executive.

Scalia's dissent found favor with former Federal Appellate Judge Richard Posner. As noted above Posner has been critical of the potential for abuse under the operation of the office of Special Prosecutor, highlighting in particular Kenneth Starr's abuse of power and the failures of the Judicial panel appointment process. He argues that if Clinton had more control over appointment and investigation, the controversial investigation would not have transpired in the first place (Posner 1999). In his book, Posner discusses the *Morrison v. Olson* decision and focuses a notable amount of time on the Scalia dissent. Posner says "What is most striking about the majority opinion is its failure to engage with the Realpolitik considerations advanced in Scalia's dissent (Posner 1999, 223). He goes on to call Justice Renquist's opinion "dry" and "legalistic in a bad sense" (Posner 1999, 221). Posner explicitly criticizes the majority opinion view that the Independent Counsel statute is harmless because the President has the ability to

remove the appointee with cause. The majority failed to recognize that an individual appointed by a court panel has no political legitimacy and ultimately could decide the employment status of the President (Posner 1999, 224). Scalia's dissent almost prophesied Kenneth Starr's abuse of power.

There are many that believe the Special Prosecutor is the perfect solution to holding the President accountable. In our democratic system, checks and balances are necessary for three branches of government in equal power. Congress has had an increased difficulty reigning in the growing power of the President and conducting the necessary oversight. The Executive has the most concentrated power over any individual in our government, which is why it is paramount that they are held accountable. Proponents of the Independent Counsel statute argue that an individual free from political accountability and influence can most effectively investigate Executive wrongdoing. There has been an ongoing effort by those who support the institution but believe there need to be adjustments. There were numerous bills proposed by the 115th and 116th Congress aiming to restrict the ability to remove a Special Counsel (Brown 1998, 22). This legislation would insulate the investigation and require a federal court to review the removal after the Attorney General makes the recommendation (Brown 1998, 23). It is likely that this would have withstood the balancing viewpoint laid out in *Morrison v. Olson* because the Executive branch still retains control over the appointment.

While there had been a few Special Prosecutor appointments scattered throughout American history, the Watergate scandal gave rise to a significant paradigm shift for the Special Counsel framework. After the ultimate overstep of Executive authority exhibited by Nixon's dismissal of the Special Counsel, legislatures began to reassess the dangerous relationship

between the President and the Special Counsel. The Independent Counsel law came as a result of this tension and made the Independent Counsel autonomous from the Department of Justice. Critics vilified the law arguing that it clashed with the separation of powers and would concentrate far too much power on one individual. With the right safeguards in place, the Special Counsel can be an effective tool in holding the Executive accountable.

## **Chapter 2: Nixon, the Independent Counsel Law, and the Saturday Night Massacre**

Nixon's order to dismiss Archibald Cox during the Saturday Night Massacre was a flagrant overstep of Executive power. Nixon's Special Counsel investigation was what initially sounded the alarm that the existing relationship between the Executive and Special Counsel was inherently flawed. Nixon's misconduct sparked widespread public distrust in government and legislatures scrambled to reinstate faith in government. Many believed that the only resolution was transferring the Special Prosecutor appointment power from the Executive to the Judiciary and creating a legislated office. This prompted a contentious debate surrounding the separation of powers and the constitutionality of Judicial appointments. Ultimately, the Independent Counsel Law was passed as part of the Ethics in Government act of 1978. We will come to see in the Clinton case study that this legislation may have gone too far in making the Special Prosecutor more independent. The question that continues to resurface is how can we limit the Special Prosecutor's power without interfering with their ability to do the job?

### **The Watergate Break-in and Nixon's Cover-up**

On June 16th, 1972, five men broke into the Democratic National Convention Headquarters at the Watergate complex in Washington D.C. These men brought telephone bugs and sought to take pictures of sensitive documents. During the attempt, the perpetrators were arrested and taken into custody. As law enforcement officials searched the burglars' hotel room

they found an address book with the initials “WH.” It later transpired that these individuals were hired by officials working under the Republican President Richard Nixon to secure his reelection—“WH” stood for the White House (Anderson 2007, 36). Even in the early stages of the investigation, it became increasingly evident that Nixon was associated with those involved in the Watergate break-in. But as the media unraveled the nature of the plot, the scandal grew increasingly close to the President himself. A team of reporters from the *Washington Post* including Bob Woodward and Carl Bernstein began to find multiple links between the burglars and official Nixon re-election efforts. Among the burglars were former FBI agent Gordon Liddy, a CIA agent, White House consultant Howard Hunt and a salaried Security Coordinator for the President’s reelection committee, James McCord (Anderson 2007, 14). As developments in the scandal put pressure on President Nixon and his associates, a recorded conversation between Nixon and his Special Counsel, the “Smoking Gun,” revealed Charles Colson’s deliberate effort to cover up this scandal; “It’s going to be forgotten” (van der Voort, A)

As the scandal began to coil closer to Nixon, the President accepted the need for and undertook a response. Three days after his conversation with Colson, Nixon had a conversation with his Chief of Staff, Bob Haldeman, instructing him to dismiss the FBI investigation (van der Voort, B). In August, Woodward and Bernstein announced in the *Washington Post* that the Nixon reelection campaign wired \$25,000 to one of the Watergate burglars (van der Voort, B). The scandal gained significant publicity when the Senate Watergate Committee began its own investigation. Nixon tried to regain control of the situation with a televised address on April 30th (van der Voort, B). These televised addresses, where Nixon would defend himself and convince the American public of his innocence, were a trademark of his. He had done so successfully

earlier in his career in the Checkers Speech where he exculpated himself from questionable campaign donations. During the Watergate address, he claimed total innocence and said he was unaware of everything that had transpired. He pushed the entirety of the responsibility on his aides and Special Counsel, claiming that they were not transparent with him. He announced that Haldeman, Dean, and Ehrlichman had resigned from their positions in the White House and announced the new appointment of Elliot Richardson as Attorney General. Nixon claimed that he was going to take a more hands-on approach in dealing with the apparent corruption in his administration. He said, “New information then came to me and persuaded me... that there had been an effort to conceal the facts, both from the public, from you, and from me” (van der Voort, B). Nixon then followed this by personally taking on responsibility for launching new inquiries into the matter. This made it clear that no one around him was safe. During Richardson’s confirmation hearing he promised Congress the appointment of a new Special Prosecutor and on May 18, 1973, Archibald Cox was appointed to investigate the Watergate scandal. Archibald Cox was a former U.S. Solicitor General and Harvard Law School professor. He had a reputation for being nonpartisan, independent, and a man of integrity (Rodino 1994, 8).

During one of the Senate Watergate Committee hearings, deputy assistant and trusted Nixon aide Alexander Butterfield revealed the installation of a voice-activated taping in the Oval Office to the committee (Van der Voort, B). This initiated the panicked downfall of President Nixon because the truthfulness of his words could be assessed. The Senate Watergate committee and Special Prosecutor Cox subpoenaed the tapes for their investigations. Nixon recognized the incriminating nature of these tapes and cited his Executive privilege as President: the “principle of confidentiality of Presidential conversations is at stake in the question of these tapes. I must

and I shall oppose any efforts to destroy this principle, which is so vital to the conduct of this great office” (van der Voort, B). Cox went to the US District Court to require Nixon to hand over the tapes. Litigation continued and both the District Court and Appellate Court ruled that Nixon was required to submit the tapes to Cox (Kassop 1992, 25). Nixon tried to compromise and offered a summary of the tapes in return for the ending of the subpoena requests (Kassop 1992). This was the last bit of hope Nixon could hold onto and he persisted in trying to keep the tapes from getting out.

### **Nixon’s Dismissal of Special Counsel Cox**

Everything culminated on October 20, 1973, during what became known as the Saturday Night Massacre. In the midst of the investigation and Senate hearings, both Cox and the Senate ordered subpoenas for taped conversations proving that Nixon made an effort to cover up the break-in. On the night of October 20th, Nixon first ordered Attorney General Richardson to fire Special Prosecutor Cox. Richardson refused and then promptly resigned his position. President Nixon then turned to Deputy Attorney General William French Smith who also refused and resigned his position. The next in line of succession was Solicitor General Robert F. Bork who ultimately fired Archibald Cox. Within thirty minutes of Cox’s dismissal, Nixon ordered FBI agents to restrict office access for Cox, Richardson, and Ruckelshaus (Andrews 2013). Cox’s files were secured and removed from his office (Rodino 1994, 10). Department of Justice guidelines required Nixon to appoint someone new to the role of Special Prosecutor. Reluctantly, Nixon appointed Leon Jaworski to continue the inquiry.

Nixon's dismissal of Cox during the Saturday Night Massacre was unlawful and showed that if given the opportunity, the President would take advantage of their close proximity to Special Counsel investigations. The pre-Nixon DOJ regulations held that "the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and not without the President's first consulting the Majority and Minority Leaders, Chairmen, and Ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action" (Rodino 1994, 10). First, Nixon did not consult with any Legislative leaders before taking this action. Surely, if he were to approach an elected official for support on this, he would have had very little luck. Dismissing the chief investigator of an inquiry into the President's own conduct is a flagrant ethical violation. Second and most importantly, Cox showed no semblance of "extraordinary impropriety" during his time as Special Prosecutor. Nixon's only conceivable justification for firing Cox was to protect himself from the investigation and ultimate removal from office.

The legal disputes surrounding the tapes eventually made their way to the U.S. Supreme Court in 1978. Nixon continued his defense asserting that separation of powers granted him full authority over the future of the investigation (Rodino 1994, 11). The Court held this defense invalid according to the special regulation. The Court opined that "the delegation of authority to the Special Prosecutor, in this case, is not an ordinary delegation: . . . with the authorization of the President, the Acting Attorney General provided in the regulation that the Special Prosecutor was not to be removed without the "consensus" of eight designated leaders of Congress" (Rodino 1994, 11). According to this regulation, Nixon's actions were unlawful. Although the Supreme

Court determined the illegality of Nixon's actions, they failed to even consider the validity of the regulation itself (Rodino 1994, 11). This overt abuse of Executive power forced the Legislature to reconsider the President's relationship with the Special Prosecutor. The legislation to this end was drafted in 1976 and 1977 although it did not pass.

### **The Implications of the Saturday Night Massacre and the Emergence of the Independent Counsel Law**

Watergate exhibited clear deficiencies in the existing system of checks and balances. Scholar David Gottlieb points out that the Executive branch holds all of the power to prosecute and investigate crimes. If there is a conflict of interest between an Executive branch official and an investigation, how can we expect that official to be held accountable? This structure relies far too much on the impeachment process which is lengthy, partisan, and has only been executed a few times in American history. Further, impeachment can only occur when an official commits a high crime or misdemeanor (Gottlieb 1999, 564). Moreover, impeachment requires a consensus between both houses of Congress, including two-thirds of the Senate to actually successfully secure a conviction. Lastly, the vital investigative role that the press played in Watergate evinces a concern for accountability in government. But it seems unreliable to depend on the private sector to hold political office holders accountable. With these unsound modes of accountability, there is increased reliance upon the Special Prosecutor to deliver justice.

The greatest development in this area after Watergate was the Independent Counsel portion of the Ethics in Government Act of 1978. This statute prompted a significant shift of power from the Executive to the Judiciary in an effort to rebalance power. The provision holds

that the Attorney General must conduct a preliminary investigation if they receive any “specific information” of a high-ranked administration official violating federal law (O’Keefe 1982, 120). The Attorney General has ninety days to complete this investigation and report to the three-judge panel within the Special Prosecutor Division of the United States Court of Appeals in the District of Columbia. To discontinue the investigation the report must find “that the matter is so unsubstantiated that no further investigation or prosecution is warranted” (O’Keefe 1982, 120). The court possesses the power to appoint the Special Prosecutor and the discretion to disclose the appointment publicly and expand its jurisdiction (O’Keefe 1982, 121). The Special Prosecutor has expansive powers once appointed. They have access to all Department of Justice resources and files and decide the length and publicity of the investigation. The Special Prosecutor was required to inform the House of Representatives of any credible information that could provide the grounds for impeachment. Lastly, they can only be removed for “extraordinary impropriety” (O’Keefe 1982, 122). All of the reforms in this statute were meant to aggressively limit the power of the Executive to prevent anything like the Saturday Night Massacre from occurring again.

Watergate and the discourse that followed prompted the debate over the merits of Judicial versus Executive authority over Special Counsel investigations. Nixon showed everyone what can happen if there are not sufficient boundaries between those in positions of power and those responsible for holding them accountable. In the Independent Counsel Law, we see an effort to make the Special Prosecutor more autonomous. Within days of the Saturday Night Massacre, the Senate and the House both conducted hearings to reform the office of the Special Prosecutor with an assurance of independence (Harriger 1998, 495). Senator Birch Bayh introduced a bill that

called for the Judicial appointment of the Special Prosecutor. This bill sought to achieve the necessary goal of “reestablishing public faith and confidence from which all else proceeds in a democracy” (Harriger 1998, 495). This is when many began to believe that Judicial appointments were the only thing that can ensure an independent investigation of an administration official. This initial push for reform ceased when the newly appointed Special Prosecutor, Leon Jaworski, testified before the Senate Judiciary Committee and guaranteed an investigation. He proposed a new regulation that would only allow him to be fired upon the consent of the committee (Harriger 1998, 496). However, this proved to be a temporary respite and Congress returned to the idea of a Judicially-appointed office in a few months. Just within the few months following Cox’s dismissal, there were thirty-five different pieces of legislation, with over 165 sponsors, aimed at providing a resolution to this issue (Harriger 1998, 496).

The initial effort to create a permanent office was packaged within the Watergate Reorganization and Reform Act in 1976. Some believed that this long-term appointment for the legislated office would be a poor alternative. Many Congressmen got behind the American Bar Association’s proposal for a temporary Judicial appointment initiated by the Attorney General (Harriger 1998, 502). The proposal was backed by many Senators but was met with intense opposition from the Department of Justice. Attorney General Levi launched a lobbying campaign against this movement, arguing that Judicial appointments were inherently unconstitutional (Harriger 1998, 502). The Senate amended the original bill with Levi’s recommendations and it passed overwhelmingly. This early push for a permanent office was halted when the bill was blocked by the House. The legislative office effort was revitalized with the election of Jimmy Carter in 1976 who was a vocal supporter of the endeavor. Carter supported the proposed 1977

Public Officials Integrity Act that called for a temporary Special Prosecutor (Harriger 1998, 503). The House Judiciary Committee found the constitutional arguments against the Senate's bill compelling and the House's final proposal did not include a Special Prosecutor. The Independent Counsel Law was given birth in the Conference Committee and was signed into law as part of the Ethics in Government Act of 1978.

Unfortunately, this hasty response by Congress may have created unforeseen complications. As we will see later during the Clinton investigation, this transfer of power held the potential for abuse by the Special Prosecutors themselves. This conflict between an ad-hoc position versus a permanently legislated one was at the core of the debate for Congress. The impulse of many in Congress was to form a truly independent office that would always be prepared to investigate and thus deter the possibility of another Saturday Night Massacre (Harriger 1998, 504). A legislated office would remove the DOJ from the appointment process and prevent any potential for coordination between the Executive and Independent Counsel. While it is easy to critique the law after seeing its disastrous result, it appears that the ad-hoc arrangement was more practical than many thought at the time. The Saturday Night Massacre set a dangerous precedent for abuse of Executive power and the panicked response was reasonable. The American public and Congress were convinced that the ad-hoc framework where the Special Prosecutor was appointed by the Attorney General had failed miserably. The natural remedy was to legislate an office that insulated the Special Prosecutor entirely from the Executive. It was viewed that the Special Prosecutor is incapable of fairly administering justice when they are selected by a Presidential appointee.

But in hindsight, it might be argued that the ad-hoc model was more successful than it was given credit for at the time. Ultimately Nixon was held accountable and forced to vacate his office because of his misconduct. To that extent, one might say that the pre-Nixon Special Prosecutor framework was successful in holding the President accountable. Although Cox did not successfully prosecute and indict Nixon, he undoubtedly played a role in uncovering Nixon's misconduct. The "Smoking Gun" tape subpoena from Cox was what prompted the Congressional inquiry, appellate litigation, articles of impeachment, and ultimately, Nixon's resignation. It appears that political accountability is a functional mechanism for holding the President accountable. As articulated by scholar Katy Harriger, "All three investigations demonstrated that when a scandal implicates the President or the Attorney General, congressional and public pressure can be brought to bear to ensure that an independent investigation takes place" (Harriger 1998, 497). Proponents of the law would also say that the very presence of the Special Prosecutor's investigation puts enough pressure on the President to hold them accountable. One might argue that the ad-hoc appointment aligns most closely with democratic principles. In the case of Nixon, there was public and Congressional pressure applied to ensure a Special Prosecutor investigation would take place. This only heightens the Prosecutor's drive to execute a fair and thorough investigation. Any refusal to appoint a prosecutor would make the coverup even more apparent. While the Independent Counsel Law does provide an additional check on the Executive, there was no need to remove the appointment power from the Executive.

Legislators in favor of the Independent Counsel Law took the opposing position — the Special Prosecutor will not be able to deter the President from breaking the law if the position is not completely independent from the Executive. The fear derived from Executive control over

the Special Prosecutor. Supporters of the legislated office argued that the Executive-appointed prosecutor would be inherently tied to the President and this would harm public confidence in investigations (Harriger 1998, 497). The argument was that the idea of an Executive-appointed prosecutor is illogical because an Independent Counsel investigation must be grounded in objectivity. The Nixon case study suggests that the only way a President will be held accountable by the Prosecutor is if the former fires the latter and in doing so draws public and political attention to presidential obstruction. A President squashing an investigation into their own misconduct shows the public that their character is compromised. This puts more pressure on the Special Counsel to carry out their investigation and is arguably the only reason why Nixon failed under the prior, ad-hoc framework. His obvious attempt to obstruct the investigation was the subject of intense scrutiny. As we will see with Trump, there may not always be a blatantly obvious instance of obstruction but the Saturday Night Massacre set the precedent that would ultimately deter Trump from dismissing Mueller.

The doctrine of separations of power was central to the constitutional debate over the Independent Counsel Law. While many believed the only way to foster an independent institution was to rebalance power, opponents found this to be plainly unconstitutional. The Judicial appointment of the Special Prosecutor seemed to be the only plausible alternative to Executive appointment and dismissal (Harriger 1998, 499). Proponents of the Independent Counsel Law frequently cited the “necessary and proper clause” from Article I Section VIII of the Constitution. This law entrusts Congress with the power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer

thereof" (U.S. Constitution Art. I Sec. 8). Legislatures justified this powershift by asserting its necessary nature in holding the Executive accountable (Harriger 1998, 499). Opponents of the legislation focus their attention on Article II Section III which outlines the power of the Executive branch. The Constitution states that the President "shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States" (U.S. Constitution Art. II Sec. 3). This clause states that the President claims law enforcement as an Executive function (Harriger 1998, 500). Additionally, opponents of the legislation use Article III of the Constitution to argue that the Judicial appointment of prosecutors yields unconstitutional supervision of the discretionary powers of the prosecutor (Harriger 1998, 500). Proponents of the Independent Counsel law advocated that the shift of power from the Attorney General to the Judiciary does not infringe upon the separation of powers. This transfer of power is essential to ensure that the President cannot control the prosecution of their own misconduct.

## **Chapter 3: Clinton, Whitewater, and the Failures of the Independent**

### **Counsel Law**

The Kenneth Starr investigation of President Clinton demonstrated the clear failures of the Independent Counsel Law. An investigation that is free of political accountability is a double-edged sword. From one perspective, it ensures that the President can't use their power and influence over the Department of Justice to defend themselves. From another perspective, however, there is the possibility that political independence increases the likelihood of abuse of power by the Independent Counsel. Following Nixon's handling of the Watergate investigation, there was a sweeping push to make the Special Prosecutor independent and protected from the President and political pressure. Opponents of this legislation anticipated that total autonomy for the Special Prosecutor would naturally provoke situations where the Prosecutor could abuse this newfound freedom. They feared that an individual with this much unchecked power would pursue investigations for frivolous conduct. This is significant because the very presence of an investigation of a public figure will assuredly result in a damaged public image. This independence gives a copious amount of power to the prosecutor in charge. In this chapter, I will use the Clinton-Whitewater investigation as a lens to assess the utility of the Independent Counsel Law. The bulk of this chapter will be spent discussing how Kenneth Starr's mismanaged investigation was directly enabled by the Independent Counsel statute.

### *Morrison v. Olson*

The basic contours of the debate over accountability that the Starr investigation brought into focus were evident in the Supreme Court's attempts to navigate the Independent Counsel Law a few years before Clinton's arrival in office. The 1988 Supreme Court case, *Morrison v. Olson*, was concerned with the Constitutionality of the Independent Counsel Law, but also grappled with the functionality of the law as a mode of accountability. For background, two House of Representatives subcommittees ordered subpoenas for the Environmental Protection Agency (EPA) to produce documents regarding the DOJ's enforcement of the Superfund law. President Reagan instructed his EPA administrator, Theodore Olson, not to comply with the subpoena. Pursuant to the Independent Counsel Law, the report was forwarded to Reagan's Attorney General and Alexia Morrison was appointed as Independent Counsel. Olson sued Morrison on the grounds that the Independent Counsel Law violates the separation of powers by undermining the power of the Executive branch outlined in Article III of the Constitution. The Supreme Court ruled almost unanimously in a 7-1 decision to uphold the Ethics in Government Act. The majority overwhelmingly upheld the law arguing that the separation of powers was not violated. The majority argued that the separation of powers doctrine was not violated because Congress was not increasing its own power at the expense of the Executive. While the Judiciary plays an active role in these investigations, the Executive branch still holds "sufficient control over the Independent counsel" (*Morrison v. Olson* 1988, 696). The sole dissenting opinion was written by Justice Scalia, who argued the law was unconstitutional because law enforcement is a power solely reserved for the Executive branch. He says "we have never presumed to determine how much of the purely executive powers of government must be within the full control of the

President. The Constitution prescribes that they *all* are.” (*Morrison v. Olson* 1988, 709). In giving the appointment and oversight responsibilities to the court, the law created an imbalance in the separation of powers. The statute vests prosecution, a power reserved for the Executive branch, to the Independent Counsel. Scalia asserts that because of this, the law is “void” (*Morrison v. Olson* 1988, 705).

The second portion of his argument is that this newfound power given to the Independent Counsel is likely to be abused. He asserts that “A system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused....While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty” (*Morrison v. Olson* 1988, 710). Scalia foregrounds the importance of the separation of powers. The Constitution was produced with tyranny in mind and implemented mechanisms to distribute power. Centralized authority cultivates situations for misuse of power. In concentrating so much power in the Independent Counsel with minimal accountability, there is a high probability that an individual can take advantage of their position. This stance was given credibility through Starr’s mishandling of the Clinton investigation.

The anticipated prosecutorial misconduct is precisely what transpired during the Starr investigation. While Starr’s motives were unclear, his investigation was perceived by many as being politically motivated and personal. Richard Posner, a former Federal Judge for the 7th Circuit and staunch adversary of the Independent Counsel Law, wrote extensively on Starr’s political background and how this likely played a role in the way he conducted the investigation. Kenneth Starr was considered a conservative jurist and former Solicitor General. Starr’s apparent political affiliation was a clear red flag, although at the time of his appointment he still had a

strong reputation for integrity and for “fairness and nonpartisan engagement of the law” (Ogletree 1999, 854). Starr served as the Solicitor General under Clinton’s conservative predecessor, George H.W. Bush. It was also known that Starr was appointed by a conservative Circuit Court panel, replacing moderate Robert Fiske. Later on, Starr would be an addition to President Trump’s legal defense team during this first impeachment trial. Rather than showing his devotion to holding public figures accountable, his career has been marked by his political allegiance to the right. As the Clinton investigation developed, we began to see how his politics likely influenced his judgment. The prospect that there could be such a thing as a completely independent, nonpartisan prosecutor seems entirely farfetched. Any individual who takes on the position of the Independent Counsel will have tendencies that influence the way they decide to conduct an investigation—some will be more subjective than others.

In casting Starr’s motivations in this light I am not advocating that Clinton was entirely innocent or that his actions were excusable. The President of the United States holds an immense amount of power and should be held to the highest standard possible; this is why the Special Prosecutor plays a crucial role in preserving American democracy. The Special Prosecutor is meant to be an enforcer; deterring officials from taking advantage of their position of power. Without the capacity to fairly scrutinize public figures, this position is rendered powerless. In the following, I will discuss Kenneth Starr’s conduct in his investigation of President Clinton in rather critical terms. This is done not to condemn Starr’s ethics but rather to demonstrate the inept nature of the Independent Counsel Law when figures such as Starr take on this role. This chapter is designed to show that it is not Starr’s political prejudice that was the problem here; it was the autonomy given to him that allowed him to exploit those prejudices.

### **Fiske's Appointment to Investigate Whitewater**

President Clinton was considered a highly respected and reformist President of his time. Clinton took over the White House in 1992 after beating George H.W. Bush with only 43% of the popular vote (Britannica). He was the first Democrat since Franklin Delano Roosevelt to win a second presidential election and brought economic prosperity to the US economy. After a failed attempt at health care reform, Clinton embraced an approach to end the era of big government. The Clinton administration was marked by numerous victories including the passage of the North Atlantic Free Trade Organisation (NAFTA), The Violence Against Women Act, and the Medical Leave Act (Britannica). He breathed life into the progressive movement — appointing numerous women and minorities to his cabinet and championing issues of education, environment, crime prevention, and women's rights.

A controversy regarding an investment estate carried on from the campaign and through his first term as President. The Whitewater controversy involved President Clinton, then the governor of Arkansas, his wife Hillary, and their associates, Jim and Susan McDougal. The Clintons created the Whitewater Development Corporation in partnership with real estate mogul, Jim McDougal. The Clintons and McDougals took out a \$200,000 loan investing in property to be turned into vacation homes (Dumas 2015). This property turned out to be fruitless as the real estate market plummeted and interest rates rose. The couples lost their investment. The pressure was applied to the Clintons when on March 8th, 1992, a *New York Times* article was published citing McDougal's resentment towards the Clintons for attributing most of the responsibility for the failed venture to them (Dumas 2015). Within the first few months of his presidency, a close Clinton ally was found dead in Fort Marcy Park. Vincent W. Foster Jr. was Clinton's deputy

White House counsel overseeing the Whitewater scandal and many Republican circles theorized that the Clintons had him killed to preserve incriminating Whitewater secrets (Dumas 2015). When in office, President Clinton instructed Attorney General Janet Reno to appoint an Independent Counsel to handle the Whitewater matters. Republican litigator and former U.S. Attorney Robert Fiske Jr. was selected by Reno to ensure the investigation would be fair. Republicans were pleased by this decision and Fiske was met with “universal praise” among the party (Gormley 2010, 97). This praise soon ceased when only after six months, Fiske found no wrongdoings by the Clintons in the Whitewater affair. On the day Fiske filed this report, Clinton reauthorized the Independent Counsel Law, requiring the D.C. Circuit Court to select the Independent Counsel. Reno proposed to the court that Fiske be granted the appointment to continue the Whitewater investigation but the court went on to appoint Kenneth Starr instead. This is a particularly significant event that completely backfired on those trying to foster a fair and impartial investigation. The irony within this demonstrates everything that is wrong with the Independent Counsel Law. Reno appointed a praised conservative that had proven his ability to conduct a fair, sweeping, and efficient investigation. Reno’s reappointment proposal was shot down by the court and Starr was appointed because he had no ties to the President and seemingly no reason to skew the investigation in his favor. Both Reno and Fiske acted faithfully and ethically and conditions were as close to perfect as they could be. It was not until the reauthorization of the Independent Counsel Law and the court’s appointment of Starr that this affair became derailed.

### **Analyzing the Statute's Failures through the Lens of the Starr Investigation**

Starr's investigation has been remembered by many on the left as being excessively subjective and unfair in his treatment of the former President. The Independent Counsel Law was forged to keep the President's political influence away from highly sensitive investigations. As we will see during Starr's handling of the investigation, this law gave the Prosecutor a potentially toxic amount of independence and very little accountability. Legal scholars are quick to point out the numerous instances of unprofessionalism that occurred during Starr's proceedings.

Individuals who are politically accountable could be less likely to act unethically because they know that their decisions are watched by many and could have significant implications. Any position afforded enough power to incriminate the leader of the free world must be kept in check by another institution. The question then arises whether the Judiciary is a more effective mechanism than the political pressure from the Department of Justice in providing oversight. In the case of Whitewater, the Judiciary proved to be inept in reining in Starr and so enabled his misconduct.

Attorney and Harvard Law professor Charles Ogletree Jr. highlights the lack of professional integrity in Starr's work. Ogletree's first criticism of Starr's prosecution was the Starr team's impromptu interviewing of Monica Lewinsky at her hotel room. Lewinsky and her attorney claimed that when the federal agents and attorneys arrived at her room they began firing away with probing questions regarding her affair with the President without her personal attorney present (Ogletree 1999, 859). While she was "technically free to go" she was coerced to speak with the authorities for over eight hours. One of the most shocking allegations regarding this

encounter was that the Starr team implied threats toward her parents as a means of pressuring her to testify against the President. Ogletree fairly points out that interviewing a represented individual without receiving consent from their lawyer is an unethical practice and barred by the American Bar Association's Model Rules of Professional Conduct Rule 4.2 (Ogletree 1999, 859). The obvious reason for this is to prevent prosecution and law enforcement from intimidating subjects into providing incriminating testimony that would serve their interests. In a case seeking to determine whether an intern was having a private affair with the President, credible testimony is imperative to the investigation. This accusation suggests that Starr wasn't pursuing an open inquiry but rather looking for hard evidence that would lead to a Clinton prosecution. While at the time, Starr's team did not violate the Department of Justice guidelines, it is evident that interrogating a young woman without her lawyer present is an unethical practice.

Another predatory practice deployed by Starr's team was his issuance of subpoenas to Lewinsky's family (Ogletree 1999, 860). In the preliminary stages of the investigation, Starr issued subpoenas to Lewinsky's former lawyer, Frank Carter, her mother, and Clinton's secret service agents. Ogletree asserts that subpoenas of this nature are universally frowned upon by DOJ guidelines and ethical conventions. The subpoena issued to Carter blatantly violates principles of attorney-client privilege and "invades the zone of confidentiality and trust" (Ogletree 1999, 860). Further, the subpoenas provided to Lewinsky's family violate general "fair play" procedures. Any well-practiced professional recognizes that it is cruel to expect family members to testify against each other and potentially incriminate someone that they deeply care

about. Ogletree holds that these types of subpoenas were “ethically suspect and seemingly unfair” but legal at face value (Ogletree 1999, 860).

Ogletree’s last criticism of the Starr investigation was the numerous leaks from the investigation. The very presence of a pending investigation on a public figure is extremely damaging to their image, reputation, and re-election ambitions. While an investigation does not necessarily presume the subject is guilty of any misconduct, the assumption is that the figure is in close proximity to some sort of lawless behavior. Further, confidentiality is imperative to any criminal investigation. The sensitive information that is part of an investigation is restricted in order to protect people. In the case of a violent crime, confidentiality might prevent a suspect from seeking vengeance against witnesses. In many cases, leaking privileged information can create a flight risk for a suspect who may try to evade the consequences of their actions. To preserve the integrity of any criminal inquiry, it is imperative for law enforcement officials to keep intelligence from the public sphere. Federal Criminal Procedure 6(e) cites explicitly that prosecutors “shall not disclose matters occurring before the grand jury” (Ogletree 1999, 861). As one might expect, this principle is even more critical when the case grapples with the conduct of the leader of the free world. After the Starr investigation concluded, the Justice Department and a federal judge began investigating ties between the Office of the Independent Counsel and grand jury leaks to the media (Ogletree 1990, 861). All of the media outlets cited a source from within the Office of Independent Counsel (OIC) and so Chief Justice of the D.C. District Court, Norma Holloway Johnson, was appointed a special master to look into these leaks. Starr admitted that he and his team had spoken with the press about the grand jury testimony. Ogletree asserts that Starr

was likely not responsible for this misconduct because he only told the press what *would* happen in the grand jury, not what necessarily *did* happen (Ogletree 1999, 861).

The appointment of the Special Master to investigate the leaks raises some major concerns regarding the legitimacy of the Office of the Independent Counsel. If we cannot rely upon the Special Prosecutor to faithfully administer the law and conduct a proper investigation, the position is rendered pointless. The ability to deter misconduct rests entirely on the credibility of the Special Prosecutor's report. Ogletree interestingly points out that "public interest in the OIC matter reached an alarmingly low level early in the investigation, and President Clinton's approval rating actually increased during the early days of the scandal" (Ogletree 1999, 861). The role of the Special Prosecutor is to keep the President and high-ranking officials in check, but leaks in this scenario are suggestive of a desire to use the office to further political goals. If this is what occurs under the Independent Counsel Law framework, then the Special Prosecutor may be unable to successfully fulfill their role. Ogletree makes the point that there is a universal decline in ethics within the legal profession credited to the competitive drive and the "win at all costs" mindset. One of Ogletree's subsidiary arguments is that ethical guidelines are not enough because lawyers like Starr use them to get as close to the line of illegality as possible without crossing it (Ogletree 1999, 865). Assuming that we buy Ogletree's argument that there is a decline in ethics in the legal profession, the Independent Counsel Law offers these lawyers too much freedom to push the line.

In Posner's acclaimed book, *An Affair of State*, he highlights the importance of prosecutorial discretion and elucidates the role it played in the Starr investigation. Posner describes how Starr's arguably unethical use of prosecutorial discretion was legitimized by the

Independent Counsel Law. In Posner's chapter on the prosecution, he says "The impersonality, the unemotionality, of law enforcement is a notable advance over justice as revenge, which preceded the modern notion of criminal justice and founders on (among other things) the lack of emotional distance between law enforcer (the avenger) and the criminal" (Posner 1999, 59). Posner claims that the American justice system was founded on principles of fairness and that impartiality in criminal proceedings is central to this. A functioning legal system requires a degree of separation between law enforcement and defendants to ensure that a prosecution is not being pursued out of prejudice or other external factors. Posner describes how prosecutorial discretion can oftentimes be levied as an arbiter of injustice. In our three-branch system of government, it is the role of the Legislature to make the law, the Executive to enforce the law, and the Judiciary to interpret the law. Lawmakers leave some gaps in their regulations — some of these may be purposeful, some being the byproduct of the limitations of language. These gaps give both prosecutors and the Judiciary room to interpret the law. Prosecutorial discretion is ultimately the decisions that prosecutors are charged with when litigating a case. Some examples include a prosecutor's choice to drop charges, offer plea bargains and recommend particular sentences. Among many, Posner sees Starr's poor judgment as a function of the powers granted to him under the Independent Counsel Law.

Posner identifies Starr's perjury trap or sting operation to be another strong argument against the Independent Counsel Law. Posner defines a sting operation as "a scheme by prosecutors or police to induce a person to commit a crime for which he can be arrested and prosecuted" (Posner 1999, 77). The main charges in Clinton's articles of impeachment related to perjury. During the earlier Paula Jones lawsuit, her lawyers got Linda Tripp's recordings in their

hands and called Lewinsky as a witness in order to show this type of behavior was common for Clinton. In the midsts of his sworn deposition, Clinton continuously denied having a sexual relationship with Lewinsky. Posner describes this as a perjury trap because Starr's team could have warned Clinton of the content from the Jones deposition but instead allowed him to incriminate himself. Posner suggests the "setup" could have involved cooperation from Jones' lawyers, especially considering that the judge threw out the initial case. Since enticement was not involved in this particular perjury trap, this sting operation was lawful. Posner does assert that "to conduct a sting operation against the President of the United States, in concert with the President's partisan enemies, is certainly questionable as a matter of sound enforcement policy" (Posner 1999, 78). The Independent Counsel Law enabled this type of unsound prosecution style that seemed to go after the President rather than fairly investigating.

The most controversial aspect of Starr's probe was the expansion of the investigation from Whitewater to the Lewinsky affair. How can one justify linking a financial crime from before Clinton's time in office to a sexual affair that took place while in office? The investigation into Whitewater had been going on for over three and a half years by the time the scope of the investigation was expanded. Starr waited until the day before Clinton's deposition in the Paula Jones case to request permission from the D.C. Court of Appeals to embrace potential obstruction of justice charges (Posner 1999, 25). Many, including legal scholar Ken Gormley, argue that the Office of the Independent Counsel manipulated Tripp's narrative to force the Appeals panel to expand the investigation. According to notes from Stephen Bates, a member of Starr's team, the OIC team met with Deputy AG Eric Holder at the Attorney General's office (Gormley 2010, 336). They came with one shocking revelation that they hoped would grant them

authority to expand the investigation. OIC lawyer Jackie Bennet said during the meeting “We were called on Monday morning by Linda Tripp...She told us that a friend and former colleague of hers, a witness in Jones, had been contacting Tripp and urging her to commit perjury. The efforts seem to go back to the President and a close associate of his, Vernon Jordan. The friend’s name is Monica Lewinsky” (Gormley 2010, 336). Apparently, Lewinsky gave Tripp a set of deceiving talking points if she were to be deposed during Jones’ case and were sophisticated enough to be traced back to the White House (Posner 1999, 26). Bates’ notes confirm that there was discussion regarding “the concept of the OICs and the DOJ’s working together on the investigation” (Gormley 2010, 337). The general proposition was that if DOJ lawyers could find a strong enough link between the White House and Lewinsky’s suspect involvement in Jones’ case, that would be enough to transfer the case to the OIC. It became clear that the OIC team presented only Tripp’s narration of the events and willfully avoided the conversation regarding Clinton’s upcoming deposition for Jones. Gormley asserts that there were many DOJ officials who felt “hornswoggled” and “particularly infuriated” that the OIC team “intentionally shaded the facts to seduce the Justice Department into granting the OIC to expand into Lewinsky’s case” (Gormley 2010, 338). After this meeting, DOJ officials were disappointed that Starr’s team formed the narrative that they were forced into taking on the Lewinsky scandal because Reno requested it (Gormley 2010, 338).

As this meeting demonstrates, Starr’s team needed to compel the Department of Justice to expand the scope of the investigation. Following this meeting, Starr and his team drafted a two-page memo to be sent to AG Reno. In this letter, Starr completely walked back the OIC argument that they needed Reno’s permission to expand the investigation — a move likely made

to protect him legally if the contents were made public (Gormley 2010, 338). The memo asserted that Starr's office had jurisdiction over the Lewinsky investigation and pushed that the office should be independent of the Department of Justice in its pursuit of justice. He argued that the OIC could bring a degree of independence to the Lewinsky investigation and instill public confidence — something that would be impossible under Clinton's Justice Department (Gormley 1999, 339). While this was the whole purpose of the Independent Counsel Law, Bates' notes from the team's meeting strongly suggest that Starr wanted to work with the Department of Justice to a degree. The Independent Counsel Law clearly fell short in creating enough separation between the Independent Counsel and the President's Justice Department if these were Starr's true intentions. The Independent Counsel Law gave Starr the autonomy to transition Whitewater to Lewinsky and allowed him to play it off as ethical because the Justice Department sponsored the decision. Starr himself even points out that the Lewinsky matter "had to be investigated. But I was a poor choice to do it" (Gormley 1999, 431). One common critique of the law in its early stages was that it would lead to trivial matters being prosecuted. While a real estate fraud scheme would certainly reach the degree of criminality to be prosecuted, it is less likely that an affair with an intern would as well. Clinton's perjury relating to the affair would also reach the standard to be investigated by the OIC however, he would not have been in a position to lie under oath if Starr had not expanded the matter from Whitewater to Lewinsky.

It becomes clear that Clinton had a target on his back just by reading the sexually explicit content of Starr's report. One of Richard Posner's central critiques of Starr's team was the amount of vulgar sexual narrative in the report. I will refrain from giving explicit examples, however, Starr's report includes some incredibly intimate details about particular sexual

encounters that would significantly alter the way you might view someone in power. Posner fairly points out that the report is supposed to present the objective facts of the case to let the Justice Department decide necessary charges. If Starr was trying to prove that the President committed perjury, he could have easily accomplished this by simply displaying the date, time, and witnesses for the numerous sexual encounters (Posner 1999, 80). What President Clinton had said and done while with Monica Lewinsky is completely irrelevant to exhibit that he lied under oath. One would likely include this type of detail to blemish another person's image. Although President Clinton had obvious reason to discredit Starr's investigation, he would later eloquently summarize the Independent Counsel Law's failure in this case. He says "What should never happen is that someone should be appointed with unlimited powers, unlimited access to law enforcement personnel, unlimited access to budget, unlimited time frame in which to operate, and their main purpose becomes using criminal law and its ability to indict, to bankrupt, and to destroy, to dig up things on someone's personal life" (Gormley 2010, 431). There was certainly something predatory in the manner that Starr conducted his investigation and the Independent Counsel Law fostered these conditions.

One of Posner's critiques unrelated to Starr's prosecutorial discretion was the legitimacy of Starr's appointment in the first place. Robert Fiske conducted a thorough investigation of Whitewater and released a report the same day that Clinton signed a reauthorization of the Independent Counsel Law. As noted, Attorney General Reno requested that Fiske stay on as the Independent Counsel but the Special Division Court panel had the power to reject that request. According to the extant law, "the division of the court shall appoint an appropriate Independent Counsel and shall define that Independent Counsel's prosecutorial jurisdiction" (28 U.S. Code §

593). Posner points out that the three-judge panel that appointed Starr was headed by David Sentelle, a very conservative judge, and seated Lauch Faircloth who had publicly called for Fiske's removal. Further, the panel's justification for Fiske's removal was remarkably weak. They argued that because Fiske was appointed by Clinton's Attorney General, he would be inherently biased in the investigation (Posner 1999, 65). While it may be unfair to determine that Starr's political affiliation influenced the way he conducted the investigation, it is evident that the Independent Counsel Law cultivated a scenario where this question could legitimately be posed.

Starr's appointment becomes even more questionable when you consider his connections within the legal networks opposed to Clinton. Starr's many connections to Paula Jones' and Linda Tripp's lawyers raise questions about the legitimacy of the investigation. Both of their lawyers were known Republican Clinton critics and consulted a junior partner at Kirkland and Ellis, Richard Porter, on matters relating to the Jones case (Posner 1999, 66). Kenneth Starr was a partner at Kirkland and continued to work there throughout the Clinton-Lewinsky affair until July 1998 (Posner 1999, 66). We can never know for certain whether these connections reflected a partisan motivation for Starr's aggressive prosecution of Clinton. What we do know is that this hand-selected individual had personal and partisan incentives to go after Clinton and was put in a position to do so through § 593 of the Independent Counsel Law. The statute is excessively ambiguous regarding the question of the impartiality of the Independent Counsel. § 593 (b) (2) states that the Judicial panel "shall appoint as Independent Counsel an individual who has the appropriate experience and who will conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner" and further "the court may not appoint as an Independent

Counsel counsel any person who holds any office of profit or trust under the United States.”

These lines from the statute give the court an abundance of flexibility to decide what may or may not be a conflict of interest when selecting an Independent Counsel. It simply states that as long as the individual does not currently hold a position where material gain is at stake in the investigation, they can receive the appointment. This is not what the standard ought to be when selecting someone to investigate a highly politicized case.

In *An Affair of State*, Posner says that the Independent Counsel Law is mostly to blame for the controversial investigation. Posner illustrates the contradictory nature of the law, asserting that while it was “designed to give Independent Counsel more credibility than prosecutors employed or appointed by the Department of Justice, the law [...] has had the effect, at least in the case of Starr’s investigation of President Clinton, of giving them less credibility” (Posner 1999, 219). Starr’s hostile approach to the investigation in combination with his politics and connections to the previous administration resulted in a depiction of him as nothing more than an “agent of the Judiciary that is politically hostile to Clinton” (Posner 1999, 219). If Fiske had remained as Independent Counsel there would not have been the same conflict because he did not have the same ties to Jones’ lawyers and the Bush administration. Reno certainly would not have appointed anyone with Starr’s background to investigate Clinton and this could have in turn given the investigation far more legitimacy. Posner advocates for a pre-Nixon Special Prosecutor structure where the Justice Department appoints the individual. As discussed in a previous chapter, there has been a long history of Special Prosecutor appointments where the Department of Justice would hire an attorney from the private sector to investigate high-ranking government officials. Nixon’s firing of Cox and Jaworski tested this long-standing framework in novel ways,

but in the end, Nixon was held accountable (Posner 1999, 220). Posner seems to believe that there was nothing wrong with the initial framework anyway and found it “puzzling that Congress thought it necessary to enact an Independent Counsel Law” (Posner 1999, 220).

Ironically, the mechanisms put in place to ensure fair investigations of public officials are the very structures that enabled Starr to conduct his investigation so poorly. The appointment process for the Special Prosecutor was one of the main reforms that came out of Watergate. The purpose of transferring appointment power to the court was to create a layer of separation between the Attorney General and the appointee. Nixon’s clear effort to disrupt an investigation into his own misconduct certainly drove this shift. In lessening the Attorney General’s role in the appointment and removal process, the Justice Department has far less power over the Independent Counsel. Perhaps in a perfect legal system where judges were completely insulated from their own personal biases and a completely independent candidate for the role of Special Prosecutor existed, then this would be a security for an effective and independent investigation — but that utopia was not evident in the United States of the 1990s. The new law created the illusion that the appointee chosen by the panel would be a neutral figure, and the optimism that this legislation would be successful may have been blinding to many. The Independent Counsel Law convinced many that there is such a thing as a truly independent prosecutor. But as matters unfolded, Starr failed to meet the expected ethical standard. It may be more practical to remove the facade and make the prosecutor politically accountable to the public. The pre-Independent Counsel Law framework, while it comes with its own set of problems, addresses the Special Prosecutor’s prejudices out front and in the open. In an effort to create a more fair process, the law fails to address the inevitable external influences over the Special Prosecutor.

The Independent Counsel Law prompted a major paradigm shift for the Special Prosecutor. Prior to Watergate, the Special Prosecutor was appointed directly by the President or Attorney General and could be dismissed at any time at the discretion of the AG. The Independent Counsel Law as part of the Ethics and Government Act of 1978 came with a slew of reforms to the Office of the Independent Counsel. The new law required the Attorney General to conduct a 90-day preliminary investigation after hearing of alleged wrongdoing and, if necessary, request an appointment from the Special Division of the Federal Circuit Court. The most notable portion of this statute was the expanded power of the Judiciary in overseeing these investigations. The court was given sole authority to select and remove the Independent Counsel, and to determine the scope of the authority in the inquiry. This legislation was made in response to the growing distrust in public officials and the likelihood of holding them accountable in the wake of Nixon's Saturday Massacre. Fiske's and Starr's investigation into Clinton's involvement with the Whitewater scandal was the first major test to gauge the effectiveness of the Independent Counsel Law. While it is a controversial proposition to try to determine the success of a law, it is fair to say that the Independent Counsel Law failed in what it had set out to do. This new statute created a legislated position with more independence and free from influence by the President or Attorney General. As events unfolded, the country saw that Starr wanted to pursue more than just Whitewater; he was going after Clinton. Starr deployed an assortment of tactics to incriminate the President: perjury traps, subpoenas to Lewinsky's family and lawyer, and the excessive interrogation of Lewinsky. Starr's work appeared predatory with his unnecessarily detailed accounts of Clinton and Lewinsky's sexual relationship and an effort to expand Whitewater to the affair. This case study has made evident that the pendulum of

accountability had swung too far in the other direction, exposing the dangers of the Independent Counsel Law and heightened prosecutorial independence.

## **Chapter 4: Trump, the Mueller Probe, and the DOJ Guidelines**

Since its inception in 1978, the Independent Counsel Law has been reauthorized three times: in 1982, 1987, and 1994. The sunset provision of the 1994 Ethics in Government Act required that the law terminates in 1999 if not re-enacted by Congress, a fate that came to fruition in 1999 when Congress failed to reauthorize it. The lack of reauthorization can likely be credited to the law's impact on the Clinton investigation and impeachment. Starr's investigation of the Clintons and their associates cost the American people over \$47 million — all of the OIG investigations in sum cost \$160 million (Cohn 1999, 73). The Starr investigation lasted over five years and smeared Clinton's political career. There was substantial criticism of the Independent Counsel Law from the White House, Janet Reno, and most importantly The American Bar Association (representing over 400,000 attorneys in the US) (Cohn 1999, 74). Among the most jarring of the critiques came from the infamous Independent Counsel himself, Kenneth Starr. When questioned by the Senate Government Affairs Committee about the reauthorization of the Independent Counsel Law, Starr opposed the law and said that it sought to “cram a fourth branch of government into our three-branch system” (Cohn 1999, 74). After the 1999 deadline, the law was not renewed and died off. The death of the Independent Counsel Law prompted the balance of power to swing back to the same legal status as it was pre-Watergate.

### **The Return of the Special Counsel and the Dissolution of the Independent Counsel Law**

With the dissolution of the Independent Counsel Law came the end of the legislated office and the responsibility for managing Special Counsel investigations returned to the Department of Justice. The Attorney General now holds the sole authority to appoint and remove the Special Prosecutor and to oversee indictments and other prosecutorial actions (Cohn 1999, 74). The opposition cited Watergate to justify their fear of Executive control over the Independent Counsel. A few Congressmen, including Pennsylvania Republican Senator Arlen Specter, expressed their concern about the clear conflicts of interest. Specter along with another Republican and two Democrats proposed the Independent Counsel Reform bill of 1999. The bill proposed to keep the Independent Counsel Law but added a few adjustments. First, it sought to change the wording of the standard required in an AG's application to the court for further investigation from "reasonable" to "substantial" grounds (Cohn 1999, 75). This was meant to heighten the standard necessary to pursue an investigation, however, the terms themselves are imprecise. Second, the appointment of the investigator would be made from a list of five individuals all appointed by the Chief Judges of each Federal Circuit (Cohn 1999, 75). The logic behind this was to have a wider pool of candidates to avoid a situation where someone like Starr would be selected from one very conservative panel. Third, the bill removed the power from the Judiciary to expand the jurisdiction of the investigation as had been done with the Lewinsky affair (Cohn 1999, 75). The proposal also pushed to eliminate the Referral Clause that allows the Independent Counsel to turn over information to the House of Representatives that may offer grounds for impeachment (Cohn 1999, 75). Impeachment is a power solely reserved for Congress and this modification sought to rectify this violation in the separation of powers.

Lastly, any investigation would be terminated after two years to prevent unlimited partisan investigations (Cohn 1999, 77). Just as the Ethics in Government Act had sought to address the deficiencies in the pre-Nixon framework, so the proposed Independent Counsel Reform Act tried to address the deficiencies exposed during the Lewinsky investigation.

In the end, this Senate bill did not receive the support to be codified, and that in turn prompted the formation of the new Department of Justice guidelines that we currently operate under. After the expiration of the Independent Counsel Law, Attorney General Janet Reno issued the new Department of Justice Guidelines on July 9th, 1999. Rather than being called “Independent Counsel” those serving under this guideline were considered “Special Counsels” (Congressional Research Service 2002). 28 CFR § 600 outlines the DOJ guidelines which authorize the Attorney General to play a far more assertive role in the Special Counsel investigations. Rather than a three-judge panel, the Attorney General “will appoint a Special Counsel when he or she determines that criminal investigation of a person or matter is warranted” (28 CFR § 600.1). Further, the “jurisdiction of a Special Counsel shall be established by the Attorney General” (28 CFR § 600.1). Next, the Special Counsel is required to report significant events directly to the Attorney General and upon completion of the investigation, “shall provide the Attorney General with a confidential report explaining the prosecution or declination decisions reached by the Special Counsel” (28 CFR § 600.8). One of the more significant sections of these regulations was that the AG was given the power to remove the Special Counsel for “misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies” (28 CFR § 600.7). Under the previous

statute, they could only be removed at the discretion of the Circuit Court for “good cause, physical or mental disability” (Congressional Research Service 2022, 8).

## **The Transition from the Independent Counsel Law to the Department of Justice**

### **Regulations**

In what follows, I will discuss how well the DOJ guidelines endured during the Mueller investigation of former President Donald Trump. However, it would be helpful to first highlight the changes from the statute before diving into the case study. The major difference is the DOJ guidelines give a significant amount of discretion to the Attorney General. The Attorney General has the authority to appoint and remove the Special Counsel, to determine the jurisdiction of the investigation, and has nearly complete oversight over the prosecutor’s operation. The Congressional Research Service states that when allegations are brought to the Attorney General they have three options under which to process the allegations: naming a Special Counsel, directing an initial investigation, or keeping the case within the Department of Justice (Congressional Research Service 2002, 7). The Attorney General has the ability to kill off an investigation if they see fit. Further, the new guidelines eliminate many limitations on the AG’s investigative authority. Granting immunity, issuing subpoenas, plea bargaining, and grand juries are all tools now accessible to the Attorney General that were barred under the previous statute (Congressional Research Service 2002, 7). The Attorney General also has unlimited time to conduct and review the initial investigation which was kept to 90 days under the Independent Counsel Law (Congressional Research Service 2002, 7).

Another notable change between the laws is in regard to the qualifications of the appointed Special Counsel. Under the Independent Counsel Law, the individual chosen was only expected to have “appropriate experience” and be able to conduct an investigation in a “prompt, responsible and cost-effective manner” (28 C.F.R. § 600.3(a)). Under the new guidelines, there seems to be a higher standard of impartiality. The Special Prosecutor “shall be a lawyer with a reputation for integrity and impartial decision making” (28 C.F.R. § 600.3(a)). As the Congressional Research Service correctly notes, this addition makes an apparent effort to prevent partisans from being selected in this process (Congressional Research Service 2002, 8). This is certainly a competent modification to make but it has to be assessed by its functionality within the new framework. Under the DOJ guidelines, this presumed a neutral appointee will be selected by someone who is a partisan and appointed by the President himself. In the Trump-Mueller case study, this adjustment perhaps succeeded; Robert Mueller was a Republican but had a strong reputation for professionalism and ended up conducting a thorough and honest investigation.

Another accommodation made in response to the Starr-Clinton investigation was a narrowing of the jurisdictional authority of the Special Prosecutor. Under the statute, the Independent Counsel can investigate any matter “related to” or which “may arise out of” the original investigation (28 U.S.C. § 593(b)(3)). As we saw, this ambiguity gave Kenneth Starr the capability to expand the Whitewater investigation to the Lewinsky scandal and the perjury related to it, matters that were distantly related. The new law requires the Attorney General to provide the Special Counsel with a “specific factual statement of the matter to be investigated” (28 C.F.R. § 600.4(a)). Further, the Special Counsel holds the authority to investigate federal

crimes committed "in the course of, and with the intent to interfere with," the Special Counsel's investigation (28 C.F.R. § 600.4(a)). The Special Counsel is required to consult with the Attorney General before the investigation makes any significant changes. This provision is an obvious effort to preempt the faults of the Independent Counsel in the Kenneth Starr investigation. As discussed in the previous chapter, Starr knew that there was no logical justification to expand the investigation so he had to deceive the Justice Department. This restriction in the new guidelines seems to be the obvious solution but it is always important to be cautious of simple answers. It is true that an additional check on the Independent Counsel is helpful in preventing abuse of power. At the same time, it is also true that this provides the Attorney General with the capacity to steer an investigation away from the President when there could be legitimate reasons to pursue a new course. The caveat that legitimizes this provision is that any unethical behavior by the AG will be subject to public scrutiny which would hurt the image of the President, the party, and the integrity of the Administration. The shifting of power from the Judiciary back to the Executive depends on the idea that the political pressure will keep the Attorney General in check.

The last and most consequential provision of the Department of Justice guidelines is the requirement of the Special Counsel to file a report to the Attorney General at the conclusion of their investigation. § 600.8 of the Code of Federal Regulations states "At the conclusion of the Special Counsel's work, he or she shall provide the Attorney General with a confidential report explaining the prosecution or declination decisions reached by the Special Counsel" (28 CFR § 600.8 (c)). Under the Independent Counsel Law, a final report was made public upon approval by the three-judge panel (Congressional Research Service 2002, 14). Starr's report on Clinton was criticized for its excessive use of sexually explicit content. As we saw following the release of

Starr's report, this subjected the President and others to unnecessary embarrassment, ridicule, and shame even without an indictment or a forum to defend themselves. The DOJ guidelines allow the Special Counsel to "propose action" and it is up to the Attorney General to pursue such matters. This seems to be where things went wrong in Special Counsel Mueller's investigation into President Trump.

### **The Appointment of Special Counsel Mueller**

One of the hallmarks of the Trump Presidency was Robert Mueller's investigation. Special Counsel Mueller was tasked with investigating Russian interference in the 2016 Presidential election, the Trump campaign's contacts with Russian officials, and obstruction of justice. The saga began on January 27th, 2017 at a meeting in the Whitehouse between President Trump and then FBI Director, James Comey. In this meeting, Trump expressed to Comey that he expected complete loyalty from the FBI director and wanted the agency to formally quash any speculation that Trump officials were linked to the Russian interference (Toobin 2020). While all of this was happening the FBI was actively investigating former National Security Advisor Michael Flynn for lying under oath. Trump also requested that the Flynn investigation conclude. Comey refused to deliver on Trump's numerous pleas and on May 8th, Trump ordered Deputy Attorney General Rod Rosenstein to formulate a memo vilifying Comey's work, particularly in regard to his supervision of Hillary Clinton's use of a private email server (Toobin 2020). Comey was promptly fired and it soon became obvious to Rosenstein that this was not about Clinton's email but about the fear of the Russia investigation coming back to Trump (Toobin 2020). The Trump-appointed Attorney General Jeff Sessions recused himself from Mueller's investigation

and on May 17th, Deputy AG Rosenstein appointed Robert Mueller as Special Counsel (Toobin 2020). Mueller met with acting FBI director Andrew McCabe and Rosenstein to be briefed on the matters thus far. According to individuals present at McCabe's briefing, Rosenstein allegedly said "I love Kenn Starr...but his investigation was a fishing expedition. Don't do that. This is a criminal investigation. Do your job, and then shut it down" (Toobin 2020). Mueller went on to deliver a narrow, focussed, and thorough investigation into the Russian interference in the election.

Robert Mueller was an uncontroversial pick with strong credentials and a long career devoted to civil service. Mueller had previously served as an Assistant United States Attorney, a United States Attorney, an Assistant Attorney General in charge of the criminal division of the Justice Department, Acting Deputy Attorney General, and FBI director. He received a Bronze Star and a purple heart for his service in Vietnam. The report that authorized Mueller's appointment determined a narrow scope for the investigation's jurisdiction. Mueller was solely charged with investigating "the Russian government's efforts to interfere in the 2016 Presidential election," including any links or coordination between the Russian government and individuals associated with the Trump Campaign" (Mueller 2019 A, 1). As the report outlines, Mueller's team made three key findings. First, a Russian entity executed a widespread social media campaign to assist then Presidential Candidate Donald Trump (Muller 2019 A, 1). Second, a Russian intelligence program hacked and stole documents from employees and volunteers on the Clinton campaign. Last and most important, Mueller's Team found several links between Trump's campaign and Russian officials.

Free and fair elections are the cornerstones of American democracy. They are the method by which we elect our leaders and give meaning to the principle “we the people.” It is extremely concerning that a foreign entity attempted and succeeded in influencing the result of an American election. It is considerably more concerning that the winning campaign was involved to a degree. Mueller’s investigation ultimately produced thirty-seven indictments and seven convictions. Nearly all of the indictments cited obstruction of justice charges for lying under oath. The Mueller report explicitly identifies Foreign Policy Advisor George Papadopoulos, National Security Advisor Michael Flynn, Private Attorney Michael Cohen, and others as engaged in obstruction. Mueller wrote simply that his investigation could not “establish that the Trump campaign coordinated with the Russian government” (Muller 2019 A, 2). While this direct link could not be made, President Trump’s numerous attempts to impede the investigation suggest that he was not entirely innocent in the matter. Within the report, Mueller outlines at least ten instances where Trump unequivocally sought to obstruct justice. Some of these instances include efforts to curtail the Special Counsel investigation, efforts to prevent disclosure about a meeting between Trump and Russian officials, the firing of FBI Director James Comey, ordering McGahn to deny the removal of the Special Counsel, efforts to have AG Sessions take over the investigation and specific conduct towards Flynn, Manafort, and Cohen (Mueller 2019 A, ii).

### **Trump’s Effort to Obstruct and Barr’s Mischaracterization of the Report**

The most distinct instance of obstruction was Trump’s blatant effort to remove the Special Counsel. The Mueller report dramatically narrates the moment Jeff Sessions informed Trump of

Mueller's appointment. "Oh my God. This is terrible. This is the end of my Presidency. I'm f\*\*\*\*d" (Mueller 2019 A, 78). Trump challenged Sessions remarking "You let me down...you were supposed to protect me" (Mueller 2019 A, 78). Trump went on to request Session's resignation. This prompted a concerted effort to remove Mueller. Following the appointment, Trump tried to remove Mueller by convincing his advisors that Mueller had conflicts of interest that would discredit the investigation. Trump threw out everything he could to his advisors but none of his appeals were convincing enough. He said Mueller was interviewed to be FBI Director right before his appointment, that his previous law firm represented people affiliated with Trump, and lastly that Mueller disputed fees relating to his membership at a Trump Golf Course (Mueller 2019 A, 80). Advisors including McGahn and Bannon had pushed back against these claims. The Department of Justice ethics office ruled out these claims of conflict of interest and during this time, Trump tried to coerce McGahn to contact Rosenstein to address the issue. (Mueller 2019 A, 81). On Saturday, June 17th, McGahn received numerous phone calls from Trump directing him to contact Rosenstein and remove Mueller. "Call Rod, tell Rod that Mueller has conflicts and can't be the Special Counsel," Trump said (Mueller 2019 A, 86). McGahn refused and went on to resign from his post. In assessing whether Trump's attempted removal of Mueller qualified as an act of obstruction, Mueller considered three factors: whether these were obstructive acts, whether there was a nexus to an official proceeding (grand jury), and Trump's intent (Mueller 2019 A, 88). The report systematically provides substantive evidence that Trump's actions satisfied all three elements. In accordance with the Code of Federal Regulations, Mueller submitted his report to Attorney General William Barr on March 22nd, 2019.

The impetus of the Special Counsel report was to “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” (28 CFR § 600.6). The completed Mueller report contains two volumes and rigorously outlined matters of Russian interference and obstruction of justice in 448 pages. Only two days after the report was delivered, AG Barr sent a four-page memo to members of the House and Senate Judiciary committees to communicate the principal conclusions (Barr 2019, 1). The language in the Barr memo was incredibly ambiguous and completely mischaracterized the findings. In regards to Russian interference, Barr said “The Special Counsel's investigation 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” (Barr 2019, 2). This is only partially accurate and is incredibly deceiving. The Mueller report outlines a few instances where Trump campaign officials were complicit in the Russian meddling. One prime example is George Papoudopolius’s meeting to discuss potential “dirt” on Hillary Clinton with Joseph Mifsud — an individual with ties to Russian intelligence agencies.

The greatest issue with the Barr memo was how he downplayed Trump’s numerous attempts to obstruct justice despite the evidence in the report. Barr quotes the report “while this report does not conclude that the President committed a crime, it also does not exonerate him” (Barr 2019, 3). He goes on to assert that the vagueness of findings leaves it up to the Attorney General to make final legal conclusions deciding what constitutes a crime. He concludes that “Deputy Attorney General Rod Rosenstein and I have concluded that the evidence developed during the Special Counsel's investigation is not sufficient to establish that the President committed an obstruction-of-justice offense” (Barr 2019, 3). According to the memo, there was

simply not enough in the report to indicate that Trump sought to obstruct a criminal procedure beyond a reasonable doubt. Barr justifies this further by stating that Trump's lack of involvement in the underlying crime indicates that he had no reason or intent to interfere in the investigation. Whether Trump was implicated in the election interference, he could certainly have the intent to impede an investigation. This judgment was made entirely by AG Barr — someone with a vested interest in protecting the President. Here we see how placing too much power in the Attorney General to oversee Special Counsel investigations can be problematic.

Mueller took issue with Barr's mischaracterization of the report's findings. On March 27th, Mueller wrote to Barr and Justice Department Officials to address the misleading memo. He says that the summary letter "did not fully capture the context, nature, and substance of this Office's work and conclusions (Mueller 2019 B, 1). Mueller prompted Barr to deliver the full report to Congress and release it to the public. With the report being public, it would be up to the public to draw their own conclusions on the matter of obstruction. The public confusion "threatens to undermine a central purpose for which the Justice Department appointed the Special Counsel: to assure full public confidence in the outcome of the investigations" (Mueller 2019 B, 1). Following this exchange, no obstruction charges were pursued and Mueller was subpoenaed to testify in front of the House Judiciary and Intelligence on July 24th. During his testimony, while Republicans sought to diminish his credibility, Democrats tried to get an answer as to why Trump was not indicted. Mueller was steadfast in his neutrality regarding criminal charges. Mueller asserted "What I wanted to clarify is the fact that we did not make any determination with regard to culpability in any way" (Mazzetti 2019). Lastly, after being questioned by Representative Ted Lieu, Mueller confirmed that the only reason that his team

chose not to indict the President was the OLC opinion stating that the Department of Justice cannot indict a sitting President (Mazzetti 2019).

The implementation of the Department of Justice guidelines swung the pendulum back to where it was pre-Watergate. The return to this framework afforded the Attorney General an abundance of authority over the Special Counsel and their investigations. Relative to the previous case studies, did the guidelines prove to be successful? I find that the answer to this question is similar to that of the Nixon case study. If success is defined by the Special Prosecutor indicting a public official when they have clearly wronged the public, then Mueller's efforts were unsuccessful. Mueller's investigation was done in a spectacular fashion and he conducted a tremendously thorough investigation despite the sensitivity of the case. By the DOJ standards for obstruction of justice, the former President committed a crime and yet no charges were brought against him. Why was the former President never charged when it was evident that obstruction occurred? In the report, Mueller explains that he chose not to make a traditional prosecutorial judgment. He based this decision on an opinion issued by the Office of Legal Counsel (OLC) that states "the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the Executive branch to perform its constitutionally assigned functions" in violation of "the constitutional separation of powers" (Mueller 2019 A, 213). In addition to this, Mueller asserts that the presence of an investigation of a sitting President would be damaging to their image and that officials would have no way to clear their name. It appears that this OLC opinion, which is not a codified law, statute, or guideline, is ultimately to blame for Trump's exoneration. I would argue that the entire Special Prosecutor framework is void if you are unable to deliver a sanction. What gives legitimacy to our legal system and creates order

in society is the government's ability to enforce the law. Mueller's decision to observe this opinion has long-lasting implications for the Special Counsel. The Special Prosecutor's only function is now to conduct an investigation. The burden of enforcement is entirely left up to the impeachment process or the American people's vote.

### **Assessing the Success of the Mueller Investigation**

For a few reasons, the Mueller probe was arguably successful. First, after two impeachments, a Special Counsel inquiry, countless lawsuits, and a hotly contested election, Trump was not re-elected as President. The Trump administration was able to escape several legal challenges that could have easily put an end to the Presidency. Although Mueller's inquiry did not lead to a Trump conviction, the American people held him accountable through political means in the 2020 Presidential election. This was precisely the reason Mueller implored Barr to make the full report public; to inform the people of the misconduct. There is no way to tell for certain if Trump's efforts to obstruct the Special Counsel investigation impacted the public's image of the leader. Whether it was the OLC's opinion or whether it was AG Barr's choice not to pursue obstruction charges, Mueller was unable to bring a direct sanction against the President. His investigation did, however, successfully reveal Trump's role in the 2016 election interference and his obstruction of the investigation itself. Mueller left it up to the American people to decide the remedy for Trump's conduct. The only issue with this is that the obstruction of the investigation concerned the matter of election interference. Arguably, the obstruction worked against the functioning of this exact mechanism of accountability.

The second reason to believe that the Mueller report was successful was its completion despite Trump's obstructive efforts. As discussed above, there were over ten instances where President Trump sought to curtail the investigation, influence testimony, and most significantly, fire the Special Counsel. Trump's efforts to obstruct the investigation began at the start when Attorney General Jeff Sessions recused himself. As the report outlines, Mueller's appointment prompted Trump to have a conversation with his former Campaign Advisor, Corey Lewandowski, where he requested that Lewandowski convince Sessions to come out with a statement that the investigation was "unfair" (Mueller 2019 A, 217). Throughout the rest of Session's tenure as Attorney General, the attacks from Trump persisted and shortly after, Trump would demand his resignation. Matters escalated further when Trump explicitly ordered White House Counsel Don McGahn to persuade Rosenstein to fire Special Counsel Mueller. Trump's actions to dismiss Mueller were analogous to Nixon's dismissal of Elliot Richardson and William French Smith during the Saturday Night Massacre. The only distinction between the two cases is that Nixon continued going down the pecking order until he found someone willing to lay off Special Counsel Cox. When Barr took over, he did not bother trying to get rid of Mueller; his memo, meant to obscure the findings of the investigation, was a more subtle way to obstruct the prosecution. In McGahn's conversation with Trump, he expressed reservations about firing Mueller out of fear that it would be compared to the Saturday Night Massacre (Mueller 2019 A, 290). This conversation in tandem with Barr's memo suggests that public perception provides significant oversight over the AG's handling of Special Counsel Investigations. During the Nixon investigation, this precedent did not exist. The overwhelming response to Nixon's dismissal of Cox will likely deter many Presidents from taking similar action.

Upon the expiration of the Independent Counsel Law, and Ken Starr's investigation Attorney General Reno produced 28 Code of Federal Regulations Part 600. These new regulations outlined the new procedures for Special Counsel investigations. This set of guidelines marked a return to the pre-Nixon apparatus, distancing the Judiciary from the process and allowing the Attorney General more power over investigations. Under this law, the Attorney General holds the sole power to appoint and remove a Special Counsel, determine the scope of the investigation and must be provided a final report of the findings. Special Counsel Mueller's investigation looking into Russian election interference and obstruction of justice put these modifications to the ultimate test. There was virtually no criticism regarding the integrity and credibility of the investigation even after weathering numerous efforts to disrupt the investigation. The Special Counsel team successfully uncovered countless obstruction offenses and Trump campaign officials' complicity with Russian officials. Notwithstanding the proven criminality of the President's conduct, there were no charges brought against Trump. Mueller states in his report that the Office of Legal Counsel's opinion prevented him from making any direct "criminal accusations against a sitting President" (Mueller 2019 A, 1). Additionally, Attorney General Barr mischaracterized the findings of the investigation and downplayed the extent of Trump's efforts to obstruct Mueller. Some may argue that justice was not served and can never be served with the institution of the OLC opinion. Critics argue that the investigation proved to be ineffective and demonstrated that the President, and others in power, can be above the law. Trump did not go on to be charged and there were no impeachment proceedings in regards to obstruction. Defenders of the Mueller investigation would contend that the report served its exact purpose — determining the campaign's involvement in the Russian election

interference. The investigation is simply meant to determine the facts and it is up to Congress to take disciplinary action.

The future of the Special Counsel is uncertain as it has been proven that all of the attempted frameworks have failed. Mueller's team was undoubtedly successful in exhibiting President Trump's criminal misconduct. Under the DOJ guidelines, Attorney General Barr was provided significant power over the Special Counsel investigation and, as we saw, he took advantage of this when he misconstrued the findings in the report. Barr's dishonesty in tandem with the Office of Legal Counsel's opinion made charging Trump for obstruction nearly impossible.

## **Chapter 5: General Analysis and the Future of the Special Counsel**

In the foregoing chapters, I have illustrated how the office of the Special Prosecutor has evolved and how each framework for the office has endured the various tests it faced. Nixon's Watergate scandal was the first instance where the President and Special Counsel dynamic was called into question. Special Counsel Archibald Cox was appointed to investigate Nixon's involvement with the break-in at the Democratic National Convention. During the infamous Saturday Night Massacre, Nixon ordered both his Attorney General and Deputy Attorney General to dismiss Cox. When both refused and resigned, Nixon called on Solicitor General Robert Bork who would ultimately execute the command. After overwhelming criticism, Bork appointed Leon Jaworski to complete the investigation. Before he could be impeached, Nixon resigned and was later pardoned by President Ford. The distrust in government stemming from the Watergate scandal prompted the passing of the Independent Counsel statute in 1978. The last Independent Counsel to be appointed was Kenneth Starr who was tasked with investigating Clinton's failed real estate investment called Whitewater. Clinton's sexual impropriety from his time as Arkansas Governor triggered Starr to expand the investigation to look into the Lewinsky affair and obstruction of justice relating to it. Clinton was impeached but then acquitted despite lying under oath on numerous occasions. The failure of the Independent Counsel Law prompted AG Janet Reno to draft new DOJ guidelines and revert back to the original Special Counsel framework. Lastly, Special Counsel Robert Mueller was selected to investigate the Trump campaign's coordination with Russian interference in the 2016 Presidential election. The Mueller report outlined the numerous Trump campaign contacts with Russian officials and at least ten

instances of obstruction of justice. An Office of Legal Counsel opinion informed Mueller's decision to forgo making any criminal referrals to the Department of Justice. At the conclusion of the inquiry, Attorney General Barr sent Congress a four-page letter that mischaracterized the findings of the investigation and essentially vindicated Trump for his misconduct. Mueller wrote to Barr and testified in front of Congress expressing that Barr's conclusions did not accurately reflect the findings in the report. While Mueller's investigation led to many Trump crony indictments, Trump was not further prosecuted for the obstruction of justice.

Throughout this project, I have used the analogy of the pendulum to illustrate the changes in Executive control over the Special Prosecutor. On one side of the pendulum swing, the Special Counsel is under the direct supervision of the Attorney General, and by extension the Executive branch. The Special Prosecutor is an appendage of the DOJ. The Department of Justice and the Attorney General have an abundance of power to dictate the course of the investigation. They control the appointment/removal process, determine the scope/expansion of the investigation, and can request updates throughout the investigation. This was the arrangement that both Mueller and Cox operated under. Ironically, the perceived failures of this framework are what prompted the Independent Counsel Law. The second swing of the pendulum represents the Independent Counsel statute. This law gave the Independent Counsel excess autonomy over their investigations, making them almost independent of the Department of Justice. To provide some semblance of oversight, the law formed a three-judge panel out of the D.C. Circuit Court that took on the same responsibilities of the Attorney General under the previous framework. The sole role that the Attorney General played was conducting the preliminary investigation to determine whether the misconduct shall be further investigated. Once appointed, the Independent

Counsel had a surplus of authority with limited safeguards to be held accountable. The last and most consequential of the Independent Counsel appointments was Kenneth Starr. Starr's handling of the Clinton investigation demonstrated that independence won't always foster an unbiased and apolitical investigation. Independence meant that the Independent Counsel was liberated from the Executive but it also made it impossible to hold the prosecutor accountable if they were to overstep their powers.

The principles of separation of powers along with checks and balances are foundational to democracy in the United States. Determining the proper framework is difficult because the position of Special Prosecutor is designed to look into instances where the head of the Department of Justice would necessarily have a conflict of interest given their association with the incumbent President. It is nearly impossible to include the Executive branch in the process of oversight but at the same time exclude them because of a conflict of interest. This is why Kenneth Starr and others describe the office as a hybrid fourth branch of government. It is certain that the Special Counsel must be detached from the DOJ to some degree, but the proper distance has yet to be discovered. The Special Counsel under Nixon and Trump was closely tied to the Executive. This method relies heavily upon political accountability in deterring the Attorney General from crossing any boundaries. As was seen in both case studies, individuals within the DOJ demonstrated restraint in interfering with the investigations out of fear of public scrutiny — but others did not. Further, both Nixon's and Trump's efforts to obstruct became public and undoubtedly undermined their image as fit leaders. The Independent Counsel Law depended on the impartiality of the appointed counsel. There was never a concern that the Attorney General

would interfere in the matters but this came at the expense of the accountability of the Independent Counsel themselves.

One might argue that the entire position of the Special Prosecutor should be dissolved because it is not included in the Constitution. The U.S. Constitution already outlines a way to remove people from high office. Article II Section IV of the Constitution grants “Congress the authority to impeach and remove the President, Vice President, and all federal civil officers for treason, bribery, or other high crimes and misdemeanors” (U.S. Const. 1788). There is no need to create a new position that is fickle and inherently unreliable. Impeachment and removal require consensus from both houses of Congress to implicate a public official and so provide a moderated but direct mechanism of accountability. Impeachment places the responsibility under the legislature avoiding models that rely on a Special Prosecutor beholden either to the Executive or Judiciary as a basis of authority. Although this point is persuasive, it is fair to say that the political nature of the impeachment process makes it unreliable as a mechanism of accountability. Impeachment and removal require agreement across both houses and in many instances unless the evidence is overwhelming, there will be a split. President Trump was impeached twice but because the Senate was controlled by Republicans, and few Senators voted to remove their party leader, he remained in office. It is not up to me to determine whether Trump’s actions were legal, however, it is clear that he was able to conclude his term without being indicted or removed after two impeachment trials and a Special Counsel appointment. Clearly, the structure we have in place for holding corrupt officials accountable has proven to be ineffective.

Political accountability also sits uneasily with countering criminality. Both impeachment and Special Counsel investigations are methods to hold the President accountable via political means. Unfortunately, neither allow for the President to be charged criminally. The greatest sanction authorized through the impeachment process is removal from and subsequent disqualification from holding public office under the Constitution. As we saw with the Mueller investigation, the Special Counsel is limited in its ability to press criminal charges against a sitting President. The Office of Legal Counsel's opinion seems to be largely responsible for this barrier. The idea that the President cannot be charged criminally while in office is extremely concerning and goes against democratic principles. The integrity of the justice system's work derives from its ability to administer justice fairly and equitably. The belief that no one is above the law has endured throughout the United States' history. When the framers of the Constitution began building the federal government, they knew what tyranny looked like and implemented measures to ensure it would never return. The founding fathers wanted a duly elected President, not a king. The OLC opinion does hold merit in that it provides a safeguard from petty interference in the execution of office. This is similar to parliamentary privilege that provides criminal and civil immunity to members of Congress. But while petty investigations would certainly impede the Executive, the idea of blanket immunity from criminal prosecution for the holder of the highest office poses a far greater threat.

What is the solution? As described, impeachment is a process solely designed to remove a high-ranking official from their position. For this reason, the role of the Special Prosecutor is even more important in prosecuting officials for criminal matters. Rather than adhering to the pessimism borne by the failure of previous models and disbanding the office altogether, there is

plenty of room for reform. The Independent Counsel statute was flawed for the reasons discussed above but I believe it was a mistake to remove the Judiciary entirely from the process. The Special Counsel operates under DOJ guidelines, utilizes its resources, and is formally considered an employee of the Executive agency. Under the current regulations, the Executive has sufficient power over the Special Counsel. As demonstrated in both Nixon and Trump's investigations, it is inevitable that the Attorney General will influence the investigation. For this reason, it is clear that there must be another check over the Special Prosecutor to ensure that the investigations will not be hijacked by the President. Congress is an unreliable option because they are an inherently political institution. The party in control would likely protect the Executive if it is in their interest - or not protect them in opposing circumstances. The Judiciary is the best option to keep the Special Prosecutor in check because they are the most insulated from partisan influences and from the Executive.

The Judiciary has recently operated as the main check on Executive branch activities. Executive power is regularly challenged by Judicial review in the courts. Judges are one of the very few positions in the federal government that are given lifetime appointments; meaning that judges are free from any political pressures that would influence their decisions. As the Clinton case study demonstrated, a panel of three Circuit Court judges simply failed to provide proper, fair oversight over an Independent Counsel. As I discussed at length, this particular panel was composed of conservative justices who were overseeing the investigation of a Democratic President by a lifelong Republican lawyer. I propose a solution that involves the executive but reverts back to the Judiciary being the primary body keeping the Special Counsel in check. I propose a large panel of 13 judges made up of the Chief Justices from each Federal Circuit Court

and the Supreme Court. This would bring ideological and political diversity to ensure each decision regarding the Special Counsel will be objective and scrutinized. The court would hold the same responsibilities over the investigations as they did under the Independent Counsel statute. This panel of judges would determine the scope and authority of the investigations, approve expansions and hold the power to remove or appoint the Special Counsel. To involve the Executive to a healthy degree, the Department of Justice would be able to make proposals and nominate the Special Counsel to be confirmed by the judicial panel. The inherently political nature of Special Counsel investigations has undoubtedly been an obstacle in holding Presidents to account. The Judiciary is the most politically insulated branch of government that has always been a primary check on executive power. In expanding the panel, the Special Counsel will have the freedom to conduct investigations free from DOJ pressure while also being kept in check by the panel.

At a time when Executive power continues to expand, the Special Prosecutor figure becomes an essential instrument in preserving American democracy. The role of the Special Counsel is to control an agent - The President of the United States. The President of the United States holds an immense amount of power and oversees the Justice Department. The ruler of the free world and one of the most affluent countries on the planet ought not to be above the justice system that they preside over. In order to maintain an organized society, there must be universal faith and trust in the government. Figures including Robert Mueller, Kenneth Starr, and Archibald Cox have emerged at some of the most consequential times in American history to prove that the United States' ideal of justice is legitimate and equitable. For these Special Counsels to properly execute the job that they were appointed to do, they must have the tools to

deter the Executive from engaging in misconduct. At the same time, Special Counsels cannot be granted an excess of power that has the potential to be abused. The Independent Counsel Law and DOJ guidelines attempted to reconcile this tension. It is evident that we have been unsuccessful in creating a model that remedies this conflict.

## Bibliography

- Anderson, Dale. *Watergate: Scandal in the White House*. Compass Point Books, 2007.
- Andrews, Evan. "What Was the Saturday Night Massacre?" History, December 4, 2013.  
<https://www.history.com/news/what-was-the-saturday-night-massacre>.
- Barr, William. "Read Attorney General William Barr's Summary of the Mueller Report," March 24, 2019.  
<https://www.nytimes.com/interactive/2019/03/24/us/politics/barr-letter-mueller-report.html>.
- Bertozzi, Mark. "Separating Politics from the Administration of Justice: The Role of the Federal Special Prosecutor." *Judicature* 67, no. 1 (July 1983): 486.
- Britannica, The Editors of Encyclopaedia. "Bill Clinton". *Encyclopedia Britannica*, 15 Aug. 2021, <https://www.britannica.com/biography/Bill-Clinton>.
- Brown, Cynthia, and Jared Cole. "Special Counsel Investigations: History, Authority, Appointment and Removal." *Congressional Research Service*, March 13, 2019.  
<https://sgp.fas.org/crs/misc/R44857.pdf>.
- Cohen, William. "Reforming the Special Prosecutor Process." *American Bar Association* 68, no. 3 (March 1982): 278–81. <https://www.jstor.org/stable/20748459>.
- Cohn, Marjorie. "The Politics of the Clinton Impeachment and the Death of the Independent Counsel Statute: Toward Depoliticization." *West Virginia Law Review* 102 (2002 1999): 59–79. <https://heinonline.org/HOL/P?h=hein.journals/wvb102&i=71>.

- Devoy, Maeve Aine. "Politicized Justice: Investigating the President from Watergate to Whitewater." University of California Santa Barbara, 2011.  
<https://www.proquest.com/openview/948f3123a8683fbe31c91cc85c012949/1?cbl=18750&loginDisplay=true&pq-origsite=gscholar>.
- Dimova, Gergana. "Investigating the Trump Scandal: Implications for Democracy and Political Risk." *The Journal Of Political Risk* 5, no. 5 (May 2017).  
[https://www.jpolorisk.com/investigating-the-trump-scandal-implications-for-democracy-and-political-risk/#\\_ftn1](https://www.jpolorisk.com/investigating-the-trump-scandal-implications-for-democracy-and-political-risk/#_ftn1).
- Dumas, Earnest. "Whitewater Scandal." CALS Encyclopedia of Arkansas, December 22, 2015.  
<https://encyclopediaofarkansas.net/entries/whitewater-scandal-4061/>.
- Gormley, Ken. *The Death of American Virtue: Clinton vs. Starr*. New York: Crown Publishers, 2010.  
[https://books.google.com/books?id=MkwPI8pFmm0C&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](https://books.google.com/books?id=MkwPI8pFmm0C&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false).
- Gottlieb, David. "A Brief History of the Independent Counsel Law." *University of Kansas Law Review* 47 (1999 1998): 563–72.  
<https://heinonline.org/HOL/P?h=hein.journals/ukalr47&i=584>.
- Harriger, Katy. "The History of the Independent Counsel Provision: How the Past Informs the Current Debate." *Mercer Law Review* 49 (1998 1997): 489–518.  
<https://heinonline.org/HOL/P?h=hein.journals/mercer49&i=499>.
- "Independent Counsel Law Expiration and the Appointment of 'Special Counsels.'" *Congressional Research Service*, January 15, 2002.  
<https://www.everycrsreport.com/reports/RL31246.html>
- Kassop, Nancy, Leon Friedman, and William Levantrosser. *Watergate and Afterward*. Westport, Connecticut: Greenwood Press, 1992.

Mazzetti, Mark, and Julia Hirschfeld Davis. "Highlights of Robert Mueller's Testimony to Congress." *The New York Times*, July 24, 2019.

<https://www.nytimes.com/2019/07/24/us/politics/mueller-testimony.html>.

*Morrison v. Olson*, No. 87-1279 (U.S. Supreme Court June 29, 1988).

Mueller III, Robert. "Report On The Investigation Into Russian Interference In The 2016 Presidential Election." Washington D.C.: U.S. Department of Justice, March 2019.

<https://www.justice.gov/archives/sco/file/1373816/download>.

Mueller III, Robert. "Mueller Letter to Barr," March 27, 2019.

<https://apps.npr.org/documents/document.html?id=5984399-Mueller-Letter-to-Barr>.

"Nixon's Address to the Nation." *Miller Center: UVA*, April 30, 1973.

<https://millercenter.org/the-presidency/educational-resources/watergate/watergate-cover>.

Ogletree, Charles. "Personal and Professional Integrity in the Legal Profession: Lessons from President Clinton and Kenneth Starr." *Washington and Lee Law Review* 56 (1999).

<https://heinonline.org/HOL/P?h=hein.journals/waslee56&i=861>.

O'Keefe, Constance, and Peter Safirstein. "Fallen Angels, Separation of Powers and the Saturday Night Massacre." *Brooklyn Law Review* 49 (1983 1982).

<https://heinonline.org/HOL/P?h=hein.journals/brklr49&i=133>.

Posner, Richard. *An Affair of State : The Investigation, Impeachment, and Trial of President Clinton*. Harvard University Press, 1999.

Rodino Jr., Peter. "The Case for the Independent Counsel." *Seton Hall Legislative Journal* 19 (1995 1994): 5–16.

[https://heinonline.org/HOL/Page?handle=hein.journals/sethlegj19&div=8&g\\_sent=1&casa\\_to ken=DltmRE5CLsQAAAAA:mROk3DoTMXkE-qA1KmR88kOz5tq1IyNOvBnM215Fk4uYmnPdLp33BGOQoDB34jS4Gbk\\_Qdmn&collection=journals](https://heinonline.org/HOL/Page?handle=hein.journals/sethlegj19&div=8&g_sent=1&casa_to ken=DltmRE5CLsQAAAAA:mROk3DoTMXkE-qA1KmR88kOz5tq1IyNOvBnM215Fk4uYmnPdLp33BGOQoDB34jS4Gbk_Qdmn&collection=journals).

Smaltz, Donald. "The Independent Counsel: A View From The Inside." *Georgetown Law Journal* 86 (n.d.). <https://govinfo.library.unt.edu/oic/SMALTZ/speeches/GTLJ.htm>.

The Editors of Encyclopaedia Britannica. "Bill Clinton." Britannica, n.d. <https://www.britannica.com/biography/Bill-Clinton/Presidency>.

Toobin, Jeffrey. "Why the Mueller Investigation Failed." *The New Yorker*, June 29, 2020. <https://www.newyorker.com/magazine/2020/07/06/why-the-mueller-investigation-failed>.

U.S. Constitution, Article I Section VIII.

<https://constitution.congress.gov/browse/article-1/section-8/#:~:text=The%20Congress%20shall%20have%20Power,ArtI>.

U.S. Constitution, Article II Section III.

<https://constitution.congress.gov/browse/article-2/section-3/#:~:text=He%20shall%20from%20time%20to,them%20C%20with%20Respect%20to%20the>

Voort, Tom van der. "Watergate: The Break-In." Miller Center: University of Virginia, n.d. <https://millercenter.org/the-presidency/educational-resources/watergate/watergate-break>.

Voort, Tom van der. "Watergate: The Cover-Up." Miller Center: University of Virginia, n.d. <https://millercenter.org/the-presidency/educational-resources/watergate/watergate-cover>.

28 Code of Federal Regulations § 600 et seq.

28 U.S. Code Chapter 40 § 593 et seq.