1-1-2020

Presidential Crimes Matter

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University of Georgia School of Law
Research Paper Series
Paper No. 2020-18

U.C.L.A. Law Review

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ABSTRACT

The resignations of United States Attorneys Geoffrey Berman and Jessie Liu from their respective positions in the Southern District of New York and the District of Columbia, and Attorney General William Barr's and President Donald Trump's persistent undermining of Special Counsel Robert Mueller's Russian interference and obstruction of justice investigations and prosecutions are clarion calls to reform the process by which the executive branch criminally investigates itself. But there is another critical circumstance—the Special Counsel regulations—that has been largely overlooked and has been grossly underappreciated in the public discussion about undue executive branch influence. These regulations are foundational, their impact is deeply consequential, and absent meaningful reform there is little to prevent a repeat of such executive branch interventions now and in administrations to come.

This Essay discusses these regulations and illuminates how they compromise not only the integrity of investigations of executive branch wrongdoing but also the public trust. In so doing, this Essay reviews a high-profile occurrence during the Mueller investigation and explains how the regulations arguably hamstrung Muller during this process. It proposes a two-pronged legislative remedy that calls for a return to the former Independent Counsel Statute with a significant modification, and defends its constitutionality.

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I would like to thank Professors Daniel Coenen and Barbara McQuade for their helpful comments. I would also like to thank the many faculty members of the University of Georgia School of Law, including Professors Camilla Watson, Nathan Chapman, Greg Polsky, and Harlan Cohen, and the Emory University School of Law, including Professor Matthew Lawrence, who provided excellent feedback during our annual University of Georgia–Emory University Faculty Workshop. Finally, I would also like to thank Jacob Fucetola and Ariel Pinsky for their invaluable research assistance.

TABLE OF CONTENTS

INTRODUCTION

On Saturday, June 20, 2020, Geoffrey Berman issued a statement announcing his resignation from his position as United States Attorney for the Southern District of New York. He stated that it was an "honor of a lifetime to serve" in this capacity and lavished praise upon his replacement, Audrey Strauss, who served under him as Deputy U.S. Attorney.[1] Describing Strauss as the "the smartest, most principled, and effective lawyer with whom I have ever had the privilege of working," he forecasted that she would "continue to safeguard the Southern District's enduring tradition of integrity and independence."[2]

The flowery language of Berman's statements, however, cannot obscure the disquieting reality underlying his departure. During Donald Trump's presidency, the executive branch's undermining of criminal investigations of alleged wrongdoing within its ranks has been persistent, unabashed, and, at times, brazen. The story of Berman's departure is merely the latest addition to this disturbing portrait.

A day earlier, during the evening hours of June 19, Attorney General William Barr announced that Berman had agreed to resign, that President Trump intended to nominate current Chairman of the Security and Exchange Commission, Jay Clayton, as Berman's replacement, and that the President intended to name Craig Carpenitto, the current U.S. Attorney for the District of New Jersey, as Acting U.S. Attorney during the transition.[3] This announcement followed a meeting earlier that day when the men discussed—but reached no agreement—regarding Berman's possible transition to another prominent position within the Department of Justice (DOJ).[4] But what would soon prove

1. Press Release, U.S. Att'y's Off., S. Dist. of N.Y., Statement of Geoffrey S. Berman (June 20, 2020), https://www.justice.gov/usao-sdny/pr/statement-geoffrey-s-berman [https://perma.cc/HA4M-YHU7].
2. *Id.*
3. *See* Press Release, U.S. Dep't of Just., Attorney General William P. Barr on the Nomination of Jay Clayton to Serve as U.S. Attorney for the Southern District of New York (June 19, 2020), https://www.justice.gov/opa/pr/attorney-general-william-p-barr-nomination-jay-clayton-serve-us-attorney-southern-district [https://perma.cc/NP9H-EFSJ] (commenting on President Trump's nomination of Clayton).
4. *See* Andrew Prokop, *The Firing of SDNY US Attorney Geoffrey Berman, Explained*, VOX (June 22, 2020, 5:20 PM), https://www.vox.com/2020/6/22/21298917/geoffrey-berman-sdny-fired-barr [https://perma.cc/45T3-52HL] (discussing U.S. Attorney Geoffrey Berman's history as U.S. Attorney and the events leading up to his firing, and reasoning as to why he was fired).

to be an attempted "Friday Night Massacre" never materialized.[5] Seemingly cognizant of Barr's dubious authority to fire him given the fact that Berman had been appointed to his position by the judiciary, Berman refused to resign and issued the following statement:

> I learned in a press release from the Attorney General tonight that I was "stepping down" as United States Attorney. I have not resigned, and have no intention of resigning, my position, to which I was appointed by the Judges of the United States District Court for the Southern District of New York. I will step down when a presidentially appointed nominee is confirmed by the Senate. Until then, our investigations will move forward without delay or interruption. I cherish every day that I work with the men and women of this Office to pursue justice without fear or favor—and intend to ensure that this Office's important cases continue unimpeded.[6]

Implicit in Berman's statement was a perspective—shared by many—that Barr's actions were undertaken in an effort to undermine the array of criminal investigations that the office was pursuing "that hit close to home for Trump."[7] Alleged campaign finance violations,[8] Rudolph Giuliani's personal business

5. Jennifer Rubin, Opinion, *A Friday Night Massacre That Backfired*, WASH. POST (June 20, 2020, 1:53 PM), https://www.washingtonpost.com/opinions/2020/06/21/friday-night-massacre-that-backfired [https://perma.cc/YXQ8-9XLL].

6. *READ: Geoffrey Berman Responds to Justice Department's Press Release on His Resignation*, CNN: POL. (June 19, 2020, 11:35 PM) (emphasis added), https://www.cnn.com/2020/06/19/politics/ny-berman-statement/index.html [https://perma.cc/U48L-UP7N].

7. Barbara McQuade, *Trump Fires Geoffrey Berman, Exposing Barr's Bully Tactics and Lies in the Process*, NBC NEWS (June 22, 2020, 2:34 PM), https://www.nbcnews.com/think/opinion/trump-fires-geoffrey-berman-exposing-barr-s-bully-tactics-lies-ncna1231776 [https://perma.cc/A7W7-8NBH]; *see also* Barbara Campbell, Ryan Lucas, Colin Dwyer & Jason Slotkin, *President Trump Fires Top U.S. Prosecutor Who Investigated His Allies, Barr Says*, NPR (June 20, 2020, 12:30 AM), https://www.npr.org/2020/06/20/881148365/geoffrey-berman-u-s-attorney-who-prosecuted-trump-allies-says-he-wont-quit [https://perma.cc/PCL6-A4C6] (noting the perspectives of Congressman Jerry Nadler (D-N.Y.) and Elie Honig, former Assistant U.S. Attorney for the S.D.N.Y.); Shayna Jacobs, *Acting U.S. Attorney in New York Expected to Advance Politically Sensitive Cases, Safeguard Office's Independence, Colleagues Say*, WASH. POST (June 21, 2020, 5:12 PM), https://www.washingtonpost.com/national-security/audrey-strauss-us-attorney-new-york-geoffrey-berman-william-barr/2020/06/21/21f7d7ba-b3fa-11ea-a8da-693df3d7674a_story.html [https://perma.cc/8HX9-BPS6] ("Among the attorney general's critics, an answer soon became evident: Berman's departure was neither planned nor voluntary but driven by long simmering frustrations over his office's pursuit of investigations targeting President Trump's interests and members of his inner circle.").

8. *Here's Who Is Taking Over Manhattan's U.S. Attorney's Office After Berman Firing*, NBC N.Y. (June 23, 2020, 1:40 AM), https://www.nbcnewyork.com/news/local/heres-who-is-taking-over-manhattans-u-s-attorneys-office-after-berman-firing/2479740 [https://perma.cc/D6HL-QCTY].

dealings,[9] and the Trump inauguration committee's "possible financial impropriet[ies]"[10] are among the matters the Southern District is currently investigating. As noted, Berman resigned the following day, but only after securing an assurance that Strauss would be his replacement.

Yet, Berman's resistance might have also been informed by a similar episode earlier that same year involving Jessie Liu, then the U.S. Attorney for the District of Columbia. Liu, whose office oversaw the prosecution of Trump's former National Security Advisor Michael Flynn[11] and former Trump aide and advisor Roger Stone[12]—cases inherited from Special Counsel Robert Mueller—was offered a top position in the Treasury Department in exchange for her resignation. In contrast to Berman, Liu agreed to this arrangement and announced her intention to remain in her post until such time as her replacement was confirmed. Barr, however, requested an expedited departure date to which Liu, again, acquiesced. Notably, on the day of her departure, Liu's office reversed course in the Flynn case, lowering its recommended sentence in a revised memorandum submitted to the district court.[13] And in

9. Campbell et al., *supra* note 7.
10. Tessa Berenson, *Geoffrey Berman's Investigations Into Trump Associates Raise Concerns Over His Firing*, TIME (June 22, 2020, 3:47 PM), https://time.com/5857204/berman-trump-firing-questions [https://perma.cc/Y9AK-J2Q8].
11. Michael Flynn had earlier pleaded guilty to lying to federal investigators regarding his conversations with Sergey Kislyak, the Russian U.S. Ambassador, about U.S. sanctions on Russia. Editorial Board, Opinion, *Don't Forget, Michael Flynn Pleaded Guilty. Twice.*, N.Y. TIMES (May 7, 2020), https://www.nytimes.com/2020/05/07/opinion/michael-flynn-charges-dropped.html [https://perma.cc/G6EN-QCUW]. Mueller had initiated the case and Flynn's guilty plea was a byproduct of negotiations with Mueller's team. Spencer S. Hsu, Devlin Barrett & Matt Zapotosky, *Justice Dept. Moves to Drop Case Against Michael Flynn*, WASH. POST (May 7, 2020, 6:34 PM), https://www.washingtonpost.com/local/legal-issues/justice-dept-moves-to-void-michael-flynns-conviction-in-muellers-russia-probe/2020/05/07/9bd7885e-679d-11ea-b313-df458622c2cc_story.html [https://perma.cc/PK5Y-GEQ8]. For further discussion of Flynn's guilty plea, see Mark Mazzetti, *In Flynn Case, Barr Again Takes Aim at Mueller Inquiry*, N.Y. TIMES (May 18, 2020), https://www.nytimes.com/2020/05/08/us/politics/barr-mueller-investigation-flynn.html [https://perma.cc/SB7Q-574L], and Matt Ford, *A Presumption of Flynnocence*, SOAPBOX (May 8, 2020), https://newrepublic.com/article/157668/bill-barr-michael-flynn-trump-corruption [https://perma.cc/MKY6-5CCW].
12. Robert Stone was convicted of "seven felony counts including lying to authorities, obstructing a congressional investigation and witness intimidation." Darren Samuelsohn & Josh Gerstein, *Roger Stone Sentenced to Over 3 Years in Prison*, POLITICO (Feb. 20, 2020, 4:33 PM), https://www.politico.com/news/2020/02/20/roger-stone-sentenced-to-over-three-years-in-prison-116326 [https://perma.cc/67GC-LYV2].
13. Peter Alexander & Dareh Gregorian, *Jessie Liu, Ex-U.S. Attorney Who Oversaw Roger Stone Case, Resigns From Trump Administration*, NBC NEWS (Feb. 13, 2020, 9:30 AM), https://www.nbcnews.com/politics/donald-trump/former-us-attorney-who-oversaw-roger-stone-case-resigns-n1136411 [https://perma.cc/4LZF-E6KS].

May 2020 the DOJ moved to dismiss the Flynn case altogether.[14] The DOJ also submitted a revised sentencing memorandum recommending a more lenient term in the Stone case. In testimony before the House Judiciary Committee, Aaron Zelinsky, one of the prosecutors in the case, testified that the reduced sentencing memorandum was the byproduct of Stone's "relationship to the president."[15]

Berman's actions were plainly designed to forestall—or at least temporarily stay—the type of interventionist conduct by the DOJ that compromised the legitimacy of the Flynn and Stone prosecutions. The Berman and Liu affairs are clarion calls to reform the process by which the executive branch investigates itself. They vividly exemplify the inherent conflicts that attend to such investigations. And they further attest to the unevenness of the criminal justice system—a system well-suited for the powerful and the connected but far less forgiving for those with lesser resources, including those of different races and ethnicities.

The DOJ's Justice Manual mandates that federal prosecutors pursue the "common value" that "public service is a public trust."[16] This is certainly a laudable guiding principle for prosecutors at any level and for all public servants. Yet, as detailed below, this ethical norm during the Trump presidency has too often amounted to little more than words over substance. Indeed, the Berman and Liu episodes are not standalone incidents. Rather, they are part of a pattern of the executive branch's attempts to scuttle investigations and prosecutions of alleged criminal activity within its ranks and shield the President from such pursuits.

Consider *Trump v. Vance*,[17] a case just recently decided by the U.S. Supreme Court. *Vance* addressed the propriety of a subpoena the New York

14. Kevin Johnson & Kristine Phillips, *Judge in Michael Flynn Case Delaying Decision on DOJ Request to Abandon Prosecution*, USA TODAY (May 13, 2020, 1:05 PM), https://www.usatoday.com/story/news/politics/2020/05/12/judge-michael-flynn-case-delays-doj-move-drop-case/3107727001 [https://perma.cc/LQ32-BLNH]. Barr also appointed two U.S. Attorneys—John Durham and Jeff Jensen—to investigate the origins and appropriateness of the Russian meddling investigation and the Michael Flynn matter, respectively. Adam Goldman, Charlie Savage & Michael S. Schmidt, *Barr Assigns U.S. Attorney in Connecticut to Review Origins of Russia Inquiry*, N.Y. TIMES (May 13, 2019), https://www.nytimes.com/2019/05/13/us/politics/russia-investigation-justice-department-review.html [https://perma.cc/TJ4Z-PF3R].

15. Billy House, *Whistle-Blower Says DOJ Aimed to Give Trump Ally Stone a Break*, BLOOMBERG L. (June 23, 2020, 8:01 PM), https://news.bloomberglaw.com/white-collar-and-criminal-law/prosecutor-says-improper-pressure-applied-for-trump-ally-stone [https://perma.cc/LVC7-Y3W6].

16. U.S. DEP'T OF JUST., JUSTICE MANUAL § 1-4.010 (2018) [hereinafter JUSTICE MANUAL].

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

City District Attorney issued to Mazurs USA, LLP, which sought the "financial and tax records of several individuals and entities, including [Trump] and entities owned by [Trump] before he became President, from January 1, 2011 to the present."[18] Before the Court, the President pressed a sweeping theory of immunity. Specifically, he submitted "that the Supremacy Clause gives a sitting President absolute immunity from state criminal subpoenas because compliance with those subpoenas would categorically impair a President's performance of his Article II functions."[19] In the alternative, the U.S. Solicitor General proposed a less absolute threshold; namely, that state grand jury subpoenas that seek the personal records of a sitting president satisfy a "heightened standard of need."[20] By a 7–2 margin, the Court rejected both arguments. Notably, the entire Court concluded that neither Article II nor the Supremacy Clause supported Trump's absolute immunity claim.[21]

Though Trump's absolute immunity theory failed to garner any Supreme Court support, earlier this year Trump publicly proclaimed his own legal judgment: namely, that he has the "legal right" to interfere in executive branch criminal cases.[22] And in the Stone case Trump backed up his words, publicly expressing his displeasure with the DOJ's original sentencing

18. Brief in Opposition at 5, *Vance*, 140 S. Ct. 659 (No. 19-635). The subpoena was purposefully "patterned" after the subpoena previously issued by the House Committee on Oversight and Reform. *Id.* at 5 n.2. The District Attorney also issued a subpoena to the Trump Organization seeking similar documentation. Richard Lempert, *Trump's Tax Returns: The Legal Issues and Possible Outcomes*, BROOKINGS (May 28, 2020), https://www.brookings.edu/blog/fixgov/2020/05/28/trumps-tax-returns-the-legal-issues-and-possible-outcomes [https://perma.cc/P3MU-KFSQ]. The Trump organization turned over financial documents but did not produce Trump's tax returns. Brief in Opposition, *supra*, at 4–5.

19. *Vance*, 140 S. Ct. at 2425.

20. *Id.*

21. *Id.* at 2429 ("Given these safeguards and the Court's precedents, we cannot conclude that absolute immunity is necessary or appropriate under Article II or the Supremacy Clause. Our dissenting colleagues agree.").

22. *See* Edward Helmore, *Trump Claims He Has 'Legal Right' to Intervene in Criminal Cases*, GUARDIAN (Feb. 14, 2020, 7:29 PM), https://www.theguardian.com/us-news/2020/feb/14/trump-claims-legal-right-intervene-criminal-cases-william-barr-plea-not-tweet [https://perma.cc/2HMQ-FSBX].

memorandum,[23] criticizing the presiding judge, questioning the impartiality of the jury forewoman,[24] and ultimately commuting Stone's 40-month sentence.[25]

In addition to the Flynn and Stone interventions, Barr has undermined Mueller's work in other contexts as well. Perhaps his most notable intrusion occurred on March 24, 2020, just two days after Mueller submitted his *Report on the Investigation into Russian Interference in the 2016 Presidential Election* to the Attorney General. In Barr's infamous four-page summary of Mueller's findings, he stated that Mueller found insufficient evidence of a conspiracy between Russia and the Trump campaign and that no conclusion was reached in regard to obstruction.[26] Nevertheless, Barr included his personal determination that there was insufficient evidence of obstruction.[27] In a pointed retort, Mueller wrote a letter to Barr complaining that the summary misrepresented the work of the Special Counsel's office. Specifically, Mueller argued that the summary "did not fully capture the context, nature, and substance" of the work of Mueller's team, and that the letter created "public confusion about critical aspects of the results of [the] investigation," which potentially compromised the public's confidence in the Special Counsel's work.[28]

23. *See* Lucien Bruggeman & Soo Rin Kim, *A Timeline of the Extraordinary Turn of Events in the Roger Stone Case*, ABC NEWS (Feb. 14, 2020, 7:21 AM), https://abcnews.go.com/Politics/timeline-extraordinary-turn-events-roger-stone-case/story?id=68921601 [https://perma.cc/E9DQ-3V7N] (noting Trump's comments via Twitter that it was "a horrible and very unfair situation" and a "miscarriage of justice"); *see also Roger Stone, Longtime Trump Adviser, Denied Bid for New Trial*, GUARDIAN (Apr. 16, 2020, 7:35 PM), https://www.theguardian.com/us-news/2020/apr/16/roger-stone-trump-denied-new-trial [https://perma.cc/M2V2-3ESW] (discussing Stone's prison sentence and President's Trump's strong rebuke of the Department of Justice).
24. Darren Samuelsohn & Josh Gerstein, *Federal Judge Rebukes Trump Over Roger Stone Jury Comments*, POLITICO (Feb. 25, 2020, 3:18 PM), https://www.politico.com/news/2020/02/25/judge-rebukes-trump-roger-stone-jury-117442 [https://perma.cc/2KBW-33GZ].
25. Ryan Lucas, *Trump Commutes Sentence of Longtime Friend and Adviser Roger Stone*, NPR (July 10, 2020, 7:57 PM), https://www.npr.org/2020/07/10/887721441/trump-commutes-sentence-of-longtime-friend-and-adviser-roger-stone [https://perma.cc/7ZQ7-KPGX]; Peter Baker, Maggie Haberman & Sharon LaFraniere, *Trump Commutes Sentence of Roger Stone in Case He Long Denounced*, N.Y. TIMES (July 10, 2020), https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html [https://perma.cc/NRY7-USHX].
26. *Read Attorney General William Barr's Summary of the Mueller Report*, N.Y. TIMES (Mar. 24, 2019), https://www.nytimes.com/interactive/2019/03/24/us/politics/barr-letter-mueller-report.html [https://perma.cc/43EP-3VJW].
27. *Id.*
28. Devlin Barrett & Matt Zapotosky, *Mueller Complained That Barr's Letter Did Not Capture 'Context' of Trump Probe*, WASH. POST (Apr. 30, 2019, 5:21 PM), https://www.washingtonpost.com/world/national-security/mueller-complained-that-barrs-letter-did-not-capture-context-of-trump-probe/2019/04/30/d3c8fdb6-6b7b-11e9-a66d-a82d3f3d96d5_story.html [https://perma.cc/N5TV-W3ZA].

The flair and circumstances of these events rightfully generated public attention. But there is another critical aspect of this public discussion about undue executive branch influence that has been largely overlooked and grossly underappreciated: the Special Counsel regulations. These regulations are not fancy and are rather unlikely to ever generate substantial public interest. Yet, they are foundational, their impact is deeply consequential, and they help elucidate many of the ills referenced above. In fact, absent meaningful reform there are few safeguards to prevent a repeat of such interventions now or in administrations to come. Presidential crimes matter, as do other executive branch crimes, and a fair and impartial structure must be implemented to effectively respond to the challenge of addressing such alleged wrongdoing.

The Special Counsel regulations, promulgated by the DOJ, delineate the rules and procedures that determine when outside counsel, such as Mueller, must be appointed to criminally investigate alleged wrongdoing within the executive branch, as well as the rules and processes to which special counsels must adhere when performing their investigative and prosecutorial functions.[29] When Deputy Attorney General Rod Rosenstein (in his capacity as Acting Attorney General) appointed Mueller to serve as Special Counsel to investigate Russia's involvement in the 2016 election and its possible coordination with the Trump campaign, Rosenstein stated:

> In my capacity as [A]cting [A]ttorney [G]eneral I determined that it is in the public interest for me to exercise my authority and appoint a special counsel to assume responsibility for this matter .... What I have determined is that based upon the unique circumstances the public interest requires me to place this investigation under the authority of a person who exercises a degree of independence from the normal chain of command.[30]

Rosenstein's statement hinted that Mueller possessed some meaningful measure of investigative and prosecutorial authority independent of the DOJ. Indeed, the Special Counsel regulations exist ostensibly for this purpose—to provide for the appointment of a special prosecutor in the event of a conflict

29. *See* CYNTHIA BROWN & JARED P. COLE, CONG. RSCH. SERV., SPECIAL COUNSEL INVESTIGATIONS: HISTORY, AUTHORITY, APPOINTMENT AND REMOVAL 8–14 (2019), https://fas.org/sgp/crs/misc/R44857.pdf [https://perma.cc/39VU-GZKB].

30. Devlin Barrett, Sari Horwitz & Matt Zapotosky, *Deputy Attorney General Appoints Special Counsel to Oversee Probe of Russian Interference in Election*, WASH. POST (May 18, 2017), https://www.washingtonpost.com/world/national-security/deputy-attorney-general-appoints-special-counsel-to-oversee-probe-of-russian-interference-in-election/2017/05/17/302c1774-3b49-11e7-8854-21f359183e8c_story.html [https://perma.cc/V6DD-EJJZ].

of interest within the DOJ and when such an appointment is in the public interest.[31] Unfortunately, as this Essay will explain, the special counsel regulations are inapt for this purpose. Prosecutors appointed pursuant to these regulations enjoy little independence and are subject to the persistent DOJ oversight when performing their investigative and prosecutorial functions.

This Essay will discuss these regulations, explain why they deprive special counsels of any meaningful investigative and prosecutorial independence, and illuminate how they compromise not only the integrity of investigations of executive branch wrongdoing but also the public's trust. In so doing, this Essay will review a high-profile occurrence during the Mueller investigation and explain how the regulations arguably hamstrung Muller during this process. It will also propose a two-pronged legislative remedy that calls for a return to the former Independent Counsel Statute (ICS), with a significant modification. More specifically, the presented proposal mandates special prosecutors' compliance with DOJ policies, but allows for judicial review in the event that the DOJ denies a course of action proposed by the special counsel. Finally, it will explain why this two-pronged approach is consistent with the dictates of *Morrison v. Olson*,[32] the Supreme Court decision that upheld the constitutionality of the former ICS.

I. SPECIAL COUNSEL REGULATIONS AND THE INDEPENDENT COUNSEL STATUTE

In *Berger v. United States*,[33] the Supreme Court commented:

> [A prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern *impartially* is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[34]

A prosecutor's duty to distribute justice with an even hand is an ethical prescription.[35] Yet, in the context of the Mueller investigation the conclusion

31. 28 C.F.R. § 600.1 (2019).
32. 487 U.S. 654 (1988).
33. 295 U.S. 78 (1935).
34. *Id.* at 88 (emphasis added).
35. The *Criminal Justice Standards for the Prosecution Function* dictate:
> The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate

that Trump and Barr compromised the integrity of the probe both in fact and in appearance with their frequent overt interventions is largely, if not entirely, inescapable. But, irrespective of their conduct (and any arguable merits thereof), the impartiality of the Mueller investigation was structurally compromised from the outset due to the less conspicuous Special Counsel regulations. These regulations, enacted in 1999 (long before Trump assumed the presidency),[36] governed Mueller's tenure and severely constricted his freedom to independently pursue investigative and prosecutorial strategies.

As noted, the regulations empower the Attorney General to appoint a special counsel in instances where the DOJ has a conflict of interest and when the public interest warrants such an appointment.[37] Furthermore, the appointed counsel must not be an employee of the federal government.[38] The regulations also instruct that the special counsel's investigative jurisdiction (and any future expansions of such jurisdiction) is determined by the Attorney General.[39]

In testimony before the U.S. Senate Judiciary Committee on May 1, 2019, Barr famously—and accurately—referred to Mueller as "the equivalent of a U.S. attorney" who "was exercising the powers of the attorney general subject to the supervision of the attorney general."[40] The regulations plainly provide that special counsels enjoy "the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney."[41] The regulations further state that the special counsel must abide by all DOJ rules and regulations,[42] that the Attorney General is empowered to override any actions by the special counsel of which he or she disapproves,[43] and that the Attorney General has the exclusive authority to remove a special

> severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.
>
> CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION r. 3-1.2(b) (AM. BAR ASS'N 2017).

36. *See generally* 28 C.F.R. §§ 600.1–600.10 (2019).
37. *Id.* § 600.1.
38. *Id.* § 600.3(a).
39. *Id.* § 600.4(a)–(b).
40. *Department of Justice's Investigation of Russian Interference With the 2016 Presidential Election: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2019) (statement of William P. Barr, U.S. Att'y Gen.), https://congressionaldish.com/cd197-constitutional-crisis [https://perma.cc/H96B-RMHB].
41. 28 C.F.R. § 600.6 (2019).
42. *See id.* § 600.7(a).
43. *See id.* § 600.7(b).

counsel from his or her position.[44] When the work of the special counsel is completed, the regulations require the submission of a confidential final report to the Attorney General that describes "the prosecution or declination decisions reached by the Special Counsel."[45] If the Attorney General concludes that publication of the report would be in the "public interest" then he or she can provide for its release.[46]

Though the regulations provide that special counsels are relieved from the DOJ's "day-to-day supervision,"[47] special counsels enjoy little latitude to exercise prosecutorial discretion in a meaningfully independent manner. As DOJ employees, special counsels are subject to the rules and regulations of the department that oversees their activities. Practices and strategies that a special counsel employs or proposes can be overridden by the DOJ, potentially providing a basis for the special counsel's removal.[48]

An inherent conflict exists whenever the executive branch is charged with investigating alleged criminal activity within its own ranks. In fact, it was this reality that was the impetus for the inclusion of the original special prosecutor provisions in the Ethics in Government Act of 1978.[49] An outgrowth of the Watergate saga, the special prosecutor provisions were an attempt to create a constitutionally sound structure whereby high-ranking executive branch officials could be investigated and prosecuted by a body sufficiently independent of undue executive branch influence. During its approximate twenty-year lifespan the statute underwent various changes. In 1982 the term "special counsel" was supplanted by "independent counsel,"[50] and when the statute was reauthorized in 1987 it was renamed the "Independent Counsel Reauthorization Act."[51]

Substantively, however, the core tenets of the statute remained in place. The ICS included a number of high-ranking executive branch officials within its jurisdiction, including, but not limited to, the president, the vice president,

44. *See id.* § 600.7(d) (allowing for removal for "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies").
45. *Id.* § 600.8(c).
46. *Id.* § 600.9(c).
47. *Id.* § 600.7(b).
48. *Id.* § 600.7(d).
49. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 28 U.S.C. §§ 591–98).
50. Jim Mokhiber, *A Brief History of the Independent Counsel Law*, PBS FRONTLINE (May 1998), https://www.pbs.org/wgbh/pages/frontline/shows/counsel/office/history.html [https://perma.cc/PSD8-XC4G].
51. *See* Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293.

the Attorney General, and various department secretaries and directors.[52] To trigger an investigation, the most recent version of the statute (1994) required that the Attorney General, upon receipt of information suggesting that a covered official violated a federal law, conduct a preliminary investigation.[53] If the evaluative criteria delineated in the statute were satisfied, then the Attorney General was required to seek the appointment of an independent counsel from the division of the court.[54] This Court consisted of three members of the Court of Appeals for the District of Columbia Circuit who served two-year terms.[55] The division was empowered to appoint the independent counsel,[56] define his or her jurisdiction,[57] and enlarge the jurisdictional grant.[58] A decision by the Attorney General to remove an independent counsel was reviewable not by the division of the Court, but by the United States District Court for the District of Columbia.[59] The statute also sought to require independent counsels' adherence to DOJ policies. Section 594(f) provided, in part, that "except to the extent that to do so would be inconsistent with the purposes of this chapter," special counsels were expected to "comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws."[60]

A total of twenty independent counsel investigations were initiated.[61] Though the statute could boast of some successful and just investigative outcomes, these virtues were ultimately drowned out by the weight of other investigations and prosecutions.[62] The poster children of this latter category undoubtedly included Kenneth Starr's Whitewater investigation of President Bill Clinton and First Lady Hillary Clinton's real estate dealings as well as

52. 28 U.S.C. § 591(a)–(b) (1994).
53. *Id.* § 591(a). The evaluative criteria changed over the years. The 1994 version required that a referral for an appointment of a special counsel be made if the information received by the Attorney General was specific and was from a credible source. *Id.* § 591(d)(1).
54. *Id.* § 592(c)(1).
55. *Id.* § 49.
56. *Id.* § 593(b)(1).
57. *Id.* § 593(b)(1), (3).
58. *Id.* § 593(c)(1).
59. *Id.* § 596(a)(3).
60. *Id.* § 594(f)(1).
61. CONG. RSCH. SERV., INDEPENDENT COUNSELS APPOINTED UNDER THE ETHICS IN GOVERNMENT ACT OF 1978, COSTS AND RESULTS OF INVESTIGATIONS 3 (2006).
62. *See, e.g.*, Julian A. Cook III, *Mend It or End It? What to Do With the Independent Counsel Statute*, 22 HARV. J.L. & PUB. POL'Y 279, 297–305 (1998).

Lawrence Walsh's Iran-Contra investigation into alleged misconduct by President Ronald Reagan's administration.[63]

When the statute was allowed to expire in 1999, there was a sense of fatigue amongst Democrats and Republicans. The statute's inability to control the runaway exercise of prosecutorial discretion was the principal, commonly-expressed complaint. As aptly summarized by Richard Pildes:

> The view was that the act had left independent counsels (ICs) too independent of all constraints and had inadvertently created a bad incentive structure for the ICs that at times encouraged investigations that sprawled well beyond their original justification, went on endlessly, and created too much pressure for the independent counsel to justify their existence by showing that they had discovered some sort of crime that the target of their investigation had committed.[64]

Even former Independent Counsel Jacob Stein, who investigated former Attorney General nominee Edwin Meese, expressed sentiments consistent with this perspective. Reflecting on his own experiences, he commented that the statute left him discretionary authority that was seemingly boundless:

> I had no limits. I was astonished at the authority I had, and I felt it was a personal test of my own sanity in the exercise of that authority. I don't know whether others thought that I passed the test. But I had more authority than anybody should have.[65]

Despite the statute's notable shortcomings, the ICS was superior to the Special Counsel regulations it replaced. First, independent counsel prosecutions were comparatively less hampered by the appearance of conflicts that necessarily attend special counsel investigations. As noted, independent counsels were, for the most part, structurally insulated from executive branch oversight.[66] Moreover, appointments were made by a judicial panel, which also defined the prosecutorial jurisdiction, and final decisions regarding

63. *See* Carlos Lozada, *Every Report on Past Presidential Scandal Was a Warning. Why Didn't We Listen?*, WASH. POST (Mar. 22, 2019, 7:40 AM), https://www.washingtonpost.com/outlook/2019/03/22/every-report-past-presidential-scandal-was-warning-why-didnt-we-listen [https://perma.cc/KG8M-CHY3].

64. Richard H. Pildes, *Could Congress Simply Codify the DOJ Special Counsel Regulations?*, LAWFARE (Aug. 3, 2017, 3:27 PM), https://www.lawfareblog.com/could-congress-simply-codify-doj-special-counsel-regulations [https://perma.cc/DFX3-Q9JU].

65. *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, 54 WASH. & LEE L. REV. 1515, 1549 (1997) [hereinafter *Independent Counsel Process*] (remarks by Jacob Stein).

66. *See supra* note 61 and accompanying text; *supra* note 62 and accompanying text.

removal rested with the district court. Second, the ICS produced several meritorious criminal investigations and prosecutions.[67]

Nevertheless, the statute's inability to effectively constrain prosecutorial discretion was its ultimate undoing. Approximately two years prior to the statute's demise, Robert Fiske, the original special prosecutor appointed to investigate the Whitewater affair, commented at the Fourth Circuit's Sixty-Seventh Judicial Conference that while he preferred the retention of the statute he did not "see a practical way to limit the authority of the independent counsel."[68] How to structure a process that grants prosecutors sufficient investigative and prosecutorial latitude yet constrains the exercise of prosecutorial discretion has vexed legislators since Watergate. The following Part introduces a proposal that addresses this dilemma.

II. PROPOSAL FOR REFORM

This objective can be achieved by reenacting the ICS, with the following two-pronged modification.[69] First, when an independent counsel seeks to pursue an investigative or prosecutive activity that implicates a DOJ policy, such as those contained in the DOJ's Justice Manual,[70] he or she must comply with departmental policy. Thus, if the activity triggers a reporting, consulting, or approval obligation then the independent counsel must fulfill it. If the approval is obtained, then the independent counsel can pursue the desired course of conduct. In the event of an adverse outcome, however, the independent counsel could either accept the department's determination or seek review of the matter before the division of the court. If the latter option is pursued, the DOJ can argue before the Court in opposition. Should the independent counsel prevail before the Court, he or she can then proceed with the desired course of action.

67. *See* Cook, *supra* note 62.
68. *Independent Counsel Process*, *supra* note 65, at 1550 (remarks of Robert B. Fiske, Jr.).
69. For a more in-depth discussion of this proposal, see Julian A. Cook III, *Executive Branch Crimes and the Public Trust*, U. MICH. J.L. REFORM (forthcoming 2021). *See also* Julian A. Cook, III, *The Independent Counsel Statute: A Premature Demise*, 1999 B.Y.U. L. REV. 1367 (discussing the two-pronged proposal).
70. For discussion of the Justice Manual, see *supra* note 16 and accompanying text. Some Justice Manual provisions are inapplicable to my proposed rule (see, for example, JUSTICE MANUAL, *supra* note 16, § 9-2.170, which requires notification to the Appellate Section of the Criminal Division of every decision adverse to the DOJ rendered by a court of appeals.). My proposal does not intend to make every Justice Manual provision applicable to independent counsel, but only those that fit within the *Morrison v. Olson* framework. This Essay does not attempt to delineate a comprehensive list of applicable provisions.

Federal prosecutors have ample authority to exercise independence on matters that are comparatively routine. If a proposed course of conduct is less routine or implicates an interest of special concern to the DOJ, however, prior consultation or approval is typically warranted. The Justice Manual often delineates these instances and the corresponding consultation and approval requirements. The Manual's officially stated objective[71] is to "improv[e] efficiency, promot[e] consistency, and ensur[e] that applicable Department policies remain readily available to all employees as they carry out the Department's vital mission."[72] Or, as more bluntly described by Robert Fiske, the "internal DOJ guidance" that the Manual provides to DOJ attorneys[73] is "to make sure that some Assistant or some U.S. Attorney isn't going off half-cocked in a way that would be detrimental to law enforcement in general."[74]

A. Constitutionality—*Morrison v. Olson*

My proposal, which calls for a more elaborative judicial function than seen in earlier iterations of the ICS, naturally presents constitutional questions, including separation of powers issues. As expounded on below, however, the functions envisioned pursuant to my proposal satisfy the dictates enunciated by the Supreme Court in *Morrison v. Olson*,[75] the decision that upheld the constitutionality of the Independent Counsel provisions of the 1978 Ethics in Government Act.

In *Morrison*, two U.S. House of Representatives subcommittees in 1982 issued subpoenas to the Environmental Protection Agency (EPA) seeking certain documents.[76] Pursuant to DOJ recommendations, President Ronald Reagan ordered that the EPA refuse to comply with the subpoenas, citing executive privilege.[77] The following year, the House Judiciary Committee, as part of its investigation into this controversy, subpoenaed Theodore Olson, then the Assistant Attorney General for the Office of Legal Counsel, to

71. It is important to note the Justice Manual only delineates publicly available DOJ policies and procedures. JUSTICE MANUAL, *supra* note 16, § 1-1.100.
72. Press Release, U.S. Dep't of Just., Department of Justice Announces the Rollout of an Updated United States Attorneys' Manual (Sept. 25, 2018), https://www.justice.gov/opa/pr/department-justice-announces-rollout-updated-united-states-attorneys-manual [https://perma.cc/86M7-6VNC] (quoting Rod Rosenstein, U.S. Deputy Att'y Gen.).
73. JUSTICE MANUAL, *supra* note 16, § 1-1.200.
74. *Independent Counsel Process*, *supra* note 65, at 1546 (remarks of Robert B. Fiske, Jr.).
75. 487 U.S. 654 (1988).
76. *Id.* at 665. The subpoenas were issued as part of its investigation of the Environmental Protection Agency (EPA) and its enforcement of the Superfund Law. *Id.*
77. *Id.*

testify.[78] In 1985, the Judiciary Committee prepared a "lengthy report on the Committee's investigation" which alleged, among other things, that Olson lied before the Judiciary Committee, and forwarded the report to the Attorney General seeking the appointment of an independent counsel to investigate Olson and two other Justice Department officials.[79]

Alexia Morrison was eventually appointed by the division of the court to serve as independent counsel.[80] After Morrison served grand jury subpoenas on all three subjects, Olson and the other subjects moved in federal district court in Washington, D.C. to have the subpoenas quashed, arguing that the independent counsel provisions were unconstitutional.[81] The district court upheld the constitutionality of the statute but was reversed by the U.S. Court of Appeals for the D.C. Circuit.[82]

By a 7–1 vote, the Supreme Court reversed.[83] Chief Justice Rehnquist, writing for the majority, reasoned in part that independent counsels were inferior officers; therefore, the Appointments Clause of Article II of the U.S. Constitution authorized the judicial branch to make such appointments.[84] The majority further found that the appointment and jurisdictional grant provisions did not run afoul of Article III. Noting the Article's "Cases" and "Controversies" limitations, the Court acknowledged "that 'executive or administrative duties of a nonjudicial nature may not be imposed on judges'"[85] and that this was necessary to safeguard against judicial "encroach[ment] into areas reserved for the other branches."[86] Finding that the statute did not exceed this limitation, the Court reasoned that the Appointments Clause grants courts "in certain circumstances . . . some discretion" to define "the appointed official's authority."[87] And it added that a court's determination of an independent counsel's jurisdiction was "incidental" to its appointment power.[88]

The Court also found that an array of other "miscellaneous powers" afforded the division of the court under the Act[89] did not violate Article III.

78. *Id.* at 665–66.
79. *Id.* at 666.
80. *Id.* at 667.
81. *Id.* at 668.
82. *Id.*
83. *Id.* at 696–97.
84. *Id.* at 670–77.
85. *Id.* at 677 (quoting Buckley v. Valeo, 424 U.S. 1, 123 (1976)).
86. *Id.* at 678.
87. *Id.* at 679.
88. *Id.*
89. *Id.* at 680. The Court explained:

The Court reiterated Article III's concern with safeguarding executive branch functions from judicial encroachment. But the judicial powers granted under the Act, according to the Court, "do not impermissibly trespass upon" executive branch authority.[90] Indeed, the Court characterized some of the authorities as "passive" and "ministerial."[91] It further added:

> The Act simply does not give the Division the power to "supervise" the independent counsel in the exercise of his or her investigative or prosecutorial authority. And, the functions that the Special Division is empowered to perform are *not inherently "Executive"*; indeed, they are *directly analogous to functions that federal judges perform in other contexts*, such as deciding whether to allow disclosure of matters occurring before a grand jury, deciding to extend a grand jury investigation, or awarding attorney's fees . . . .[92]

Finally, the Court assessed the independent counsel provisions as a whole and took a closer look at the provision's good faith removal clause, considering whether both complied with separation of powers principles. Regarding the good faith clause, the Court found that it does not "unduly trammel[] on executive authority," or "impermissibly burden[] the President's power to control or supervise the independent counsel, as an executive official, in the execution of his or her duties under the Act."[93] With respect to the provisions in their entirety, the Court held that separation of powers was respected, emphasizing the inability of the division of the court to initiate review or oversight of independent counsel conduct. It noted that the division "has no

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> These duties include granting extensions for the Attorney General's preliminary investigation, § 592(a)(3); receiving the report of the Attorney General at the conclusion of his preliminary investigation, §§ 592(b)(1), 593(c)(2)(B); referring matters to the counsel upon request, § 594(e); receiving reports from the counsel regarding expenses incurred, § 594(h)(1)(A); receiving a report from the Attorney General following the removal of an independent counsel, § 596(a)(2); granting attorney's fees upon request to individuals who were investigated but not indicted by an independent counsel, § 593(f); receiving a final report from the counsel, § 594(h)(1)(B); deciding whether to release the counsel's final report to Congress or the public and determining whether any protective orders should be issued, § 594(h)(2); and terminating an independent counsel when his or her task is completed, § 596(b)(2).

Id. (footnote omitted).

90. *Id.* at 681.

91. *Id.* at 656, 681.

92. *Id.* at 681 (emphasis added) (citing FED. R. CRIM. P. 6(e), (g); 42 U.S.C. § 1988). The Court later emphasized that "the Special Division has *no* authority to take any action or undertake any duties that are not specifically authorized by the Act." *Id.* at 684.

93. *Id.* at 691, 692.

power to appoint an independent counsel *sua sponte*" and that "it has no power to supervise or control the activities of the counsel."[94] It also found that the executive authority is not "impermissibly undermine[d]" by the Act.[95] Finally, it noted that despite some limitations, the Attorney General retains meaningful appointment referral authority as well as "supervising or controlling" authority over the independent counsel, including a conditional power to remove.[96]

The following Subpart will examine my proposal in light of the Court's holding in *Morrison* and demonstrate why the enhanced duties my proposal would assign to the division of the court are constitutional. To this end, it will review a high-profile example from the Mueller investigation: his authority, if any, to issue a subpoena to a sitting president to testify before a grand jury.

B. Justice Manual—Grand Jury Subpoenas

Consistent with *Morrison*, my two-pronged proposal provides the division of the court with no authority beyond what *Morrison* allows. The division of the court is afforded no supervisory authority and is not empowered to initiate any actions. The involvement of the division of the court is entirely dependent on an independent counsel's request for a judicial review following a declination of a preferred strategy by the DOJ. Absent such initiation, the division of the court lacks authority to exercise any influence over the course of conduct an independent counsel chooses to take.

Moreover, when an independent counsel seeks judicial review, the functions the court performs are directly analogous to activities the courts already routinely undertake. And, assuming that such functions did tread into executive branch territory, this would neither "unduly" burden nor impermissibly hinder the executive branch's oversight and supervisory authority.

Consider the following. Attendant to the prosecutor's well-established authority to conduct grand jury investigations is the right to issue grand jury subpoenas.[97] When the subpoenas are directed to an investigative target, however, the DOJ requires consideration of other factors prior to their issuance. The Justice Manual documents these concerns in section 9-11.150 (Subpoenaing Targets of the Investigation), noting that such subpoenas "may

94. *Id.* at 695.
95. *Id.*
96. *Id.* at 696.
97. H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1705 (2000); FED. R. CRIM. P. 17.

carry the appearance of unfairness," that "the potential for misunderstanding is great," and that federal prosecutors should initially attempt to obtain "the target's voluntary appearance."[98] If, however, such an agreement cannot be obtained, then prior clearance must be received from either "the United States Attorney or the responsible Assistant Attorney General."[99] The provision also details the following three criteria by which such subpoena requests will be assessed:

> The importance to the successful conduct of the grand jury's investigation of the testimony or other information sought;
>
> Whether the substance of the testimony or other information sought could be provided by other witnesses; and
>
> Whether the questions the prosecutor and the grand jurors intend to ask or the other information sought would be protected by a valid claim of privilege.[100]

There was considerable speculation that Mueller might issue Trump a grand jury subpoena *ad testificandum*.[101] For over a year, Mueller and Trump's defense team engaged in negotiations to secure Trump's testimony. But an agreement for a voluntary appearance was never reached and a subpoena was never issued. In his final report, Mueller stated that "while we believed that we had the authority and legal justification to issue a grand jury subpoena to obtain the President's testimony, we chose not to do so."[102] And in testimony before the House Judiciary Committee, Mueller explained further that his decision was dictated by his desire to avoid a protracted legal battle and to conclude the investigation.[103]

It is worth considering, however, whether Mueller's decision was also influenced by the section 9-11.150 review process.[104] Given the immense

98. JUSTICE MANUAL, *supra* note 16, § 9-11.150.
99. *Id.*
100. *Id.*
101. *See* Nelson W. Cunningham, *Has Mueller Subpoenaed the President?*, POLITICO MAG. (Oct. 31, 2018), https://www.politico.com/magazine/story/2018/10/31/has-robert-mueller-subpoenaed-trump-222060 [https://perma.cc/BU9S-TYS9].
102. Eric Lach, *Robert Mueller Let Donald Trump Duck Direct Questions About Obstruction*, NEW YORKER (Apr. 18, 2019, 1:52 PM), https://www.newyorker.com/news/current/robert-mueller-let-donald-trump-duck-direct-questions-about-obstruction [https://perma.cc/5KN6-8CC7].
103. Alan Neuhauser, *Mueller Explains Why He Didn't Subpoena Trump*, U.S. NEWS (July 24, 2019, 4:14 PM), https://www.usnews.com/news/national-news/articles/2019-07-24/robert-mueller-explains-why-he-didnt-subpoena-donald-trump [https://perma.cc/3QWH-HLAQ].
104. Mueller's authorization was threefold: to investigate 1) "any links and/or coordination between the Russian government and . . . the [Trump] campaign"; 2) "matters that arose . . . directly from the investigation;" and 3) "any other matters within the scope of 28 C.F.R. § 600.4(a)." 1 ROBERT S. MUELLER, III, U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 11

political pressures faced by Deputy Attorney General Rod Rosenstein—who at the time was serving as Acting Attorney General, was overseeing the Mueller investigation, and was under threats of removal—it is reasonable to wonder whether Mueller had been, at the very least, indirectly discouraged from issuing a subpoena. The elongated negotiations between Mueller and Trump produced only an agreement requiring the President to provide written responses to questions Mueller posed. Mueller later testified that he generally found Trump's responses to be untruthful,[105] and his final report indicated that Trump failed to answer *any* questions relevant to the obstruction inquiry.[106] If the section 9-11.150 review truly culminated in unequivocal DOJ support, it is difficult to fathom why Mueller, in such a high-profile matter involving a seemingly unrepentant and recalcitrant individual, would ultimately elect to forgo a subpoena fight and terminate the investigation. Perhaps the reality of Mueller's post–section 9-11.150 world left him with little, if any, plausible options beyond engaging the Trump team to secure a presidential interview.

Irrespective of the accuracy of such speculation, the proposal set forth in this Essay would have afforded Mueller the freedom to pursue a judicial review in the event of an adverse section 9-11.150 determination. It would have afforded him independence that could have potentially altered the course of conduct he ultimately adopted. And it is a review process that fits within the *Morrison* framework, as it requires nothing more from courts than the steps they routinely perform with respect to subpoenas.

Subpoenas are judicial orders that courts are empowered to enforce, modify or quash.[107] The judiciary routinely adjudicates claims of allegedly unreasonable or oppressive subpoenas and has the authority to hold

(2019). Section 600.4(a) extends a special counsel's investigative and prosecutorial jurisdiction to "federal crimes committed in the course of, and with intent to interfere with, the Special Counsel's investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses." 28 C.F.R. § 600.4(a) (2019). It was "a series of actions by the President that related to the Russian-interference investigations, including the President's conduct towards the law enforcement officials overseeing the investigations and the witnesses to relevant events" that subjected Trump to a section 600.4(a) investigation, 2 ROBERT S. MUELLER, III, U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 3 (2019), and likely triggered a section 9-11.150 consultation mandate.

105. Charlie Savage, *Mueller's Skepticism of Trump's Truthfulness Heightens Impeachment Debate*, N.Y. TIMES (July 25, 2019), https://www.nytimes.com/2019/07/25/us/politics/trump-written-answers-mueller.html [https://perma.cc/KH6T-GJLB].

106. Lach, *supra* note 102.

107. FED. R. CRIM. P. 17.

individuals and entities in contempt for failure to comply.[108] The proposal set forth in this Essay—which merely empowers the division of the court to decide whether a subpoena should issue—does nothing to expand upon this preexisting authority. Moreover, the proposal does not empower the division of the court to initiate any supervisory, oversight, or affirmative action with respect to independent counsel conduct.

C. Justice Manual—Additional Sections

Section 9-11.150 is but one among a myriad of DOJ policies delineated in the Justice Manual that govern the conduct of federal prosecutors. And it is plainly foreseeable that future special prosecutors will, like Mueller, find themselves subject to one or more of these provisions. Some, such as section 9-13.400 and section 9-13.410—provisions analogous to section 9-11.150—concern, respectively, the issuance of grand jury subpoenas to the news media and to attorneys regarding client information.[109]

The breadth of the Justice Manual, however, extends well beyond subpoenas and reaches many forms of pretrial prosecutorial conduct. For example, prosecutors who seek to release grand jury materials,[110] to engage in certain types of oral and wire interception of communications,[111] to submit search warrant applications that seek documents in the possession of attorneys, doctors, and members of the clergy,[112] and to indict individuals for specified crimes[113] are subject to the Manual's provisions. It also applies to a certain category of pen register requests,[114] to investigations and prosecutions of alleged perjury before the U.S. Congress,[115] to matters involving campaign finance violations,[116] and to the resolution of cases by virtue of *nolo contendere* or Alford pleas.[117]

108. *Id.*
109. *See* JUSTICE MANUAL, *supra* note 16, §§ 9-13.400 to .410.
110. *Id.* § 9-11.260.
111. *Id.* §§ 9-7.110 to .111.
112. *Id.* § 9-19.220.
113. *Id.* §§ 9-60.1200 (civil disturbances and riots), –63.221 (aircraft sabotage), –90.020 (national security).
114. *Id.* § 9-7.500.
115. *Id.* § 9-69.200.
116. *Id.* § 9-85.210.
117. *Id.* §§ 9-16.010 to .015. An individual who enters a nolo contendere (or no contest) plea does not admit his guilt but accepts the court's imposition of punishment. Ramy Simpson, Nolo Contendere *Convictions: The Effect of No Confession in Future Criminal Proceedings*, CRIM. L. PRAC., Spring 2019, at 25. A person enters an Alford plea when he pleads guilty but maintains his innocence. North Carolina v. Alford, 400 U.S. 25 (1970).

The Manual also addresses investigative and prosecutorial practices that target certain classifications of individuals. Illustrative are provisions that require consultation before monitoring oral conversations,[118] submitting certain search warrant applications,[119] and proposing plea agreements[120] when the targets are members of congress, federal judges, governors, and lieutenant governors. Even certain posttrial conduct requires prior consultation or approval, such as pursuing appeals in cases that involve national security,[121] appealing adverse judicial orders, and requesting en banc review.[122] In the context of my proposal, each of these Justice Manual provisions would also require the division of the court to engage in tasks directly analogous to functions it routinely performs, such as approving or disapproving search warrants, oral or wire interceptions, and pen register requests; approving or disapproving guilty pleas and plea agreements; assessing the propriety of indictments; and assessing the propriety of appeals.

The Justice Manual regulations identified in this Essay constitute a small sample of the wide swath of DOJ policies and procedures that regulate federal prosecutors' conduct. A return to the ICS with the substantial modifications set forth in this Essay would produce the constitutionally sound paradigm that has thus far been elusive. This delicate balance between the exercise of prosecutorial independence accompanied by sufficient constraints can be achieved by making select Justice Manual provisions applicable to independent counsel conduct accompanied by the option of division of the court review.

CONCLUSION

Among the byproducts of the Watergate saga was the enactment of the ICS. At the time, it was readily understood that executive branch investigations of alleged criminal wrongdoing within its ranks were fraught with inherent conflicts. Despite some arguable success stories, both political parties readily agreed that the ICS also produced high-profile criminal investigations that were deeply problematic. Chief among the complaints was the statute's inability to constrain the wayward exercise of prosecutorial discretion. Unable

118. JUSTICE MANUAL, *supra* note 16, § 9-7.302(A)(2).
119. *Id.* § 9-85.110.
120. *Id.* § 9-16.110.
121. *Id.* § 9-90.020.
122. *Id.* § 9-2.170.

to develop a suitable fix, legislators abandoned the statute and substituted it with a set of regulations that effectively represent a return to yesteryear.

The Mueller investigation should serve as an important lesson that was taught by Watergate but went unheeded in the scandal's aftermath. Like Berman and Liu, Mueller was never an independent actor. His investigation was hamstrung from the outset. And in the end, Mueller submitted an incomplete final report that was compromised by an Attorney General who persistently undercut his efforts. No reform proposal can cure all the ills associated with the current structure, and even under my proposal, room remains for the exercise of Attorney General, judicial, and prosecutorial bias. Yet, for investigations and prosecutions of executive branch wrongdoing to have genuine and steadfast legitimacy in appearance and in fact, a prosecutor must be sufficiently independent. And to maintain this legitimacy, the exercise of that discretion must be properly channeled. The proposal set forth in this Essay helps achieve this critical objective.