

# Prosecuting the Executive

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## I. INTRODUCTION

*Forget the myths the media's created about the White House. The truth is, these are not very bright guys, and things got out of hand. . . . Follow the money.*<sup>1</sup>

On October 20, 1973, President Nixon demanded the Attorney General and the Deputy Attorney General fire Special Counsel Archibald Cox.<sup>2</sup> When both men refused, they resigned rather than fire the Special Counsel in what is now known as the Saturday Night Massacre.<sup>3</sup> President Nixon's actions set off a constitutional crisis on whether a president, the higher echelon of the White House, or the Executive Branch was above the rule of law.<sup>4</sup> During his investigation into the Watergate break-in and other crimes committed by the Committee to Re-elect President Nixon (CRP), Cox subpoenaed the President's tapes, which led Nixon to fire Cox.<sup>5</sup> The placement of a special counsel and its supervision under the Executive created a myriad of problems illustrated by the massacre. For the most part, the President may fire Executive Branch employees.<sup>6</sup> A critical problem illustrated by the Saturday Night Massacre is insulating a special counsel investigation from tampering or firing from the White House.<sup>7</sup> A

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1. ALL THE PRESIDENT'S MEN (Wildwood Enterprises 1976).

2. Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit: President Abolishes Prosecutor's Office; FBI Seals Records*, WASH. POST, Oct. 21, 1973, at A01.

3. Evan Andrews, *What Was the Saturday Night Massacre?*, HISTORY (Dec. 4, 2013), <https://www.history.com/news/what-was-the-saturday-night-massacre> [<https://perma.cc/XWL5-P5MB>]; see also Hanley A. Ingram, Note, *United States v. Tucker: Should Independent Counsels Investigate and Prosecute Ordinary Citizens?*, 86 KY. L.J. 741, 741 n.3 (1998).

4. The independent counsel statute—originally passed in response to Watergate and the Saturday Night Massacre—“codified the long-recognized principle that an institutional conflict of interest exists whenever the Department of Justice . . . investigates high-level executive branch officials.” Ingram, *supra* note 3, at 741.

5. See Kilpatrick, *supra* note 2.

6. *Myers v. United States*, 272 U.S. 52, 127–28 (1926) (citing U.S. CONST. art. II, § 2).

7. Donald J. Simon, *The Constitutionality of the Special Prosecutor Law*, 16 U. MICH. J.L. REFORM 45, 47–48 (1982).

solution requires understanding the importance of a special counsel, the role the counsel serves, and the limits of the counsel's power.

After Watergate, the independent counsel provision was created as part of the Ethics in Government Act of 1978.<sup>8</sup> The use of the independent counsel created problems because of its overuse and ability to be used as a political weapon.<sup>9</sup> These problems led to an agreement that the provision should lapse in 1999.<sup>10</sup> Attorney General Janet Reno directed the drafting of new special counsel guidelines after the independent counsel statutory provision lapsed.<sup>11</sup> These regulations rest the power of appointment of a special counsel within the Department of Justice (DOJ) and outline the scope of an investigation, the special counsel's reporting official, the scope of powers, and the procedure to conclude an investigation.<sup>12</sup>

Understanding the independent counsel statute's uses and weaknesses helps illustrate the circumstances that should lead to the appointment of a special counsel.<sup>13</sup> The independent counsel statute required the Attorney General to make a preliminary finding on an incident before sending the inquiry to a three-judge panel.<sup>14</sup> The panel had jurisdiction over the independent counsel.<sup>15</sup> Currently, the special counsel remains a part of the Executive Branch,<sup>16</sup> which is necessary but also problematic. A special counsel is appointed to investigative criminal activity within the Executive Branch of the federal government.<sup>17</sup> The scope of their investigation and possible

8. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. §§ 101–505 (2012)).

9. Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 643 (1998); Katy J. Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 MERCER L. REV. 489, 515 (1998)

10. CONG. RESEARCH SERV., R44857, SPECIAL COUNSELS, INDEPENDENT COUNSELS, AND SPECIAL PROSECUTORS: LEGAL AUTHORITY AND LIMITATIONS ON INDEPENDENT EXECUTIVE INVESTIGATIONS (2018), [https://www.everycrsreport.com/files/20180413\\_R44857\\_17152568e256d9546739039f5635c6b877b00b19.pdf](https://www.everycrsreport.com/files/20180413_R44857_17152568e256d9546739039f5635c6b877b00b19.pdf) [<https://perma.cc/L9VE-UAVU>] (first citing Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 1701, 1706, 1706 n. 25; and then citing MICHAEL GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS* 189–91 (2000)).

11. See David Johnston, *Attorney General Taking Control as Independent Counsel Law Dies*, N.Y. TIMES, June 30, 1999, at A00001.

12. See 28 C.F.R. §§ 600.1, 600.4, 600.6, 600.8 (2018).

13. See generally Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

14. *Id.* §§ 601–602.

15. *Id.* § 602.

16. See 5 U.S.C. § 1211 (2012).

17. See *id.* §§ 1212, 1216; CONG. RESEARCH SERV., *supra* note 10, at 2, 8–13.

prosecution is established by the DOJ—specifically, the Attorney General.<sup>18</sup> A special counsel is unique as it combines both law enforcement and prosecution for a limited scope federal investigation.<sup>19</sup> The role of the special counsel has shifted throughout modern American history as inquiries into malfeasance in the Executive Branch of the federal government have called for it.<sup>20</sup>

While the special prosecutor has been appointed in a myriad of criminal investigations regarding misconduct at all levels of the Executive Branch, implementation should occur only by potentially egregious conduct by senior hierarchy within the Executive Branch.<sup>21</sup> This includes Cabinet secretaries, senior counsel to the President of the United States, and the President himself. Such restrictions of when a special counsel is appointed is vital not only to demonstrate the severity of the potential criminal conduct but also to appreciate that a targeted investigation must be separate from the normal duties of the DOJ and the Federal Bureau of Investigation (FBI).

Because of the distinct role of the special counsel, it is imperative to define what the position seeks to protect. The expansive powers of the White House and its administration can have a disastrous effect both constitutionally and politically. Therefore, an examination of the underlying ideals that are protected by avoiding constitutional fault lines lends credence to the view that the appointment of a special counsel should only occur in a very narrow set of circumstances.<sup>22</sup> An examination of proper uses of the special counsel illustrates the bedrock principles protected.

There have been two specific incidents in modern American history that demonstrate the need for a special counsel's appointment, the importance of an investigation at the time, the outcome of the investigation, and limitations of the investigation.<sup>23</sup> An examination of the Teapot Dome Scandal<sup>24</sup> and Watergate provide key lessons on the importance of appointing

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18. 28 C.F.R. § 600.4; CONG. RESEARCH SERV., *supra* note 10, at 11–13.

19. *See* CONG. RESEARCH SERV., *supra* note 10, at 1 n.3.

20. *See generally id.*

21. *See* Gormley, *supra* note 9 (asserting that political abuse of the independent counsel statute has resulted in “abandonment of the original notion that the special prosecutor law would be reserved for rare and special crises”); Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2136 (1998) (“The [independent counsel] statute, by attempting to specify in minute detail the precise situations requiring an independent counsel, is largely overinclusive, thus producing too many investigations.”).

22. *See* Gormley, *supra* note 9, at 659–60 (discussing how a “narrow jurisdictional lock” is essential to limiting a special prosecutor’s scope of authority).

23. *See infra* Part II.

24. *See* Harriger, *supra* note 9, at 491–92 (discussing the need for a special prosecutor to address the Teapot Dome Scandal, which occurred during the “corrupt” Harding Administration).

a special counsel when the hierarchy of the Executive Branch becomes compromised and there exists a question on whether the DOJ may properly handle that investigation.<sup>25</sup> Those investigations provide crucial lessons that are imperative in the current investigation into the Russian interference in the 2016 presidential election.<sup>26</sup>

On May 17, 2017, the Deputy Attorney General Rod Rosenstein appointed Robert Mueller as the Special Counsel to investigate possible Russian interference into the 2016 Presidential Election and to determine whether there was collusion with the Trump campaign.<sup>27</sup> Rosenstein became the ranking member at the DOJ after Attorney General Jeffrey Sessions recused himself from the investigation.<sup>28</sup> Sessions revealed his conflict of interest because he failed to disclose contacts with the Russian ambassador during the Trump presidential campaign in 2016.<sup>29</sup> Such actions placed the Special Counsel in a precarious position given that Mueller was tasked with investigating close associates and family members of the President and perhaps the President himself.<sup>30</sup>

The underlying issue is whether the Executive Branch should be entrusted to prosecute itself when there is internal misconduct or criminal activity. A secondary problem exists when the DOJ or its key hierarchy is implicated in the investigation. This problem has arisen in three investigations within the last hundred years. Those investigations are the Teapot Dome Scandal, Watergate,<sup>31</sup> and the current Russia investigation.<sup>32</sup> Each of these executive

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25. See Simon, *supra* note 7, at 47–51 (discussing the need for a special prosecutor in Watergate because of the criminal activity and conflicts in the DOJ).

26. See Rebecca R. Ruiz & Mark Landler, *Special Counsel Will Investigate Russia Influence*, N.Y. TIMES, May 17, 2017, at A1.

27. ROD. J. ROSENSTEIN, OFFICE OF THE DEPUTY ATT’Y GEN., ORDER NO. 3915-2017, APPOINTMENT OF SPECIAL COUNSEL TO INVESTIGATE RUSSIAN INTERFERENCE WITH THE 2016 PRESIDENTIAL ELECTION AND RELATED MATTERS (2017); Ruiz & Landler, *supra* note 26.

28. Ruiz & Landler, *supra* note 26.

29. *Id.*

30. See ROSENSTEIN, *supra* note 27.

31. See Harriger, *supra* note 9, at 490–96 (providing background information about the Teapot Dome Scandal and Watergate).

32. See Matt Apuzzo, Adam Goldman & Nicholas Fandos, *How F.B.I. Embarked, with Strictest Secrecy, On Trump Team’s Trail*, N.Y. TIMES, May 16, 2018, at A1 (providing background information about the current Russia investigation).

investigations used a special counsel and implicated the Attorney General within those investigations.<sup>33</sup>

This Article considers when criminal acts by those in the Executive Branch rise to the level warranting the appointment of a special prosecutor. One of the main problems with the independent counsel statute was overuse.<sup>34</sup> An understanding of prior appointments of a special counsel before the independent counsel statute's implementation demonstrates why an appointment should be made sparingly.<sup>35</sup> By examining the complex issues in these cases, it will become clear why special counsels should be utilized when blatant criminal activity by senior members within the Executive Branch consisting of secretaries of departments, the senior staff within the White House, or the President himself occurs. The bad actors in each investigation sought to directly subvert the rule of law, abuse power, and undermine the integrity of understood political norms. Special prosecutors are a vital check on the usurpation of power from members of the Executive Branch.

Part II of this Article lays out the scope of a special counsel's powers and explores the core values of the constitutional structure that can be affected by executive misconduct. With an examination of rule of law, separation of powers, and national security, it becomes clear why the special counsel can and should be appointed when those core values are compromised by potential criminal activity. Part III describes the prior investigations conducted by special counsel into criminal conduct within the Executive Branch. The investigations and prosecutions of the Teapot Dome Scandal and the Watergate break-in illustrate the political and practical problems that a special counsel faces. Part IV examines the Special Counsel's role in the current Russia investigation. The discussion looks at the order authorizing the appointment of Robert Mueller, the current activities of the investigation, the political turmoil around his investigation, and the actions Congress has taken in response to the investigation. Special Counsel Mueller's investigation illustrates the constitutional principles potentially threatened by foreign interference. Finally, this Article discusses whether

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33. See Harriger, *supra* note 9, at 497 (explaining that when a scandal implicates the President or the Attorney General, Congress and the public press for independent counsel); Darren Samuelsohn, *Trump's Russia Strategy: Bash Mueller to Beat Impeachment*, POLITICO (May 3, 2018, 7:34 PM), <https://www.politico.com/story/2018/05/03/trump-lawyers-mueller-russia-probe-strategy-568481> [<https://perma.cc/8SAA-N58V>].

34. See Gormley, *supra* note 9 (asserting that political abuse of the independent counsel statute has resulted in "abandonment of the original notion that the special prosecutor law would be reserved for rare and special crises").

35. See Thomas W. Merrill, *Beyond the Independent Counsel: Evaluating the Options*, 43 ST. LOUIS U. L.J. 1047, 1052 (1999) (asserting that independent counsel "should be reserved for only extraordinary circumstances").

special counsel serves a critical part in our criminal justice system. After reviewing the prior investigations conducted by special counsel and the current investigations, the special counsel's office is an integral part that must be preserved from outside interference.

## II. WHY AND WHEN IS A SPECIAL PROSECUTOR NECESSARY?

### *A. Special Counsel's Role in Protecting the Rule of Law*

When potential criminal conduct occurs within the White House or among the cabinet secretaries, a special counsel is suited to investigate and prosecute those involved. Two factors make the appointment of a special counsel necessary. First, the criminal activity must be severe—charges classified as felonies under federal law. Second, those investigated must be senior officials within the Executive Branch. Both factors should exist before the Attorney General considers activating the special counsel provision. The use of a special prosecutor is a significant step because of the message it sends not only to the Executive but also to the rest of the federal government, the media, and U.S. citizens. Such actions should not be taken lightly as it signals a potential constitutional crisis—those at the highest levels of government controlling a vast amount of power and the ability to affect both domestic and international policy. The discussion below illustrates why a special prosecutor differs from other prosecutors and why a special prosecutor's appointment protects the rule of law.

#### *1. What is a Special Prosecutor?*

Under current DOJ guidelines, the Attorney General appoints a special counsel in one of two circumstances. First, an appointment will be made if there exists a conflict of interest between the DOJ, a division within the DOJ, or the U.S. Attorney's Office.<sup>36</sup> In such a situation, a special counsel operating outside of the DOJ is necessary to cure the conflict for ethical concerns and to eliminate the appearance of impropriety. The second basis focuses on the "public interest" to appoint a special prosecutor.<sup>37</sup> These two guidelines also existed under the independent counsel statute, which

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36. 28 C.F.R. § 600.1(a) (2018).

37. *Id.* § 600.1(b).

lapsed.<sup>38</sup> Usually there is a call within Congress, the media, or both to appoint a special counsel. For example, during Watergate, the Senate Judiciary Committee pressured Attorney General candidate Elliott Richardson to appoint a special counsel to investigate Watergate prior to their vote to appoint him permanently.<sup>39</sup>

A special counsel appointment reflects growing concerns that the Executive has usurped constitutional power or committed serious or complex criminal actions—often in numerous ways. Only by designating a certain individual with a plethora of powers can the inequity and criminality be brought to light. A special prosecutor differs from a federal prosecutor because a special prosecutor investigates only one specific issue.<sup>40</sup> The Attorney General determines the scope of the investigation, which may change only if the special counsel notifies the Attorney General that the initial investigation has grown, thereby encompassing more than originally believed.<sup>41</sup>

Special prosecutors have been appointed to investigate Watergate, Iran-Contra, Whitewater, and, currently, Russian interference in the 2016 Presidential Election.<sup>42</sup> Given the complexity of these events, a special counsel may hire investigators and lawyers to handle the various aspects of the case.<sup>43</sup> While the special prosecutor and staff may be housed within the DOJ, they are very much apart from it. Because of the potential conflicts within the DOJ, the special counsel team's independence is paramount to an unbiased and fair investigation into the allegations. Therefore, the only person the special prosecutor answers to is the Attorney General.<sup>44</sup>

The appointment of a special prosecutor often causes political and media attention amid a growing concern over the abuses of Executive power. While the public often wants immediate answers or resolution regarding such matters, which have often been reported for months before appointment, these investigations take considerable time. It is often years before a special

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38. See JACK MASKELL, CONG. RESEARCH SERV., R43112, INDEPENDENT COUNSELS, SPECIAL PROSECUTORS, SPECIAL COUNSELS, AND THE ROLE OF CONGRESS 2 (2013).

39. See Simon, *supra* note 7, at 49 n.24; see also JAMES DOYLE, NOT ABOVE THE LAW: THE BATTLES OF WATERGATE PROSECUTORS COX AND JAWORSKI 40–41 (1977); MASKELL, *supra* note 38, at 1.

40. See Simon, *supra* note 7, at 60 (“To be sure, the authority and independence [the special prosecutor] possesses are broad; however, it is broad authority in an extremely limited area.”).

41. 28 C.F.R. § 600.4.

42. Amelia Thomson-DeVeaux, *How Mueller's First Year Compares to Watergate, Iran-Contra and Whitewater*, FIFTYEIGHT (May 17, 2018, 9:00 AM), <https://fiftyeight.com/features/how-muellers-first-year-compares-to-watergate-iran-contra-and-whitewater/> [<https://perma.cc/TYM6-VMZA>].

43. See 28 C.F.R. § 600.5.

44. See *id.* § 600.6. For a discussion of the implications of a compromised Attorney General, see *infra* pp. 134–35.



counsel brings charges against any wrongdoers.<sup>45</sup> Because of these lengthy delays, Congress generally takes action alongside a special prosecutor to get answers concerning malfeasance within various executive agencies.<sup>46</sup> Congressional action is usually done with public hearings and testimony.<sup>47</sup> Conversely, a special prosecutor's investigation is private and only made public upon indictment.<sup>48</sup> As discussed below, various committees within the House and Senate have subpoenaed documents and people who would also be interviewed by special counsel investigators.<sup>49</sup>

One of the main criticisms against a special counsel is the overuse of the position.<sup>50</sup> When the independent counsel statute was in effect, it was consistently used by one political party against another.<sup>51</sup> The independent counsel statute is similar to the special counsel provisions in its aim at evaluating criminal conduct amongst those in the Executive Branch.<sup>52</sup> However, the statutory guidelines were much more complex allowing the position to be manipulated for political motive.<sup>53</sup> While the special counsel provision in its current iteration has not been used with the same frequency

45. For example, it took two years to bring charges in Watergate. See Kristine Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791, 815 (1978). Similarly, the Iran-Contra investigation took several years. See 2 LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 1 (1993).

46. See Bruce Fein, *Mueller's Role: A Primer on Special Prosecutors*, HUFFPOST (May 20, 2017, 3:14 PM), [https://www.huffingtonpost.com/entry/a-special-prosecutor-primer\\_us\\_592094c9e4b0e8f558bb2713](https://www.huffingtonpost.com/entry/a-special-prosecutor-primer_us_592094c9e4b0e8f558bb2713) [<https://perma.cc/3NTR-2JQF>].

47. *Congressional Hearings, 104th Congress (1995–1996) to Present*, GOVINFO (Dec. 7, 2018), <https://www.govinfo.gov/help/chrq> [<https://perma.cc/9KMK-Q8LE>].

48. Derek Hawkins, *Special Prosecutors: People Often Want Them Until They Get Them*, WASH. POST (Mar. 3, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/03/03/the-flawed-record-of-special-prosecutors-who-create-as-much-controversy-as-they-resolve/?utm\\_term=.b7cd2fb8c9a8](https://www.washingtonpost.com/news/morning-mix/wp/2017/03/03/the-flawed-record-of-special-prosecutors-who-create-as-much-controversy-as-they-resolve/?utm_term=.b7cd2fb8c9a8) [<https://perma.cc/WTM9-U4P7>].

49. See *infra* text accompanying notes 171–76.

50. See Kavanaugh, *supra* note 21.

51. See Gormley, *supra* note 9, at 641–42 (“Since the statute’s adoption in 1978, there have been twenty separate independent counsel investigations . . . with the number growing with each administration. . . . Both Democrats and Republicans have discovered how to push the buttons and tilt the machine, in the years following Watergate.” (footnote omitted)).

52. *Compare* Ethics in Government Act of 1978, Pub. L. No. 95-521, § 601(a), 92 Stat. 1824, 1867–73, with 5 U.S.C. §§ 1212, 1216 (2012).

53. See Ethics in Government Act § 601(a). In 1994, the Independent Counsel Reauthorization Act replaced “1987” with “1994” and “reauthorize[d] the independent counsel law for an additional 5 years.” Pub. L. No. 103-270, Stat. 732 (codified as amended in scattered sections of 28 U.S.C.). In 1999, 28 U.S.C. § 599 overruled the Act.

as its predecessor, abuse of the position remains a key concern whenever a special counsel is appointed.<sup>54</sup>

## 2. *The Power of the Executive Branch: Who is a Target?*

Outside a special prosecutor's investigation targeting criminal activity inside the Executive Branch, there is little guidance as to the rank of the people being investigated. Under the current DOJ regulations, there is minimal guidance on who should be the target of a special counsel investigation.<sup>55</sup> Because the special counsel provision has an extensive range of powers—not only to assemble its own staff but also to conduct a criminal investigation outside of the normal DOJ chain of command<sup>56</sup>—it should only be implemented in the most egregious cases by those at the highest executive levels.

Only the higher ranking members of the Executive Branch—those who hold an extraordinary amount of power<sup>57</sup>—necessitate a special counsel investigation. It would be easy for those at high levels of the Cabinet and in the White House to subvert the efforts of a normal federal prosecution.<sup>58</sup> Further, there are political and actual conflicts of interest between these ranked officials.<sup>59</sup> The President and his staff are empowered to appoint

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54. See, e.g., Avery Anapol, *Chris Wallace: White House is Trying to 'Undercut' Mueller Investigation*, HILL (Jan. 25, 2018, 4:30 PM), <http://thehill.com/homenews/media/370774-chris-wallace-white-house-is-trying-to-undercut-mueller-investigation> [https://perma.cc/DHT7-2KTT]; Daniella Diaz, *Here Are the Times Republicans Tried to Undermine the Russia Investigation*, CNN (Jan. 26, 2018, 7:02 PM), <https://www.cnn.com/2018/01/26/politics/republicans-russia-investigation-robert-mueller/index.html> [http://perma.cc/2ZQW-5E4B].

55. See 28 C.F.R. §§ 600.1, 600.4 (2018). *But see* 28 U.S.C. § 591(a)–(b). The lapsed independent counsel statute was amended in 1994 to guide the target of the investigation to include conflicted persons:

[T]he DOJ is conclusively deemed to have a conflict of interest in criminal investigations because of the covered persons' political power or importance to the success of an administration. These "covered persons" include the President, the Vice President, cabinet level officials (including the Attorney General), certain high-ranking officials in the Executive Office of the President and the DOJ, the Director and Deputy Director of the Central Intelligence Agency, the Commissioner of the Internal Revenue Service, and certain officials involved in the President's national political campaign.

Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 465 (1996) (citing 28 U.S.C. § 591(b)).

56. See Ethics in Government Act § 601(a).

57. See U.S. CONST. art. II.

58. See, e.g., Simon, *supra* note 7, at 50 (discussing how ITT investigations and prosecutions were quashed for donations to the CRP).

59. See Merrill, *supra* note 35, at 1050, 1052–55 (describing traditional conflicts of interest and political conflicts of interest necessitating an independent investigator); John Padilla & Alex Wagner, Note, *The "Outing" of Valerie Plame: Conflicts of Interest in Political*

all U.S. Attorneys as well as high ranking officials within the DOJ.<sup>60</sup> As such, the Attorney General may have both a political and actual conflict if the potential criminal activity involves the President.<sup>61</sup> Only a special prosecutor focused solely on potential criminal activities committed by those at the upper levels of power can circumvent some of the political pressure bad actors may use on other federal prosecutors.<sup>62</sup>

Critics of the special counsel provision focus on the fact that it can be, and has been, overused for minor executive officials.<sup>63</sup> Reserving the special counsel for the senior counsel of the White House and the secretary level for the Cabinet will help alleviate concerns about the overuse of the appointment. The necessity of some prima facie criminal activity and the seniority of these positions will take some of the burden off the Attorney General to bend to political whims.<sup>64</sup> By restricting the appointment to potential criminal activity within the senior levels of the Executive, it will eliminate the potential for overuse as well. Furthermore, directing the special counsel toward higher executive officials will signal the severity of the potential criminal activity when one is appointed.

*Investigations After the Independent Counsel Act's Demise*, 17 GEO. J. LEGAL ETHICS 977, 983–84 (2007) (“Conflict of interest considerations were the driving force behind the Ethics in Government Act’s independent counsel provisions . . .”).

60. See U.S. CONST. art. II, § 2; see also Josh Dawsey & Josh Gerstein, *Trump Administration Moving to Replace Fired U.S. Attorneys*, POLITICO (May 25, 2017, 3:06 PM), <https://www.politico.com/story/2017/04/25/donald-trump-us-attorney-positions-appointments-237588> [<https://perma.cc/SWL7-EQCN>]; Sari Horwitz, *A Month After Dismissing Federal Prosecutors, Justice Department Does Not Have Any U.S. Attorneys in Place*, WASH. POST (Apr. 18, 2017), [https://www.washingtonpost.com/world/national-security/a-month-after-dismissing-federal-prosecutors-justice-department-does-not-have-any-us-attorneys-in-place/2017/04/18/d94c4bd0-2442-11e7-b503-9d616bd5a305\\_story.html?noredirect=on&utm\\_term=.3e598f5fb912](https://www.washingtonpost.com/world/national-security/a-month-after-dismissing-federal-prosecutors-justice-department-does-not-have-any-us-attorneys-in-place/2017/04/18/d94c4bd0-2442-11e7-b503-9d616bd5a305_story.html?noredirect=on&utm_term=.3e598f5fb912) [<http://perma.cc/3ULK-WU79>].

61. See Merrill, *supra* note 35, at 1055.

62. But see Maggie Haberman & Michael S. Schmidt, *Trump Sought to Fire Mueller in December*, N.Y. TIMES (Apr. 10, 2018), <https://www.nytimes.com/2018/04/10/us/politics/trump-sought-to-fire-mueller-in-december.html> [<https://perma.cc/Z5JS-S2MW>] (discussing Trump’s attempt to discharge special counsel Mueller); Kilpatrick, *supra* note 2 (discussing Nixon’s discharge of Special Counsel Cox); Michael S. Schmidt & Maggie Haberman, *Trump Ordered Mueller Fired, but Backed Off When White House Counsel Threatened to Quit*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/us/politics/trump-mueller-special-counsel-russia.html> [<https://perma.cc/F2XY-Q8J9>].

63. See Gormley, *supra* note 9, at 64–43, 649–53 (explaining the problems with the overuse of the independent counsel statute for minor executive officials).

64. See Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 NOTRE DAME L. REV. 1373, 1375 (2002) (discussing the numerous Independent Counsel Investigations Attorney General Janet Reno had to contend with during her tenure).

When an attorney general makes such an appointment, the focus should be on the potential harm on the rule of law that can occur by these bad actors. This would implicate those with the most power in the Executive Branch. Because the senior counsel and secretary level positions have the potential to affect national security, international relations, and states' rights, a special counsel is singularly able to focus the vast resources of prosecutorial power to counteract a threat to constitutional authority.

### *B. Active Subversion of the Rule of Law*

The appointment of a special counsel is essential when the ranking members of the Executive Branch intentionally attempt to subvert the rule of law. This requires a discussion of the people or positions that have a substantial impact on policy or rule-making, which creates a constitutional crisis. Further, the special counsel's office looks to the specific activities of those officials who intentionally thwart the rule of law or violate the U.S. Constitution. To be sure, this does not include a President or Secretary making a policy decision with an unexpected outcome. The key events triggering the appointment of a special counsel have an appearance of nefariousness that threatens the basic tenets of our democracy. The specific intent of the actors to subvert the rule of law must be examined.

#### *1. What is the Rule of Law?*

The "rule of law" can be difficult to define.<sup>65</sup> The term is thrown around quite often without people having a grasp of what the term encapsulates.<sup>66</sup> At its core, it is the belief in the tenets and principles within the Constitution.<sup>67</sup> These fundamental principles of our government include the separation of powers,<sup>68</sup> checks and balances,<sup>69</sup> and due process.<sup>70</sup> No one branch of

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65. Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 381–82 (1993) ("The concept of 'rule of law' is as elusive as it is fundamental.").

66. See DIV. FOR PUB. EDUC., AM. BAR. ASS'N, PART I: WHAT IS THE RULE OF LAW 1 (2018), <https://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf> [<https://perma.cc/YL55-UBVK>] ("The *rule of law* is a term that is often used by difficult to define.").

67. See generally *id.*

68. *Id.* at 4; see also Paul R. Verkuil, *Separation of Powers, The Rule of Law, and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 305–06 (1989).

69. See Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289, 1351–53 (2015) (discussing the importance of checks and balances to encourage cooperation between the separate branches of government); see also Verkuil, *supra* note 68, at 303–06.

70. DIV. FOR PUB. EDUC., *supra* note 66.

government is—or should be—all powerful.<sup>71</sup> Under the constitutional framework, an attempt by one branch to supersede authority would be met by a check from another branch of government.<sup>72</sup> The rule of law is preserved when each branch acts within its supervisory role of the other branches.<sup>73</sup> In this context, Congress must preserve and maintain its independence from the Executive Branch to enforce its oversight power over the various Cabinet positions within the Executive, up to and including the White House. The Judicial Branch must ensure the laws enforced are proper by the other two branches of government. Each branch should ensure that the Constitution is the highest law of the land with no one person within any individual branch thwarting that purpose.

Conversely, a constitutional crisis can result by one person’s intentional act to subvert the rule of law. One key factor is when a government official, usually with considerable power or influence, attempts to usurp or override their recognized role within the norms of government. For example, this occurs when the Senate delineates power to approve appointments at the Secretary level for various Cabinet positions—especially the Attorney General and senior officials within the DOJ.<sup>74</sup> A subversion of this process could occur if a President attempted to appoint people without congressional oversight or if the Senate waived all hearings of any Cabinet level appointment. In either case, a check on one branch’s overreaching would not occur. The higher the person within the government acting outside the scope of constitutional authority, the greater the threat to constitutional integrity. When such actions occur within the Executive Branch, the Executive thwarts the rule of law’s integrity.

A President swears two oaths when taking office: to “preserve, protect, and defend the Constitution” and “faithfully execute the Office of President of the United States.”<sup>75</sup> The Constitution tasks the President to enforce the laws of the country.<sup>76</sup> As the highest ranked person within the Executive

71. See David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 *FORDHAM L. REV.* 71, 81–82 (2009) (exploring the Framers’ plan to have a strong Executive but to ensure that it obeyed the rule of law instead of political goals and abuses of power); Litman, *supra* note 69.

72. See *Checks and Balances*, HISTORY (Aug. 21, 2018), <https://www.history.com/topics/us-government/checks-and-balances> [<https://perma.cc/5NQU-3WBP>].

73. See *id.*; see also Litman, *supra* note 69.

74. See U.S. CONST. art. II, § 2, cl. 2.

75. *Id.* § 1, cl. 8.

76. Driesen, *supra* note 71, at 83 (delineating two constitutional clauses supporting a duty-based theory).

Branch, the President is singularly tasked to ensure the rule of law is preserved even if he does not agree with the laws.<sup>77</sup> Although the President is the government's highest and most identifiable member, the overall ideal is that no one is above the law.<sup>78</sup>

Further, all employees of the executive equally swear oaths to uphold the Constitution and must disobey the President if he interferes with the proper administration of the law.<sup>79</sup> Key executive agencies who ensure the government's security both internally and internationally are expected to advise but act independently of White House oversight.<sup>80</sup> This would include the National Security Agency (NSA), the Central Intelligence Agency (CIA), and the DOJ. When the Executive acts as intended, the DOJ acts independently with broad policy directives from the White House.<sup>81</sup> Similarly, the President, and those chosen for high level Cabinet positions, swears allegiance to the Constitution, not the person.<sup>82</sup> While these officials serve at the pleasure of the President, their obligation is to people and the Constitution.<sup>83</sup>

A special counsel becomes vital when another branch of government either becomes compromised or fails to take action in the face of a *prima facie* case of criminal conduct.<sup>84</sup> For example, if one house of Congress fails to act in the face of credible criminal charges by someone in the Executive Branch the credibility of Congress is diminished. Inaction through either congressional oversight or impeachment threatens the integrity of a branch of government. Such a failing in the rule of law makes it imperative for an independent investigation into the actors who compromise the rule of law or the normal functions of the government.

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77. *See id.* at 73 (asserting the Framers expected Congress to make the laws, and the Executive to enforce the laws).

78. *See id.* at 72 (“[T]he Constitution imposes a duty upon the President and all other executive branch officials to obey the law . . .”).

79. *Id.* at 81.

80. *See id.* at 117 (discussing how Congress makes agencies independent).

81. *See* Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2210–12 (2018) (discussing the history of the FBI and its current framework of autonomy in the day-to-day functions of the agency).

82. Driesen, *supra* note 71, at 81.

83. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men.”).

84. *See* 28 C.F.R. § 600.1 (2018) (authorizing appointment of special counsel when there is a conflict of interest or it would be in the public interest).

## 2. Active Subversion by the Executive as the Trigger to Special Counsel Appointment

When those in the Administration engage in acts to directly subvert the rule of law, it should result in the automatic triggering of the appointment of a special counsel.<sup>85</sup> Active subversion can come in different forms, but it includes overt abuses of executive power or criminal actions. For those outside of the bad actors in the Executive Branch, it is incumbent for Congress to initiate congressional oversight and to request appointment of a special counsel for an independent investigation.

The oversight power of Congress is vital to maintaining the rule of law. Several federal laws create a framework for overseeing various executive departments.<sup>86</sup> These oversights include periodic reports from executive departments to both houses of Congress.<sup>87</sup> Such mandatory reporting ensures transparency.<sup>88</sup> Further, it is a check on abuses by secretaries and high-level executive officials. Another check is the testimony of secretaries to various congressional committees. Over the past two years, the testimony of former FBI Director James Comey, current FBI Director Christopher Wray, former CIA Directors John Brennan and Michael Pompeo, NSA Director ADM Michael Rogers, and Assistant Attorney General Rod Rosenstein before the intelligence committees have made routine oversight take on greater significance in the backdrop of concerns about Russian interference in our elections.<sup>89</sup> However, these norms are imperative to prevent illegal and questionable actions.

Once Congress becomes aware of blatant abuses of the rule of law, a committee or congressional leadership can directly request the DOJ to appoint

85. Under the current DOJ regulations, the Attorney General may appoint a special counsel if there is a conflict of interest and it would be in the public interest to do so. *Id.* This point suggests active subversion of constitutional norms would trigger grounds for appointment.

86. See Legislative Reorganization Act of 1970, Pub. L. No. 91-510, § 118, 84 Stat. 1140, 1156 (codified as amended at 2 U.S.C. § 190(d) (2012)).

87. 2 U.S.C. § 190(d).

88. See 18 U.S.C. § 1001 (2012) (making it a felony to lie to Congress or a congressional committee); Tung Yin, *National Security Lies*, 55 HOUS. L. REV. 729, 732 (2008).

89. See Steven Harper, *A Timeline: Everything We Know About the Comey Firing*, MOYERS & COMPANY. (Apr. 24, 2018), <https://billmoyers.com/story/comey-timeline/> [<https://perma.cc/ZA26-5Z9Z>]; Ellen Nakashima & Shane Harris, *The Nation's Top Spies Said Russia Is Continuing to Target the U.S. Political System*, WASH. POST (Feb. 13, 2018), [https://www.washingtonpost.com/world/national-security/fbi-director-to-face-questions-on-security-clearances-and-agents-independence/2018/02/13/f3e4c706-105f-11e8-9570-29c9830535e5\\_story.html?utm\\_term=.1e2c19777f26](https://www.washingtonpost.com/world/national-security/fbi-director-to-face-questions-on-security-clearances-and-agents-independence/2018/02/13/f3e4c706-105f-11e8-9570-29c9830535e5_story.html?utm_term=.1e2c19777f26) [<https://perma.cc/6WQV-KK2H>].

a special counsel when either the House or Senate committees find illegal actions or other highly questionable conduct by the hierarchy of the Executive Branch.<sup>90</sup> For example, the Senate Committee investigating Watergate led to the appointment of the Special Counsel despite corruption within the hierarchy of the DOJ.<sup>91</sup> Beyond the appointment power, Congress has provided protections for executive whistleblowers<sup>92</sup> and has prevented the White House from restricting executive employees from communicating with members of Congress.<sup>93</sup> Providing these additional protections for the rank and file employees in the executive ensures Congress's oversight ability is protected.

Oversight powers fundamentally protect the rule of law. When illegal activities or highly suspect decisions made by the White House or its secretaries occur, the ability of elected officials from both political parties to question those actions protects the integrity of the country's system of laws. Representatives and Senators swear oaths to uphold the Constitution.<sup>94</sup> Much like the Executive Branch oath,<sup>95</sup> the cornerstone is to support the Constitution.<sup>96</sup> If the various members of Congress neglect to check the abuses of the Executive Branch, it threatens the country with unwieldy illegal actions, which may have a wide impact both within the country and amongst the international community. However, more damage is done to the belief that no one is above the law. People may grow disenchanted with the overarching ideals within the Constitution that no one is above the law and there is a sense of justice for all.

### *C. National Security Concerns*

Corruption within the Executive Branch carries significant international concerns. The President handles most issues of national security before any other branch of government or the American people are made aware. Such responsibility for being briefed daily on delicate international and national security issues mandates a balancing of various interests. Because of the sophistication of these issues, the President depends on several advisors in the White House and amongst his Cabinet. Further, both the FBI and

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90. See 28 U.S.C. § 592(g) (2012).

91. See *infra* Section III.B.

92. See Intelligence Community Whistleblower Protection Act of 1998, Pub. L. No. 105-272, 112 Stat. 2413.

93. 5 U.S.C. § 7211 (2012).

94. U.S. CONST. art. VI, cl. 3.

95. See *supra* note 75 and accompanying text.

96. See 5 U.S.C. § 3331.



CIA work to ensure any threats to national security are investigated and dealt with based on their working relationship with the White House.<sup>97</sup>

The potential for abuses by senior advisors in the White House or Cabinet imperils national security in numerous ways. First, conflicts of interest between senior advisors and foreign entities may compromise the advice given to the President.<sup>98</sup> These conflicts may be financial or political in nature. As in most conflicts, the double-dealing involved may directly affect the advice or interpretation of intelligence given. The appearance of a conflict may have a similar effect despite the advice being given without pretense. Similarly, foreign intelligence gathered from one source could be compromised and provided to an enemy or hostile foreign power.<sup>99</sup> Such treasonous acts may go unpunished.<sup>100</sup>

Finally, overt hostile actions may not be appropriately responded to because of the illegal actions of parties in the White House or the Administration. Currently, top officials in the FBI, CIA, and Congress are concerned about continued Russian interference with the November 2018 midterm elections.<sup>101</sup> There has been no directive from the White House to implement wholesale protections or punish Russia for its interference in past elections.<sup>102</sup> Failure to take the necessary protective actions affects not only the United

97. See *CIA vs. FBI*, DIFFEN, [https://www.diffen.com/difference/CIA\\_vs\\_FBI](https://www.diffen.com/difference/CIA_vs_FBI) [<https://perma.cc/P4HQ-4G4R>].

98. See, e.g., Dan Boylan, *Qatar Has Damaging Information on Jared Kushner: Report*, WASH. TIMES (Mar. 12, 2018), <https://www.washingtontimes.com/news/2018/mar/1/qatar-damaging-information-jared-kushner-report/> [<https://perma.cc/DTC4-HWDM>] (“Qatari government officials who visited Washington in late January considered passing information to Special Counsel Robert Mueller’s Russian election meddling investigation which they believed showed coordination between the UAE and Mr. Kushner to hurt Qatar . . . . The evidence, reportedly including information about secret meetings, was not passed along because Qatari officials feared ‘harming relations with the Trump administration.’”).

99. See, e.g., Adam Goldman, Eric Schmitt & Peter Baker, *Israel Said To Be Source of Secret Intelligence Trump Gave to Russians*, N.Y. TIMES (May 16, 2017), <https://www.nytimes.com/2017/05/16/world/middleeast/israel-trump-classified-intelligence-russia.html> [<https://perma.cc/S6BY-JFBM>].

100. See, e.g., Charles V. Bagli & Jesse Drucker, *Kushners Near Deal with Qatar-Linked Company for Troubled Tower*, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/nyregion/kushner-deal-qatar-666-5th.html> [<https://perma.cc/9GBN-MF62>] (discussing issues raised with Kushner’s foreign dealing and lapsed security clearance due to conflicts-of-interest with his businesses).

101. See Jeremy Herb, *US Intel Chiefs Unanimous that Russia Is Targeting 2018 Elections*, CNN (Feb. 13, 2018, 8:53 PM), <https://www.cnn.com/2018/02/13/politics/intelligence-chiefs-russia-2018-elections-target/index.html> [<https://perma.cc/74X8-4WUX>].

102. See *id.*

States, but our allies as well. Allied countries have provided the U.S. intelligence agencies information about criminal hacking of infrastructure or private companies; they expect not only that Americans utilize the intelligence but also assist them in an allied response as well.<sup>103</sup> When the hierarchy of the Executive Branch is criminally compromised, not only are we internally vulnerable to further attack, but also our international alliances are undermined.

Another key problem with national security is how it affects Congress's oversight powers. The national security divisions in the Executive—the CIA, NSA, FBI and others—provide routine reports and testimony to both the House and Senate Intelligence Committees as a check on Executive over-reaching and to inform the rest of Congress whether certain actions or laws must be taken or enacted against a foreign power.<sup>104</sup> This cannot effectively happen if the information provided to Congress is false or intentionally incomplete. When oversight committees receive false or misleading information from executive agents, their constitutional role is thwarted, as Congress is the body charged with declaring war<sup>105</sup> and the Senate ratifies treaties and approves executive foreign appointments.<sup>106</sup> False or misleading intelligence from the executive to Congress may have perilous consequences both domestically and internationally.

Preserving the rule of law and the institutions supporting it is vital to ensuring the integrity of the Constitution. To avoid a constitutional crisis, the bedrock principles of checks and balances, oversight, and separation

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103. See Luke Harding, Stephanie Kirchgaessner & Nick Hopkins, *British Spies Were First To Spot Trump Team's Links with Russia*, *GUARDIAN* (Apr. 13, 2017, 9:39 AM), <https://www.theguardian.com/uk-news/2017/apr/13/british-spies-first-to-spot-trump-team-links-russia> [<https://perma.cc/8JGR-NXYP>] (examining how various allies in Europe provided intelligence of Russian connections with the Trumps to the CIA for years); see also Madeline Conway, Martin Matishak & Austin Wright, *Key Moments from Sally Yates' Flynn Testimony*, *POLITICO* (May 8, 2017, 5:47 PM), <https://www.politico.com/story/2017/05/08/sally-yates-testimony-michael-flynn-key-moments-238123> [<https://perma.cc/TH8N-2KDR>] (“Clapper confirmed media reports that the United Kingdom and other European allies passed along information to U.S. intelligence agencies in 2016 of contacts between Trump associates and Russian officials. ‘Yes, it is and it’s also quite sensitive,’ Clapper said about the accuracy of the reports in response to questions from Sen. Dianne Feinstein (Calif.), the Judiciary Committee’s top Democrat. ‘The specifics are quite sensitive,’ Clapper added.”).

104. See *How Intelligence-Sharing Works at Present*, Cent. Intelligence Agency (Apr. 4, 2017, 6:95 PM), <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/sharing-secrets-with-lawmakers-congress-as-a-user-of-intelligence/3.htm> [<https://perma.cc/BKL3-WHZZ>]; see also Yin, *supra* note 88, at 774 (“National security lies are especially subject to some of these criticisms because they threaten our constitutional structure more than political lies do: they are typically more difficult to detect, and they impede Congress’ ability to gather national security information.”).

105. U.S. CONST. art I, § 8, cl. 11

106. *Id.* art. II, § 2.

of powers must be safeguarded. An Executive Branch that either dismisses or overreaches beyond its constitutional role threatens not only the core tenets of our form of government but also threatens the United States' allies. Appointment of a special counsel in such circumstances ensures that those involved in criminal activity are prosecuted and helps to restore the country's balance of power. An examination of prior special counsel investigations reveals how far such crises affect the country and what their investigations uncovered.

### III. PRIOR EXECUTIVE INVESTIGATIONS AND PROSECUTIONS

The Executive has appointed special counsel in numerous instances involving criminal conduct along with questionable decisions made by members of the Cabinet or within the White House. Some of these investigations include the Iran-Contra deal during President Reagan's second term,<sup>107</sup> the Whitewater/Monica Lewinsky scandals during President Clinton's administration,<sup>108</sup> and the revealing of Valerie Plame's CIA status.<sup>109</sup> However, the appointment of a special counsel should not be considered whenever an Executive Branch official is believed to have committed a criminal infraction. In most instances, the DOJ can handle these investigations in their normal course.

Instead, a special counsel should only be appointed when the criminal activity rises to such a level where two issues become apparent. First, the criminal activity must touch upon the higher levels of the Cabinet, implicating secretaries or—at a minimum—senior counsel within the White House or the President himself. Second, and perhaps more importantly, the special counsel investigation's targets must subvert the rule of law. Active subversion can take many forms but is often seen as usurping power from another branch of government or abusing the police power of the Executive Branch—the FBI, IRS, or CIA. Blatant subversion goes beyond what is considered a run-of-the-mill criminal action—for example, embezzlement, or campaign finance infractions can easily be handled by DOJ. The distinction is that active subversion on this scale has the power to change policy and actions of those rank and file executive employees or affect the actions of another branch of government. These nefarious actions mandate the appointment of a special prosecutor who is outside the normal structure of the DOJ.

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107. See Peterson, *supra* note 64, at 1403–04.

108. See Gormley, *supra* note 9, at 604–06.

109. See Padilla & Wagner, *supra* note 59, at 978–80.

There have been two such instances of criminal conduct within the Executive Branch in recent history. Those two are the Teapot Dome Scandal and Watergate. The discussion below details the factors that necessitated the appointment of a special counsel and the scope of their investigation.

### *A. Teapot Dome Scandal*

President Warren G. Harding's administration struggled with the perception and eventual reality of corruption and scandal, much of which surrounded his appointments to various Cabinet positions.<sup>110</sup> His selections of Albert B. Falls to head the Department of Interior and Harry M. Daugherty as the Attorney General drew criticisms for their perceived questionable character from their actions in Ohio where they became friends with the President.<sup>111</sup> In 1922, the Teapot Dome Scandal broke shortly before President Harding's death a year later.<sup>112</sup> Allegations arose concerning Secretary Fall's dealings with Mammoth Oil and Pan-American Petroleum.<sup>113</sup>

As Secretary of the Department of the Interior, Falls decided which companies were granted leasing rights on governmental properties within the United States.<sup>114</sup> He granted both oil companies lucrative rights to the naval oil reserves in Teapot Dome, Wyoming.<sup>115</sup> In exchange for these exclusive rights, the heads of both Mammoth Oil and Pan-American Petroleum issued personal "loans" to Secretary Fall totaling \$400,000.<sup>116</sup> Conservation groups complained about the leases, drawing the attention of Congress, who began asking official questions about the transactions.<sup>117</sup>

The Senate Committee on Public Lands and Survey commenced hearings on the Teapot Dome leases in 1923.<sup>118</sup> During these hearings, the scope of Secretary Fall's corruption took shape. Although Fall resigned in early

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110. See Harriger, *supra* note 9, at 491.

111. See *id.* at 491–92 (explaining that both Falls and Daugherty were investigated, and ultimately resigned).

112. Chalmers M. Roberts, *Uncovering a Coverup on Teapot Dome*, WASH. POST (June 9, 1977) [https://www.washingtonpost.com/archive/politics/1977/06/09/uncovering-a-coverup-on-teapot-dome/93c16e16-8e32-4bf0-aabd-bb83c9bebd0d/?utm\\_term=.e97674b6ef1c](https://www.washingtonpost.com/archive/politics/1977/06/09/uncovering-a-coverup-on-teapot-dome/93c16e16-8e32-4bf0-aabd-bb83c9bebd0d/?utm_term=.e97674b6ef1c) [<https://perma.cc/E3HQ-QWZT>].

113. Gormley, *supra* note 9, at 628 (first citing ROBERT K. MURRAY, *THE HARDING ERA: WARREN G. HARDING AND HIS ADMINISTRATION* 461–73 (1969); and then citing FRANCIS RUSSELL, *THE SHADOW OF BLOOMING GROVE: WARREN G. HARDING AND HIS TIMES* 488–532 (1968)).

114. See Harriger, *supra* note 9, at 491–92.

115. Gormley, *supra* note 9, at 628.

116. *Id.* The heads of both companies were Harry Sinclair for Mammoth Oil and Edward Donhany for Pan-American Petroleum. *Id.*

117. See Harriger, *supra* note 9, at 49 (citing BURT NOGGLE, *TEAPOT DOME: OIL AND POLITICS IN THE 1920S* (1962)).

118. *Id.*

1923, the Senate investigation continued,<sup>119</sup> suggesting bribery likely occurred. President Coolidge decided to appoint a special counsel to examine whether criminal bribery charges should be brought against Fall.<sup>120</sup> Bypassing the DOJ, Coolidge called upon Senator Atlee Pomerene and Owen Roberts, an attorney and later Supreme Court Justice, to serve as Special Counsel.<sup>121</sup> Over the next few years, the Special Counsel investigated the incident and brought charges against former Secretary Fall in 1929.<sup>122</sup> Albert Fall was convicted of bribery charges and sentenced to restitution and one year imprisonment.<sup>123</sup>

The Teapot Dome investigation and subsequent special investigation excluded Attorney General Daugherty because he too came under scrutiny.<sup>124</sup> The Senate Committee began investigating Daugherty's failure to act against Secretary Fall when the allegations of corruption first emerged in 1922.<sup>125</sup> Both Daugherty and Fall were political appointees of President Harding.<sup>126</sup> President Coolidge and Senators questioned why the Attorney General failed to start an investigation into possible corruption or criminal activity when Fall's actions drew serious concerns.<sup>127</sup> Even after the Senate Committee on Public Lands and Survey announced its investigation, the DOJ remained silent.<sup>128</sup> A congressional investigation would not preclude

119. *Id.* (citing NOGGLE, *supra* note 117, at 91).

120. *Id.*; see also CYNTHIA BROWN & JARED P. COLE, CONG. RESEARCH SERV., R44857, SPECIAL COUNSELS, INDEPENDENT COUNSELS, AND SPECIAL PROSECUTORS: LEGAL AUTHORITY AND LIMITATIONS ON INDEPENDENT EXECUTIVE INVESTIGATIONS 1 (2018) (discussing congressional authority to prosecute).

121. Gormley, *supra* note 9, at 628. The Senate confirmed both Pomerene and Roberts as Special Counsel. *Id.*

122. The special counsel investigation took years after they began their investigation into criminal activity over the Teapot Dome leases. *Id.* These investigations are complex—taking a considerable amount of time and resources before criminal charges are brought.

123. *Id.*

124. Scott Bomboy, *Attorney General Removals Rare, But Not Unprecedented*, NAT'L CONST. CTR. (July 26, 2017), <https://constitutioncenter.org/blog/attorney-general-removals-rare-but-not-unprecedented> [<https://perma.cc/4J9D-SL9P>].

125. Gormley, *supra* note 9, at 628, 628 n.115 (explaining how Attorney General Daugherty faced impeachment and was indicted multiple times for his actions during the Scandal).

126. HERBERT HOOVER, *THE MEMOIRS OF HERBERT HOOVER: THE CABINET AND THE PRESIDENCY 1920–1933*, at 48 (1952).

127. See *McGrain v. Daugherty – Teapot Dome*, JRANK, <http://law.jrank.org/pages/25404/McGrain-v-Daugherty-Teapot-Dome.html> [<https://perma.cc/JUW4-68CG>].

128. See Andrew Glass, *Senate Panel Holds Hearings in Teapot Dome Probe: Oct. 22, 1923*, POLITICO (Oct. 21, 2016, 11:43 PM), <https://www.politico.com/story/2016/10/>

a criminal investigation into the same matter as the intent and result may be different. Although no charges were brought against Daugherty by the Senate, he resigned from his position amidst questions regarding his criminal actions and personal knowledge of Fall.<sup>129</sup>

The appointment of the special counsel was appropriate given the blatant attempt by Secretary Fall to subvert the rule of law. Given the significant role of the Department of the Interior at the time, his actions were not the run-of-the-mill criminal violation that occurred by someone within the Executive. The combination of the Attorney General's inaction and his direct control of the DOJ resulted in silence of the DOJ's normal ability to handle this criminal investigation. This conflict necessitated the appointment of the special counsel. While political appointments are the norm for Cabinet positions, these individuals must still swear to follow the Constitution and uphold the rule of law. The overlap of criminal actions by Cabinet secretaries and White House senior counsel are more likely to trigger the appointment of the special counsel because it often accompanies the failure to uphold constitutional tenets. This is demonstrated with the Watergate investigation.

### B. Watergate

Watergate has become synonymous with the five Watergate burglars who broke into the headquarters of the Democratic National Committee (DNC) to repair illegal surveillance equipment.<sup>130</sup> The break-in was the tip of the iceberg of the nefarious actions of several high-level officials within the White House and DOJ. Once the Senate began investigating the break-in, they quickly found numerous other criminal activities committed on President Nixon's behalf or with his express permission.<sup>131</sup> Investigations conducted by the Senate Select Committee on Presidential Campaign Activities—and later the Special Counsel—uncovered illegal activities, including campaign finance violations, obstruction of justice, and espionage.<sup>132</sup> This created a constitutional crisis because of the numerous bad actors within the Executive Branch who sought to subvert the rule of law through covert actions, which included tampering with the Special Counsel. The Watergate investigation's complexity demonstrates a need for a special counsel appointment and investigation.

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senate-panel-holds-hearings-in-teapot-dome-probe-oct-22-1923-229951 [<https://perma.cc/U2CB-X9ZL>].

129. See Gormley, *supra* note 9, at 628 n.115.

130. See *Watergate Scandal*, HISTORY (Oct. 29, 2009), <https://www.history.com/topics/1970s/watergate> [<https://perma.cc/P8UX-PUR8>]; see also S. REP. NO. 96-981, at 83–84 (1974).

131. *Watergate Scandal*, *supra* note 130.

132. See S. REP. NO. 96-981, *supra* note 130, at 83.

### 1. *The Break-In and Who Was Involved*

On May 28, 1972, G. Gordon Liddy and Howard Hunt, two members of the CRP, orchestrated and implemented a plan to surveil the DNC Headquarters located in the Watergate office complex.<sup>133</sup> These burglars were part of Liddy and Hunt's ongoing campaign to spy and harass the Democratic Party.<sup>134</sup> Hunt contracted with Cuban-Americans who comprised most of the team that broke into Watergate.<sup>135</sup> The first burglary of the DNC headquarters went smoothly, resulting in the wiretapping of high officials' telephones and photographing of sensitive documents.<sup>136</sup> A review of the wiretap conversations by Attorney General John Mitchell and other senior White House officials revealed nothing of substance from the recordings.<sup>137</sup> Hunt and Liddy planned a second break-in to fix one of the telephone microphones in an effort to get better intelligence.<sup>138</sup>

The second burglary took place on June 17, 1972, when four Cuban-Americans and James McCord broke into the DNC.<sup>139</sup> Security Guard Frank Willis called police after finding tape on a door lock.<sup>140</sup> Plainclothes police caught the five intruders while trying to repair the defective electronic surveillance equipment.<sup>141</sup> Police investigation revealed Hunt's name in one of the burglar's belongings, leading to his eventual arrest.<sup>142</sup>

The break-in occurred at the behest of the CRP, which was run initially by White House Chief of Staff H.R. Halderman<sup>143</sup> and later by former Attorney General Mitchell.<sup>144</sup> Liddy served as legal counsel for CRP at the time of his involvement in the break-in.<sup>145</sup> His involvement was the

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133. *Id.* at 28.

134. *See id.* at 205–06.

135. *See id.* at 28.

136. *Id.* at 28–29.

137. *Id.* at 29.

138. *Id.* at 31.

139. *Id.*

140. *Id.*

141. *Id.* at 1; WATERGATE SPECIAL PROSECUTION FORCE, FINAL REPORT, app. A at 43 (1977).

142. S. REP. NO. 96-981, *supra* note 130, at 31.

143. Adam Augustyn et al., *H.R. Halderman*, ENCYCLOPAEDIA BRITANNICA (Nov. 8, 2018), <https://www.britannica.com/biography/H-R-Haldeman> [<https://perma.cc/3WPA-VFH7>].

144. S. REP. NO. 96-981, *supra* note 130, at 32–33.

145. Karlyn Barker & Walter Pincus, *Watergate Revisited; 20 Years After the Break-in, the Story Continues to Unfold*, WASH. POST (June 14, 1992), <https://www.washingtonpost.com/politics/watergate-revisited-20-years-after-the-break-in-the-story-continues-to->

first indication of a larger role played by CRP and senior counsel to the President. Their goal of ensuring President Nixon's re-election by any means, including illegal activity, was successful in the short term. Three months after the break-in, the four Cuban-Americans, Liddy, Hunt, and McCord, were federally indicted for burglary.<sup>146</sup>

## 2. *The Cover-Up*

After McCord's conviction in 1973, his actions led to the unraveling of numerous criminal activities and sophisticated cover-ups by many in the highest levels of the Executive Branch. McCord requested a private meeting with the federal judge who presided over his trial.<sup>147</sup> The judge gathered witnesses and a court reporter to read his letter—the contents of which he read at the sentencing.<sup>148</sup> This resulted in action being taken by

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unfold/2012/06/04/gJQAKaAqIV\_story.html?utm\_term=.2dfac7a87be0 [https://perma.cc/Q4U5-ECBH].

146. WATERGATE SPECIAL PROSECUTION FORCE, *supra* note 141.

147. DOYLE, *supra* note 39, at 33–34.

148. *Id.*; Letter from James W. McCord to John Sirica, Judge, U.S. Dist. Court for D.C. (Mar. 19, 1973), <http://watergate.info/1973/03/19/mccord-letter-to-judge-sirica.html> [https://perma.cc/XF5T-RD4]. McCord divulged the following information to Judge Sirica:

[I]n the interests of justice, and in the interests of restoring faith in the criminal justice system, which faith has been severely damaged in this case, I will state the following to you at this time which I hope may be of help to you in meting out justice in this case:

1. There was political pressure applied to the defendants to plead guilty and remain silent.
2. Perjury occurred during the trial in matters highly material to the very structure, orientation, and impact of the government's case, and to the motivation and intent of the defendants.
3. Others involved in the Watergate operation were not identified during the trial, when they could have been by those testifying.
4. The Watergate operation was not a CIA operation. The Cubans may have been misled by others into believing that it was a CIA operation. I know for a fact that it was not.
5. Some statements were unfortunately made by a witness which left the Court with the impression that he was stating untruths, or withholding facts of his knowledge, when in fact only honest errors of memory were involved.
6. My motivations were different than those of the others involved, but were not limited to, or simply those offered in my defense during the trial. This is no fault of my attorneys, but of the circumstances under which we had to prepare my defense.

.....

I give this statement freely and voluntarily, fully realizing that I may be prosecuted for giving a false statement to a Judicial Official, if the statements herein are knowingly untrue. The statements are true and correct to the best of my knowledge and belief.

Letter from James W. McCord, *supra*.



two branches of government. First, the Executive Branch engaged in systematic efforts to cover-up the illegal activities that the White House and Cabinet members had engaged.<sup>149</sup> Second, the Senate called not only for creation of a commission to investigate but also for the appointment of a special counsel.<sup>150</sup>

Just weeks after the arrests at the Watergate Complex, Attorney General Mitchell resigned from his position to chair CRP.<sup>151</sup> However, Mitchell secretly ran CRP, along with Haldeman, for a year prior to Mitchell's resignation.<sup>152</sup> During Mitchell's time as Attorney General, he led meetings where illegal activities were discussed by senior members of the administration, along with the hierarchy of CRP.<sup>153</sup> Those planning espionage activities included Senior Counsel John Ehrlichman and White House Counsel John Dean.<sup>154</sup> CRP involved other federal executive agencies in harassing and threatening their enemies, including the Internal Revenue Service (IRS), the FBI, and the CIA.<sup>155</sup> These activities included monitoring political enemies, planning wiretaps and surveillance of the Watergate complex, committing office break-ins, interfering with Democratic Party meetings and events, and shadowing people at the Democratic National Convention.<sup>156</sup>

In the immediate days after the break-in both CRP and senior White House counsel focused on damage control.<sup>157</sup> Dean, senior counsel Jeb Magruder, Chief of Staff John Haldeman, Liddy, and Mitchell discussed how to curtail any potential criminal liability.<sup>158</sup> Their efforts included destroying evidence, insulating President Nixon, and pressuring the DOJ to quash the investigation.<sup>159</sup> Over the next few months, both CRP and

149. See DOYLE, *supra* note 39, at 34.

150. See *id.*

151. PBS NEWSHOUR, WATERGATE BACKGROUND (2013), <http://www.pbs.org/newshour/extra/app/uploads/2013/11/Watergate-Background.pdf> [<https://perma.cc/B7RP-69JG>]. Mitchell resigned on July 1, 1972, just two weeks after the break-in. *Id.*

152. See S. REP. NO. 96-981, *supra* note 130, at 19–20. During the Senate Judiciary Committee hearing, Mitchell lied that he had any involvement in CRP prior to leaving the DOJ. *Id.* at 20. It was a violation of campaign finance laws and a conflict of interest for the attorney general to be a campaign manager. *Id.* at 73, 76–78.

153. See S. REP. NO. 96-981, *supra* note 130, at 21–22. These meetings were held in the Attorney General's Office at the DOJ. *Id.* at 22.

154. See *id.* at 88–90.

155. See *id.* at 130–50.

156. See *id.* at 130–56.

157. See *id.* at 86–87.

158. See *id.* at 86–91.

159. See *id.*

the White House vehemently denied any involvement in the burglary.<sup>160</sup> Behind the scenes, the administration orchestrated a campaign limiting criminal liability to the five Watergate burglars, Hunt, and Liddy.<sup>161</sup> After President Nixon's reelection, Nixon, Haldeman, Ehrlichman, and Dean planned to retaliate against those trying to uncover the breadth of the cover-up.<sup>162</sup>

According to Dean, other topics discussed at the meeting included the bugging of the 1968 Nixon campaign, the date of the criminal trial, progress in the various Watergate civil suits, press coverage of Watergate, a GAO audit, the Patman Committee's inquiry, use of the IRS to attack administration "enemies," and post-election plans to place officials responsive to White House requirements in the IRS and other Federal agencies. He said the President also asked him to "keep a good list of the press people giving us trouble, because we will make life difficult for them after the election."<sup>163</sup>

In the short term, the Administration's efforts were successful. Not only was President Nixon re-elected by a landslide but also the FBI's initial investigation appeared closed with only low-level CRP and White House personnel being implicated.<sup>164</sup> However, cover-up efforts were short lived after McCord and Hunt's trials commenced, leading not only to an investigation by the Senate but also the appointment of the special prosecutor.<sup>165</sup>

What brought down two attorney generals, the President, and his senior counsel was a joint effort from Congress and the Special Counsel.<sup>166</sup> The relationship between the Special Counsel and the Senate Watergate Committee was not always harmonious, but both investigations were vital.<sup>167</sup> These actions, along with intense investigative reporting from news agencies, were instrumental in shedding light on the pervasive illegal activity occurring

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160. *See id.* at 46–47.

161. *Id.* at 47–48 (detailing how the President held a press conference stating Dean conducted an internal investigation into Watergate and found no wrongdoing outside of those already indicted). On September 15, 1972, John Hushen, Director of Public Information of the DOJ, stated: "We have absolutely no evidence to indicate that any others should be charged" in the Watergate incident. *Id.* at 48.

162. *See* S. REP. NO. 96-981, *supra* note 130, at 49–50. *See generally* JOHN W. DEAN & JAMES ROBENALT, *THE LEGACY OF WATERGATE* (2012).

163. S. REP. NO. 96-981, *supra* note 130, at 48.

164. *See The Watergate Trial Timeline*, GERALD R. FORD LIBR. MUSEUM, [https://www.fordlibrarymuseum.gov/museum/exhibits/watergate\\_files/content.php?section=1&page=d](https://www.fordlibrarymuseum.gov/museum/exhibits/watergate_files/content.php?section=1&page=d) [<https://perma.cc/V5LL-4KBE>].

165. *See* Rob Isbits, *Watergate and the Stock Market: A Brief Review*, FORBES (May 23, 2017, 1:32 PM), <https://www.forbes.com/sites/robisbits2/2017/05/23/watergate-and-the-stock-market-a-brief-review/#512780253381> [<https://perma.cc/946D-PRT9>].

166. *See* DOYLE, *supra* note 39, at 13.

167. *See id.* at 68–69 (explaining that because much of the Special Counsel's investigation was done in secret, it was important for the public to hear testimony from various Executive personnel to understand how these criminal actions occurred and for what duration).

in the higher echelons of government.<sup>168</sup> However, their efforts were undermined at every point by the targets of these investigations. The political efforts to halt this investigation show several key lessons that must be learned during the current Special Counsel investigation into Russian interference with the 2016 election.<sup>169</sup>

### *3. The Senate Watergate Commission, the Special Counsel Investigations, and Conflicts with the DOJ*

The publicity surrounding the Watergate burglary and subsequent prosecutions led several governmental officials to dig deeper into those supposedly involved within the White House.<sup>170</sup> The Senate Committee tasked to investigate Watergate began its work in February 1973 after the Senate voted for its creation.<sup>171</sup> Four Democrats and three Republicans would comprise the Committee with Senator Sam Ervin chairing the committee.<sup>172</sup> Their mandate was to investigate potential illegal activity done by the CRP.<sup>173</sup> The Senate Committee could subpoena witnesses to appear before it along with ordering the production of documents.<sup>174</sup> However, the Senate Committee lacked the overall prosecutorial power of a Special Counsel.<sup>175</sup> The Senate Committee would have to refer any failures to cooperate to a federal court for advancement.<sup>176</sup>

The mandate of the Special Counsel differed from that of the Senate Committee. Prior to his confirmation, acting Attorney General Elliott Richardson discussed with Archibald Cox the scope of the investigation's mandate.<sup>177</sup> Cox argued for one key addition: the power to make regular and public status reports of the investigation.<sup>178</sup> He felt "it was public opinion that had forced the appointment of a special prosecutor [and that] public

168. *See id.* at 13.

169. *See infra* Part IV.

170. *See* DOYLE, *supra* note 39, at 33.

171. S. REP. NO. 96-981, *supra* note 130, at vii; *see also* DOYLE, *supra* note 39, at 33.

172. DOYLE, *supra* note 39, at 33; *see also* PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 76 (1978) (explaining the efforts various Senators made to appoint a special counsel and the pressure on Richardson to appoint one after his confirmation).

173. *See* DOYLE, *supra* note 39, at 33.

174. *See id.* at 13–14.

175. *See id.* at 13.

176. *See id.* at 13–14.

177. *See id.* at 44. Richardson and Cox decided to extend the powers "to investigate members of the White House staff and presidential appointees." *Id.*

178. *Id.* at 45.

opinion that would compel cooperation with him.”<sup>179</sup> In May of 1973, Cox was officially appointed as Special Counsel for the Watergate Special Prosecution Force.<sup>180</sup>

Over the next few months, Cox built a large staff tasked to investigate approximately six areas of criminal activities: (1) the Watergate break-ins and cover-up; (2) obstruction of justice; (3) the Plumber cases involving break-ins of various people seen as threats to President Nixon; (4) the money trail from the Watergate burglary; (5) the International Telephone and Telegraph Corporation (ITT) investigation; and (6) “the ‘dirty tricks’ . . . disruption[] of the Democratic primary campaigns.”<sup>181</sup> The complexity of the investigation revealed criminal conduct not only by senior White House officials but also within the DOJ itself.<sup>182</sup> Attorney General Kleindienst and former Attorney General Mitchell were both implicated.<sup>183</sup> Kleindienst faced pressures from the White House and CRP to control the FBI investigation and minimize charges against the Watergate burglars, Liddy, Hunt, and McCord.<sup>184</sup> Shortly after the FBI investigation began, Liddy approached Kleindienst about releasing the burglars.<sup>185</sup> The Attorney General refused and ordered the case to proceed as normal.<sup>186</sup> While Kleindienst refused to interfere with the FBI investigation, he lied to the Senate Judiciary Committee during his confirmation hearing about his involvement with the ITT investigation and pressure from the White House.<sup>187</sup>

The ITT antitrust investigation illustrates the level of corruption the White House, specifically the President, would put on historically independent actors to benefit personal contacts or funding sources. The DOJ wanted to appeal a lower court ruling favoring ITT in the dispute.<sup>188</sup> The decision fell to Deputy Attorney General Kleindienst, who chose to appeal.<sup>189</sup> On the day before the notice of appeal was due, senior assistant Ehrlichman called Kleindienst on the President’s behalf to request the DOJ not file a

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179. *Id.*

180. *Id.* at 45–47.

181. *Id.* at 59–61. The Plumbers were comprised of both Administration and CRP personnel who made “efforts to subvert government agencies from the [IRS] to the [CIA]. Most of these leads pointed toward John Ehrlichman or Charles Colston.” *Id.* at 60.

182. *See Watergate Scandal*, HISTORY (Aug. 27, 2018), <https://www.history.com/topics/1970s/watergate> [<https://perma.cc/2DG2-PWPH>].

183. *See WATERGATE SPECIAL PROSECUTION FORCE*, *supra* note 141, app. A at 53, app. B at 66.

184. *See* S. REP. NO. 96-981, *supra* note 130, at 32.

185. *Id.*

186. *See id.*

187. LEON JAWORSKI, *THE RIGHT AND THE POWER: THE PROSECUTION OF WATERGATE* 150 (1976).

188. *Id.* at 149.

189. *Id.*

notice of appeal.<sup>190</sup> When the deputy balked at Ehrlichman's request, President Nixon called Kleindienst demanding he drop the case.<sup>191</sup> After receiving an extension on the notice of appeal, Kleindienst went to Attorney General Mitchell with a threat to resign along with several senior DOJ officials if he was forced to obey Nixon's wishes.<sup>192</sup> What was unknown to the DOJ at the time is that ITT offered CRP \$400,000 if the antitrust law suit went away or settled.<sup>193</sup> While Nixon withdrew his order at Mitchell's request, the ITT case did settle soon thereafter.<sup>194</sup>

When asked about the incident during his Senate Judiciary Confirmation hearing, Kleindienst lied about whether the White House played a part in pressuring the DOJ.<sup>195</sup> He and Ehrlichman frequently communicated about various cases being investigated by the FBI and DOJ.<sup>196</sup> Kleindienst recused himself from control over the Watergate investigation in April 1973.<sup>197</sup> However, his lie led to his resignation a year after being appointed and a guilty plea to lying to the Senate on May 16, 1974.<sup>198</sup>

Mitchell's criminal activities stained the DOJ in their magnitude. Newspaper reports showed that Mitchell, along with several other CRP leaders, controlled a secret fund for criminal activities prior to the appointment of the Special Counsel.<sup>199</sup> As explained previously, he orchestrated much of the surveillance of the DNC and targeted enemies of the President during his time as Attorney General and continued while head of CRP.<sup>200</sup> Mitchell was indicted "on one count of conspiracy to obstruct justice, one count of obstruction of justice, two counts of making a false statement to a Grand

190. *Id.* at 149–50.

191. *See id.* at 150 ("I know what was said on that April day in 1971, because I listened to the tape recording of the conversation more than two years later. Nixon's voice was angry and his words abusive. It was a tirade in which he threatened to fire [senior DOJ attorney] McLaren. . . . Kleindienst tried to interrupt, but the President wouldn't let him. Nixon concluded his denunciation by expressly directing Kleindienst not to file an appeal and adding, 'This is an order!'").

192. *Id.*

193. S. REP. NO. 96-981, *supra* note 130, at 127.

194. JAWORSKI, *supra* note 187, at 150.

195. *See* DOYLE, *supra* note 39, at 130.

196. *See id.* at 32.

197. WATERGATE SPECIAL PROSECUTION FORCE, *supra* note 141, app. A at 44.

198. *Id.* at 45, 53 (noting Kleindienst pled guilty to 2 U.S.C. § 192 for "refusal to answer pertinent questions before a Senate Committee").

199. 1 WATERGATE AND THE WHITE HOUSE: JUNE 1972–JULY 1973, at 15–16, 54 (Edward W. Knappman et al. eds., 1973); WATERGATE SPECIAL PROSECUTION FORCE, *supra* note 141, app. A at 44.

200. *See supra* Section III.B.2.

Jury, one count of perjury, and one count making a false statement to an agent of the FBI.”<sup>201</sup> A jury convicted him of all charges except for making a false statement to the FBI, which the district court dismissed.<sup>202</sup> He was sentenced to two and a half to eight years in prison.<sup>203</sup>

One of the critical dangers of the numerous illegal activities of those within the White House and in the Cabinet was the placement of high-level officials loyal to President Nixon within the FBI. J. Edgar Hoover, Director of the FBI, opposed the expansion of domestic intelligence that the White House requested of him during his tenure.<sup>204</sup> He voiced his objections to Mitchell, but the plan proceeded.<sup>205</sup> After Hoover’s death in May of 1972, Nixon appointed L. Patrick Gray as acting director of the FBI.<sup>206</sup> Along with Gray, Henry Petersen, who was the Assistant Attorney General overseeing the Watergate burglaries investigation, reported on the grand jury’s activities including the testimony of White House and CRP officials.<sup>207</sup> Such action is a violation of federal law.<sup>208</sup> Gray and Petersen, along with other DOJ officials, ensured the White House knew about the progress of the Watergate investigation, could get ahead of potential problems, and could thwart the investigation when necessary.<sup>209</sup>

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201. WATERGATE SPECIAL PROSECUTION FORCE, *supra* note 141, at app. B at 66 (citations omitted).

202. *Id.*

203. *Id.*

204. S. REP. NO. 96-981, *supra* note 130, at 4–6.

205. *See id.* at 4–5.

206. Patricia Sullivan, *Watergate-Era FBI Chief L. Patrick Gray III Dies at 88*, WASH. POST (July 7, 2005), [https://www.washingtonpost.com/politics/watergate-era-fbi-chief-l-patrick-gray-iii-dies-at-88/2012/05/31/gJQA9fX2FV\\_story.html?utm\\_term=.d42283174c2e](https://www.washingtonpost.com/politics/watergate-era-fbi-chief-l-patrick-gray-iii-dies-at-88/2012/05/31/gJQA9fX2FV_story.html?utm_term=.d42283174c2e) [<https://perma.cc/DG3S-4URW>].

207. *See* DOYLE, *supra* note 39, at 54–57 (discussing Petersen’s initial interview with Special Counsel Cox where Petersen objected to explaining his discussions with the White House and the President); *see also* Simon, *supra* note 7, at 48 (“Testimony before the Senate Select Committee on presidential Campaign Activities (the Senate Watergate Committee) revealed ample evidence of such conflicts. It was shown, for instance, that throughout the summer of 1972, and continuing until the spring of 1973, Henry Petersen, chief of the Justice Department’s Criminal Division, served as a ‘conduit for a constant flow of information from the grand jury and the prosecutors’ to both presidential counsel John Dean and to the President. Dean testified that Petersen informed him of the witnesses that would be called before the grand jury, and what they would be asked. According to Dean, Petersen passed on the information because he was ‘a soldier.’” (footnotes omitted)).

208. *See* FED. R. CRIM. P. 6(e)(2) (“No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B). . . . Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury: (i) a grand juror; (ii) an interpreter; (iii) a court reporter; (iv) an operator of a recording device; (v) a person who transcribes recorded testimony; (vi) an attorney for the government; or (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).”).

209. *See* Andrew Rudalevige, *What Can Watergate Teach Us About the Trump White House?*, WASH. POST (May 18, 2017), [134](https://www.washingtonpost.com/news/monkey-</a></p></div><div data-bbox=)

Further, the White House sought to enlist the CIA to stop the FBI's investigation into Watergate.<sup>210</sup> Five days after the Watergate burglars were arrested, Acting FBI Director Gray and CIA Director Richard Helms discussed the break-in, and Helms explained that the CIA was not involved in DNC surveillance or with those arrested.<sup>211</sup> However, the senior White House counsel saw things differently:

[A]t President Nixon's direction after meeting with him, Haldeman and Ehrlichman called CIA Director Helms and Deputy Director Walters to the White House for a meeting. At this session, . . . Haldeman asked if there w[as] any CIA connection with the Watergate break-in. Helms replied there was none. Haldeman, however, suggested that an FBI investigation in Mexico might uncover CIA operations or assets. Helms replied that no FBI investigations of Watergate would jeopardize any CIA operations. Nevertheless, Haldeman and Ehrlichman directed Walters to meet with Gray and tell him that any further investigations into Mexico could endanger CIA assets there.<sup>212</sup>

Given that some of the funds CRP accepted were from Mexican nationals, any investigation into the money paid to the Watergate burglars would uncover these illegal assets.<sup>213</sup> Gray suffered political ruin due to the President's senior counsel's actions in either slowing down the DOJ investigation or directly impeding it.<sup>214</sup> Gray destroyed Hunt's documents detailing the break-in and the extent of the conspiracy.<sup>215</sup> When his actions were uncovered, he withdrew his nomination as FBI director and later stepped down from the position after the Washington Post broke the story.<sup>216</sup>

The complexity of the Watergate conspiracy and the direct involvement of DOJ officials demonstrate why the appointment of the Special Counsel was necessary. In hindsight, the decision was clear after the numerous indictments, guilty pleas, and convictions resulting from the Special Counsel's actions. However, going through these events, signs of highly questionable

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210. *Id.*

211. S. REP. NO. 96-981, *supra* note 130, at 37.

212. *Id.*

213. *See id.* at 36–37.

214. *See* Todd S. Purdum, *L. Patrick Gray III, Who Led the F.B.I. During Watergate, Dies at 88*, N.Y. TIMES (July 7, 2005), <https://www.nytimes.com/2005/07/07/politics/l-patrick-gray-iii-who-led-the-fbi-during-watergate-dies-at-88.html> [https://perma.cc/A53C-XGP8].

215. *Id.*

216. WATERGATE SPECIAL PROSECUTION FORCE, *supra* note 141, app. A at 45.

conduct was seen by all three branches of government. Congress grew concerned based on news reports from the Washington Post and New York Times of illegal activity surrounding CRP personnel and junior White House officials.<sup>217</sup> Federal Judge Sirica grew concerned after presiding over the Watergate burglars' trials and reading McCord's letter.<sup>218</sup> His reading of the letter in open court led directly to the Senate's creation of the Commission.<sup>219</sup> Finally, it was pressure by the Senate during Richardson's confirmation hearing that caused the Special Counsel's appointment.<sup>220</sup> These actions are the checks and balances that preserved the rule of law in a critical time of constitutional jeopardy. Despite the White House's attempts to interfere with the DOJ and FBI, two separate investigations—one public, the other private—continued to uncover illegal actions.

The Saturday Night Massacre<sup>221</sup> was the closest the country came to a constitutional crisis concerning the rule of law. For most of the investigation, Special Counsel Cox knew of President Nixon's recordings.<sup>222</sup> However, he did not request these tapes until White House aide, William Butterfield, testified before the Senate Committee to the taping system's existence within the Oval Office.<sup>223</sup> Cox subpoenaed nine tapes to confirm several witnesses' testimony about the breadth of the cover-up.<sup>224</sup>

One of the critical reasons the later appointment of a special counsel was so important was the numerous conflicts of interest between a few of the attorneys general and their implication in the Watergate investigations. Nixon refused to disclose the tapes on the grounds of executive privilege and national security.<sup>225</sup> Despite his attempts to provide summaries of the

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217. See, e.g., *The Woodward and Bernstein Watergate Papers*, HARRY RANSOM CTR., <https://www.hrc.utexas.edu/exhibitions/web/woodstein/post/> [<https://perma.cc/C4KF-ZGTL>].

218. See David Millward, *What Was Watergate and Why Did Nixon Face Impeachment?*, TELEGRAPH (May 20, 2017, 1:01 AM), <https://www.telegraph.co.uk/news/0/watergate-nixon-impeached/> [<https://perma.cc/2Z49-TYRX>].

219. *Chronology of Watergate Developments in 1973*, CQ ALMANAC, <https://library.cqpress.com/cqalmanac/document.php?id=cqal73-867-26366-1225636> [<https://perma.cc/YP8J-59ML>].

220. See Jim Mokhiber, *A Brief History of the Independent Counsel Law*, KPBS, <https://www.pbs.org/wgbh/pages/frontline/shows/counsel/office/history.html> [<https://perma.cc/S2RV-5W4L>].

221. See Andrews, *supra* note 3.

222. See DOYLE, *supra* note 39, at 54–56.

223. *Id.* at 92–93; see also S.REP. NO. 96-981, *supra* note 130, at 1081.

224. See DOYLE, *supra* note 39, at 95–97, 101–107; KURLAND, *supra* note 172, at 53 (“As soon as Alexander Butterfield had publicly spilled the beans about the existence of the White House tapes, the committee issued a subpoena to the President for their production.”).

225. Carroll Kilpatrick, *President Refuses to Turn Over Tapes; Ervin Committee, Cox Issue Subpoenas: Action Sets Stage for Court Battle on Powers Issue*, WASH. POST, July 24, 1973, at A01.



tapes' contents, Cox remained adamant that the subpoena demanded the tapes themselves, not a summary.<sup>226</sup> Nixon's demand that Attorney General Richardson fire Cox<sup>227</sup> was not only an interference with a sound criminal investigation but also an act that asked whether the President was beholden to the rule of law. Both Richardson's and Deputy Attorney General William Ruckelshaus's refusals and resignations<sup>228</sup> told the President that no one is above the law. Although Solicitor General Robert Bork fired Cox,<sup>229</sup> the actions of the two highest law enforcement officials set the stage for the Supreme Court to resolve the issue.

The role of the special counsel is integral to protecting the rule of law. Sophisticated criminal activity within the highest members of the Executive Branch can be brought to justice only through the action similar to that taken by counsels in Teapot Dome and Watergate. As the Executive's powers expand and grow more complex, the special counsel's role must evolve to meet that challenge. The special prosecutor staff investigating Teapot Dome would be inadequate to handle the intricate web that comprised the Watergate investigation. The lessons learned from these two special counsel investigations illustrate why Mueller's current investigation into Russian interference in the 2016 election<sup>230</sup> is not only appropriate but also seeks to protect many of the core principles for which the position exists.

#### IV. SPECIAL COUNSEL MUELLER'S INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 ELECTION

At this point, the current Special Counsel's investigation is almost two years old with numerous indictments to Mueller's credit.<sup>231</sup> Additionally,

226. Blair Guild, *What Was the Saturday Night Massacre?*, CBS NEWS (June 7, 2017, 5:21 PM), <https://www.cbsnews.com/news/what-was-the-saturday-night-massacre/> [<https://perma.cc/8SAE-CFUC>].

227. *Photos: Anniversary of the So-Called 'Saturday Night Massacre,'* MADISON (Oct. 19, 2018), [https://madison.com/gallery/news/archives/photos-anniversary-of-the-so-called-saturday-night-massacre/collection\\_bc557033-07c6-5590-8582-700b7df6b61d.html#1](https://madison.com/gallery/news/archives/photos-anniversary-of-the-so-called-saturday-night-massacre/collection_bc557033-07c6-5590-8582-700b7df6b61d.html#1) [<https://perma.cc/3UB7-RGHX>].

228. *Id.*

229. Howard Leib, *Archibald Cox*, FIRST AMEND. ENCYCLOPEDIA, <https://mtsu.edu/first-amendment/article/1393/archibald-cox> [<https://perma.cc/5K9V-LEUS>].

230. See Ruiz & Landler, *supra* note 26.

231. See Andrew Prokop, *All of Robert Mueller's Indictments and Plea Deals in the Russia Investigation So Far*, VOX (Jan. 25, 2019, 9:51 AM), <https://www.vox.com/policy-and-politics/2018/2/20/17031772/mueller-indictments-grand-jury> [<https://perma.cc/L4P8-VTZF>].

the list of cooperating witnesses affiliated with President Trump's campaign or administration continues to grow.<sup>232</sup> While some have likened it to Watergate, the breadth and scope of the investigation appears to be quite different.<sup>233</sup> Those differences, however, do not diminish the validity of the appointment of a special counsel to focus on potential criminal conduct. Instead, the mandate illustrates why this investigation at its essence protects the most sacred principles of our democracy. An examination of its creation and current pursuits clearly shows why.

#### A. *What Led to the Appointment of the Special Counsel?*

In the months leading up to the 2016 Presidential election, national security agencies and the FBI became aware of Russian interference.<sup>234</sup> Specifically, allied countries began providing intelligence to the FBI and CIA about Russian interference with the election and growing communications between Russian agents and the Trump campaign.<sup>235</sup> Given the growing credibility of this intelligence, the FBI warned both the Clinton and Trump campaigns about the potential of Russian agents or malicious actions that could be made against either campaign.<sup>236</sup> However, while one campaign headed the warnings, the other seemingly embraced the potential of a working relationship. Based on growing concerns with Russian activity, the FBI began an investigation into Russian activity in the summer of 2016.<sup>237</sup>

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232. *See id.*

233. *See* Peter Baker, 'Bigger than Watergate'? Both Sides Say Yes, but for Different Reasons, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/us/politics/watergate-trump-russia-inquiry.html> [<https://perma.cc/9BX6-3AWC>].

234. Harding, Kirchaessner & Hopkins, *supra* note 103.

235. *Id.*; *see also* Rick Noack, *The Dutch Were a Secret U.S. Ally in War Against Russian Hackers, Local Media Reveal*, WASH. POST (Jan. 28, 2018), <https://www.washingtonpost.com/news/worldviews/wp/2018/01/26/dutch-media-reveal-country-to-be-secret-u-s-ally-in-war-against-russian-hackers/> [<https://perma.cc/3KZ7-9VQS>].

236. Marshall Cohen, *Trump Says He Wasn't Warned in 2016 About Russia Threats. He Was.*, CNN POL. (May 31, 2018, 5:40 PM), <https://www.cnn.com/2018/05/31/politics/trump-2016-russia-warnings/index.html> [<https://perma.cc/H822-L395>]; Ken Dilanian, Julia Ainsley & Carol E. Lee, *FBI Warned Trump in 2016 Russians Would Try To Infiltrate His Campaign*, NBC NEWS (Dec. 18, 2017, 10:23 PM), <https://www.nbcnews.com/news/us-news/fbi-warned-trump-2016-russians-would-try-infiltrate-his-campaign-n830596> [<https://perma.cc/X265-E7YE>] (stating the FBI warned Trump and Clinton through high-level briefings about potential threats to their campaigns from foreign adversaries).

237. *See* Matt Apuzzo, Adam Goldman & Nicholas Fandos, *Code Name Crossfire Hurricane: The Secret Origins of the Trump Investigation*, N.Y. TIMES (May 16, 2018), <https://www.nytimes.com/2018/05/16/us/politics/crossfire-hurricane-trump-russia-fbi-mueller-investigation.html> [<https://perma.cc/3K6P-JLYB>] (noting the FBI began investigating Michael Flynn, Paul Manafort, Carter Page, and George Papadopoulos 100 days before the election).

### 1. Russian Interference in the 2016 Presidential Election

A foreign power's meddling in an election strikes at the heart of this country's democracy. The right to vote and have that vote uninfringed upon has been and continues to be a cornerstone of the rule of law.<sup>238</sup> The right to vote has been expanded by Amendments six times over a hundred years.<sup>239</sup> Russia's longstanding goal is to undermine the United States' electoral process.<sup>240</sup> Beginning in 2014, Russia's goal was to affect the vote by shifting public opinions on various candidates.<sup>241</sup> As indicated in the indictment filed by the Special Counsel, numerous Russian agents traveled to the United States to learn about the political system and establish their infrastructure of disinformation.<sup>242</sup> These agents organized political rallies through social media platforms to promote the candidates potentially favorable to Russian interests.<sup>243</sup> Russia deemed its efforts a success given the results of the November 2016 Presidential election.<sup>244</sup>

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238. See Carroll Rhodes, *Federal Appellate Courts Push Back Against States' Voter Suppression Laws*, 85 MISS. L.J. 1227, 1228–30 (2017); Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2257 (2018) (asserting that states have an interest in ensuring "election integrity").

239. See U.S. CONST. amends. XII, XV, XVII, XIX, XXIV, XXVI.

240. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, ICA 2017-01D, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS, at ii (2017) ("Russian efforts to influence the 2016 US presidential election represent the most recent expression of Moscow's longstanding desire to undermine the US-led liberal democratic order, but these activities demonstrated a significant escalation in directness, level of activity, and scope of effort compared to previous operations.").

241. See Indictment at 3, *United States v. Internet Research Agency, LLC*, No. 1:18-cr-00032-DLF (D.D.C. filed Feb. 16, 2018) ("Defendants, posing as U.S. persons and creating false U.S. personas, operated social media pages and groups designed to attract U.S. audiences. These groups and pages, which addressed divisive U.S. political and social issues, falsely claimed to be controlled by U.S. activists when, in fact, they were controlled by Defendants. Defendants also used the stolen identities of real U.S. persons to post on ORGANIZATION-controlled social media accounts. Over time, these social media accounts became Defendants' means to reach significant numbers of Americans for purposes of interfering with the U.S. political system, including the presidential election of 2016."); see also Scott Shane, *How Russians Exploited Web In '16 Meddling*, N.Y. TIMES, Feb. 18, 2018, at A1 (describing the Russian attempt to use social media to influence the 2016 election).

242. Indictment, *supra* note 241, at 2–3.

243. *Id.* at 4.

244. See Matthew Rosenberg, Charlie Savage & Michael Wines, *Russia Sees Midterm Elections as Chance to Sow Fresh Discord, Intelligence Chiefs Warn*, N.Y. TIMES (Feb. 13, 2018), <https://www.nytimes.com/2018/02/13/us/politics/russia-sees-midterm-elections-as-chance-to-sow-fresh-discord-intelligence-chiefs-warn.html> [<https://perma.cc/>

The first tactic of Russian interference was to directly hack local and state election offices.<sup>245</sup>

Bloomberg reported earlier this month that Russian hackers “hit” systems in 39 states, and the Intercept, citing a classified intelligence document, reported that Russian military intelligence “executed a cyberattack on at least one U.S. voting software supplier and sent spear-phishing emails to more than 100 local election officials just days before last November’s presidential election.”<sup>246</sup>

Although national security agencies explained no voter rolls or votes cast were affected by these efforts,<sup>247</sup> these aggressive actions demonstrate the extent Russia will go to impede elections on any level. National security agencies echo concerns about the November 2018 midterm elections being targeted.<sup>248</sup>

The second prong of Russian efforts affecting the election was direct contact with the Trump Presidential campaign.<sup>249</sup> In the months leading up to the election, high ranking officials within the campaign started meeting with various Russian agents.<sup>250</sup> In early June 2016, Donald Trump, Jr. agreed to a meeting with a Russian lawyer with known ties to the Kremlin.<sup>251</sup> Those who attended the meeting for the campaign included Trump, Jr.; President Trump’s campaign chairman, Paul Manafort; and Trump’s son-in-law, Jared Kushner.<sup>252</sup> The goal of the meeting was to uncover potentially damaging information against Democratic Presidential Candidate Hillary Clinton.<sup>253</sup>

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G5FX-TBWF] (quoting the director of national intelligence, Dan Coats, as saying, “There should be no doubt that Russia perceives its past efforts as successful and view the 2018 U.S. midterm elections as a potential target for Russian influence operations”).

245. Matt Zapotosky & Karoun Demirjian, *Homeland Security Official: Russian Government Actors Tried to Hack Election Systems in 21 States*, WASH. POST (June 21, 2017), [https://www.washingtonpost.com/world/national-security/homeland-security-official-russian-government-actors-potentially-tried-to-hack-election-systems-in-21-states/2017/06/21/33bf31d4-5686-11e7-ba90-f5875b7d1876\\_story.html?noredirect=on&utm\\_term=.8427f4a46877](https://www.washingtonpost.com/world/national-security/homeland-security-official-russian-government-actors-potentially-tried-to-hack-election-systems-in-21-states/2017/06/21/33bf31d4-5686-11e7-ba90-f5875b7d1876_story.html?noredirect=on&utm_term=.8427f4a46877) [https://perma.cc/CUC8-TNXH].

246. *Id.*

247. *See* OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, *supra* note 240, at 3.

248. *See* Rosenberg, Savage & Wines, *supra* note 244.

249. *See* Meg Kelly, *All the Known Times the Trump Campaign Met with Russians*, WASH. POST (Nov. 13, 2017), [https://www.washingtonpost.com/news/fact-checker/wp/2017/11/13/all-of-the-known-times-the-trump-campaign-met-with-russians/?utm\\_term=.480ed04a0549](https://www.washingtonpost.com/news/fact-checker/wp/2017/11/13/all-of-the-known-times-the-trump-campaign-met-with-russians/?utm_term=.480ed04a0549) [https://perma.cc/R8S2-9G6E].

250. *See id.*

251. Luke Harding, *What Is the Significance of Trump Jr’s Meeting With a Russian Lawyer?*, GUARDIAN (July 11, 2017, 12:23 PM), <https://www.theguardian.com/us-news/2017/jul/11/what-is-the-significance-of-trump-jr-meeting-with-a-russian-lawyer> [https://perma.cc/C9KR-N8T8].

252. *Id.*

253. *See id.* (“On Tuesday Donald Trump Jr. published an exchange of emails with Goldstone. They are damning. On 3 June 2016, Goldstone wrote that ‘Emin just called and asked me to contact you with something very interesting.’ He said that Aras had met

The purpose of this meeting changed numerous times before Trump, Jr. disclosed the emails.<sup>254</sup> Other contacts with Russia involved Carter Page, a foreign policy advisor with the campaign, who traveled to Moscow in early July 2017.<sup>255</sup> Shortly thereafter, the Republican platform changed to a friendly, pro-Russian view regarding the Ukraine.<sup>256</sup>

Additionally, in July 2016, Wikileaks began disclosing hacked emails taken from the Democratic National Committee.<sup>257</sup> Wikileaks, run by Julian Assange,<sup>258</sup> has known ties to the Russian government, specifically a Russian intelligence agency—the GRU.<sup>259</sup> Throughout the campaign, then candidate Trump repeatedly requested Wikileaks produce candidate Clinton’s emails which, according to the Trump campaign, showed criminal activity.<sup>260</sup>

with Russia’s crown prosecutor and offered to provide ‘some official documents and information that would incriminate Hillary and her dealings with Russia and would be very useful to your father.’ Goldstone added: ‘This is obviously very high level and sensitive information but is part of Russia and its government’s support for Mr. Trump—helped along by Aras and Emin.’ Trump Jr. seemed receptive. Seventeen minutes later he emailed back to say he appreciated the offer, adding: ‘If it’s what you say I love it especially later in the summer.’”).

254. *See id.*

255. *See* Natasha Bertrand, *A Timeline of Events that Unfolded During the Election Appears to Support the FBI’s Investigation into Trump and Russia*, BUS. INSIDER (Mar. 26, 2017, 11:14 AM), <https://www.businessinsider.com/updated-trump-russia-election-timeline-fbi-2017-3> [<https://perma.cc/4UAN-FV8V>]; Kyle Cheney, *Judge Orders Intel Agencies to Answer Some ‘Dossier’ Questions in BuzzFeed Case*, POLITICO (Aug. 3, 2018, 7:39 PM), <https://www.politico.com/story/2018/08/03/steele-dossier-trump-buzzfeed-intelligence-agencies-ruling-762397> [<https://perma.cc/8BHE-9ZRR>].

256. *See* Bertrand, *supra* note 255.

257. *Id.*

258. *See id.*

259. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, *supra* note 240, at 3 (describing the relationship between Russian intelligence, the GRU, and Wikileaks).

260. *See* Natasha Bertrand, *A Timeline of Trump Associates Asking for Dirt on Clinton*, ATLANTIC (May 27, 2018), <https://www.theatlantic.com/politics/archive/2018/05/a-timeline-of-trump-associates-asking-for-dirt-on-clinton/561350/> [<https://perma.cc/HPP7-D78L>] (explaining how then candidate Trump repeatedly requested disclosure of Clinton’s emails—“Russia, if you’re listening, I hope you’re able to find the 30,000 emails that are missing.”); *see also* Rosalind S. Helderman & Tom Hamburger, *Email Pointed Trump Campaign to Wikileaks Documents that were Already Public*, WASH. POST (Dec. 8, 2017), [https://www.washingtonpost.com/politics/email-offering-trump-campaign-wikileaks-documents-referred-to-information-already-public/2017/12/08/61dc2356-dc37-11e7-a841-2066faf731ef\\_story.html?utm\\_term=.0352476c0f09](https://www.washingtonpost.com/politics/email-offering-trump-campaign-wikileaks-documents-referred-to-information-already-public/2017/12/08/61dc2356-dc37-11e7-a841-2066faf731ef_story.html?utm_term=.0352476c0f09) [<https://perma.cc/CRD7-NUL2>] (mentioning emails sent to senior Trump campaign advisors about the Wikileaks disclosures).

Privately, the campaign maintained communications with Wikileaks.<sup>261</sup> Roger Stone, a campaign advisor, told reporters that he spoke with Assange and predicted that more hacked emails would be made public right before they were released.<sup>262</sup> Up until the election, the relationship with Wikileaks continued as Stone and Assange targeted Clinton and the DNC to undermine their credibility.<sup>263</sup>

## 2. Firing of Former FBI Director James Comey

In July 2016, the FBI opened an investigation into the Trump campaign and its ties with Russian interests.<sup>264</sup> Shortly after Trump was elected President, the national security team, which included Comey, briefed Trump about Russian interference in the election.<sup>265</sup> It was during that meeting that the national security team first mentioned and described the Dossier.<sup>266</sup>

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261. See Marshall Cohen, *What We Know About Trump Jr.'s Exchanges with WikiLeaks*, CNN (Nov. 14, 2017, 1:17 PM), <https://www.cnn.com/2017/11/14/politics/donald-trump-jr-wikileaks-timeline/index.html> [<https://perma.cc/M7EV-PTD9>].

262. See *id.* (“[W]ithout specifically referencing emails, Stone predicts that Podesta will soon be in hot water. ‘Trust me, it will soon be the Podesta’s time in the barrel,’ he tweeted. Stone later claimed that he wasn’t talking about the upcoming Wikileaks releases but was alluding to an expose he was planning on his own.”); see also Bertrand, *supra* note 260.

263. See Cohen, *supra* note 261.

264. See Philip Bump, *Timeline: What We Know About Trump’s Decision to Fire Comey*, WASH. POST (Jan. 5, 2018), [https://www.washingtonpost.com/news/politics/wp/2018/01/05/timeline-what-we-know-about-trumps-decision-to-fire-comey/?utm\\_term=.759e25067c1e](https://www.washingtonpost.com/news/politics/wp/2018/01/05/timeline-what-we-know-about-trumps-decision-to-fire-comey/?utm_term=.759e25067c1e) [<https://perma.cc/PLC7-4F4D>] (explaining that when Trump fired Comey, the investigation focused on the Trump campaign’s interactions with Russian actors during the 2016 presidential election).

265. See *id.*

266. See Scott Shane, Adam Goldman & Matthew Rosenberg, *Trump Received Unsubstantiated Report That Russia Had Damaging Information About Him*, N.Y. TIMES (Jan. 10, 2017), <https://www.nytimes.com/2017/01/10/us/politics/donald-trump-russia-intelligence.html> [<https://perma.cc/YA2J-2282>] (“The memos suggest that for many years, the Russian government of Mr. Putin has looked for ways to influence Mr. Trump, who has traveled repeatedly to Moscow to investigate real estate deals or to oversee the Miss Universe competition, which he owned for several years. Mr. Trump never completed any major deals in Russia, though he discussed them for years. Mr. Steele, who gathered the material about Mr. Trump, is considered a competent and reliable operative with extensive experience in Russia, American officials said. But he passed on what he heard from Russian informants and others, and what they told him has not yet been vetted by American intelligence. The memos describe sex videos involving prostitutes with Mr. Trump in a 2013 visit to a Moscow hotel. The videos were supposedly prepared as ‘kompromat,’ or compromising material, with the possible goal of blackmailing Mr. Trump in the future. The memos also suggest that Russian officials proposed various lucrative deals, essentially as disguised bribes in order to win influence over Mr. Trump.”); see also Shane Harris, Devlin Barrett & Alan Cullison, *Spy Agencies Investigating Claims Trump Advisers Worked with Russian Agents*, WALL ST. J. (Jan. 9, 2017), <https://www.wsj.com/articles/spy-agencies-investigating-claims-trump-advisers-worked-with-russian-agents-1484101731>

After the inauguration, President Trump met with the FBI Director over the next few months, seeking assurances that he was not under investigation, requesting leniency for Michael Flynn and loyalty from the FBI Director.<sup>267</sup> Comey refused both requests and memorialized the details of these meeting with FBI senior officials.<sup>268</sup> During testimony before the House Intelligence Committee, Comey testified that there was a counterintelligence investigation into Russian interference in the election.<sup>269</sup> However, Comey refused to answer questions on whether President Trump was under investigation.<sup>270</sup> On May 3, 2017, Comey testified before the Senate Judiciary Committee about his handling of the Clinton email investigation and the pending Russian investigation.<sup>271</sup> Again, Comey confirmed the earlier Russian interference investigation, but he did not answer questions on whether the President was directly implicated.<sup>272</sup>

On March 2, 2017, Attorney General Jeff Sessions recused himself from the Russian investigation based upon the advice of DOJ counsel.<sup>273</sup> His recusal came after he failed to disclose his own meetings with Russian

267. See Glenn Thrush & Maggie Haberman, *At a Besieged White House, Tempers Flare and Confusion Swirls*, N.Y. TIMES (May 16, 2017), <https://www.nytimes.com/2017/05/16/us/white-house-staff.html> [<https://perma.cc/5H8Z-S3BR>] (“[T]he president had prodded Mr. Comey to drop an investigation into Michael T. Flynn . . . .”); see also Tom McCarthy et al., *Donald Trump Reportedly Urged Comey to Drop Michael Flynn Investigation*, GUARDIAN (May 17, 2017, 6:29 AM), <https://www.theguardian.com/us-news/2017/may/16/trump-james-comey-memo-michael-flynn-fbi-white-house-denial> [<https://perma.cc/XF74-N8A6>].

268. McCarthy et al., *supra* note 267; see also Devlin Barrett, Ellen Nakashima & Matt Zapotosky, *Notes Made by FBI Director Comey Say Trump Pressured Him to End Flynn Probe*, WASH. POST (May 17, 2017), [https://www.washingtonpost.com/world/national-security/notes-made-by-former-fbi-director-comey-say-trump-pressured-him-to-end-flynn-probe/2017/05/16/52351a38-3a80-11e7-9e48-c4f199710b69\\_story.html?utm\\_term=.be1bb50d5291](https://www.washingtonpost.com/world/national-security/notes-made-by-former-fbi-director-comey-say-trump-pressured-him-to-end-flynn-probe/2017/05/16/52351a38-3a80-11e7-9e48-c4f199710b69_story.html?utm_term=.be1bb50d5291) [<https://perma.cc/8665-F7XA>].

269. Matthew Rosenberg, Emmarie Huetteman & Michael S. Schmidt, *Comey Confirms F.B.I. Inquiry on Russia: Sees No Evidence of Wiretapping*, N.Y. TIMES (Mar. 20, 2017), <https://www.nytimes.com/2017/03/20/us/politics/intelligence-committee-russia-donald-trump.html> [<https://perma.cc/5Q6A-XZDU>].

270. See *id.*

271. *Read the Full Testimony of FBI Director James Comey in Which He Discusses Clinton Email Investigation*, WASH. POST (May 3, 2017), [https://www.washingtonpost.com/news/post-politics/wp/2017/05/03/read-the-full-testimony-of-fbi-director-james-comey-in-which-he-discusses-clinton-email-investigation/?utm\\_term=.d6cee314fade](https://www.washingtonpost.com/news/post-politics/wp/2017/05/03/read-the-full-testimony-of-fbi-director-james-comey-in-which-he-discusses-clinton-email-investigation/?utm_term=.d6cee314fade) [<https://perma.cc/2J3R-HDAL>].

272. See *id.*

273. Mark Landler & Eric Lichtblau, *Jeff Sessions Recuses Himself from Russia Inquiry*, N.Y. TIMES (Mar. 2, 2017), <https://www.nytimes.com/2017/03/02/us/politics/jeff-sessions-russia-trump-investigation-democrats.html> [

diplomats during his tenure on the Trump campaign.<sup>274</sup> Specifically, Sessions lied during his confirmation hearing when he failed to mention meetings with Ambassador Kislyak.<sup>275</sup> The combination of Session’s recusal and Comey’s testimony frustrated Trump’s attempts to move past questions about Russian actions in the election. Senior advisors in Trump’s administration began working to prevent Sessions’ recusal and find reason to fire Comey.<sup>276</sup>

Senior officials began working on a letter explaining why Comey was to be fired.<sup>277</sup> There were several versions of this letter before it finally settled on his handling of the Clinton email investigation as the root cause of Comey’s termination.<sup>278</sup> President Trump insisted the letter state what he perceived as political motivations behind the Russian investigation.<sup>279</sup> On May 8, 2017, Trump met with Sessions and newly appointed Deputy Attorney General Rod Rosenstein to discuss firing Comey.<sup>280</sup> Before Rosenstein composed the final version, he took a copy of the letter senior officials drafted.<sup>281</sup> President Trump had his former bodyguard deliver the letter to Comey’s office while the Director was in California.<sup>282</sup> Comey learned about his termination from the news.<sup>283</sup>

The fallout caused by Comey’s termination was not what the President anticipated. Because of Comey’s improper handling of the Clinton email investigation, Trump believed his actions would be applauded by both Democrats and Republicans.<sup>284</sup> Instead, there were harsh rebukes from Democrats and some Republicans that his actions were an effort to thwart

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274. *See id.*

275. *Id.*

276. See Michael S. Schmidt, *Obstruction Inquiry Shows Trump’s Struggle to Keep Grip on Russia Investigation*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/us/politics/trump-sessions-russia-mcgnahn.html> [<https://perma.cc/E5ZT-KM4K>] (“After that hearing, Mr. Trump began to discuss openly with White House officials his desire to fire Mr. Comey. This unnerved some inside the White House counsel’s office, and even led one of Mr. McGahn’s deputies to mislead the president about his authority to fire the F.B.I. director. The lawyer, Uttam Dhillon, was convinced that if Mr. Comey was fired, the Trump presidency could be imperiled, because it would force the Justice Department to open an investigation into whether Mr. Trump was trying to derail the Russia investigation.”).

277. *Id.*

278. *See id.*

279. *See id.*

280. *Id.*

281. *Id.*

282. Dan Merica, *Who is Keith Schiller, the Man Trump Sent to Fire Comey?*, CNN (May 9, 2017, 9:53 PM), <https://www.cnn.com/2017/05/09/politics/who-is-keith-schiller/index.html> [<https://perma.cc/84UJ-YCH3>].

283. Josh Dawsey, *Behind Comey’s Firing: An Enraged Trump, Fuming About Russia*, POLITICO (May 10, 2017 1:06 PM), <https://www.politico.com/story/2017/05/10/comey-firing-trump-russia-238192> [

284. *Id.*



a valid criminal investigation of which he may be a part.<sup>285</sup> Calls grew for the appointment of a special counsel because of Session's recusal and Comey's firing.<sup>286</sup>

As the fallout continued, Trump gave inconsistent reasons for Rosenstein's letter. During a meeting with Russian officials, he told those present that Comey was fired because he was a "nut job."<sup>287</sup> When Trump was asked during a televised interview the reason for Comey's firing, he refuted the grounds raised in Rosenstein's letter, instead stating, "[I]n fact, when I decided to just do it, I said to myself, I said, 'You know, this Russia thing with Trump and Russia is a made-up story' . . . . [i]t's an excuse by the Democrats for having lost an election that they should have won."<sup>288</sup> These conflicting reasonings greatly undermined Rosenstein and provided an additional basis for an independent inquiry, not only into Russian interference but also any ties with the Trump Campaign.

### *B. Appointment of Special Counsel Robert Mueller*

The appointment of the Special Counsel to handle the Russia investigation revealed that several people in leadership positions within the Trump Campaign, and later in his administration, had close ties with Russian agents.<sup>289</sup> Several indictments have already been filed on these officials, along with Russian nationals who were involved with affecting the election.<sup>290</sup> The speed at which the Special Counsel's investigation has moved signals not only more indictments to come but also a report detailing the expanse of the criminal activity spanning both the Campaign and current administration.

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285. *See id.*

286. *Id.*

287. Matt Apuzzo, Maggie Haberman & Matthew Rosenberg, *Trump Told Russians that Firing 'Nut Job' Comey Eased Pressure from Investigation*, N.Y. TIMES (May 19, 2017), <https://www.nytimes.com/2017/05/19/us/politics/trump-russia-comey.html> [<https://perma.cc/9TXN-6CRX>].

288. Peter Baker & Michael D. Shear, *Trump Shifts Rationale for Firing Comey, Calling Him a 'Showboat'*, N.Y. TIMES (May 11, 2017), <https://www.nytimes.com/2017/05/11/us/politics/trump-comey-showboat-fbi.html> [

289. *See Kelly, supra* note 249.

290. *See Prokop, supra* note 231.

## I. Mandate & Investigation

On May 17, 2017, Rosenstein announced the appointment of Robert Mueller III as Special Counsel for the Russia investigation.<sup>291</sup> After the lapse of the independent counsel statute, the DOJ drafted new guidelines allowing for the appointment of a special counsel.<sup>292</sup> Rosenstein laid out the scope of Mueller’s investigative mandate as follows:

- (b) The Special Counsel is authorized to conduct the investigation confirmed by then-FBI Director James B. Comey in testimony before the House Permanent Select Committee on Intelligence on March 20, 2017, including:
  - (i) any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump; and
  - (ii) any matters that arose or may arise directly from the investigation; and
  - (iii) any other matters within the scope of 28 C.F.R. § 600.4(a).
- (c) If the Special Counsel believes it is necessary and appropriate, the Special Counsel is authorized to prosecute federal crimes arising from the investigation of these matters.<sup>293</sup>

The mandate transferred the existing FBI investigation into Russian interference to the control of the Special Counsel.<sup>294</sup> For the first time, the DOJ acknowledged the possible connection between the Trump Campaign and Russian interference.<sup>295</sup> Additionally, under the Code of Federal Regulations, Mueller could investigate and charge “perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.”<sup>296</sup>

Much like the Watergate special counsel investigation, Mueller began building his team of attorneys, FBI agents, and other personnel qualified to handle an investigation focused on the actions of a foreign government.<sup>297</sup> Those who joined Mueller were often people he had worked with when he was the FBI director—federal prosecutors with expertise in national

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291. Devlin Barrett, Sari Horwitz & Matt Zapposky, *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?noredirect=on&utm\\_term=.ac22caa44871](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?noredirect=on&utm_term=.ac22caa44871) [<https://perma.cc/2RYH-J9DR>].

292. MASKELL, *supra* note 38, at 3.

293. ROSENSTEIN, *supra* note 27; *see also* Barrett, Horwitz & Zapposky, *supra* note 291.

294. ROSENSTEIN, *supra* note 27.

295. *See id.*

296. 28 C.F.R. § 600.4(a) (2018).

297. *See* Josh Gerstein, *Inside Mueller’s FBI Team*, POLITICO (May 17, 2018, 5:01 AM), <https://www.politico.com/story/2018/05/17/mueller-fbi-team-russia-probe-594345> [<https://perma.cc/6B7T-CDC2>].

security, racketeering, money laundering, and other white-collar offenses.<sup>298</sup> However, unlike Watergate, understanding how a hostile foreign power directly and indirectly infiltrated the elections required the team to not only look at how the Russian government was able to do so but also the funding and assistance within the United States necessary to accomplish infiltration.<sup>299</sup>

During the first few months of the investigation, the DOJ turned over the developing Russian interference intelligence and known potential criminal actors in the Trump administration.<sup>300</sup> The FBI began building a case against Michael Flynn, former National Security Advisor—even before he assumed the role in January 2017—for not disclosing his work as a lobbyist for Turkey.<sup>301</sup> FBI agents interviewed Flynn about his connections with Turkey and about a conversation he had with Russian Ambassador Sergey Kislyak shortly before the inauguration.<sup>302</sup>

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298. See Scott Shane & Charlie Savage, *Mueller, Known for Being Above the Fray, Is Now in the Thick of It*, N.Y. TIMES (June 15, 2017), <https://www.nytimes.com/2017/06/15/us/politics/robert-mueller-special-counsel.html> [<https://perma.cc/W2AA-5U79>] (discussing the background of the attorneys joining the special counsel investigation, including a former Watergate prosecutor, a former DOJ legal counsel, and trial litigators); see also Michelle Mark, *Meet the All-Star Team of Lawyers Robert Mueller has Working on the Trump-Russia Investigation*, BUS. INSIDER (May 17, 2018, 7:28 PM), <http://www.businessinsider.com/lawyers-robert-mueller-hired-for-the-trump-russia-investigation-2017-6> [<https://perma.cc/3AAL-Z7NS>] (detailing the more recent special counsel hires, including attorneys versed in national security, organized crime, public corruption, and international criminal law).

299. See Baker, *supra* note 233.

300. See David Smith, *Trump-Russia Inquiry to Examine Grand Jury Findings on Flynn's Foreign Lobbying*, GUARDIAN (June 2, 2017, 3:50 PM), <https://www.theguardian.com/us-news/2017/jun/02/trump-russia-investigation-michael-flynn-foreign-lobbying> [<https://perma.cc/57BB-B2YY>].

301. See Morgan Chalfant, *Mueller Releases Memo Detailing 2017 FBI Interview with Flynn*, HILL (Dec. 17, 2018, 7:22 PM), <https://thehill.com/homenews/administration/421796-mueller-releases-memo-detailing-2017-fbi-interview-with-flynn> [<https://perma.cc/N2JK-VPGM>]; Matthew Rosenberg & Mark Mazzetti, *Trump Team Knew Flynn Was Under Investigation Before He Came to White House*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/us/politics/michael-flynn-donald-trump-national-security-adviser.html> [<https://perma.cc/278P-DVVM>].

302. James Hohmann, *The Daily 202: 10 Important Questions Raised by Sally Yates's Testimony on the 'Compromised' Michael Flynn*, WASH. POST (May 9, 2017), [https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2017/05/09/daily-202-10-important-questions-raised-by-sally-yates-s-testimony-on-the-compromised-michael-flynn/59110598e9b69b209cf2b7df/?utm\\_term=.db655906295c](https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2017/05/09/daily-202-10-important-questions-raised-by-sally-yates-s-testimony-on-the-compromised-michael-flynn/59110598e9b69b209cf2b7df/?utm_term=.db655906295c) [<https://perma.cc/Y4AC-KU8P>]; Rosenberg & Mazzetti, *supra* note 301.

Much of the current Special Counsel investigation continues in secrecy.<sup>303</sup> The only indication of what occurs is from confirmation by those who have been interviewed or reporters learning of document production requests made on various financial institutions, the White House, or other persons and agencies.<sup>304</sup> Silence from a special counsel investigation is often the norm,<sup>305</sup> as was the case with the Watergate investigation.<sup>306</sup> Similar to Watergate is the speed by which criminal charges were brought, but for very different reasons. The Watergate special prosecution began after the five Watergate burglars were arrested.<sup>307</sup> The scope of the investigation was large, but the path was set based on news reports and the simultaneous Senate Committee.<sup>308</sup> Here, the scope of the investigation is unclear, but the Russian interference investigation has already resulted the impaneling of a grand jury, search warrants, indictments, and guilty pleas.<sup>309</sup>

## 2. *Indictments and Cooperating Witnesses*

Early targets of the Russian investigation were former Trump Campaign Manager, Paul Manafort, and his associate, Richard Gates.<sup>310</sup> Both men were indicted on numerous charges including money laundering, failing

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303. See Noah Weiland, *Meet the Special Counsel Team: So Careful They Won't Even Disclose Their Shake Shack Orders*, N.Y. TIMES (Aug. 16, 2018), <https://www.nytimes.com/2018/08/16/us/politics/special-counsel-investigation-mueller.html> [<https://perma.cc/B2NZ-D5PS>].

304. See, e.g., Rebecca Ballhaus & Peter Nicholas, *Special Counsel Mueller Issued Subpoena for Russia-Related Documents from Trump Campaign Officials*, WALL ST. J. (Nov. 16, 2017, 7:51 PM), <https://www.wsj.com/articles/special-counsel-mueller-issued-subpoena-for-russia-related-documents-from-trump-campaign-officials-1510875492> [<https://perma.cc/7ZN3-4HML>] (discussing a subpoena requesting documents and emails with Russia-related keywords).

305. See Michael M. Grynbaum, *Under Fire, Robert Mueller Has a Novel P.R. Strategy: Silence*, N.Y. TIMES (Sept. 13, 2018), <https://www.nytimes.com/2018/09/13/business/media/robert-mueller-press-strategy.html> [<https://perma.cc/WNY5-MPEG>].

306. See *supra* Section III.B.

307. See Daniel Bush, *The Complete Watergate Timeline (It Took Longer Than You Realize)*, PBS NEWSHOUR (May 30, 2017, 4:12 PM), <https://www.pbs.org/newshour/politics/complete-watergate-timeline-took-longer-realize> [<https://perma.cc/8FWT-VJGL>]; Andrew Glass, *Watergate Burglars Arrested, June 17, 1972*, POLITICO (June 17, 2009, 4:36 AM), <https://www.politico.com/story/2009/06/watergate-burglars-arrested-june-17-1972-023799> [<https://perma.cc/YPE7-DYCK>].

308. See *supra* Section III.B.2.

309. See *infra* Section IV.B.2.

310. See Kaitlyn Schallhorn, *How Paul Manafort is Connected to Trump, Russia Investigation*, FOX NEWS (Nov. 27, 2018), <https://www.foxnews.com/politics/how-paul-manafort-is-connected-to-trump-russia-investigation> [<https://perma.cc/2SVZ-BYJS>]; see also Memorandum from Rod J. Rosenstein, Acting U.S. Attorney General, to Robert S. Mueller III, Special Counsel (Aug. 2, 2017) (on file with the U.S. Dep't. of Justice).

to register as a federal agent, wire fraud, and tax evasion.<sup>311</sup> Earlier, a lesser known figure in the Trump Campaign had already pleaded guilty and was a cooperating witness with the investigation.<sup>312</sup> George Papadopoulos was indicted on making false statements to the FBI and pled guilty in October 2017.<sup>313</sup> Papadopoulos worked as a foreign advisor on the Campaign under current Attorney General Sessions.<sup>314</sup> During his employment, he received information about Russian agents who potentially had damaging information on Hillary Clinton.<sup>315</sup> After informing superiors of the potential information, one gave the go-ahead to set up a meeting.<sup>316</sup> In exchange for his plea, Papadopoulos agreed to cooperate with the Special Counsel investigation.<sup>317</sup> This first salvo established connections between the Trump campaign and Russian interests to potentially elect Trump.<sup>318</sup>

A month later, Michael Flynn was charged with lying to FBI agents about his communications with the Russian Ambassador shortly before President Trump's inauguration.<sup>319</sup> A few months later, he took a plea and

311. See generally Indictment, United States v. Manafort, No. 17-cr-00201 (D.D.C. filed Oct. 30, 2017), ECF No. 13. Manafort and Gates were arraigned in federal court on a dozen charges of fraud, conspiracy, and money laundering in an alleged scheme to conceal millions of dollars overseas without paying taxes, and using this to buy luxury cars, expensive suits, and fancy homes. See Aruna Viswanatha, *Manafort's Finances Will Be in Spotlight in High-Stakes Trial*, WALL ST. J. (July 29, 2018, 5:16 PM), <https://www.wsj.com/articles/manafort-trial-holds-big-implications-for-russia-probe-1532862000> [<https://perma.cc/4PDX-FG8B>]. Manafort pleaded not guilty, while Gates pleaded guilty before trial. *Id.*

312. See Sharon LaFraniere, Mark Mazzetti & Matt Apuzzo, *How the Russia Inquiry Began: A Campaign Aide, Drinks and Talk of Political Dirt*, N.Y. TIMES (Dec. 30, 2017), <https://www.nytimes.com/2017/12/30/us/politics/how-fbi-russia-investigation-began-george-papadopoulos.html> [<https://perma.cc/EK99-P487>].

313. Plea Agreement, United States v. Papadopoulos, No. 1:17-cr-00182 (D.D.C. filed Jul. 28, 2017), ECF No. 18.

314. LaFraniere, Mazzetti & Apuzzo, *supra* note 312.

315. *Id.*; Eileen Sullivan & Glenn Thrush, *George Papadopoulos, First to Plead Guilty in Russia Inquiry*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/us/politics/george-papadopoulos-russia-trump.html> [<https://perma.cc/B9SK-LL4M>].

316. See Statement of the Offense, *Papadopoulos*, No. 1:17-cr-00182, ECF No. 19.

317. Matthew Mosk & Lucien Bruggeman, *After Weeks of Uncertainty, Papadopoulos Decides to Accept Plea Deal with Mueller*, ABC NEWS (Aug. 29, 2018, 5:34 PM), <https://abcnews.go.com/Politics/weeks-uncertainty-papadopoulos-decides-accept-plea-deal-mueller/story?id=57483474> [<https://perma.cc/8UQE-XBR9>].

318. See Katelyn Polantz & Caroline Kelly, *George Papadopoulos Gets 14 Days in Prison*, CNN POL. (Sept. 8, 2018, 11:34 AM), <https://www.cnn.com/2018/09/07/politics/george-papadopoulos-sentencing-hearing/index.html> [<https://perma.cc/M6BP-D92G>].

319. See generally Indictment, United States v. Flynn, No. 1:17-cr-00232 (D.D.C. filed Nov. 30, 2017), ECF No. 1.

began cooperating with the Special Counsel's investigation.<sup>320</sup> The Special Counsel brought additional charges against both Manafort and Gates for further financial violations.<sup>321</sup> This led Gates to also accept a plea agreement that included cooperating with the Special Counsel.<sup>322</sup> Gates testified on the Government's behalf during Manafort's first trial in Virginia.<sup>323</sup> After several days of deliberation, the jury returned a conviction on eight of the eighteen counts of the indictment.<sup>324</sup> Instead of proceeding with the second trial, Manafort entered a cooperation agreement with the Special Counsel.<sup>325</sup> A condition of the agreement requires Manafort to "cooperate fully with the government in 'any and all matters as to what the Government deems the cooperation relevant.'"<sup>326</sup> He agreed to testify at any trial or grand jury, and may be interviewed by federal agents and government attorneys.<sup>327</sup> Mueller's agreements typically do not specify which individuals or topics the defendant must testify about.<sup>328</sup> With the Manafort cooperation agreement, all of the individual targets of his investigation have agreed to assist the Mueller team.

Acting on information provided by the Special Counsel, the U.S. Attorney for the Southern District of New York began investigating Michael Cohen for various federal crimes.<sup>329</sup> Cohen represented Trump through the 2016 presidential campaign and his Administration.<sup>330</sup> One of the key points in

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320. See Plea Agreement at 1, *Flynn*, No. 1:17-cr-00232, ECF No. 3. The special counsel did not charge Flynn with failing to file as a foreign agent. See *id.* This may have been a strategic move to ensure Flynn's full cooperation or face additional criminal charges.

321. See Sharon LaFraniere, *Paul Manafort, Trump's Former Campaign Chairman, Guilty of 8 Counts*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/us/politics/paul-manafort-trial-verdict.html> [<https://perma.cc/H8CS-XVFN>].

322. See *id.*

323. *Id.*

324. *Id.*

325. See Spencer S. Hsu, Devlin Barrett & Justin Jouvenal, *Manafort Will Cooperate with Mueller as Part of Guilty Plea, Prosecutor Says*, WASH. POST (Sept. 14, 2018), [https://www.washingtonpost.com/world/national-security/manafort-plans-to-plead-guilty-to-second-set-of-charges/2018/09/14/a1541068-b5c9-11e8-a7b5-adaaa5b2a57f\\_story.html?utm\\_term=.5f5fbc3a7c09](https://www.washingtonpost.com/world/national-security/manafort-plans-to-plead-guilty-to-second-set-of-charges/2018/09/14/a1541068-b5c9-11e8-a7b5-adaaa5b2a57f_story.html?utm_term=.5f5fbc3a7c09) [<https://perma.cc/W73L-3SD9>].

326. Tom Winter et al., *Paul Manafort Pleads Guilty in Mueller Probe, Will Cooperate with Prosecutors*, NBC NEWS (Sept. 14, 2018, 12:17 PM), <https://www.nbcnews.com/politics/politics-news/paul-manafort-pleads-guilty-mueller-probe-n909576> [<https://perma.cc/N5LH-S84S>].

327. *Id.*

328. See *id.*

329. See Devlin Barrett et al., *Michael Cohen Says He Worked to Silence Two Women 'In Coordination' with Trump to Influence 2016 Election*, WASH. POST (Aug. 21, 2018), [https://www.washingtonpost.com/world/national-security/trumps-longtime-lawyer-michael-cohen-is-in-plea-discussions-with-federal-prosecutors-according-to-a-person-familiar-with-the-matter/2018/08/21/5fbd7f34-8510-11e8-8553-a3ce89036c78\\_story.html](https://www.washingtonpost.com/world/national-security/trumps-longtime-lawyer-michael-cohen-is-in-plea-discussions-with-federal-prosecutors-according-to-a-person-familiar-with-the-matter/2018/08/21/5fbd7f34-8510-11e8-8553-a3ce89036c78_story.html) [<https://perma.cc/4YEB-39XY>].

330. *Id.*

the FBI investigation was potential payments Cohen made on Trump's behalf to conceal payments about infidelity.<sup>331</sup> On August 21, 2018, Cohen pled guilty to various crimes including tax evasion and campaign finance violations.<sup>332</sup> During the plea colloquy, Cohen explained he worked with a candidate for federal office and CEO from a media company, "for the principal purpose of influencing the election."<sup>333</sup> It was clear that Cohen named Trump as an unindicted co-conspirator. Shortly after Cohen's plea, news outlets reported immunity was granted to David Pecker, chief executive of the company that publishes the *National Enquirer*,<sup>334</sup> and Trump Foundation CFO Allen Weisselberg.<sup>335</sup> Both men would have details related to the campaign finance violations mentioned in Cohen's plea and may provide further evidence of potential crimes involving Trump.<sup>336</sup>

The most critical indictment filed, to date, by the Special Counsel was against the thirteen Russian nationals and agencies which orchestrated the social media arm of the interference.<sup>337</sup> It details how they began their operation several years prior to the presidential election to learn about how Americans used social media as a political tool for campaigns and mobilization.<sup>338</sup> Their plan included sowing dissension among groups using known entities like Black Lives Matter, Secured Borders, and Heart of Texas.<sup>339</sup> Further, they provided negative commentary on social media towards presidential candidates Marco Rubio, Ted Cruz, and Clinton while seeking to boost support for Bernie Sanders and Trump.<sup>340</sup> Their goal was "to sow discord in the U.S. political system, including the 2016 U.S. presidential election. Defendants posted derogatory information about a number of candidates, and by early to mid-2016, Defendants' operations

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331. *Id.*

332. *Id.*

333. *Id.*

334. Nicole Hong & Lukas I. Alpert, *David Pecker Granted Immunity in Michael Cohen Case*, WALL ST. J. (Aug. 23, 2018, 1:44 PM), <https://www.wsj.com/articles/pecker-granted-immunity-in-cohen-case-1535041976> [<https://perma.cc/B5MG-WZQE>].

335. Karen Freifeld, *U.S. Prosecutors Grant Trump Organization CFO Immunity in Cohen Probe*, REUTERS (Aug. 24, 2018, 8:10 AM), <https://www.reuters.com/article/us-usa-trump-cohen-weisselberg/u-s-prosecutors-grant-trump-organization-cfo-immunity-in-cohen-probe-idUSKCN1L91MS>

336. *See id.*

337. *See* Indictment, *supra* note 241, at 2, 4, 14.

338. *See id.* at 1–9.

339. *Id.* at 14.

340. *Id.* at 17.

included supporting the presidential campaign of then-candidate Donald J. Trump . . . and disparaging Hillary Clinton.”<sup>341</sup>

It is unlikely that any of the thirteen defendants and businesses will ever be arrested or answer to these charges. No current extradition agreement exists between the countries where President Putin would hand over these Russian nationals.<sup>342</sup> However, that may not have been the point of Mueller’s actions. Instead, the lengthy indictment provides a detailed account of how the nation’s political process was manipulated by a foreign country. These actions have been seen by some as an act of war for such blatant interference with the political process, which continues. Furthermore, it illustrates the severity and complexity of the Special Counsel investigation. The indictment demonstrates the high stakes involved by Russian interference. As the investigation continues, it will become easier to understand fully the extent the political structure has been compromised by a foreign power and those who may have aided them.

On Friday, July 13, 2018, Mueller filed another indictment against twelve Russian intelligence officers who hacked into the Clinton campaign, the DNC, and the Democratic Congressional Campaign Committee.<sup>343</sup> For the first time, the Special Counsel designated the actions of these Russian nationals as a “military intelligence” operation against the United States.<sup>344</sup> Among the criminal actions these GRU agents engaged in was a conspiracy against the United States “to hack into the computers of U.S. persons and entities involved in the 2016 U.S. presidential election, steal documents from those computers, and stage releases of the stolen documents to interfere with the 2016 U.S. presidential election.”<sup>345</sup> The indictment presents a detailed explanation of how these intelligence agents gained access to Democratic Party affiliates to sow discord.<sup>346</sup> Additionally, this is the first time the Special Counsel mentions U.S. citizens, including those associated with the Trump campaign engaging with Russian agents.<sup>347</sup>

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341. *Id.* at 4.

342. Danny Cevallos, *How Would the U.S. Put the Indicted Russians on Trial?*, NBC NEWS (July 15, 2018, 4:26 PM), <https://www.nbcnews.com/news/us-news/how-would-u-s-put-indicted-russians-trial-n891581> [<https://perma.cc/5HYE-L622>].

343. *See generally* Indictment, U.S. v. Netyksho, No. 1:18-cr-00215-ABJ (D.D.C. filed July 13, 2017), ECF No. 1.

344. *Id.* at 1.

345. *Id.* at 6.

346. *See id.* at 10.

347. *See id.* at 15–16 (“On or about August 15, 2016, the Conspirators, posing as Guccifer 2.0, received a request for stolen documents from a candidate for the U.S. Congress. . . . On or about August 15, 2016, the Conspirators, posing as Guccifer 2.0, wrote to a person who was in regular contact with senior members of the presidential campaign of Donald J. Trump . . .”).



Similar to the indictment filed in February 2018 against the thirteen Russian nationals and agencies,<sup>348</sup> there is little likelihood that these intelligence officers will be arrested. This indictment states that this was, and probably is, an ongoing act of Russian aggression towards the United States.<sup>349</sup> Explaining how these military officers targeted the Democratic Party to undermine their political credibility is frightening. Mueller is now explaining how these Russian agents worked with those inside the United States to disseminate the stolen emails.<sup>350</sup> While there are no names of the politicians or Trump Campaign operatives in the indictment, Mueller probably knows who these people are and the specific steps they took to aid a foreign power's hostile actions against the United States.

Mueller's investigation echoes Watergate not only as to the target of both conspiracies but also the brazen criminal conduct by those involved. While it is unclear where the Russian interference investigation will lead, it is apparent that it must continue. From the guilty pleas, convictions, and criminal charges brought, there is concrete proof that Russia interfered with a presidential election and plans on continuing such interference. Trump's continued refusal to answer such hostility is deeply troubling and supports the need for answers from Mueller's investigation.

### *C. Efforts to Undermine Mueller's Investigation*

Despite both investigative journalism and the criminal activities already presented by the Mueller team, there are concerted efforts to undermine their validity. Both the President and members of Congress have launched efforts to curtail the investigation.<sup>351</sup> The House Intelligence Committee previously led by Representative Devin Nunes sought to discredit both the

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348. See generally Indictment, *supra* note 241.

349. See Indictment, *supra* note 343, at 3.

350. See *id.* at 2.

351. See, e.g., Samuelsohn, *supra* note 33 (“Trump’s plan is to forcefully challenge Mueller in the arena he knows best—not the courtroom but the media, with a public campaign aimed at the special counsel’s credibility, especially among Republican voters and GOP members of Congress.”); Jason Zengerle, *How Devin Nunes Turned the House Intelligence Committee Inside Out*, N.Y. TIMES (Apr. 24, 2018), <https://www.nytimes.com/2018/04/24/magazine/how-devin-nunes-turned-the-house-intelligence-committee-inside-out.html> [<https://perma.cc/Z49Q-P3VV>] (submitting that when the House Intelligence Committee demanded Deputy Attorney General Rod Rosenstein to turn over copies of memos Comey drafted, it “set a dangerous precedent for Congress to interfere with the” FBI and Mueller’s investigations).

FBI and Mueller based on specious allegations of bias.<sup>352</sup> He was joined by a few other Republican Representatives who demanded the FBI divulge the fruits of its investigation—an action that has been denied by prior DOJ Administrations.<sup>353</sup> Their goals appeared to be to delegitimize the investigation itself so that if senior officials within the Campaign or Administration are charged, it will be seen as politically motivated, at best, and corrupt, at worst.<sup>354</sup>

### *1. President Trump's Interference*

According to the current guidelines, Mueller should only be terminated by Deputy Attorney General Rosenstein upon a finding of “misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies.”<sup>355</sup> However, the President has repeatedly attacked Mueller,<sup>356</sup> Rosenstein,<sup>357</sup> and Sessions over the Russia investigation.<sup>358</sup> While he consistently asserts there has been no “collusion” between himself and Russia, his actions toward Russia raise concerns as to his relationship with Putin.<sup>359</sup> Several White House sources claimed the President wanted to fire Mueller at least two times over the last year as the special counsel investigation pursued its goal.<sup>360</sup> In both instances, senior officials have dissuaded Trump.<sup>361</sup> His efforts to either force Sessions or Rosenstein to quit have gone unheeded.

As of yet, the President has made no move to fire the top two men in the DOJ or the Special Counsel. Instead, his new tactic is to undermine the credibility of the Special Counsel investigation in the eyes of the public.<sup>362</sup>

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352. Zengerle, *supra* note 351.

353. *Id.*

354. *See id.*

355. 28 C.F.R. § 600.7(d) (2018).

356. *See* Rebecca Morin, *Trump Revives His Attacks on Mueller*, POLITICO (Nov. 7, 2018, 11:48 AM), <https://www.politico.com/story/2018/11/07/trump-attacks-mueller-971062> [<https://perma.cc/R2Q9-SZ7P>].

357. *See* Alex Ward, *Rosenstein is the Only Person Between Trump and Mueller. He May Soon Be Gone.*, VOX (Sept. 21, 2018, 3:15 PM), <https://www.vox.com/2018/9/21/17888028/trump-rosenstein-mueller-nyt-25th-russia> [<https://perma.cc/46SX-H54S>].

358. *See* Jennifer Hansler, *Trump's Twitter Attacks on Sessions: An Annotated Timeline*, CNN (Aug. 25, 2018, 3:46 PM), <https://www.cnn.com/2018/08/25/politics/trump-sessions-twitter-timeline/index.html> [<https://perma.cc/P86P-E455>].

359. *See* John R. Schindler, *Jim Clapper Just Nuked the Trump Presidency*, OBSERVER (Dec. 19, 2017, 10:40 AM), <http://observer.com/2017/12/james-clapper-tells-cnn-donald-trump-is-vladimir-putins-kremlin-asset/> [<https://perma.cc/2XRK-KYW8>].

360. *See* Maggie Haberman & Michael S. Schmidt, *Trump Sought to Fire Mueller in December*, N.Y. TIMES (Apr. 10, 2018), <https://www.nytimes.com/2018/04/10/us/politics/trump-sought-to-fire-mueller-in-december.html> [<http://perma.cc/4CRK-UFCG>].

361. *See id.*

362. *See* Samuelsohn, *supra* note 33.

With the hiring of former U.S. Attorney and New York City Mayor, Rudy Giuliani, the President's personal legal team took a much more public approach to defending him.<sup>363</sup> The legal team's strategy is to destroy the credibility of the Special Counsel and—by association—any report or indictments issued against the President and his family.<sup>364</sup> Giuliani consistently advocates that the investigation should end, persists that the President is under no obligation to speak to Mueller, and makes assertions of what the Special Counsel has told him.<sup>365</sup> Such actions are aimed at heading off any possibility of impeachment that may occur under the Democratic-controlled House of Representatives.<sup>366</sup> However, such a strategy is problematic because it insinuates the President has something to hide, which may be criminal. The extent of that criminal activity is unknown except, perhaps, by the Special Counsel.

The President's actions on Twitter further undermine the credibility of the Special Counsel as he seeks to use the silence from Mueller's team against them.<sup>367</sup> For several months, the President has tweeted consistently that the investigation is a "Witch Hunt" and "trap."<sup>368</sup> While the President routinely vilifies the actions of the Special Counsel,<sup>369</sup> there is no response from Mueller or his team as to the status of their investigation or a refutation of the likely false statements made by the President's digital rants.<sup>370</sup> The very nature of a special prosecution investigation is private with no communication of progress unless the investigation indicts someone or comes to a conclusion. Trump's, or his legal team's, efforts are aimed

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363. See *id.*

364. See *id.*; see also Michael S. Schmidt & Maggie Haberman, *Shifting Strategy, Trump's Lawyers Set New Conditions for Mueller Interview*, N.Y. TIMES (July 6, 2018), <https://www.nytimes.com/2018/07/06/us/politics/trump-special-counsel-interview.html> [<http://perma.cc/YE49-W2HH>].

365. See Laura King, *Giuliani: Trump Wouldn't 'Have To' Obey a Mueller Subpoena, Could Take the 5th*, L.A. TIMES (May 6, 2018, 11:25 AM), <http://www.latimes.com/politics/la-na-pol-giuliani-trump-20180506-story.html> [<http://perma.cc/M9FY-XRK3>]; Samuelsohn, *supra* note 33; Schmidt & Haberman, *supra* note 364.

366. See Schmidt & Haberman, *supra* note 364; see also Samuelsohn, *supra* note 33.

367. See Morin, *supra* note 356.

368. John Wagner, *'Setup & Trap': Trump Lashes Out at Investigation into Obstruction of Justice*, WASH. POST (May 2, 2018), [https://www.washingtonpost.com/politics/setup-and-trump-lashes-out-at-investigation-into-obstruction-of-justice/2018/05/02/88c78e4e-4d32-11e8-b725-92c89fe3ca4c\\_story.html?utm\\_term=.f17b3e646e5e](https://www.washingtonpost.com/politics/setup-and-trump-lashes-out-at-investigation-into-obstruction-of-justice/2018/05/02/88c78e4e-4d32-11e8-b725-92c89fe3ca4c_story.html?utm_term=.f17b3e646e5e) [<http://perma.cc/XMZ5-EKX4>].

369. See Morin, *supra* note 356.

370. See Grynbaum, *supra* note 305.

at different audiences: his base and Congress. Despite Trump's actions, his base has largely remained loyal to him.<sup>371</sup> Maintaining his 30 to 35% percent base is critical for Trump because of the affect it has on Republican Congressmen. There was little critical oversight by the previous Republican-controlled Congress on this Administration.<sup>372</sup>

In August 2018, the President employed a new strategy to undermine the Special Counsel: targeting security clearances.<sup>373</sup> Trump has threatened to strip the national security clearances of several former national security and law enforcement personnel who have criticized him—including Comey, former Deputy Attorney General Sally Yates, General James Clapper, former National Security Advisor Susan Rice, and DOJ Attorney Bruce Ohr.<sup>374</sup> Former CIA Director John Brennan's security clearance was stripped based on what the White House called, "erratic conduct and behavior."<sup>375</sup> Brennan has been one of the most vocal critics of the Trump Administration overall, and the President specifically.<sup>376</sup> When questioned about the rationale for stripping security clearances, Trump admitted it had to do with the Russia investigation.<sup>377</sup>

The power to grant or withdraw belongs solely to the Executive Branch.<sup>378</sup> However, the taking of a former governmental official's security clearance has largely never been done for political reasons.<sup>379</sup> Trump's ability to strip clearances may be a way to neuter the Special Counsel without ever

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371. Kenneth T. Walsh, *President Trump's Base Remains Loyal*, U.S. NEWS & WORLD REP. (Apr. 24, 2017, 7:18 AM), <https://www.usnews.com/news/ken-walshs-washington/articles/2017-04-24/president-donald-trumps-base-remains-loyal>.

372. See Jennifer Rubin, *Want National Security Oversight? Don't Leave It to Republicans*, WASH. POST (Feb. 9, 2018), [https://www.washingtonpost.com/blogs/right-turn/wp/2018/02/09/want-national-security-oversight-dont-leave-it-to-republicans/?utm\\_term=.e066fd2d1382](https://www.washingtonpost.com/blogs/right-turn/wp/2018/02/09/want-national-security-oversight-dont-leave-it-to-republicans/?utm_term=.e066fd2d1382) [<http://perma.cc/T5HT-RNE8>].

373. See Russell Berman, *How a Lawsuit Could Check Trump's Power Over Security Clearances*, ATLANTIC (Aug. 24, 2018), <https://www.theatlantic.com/politics/archive/2018/08/trump-brennan-security-clearance-lawsuit/568201/> [<http://perma.cc/FL36-93XW>].

374. *Id.*

375. *Id.*

376. *Id.*

377. Margaret Hartmann, *Trump Admits Revoking Brennan's Security Clearance Was About the Mueller Probe*, N.Y. MAG. (Aug. 16, 2018), <http://nymag.com/intelligencer/2018/08/trump-brennan-clearance-russia-probe.html?gtm=top&gtm=bottom> [<https://perma.cc/EJY5-75H6>].

378. Phillip Bump, *Trump Can Revoke Critics' Security Clearances if He Wants – But it Probably Wouldn't Change Much*, WASH. POST (July 23, 2018), [https://www.washingtonpost.com/news/politics/wp/2018/07/23/trump-can-revoke-critics-security-clearances-if-he-wants-but-it-likely-wouldnt-change-much/?utm\\_term=.c3faa45c805c](https://www.washingtonpost.com/news/politics/wp/2018/07/23/trump-can-revoke-critics-security-clearances-if-he-wants-but-it-likely-wouldnt-change-much/?utm_term=.c3faa45c805c) [<http://perma.cc/Z2QB-VMHG>].

379. See Julie Hirschfeld Davis & Julian E. Barnes, *Trump Weighs Stripping Security Clearances from Officials Who Criticized Him*, N.Y. TIMES (July 23, 2018), <https://www.nytimes.com/2018/07/23/us/politics/trump-security-clearances.html> [<https://perma.cc/GBV9-FV3A>].

having to fire Rosenstein, Mueller, or his team. Without a security clearance, the Special Counsel team would be unable to view any national security information, making them unable to continue with the investigation or any criminal prosecutions. As the Special Counsel's investigation intensifies, there are concerns amongst some senators that the President may abuse this power to silence critics along with those examining potential criminal activity.<sup>380</sup>

## 2. Congressional Interference

Most disconcerting of these efforts is the failure of Congress to exert its role as a coequal branch of government that could, and should, check the excesses of the White House. As discussed earlier, separation of powers is an integral part of our constitutional framework.<sup>381</sup> Preserving the rule of law requires other branches of government to use their check on abuses of another branch.<sup>382</sup> Here, both the House and Senate could curtail the Administration's attempts to undermine the DOJ as an agency, the heads of the department specifically, and the Special Counsel. Devin Nunes, as the former Republican Chair of the House Intelligence Committee, used his role to demand documentation from the DOJ which normally would not be disclosed.<sup>383</sup> Efforts by Rosenstein and FBI Director Wray to prevent this violation of the DOJ's independence was not preserved by Speaker Paul Ryan.<sup>384</sup>

Further, those called to testify before the Committee have also stonewalled answering questions. Several witnesses invoked Executive Privilege, or some form of attorney-client privilege, without having had anyone in the

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380. See Niels Lesniewski, *Criticism of Trump Over Brennan's Clearance Keeps Increasing*, ROLL CALL (Aug. 17, 2018, 7:42 PM), <https://www.rollcall.com/news/politics/criticism-trump-brennans-clearance-keeps-increasing> [<http://perma.cc/5DR6-YWPA>].

381. See *supra* Section II.B.1.

382. See *supra* Section II.B.1.

383. Anna Edgerton, *Nunes Doubles Down on Holding Sessions in Contempt for Documents*, BLOOMBERG (May 8, 2018, 7:43 AM), <https://www.bloomberg.com/news/articles/2018-05-08/nunes-doubles-down-on-holding-sessions-in-contempt-for-documents>.

384. See *id.*

White House overtly say to use it.<sup>385</sup> This includes Sessions,<sup>386</sup> Steve Bannon,<sup>387</sup> and Trump, Jr.<sup>388</sup> among others. Such actions may result in contempt of Congress; however, no action was taken against these witnesses. Others who testified before the Committee have been found to have lied, which is a crime.<sup>389</sup> However, Nunes took no action against these witnesses. The Senate Intelligence Committee is proceeding in a much more serious role and found that Russian interference did occur during the 2016 Presidential Campaign, which helped elect Trump.<sup>390</sup> However, little came of this report. Little has been done to preserve the integrity of the DOJ or ensure that it maintains its independence during this crucial time.

## V. ARE SPECIAL PROSECUTORS NECESSARY?

Permitting the DOJ the power to appoint special prosecutors is necessary to ensure the rule of law, separation of powers, and due process. As discussed previously, the current iteration of the special counsel guidelines does much to curtail the possible abuse of the office compared with what existed during the independent counsel statute.<sup>391</sup> However, the current provision lacks any institutional controls to ensure that an appointment is made when the possible criminal conduct involves the Cabinet or senior members of the Administration. Overuse of the office not only degrades the importance of the position but also makes it a much more political tool, rather a check on serious abuses of power.

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385. See Matt Zapposky, *Jeff Sessions Finds a Shield in Executive Privilege—But it Might Not Be a Strong One*, WASH. POST (June 13, 2017), [https://www.washingtonpost.com/world/national-security/jeff-sessions-finds-a-shield-in-executive-privilege—but-it-might-not-be-a-strong-one/2017/06/13/977677ce-5077-11e7-be25-3a519335381c\\_story.html?utm\\_term=.2e17547eda41](https://www.washingtonpost.com/world/national-security/jeff-sessions-finds-a-shield-in-executive-privilege—but-it-might-not-be-a-strong-one/2017/06/13/977677ce-5077-11e7-be25-3a519335381c_story.html?utm_term=.2e17547eda41) [<http://perma.cc/HV2N-DCR4>].

386. See *id.*

387. See Manu Raju, Jeremy Herb & Kara Scannell, *Bannon Stonewalls House Panel After WH Advised Him To Invoke Executive Privilege*, CNN (Feb. 15, 2018, 3:23 PM), <https://www.cnn.com/2018/02/14/politics/bannon-contempt-hearing/index.html> [<http://perma.cc/LT7S-HSZH>].

388. See Aaron Blake, *Donald Trump Jr. 's Brazen Claim of Attorney-Client Privilege Suggests Trump Team Desperation—Again*, WASH. POST (Dec. 7, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/12/07/donald-trump-jr-s-brazen-claim-of-attorney-client-privilege-suggests-trump-team-desperation-again/?noredirect=on&utm\\_term=.d5ad461343b3](https://www.washingtonpost.com/news/the-fix/wp/2017/12/07/donald-trump-jr-s-brazen-claim-of-attorney-client-privilege-suggests-trump-team-desperation-again/?noredirect=on&utm_term=.d5ad461343b3) [<http://perma.cc/K4P9-UHSR>].

389. See Kyle Cheney, *House Russia Investigators Eye Witness Honesty*, POLITICO (Mar. 8, 2018, 7:33 PM), <https://www.politico.com/story/2018/03/08/erik-prince-house-russia-probe-trump-associates-448595> [<http://perma.cc/J5PE-JYXH>] (discussing the alleged lies by Erik Prince, Rodger Stone, and Carter Page to the House Intelligence Committee).

390. See Cristiano Lima, *Reports Show Russia Mounted Sweeping Effort to Sow Divisions, Support Trump*, POLITICO (Dec. 17, 2018, 12:24 PM), <https://www.politico.com/story/2018/12/17/russia-social-media-senate-report-1067113> [<https://perma.cc/2NYP-5TXC>].

391. See *supra* text accompanying notes 50–54.

As seen in both the Teapot Dome Scandal and Watergate special prosecutor investigations, the blatant criminal conduct by senior executive officials threatened the underlying tenets of our system of government. Such criminal activities combined with a compromised Attorney General make it more imperative that a special counsel provision exist. Because of the pervasive power of the Secretary of Interior at the time and the numerous members of the Nixon Administration implicated in Watergate, those investigations could not be conducted in the normal course of business for the DOJ or U.S. Attorney's Office. History and present-day events illustrate how a rank-in-file investigation—no matter how well meaning—can be thwarted by criminal actors with more power to fire those attorneys and FBI Agents. Instead, the special counsel cures any conflicts with an Attorney General implicated in the investigation—demonstrated by former Attorneys General Daugherty, Mitchell, and Kleindienst. Actions taken against a special counsel are dangerous and often prove fatal to the actor.

Following this pattern, Mueller's current investigation was an appropriate use of the special counsel provision. It cured the conflict with Sessions, who is possibly implicated in the Russian interference investigation. Sessions's recusal made Deputy Attorney General Rod Rosenstein the sole person who can fire Special Counsel Mueller. That insulation provides a framework that allows full investigation and prosecution of criminal actors. While the investigation is still ongoing, so far, the indictments and guilty pleas demonstrate that there are senior officials in the Trump Campaign and the Administration that are implicated. Additionally, the two indictments of Russian nationals and military personnel provide significant detail of how a foreign power made a direct attack against the United States. These two indictments also indicate there are U.S. citizens who aided the Russians to infiltrate the 2016 election.<sup>392</sup> Mueller's investigation must continue given the historical parallels with Teapot Dome and Watergate. Constitutional bedrock principles must be preserved despite the egregious criminal conduct of those serving in the highest ranks of the Administration.

## VI. CONCLUSION

The Teapot Dome Scandal and Watergate taught the country that no one is above the law—not Cabinet members, White House officials, or even the President. The fundamental principle is that no one is above the law.

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392. See generally Indictment, *supra* note 241; Indictment, *supra* note 343.

The Constitution is premised on both the equal protection of the law and its fair appliance to those who live in this country. Currently, the Mueller investigation has moved quickly by indicting several key members of both the Trump Presidential Campaign and the Administration. Details from these indictments insinuate concerted efforts to undermine the rule of law and bedrock constitutional principles. Avoiding a constitutional crisis now will take more than Mueller's final report and any other indictments. It will rest on Congress to take those recommendations and act when, and if, it is appropriate. An Executive Branch free from corruption and criminal activity is imperative for national security and protecting the tenets of democracy.