ALL THE PRESIDENT'S LAWYERS—PROBLEMS AND POTENTIAL SOLUTIONS IN PROSECUTING PRESIDENTIAL CRIMINAL CONDUCT

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Following the presidential election of 2016, the United States has found itself in a constitutional crisis, the likes of which the Framers could not have anticipated. The evidence currently mounting against President Donald Trump regarding possible Russian collusion has sparked a number of controversies, including the President's unilateral firing of FBI Director James B. Comey in the middle of a formal investigation into the Trump Administration's ties to Russia. Despite this potential obstruction of justice, the sole governmental entity with any enumerated constitutional authority to bring punitive action against a sitting president, the legislative branch, has been politically reticent to take any action against President Trump. While Special Counsel Robert Mueller has been tasked with the Russia investigation, there is no precedent in American law that would permit any entity from bringing criminal charges against a sitting president without Congress's willingness to draft and try articles of impeachment. Further, the current laws governing a special counsel's abilities severely limit any vital impact he or she may have in the face of a politically biased Congress. This Note proposes the resurrection of Title VI of the Ethics in Government Act of 1978, which gave special counsel broader authority while conducting investigations into potential executive-branch abuse of power. Additionally, this Note further advocates for an expanded role for the judicial branch in investigating and, if necessary, compelling congressional action through judicial review in situations where an executive-branch abuse of power remains congressionally unaddressed despite special-counsel recommendations.

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WE, THE PEOPLE—AN OVERVIEW OF THE FEDERAL GOVERNMENT'S DELEGATED CONSTITUTIONAL AUTHORITY

Despite the relative youth of our nation, the United States and its government have been able to maintain authority and order following the ratification of the Constitution in the late eighteenth century. The central sections of the Constitution involve the first three articles, which enumerate and delegate the authorities of the legislative, executive, and judicial branches, respectively.[1] These reflect the drafters' goal of providing a framework for the nation and ensuring that no one branch of the government would be able to singlehandedly impede the creation of "a more perfect union."[2]

Among the aims was to assure that the President could not govern with the same unchecked, unilateral authority that King George III of Great Britain had imposed upon the former colonies.[3] Article II, Section 3, which specifically dictates that the President of the United States shall take care to make sure that the laws of the United States are faithfully executed, was one of the many ways that this was

1. *See* U.S. CONST. art. I-III.
2. U.S. CONST. pmbl.
3. *See Article 2 of the Constitution*, LAWS.COM, https://constitution.laws.com/article-2/article-2-of-the-constitution (last visited Oct. 11, 2017).

accomplished.[4] Further, the Constitution outlines the consequences for abuse or failure of these enumerated powers in Section 4, which allows for impeachment and conviction for the commission of "high crimes and misdemeanors."[5]

Authority to remove the President and other executive officials is specifically vested in the U.S. Congress.[6] The Judiciary has the authority to define what constitutes the crime of treason as applied to all citizens,[7] but Article III of the Constitution specifically delegates to Congress the power to apply whatever punishment might be imposed for the President's treason.[8] As representatives of the people, vesting the power of impeachment for treason and other high crimes with Congress, in theory, ensures that the people have a say in responding to executive abuse of power. In the nearly two and a half centuries since its ratification, the Constitution and its delegation of federal authority have appeared to function adequately, despite occasional controversy and change. However, the drafters of the Constitution may not have predicted the current number and magnitude of executive departures from constitutional norms and dictates would spike. Nor could they have anticipated the extreme partisan divides that now hobble congressional ability to check executive abuse of power.

This Note discusses one of the controversies that has emerged during the Trump Administration: potential obstruction of justice in firing FBI Director James Comey. Part I of this Note will discuss the events leading up to that dismissal, the charges of potential collusion with Russia, and the investigation of these events by Special Counsel Robert Mueller. Part II will explore why Mueller may currently have no legal recourse to charge Trump, even if he discovers evidence of presidential obstruction of justice. It explores the many shortcomings in the current regulations pertaining to the jurisdiction and authority of special counsel conducting special investigations. Specifically, the current regulations afford special counsel little protection from potential interference in their investigations, as well as little assurance that their recommendations will ever be heard by individuals without political motivation to disregard them. Part III of this Note then proposes the imperfect solution that Title VI of the Ethics in Government Act of 1978—a series of regulations that Congress permitted to expire in 1999—should be reimplemented as a safeguard against these threats to the integrity of the federal government. Title VI encompassed a series of regulations that gave far broader authority to what were then deemed "independent counsel" in the course of their duties.[9] Part III will also discuss expanding the judicial branch's (and specifically the U.S. Supreme Court's) arsenal of judicial review in checking the legislative branch's inaction during an executive crisis. While it is not a perfect solution, and avenues for executive and

4. U.S. CONST. art. II, § 3.
5. *Id*. art. II, § 4.
6. *See Id*. art. I, § 2, cl. 5; *Id*. art. I, § 3, cl. 6–7.
7. *See Id*. art. III, § 3, cl. 1.
8. *Id*. art. III, § 3, cl. 2.
9. Frank Bowman, *Not So Fast, Special Counsel: All the Ways Robert Mueller's Investigation of Donald Trump Might be Tripped up Before it Reaches the Finish Line*, SLATE (July 18, 2017, 5:52 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/07/all_the_many_ways_robert_mueller_s_investigation_into_donald_trump_could.html.

legislative interference exist, it affords a much better opportunity for the appointments, jurisdiction, and recommendations of special counsel to be more than simply nominal.

Although it is unlikely that these issues will be addressed or resolved during this presidential Administration, it is important to explore possible legal implementations that would strengthen executive accountability within the confines of the Constitution despite the executive and legislative branches' unwillingness to react to potential abuses of power. Not only would this serve to prevent something akin to the precarious current situation from reoccurring, but it would also have the secondary, yet equally important, effect of restoring faith in the American governmental process after years of disillusionment.

I. A NATION IN CRISIS—THE CURRENT CONSTITUTIONAL CONUNDRUM

The presidential election of 2016, culminating in the election of Donald Trump as President, was undoubtedly a time of peak political divisiveness and turmoil.[10] In the years following Trump's inauguration, the ramifications of his election have prompted unprecedented questions regarding presidential authority.[11]

The turmoil began less than a month after the inauguration: National Security Advisor Michael Flynn was forced to resign after misleading Vice President Mike Pence regarding his conversations with Russian Ambassador Sergey I. Kislyak involving the lifting of sanctions against Russia.[12] This resignation, and Flynn's connections to the Russian government, began a series of events that would call into question Trump, his campaign, and possible collusion with the Russian government in the course of the 2016 election.

Further fuel was added to the fire in March 2017 when then-FBI Director James B. Comey announced before the House Intelligence Committee that the Bureau was conducting an investigation into the Trump Administration's possible connections with Russia, including any collusion that may have influenced the 2016 election.[13] This announcement served as a lightning rod for speculation into the possibly criminal activities and validity of the Trump Administration, including

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10. Joel Achenbach & Scott Clement, *America Really is More Divided Than Ever*, WASH. POST (July 16, 2016), https://www.washingtonpost.com/national/america-really-is-more-divided-than-ever/2016/07/17/fbfebee6-49d8-11e6-90a8-fb84201e0645_story.html ?utm_term=.b086c729b7e9.

11. Jackie Wattles, *Carl Bernstein: 'We're in a real constitutional crisis'*, CNN: MONEY (Jan. 7, 2018, 4:49 PM), https://money.cnn.com/2018/01/07/media/president-trump-carl-bernstein/index.html.

12. Maggie Haberman et al., *Michael Flynn Resigns as National Security Adviser*, N.Y. TIMES (Feb. 13, 2017), https://www.nytimes.com/2017/02/13/us/politics/donald-trump-national-security-adviser-michael-flynn.html.

13. Matt Apuzo et al., *F.B.I. Is Investigating Trump's Russia Ties, Comey Confirms*, N.Y. TIMES (Mar. 20, 2017), https://www.nytimes.com/2017/03/20/us/politics/fbi-investigation-trump-russia-comey.html.

Trump himself.[14] However, the FBI investigation was prematurely interrupted on May 9, 2017 when Trump fired Comey as head of the FBI.[15] This new development took an even further, more disturbing turn when Trump confirmed that, despite the reported dissatisfaction with Comey's handling of the Hillary Clinton email scandal, he had unilaterally decided to fire Comey because of the ongoing Russia investigation, telling NBC News's Lester Holt: "And in 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, it's an excuse by the Democrats for having lost an election that they should have won.'"[16] This was corroborated by Comey in a letter he released less than a week later, in which he detailed Trump's several attempts to convince him to drop the investigation into Flynn.[17] These actions and subsequent revelations cast a new shadow upon the Trump–Russia investigation. Now, many have questioned not only whether Trump and his Administration had colluded with Russia, but also whether Trump had committed obstruction of justice in first asking Comey to end the Flynn investigation and then subsequently firing Comey for his refusal to do so.[18] Due to the constantly snowballing controversy, acting-FBI Director Rod Rosenstein appointed former-FBI Director Robert Mueller to act as a special counsel in the Trump–Russia investigation.[19] However, even if Mueller were to conclude that obstruction of justice occurred, this may have little legal impact.

As the current federal law stands, once Mueller completes his investigation, he will be required to report his findings and recommendations to the Attorney General, who then, with the input of Congress, will decide how to proceed.[20] In the current volatile political climate—both among American citizens, and especially in Congress—the probability of this process proceeding "normally" versus in hyper-partisan fashion is extremely slim. The current Congress has shown a marked unwillingness to step outside of party lines despite the need for collaboration to

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14. *Russia: The 'Cloud' Over the Trump White House*, BBC (Sep. 14, 2018), https://www.bbc.com/news/world-us-canada-38966846.

15. Michael D. Shear & Matt Apuzzo, *F.B.I. Director James Comey Is Fired by Trump*, N.Y. TIMES (May 9, 2017), https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html.

16. James Griffiths, *Trump Says He Considered 'this Russia Thing' Before Firing FBI Director Comey*, CNN (May 12 2017, 9:11 AM), http://www.cnn.com/2017/05/12/politics/trump-comey-russia-thing/index.html.

17. Michael S. Schmidt, *Comey Memo Says Trump Asked Him to End Flynn Investigation*, N.Y. TIMES (May 16, 2017), https://www.nytimes.com/2017/05/16/us/politics/james-comey-trump-flynn-russia-investigation.html.

18. Benjamin Goggin, *Could Trump Be Impeached for 'Obstruction of Justice'?*, DIGG (May 17, 2017, 12:33 PM), http://digg.com/2017/what-is-obstruction-of-justice-definition-trump-comey-impeachment.

19. Rebecca R. Ruiz & Mark Landler, *Robert Mueller, Former F.B.I. Director, Is Named Special Counsel for Russia Investigation*, N.Y. TIMES (May 17, 2017), https://www.nytimes.com/2017/05/17/us/politics/robert-mueller-special-counsel-russia-investigation.html.

20. 28 C.F.R. §§ 600.8(c), 600.9(a)(3) (2019).

promote the public good.[21] The sole means of taking any legal action against the President—impeachment—is entirely within the purview of Congress, requiring a House of Representatives vote for impeachment, followed by the Senate presiding over an impeachment trial.[22] However, the Framers of the Constitution likely did not anticipate the current form of gridlock, which may allow even grave abuse of executive power to remain unchecked.

A. Federal Obstruction of Justice—Statutory Elements and Case-Law Limitations

The current political crisis has left many in Washington, D.C. and around the nation wondering whether the evidence gathered thus far may bolster the implication that Trump and his Administration committed obstruction of justice in relation to the Russia investigation.[23] In order to perform any kind of potential legal analysis, it is important to list and acknowledge both the elements of the federal obstruction-of-justice statutes as well as any limitations on those elements as defined by case law.

The U.S. Code's omnibus obstruction statute states that obstruction occurs when an individual acts "corruptly, or by threats or force, or by any threatening letter or communication" in endeavors to "influence, obstruct, or impede, the due administration of justice."[24] Additionally, the Code also addresses obstructing proceedings before departments, agencies, and committees, stating that one commits obstruction if one "corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States."[25] The statute, like many others, introduces terms that have been interpreted by courts.[26]

Like any other crime, the commission of obstruction of justice requires the presence of both an *actus reus* (culpable act) committed while possessing the requisite *mens rea* (guilty state of mind).[27] Case law has examined and defined the

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21. For example, Republicans have taken a number of actions that have impeded the process. This includes incidences such as Congressman Devin Nunes giving information to the President through backchannel communications regarding ongoing investigations into his Administration. *See* Matthew Rosenberg et al., *2 White House Officials Helped Give Nunes Intelligence Reports*, N.Y. TIMES (Mar. 30, 2017), https://www.nytimes.com/2017/03/30/us/politics/devin-nunes-intelligence-reports.html.

22. U.S. CONST. art. I, § 2, cl. 5; U.S. CONST. art. I, § 3, cl. 6–7.

23. Domenico Montanaro, *Is Trump Guilty of Obstruction of Justice? Comey Laid Out the Case*, NPR (June 10, 2017, 7:01 AM), https://www.npr.org/2017/06/10/532321287/is-trump-guilty-of-obstruction-of-justice-comey-laid-out-the-case.

24. 18 U.S.C. § 1503(a) (1996).

25. *Id.* § 1505 (2004).

26. For a summary of the following case law interpreting the meaning of the language contained in the obstruction statutes, see Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. 1277 (2018).

27. *Id.* at 1284–86.

limitations of both components. In regard to the *actus reus* under § 1505, a person must commit an act that attempts to influence, obstruct, or impede a proceeding in order to satisfy this component.[28] But what exactly does acting with attempt to influence, obstruct, or impede a proceeding actually entail? According to case law, it entails a number of possible actions.[29] In *United States v. Alo*, for example, the Second Circuit Court of Appeals held that a witness's apparent deliberate evasion during questioning before a Securities and Exchange Commission proceeding was sufficiently impeding to qualify as obstruction.[30] Additionally, the Seventh Circuit held that a person or attorney who knowingly files motions that contain inaccurate recounting of information has committed an activity rising to the level of obstruction.[31] Interestingly (and possibly most pertinent to the current situation), the Ninth Circuit held that even if a person under investigation in a formal proceeding ends up acquitted of the underlying crime, that person may still be charged with obstruction of justice if he or she does anything to impede the investigation, because obstruction is a separate crime from the crime being investigated.[32] Therefore, even if Mueller has insufficient evidence to recommend criminal charges in regards to collusion or treason, he may still recommend that obstruction charges be brought against Trump or his Administration if enough evidence exists showing that all obstruction elements have been met.

Turning to the component of *mens rea*, it is not sufficient for one to simply commit obstructive acts; one must also do so with the intent to act with a "corrupt purpose."[33] Hemel and Posner postulate that there are four possible interpretations that emerge from relevant case law that help define what constitutes acting with a "corrupt purpose."[34] The first, provided by Ninth Circuit holdings, construes acting corruptly to mean acting "for an evil or wicked purpose."[35] The second view, courtesy of the dissenting opinion of D.C. Circuit's Justice Silberman in *United States v. North*, states that courts should not focus on the state of mind to determine if someone acted with a corrupt purpose, but rather on the means utilized to carry out the alleged obstruction.[36] The D.C. Circuit also provided the third interpretation in *United States v. Poindexter*, holding that the *mens rea* of acting with a corrupt purpose should only be limited to instances in which a person corrupts another into violating a legal duty regarding a proceeding under § 1505.[37] However, it is important to note that this view was rejected by Congress in 1996 with the passage of the False Statements Accountability Act.[38] The fourth and majority view regarding acting with a corrupt purpose comes courtesy of the Second Circuit, which

28. *Id.* at 1284–85.
29. *Id.*
30. 439 F.2d 751, 752–54 (2d Cir. 1971).
31. United States v. Cueto, 151 F.3d 620, 624–35 (7th Cir. 1998).
32. United States v. Hopper, 177 F.3d 824, 831 (9th Cir. 1999).
33. Hemel & Posner, *supra* note 26, at 7–8.
34. *Id.* at 1286–89.
35. United States v. Rasheed, 663 F.2d 843, 852 (9th Cir. 1981) (quoting United States v. Ryan, 455 F.2d 728, 734 (9th Cir. 1972)).
36. 910 F.2d 843, 882 (D.C. Cir. 1990) (Silberman, J. dissenting).
37. 951 F.2d 369, 379 (D.C. Cir. 1991).
38. Hemel & Posner, *supra* note 26, at 9.

held that acting "corruptly" entails acting with or being motivated by an "improper purpose."[39]

Though the Second Circuit's holding is now the accepted majority interpretation, there remains the question of which purposes are considered proper, and which are not. However, some of this ambiguity is relatively alleviated by case law that has imposed limitations on the scope of the obstruction statutes.[40] For instance, the District Court for the Western District of Pennsylvania has held that § 1503 of the obstruction statutes refers only to obstruction of federal judicial proceedings, such as grand-jury investigations.[41] Further, the District Court for the Western District of Kentucky has held that such federal judicial proceedings do *not* include FBI probes or investigations,[42] relying on previous case law established by the District Court for the Southern District of New York.[43] However, several federal circuit courts have held conversely that obstruction under § 1505 may apply if it occurs in the course of an investigation that could potentially lead to criminal charges being brought against the subject of the investigation.[44] Hemel and Posner further suggest[45] that charges for obstructing an FBI probe may be properly brought under § 1512(c), which prohibits obstruction of "any official proceeding."[46] Such official proceedings include grand-jury investigations, congressional proceedings, or "a proceeding before a federal government agency which is authorized by law."[47] However, some courts have rejected this viewpoint, holding that FBI proceedings do not fall under the purview of § 1512(c).[48]

B. Presidential Obstruction of Justice—Exploring a Barren Field with a Faulty Compass

Despite this analysis of the requisite elements of federal obstruction of justice, it remains difficult to ascertain whether there is sufficient evidence as to whether Trump or his Administration engaged in any legally obstructionist acts. This is partly due to the fact that, short of four previous incidences in the nearly two and a half centuries of the United States's existence, there is little case precedent addressing and defining the parameters of presidential obstruction of justice.[49]

The first, and perhaps most infamous, occurrence of presidential obstruction of justice occurred in the early 1970s by President Richard Nixon in the

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39. United States v. Thompson, 76 F.3d 442, 452 (2d Cir. 1996); *accord* United States v. Cintolo, 818 F.2d 980, 991 (1st Cir. 1987).

40. Hemel & Posner, *supra* note 26, at 11–14.

41. United States v. Scoratow, 137 F. Supp. 620, 621–22 (W.D. Pa. 1956).

42. United States v. Higgins, 511 F. Supp. 453, 455 (W.D. Ky. 1981).

43. United States v. Mitchell, 372 F. Supp. 1239, 1250 (S.D.N.Y. 1973) (holding that there can be no obstruction committed in a criminal investigation or inquiry prior to the initiation of proceedings).

44. *See* United States v. Schwartz, 924 F.2d 410, 423 (2d Cir. 1991); United States v. Lester, 749 F.2d 1288, 1298 (9th Cir. 1984).

45. Hemel & Posner, *supra* note 26, at 13–14.

46. 18 U.S.C. § 1512(c) (2008).

47. *Id.* § 1515(a) (1996).

48. *See* United States v. Ermoian, 727 F.3d 894, 902 (9th Cir. 2013).

49. Hemel & Posner, *supra* note 26, at 22.

Watergate scandal.[50] During the ensuing investigation, evidence of a tape-recorded conversation surfaced in which Nixon and Chief of Staff H.R. Haldeman devised a plan to utilize the assistance of the CIA deputy chief to pressure the FBI director into terminating its probe into the incident.[51] This led to Nixon attempting to claim executive privilege and refusing to relinquish the tapes, which was later rejected by the U.S. Supreme Court.[52] With House and Senate impeachment all but certain, Nixon resigned from office two weeks later on August 8, 1974.[53] The aftermath of this incident led to the drafting and ratification of the Ethics in Government Act of 1978, discussed later in this Note.[54]

The second and third instances of potential presidential obstruction and impeachment came in 1985, during the Iran–Contra scandal under the Reagan Administration.[55] Former-National Security Council Member Lieutenant Colonel Oliver North was charged with making false statements to Congress pertaining to its investigation into illegal aid to Nicaraguan Contras during their battle against the spread of communism by the Cuban-supported Sandinistas.[56] This resulted from Reagan's "arms-for-hostages" trade with Iran, in which the United States provided Iran with weapons in exchange for $30 million and the lives of seven American hostages.[57] Upon further investigation of this exchange, Attorney General Edwin Meese discovered a discrepancy showing that only $12 million of the agreed-upon payment had been received.[58] North came forward and admitted that he had funneled the remaining amount into aid for the Nicaraguan Contras, with National Security Adviser Admiral John Poindexter's full knowledge and Reagan's assumed knowledge.[59] Such aid was prohibited with Congress's passage of the Boland Amendment in 1982, which restricted the CIA and Department of Defense's involvement with Nicaraguan affairs.[60] Though no impeachment proceedings ever commenced, Reagan and his Administration came under increased scrutiny regarding whether he had been aware of North's actions and whether he condoned those secret dealings.[61] Despite the lack of any further impeachment proceedings,

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50. *Id.* at 23–24.
51. *Id.* at 23.
52. United States v. Nixon, 418 U.S. 683 (1974).
53. *The Watergate Story, Part 3: Nixon Resigns*, WASH. POST, http://www.washingtonpost.com/wp-srv/politics/special/watergate/part3.html (last visited Feb. 26, 2019).
54. Linda Greenhouse, *Blank Check; Ethics in Government: The Price of Good Intentions*, N.Y. TIMES (Feb. 1, 1998), https://www.nytimes.com/1998/02/01/weekinreview/blank-check-ethics-in-government-the-price-of-good-intentions.html?scp=7&sq=ethics%20in%20government%20act&st=nyt; *see infra* Section II.B.
55. AMERICAN EXPERIENCE, *The Iran-Contra Affair*, PBS, http://www.pbs.org/wgbh/americanexperience/features/reagan-iran/ (Feb. 12, 2019).
56. United States v. North, 708 F. Supp. 380 (D.D.C. 1988).
57. AMERICAN EXPERIENCE, *supra* note 55.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

two important legal developments came out of the legal proceedings against North and Poindexter. First, the District Court for the District of Columbia held that charges of making false allegations could not be summarily dismissed based upon a president's primacy in foreign-affair issues.[62] Further, presidential documents regarding the activities of the National Security Council (an executive administration) were subject to discovery on the basis that they may contain inculpatory or exculpatory evidence against an executive official under a criminal investigation.[63]

The fourth and most recent investigation into potential presidential obstruction of justice occurred in the late 1990s during President Bill Clinton's Administration.[64] Though the Clinton Administration is perhaps most infamously remembered for the impeachment proceedings in the Monica Lewinsky scandal, an important legal holding regarding executive and presidential accountability emerged prior to that investigation during the civil case of *Clinton v. Jones*.[65] Paula Jones, a former Arkansas state employee during Clinton's state gubernatorial administration, filed suit against Clinton in 1994, alleging that he had exposed himself to her during his time as Arkansas's governor.[66] The District Court of the Eastern District of Arkansas granted Clinton "temporary immunity" from the suit until he left office, a ruling that was appealed up to the U.S. Supreme Court.[67] Though the Court acknowledged that there was precedent indicating that a president may be granted immunity against lawsuits for official acts while in office, the Court held that such immunity did not extend to a president's unofficial acts.[68] The Court further held that the district court did have the authority to hear this civil suit based on its Article III jurisdiction, explicitly contradicting Clinton's contention that such authority would interfere with the performance of his official duties.[69] This holding created an important basis regarding presidential civil accountability that now becomes paramount in the question of whether a president may be held criminally accountable while in office.[70]

II. CRIMINALLY CHARGING A SITTING PRESIDENT—MISSION: IMPOSSIBLE?

Despite the inconclusive evidence regarding obstruction of justice, a dilemma remains: should Mueller elect to bring any sort of criminal charges against

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62. United States v. North, 708 F. Supp. 380, 383 (D.D.C. 1988).

63. United States v. Poindexter, 727 F. Supp. 1470, 1476 (D.D.C. 1989).

64. Dan Froomkin, Jones v. Clinton*: Case Closed*, WASH. POST (Dec. 3, 1998), http://www.washingtonpost.com/wp-srv/politics/special/pjones/pjones.htm.

65. *Id.*

66. *Id.*

67. Clinton v. Jones, 520 U.S. 681, 706 (1997).

68. *Id.* at 694–95.

69. *Id.* at 699–702.

70. Ryan Goodman, *Robert Mueller Has the Authority to Name Donald Trump an Unindicted Co-Conspirator*, SLATE (Oct. 29, 2017, 11:46 AM), https://slate.com/news-and-politics/2017/10/robert-mueller-has-the-authority-to-name-donald-trump-an-unindicted-co-conspirator.html.

Trump; may a president be criminally prosecuted while in office? While precedent such as *Clinton v. Jones* demonstrates that presidents are not immune to civil lawsuits while in office, the generally accepted conclusion is that a sitting president may *not* be criminally prosecuted while in office.[71] In a 2000 memorandum opinion, Assistant Attorney General Randolph D. Moss agreed with the 1973 Attorney General conclusion that the criminal indictment and prosecution of a sitting president would "impermissibly undermine the capacity of the executive branch to perform its constitutionally-assigned functions."[72] The opinion carefully examined the factors considered in the 1973 investigation in an attempt to find a basis for why both it and the current opinion arrived at the same conclusion.[73] Both opinions concluded that the burdens that are naturally intertwined with defending oneself in a criminal proceeding would be "uniquely destabilizing" to both the President's authority as well as the operation of the executive branch.[74] Further, both opinions concluded that any criminal proceedings where the President was the defendant would inescapably become tainted with political bias if left in the hands of a jury.[75] As such, the Assistant Attorneys General in both 1973 and 2000 remained of the opinion that such a politically esoteric task was better left to Congress through the remedy of impeachment.[76] The 2000 opinion attempted to distinguish why other executive officials, such as the Vice President, could be criminally charged, surmising that such an indictment would not result in a de facto removal from office and thus preserving Congress's exclusivity over the impeachment process.[77]

Opinions of the U.S. Attorney General are nonbinding;[78] however, the unchallenged nature of the 1973 and 2000 opinions has left the nation in the vulnerable position it now faces. Though both opinions propose possible solutions, such as indicting a president while in office but deferring trial until he or she has left office,[79] both explicitly discourage any other remedy other than impeachment for fear of entrusting laymen to a potentially politically biased task.[80] This is concordant with the constitutional intention regarding the separation of powers, and yet current events may prove this stance naïve and powerless in dealing with situations like the current constitutional crisis. Though one cannot look back into the thought processes of previous Attorneys General with a complete degree of certainty, it is unlikely that they considered a situation in which a special counsel could make "the case of the century" against a sitting president, only to have Congress "respond by doing

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71. A Sitting President's Amenability to Indictment and Criminal Prosecution, 22 OP. ATT'Y GEN. 222 (2000).

72. *Id.*

73. *Id.* at 223.

74. *Id.* at 230.

75. *Id.*

76. *Id.* at 231.

77. *Id.* at 234.

78. *Historical Resources for U.S. and State Law: Attorney General Opinions*, U. WIS.-MADISON L. LIBR., https://researchguides.library.wisc.edu/c.php?g=125247&p=820190 (last visited Feb. 23, 2019).

79. OP. ATT'Y GEN., *supra* note 71, at 231.

80. *Id.*

nothing."[81] As precarious a process as the removal of a sitting president would likely be, the idea that the remaining two branches of government would be left optionless appears incongruent with the Framers' intent that the separation of powers would guard against "usurpation of power."[82] In offering a new potential remedy for this dilemma, this Note now turns to the examination of the authority delegated to special counsel under the current regulations.

A. Scope and Authority of Special Counsel Under Current Federal Regulations—A Dull Knife in a Gunfight

While federal precedent has established that compelling the Attorney General to prosecute a federal criminal matter is prohibited,[83] there is statutory authority that allows for the delegation of investigations into executive-branch officials to specially appointed counsel.[84] Specifically, the Code of Federal Regulations permits the Attorney General to appoint, with notice given to Congress,[85] a special counsel to oversee a criminal investigation in situations where both the Justice Department's prosecution would present a conflict of interest and the appointment of a special counsel is in the public's best interest.[86] Special counsel must be selected from outside the U.S. government by the Attorney General and must pursue their investigations "ably, expeditiously and thoroughly."[87] Special counsel may also determine to what extent they wish to confer with the Attorney General regarding the conduct of their duties and responsibilities.[88]

On their surface, one could argue that these regulations supply a viable avenue to conduct a criminal investigation into executive officials (including the President) while simultaneously preventing political agendas or biases from tainting the process. Although the current regulations do provide special counsel with the authority and jurisdiction to execute their responsibilities, they also have the arguably counterintuitive effect of limiting their abilities and recommendations by delegating a large amount of authority to the Attorney General. The Attorney General is the sole entity that may not only appoint a special counsel[89] but also establish the boundaries of the special counsel's jurisdiction.[90] Should special counsel find it necessary for their jurisdiction to be expanded, such a course of action must be reviewed and approved by the Attorney General.[91] The Attorney General

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81. Brian Beutler, *We Might Just Be Stuck with Donald Trump*, NEW REPUBLIC (Aug. 15, 2017), https://newrepublic.com/article/144323/just-might-stuck-donald-trump.

82. *Checks and Balances: The Constitutional Structure for Limited and Balanced Government*, NAT'L CTR. FOR CONST. STUD., https://nccs.net/blogs/our-ageless-constitution/checks-and-balances (last visited Feb. 19, 2019).

83. *See* Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965).

84. 28 U.S.C. § 510; *Id.* § 301.

85. 28 C.F.R. § 600.9(a)(1).

86. *Id.* § 600.1.

87. *Id.* § 600.3(a).

88. *Id.* § 600.6.

89. *Id.* § 600.1.

90. *Id.* § 600.4(a).

91. *Id.* § 600.4(b).

may, at any point, ask to review any course of action that special counsel undertake and may unilaterally veto such action if the Attorney General concludes that it is "inappropriate or unwarranted" under the scope of the investigation.[92] Though the regulations do outline certain behaviors that are grounds for dismissal of a special counsel, the current regulations contain a "catch-all" provision that permits the Attorney General to dismiss a special counsel "for other good cause."[93] Though such an action would require both notification to the special counsel in writing[94] and the notification of Congress,[95] there is no other explicit check against the Attorney General's unilateral authority regarding dismissal. Upon conclusion of their investigation, special counsel must deliver a final report with their recommendations for indictment or declination to the Attorney General.[96] While the regulations normally compel the Attorney General to notify Congress of a special counsel's report and recommendations,[97] the Attorney General has the authority to decide whether publication of the counsel's findings and recommendations is in the public's best interest.[98] Any further proceedings regarding prosecution or impeachment would occur at the discretion of Congress.[99]

Under ideal circumstances, this process would appear adequate in addressing the immediate concerns of the current situation. Indeed, it is because of these regulations that Acting Attorney General Rod Rosenstein was able to appoint Mueller to oversee the Trump–Russia investigation.[100] However, the biggest impact that Mueller may make under the current regulations would be to name Trump as an unindicted coconspirator in the Russian-collusion affair.[101] However, because Mueller only has the authority that a normal U.S. Attorney would have, neither the Attorney General nor Congress would be compelled to initiate impeachment proceedings or take any further prosecutorial action.[102] Essentially then, while the results of a special counsel's investigation may be safeguarded against political taint, they are, to invoke an old phrase, "all bark and no bite." It is difficult to imagine, given the actions and political inclinations demonstrated by the then Republican-controlled Congress, that Mueller's findings would have induced any action on the part of Congress to curtail the actions of a president that it has been reluctant to confront thus far, despite the most inflammatory circumstances.[103] While it may seem like there is little recourse for a special counsel's neutered abilities under the current regulations, a glance into the post-Watergate regulations may provide an imperfect, yet much-improved alternative.

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92. *Id.* § 600.7(b).
93. *Id.* § 600.7(d).
94. *Id.*
95. *Id.* § 600.9(a)(2).
96. *Id.* § 600.8(c).
97. *Id.* § 600.9(a)(3).
98. *Id.* § 600.9(c).
99. Beutler, *supra* note 81.
100. Ruiz, *supra* note 19.
101. Bowman, *supra* note 9.
102. *Id.*
103. Beutler, *supra* note 81.

B. Title VI of the Ethics in Government Act of 1978—The Brawn Behind an Independent Counsel's Brain

As one would expect, the fallout of the Watergate scandal compelled the federal government to institute new regulations that would safeguard against the executive branch's ability to interfere with a special counsel's investigation that could conceivably result in another "Saturday Night Massacre."[104] Among the most important of these changes was the implementation of a series of regulations that was designated the Ethics in Government Act of 1978 (EGA).[105] These regulations led to the creation of the office of "independent counsel," whose abilities were governed by the Act's Title VI, a title that remained good law until Congress permitted it to lapse in 1999.[106]

Title VI of the EGA not only created the office of independent counsel, but it also enforced regulations that afforded special counsel significantly greater safeguards against political interference and abuse of discretion in the appointment, abilities, jurisdiction, and recommendations of the independent counsel than are currently afforded to special counsel.[107] Rather than permitting the Attorney General to determine whether there is a need for a special counsel, Title VI was triggered immediately upon the Attorney General's receipt of information that any executive official covered by the Title had violated a "non-petty federal criminal law."[108] The Attorney General must then determine within 15 days whether a preliminary investigation is warranted.[109] If a preliminary investigation is authorized, the Attorney General must complete it within 90 days and notify the Independent Counsel Division of the Court of Appeals whether the appointment of an independent counsel is necessary.[110] Should the Attorney General fail to make this report, he or she will be compelled to apply to the Independent Counsel Division for the appointment of an independent counsel.[111]

Unlike the current regulations, it is the Independent Counsel Division, a panel consisting of three judges that are appointed by the Chief Justice of the U.S. Supreme Court for two-year terms, that appoints and sets the parameters of an independent counsel's jurisdiction.[112] The Independent Counsel Division has the

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104. The "Saturday Night Massacre" refers to the events of Saturday, October 20, 1973, in which President Nixon's order that Watergate Special Prosecutor Archibald Cox be fired resulted not only in the firing of Cox, but also in the simultaneous resignations of Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus when both men refused to comply with the order. *See* Blair Guild, *What Was the Saturday Night Massacre?*, CBS (May 10, 2017, 4:43 PM), https://www.cbsnews.com/news/what-was-the-saturday-night-massacre/.

105. Bowman, *supra* note 9.

106. *Id.*

107. *Id.*

108. Joseph C. Bryce et al., *Ethics in Government*, 29 AM. CRIM. L. REV. 315, 336–37 (1991–1992).

109. *Id.* (citing 28 U.S.C. § 591(d)(2)).

110. *Id.* (citing 28 U.S.C. § 592(b)(1)).

111. *Id.* (citing 28 U.S.C. § 592(c)).

112. *Id.* (citing 28 U.S.C. § 593(b)).

sole authority to disclose an independent counsel's identity and expand the scope of a counsel's jurisdiction.[113] Unlike the current regulations' delegation of broad authority to the Attorney General regarding dismissal, Title VI stated that the Attorney General may remove an independent counsel *only* upon demonstration of "good cause."[114] Congress made further amendments to Title VI in 1983 that permitted the Attorney General to seek the Independent Counsel Division's appointment of an independent counsel for the investigation of any government official, regardless of whether that official was a member of the presidential administration.[115]

Prior to its expiration in 1999, Title VI of the EGA withstood legal challenge before the U.S. Supreme Court in *Morrison v. Olson*.[116] The petitioners, three former government officials who were found in contempt for failing to answer an independent counsel's subpoenas, argued that Title VI was unconstitutional based upon its alleged violations of the Constitution's Appointments Clause, Article III, and the Separation of Powers Doctrine.[117] In the Court's majority opinion, Chief Justice Rehnquist held that none of the petitioners' arguments were with merit, thus holding that Title VI did not violate any clause or article of the Constitution.[118]

It is also worth noting that, despite Title VI's expiration in 1999, there is precedent indicating that Congress has the authority to appoint a "special counsel" with some of the independence previously afforded to independent counsel under Title VI.[119] Such an appointment was made in 2003, when public pressure compelled Congress to appoint U.S. Attorney Patrick Fitzgerald as a special counsel with "full independent authority and autonomy" to pursue the investigation into the leaking of a covert CIA employee's identity.[120] Precedent also existed prior to Title VI's expiration in 1994 during the investigation into the Clinton Administration's involvement in the "Whitewater" matter.[121]

III. FUTURE IMPERFECT—RESTORING TITLE VI AND TAILORING IT FOR THE TWENTY-FIRST CENTURY

While it is unlikely, given recent congressional attitudes, that any motion to restore Title VI of the EGA is forthcoming,[122] examination of its historical impact suggests that it may be an effective, if not entirely perfect, manner to avert a future recurrence of the current constitutional crisis. While it is difficult to precisely assess

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113. *Id.* at 337–38 (citing 28 U.S.C. §§ 593(b)(4), 593(c)).

114. *Id.* at 338 (citing 28 U.S.C. § 596(a)(1)).

115. JACK MASKELL, CONG. RESEARCH SERV., R43112, INDEPENDENT COUNSELS, SPECIAL PROSECUTORS, SPECIAL COUNSELS, AND THE ROLE OF CONGRESS 1, 3 (2013).

116. 487 U.S. 654 (1988).

117. *Id.*

118. *Id.* at 659–60.

119. MASKELL, *supra* note 115, at 2–4.

120. *Id.* at 2.

121. *Id.* at 5.

122. Andrew Prokop, *Why Ryan and McConnell are More Afraid of Trump than He Is of Them*, VOX (Aug. 25, 2017, 8:00 AM), https://www.vox.com/policy-and-politics/2017/8/25/16198340/trump-mcconnell-ryan-feud.

the ins and outs of any future investigation, analysis and application of Title VI to the ongoing Trump–Russia investigation may provide a valuable blueprint from which to build a foundation.

A. Context is King—The Escalation of the Current Crisis

The contextualization of continuing developments within the Trump–Russia investigation is imperative in demonstrating the beneficial potential for Title VI's application to presidential criminal inquiries. The investigation has unexpectedly advanced in ways that, perhaps now more than ever, put Mueller's investigation into the Republican crosshairs.[123] Among the most potentially damning of developments are the recent indictments brought against former Trump-campaign manager Paul Manafort and his associate Rick Gates for laundering money in an attempt to gain Russian assistance in obtaining damaging information on Hillary Clinton.[124] Astonishingly, Mueller has already managed to obtain his first guilty plea from the investigation,[125] with former Trump foreign-policy advisor George Papadopoulos pleading guilty to lying to the FBI regarding an attempted meeting he arranged between the Trump campaign and Russian officials to gather "dirt" on Clinton from "thousands of emails."[126] These revelations put immense pressure on several Trump officials, including former-Attorney General Jeff Sessions, who has been the target of constant criticism from both the President and other administrative personnel for his recusal from the investigation.[127] With former-White House Chief Strategist Steve Bannon now offering to tell Mueller "everything,"[128] as well as the revelation that Trump gave instructions to White House counsel Don McGahn to stop Sessions from recusing himself from the

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123. Fred Lucas, *Conservatives are Warming to Firing Mueller and his 'Fishing Expedition'*, NEWSWEEK, (July 21, 2017, 10:31 AM), https://www.newsweek.com/conservatives-are-warming-firing-mueller-and-his-fishing-expedition-640204.

124. Matt Apuzo et al., *Former Trump Aides Charged as Prosecutors Reveal New Campaign Ties with Russia*, N.Y. TIMES (Oct. 30, 2017), https://www.nytimes.com/2017/10/30/us/politics/paul-manafort-indicted.html.

125. As of the date of this publishing, 34 people have also entered guilty pleas in connection with Mueller's investigation. *See* Andrew Prokop, *All of Robert Mueller's Indictments and Plea Deals in the Russia Investigation So Far*, VOX (Jan. 25, 2019), https://www.vox.com/policy-and-politics/2018/2/20/17031772/mueller-indictments-grand-jury.

126. 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.

127. Lucas, *supra* note 123.

128. Naomi Lim, *Steve Bannon Will Tell Special Counsel Robert Mueller 'everything': Report*, WASH. EXAMINER (Jan. 16, 2018, 11:41 PM), https://www.washingtonexaminer.com/steve-bannon-will-tell-special-counsel-robert-mueller-everything-report. As of the date of this publication, Steve Bannon has had at least three interviews with Mueller's team. *See* Kara Scannell and Eli Watkins, *Steve Bannon Interviewed by Mueller's Team for at Least the Third Time*, CNN (Oct. 30, 2018), https://www.cnn.com/2018/10/30/politics/steve-bannon-robert-mueller-investigaiton/index.html.

Trump–Russia investigation,[129] the potential for interference with the Mueller investigation has escalated considerably.

However, it would be foolhardy to deny that the recent controversies surrounding Supreme Court Justice nominations have cast considerable doubt on the nonpartisan integrity of the Judiciary.[130] Given these recent developments, one could easily question whether placing extra power and faith in the Judiciary as a pseudo-referee in future constitutional crises is warranted. Despite this, it is important to bear in mind that unlike those representatives and senators elected by the American public, the lifetime-appointed Supreme Court Justices are not beholden to any particular electorate in the hopes of remaining in office.[131] Constitutional theorists have argued that it is specifically this status as "comparative outsiders" in the system of government that allows them to serve in this capacity better than any other branch of government.[132]

B. Who Watches the Watchers? Why the U.S. Judiciary Should Exercise Greater Oversight Power over the Legislative and Executive Branches

Though the restoration of Title VI would theoretically ease both the legislative gridlock and potential for executive abuse, certain modifications enhancing the judicial branch's role in the process may serve to create additional safeguards, as well as (perhaps a more important goal) to restore a degree of confidence within the system of government checks and balances.

Years of political and governmental disillusion have also contributed to the current crisis. Aside from Trump's dwindling approval numbers,[133] executive-branch approval has decreased by 6% since 2016, with independent voters' confidence in the branch plummeting from 49% in 2016 to 38% in 2017.[134] The legislative branch, currently the only entity with any power to criminally charge and

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129. 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-mcgahn.html.

130. Yascha Mounk, *The Supreme Court Is Now a Partisan Institution*, SLATE (Oct. 6, 2018), https://slate.com/news-and-politics/2018/10/brett-kavanaugh-confirmed-supreme-court-no-checks-trump.html.

131. John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (1980).

132. *Id.*

133. Gary Langer, *Amid Record Low One-Year Approval Rating, Half of Americans Question Trump's Mental Stability*, ABC NEWS (Jan. 21, 2018, 12:00 AM), https://abcnews.go.com/Politics/amid-record-low-year-approval-half-question-trumps/story?id=52473639.

134. *Trust in Judicial Branch Up, Executive Branch Down*, GALLUP (Sep. 20, 2017), https://news.gallup.com/poll/219674/trust-judicial-branch-executive-branch-down.aspx.

try the President, has fared no better, with general approval standing at 35%[135] and congressional approval standing at 19%.[136]

Conversely, the branch of government that has yet to come under scrutiny is the one branch that has yet to have a major role in the crisis. The Judiciary enjoys a far-higher approval rating.[137] In fact, the disparity between the approval rating of the Judiciary versus that of the executive branch has only been higher during the days of the Nixon–Watergate scandal.[138] Much of the disparity in approval between the judicial branch and the other two branches has been attributed to the judicial branch's principle role as a nonpartisan "arbiter of disputes over existing laws" that "may make it appear to be above the political fray in contrast to Congress and the presidency."[139] It is this greater trust in the judicial branch that arguably could make it a more favorable arbiter of executive criminal activity. Title VI appeared to recognize this proposition in its establishment of the Independent Counsel Division. The resurrection of the Division would allow for stopgap measures to be implemented in which the Attorney General would have to provide good cause to dismiss Mueller or other future special counsel from their respective investigations.[140] Congress's role would be similarly monitored, with its ability to initiate or disband an independent counsel's investigation being more comparable to a request rather than a mandate.[141] Despite these potential positive outcomes that may emanate from the reimplementation of Title VI, the former laws would not sufficiently cover other contingencies that are likely to arise as this crisis progresses. Primarily, there is nothing within the former Title VI text that states what happens if Congress refuses to go forward with any criminal proceedings despite an independent counsel's recommendation in favor of criminal charges. Any progress would simply cease with Congress's inaction.

It is for this reason that any new reimplementation of Title VI should incorporate a greater role for the federal judiciary, either through the expansion of the resurrected Independent Counsel Division, or in some cases, through the U.S. Supreme Court. While a proposal such as this is likely to provide greater protection against legislative or executive misappropriation of power, it is just as likely to cause a great deal of alarm based upon what could be seen as a new violation of the Separation of Powers Doctrine. Indeed, it is likely that a lot of this apprehension will be shared among members of the Judiciary themselves. Historically, the U.S. Supreme Court has been extremely hesitant to invade the domain of the other two

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135. *Id.*

136. *2017 Congressional Job Approval Average Remains Low*, GALLUP (Dec. 14, 2017), https://news.gallup.com/poll/223598/2017-congressional-job-approval-average-remains-low.aspx.

137. *Id.* The judicial-branch approval rating rebounded from a record nadir of 53% in 2015 to 68% as of September 2017. *Trust in Judicial Branch Up, Executive Branch Down*, *supra* note 134.

138. *Trust in Judicial Branch Up, Executive Branch Down*, *supra* note 134.

139. *Id.*

140. It is arguably unlikely that any clearly partisan motivations behind the dismissal of a special counsel would rise to the level of "good cause."

141. MASKELL, *supra* note 115, at 3.

branches, having only struck down 103 of 15,817 congressionally enacted laws as of 2002.[142] Despite evidence to the contrary, many perceive the Court as the purveyor of "judicial activism," overstepping its constitutionally defined boundaries.[143]

Despite these apprehensions, there is an arguable basis for expanding the Judiciary's role in conjunction with this proposed resurrection of Title VI. It is a basis that was established in the earliest days of the Court's existence. The landmark case of *Marbury v. Madison* established the concept of judicial review.[144]

The establishment of judicial review has been a hallmark of the judicial branch's role in government since *Marbury*, with 180 acts of Congress held unconstitutional in whole or in part since its holding.[145] In addition, immediately after *Marbury* the Court established that it also has oversight power over the executive branch, with the ability to invalidate presidential orders that extended beyond the branch's congressionally delegated authority.[146] If it is accepted that judicial review grants to the Supreme Court the authority to review the actions of Congress, it may not be an overextension to postulate that judicial review also gives the Court the ability to review the *inactions* of Congress when the President may be an accomplice to obstruction of justice or the compromising of national security.

In addition, the Constitution delegates original jurisdiction to the Supreme Court over certain matters involving high-profile figures. This is exemplified in Section 2, Clause 2 of Article III, which gives the Supreme Court original jurisdiction "[i]n all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."[147] In interpreting this Clause, the Court has held that this original jurisdiction need not be implemented by an act of Congress,[148] nor may Congress deprive the Court of its appropriate original jurisdiction.[149] However, upon briefly considering adding a new section to Title VI that would task the Supreme Court with presiding over all proceedings that bring criminal charges against a sitting president , I concluded that this would perhaps be a bridge too far for the constitutional boundaries of the Judiciary. Alternatively, there may be an opportunity to use the Supreme Court's constitutionally defined

142. Adam Liptak, Opinion, *How Activist Is The Supreme Court?*, N.Y. TIMES (Oct. 12, 2013), https://www.nytimes.com/2013/10/13/sunday-review/how-activist-is-the-supreme-court.html?mtrref=www.google.com&gwt=pay&assetType=opinion&login=email (quoting CLARK M. NEILY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT (2013)).

143. *Id.*

144. 5 U.S. 137, 177–78 (1803).

145. ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES, GOV'T PUB. OFF. (2016), *https://www.govinfo.gov/content/pkg/GPO-CONAN-REV-2016/pdf/GPO-CONAN-REV-2016-11.pdf*.

146. *See* Little v. Barreme, 6 U.S. 170 (1804).

147. U.S. CONST. art. III, § 2, cl. 2.

148. California v. Arizona, 440 U.S. 59, 65 (1979).

149. *See* Stevenson v. Fain, 194 U.S. 165, 174 (1904).

status as a court of appellate jurisdiction advantageously in the revitalization and redefinition of Title VI.

If one accepts the legal postulation that judicial review allows for federal-court oversight of legislative actions *and* inactions, Title VI's language may be amended in a way that permits either the Supreme Court or the Independent Counsel Division to serve as a new avenue of providing a check against Congress's refusal to act when the evidence presented indicates that the President has violated a "non-petty federal criminal law."[150] As the Circuit Courts of Appeals and the Supreme Court are courts of appellate jurisdiction,[151] it may be feasible to establish a process in which independent counsel may file an appeal with either court for a review of their findings. In an effort to curtail any fear of radical judicial activism, both an independent counsel and a representative from the House of Representatives' Intelligence Committee could present oral arguments before the court as to why criminal proceedings should or should not be advanced. As in any criminal proceeding,[152] the burden of proof should fall to an independent counsel, who will need to demonstrate to the court beyond a reasonable doubt both that sufficient evidence exists to warrant further proceedings and that all congressional avenues of advancing have been stalled without good cause. If the independent counsel is able to meet these burdens, the House of Representatives would then draft articles of impeachment, and the impeachment process could continue to the presentation of evidence before the Senate.

C. Courting Disaster? Advocating for the Expanded Judicial Oversight & Activism of the Proposed New Title VI

Despite whatever positive outcomes the implementation of the proposed amendments to Title VI may have, the specter of judicial activism remains an albatross around the goal of restoring public confidence in the government. Historical and social trends indicate that there is a degree of reticence and resistance when the Supreme Court has exercised its judicial oversight powers in overturning federal and state laws.[153] Such activism has been criticized by the Supreme Court Justices themselves, such as Justice Scalia's scathing dissent in the *Obergefell* decision:

> Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of

150. Bryce et al., *supra* note 108, at 337.

151. U.S. CONST. art. III, § 2, cl. 2.

152. *See, e.g.*, Miles v. United States, 103 U.S. 304, 312 (1880).

153. *Those "activist" Judges*, THE ECONOMIST (July 8, 2015), https://www.economist.com/democracy-in-america/2015/07/08/those-activist-judges.

> Independence and won in the Revolution of 1776: the freedom to govern themselves.[154]

While it may be hard to convince the general public to delegate such an active role to the Judiciary, there are arguments that could be made to frame such alleged judicial activism in a positive light. Vanderbilt University law professor Suzanna Sherry makes such an argument in a 2013 law-journal article on judicial activism.[155] Rather than viewing judicial activism as the courts overstepping their constitutional boundaries, Sherry frames such action as the Framers' protection against "majority tyranny" that may arise when democratic majorities abuse their majority rule.[156] This sentiment was mirrored by former-Supreme Court Justice Robert Jackson, who was quoted in a lecture stating that the Framers deliberately imbued the Judiciary with its oversight powers because of the fear that "unrestricted majority rule leaves the individual in the minority unprotected."[157] Indeed, the antimajoritarian sentiment was a primary influence in the creation of the U.S. Constitution, with even such revered figures as James Madison fearing what he called the "inconveniences of democracy" for which the Judiciary would be tasked with protecting "the people against the transient impressions into which they might be led."[158]

One need only to look back on the history of American case law to realize that many of the rights and liberties we take for granted now were only wrenched into existence through the exercise of judicial activism. Without the exercise of this tool, the doctrine of "separate, but equal" established in *Plessy v. Ferguson*,[159] fueled by the prosegregationist attitudes among the majority American populace at the time would have never been challenged by the Court in *Brown v. Board of Education*. The Court would have never been able to hold that the Due Process Clause of the Fourteenth Amendment includes the right to privacy that allows a woman to get an abortion.[160] Nor would the landmark decision in *Obergefell v. Hodges*, granting equal marriage rights to same-sex couples, be possible had the Court not engaged in judicial activism.[161] While originalists such as Justices Scalia and Thomas would cry foul at the very notion of the judiciary "making" law, others like Professor Sherry believe that judicial activism was a blessing bestowed upon the Judiciary as a vital way to protect us from ourselves.[162] Sherry concludes that to dispose of such

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154. Obergefell v. Hodges, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting).

155. Suzanna Sherry, *Why We Need More Judicial Activism*, 16 GREEN BAG 2d 449 (2013).

156. *Id.*

157. *Id.* at 456 (quoting Robert H. Jackson, *The Supreme Court in the American System of Government* 79 (Harvard 1955)).

158. *Id.* at 457 (quoting James Madison, Notes of Debates in the Federal Convention of 1787, at 193, 339).

159. 163 U.S. 537, 548 (1896).

160. Roe v. Wade, 410 U.S. 113, 114 (1973).

161. 135 S. Ct. 2584 (2015).

162. Sherry, *supra* note 154, at 456.

an essential tool would be akin to surrendering to the tyrannical majority rule and would likely lead to many regrets as time passes.[163]

When looking at the current crisis, it is important to emphasize that advocating for greater judicial activism among the courts is not an all-or-nothing proposition. Proponents of greater activism have themselves acknowledged that the ideal situation would be one in which the courts use activism as a tool rather than a club, relying upon it "when and only when" the situation calls for it.[164] However, no enacted measure can fully compensate for the existence of human error, and indeed, the chance for legal error does increase when a court exercises its legal prerogative to make substantial changes to the law through judicial review.[165] However, Sherry and other proponents turn to the counterview on Blackstone's time-honored formulation, arguing that, for the greater good of the nation, it is better that a more active Judiciary invalidate ten laws that should have been upheld than it would be for it to uphold one law that should have been declared unconstitutional.[166] It is from this perspective that this Note advocates a greater role for the Judiciary in an expanded form of Title VI.

FIGHT THE FUTURE—CONCLUSION

Though it is unlikely that any proposed solution would adequately plug the figurative holes in the dam that is independent-counsel procedure and the impeachment process, the Trump–Russia constitutional crisis has demonstrated the need for the restoration of laws such as Title VI of the EGA and with it, a greater role for the judicial branch. Despite the inevitable protests against judicial activism, the danger our nation finds itself in is one that the Framers could not have possibly comprehended, nor tolerated. The unchecked power of a Chief Executive who—through ignorance or by design—has the ability to abuse that power to great nationwide harm was the very form of tyranny that this nation's founders rallied against. In a sense then, it can be argued that the implementation of new laws designed to fight against any future abuse of executive power is one of the most fundamental forms of patriotism. At a time when America feels like it has lost its way, the reaffirmation of our core principles may be the beacon that guides us into the future with the confidence and resolve that has let our nation endure.

163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 459.