

**American Literature and Culture 2018**  
**SFE10314**  
**Dr. J Wagner**

**Re-sit Final Exam, Part 1 (Research Essay)**

**DUE:** Friday, 12 April by 12:00

**Format Requirements:**

- Typed, Times New Roman, Arial, Garamond (12 point font)
- Docx file (Word file)
- Secondary sources are required for this assignment, and authorized sources have been uploaded to Fronter for your use. Please read each question carefully, as it will tell you what sources are authorized. MLA In-text citations of your sources are required in this paper, as is an MLA Works Cited page.
- Double-spaced (Font, spacing, style, and format should all be consistent throughout)
- 1250-1750 words (5-7 pages)

**Structure and Technical Information**

Your research essay should have a clear introduction, body, conclusion, and MLA Works Cited. Valid academic sources (mentioned in the essay questions) are the only acceptable sources for this paper.

- **Introduction:** This is the opening to your essay. It should introduce your topic and move your way toward the significance of your argument. At the end of the introduction is usually where your Thesis Statement is.
  - **The Thesis Statement**<sup>1</sup> is a statement in the introduction that explains in detail what your paper will do. *This is a statement and NOT a question.*
    - *Example:* Barack Obama's presidency fomented anger about race rather than settling the matter in the USA. One part of the population thought Obama did not focus on race enough, and the other part thought he focused on it too much. This paper will argue that Obama's reasonable and moderate commentary on racial issues, and his restrained reactions to more extreme racial events in America demonstrate how he mediated these two opposing sides enough to be an effective advocate for African Americans.
- **Body:** This is the major part of your paper. It is usually broken into a few parts depending on your **Points of Argumentation** (Major claims) and the length of your paper
  - *Example:* The Points of Argumentation stated in the thesis statement above, are "reasonable and moderate commentary," and "restrained reactions." Each Point of Argumentation must be supported with evidence from your secondary sources, and explained through your own analysis before moving to the next point.
- **Conclusion:** This is the end of your paper. It is usually the same size as or a bit shorter than your Introduction. It should review your argument, explain your findings, and wrap-up your paper.
  - *Example* (This is not an example of an entire conclusion, just the final part): An examination of Obama's commentary regarding racial issues and his restraint during extreme racial events in America reminds us that being an effective advocate for civil rights does not always mean you are the loudest voice in the debate.
- **Bibliography or Works Cited:** This is the page that explains your sources. You should use MLA to cite your sources. If you have questions, ask me in class, or use the MLA citation book (8<sup>th</sup> ed) in the library.

**Grading**

The grade you receive will be integrated into your overall grade for the Final Exam. A fail on Part 1 (30%) or Part 2 (70%) of this final exam means that you will fail the course. \*Papers submitted without *acceptable* sources cited in the text, and without an MLA style Works Cited/Bibliography, will automatically fail.\*

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<sup>1</sup> The thesis statement contains 3 things (SAP): a Subject, an Assertion (an argument) about the subject, and a Preview of the main points (claims) you will argue in the body of the paper.

## Plagiarism

You must make sure you turn in your own work for this essay. This means if you **summarize** or **paraphrase**, you must cite the source MLA style after your summary\paraphrase, with last name of author and page number, both in parenthesis, e.g. (Zielke 5). If you use someone else's words **verbatim**, you **must** use quotation marks, after which you **must** cite the source as noted above. If plagiarism is found in your paper, your paper will fail the assignment and be reported to the Examination Office.

## Academic Sources

Source material provided on this question are appropriate, and articles from *The New York Times*, *The Washington Post*, *The Guardian*, and *The Economist* are acceptable sources. **Sources other than those mentioned above *MUST* be approved by the professor.** If you use unapproved sources, your essay will fail.

Write an essay on the following topic:

1. Many American citizens see echoes of the Nixon Administration in the current Administration in the White House. In the Watergate Scandal, a Special Prosecutor had been named in May 1973 by Attorney General Elliot Richardson to investigate the break-in at DNC headquarters (the beginning of the scandal) and its connection to then President Richard Nixon. Richardson named Archibald Cox to the task. In October, Cox issued a subpoena to Nixon, asking him to turn over the Oval Office tapes that had come to their attention. Nixon refused, and on October 20, 1973, the Watergate Scandal took a fateful turn. Nixon asked Attorney General Richardson to fire Special Prosecutor Cox, but he refused and resigned in protest. Next, Nixon asked Deputy Attorney General Ruckelshaus – the next in-line by authority – to fire Cox, but he also refused and resigned in protest. Nixon then took it upon himself to fire Cox and abolish the Special Prosecutor's Office. These moves were later named the "The Saturday Night Massacre" and in essence sealed the fate of the Nixon presidency, because by attempting to thwart the investigation into himself, Nixon was seen as conspiring to hinder a federal investigation (obstruction of justice), which fanned the flames of impeachment. Some Americans watching the current Administration, have felt 1973 resonate all over again, after the President fired FBI Director James Comey in May 2017. Comey had been investigating the Trump Administration for connections between Trump's campaign and Russia during the 2016 U.S. presidential election. Using the article posted on Fronter for this question and any articles published by the sources approved above, argue whether or not you think the Trump Administration is in danger of going the way of the Nixon Administration.

## Reminders and Tips

### What is an Essay?

1. An essay is a written work **analyzing** a certain topic, using examples and textual citations to support your major points of argumentation (claims). It is NOT a report. A report does not analyze; a report simply details information and data without analyzing, evaluating, or discussing the significance of such information and data.
2. **Essays must have an argument.** "Martin Luther King's passive resistance movement, in retrospect, was not the best way to fight for equal rights" is an argument because not everyone would agree with this statement, and the author would have to shore up with evidence to prove it. "Martin Luther King is a famous Civil Rights leader" is a known statement of fact that does not require support and therefore needs no real evidence, and cuts short the discussion.
3. Essays need **titles**. Essays without titles are seriously weird. Be creative and make your reader want to read yours!
4. An essay needs a **thesis statement**. The thesis statement is a sentence or two, usually placed at the end of the essay's introduction, that names your topic and explains what are your major claims about that topic (see thesis statement information on page 1).
5. The parts of an essay are not normally separated by subheadings, but for this paper I will allow it. Still, if you are used to writing essays in which text flows from paragraph to paragraph without breaks, please feel free to continue this practice.

# Independent Prosecutors, the Trump-Russia Connection, and the Separation of Powers

Steven D. Schwinn

The U.S. Constitution, when it was framed in 1787, was an innovation in the separation of powers. It introduced and combined both familiar and novel ideas to create an elegant and complex system of checks and balances that allows each branch of government to exercise its own full authority, but at the same time to constrain each other, so that no one branch becomes too powerful, or tyrannical.

For example, the Constitution created an independent judiciary, and vested it with the power to hear “cases and controversies,” including cases against the government itself, as a check on the legislative and executive authorities. It gave the chief executive a critical role in lawmaking, as a check on the powers of Congress. And it gave the legislature the enormous power to make laws, including laws that can constrain the courts and the president. These are just the most obvious checks in our system; there are many others.

But for all the innovations in the Constitution, our founding document fails to address one of the most important separation-of-powers questions. That is, how can the government effectively prosecute illegalities at the highest levels of the executive branch?

Here’s the problem. The power to prosecute is an inherently executive power. Because it is an inherently executive power, any federal prosecutor sits within the executive branch and

ultimately answers to the president. In our federal system, that power resides principally within the U.S. Department of Justice. The head of the Department of Justice, the attorney general, answers directly to the president. But if the president can direct the actions of the attorney general, and if the attorney general can direct the actions of any federal prosecutor, how can a federal prosecutor effectively prosecute wrongdoing by the president or his associates? The Constitution, for all its innovations, does not provide an obvious answer.

That’s a little surprising. Most or all state constitutions have solved this problem by creating an independently elected, and thus independently accountable, office of the state attorney general. A state attorney general has authority, independent of the state governor, to prosecute wrongdoing under state law, including wrongdoing by the state executive branch. Similarly, some foreign constitutions provide for an independent office that is vested with authority to investigate and,

under some circumstances, prosecute wrongdoing within the executive branch. But the U.S. Constitution, by its plain terms, creates no such office.

Instead, the U.S. Constitution creates checks against executive illegalities in roundabout ways. For example, the Constitution vests Congress with authority to investigate wrongdoing within the executive branch, publicize it, and, ultimately, impeach executive officers for “high crimes and misdemeanors.” The Constitution also allows the people to vote the president out of office in the next presidential election. But these checks are relatively weak and ineffectual: congressional oversight lacks the teeth of federal prosecution; impeachment is often not a practical political option; and the election can come too late and with too little effect to meaningfully check executive wrongdoing.

There is a strong tradition of independence at the Department of Justice. This means that Department avoids politicization, and the attorney general and department prosecutors are insulated from the ordinary, day-to-day politics of the White House. But this happens by tradition, not law. It is especially weak and ineffectual when the president ignores it.



In this June 21, 2017, file photo, special counsel Robert Mueller departs after a closed-door meeting with members of the Senate Judiciary Committee about Russian meddling in the election and its possible connection to the Trump campaign, at the Capitol in Washington.

This leads to the bipartisan fear now in Congress that the current president may frustrate or even close down the special counsel's investigation into any collaboration between the Trump campaign and Russia in the 2016 presidential election. The special counsel is an office created by Department of Justice regulations that is specially designed to fill the gap in our Constitution of an independent prosecutor. By department regulation, the special counsel enjoys independent authority to investigate and prosecute illegalities in the White House. Still, bipartisan groups of senators are sufficiently concerned that President Donald Trump may try to thwart the efforts of the special counsel that they have introduced two different bills to protect that office. These bills, in turn, raise their own separation-of-powers issues.

In order to see how we have come to this place, let's take a look at the recent history of independent prosecutors, starting with the most famous case of the Watergate prosecutor.

### **The Watergate Special Prosecutor**

On May 31, 1973, Attorney General Elliott Richardson appointed Harvard Law Professor Archibald Cox to serve as special prosecutor and director of the Office of Watergate Special Prosecution Force. Richardson appointed Cox pursuant to department regulations that created the particular office and specifically vested it with authority to investigate and prosecute offenses arising out of the Watergate break-in, the 1972 presidential election, and allegations involving the president and White

House staff or presidential appointees. (The department regulations were authorized broadly by federal law.)

Department regulations also vested the office with independence. In order to ensure that the special prosecutor had "the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department," regulations provided that "[t]he Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions." Moreover, "[t]he Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities." And perhaps most importantly, "[t]he Special Prosecutor will not be

removed from his duties except for extraordinary improprieties on his part.”

Despite the office’s independence, however, President Nixon nevertheless formulated a plan to undermine it. The episode is now known as the Saturday Night Massacre. It went like this: On Saturday, October 20, 1973, Nixon ordered Attorney General Richardson to fire Cox. Richardson refused and resigned instead. Nixon then ordered Deputy Attorney General William Ruckelshaus to fire Cox. Ruckelshaus, too, refused and resigned. Finally, President Nixon ordered Solicitor General Robert Bork (the number three official in the department) to fire Cox. Bork complied.

But President Nixon’s gambit backfired. In the political blowback, Nixon was forced to appoint a new special prosecutor, Leon Jaworski. And as the Watergate investigations unfolded, Nixon ultimately resigned. Pursuant to department regulations and Jaworski’s appointment, the special prosecutor’s office terminated when Jaworski’s work on the Watergate matter ended.

### **The Ethics in Government Independent Counsel**

In reaction to the Watergate scandal, Congress created a new kind of independent prosecutor by federal statute (and not merely by federal regulation). A provision in the Ethics in Government Act of 1978 created the Office of the Independent Counsel. The Act vested the Office with authority to investigate and, if appropriate, prosecute certain high-ranking government officials for violations of federal criminal laws.

The Act designed the Office to ensure independence through the counsel’s appointment, oversight, and tenure in office. As to appointment, the Act provided that the attorney general, upon receiving information “sufficient to constitute grounds to investigate whether any person [covered by the Act] may have violated any Federal criminal law,” to conduct a preliminary investigation. If

the attorney general concluded that there were “reasonable grounds to believe that further investigation or prosecution is warranted,” then the attorney general had to apply to a special federal court for the appointment of an independent counsel. The court would then “appoint an appropriate independent counsel and ... define that independent counsel’s prosecutorial jurisdiction.”

As to oversight, the Act granted the independent counsel “full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice” for any matters within the counsel’s jurisdiction. The independent counsel had authority to hire employees, to conduct grand jury proceedings and other investigations, to “initiat[e] and conduct prosecutions in any court of competent jurisdiction,” and to appeal any decision in any case in which the counsel participated. Moreover, whenever a matter was referred to an independent counsel, the attorney general and the Justice Department were required to suspend all investigations of their own. In other words, the independent counsel had near absolute authority over matters within the counsel’s jurisdiction.

Finally, the Act limited the independent counsel’s tenure in two ways. First, the Act provided that the office terminated when the independent counsel reported to the attorney general, or when the special court determined that the counsel completed any investigations or prosecutions undertaken pursuant to the Act. Next, the Act authorized the attorney general to remove an independent counsel from office “only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel’s duties.”

In 1988, the Office of the Independent Counsel survived a significant constitutional challenge in *Morrison v. Olson*. 487 U.S. 654. In that case, a special court

appointed an independent counsel to investigate whether Theodore Olson, the assistant attorney general for the Office of Legal Counsel, provided false or incomplete testimony to Congress regarding documents that congressional committees had subpoenaed from the Environmental Protection Agency and the Office of Legal Counsel. Olson argued that the Office of the Independent Counsel violated the Appointments Clause of the Constitution, because the independent counsel was not nominated by the president and confirmed by the Senate. He also argued that the Office violated the separation of powers, because it encroached upon the judiciary, and aggrandized Congress and the judiciary at the expense of the executive branch. In particular, he argued that the “for cause” termination requirement impinged on the president’s authority to control the activities within the executive branch and, ultimately, to faithfully execute the law.

The Supreme Court disagreed. The Court first ruled that the office did not violate the Appointments Clause. The Court held that the Appointments Clause, by its plain terms, authorized Congress to “vest the Appointment of ... inferior Officers ... in the President alone, in the Courts of Law, or in the Heads of Departments.” In other words, the Appointments Clause permits Congress to authorize a court to appoint an inferior officer in the executive branch. (This seems counter-intuitive. But it operates as a hard-wired constitutional check on the president by the coordinate branches of government.) Moreover, the Court held that the independent counsel was an “inferior office,” because (1) the counsel was subject to removal by a higher officer (the attorney general), (2) the counsel’s functions were limited (to investigation and prosecution), (3) the counsel’s jurisdiction was limited (to the alleged illegalities surrounding Olson’s testimony to Congress), and (4) the counsel’s tenure was limited (until the counsel completed the investigation). Because the

Appointments Clause allowed Congress to vest the appointment of an inferior officer in the courts, and because the independent counsel was an inferior officer, the Court held that the Office of the Independent Counsel did not violate the Appointments Clause.

The Court ruled next that the Office did not violate the separation of powers. The Court held that the Office did not encroach upon the judiciary, because the Appointments Clause itself authorizes Congress to vest the appointment of inferior officers in the courts. (The Court held that the special court's power to determine the counsel's jurisdiction was simply an incident of its constitutional power to appoint the counsel in the first place, and not an encroachment on the role of the courts.) Moreover, the Court held that the office's tenure requirements—which permitted the special court to terminate the office when the Counsel completed the investigation, and which permitted the attorney general to fire the counsel for “good cause”—did not impermissibly encroach on the prosecutorial discretion of the independent counsel or the president's authority to execute the laws. As to the latter, the Court wrote,

Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.

Justice Antonin Scalia dissented and wrote an opinion that has become an important part of the constitutional canon. Justice Scalia pointed to the Vesting Clause in Article II, which says that “[t]he executive Power shall

be vested in a President of the United States.” In language that has become iconic, he argued that “this does not mean some of the executive power, but *all* of the executive power.” And because the independent counsel exercised a quintessentially executive function, but could not be terminated at will by the president, the Office impermissibly encroached on the president's plenary executive authority.

Since *Morrison*, independent counsels have investigated and prosecuted a range of alleged wrongdoings at high levels within the executive branch. Perhaps most notably, Independent Counsel Lawrence Walsh investigated the Iran-Contra affair; and Independent Counsel Kenneth Starr investigated various matters within the Clinton White House, including the Lewinsky scandal. In 1999, political support for the office waned, and Congress let the provisions in the federal statute creating the office expire.

### **The Special Counsel**

When the independent counsel law expired, the attorney general promulgated Department of Justice regulations to authorize the appointment of an outside “special counsel” to investigate and prosecute certain sensitive matters. Under Department regulations, the attorney general has the authority to appoint a special counsel “when he or she determines that criminal investigation of a person or matter is warranted,” when “the investigation or prosecution ... by a United States Attorney's Office or litigating division of the Department of Justice would present a conflict of interest for the Department or other extraordinary circumstances,” and when “it would be in the public interest to appoint an outside Special Counsel ...” Under the regulations, the attorney general establishes the special counsel's original jurisdiction, but the special counsel may request additional jurisdiction from the attorney general during the course of the investigation. Like the independent counsel, the special counsel can convene a grand jury

to investigate a matter, issue subpoenas and call witnesses, and, if appropriate, pursue an indictment for a violation of federal law.

The special counsel enjoys independence similar to, though perhaps somewhat less than, the independence enjoyed by the independent counsel. Under Department of Justice regulations, “[t]he Special Counsel may be disciplined or removed from office only by the personal action of the Attorney General.” Moreover, “The Attorney General may remove a Special Counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Department policies.”

### **The Special Counsel and the Russia Investigation**

On May 17, 2017, Deputy Attorney General Rod Rosenstein used this authority to appoint a special counsel to investigate collaboration between the Russian government and the Trump campaign in the 2016 presidential election. (Rosenstein, not Attorney General Jeff Sessions, appointed the special counsel, because Sessions had recused himself from any investigations involving Russia's interference with the elections.) Rosenstein appointed Robert S. Mueller III to investigate “any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump” and “any matters that arose or may arise directly from the investigation.” Moreover, under the authorizing regulations, Mueller can “investigate and prosecute federal crimes committed in the course of, and with intent to interfere with” his investigation—crimes like “perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.”

As far as we know, it seems that Mueller's investigation sweeps broadly, as far as Rosenstein's order and Department regulations permit. (We cannot know with certainty how far the

investigation sweeps, because the investigation is secret.) Media reports suggest that Mueller is examining potential obstruction of justice by White House officials, possibly including President Trump, and even President Trump's prior business transactions as they relate to the Russia connection.

If Mueller's investigation leads to indictments and even convictions, this is certainly not the end of the matter. The Constitution permits the president to pardon individuals convicted of a federal crime. (Think of this as a separation-of-powers check that the president can exert against Congress and the courts.) And there are serious constitutional questions whether the president can be convicted.

### Current Issues

Even before indictments and convictions, there is another worry. Bipartisan groups of senators are concerned that the president may try to impede Mueller's work or even terminate his appointment. Although Department regulations do not permit the president to do this, the president could order Rosenstein to fire Mueller, potentially sparking a redux of the Saturday Night Massacre.

Senators have introduced two bills to protect against this possibility. Both codify the provisions of Department regulations that provide independence for the Office. One of the bills would require the attorney general to file a termination action in federal court *before* firing the special counsel. The other would allow the special counsel to challenge a termination decision in court only *after* termination.

If President Trump tries to impede Mueller's work, or to terminate his appointment, or to terminate the Office entirely, with or without federal legislation protecting the Office, or if Mueller's work leads to litigation, there may be a chance to revisit the constitutionality of an independent prosecutor. Some commentators argue that *Morrison* could not stand up in the current Supreme

Court—that subsequent developments in the law and changes in the composition of the Court mean that *Morrison* is practically a dead letter.

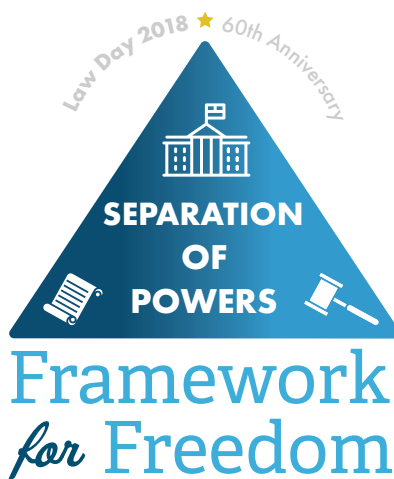
If this happens, there will once again be a gaping hole in the Constitution, and, despite all its innovations, provide no way to effectively prosecute wrongdoing at the highest levels of the executive branch. 🗣️

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### Discussion Questions

1. Do you agree with the author's description of a constitutional "gap," in that the Constitution does not specifically address investigations of the executive branch? If so, should the Constitution address this topic?
2. Do you think the special prosecutor, independent counsel, and special counsel offices have been, or are, adequate investigators of the executive branch?
3. Do you think the Supreme Court's decision in *Morrison v. Olson* was appropriate? What implications did the decision have for investigations of the executive branch?
4. Should Congress pass one, or both, of the proposed House bills?



Mark your calendar!



### Celebrate Law Day in the Classroom

The Law Day 2018 theme enables us to reflect on the separation of powers as fundamental to our constitutional purpose and to consider how our governmental system is working for ourselves and our posterity.

For Law Day Teaching Resources and more, visit: [lawday.org](http://lawday.org).



## **Timelines**

Watergate Timeline, PBS

<https://www.pbs.org/newshour/politics/complete-watergate-timeline-took-longer-realize>

Timeline: What we know about Trump's decision to fire Comey, Washington Post January 2018

[https://www.washingtonpost.com/news/politics/wp/2018/01/05/timeline-what-we-know-about-trumps-decision-to-fire-comey/?utm\\_term=.22c26b6eeb7](https://www.washingtonpost.com/news/politics/wp/2018/01/05/timeline-what-we-know-about-trumps-decision-to-fire-comey/?utm_term=.22c26b6eeb7)