

Special Counsels and the Separation of Powers
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On Saturday, October 20, 1973, President Richard Nixon ordered the attorney general to fire Archibald Cox, the Watergate special prosecutor, who had earlier issued a subpoena for the Watergate tapes. When Attorney General Elliot Richardson refused and resigned, the president ordered Deputy Attorney General William Ruckelshaus to fire Cox. The deputy attorney general also resigned rather than carry out the president's order. The president then asked Solicitor General Robert Bork to fire Cox. Worried about continuity of government, Bork swung the axe. In the political firestorm after the Saturday Night Massacre, the president was forced to hire a new special counsel, Leon Jaworski, to replace Cox. Courts later ruled that the subpoena was lawful,² and that the firing of Cox violated Justice Department regulations.³

The Saturday Night Massacre converted the long-simmering political crisis over Watergate into a full-blown constitutional crisis. It raised the stakes by exposing to public view President Nixon's obstruction of justice; dramatizing the conflict between the president, Congress (which was conducting investigations of its own), and the courts; and revealing conflicts within the executive branch itself, which gave rise to the solicitor general's fears about continuity in government.

In the wake of Watergate, Congress passed the Ethics of Government Act of 1978. A provision of that law created a new kind of special prosecutor (later the name was changed to independent counsel, and the provision is sometimes called the independent counsel law) who can be fired only for good cause. A major goal of the statute was to ensure that a constitutional crisis like the Saturday Night Massacre would never occur again. The statute accomplished that goal over the roughly twenty-year period it was in effect⁴ despite the recurrence of significant controversies over executive-branch wrongdoing, including the Iran-Contra scandal in the 1980s and the events that gave rise to the impeachment of President Bill Clinton in 1998. In all, 20 special or independent counsels were appointed under the law and various amendments. Eight of the investigations produced indictments.⁵

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² *United States v. Nixon*, 418 U.S. 683 (1974).

³ *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973).

⁴ During this period the independent counsel law was amended on several occasions. It expired in 1992, and then was reenacted in 1994.

⁵ Jack Maskell, *Independent Counsels Appointed Under the Ethics in Government Act of 1978, Costs and Results of Investigations* 5 (Cong. Research Serv., 2006).

In 1999, Congress failed to renew the independent counsel law, which expired as a result of a sunset provision. Many members of Congress were troubled with what they saw as the excessive power of the independent counsel. Much of the criticism was directed at Lawrence Walsh, who investigated the Iran-Contra affair, and Ken Starr, who investigated Bill Clinton. The critics argued that independent counsels spent too much time and money on fishing expeditions that interfered with the legitimate business of the executive branch. Some critics of the independent counsel law believed that the law was unconstitutional despite the Supreme Court's rejection of a constitutional challenge to it in 1988.⁶

Almost twenty years after the expiration of the independent counsel provision, Congress is once again considering bills that seek to promote the integrity of investigations of executive-branch wrongdoing. The problem that produced the Saturday Night Massacre, and that the independent counsel law sought to solve, is simply stated. The president is the head of federal law enforcement, which means that he might use his influence to obstruct law enforcement against him, his aides, or his allies; and entrench his position in power using unlawful means in violation of democratic values.

The independent counsel law attempted to solve this problem by protecting investigations of executive-branch lawbreaking from executive-branch interference. The law required the attorney general to refer matters related to executive-branch lawbreaking to a special judicial panel, which was empowered to appoint the independent counsel and define his jurisdiction. With respect to his jurisdiction, the independent counsel possessed all the investigatory, prosecutorial, and other law enforcement powers of the Department of Justice. He was given budgetary as well as operational independence. And, as noted above, he could be removed only by the attorney general (not by the president), and only for cause.

S. 1735 and S. 1741 would create statutes that are less intrusive of the prerogatives of the executive branch. Both provide that a special counsel or similar official appointed by the attorney general may be removed by the attorney general only for "good cause." The bills also provide for judicial review. S. 1735 provides that the attorney general must obtain approval from a three-judge district court before removing the special counsel.⁷ S. 1741 allows the attorney general to remove the special counsel without judicial pre-approval but empowers the special counsel to challenge his or her removal before a three-judge district court, which must evaluate the removal within 14 days. Unlike the independent counsel law, the Senate bills do not create special rules governing appointment or enable the special counsel to operate autonomously. Those matters would continue to be governed by the Justice Department regulations for the special prosecutor. Indeed, the bills duplicate the for-cause provision already in those regulations.⁸

⁶ *Morrison v. Olson*, 487 U.S. 654 (1988). The Court rejected the constitutional challenge by a vote of 7 to 1, with one justice not participating in the case.

⁷ In this respect, S. 1735 differs from the independent counsel law, which, like S. 1741, allows for judicial review after removal. S. 1735's approach is unusual, but does not raise constitutional difficulties. It seems likely that a special counsel who was removed without cause would seek a preliminary injunction under S. 1741, so the practical effects of the two statutes are likely to be similar.

⁸ 28 C.F.R. § 600.7(d) (2017).

Both bills are constitutional. We know they are constitutional because in *Morrison v. Olson*, the Supreme Court ruled that the independent counsel was constitutional.⁹ Because S. 1735 and S. 1741 impose less significant constraints on the president than the independent counsel law did, the court’s conclusions hold for them as well. I believe, based on my extensive research on presidential power, that both bills are consistent with, and indeed reinforce, the constitutional principles that lie at the heart of the Court’s ruling in *Morrison*. For-cause protection for the special prosecutor strengthens our democratic system of government by ensuring that the president complies with the laws enacted by Congress, and does not use his immense power over law enforcement to shield himself and his associates from investigation of wrongdoing.

I. *Morrison v. Olson*

The major question addressed by the Court was whether the independent counsel law was unconstitutional because of the removal provision. This provision states:

An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel’s duties.¹⁰

The Court addressed this question from the standpoint of two constitutional sources—the text of the Constitution, and the principle of separation of powers.

Executive Power. The Court first asked whether the removal provision interferes with the president’s power under the vesting clause of the Constitution, which vests the president with “executive power,”¹¹ as well as under his separate obligation to “take care that the laws are faithfully executed.”¹² “Executive power” has been interpreted to include the power to supervise and conduct law enforcement. The appellee—the target of the independent counsel’s investigation in *Morrison*—argued that if the president cannot remove the independent counsel, then he does not control law enforcement, and hence has been deprived of his constitutional authority.

The Court disagreed.¹³ First, the Court noted that, unlike in other cases, where the Court had rejected efforts by Congress to insert itself into removal decisions, the independent counsel was subject to the authority of an executive-branch official—the attorney general—who was in turn subject to the authority of the president. Second, the Court noted that in the past it had upheld “good cause” removal provisions because they did not interfere with the president’s constitutional functions. While such provisions are inappropriate for “principal” executive officers with core executive functions, the independent counsel was not such an officer. He was,

⁹ *Morrison v. Olson*, 487 U.S. 654 (1988).

¹⁰ *Id.*, citing 28 U.S.C. § 596(a)(1) (2012).

¹¹ U.S. Const. art. II, § 1, cl. 1.

¹² *Id.* art. II, § 3.

¹³ *Morrison*, 487 U.S. at 685-93.

instead, an “inferior” officer, whose jurisdiction and tenure were limited, and who lacked the authority to make policy. Third, the independent counsel *can* be removed—for good cause—and the Court saw no reason to believe that the president’s obligation to enforce the law would require him (or the attorney general) to remove an independent counsel without good cause.

It is straightforward under the reasoning of *Morrison* that the removal provisions of S. 1735 and S. 1741 do not unconstitutionally interfere with the president’s executive power or the take care clause. The two bills make removal conditional on identical language: “misconduct, dereliction of duty, incapacity, conflict of interest, or other good cause, including violation of policies of the Department of Justice.” These are the same grounds that currently exist in Justice Department regulations for the special counsel.¹⁴ The removal provision in the two bills is more favorable to the president than was the removal provision in the independent counsel law, which did not allow removal for “conflict of interest” or “violation of the policies of the Department of Justice.”¹⁵ Indeed, the independent counsel was required to comply with Justice Department policies only to the extent they were consistent with purposes of the independent counsel law.¹⁶

If, as *Morrison* held, the removal restrictions in the independent counsel law do not unconstitutionally impinge on executive power, then the removal restrictions in S. 1735 and S. 1741 also pass constitutional muster. This conclusion is reinforced by the fact that the attorney general retains greater control over appointment and supervision of the special counsel under these bills than he did over the independent counsel. I discuss this point in greater detail below.

Separation of powers.

The Court also asked whether the independent counsel law violates the principle of separation of powers. Of course, this inquiry is closely related to, and overlapping with, the question of whether it violated executive power alone. But broader considerations are involved.

The principle of separation of powers reflects the idea that no branch of government should be allowed to expand its power at the expense of another branch. The Court said that the independent counsel law did not aggrandize Congress because it did not give Congress any role in the appointment, operation, or removal of the independent counsel.¹⁷ Nor did the independent counsel law aggrandize the judiciary even though it gave the court a rather unusual role in the appointment of the counsel. The court’s “power to review the Attorney General’s decision to remove an independent counsel ... is a function that is well within the traditional power of the Judiciary.”¹⁸

Then the court returned to the question of executive power. Yes, the statute limited the president’s power. But, as noted before, the reduction in the president’s authority was modest because the attorney general retains a sufficient role in appointing (via the referral process),

¹⁴ 28 C.F.R. § 600.7(d) (2017).

¹⁵ The version of the independent counsel law evaluated in *Morrison* allowed removal “only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel’s duties.” *Morrison*, 487 U.S. at 663 (quoting 28 U.S.C. § 596(a)(1) (1982)).

¹⁶ 28 U.S.C. § 594(f)(1) (1982).

¹⁷ *Morrison*, 487 U.S. 692-96.

¹⁸ *Id.*, at 695.

supervising, and removing the independent counsel. The court applied a balancing test, holding that the limited incursion on the president’s executive power was justified by the goal of restoring trust in the executive branch. One might go further and observe that an executive who enjoys the trust of the public will be stronger rather than weaker.¹⁹

If the independent counsel law did not violate the separation of powers, then S. 1735 and S. 1741 certainly do not as well. Like the independent counsel law, S. 1735 and S. 1741 give no power to Congress over the special counsels. S. 1735 and S. 1741 give less power to the courts than the independent counsel law did. While the two bills give the courts the power to review the removal decision, they do not involve the courts in the appointment process.

Finally, S. 1735 and S. 1741 interfere far less with executive power than the independent counsel law did. First, while the independent counsel law transferred the appointment power from the executive branch to the judiciary, which also determined the counsel’s jurisdiction, S. 1735 and S. 1741 leave the appointment power in the executive branch, under the authority of the attorney general.²⁰ Second, while the independent counsel law gave the counsel significant operational and budgetary independence, S. 1735 and S. 1741 allow the Justice Department to determine these matters by regulation, as it has. And under current regulations, the attorney general may terminate a special counsel investigation and deny a budget for it at the beginning of every fiscal year,²¹ and request to be informed about, and veto, any “investigative or prosecutorial step” he may seek to take.²² Third, as noted above, the removal provisions of S. 1735 and S. 1741 give the attorney general more discretion than the removal provision of the independent counsel law.

Morrison v. Olson remains good law. It has been cited hundreds of times, and relied on by the Supreme Court itself on several occasions.²³ Under *Morrison v. Olson*, S. 1735 and S. 1741 are constitutional.

¹⁹ Justice Breyer makes a similar point in *Free Exercise Fund*, noting that if the president benefits from a system of impartial administrative adjudication, he gains from being able to tie his hands so that he cannot fire the adjudicators—through legislation. See *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3169 (2010).

²⁰ For the appointment regulations, see 28 C.F.R. § 600.1 (2017). The attorney general also determines the special prosecutor’s jurisdiction. 28 C.F.R. § 600.4 (2017).

²¹ 29 C.F.R. § 600.8(a)(2) (2017).

²² 29 C.F.R. § 600.7(b) (2017).

²³ In *Edmond v. United States*, 520 U.S. 651 (1997), the Court appeared to substitute a simpler test for whether an executive branch officer is a principal or inferior officer, holding that an officer is inferior if his or her work “is directed and supervised at some level by others who were appointed” by the president with advice and consent of the Senate. *Id.* at 663. The special counsel meets that standard. He is supervised by the attorney general pursuant to regulation, and the current regulation clearly puts him under the supervision of the attorney general. See 64 Fed. Reg. 37038 (July 9, 1999) (“it is intended that ultimate responsibility for the matter [under the special counsel’s jurisdiction] and how it is handled will continue to rest with the Attorney General”). In *Free Enterprise Fund*, *supra*, the Court struck down a provision of a statute that protected executive-branch employees with a “dual for-cause limitation”—meaning that the employees were removable by officials only for cause, and those officials were themselves removable for cause. The court thought this restriction on executive power went too far, violating separation of powers, but there is no such limitation in S. 1735 or S. 1741. In neither case did the court say that *Morrison* was no longer good law.

II. Constitutional Policy

While both Senate bills would certainly be upheld by courts, Congress must also decide for itself whether the bills advance constitutional values. It is possible to argue that they do not. The majority opinion in *Morrison v. Olson* was criticized in a celebrated dissent by Justice Antonin Scalia, whose views have found an academic following. Accordingly, I use Justice Scalia's dissent as a jumping-off point for discussing the broader constitutional issues raised by the two bills. I will argue that bills do indeed advance important constitutional values, and for that reason one or the other of them should be enacted.²⁴

There is much to admire about Justice Scalia's dissent. His warnings about the risks of out-of-control independent counsels were prescient. But there are several reasons why his arguments failed to persuade the majority, and continue to lack persuasiveness today. Moreover, many of his criticisms of the independent counsel law do not apply to the bills under consideration today.

Justice Scalia's dissent rests on a controversial interpretation of the vesting clause. According to Justice Scalia,

the President's constitutionally assigned duties include *complete* control over investigation and prosecution of violations of the law, and ... the inexorable command of Article II is clear and definite: the executive power must be vested in the President of the United States.²⁵

According to Justice Scalia, the vesting clause confers "all" of the executive power on the president. The independent counsel law violates this clause because it gives law enforcement power, a type of executive power, to a person not under control of the president. Justice Scalia further explains that the president needs "complete" control over investigation and prosecution so that he can provide a check on unconstitutional statutes enacted by Congress, in the spirit of the separation of powers, and so that he can provide direction to the national government.

Justice Scalia oversimplifies both the founders' vision of separation of powers and the way that the principle has operated in American political history. The founders never believed that the president should be given "complete control" over law enforcement. In the founding era and later, federal law enforcement was scattered among many different agents, including federal officers who were not directly controlled by the president, state officials, and private citizens.²⁶ Moreover, the text of the Constitution deprives the president of complete control over law enforcement in several ways—by involving the Senate in appointments;²⁷ giving budgetary authority to Congress,²⁸ which it can use to influence law-enforcement priorities; and allowing

²⁴ I do not take a position on the comparative merits of the judicial review provisions of the bills, their only major difference.

²⁵ *Morrison*, 487 U.S. at 710 (emphasis in original).

²⁶ See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 19-20 (1994).

²⁷ U.S. Const. art. II, § 2, cl. 2.

²⁸ *Id.* art. 1, § 7.

Congress to define executive-branch offices.²⁹ Notably, in exercising the latter power, Congress has created thousands of executive-branch law enforcement positions that are subject to civil service protection and hence whose occupants lie outside the president's control. Both the Justice Department and its nominally subordinate agency, the FBI, have gained considerable autonomy from the president. Not only civil service protections, but reporting requirements, inspectors general, and numerous other statutory rules and obligations over the years have restricted the president's control over law enforcement.

The accumulation of restrictions on the president's law-enforcement power over the years reflects longstanding concerns that the president can abuse his power over law enforcement if his power is too great. The independent counsel law, motivated by the Watergate scandal, was just the latest law to take this problem seriously.

Justice Scalia, by contrast, says that a legal response to the risk of abuse of power by the president is not necessary at all.

The President is directly dependent on the people, and since there is only *one* President, *he* is responsible. The people know whom to blame, whereas "one of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults and destroy responsibility."³⁰

According to Justice Scalia, the only check on abuse of law-enforcement power by the president is political—impeachment or loss of reelection. The real danger, in Justice Scalia's view, is an unaccountable independent counsel who cannot be punished for politically motivated or unfair investigations.

However, nothing is more dangerous to democracy than the president's control over law enforcement. Justice Scalia inadvertently explains why by quoting from a speech by Robert Jackson in 1940, at that time the attorney general of the United States. Jackson observed that because of the enormous range and variety of federal criminal laws, prosecutors can almost always find "at least a technical violation of some act on the part of almost anyone."³¹ This means that if a prosecutor seeks to target someone he does not like for personal or political reasons, he can make that person's life extremely difficult. But this also means that if the *president* seeks to target a political opponent, or anyone "unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious,"³² the president can do so, simply by commanding his attorney general to launch an investigation.

Justice Scalia says there is a political check on abuse of law enforcement power by the president. The president can be impeached and convicted, or be removed from office at the next election. But these "political checks" are blunt instruments. More than two centuries of experience have taught us that impeachment cannot be relied upon except in unusual

²⁹ Id. art. II, § 2, cl. 2.

³⁰ Morrison, 487 U.S. at 729, quoting The Federalist No. 70, at 424 (C. Rossiter ed. 1961) (emphasis in the original).

³¹ Morrison, 487 U.S. at 727-728, quoting Robert Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of the United States Attorneys, April 1, 1940.

³² Id.

circumstances because of the difficulty of achieving a 2/3 majority in the Senate as well as a majority in the House. Only two presidents, Andrew Johnson and Bill Clinton, have been impeached and neither was convicted. Richard Nixon alone was forced to resign because of the threat of impeachment.

Elections are an even weaker constraint on abuse of power by the president. Of course, the prospect of losing an election can deter a president only in his first term. True, Nixon's approval rating fell to 17 percent after the Saturday Night Massacre.³³ But Nixon, in his final term, *did not face another election*. Even for a first-term president, electoral constraints are weak because voters must evaluate all aspects of the president's performance, and not just allegations of law-breaking, which are often tossed about recklessly in the hothouse of the election campaign.

But the worst problem is that if the president breaks the law in order to strengthen his political standing, then he actually increases his chances of winning the next election. The power to abuse prosecutorial discretion thus weakens the electoral check on which Justice Scalia put so much emphasis. Watergate was a political espionage operation conducted prior to Nixon's reelection in 1972, which he won by a landslide, *before* his illegal behavior came to light.

The independent counsel was created to stop just this type of abuse. Justice Scalia chose to focus on another sort of abuse—abuse by the independent counsel himself. As an initial point, we need to reiterate that S. 1735 and S. 1741 do not raise many of the concerns that Justice Scalia focused on. Justice Scalia believed that the independent counsel law would lead to an excessive number of investigations of executive-branch officials because of the low standard governing appointments;³⁴ and that the attorney general would not be able to prevent the independent counsel from engaging in abusive investigative steps once the investigation began. However, S. 1735 and S. 1741 leave appointment of the special counsel in the hands of the attorney general, and do not interfere with the attorney general's supervisory powers. Even if one were to agree with Justice Scalia, these are not objections that are relevant to the bills under consideration.

Finally, Justice Scalia argues that the independent counsel law interferes with the president's constitutional obligation to check Congress when Congress passes unconstitutional statutes. But in this respect, Justice Scalia was not prescient. No independent counsel was ever appointed to investigate a president for failing to enforce a law of doubtful constitutionality against ordinary people. In every case, the independent counsel was appointed to investigate whether an executive-branch official violated a law. The reason is that failure to enforce the law is not a crime or (except in extremely rare instances) a justiciable law violation—the type that can be challenged in a court.

³³ Evan Thomas, *Being Nixon: A Man Divided* 474 (2015).

³⁴ The low threshold for referring a matter to the special division was the major source of complaint in the 1999 hearings on renewing the independent counsel law. It received far more attention than the removal provision. See *The Future of the Independent Counsel Act: Hearings Before the Senate Comm. on Governmental Affairs*, 106th Cong. 2 (1999).

Conclusion

Watergate was the greatest constitutional crisis in American history after the Civil War. It arose as a result of two factors: the vesting of executive authority in the president by the founders in an era in which the national government was, and was expected to remain, weak; and the enormous growth of presidential power in the twentieth century. With influence over the Justice Department, the CIA, the FBI, the Internal Revenue Service, and the Federal Communications Commission, President Nixon was able to bully and spy on his political opponents and the press. Before the twentieth century, the federal government was less massive, and intruded far less in people's everyday lives. With the growth of the modern administrative state, it was only a matter of time before a president abused his power for political gain, and indeed Nixon was not the first twentieth-century president to do so, as he was frequently to observe.

In 1978, Congress embarked on a journey to ensure that Watergate would not happen again. The problem faced by Congress was how to block the president from abusing his powers for political gain while also allowing him the flexibility and discretion that were needed to govern. A deceptively simple solution—one among many others that Congress tried—was the creation of a legal office that could investigate the president and his aides if suspicion arose that he or they had broken the law. This office would draw upon the resources of the Justice Department, but the counsel would be protected from presidential control.

The journey has taken many twists and turns. The Ethics in Government Act was passed by overwhelming majorities in the House and Senate and signed by the president. As experience with the independent counsel provision accumulated, Congress revisited it many times. Responding conscientiously to complaints about the operation of the independent counsel, Congress has amended the law on several occasions, and briefly let it lapse on one occasion. In 1999, Congress washed its hands of the matter, not because majorities in both houses agreed that the entire legal approach was unwise, but because the law expired on its own at a time when the political will did not exist to revisit the issue.

Either of the two Senate bills is a reasonable response to this lapse, which has left it to the executive branch to police its own boss. The bills do not recreate the independent counsel but give the special counsel, a creature of executive-branch regulation, reasonable additional job protection in the form of judicial review of the for-cause removal provision that already exists in that regulation. This layer of security would not interfere with executive power but would more likely enhance it by reassuring the public that the officers of the executive branch, including the president himself, are not above the law.