

April 24, 2018

The Honorable Charles Grassley
Chairman
U.S. Senate Committee on the Judiciary
Washington, DC 20510-6275

The Honorable Dianne Feinstein
Ranking Member
U.S. Senate Committee on the Judiciary
Washington, DC 20510-6275

Dear Chairman Grassley and Senator Feinstein:

We are writing to share our views on S. 2644—the Special Counsel Independence and Integrity Act. We both had the privilege of testifying before the Senate Judiciary Committee at its hearing last September on “Special Counsels and the Separation of Powers,” and through this letter, we aim to supplement the record with an explanation of why, in our view, S. 2644 is constitutional—and would be upheld by the federal courts, including the Supreme Court, were it to be challenged.

There are, in our view, three distinct—but related—constitutional objections that could be leveled against S. 2644:

- (1) It would violate the Appointments Clause of Article II by allowing for the appointment of a principal Executive Branch officer by someone other than the President;
- (2) It would violate the separation of powers by imposing a “good cause” removal restriction on a government officer exercising executive power; and
- (3) It would impermissibly alter the roles and responsibilities of an existing Executive Branch office by applying those changes to an existing officer.

As we explain below, we believe each of these arguments is wrong, and we close with two additional observations about the notification requirements that are apparently being proposed by Chairman Grassley.

I. THE SPECIAL COUNSEL IS AN INFERIOR OFFICER

The Appointments Clause of Article II recognizes two classes of Executive Branch officers—“principal” officers, who must be nominated by the President with the advice and consent of the Senate, and who serve at the President’s pleasure; and “inferior” officers, the appointments of which “Congress may by law vest . . . in the President alone, in the courts of law, or in the heads of departments.” U.S. CONST. art. II, § 2, cl. 2.

The Supreme Court’s decisions “have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes.” *Edmond v. United States*, 520 U.S. 651, 661 (1997). But under the tests applied in either of the Court’s leading precedents—*Edmond* and *Morrison v. Olson*, 487 U.S. 654 (1988)—the Special Counsel is an “inferior” officer. In *Morrison*, the Supreme Court held that the Independent Counsel created under the Ethics in Government Act of 1978 was an inferior officer based upon four factors: that a higher officer other than the President (the Attorney General) could remove her; that she performed only limited duties that did not include policymaking; that her jurisdiction was narrow; and that her tenure was limited. 487 U.S. at 671–72. All four of those factors are present at least to the same degree with respect to the Special Counsel. He can be removed by the Attorney General, *see* 28 C.F.R. § 600.7(d); he performs only limited duties that do not involve policymaking; *id.* § 600.6; his jurisdiction is narrow, *id.* § 600.4; and his tenure is limited to no longer than the length of the specific investigation for which he is appointed. *See id.* § 600.8(c). Indeed, in *every* relevant respect, the Special Counsel has less authority and independence than the Independent Counsel. Under *Morrison*, then, he is clearly an inferior officer.

It is no less clear that the Special Counsel is an inferior officer even under Justice Scalia’s more restrictive approach in *Edmond*. Justice Scalia emphasized that the two essential criteria for inferior officer status are whether the officer’s “work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate,” 520 U.S. at 663, and whether the officer has “no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.” *Id.* at 665. Both of those criteria are satisfied here. The Special Counsel’s work is supervised by the Attorney General (or, in cases of recusal, the Acting Attorney General), an officer who was “appointed by Presidential nomination with the advice and consent of the Senate.” And the Special Counsel has no authority to “render a final decision on behalf of the United States” unless his supervisor approves. *See* 28 C.F.R. § 600.7(b) (“[T]he Attorney General may request that the Special Counsel provide an explanation for any investigative or prosecutorial step, and may after review conclude that the action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued.”).

We therefore believe it is clear that the Special Counsel is an “inferior officer” for purposes of the Appointments Clause, and that S. 2644 would not be unconstitutional insofar as it provides for his appointment by the Attorney General. Nor do we believe that this analysis would change if Congress were to codify the relevant provisions of 28 C.F.R. part 600. Whether the Special Counsel’s authority is set out by regulation or by statute is immaterial to his status for Appointments Clause purposes.

II. INFERIOR OFFICERS MAY BE REMOVED FOR “GOOD CAUSE”

Perhaps the central argument made against the constitutionality of S. 2644 (and similar proposals) is that *Morrison v. Olson* is wrongly decided—and that the current Supreme Court would, if given the chance, overrule that decision. In doctrinal terms, this reduces to an assertion that *all* “good cause” restrictions on the removal of (even inferior) Executive Branch officers are unconstitutional. There are three problems with this reasoning.

First, *Morrison* is still good law. The Supreme Court continues to cite it without questioning its core constitutional holding: that Congress is allowed to limit the removal of inferior executive branch prosecutors to cases in which a principal officer finds good cause. *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483, 495 (2010).

Second, although we are generally wary of efforts to handicap the Justices’ votes, Justice Anthony Kennedy, whose vote would almost certainly be crucial were a challenge to S. 2644 to reach the Court, has long maintained that a balancing approach, rather than formalism like that which characterizes Justice Scalia’s *Morrison* dissent, is appropriate in cases in which “the power at issue was not explicitly assigned by the text of the Constitution to be within the sole province of the President, but rather was thought to be encompassed within the general grant to the President of the ‘executive Power.’” *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 484 (1989) (Kennedy, J., concurring in the judgment). As an example of when this approach is called for, Justice Kennedy cited the president’s power to remove executive branch officers—and *Morrison* itself. *See id.*

Third, the authority vested in the Special Counsel is less intrusive into executive power than that which was conferred by the Independent Counsel statute. As Professor Rick Pildes wrote last August, the regulation

made extensive departures from the structure of the Independent Counsel Act. These departures were virtually all designed to move the regime in the direction of greater constraints on the special-counsel process and to put the special counsel under greater supervision from the attorney general, while still maintaining the independence of the [special counsel].

Richard H. Pildes, *Could Congress Simply Codify the DOJ Special Counsel Regulations?*, LAWFARE, Aug. 3, 2017. In other words, the Special Counsel regulation, which S. 2644 would codify, was intended to preserve the salutary features of the Independent Counsel regime while eliminating its more glaring practical (and, in the view of some, constitutional) defects. Among other departures, the Special Counsel is not subject to an inter-branch appointment; the scope of the Special Counsel’s investigative jurisdiction is entirely within the control of the Attorney General (and not the Special Counsel); and the Attorney General retains the power to oversee the Special

Counsel's investigation—as provided by both the Executive Branch's existing regulation, and in S. 2644. Critically for present purposes, these are more than just factual distinctions; they go to the heart of Justice Scalia's objections to the Independent Counsel statute in *Morrison*. See 487 U.S. at 728–31 (Scalia, J., dissenting).

Indeed, whereas Justice Scalia's *Morrison* dissent highlighted a number of different ways in which the Independent Counsel statute intruded on executive power, S. 2644 would present only one of those points of intrusion: for-cause removal. So construed, the constitutional objection to the current legislation is not only far narrower than the objections voiced by Justice Scalia in *Morrison*; it's only viable if one fully accepts the “unitary executive” theory of executive power—that all for-cause removal restrictions within the executive branch are unconstitutional. Although the Supreme Court has declined to extend *Morrison* to statutes creating multiple layers of for-cause removal protection, see, e.g., *Free Enter. Fund*, 561 U.S. at 495 (“The Act before us does something quite different [from the Independent Counsel statute].”), no current Justice has voiced any interest in directly overruling it even in a case in which the question is properly presented.

We therefore are not only of the view that a “good cause” removal restriction is constitutional, but that S. 2644 would be upheld by the current Supreme Court if challenged on this ground.¹

III. S. 2644 DOES NOT RAISE RETROACTIVITY CONCERNS

Finally, there has also been a suggestion that applying S. 2644 to an ongoing investigation would raise constitutional “retroactivity” problems insofar as it alters the terms of an existing office in a manner that applies to the existing officeholder. We see two potential grounds for such a claim, but believe neither is correct.

In general, Congress may not enact laws that produce “impermissible retroactive effects.” But not all retroactive statutes produce impermissible effects. See *INS v. St. Cyr*, 533 U.S. 289, 316 (2001) (“[I]t is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect.” (citing *Landgraf v. USI Film Prods.*, 511 U.S. 233, 268 (1994))). Instead, a law is impermissibly retroactive only if it “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.” *Society for Propagation of the*

1. Nor, in our view, does the constitutional validity of such a “good cause” removal restriction on the removal of an inferior officer depend upon whether that restriction is expressly subject to judicial review—as S. 2644 provides—or not. The constitutional question is whether the President's power to remove inferior Executive Branch officers can be substantively limited. The answer to that question does not turn in any way on whether the limit is to be enforced internally, by the courts, or both.

Gospel v. Wheeler, 22 F. Cas. 756, 767 (No. 13,156) (C.C.D.N.H. 1814) (Story, J.), *quoted with approval in St. Cyr*, 533 U.S. at 321. Applying S. 2644 to an existing Special Counsel would not produce an impermissible retroactive effect, because it changes nothing whatsoever about the scope of the Special Counsel’s duties or the constraints upon his authorities. S. 2644 does nothing to impair “vested rights acquired under existing laws,” and it creates no new “obligation,” “duty,” or “disability” for “transactions or considerations already past. We therefore see no scenario in which a court would conclude that S. 2644 would be impermissibly retroactive if applied to an existing Special Counsel investigation.

A somewhat distinct concern is more specific to the Appointments Clause—and the specter of Congress materially altering the terms of an existing Executive Branch office and applying those changes to the incumbent officeholder, as discussed in *Shoemaker v. United States*, 147 U.S. 282 (1893) and *Weiss v. United States*, 510 U.S. 163 (1994). But as Chief Justice Rehnquist summarized for the majority in *Weiss*, “It cannot be doubted, and it has frequently been the case, that congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.” 510 U.S. at 174 (quoting *Shoemaker*, 147 U.S. at 300–01). The test the Court devised in *Shoemaker* (and which the Court applied in *Weiss*) was whether the new statutory duties were “germane” to the purposes of the original appointment. If so, then Congress had not in fact created a “new office,” and so no second appointment was required. Given that S. 2644 does not change the duties of the Special Counsel in any way (let alone expand them), it seems beyond peradventure that it would survive a *Shoemaker/Weiss* “germaneness” challenge.

IV. THE NOTIFICATION REQUIREMENTS

Although the above analysis explains why we think S. 2644 is constitutional, we understand that Chairman Grassley is also proposing amendments that would require the Special Counsel and/or the Attorney General to file a series of reports with Congress and the public concerning the nature and scope of the Special Counsel’s investigation. Without regard to the specifics of these amendments, we offer two comments for the Committee to consider with respect to such requirements:

First, such notification requirements should be drawn with sensitivity toward the Executive Branch’s well-settled constitutional interests in protecting sensitive law enforcement and/or national security information. Although Congress has significant constitutional authority to compel disclosure of *most* Executive Branch information, any requirement to produce law enforcement and/or national security information related to ongoing criminal investigations must be drafted narrowly and with care so as to avoid

legitimate constitutional objections.² The more that these notification requirements allow the Executive Branch to either withhold, or at least defer, disclosure of sensitive law enforcement and/or classified national security information, *see, e.g.*, 28 C.F.R. § 600.9(b), the more likely it is, in our view, that they would survive constitutional challenges.

Second, such notification requirements should also be drawn to avoid the specter of legislative micromanaging of Executive Branch criminal investigations—which, in excess, could also provoke unnecessary constitutional objections. *See, e.g.*, Memorandum from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel, to Edward L. Morgan, Deputy Counsel to the President, at 2 (Dec. 19, 1969) (“If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation.”).³ Notification requirements that have the effect of allowing the legislature to conduct ongoing supervision of the Special Counsel would, in our view, raise serious constitutional concerns. *See United States v. Brown*, 381 U.S. 437, 446 (1965) (“[T]he Framers of the Constitution sought to guard against such dangers by limiting legislatures to the task of rule-making. ‘It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.’” (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810))).

It is possible, however, to craft notification requirements that do not cross this line. We believe, for example, the current regulation adequately balances Congress’s right to be apprised of the Special Counsel’s investigation with these concerns, *see* 28 C.F.R. § 600.9, and could be codified and perhaps extended to also require the Attorney General to provide the Chairman and Ranking Members of the Judiciary Committees with copies of the Special Counsel’s reports under 28 C.F.R. § 600.8.

2. According to the Department of Justice, “[i]t is the policy of the Executive Branch to decline to provide committees of Congress with access to or copies of law enforcement files, or materials in investigative files whose disclosure might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals.” *Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op. O.L.C. 31, 31 (1982). In other words, the Executive Branch will not disclose the entirety of law enforcement files, nor will it disclose materials within those files if their release could compromise the investigation. Among other things, as then-Attorney General Robert Jackson wrote in 1941, “[c]ounsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon.” 40 Op. Att’y Gen. 45, 46 (1941).

3. A copy of the Kauper Memorandum is available at <https://perma.cc/56LK-6EPX>.

More generally, the more that any such requirements are crafted with an eye toward reporting on matters already concluded, or on reporting at some fixed time after especially significant events have taken place, and the more flexibility they give to the Attorney General to protect the integrity of the investigation, the more likely they are to withstand scrutiny.

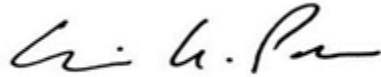
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We hope that the above analysis is useful to you and your colleagues, and would be delighted to discuss it further at your convenience.

Sincerely yours,

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Eric Posner
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A handwritten signature in black ink, appearing to read "Stephen I. Vladeck", enclosed in a thin black rectangular border.

Stephen I. Vladeck
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