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YOU’RE FIRED! SPECIAL COUNSEL REMOVAL AUTHORITY AND THE SEPARATION OF POWERS

Adrianne C. Blake∗

“Those who cannot remember the past are condemned to repeat it.” - George Santayana

I. INTRODUCTION

In June 1875, only five years after the Department of Justice (DOJ) was organized as a separate executive department, President Ulysses S. Grant appointed the nation’s first special prosecutor. John B. Henderson was appointed to investigate a robust network of whiskey distillers, Internal Revenue Service (IRS) agents, Department of Treasury (DOTR) clerks, and others who were accused of diverting federal liquor tax revenue into their personal pockets and political campaigns. Investigator Henderson’s inquiry upended the infamous “Whiskey Ring.” The investigation ultimately led to indictments of

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4. See Kline, supra note 2, at 53.
high-level advisors to President Grant, including his trusted friend and personal secretary, General Orville E. Babcock.5

In an effort to protect General Babcock, President Grant attempted to have him tried by a military tribunal instead of by a federal jury.6 However, Henderson declined to share requisite investigatory documents with the military tribunal.7 At a related trial of a DOTR official, Henderson used his closing argument to imply that President Grant was involved in the cover-up.8 These actions sealed Henderson’s fate.9 President Grant swiftly fired him “for his aggressive and impertinent behavior,”10 and replaced him with attorney James Broadhead.11

This incident demonstrated the need for special counsel to investigate matters spanning multiple executive agencies and even involving a president’s own staff.12 During this time, President Grant exercised his executive authority to both appoint and dismiss the nation’s first special prosecutor.13 The investigation resulted in the conviction of 110 of the 238 indicted conspirators and the recovery of more than $3 million in embezzled tax funds.14

Since the Whiskey Ring scandal, the DOJ, with input from Congress and the federal judiciary, has developed processes to appoint and remove special counsel.15 However, this evolution is not yet complete, and it remains an unsettled area of the federal government’s legal landscape.16

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5. Id.
6. Id.
7. Id.
8. Id. Investigator Henderson stated “[w]hat right has the President to interfere with the honest discharge of the duties of a Secretary of the Treasury? None, whatsoever.” Id.
9. See id.
10. Kline, supra note 2, at 53 (citing Smaltz, supra note 2, at 2312).
11. See Pruitt, supra note 3.
12. See id.; see also Kline, supra note 2, at 53 (describing the need for special independent investigators due to “[a] lack of confidence in the fledgling Department of Justice’s ability to investigate friends of the President”).
13. See Pruitt, supra note 3.
14. Id.
15. See discussion infra Parts II–IV.
This Comment argues that special counsel can be protected by enacting legislation that contains key provisions which will not violate the separation of powers.\textsuperscript{17} Codifying current DOJ regulations will also prevent presidents from abusing their authority by attempting to remove DOJ-appointed special counsel without adequate cause.\textsuperscript{18}

This Comment will proceed in four parts following this introduction. Part II discusses special counsel appointment and removal powers as outlined in the U.S. Constitution’s Appointments Clause and as supported by Supreme Court case law.\textsuperscript{19} Part III discusses the history of modern federal government special counsel powers enacted after the Watergate scandal, including the Ethics in Government Act of 1978.\textsuperscript{20} Part III concludes by discussing DOJ special counsel regulatory guidance and current developments.\textsuperscript{21} Part IV provides a detailed analysis of proposed Senate Bills 1735 and 1741\textsuperscript{22} and outlines six elements of a constitutional and sustainable legislative measure.\textsuperscript{23} Part IV begins by explaining why legislation is needed to protect special counsel.\textsuperscript{24} Part IV concludes by demonstrating how a modified bill will strengthen executive power by eliminating uncertainty in the special counsel removal process.\textsuperscript{25}

II. SPECIAL COUNSEL APPOINTMENT AND REMOVAL

A. Power to Appoint

The Appointments Clause of the Constitution outlines two means through which federal government officers may be appointed:

\[ \text{[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and} \]

\begin{footnotesize}
\begin{itemize}
  \item See infra Part IV.
  \item See infra Section IV.B.2.
  \item See infra Part II.
  \item See infra Sections III.A–B.
  \item See infra Sections III.C–D.
  \item See infra Sections IV.A–B.
  \item See infra Section IV.B.
  \item See infra Section IV.C.
  \item See infra Section IV.C.2.
\end{itemize}
\end{footnotesize}
which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.\(^{26}\)

The President has always had the power to appoint a special counsel.\(^{27}\) Congress does not have the power to appoint special counsel but has vested this appointment authority in the Attorney General, who is the head of the DOJ.\(^{28}\)

Agency regulations permit the Attorney General to delegate any of his duties “from time to time . . . as he considers appropriate . . . [to] any other officer, employee, or agency of the Department of Justice.”\(^{29}\) As a principal officer,\(^{30}\) the Attorney General may task a special counsel, an inferior officer,\(^{31}\) to criminally investigate a person or a matter.\(^{32}\) In the event the Attorney General is recused,\(^{33}\) the Acting Attorney General assumes the authority to appoint a special counsel in his stead.\(^{34}\)

**B. Power to Remove**

Presidents may not directly remove inferior officers that they did not appoint.\(^{35}\) Even so, there are at least two ways the President could impede an investigation by a special counsel appointed by the

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30. Principal officer is defined as “[a] United States officer appointed by the President with the advice and consent of the Senate.” Principal Officer, BLACK’S LAW DICTIONARY (10th ed. 2014).
31. Inferior officer is defined as “[a] United States officer appointed by the President, by a court, or by the head of a federal department. Senate confirmation is not required.” Inferior Officer, BLACK’S LAW DICTIONARY (10th ed. 2014). See also Morrison v. Olson, 487 U.S. 654, 671–72 (1988) (holding that an independent counsel is an inferior officer).
33. Recusal is defined as “[r]emoval of oneself as judge or policy-maker in a particular matter, [especially] because of a conflict of interest.” Recusal, BLACK’S LAW DICTIONARY (10th ed. 2014).
Justice Department. First, because the President has authority over principal officers, he could order the Attorney General to remove a special counsel. Second, the President could repeal current DOJ regulations concerning special counsel and then fire a special counsel directly.

Congress’s role in the appointment and removal of a special counsel is indirect. Congress is typically unable to reserve appointment or removal powers for themselves. However, Congress can limit or restrict removal power if they determine it to be in the public’s interest.

Congress “has a recognized inherent authority for oversight of the executive agencies and departments of government.” Nevertheless, separation of powers principles dictate that the DOJ may exercise all functions of law enforcement, including the prosecution of federal crimes. This means that Congress may not directly appoint or remove criminal investigators. Congress may, however, remove

37. See id. This has occurred in the past. See infra, Section III.A.
38. Katyal, supra note 36.
39. See MASKELL, supra note 2, at 1–2.
42. See MASKELL, supra note 2, at 1.
43. See id.
44. Id.
federal government officers through the Constitution’s express powers of impeachment.45

III. MODERN HISTORY OF SPECIAL COUNSEL INVESTIGATIONS

Since the Whiskey Ring scandal,46 U.S. presidents and DOJ leadership have appointed investigators to examine criminal allegations within the Executive Branch such as bribery, fraud, and corruption.47 The 20th century’s most prominent special counsel investigation resulted in the resignation of then-President Richard M. Nixon.48

A. Watergate and the Saturday Night Massacre

Before President Nixon’s 1972 reelection, five men broke into the Democratic National Committee Headquarters located in the Watergate complex.49 The burglars were later found to have connections to the Nixon Administration.50 In the aftermath of this discovery, several of Nixon’s closest advisors resigned or were relieved for conspiring to cover-up the incident.51 Nixon, himself, did not emerge unscathed.52 By April 1973, the President was without an attorney general or top executive aides.53 Congress, concerned over the emerging corruption allegations, desired that a special prosecutor be appointed to investigate the incident.54 As a condition of his appointment to Attorney General, congressional leadership pressured nominee Elliot Richardson to investigate.55

45. U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”); U.S. CONST. art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”); infra Section IV.C.1.
46. See supra Part I.
47. See Fred Lucas, A Short History of Special Counsels and Presidents, DAILY SIGNAL (June 12, 2017), http://dailysignal.com/2017/06/12/a-short-history-of-special-counsels-and-presidents.
49. Id. at 500.
50. Id.
51. Id.
52. See id.
54. Id.
55. Id.
Upon his confirmation, Attorney General Richardson appointed Special Prosecutor Archibald Cox.56

In July 1973, the public became aware of an Oval Office recording system.57 Special Prosecutor Cox subpoenaed nine tapes from the President to determine if Nixon had also been involved in the Watergate cover-up.58 President Nixon refused to turn them over.59 The President hoped to shift the Watergate investigation back into the hands of his political appointees at the DOJ.60 Unable to fire Special Prosecutor Cox himself, Nixon ordered Attorney General Richardson to fire him.61 On Saturday, October 20, 1973, Attorney General Richardson and Deputy Attorney General William Ruckelshaus both declined to follow President Nixon’s order and resigned.62 Finally, Solicitor General Robert Bork agreed to fire Cox, and the political ramifications of the “Saturday Night Massacre” swiftly followed.63 Congress initiated impeachment proceedings against the President and sought ways to ensure the independence of special prosecutors.64 Nixon appointed a new special prosecutor, Leon Jaworski, on the condition that he could not be removed by the President “without the consent of a majority of the Senate Judiciary Committee.”65

President Nixon was ordered to turn over the incriminating Oval Office tapes, and he resigned days before impeachment proceedings were to convene.66 One month later, Nixon’s successor, President Gerald Ford, granted him “a full and unconditional pardon . . . for any crimes he may have committed related to the Watergate scandal or during his time as president.”67

56. Id.
58. Id.
59. Id.
60. Id. at 501.
61. Id.
62. Mokhiber, supra note 53.
63. See Kutler, supra note 48, at 501.
64. See Mokhiber, supra note 53.
65. Id.
67. Id. at 503.
B. The Ethics in Government Act of 1978

Watergate and its fallout led to the passage of the Ethics in Government Act. President Jimmy Carter believed that requiring the Attorney General to investigate allegations of Executive Branch misconduct would “keep [public officials] honest.”


Signed into law by President Carter, the Act implemented a two-step process for appointing an independent counsel. First, the Attorney General would complete a preliminary inquiry to determine whether an independent investigation was necessary. If warranted, the Attorney General would request that a three-judge panel appoint an independent counsel to investigate. The Act shifted appointment power of the special counsel tasked with investigating the Executive out of the hands of the President and into the hands of the three-judge panel. Furthermore, the Act dictated an independent counsel’s scope of authority, how one could be removed, and conditions under which independent counsel inquiries could be terminated.


70. See Mokhiber, supra note 53.

71. See CYNTHIA BROWN, CONG. RESEARCH SERV., R44857, SPECIAL COUNSELs, INDEPENDENT COUNSELs, AND SPECIAL PROSECUTORS: OPTIONS FOR INDEPENDENT EXECUTIVE INVESTIGATIONS 3–4 (2017).

72. See MASKELL, supra note 2, at 2.

73. See Brown, supra note 71, at 4–5.

74. Id. at 5; see also MASKELL, supra note 2, at 2. The court was physically seated in the U.S. Court of Appeals for the District of Columbia. See Brown, supra note 71, at 5. Judges or justices were appointed to the court by the Chief Supreme Court Justice for two-year assignments. Id.

75. See Brown, supra note 71, at 5.

76. Id. at 6.

77. Id. at 6–7.

78. Id. at 7.
The Act was invoked eleven times within the first four years of its enactment, resulting in the appointment of three independent counsel. 79

2. Constitutionality of the Act

Initial authority for the Ethics in Government Act was set to expire five years after its creation. 80 In 1982, Congress amended the law, giving the Attorney General power to remove an appointed special prosecutor for good cause. 81 With this change, Congress ensured continued authorization for independent counsel by reauthorizing the Act in 1983 82 and again in 1987. 83

The Supreme Court upheld the constitutionality of the Ethics in Government Act’s independent counsel provision and its use of a three-judge panel in the 1988 case of Morrison v. Olson. 84 The Court determined that the Act did not violate the Appointments Clause or separation of powers because Congress did not intend to see and increase their own power when they passed the law. 85 The Court found that executive powers were not “impermissibly” 86 hampered by the good cause standard for removal. 87 Furthermore, the judicial panel’s authority to appoint independent special counsel did not excessively interfere with any role of the Executive Branch. 88

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79. See Mokhiber, supra note 53.
80. Brown, supra note 71, at 7, 7 n.59.
81. Good cause is defined as “[a] legally sufficient reason.” Good Cause, Black’s Law Dictionary (10th ed. 2014); see also Brown, supra note 71, at 7 (explaining that a physical or mental condition inhibiting one’s ability to perform investigative duties also warranted special counsel removal).
84. Morrison v. Olson, 487 U.S. 654, 676 (1988) (“In this case, however, we do not think it impermissible for Congress to vest the power to appoint independent counsel in a specially created federal court.”).
85. See Mokhiber, supra note 53.
86. Morrison, 487 U.S. at 692–93.
87. Id. at 691 (“[W]e cannot say that the imposition of a ‘good cause’ standard for removal by itself unduly trammels on executive authority.”).
88. See id. at 693–96.
3. The Act’s Final Expiration

The Ethics in Government Act expired again in 1992 but was reauthorized in 1994\(^9\) to allow for Special Investigator Kenneth Starr to investigate Bill and Hillary Clinton’s involvement in the Whitewater real estate development controversy.\(^9\) Criticism of the law peaked when citizens learned that Starr spent upwards of $70 million on probes spanning more than four years.\(^9\)

After Whitewater, the general consensus within Congress was that independent counsel enjoyed too much power and spent too much time and money, without results, on allegations that were politically driven.\(^9\) Congress allowed the Act to expire under sunset provisions in 1999\(^9\) and it has not been reauthorized since.\(^9\) Consequently, the President’s authority to appoint and remove special counsel tasked with investigating the Executive Branch expanded.\(^9\) The President’s power was increased by virtue of no longer sharing appointment power with the judicial panel established for this purpose.\(^9\)

It is unlikely that the now-void Ethics in Government Act will ever be reenacted because of the politics surrounding the breadth of its

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90. See Lucas, supra note 47; Brown, supra note 71, at 4.
92. See Brown, supra note 71, at 7; see also Jonathan L. Entin, Learning the Right Lesson from Watergate: The Special Prosecutor and the Independent Counsel, 16 CHAP. L. REV. 151, 159 (2012) (“The . . . special prosecutor was a political response to a political crisis.”).
93. See Brown, supra note 71, at 7.
94. See infra note 115 and accompanying text.
95. See Demirjian, supra note 16 (“[T]he [P]resident’s authority to hire and fire special counsels . . . fell more squarely under the [E]xecutive’s purview after Congress let an independent-counsel law . . . expire in 1999 . . . .”)
96. Id.
However, this does not preclude Congress from adopting a less comprehensive bipartisan measure.

C. Current Department of Justice Regulations

When Congress enacts legislation, federal agencies often implement and enforce the law by promulgating regulations. The Administrative Procedure Act authorizes agencies to create regulations, even if no codified law supports them, so long as the policies comport with statutory law and the Constitution. Only Congress may repeal an enacted law; the President has no authority to do so. The President may, however, repeal agency regulations.

In 1999, in anticipation of the Ethics in Government Act’s expiration, and before any similar law was enacted, the Justice Department promulgated regulations for the appointment and removal of special counsel. At the time, legal experts generally agreed that the Act no longer enhanced public confidence in executive investigations. As a result, when the DOJ promulgated the new regulations, several safeguards were implemented to avoid some of the drawbacks experienced under the expired Act.
For example, a special counsel is still required to submit a final report at the conclusion of an investigation, but it is no longer publically available. In theory, given that a report is now submitted privately to the Attorney General, a special counsel has less of an incentive to pursue an unwarranted investigation.

Outside counsel are typically appointed when the issue to be investigated may cause conflict of interest issues for agency personnel or under “other extraordinary circumstances.” Whether appointed from within or externally to the agency, special counsel are not entirely independent. While mostly autonomous during an investigation and any potential prosecution, they must consult and report to the individual who appointed them. Current regulations also afford the Attorney General the opportunity to supersede the decisions of any special counsel. However, the Attorney General may only remove a special counsel for “misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause.”

Despite these regulatory measures, in the past two decades, no statutory protections have been enacted to prevent “another ‘Saturday Night Massacre.’” This becomes increasingly significant when a special counsel, empowered by agency regulations, is tasked with investigating potential misdeeds of an incumbent administration. If a special counsel appointed by the DOJ is improperly removed by a President, the public will lack confidence in the government, thereby weakening our democracy.

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107. See id. at 7; 28 C.F.R. § 600.8(c) (2018) (outlining special counsel notification and report requirements).
109. See MASKELL, supra note 2, at 3.
110. Cummings, supra note 27 (quoting 28 C.F.R. § 600.1 (2010)).
112. Id.
113. Id.; see also 28 C.F.R. § 600.7 (2018).
114. 28 C.F.R. § 607(d).
115. Lucas, supra note 47; see also Pildes, supra note 102.
116. See Demirjian, supra note 16.
D. Alleged Interference in the 2016 U.S. Presidential Election

Shortly after the 2016 presidential race, Trump campaign members were accused of colluding with Russia to influence the election’s outcome. These accusations prompted the appointment of a special counsel to investigate the matter. At that time, Jeff Sessions, President Donald Trump’s former campaign advisor who was subsequently appointed as Attorney General, recused himself from all campaign-related legal matters. As a result, Deputy Attorney General Rod Rosenstein appointed Robert S. Mueller as a special counsel. Investigator Mueller was charged to investigate “any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump.”

IV. THE WAY AHEAD

A. Two Legislative Proposals

In August 2017, lawmakers introduced legislative measures in an effort to shield special counsel from political interference. Senate


119. Id.; see also Demirjian, supra note 16.


123. Brandon Carter, Dem Senator: Mueller Must Be Protected from ‘Another Saturday Night Massacre’, HILL (Dec. 1, 2017, 9:21 PM), https://thehill.com/homenews/senate/362894-dem-senator-mueller-must-be-protected-from-another-saturday-night-massacre. Since August 2017, these measures have been revised numerous times by Congress, and the latest bill proposed (but not yet passed) to address this issue is entitled the “Special Counsel Independence and Integrity Act,” first introduced to the Senate on April 26, 2018. Special Counsel Independence and Integrity Act, S. 2644,
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Bill 1735, named the “Special Counsel Independence Protection Act,” was sponsored by Senators Lindsey Graham (R-SC) and Cory Booker (D-NJ). Senate Bill 1741, named the “Special Counsel Integrity Act,” was sponsored by Senators Thom Tillis (R-NC) and Christopher Coons (D-DE).

The goal of each bipartisan bill is to prevent the wrongful firing of a special counsel appointed under DOJ regulations. During a September 2017 hearing conducted by the Senate Committee on the Judiciary, legal scholars deemed each Act’s objectives to be “important,” “reasonable,” “laudable,” and “appropriate.”


125. Special Counsel Integrity Act, S. 1741, 115th Cong. (2017); U.S. SENATE, supra note 124.

126. McCallister, supra note 16.


Both bills recommend using a three-judge panel to review proposed dismissals of special counsel.\(^\text{132}\) Additionally, both bills use identical language regarding removal for cause.\(^\text{133}\) While the proposed bills share commonalities, they are fundamentally different in certain respects.\(^\text{134}\) First, they vary regarding who may bring a claim for improper removal and how to do it.\(^\text{135}\) The bills differ over whether the judicial panel should be held to a deadline for rendering a decision\(^\text{136}\) and whether Congress must be notified.\(^\text{137}\) In addition, the bills diverge over whether any of the provisions should apply retroactively.\(^\text{138}\)

This Comment argues that a sustainable legislative measure is needed and requires four essential provisions: 1) oversight by a three-judge panel to review removal actions;\(^\text{139}\) 2) language codifying current DOJ regulations;\(^\text{140}\) 3) a clear appeal framework for special counsel who wish to challenge their removal;\(^\text{141}\) and 4) a strict deadline for judicial review.\(^\text{142}\) Two additional elements are non-essential, but they will make a proposed measure more effective: 5) a requirement that the Attorney General inform congressional judiciary committees whenever a special counsel is removed for any reason;\(^\text{143}\) and 6) elimination of any retroactive effective date provisions.\(^\text{144}\) A comparative analysis of both proposed measures follows.\(^\text{145}\)

### B. Elements of a Successful Legislative Measure

1. Use of a Three-Judge Panel for Review

A special counsel who believes that they have been unjustly removed should be afforded the opportunity to seek review from a three-judge panel established by Congress specifically for this

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\(^{132}\) See infra Section IV.B.1.
\(^{133}\) See infra Section IV.B.2.
\(^{134}\) See infra Sections IV.B.3–6.
\(^{135}\) See infra Section IV.B.3.
\(^{136}\) See infra Section IV.B.4.
\(^{137}\) See infra Section IV.B.5.
\(^{138}\) See infra Section IV.B.6.
\(^{139}\) See infra Section IV.B.1.
\(^{140}\) See infra Section IV.B.2.
\(^{141}\) See infra Section IV.B.3.
\(^{142}\) See infra Section IV.B.4.
\(^{143}\) See infra Section IV.B.5.
\(^{144}\) See infra Section IV.B.6.
\(^{145}\) See infra Sections IV.B.1–6.
purpose. The Special Counsel Independence Protection Act and the Special Counsel Integrity Act both seek to codify the use of a three-judge court to review special counsel removal actions. Using a three-judge panel ensures that a special counsel is able to act independently—without fear of improper dismissal. The provisions of both bills place adequate limitations on the removal of special counsel.

U.S. Code permits Congress to convene three-judge district courts when required. Challenges to these judicial decisions receive automatic appeal to the Supreme Court. In the past, Congress has instituted similar special courts to consider matters such as antitrust cases, railroad cases, and certain suits under the 1964 Civil Rights Act. Three-judge panels were also convened to appoint special prosecutors under the now-expired Ethics in Government Act.

Utilizing a three-judge panel has proven to be “a rather effective means of ameliorating the inevitable frictions and reducing the opportunities for abuse” that are destined to arise in politically charged legal issues. Using multiple judges, in lieu of a single judge, helps to mitigate bias and error in decision-making. For these reasons, the use of a three-judge panel is an effective process to review the removal of special counsel.

2. Removal for Cause Language

One of the main purposes of both the Special Counsel Independence Protection Act and the Special Counsel Integrity Act is to codify the language of current DOJ regulations. Both proposals

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146. See infra notes 147–56.
149. See Demirjian, supra note 16.
150. S. 1735 § 2(b); S. 1741 § 2(d)(2).
154. See supra Section III.B. Unlike their use in the Ethics in Government Act, here, the judicial panels would only be used to hear and review decisions to remove special counsel, not to appoint them. See S. 1735 § 2(b); S. 1741 § 2(d)(2).
155. See Currie, supra note 153, at 1, 7–8, 12.
156. Id. at 7.
157. See Special Counsels and the Separation of Powers, supra note 129 (“[T]he bills duplicate the for-cause provision already in [Justice Department] regulations.”).
dictate that a special counsel may only be removed on the basis of “misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of [DOJ] policies.”¹⁵⁸ This language is the same as that promulgated by the DOJ and codified in the Code of Federal Regulations.¹⁵⁹

Some may argue that current DOJ regulations are sufficient and no additional codification is needed.¹⁶⁰ However, agency regulations that are not codified can be repealed by the President.¹⁶¹ As a result, this provision is one of the most important elements proposed in both measures.¹⁶² Codifying the removal for cause language would close a current loophole between the U.S. Code and DOJ regulations.¹⁶³ Closing this gap would prevent a president from unjustifiably removing a DOJ-appointed special counsel.¹⁶⁴

3. Appeal Framework for Relieved Special Counsel

Under Special Counsel Independence Protection Act provisions, the Attorney General must file an action for judicial review before the special counsel may be removed.¹⁶⁵ The special counsel remains appointed until after review by a three-judge panel.¹⁶⁶ Conversely, the Special Counsel Integrity Act proposes to implement traditional notice, removal, and appeal measures requiring the special counsel to act,¹⁶⁷ similar to those employed against other poorly performing federal employees.¹⁶⁸ If implemented, special

¹⁵⁸. 28 C.F.R. § 600.7(d) (2018); S. 1735 § 2(c); see also Editorial Board, supra note 117 (“Under the Justice Department regulations by which Mr. Mueller was appointed, the attorney general may fire the special counsel only for cause, such as misconduct.”).
¹⁵⁹. See supra note 157 and accompanying text; see also 28 C.F.R. § 600.7(d); S. 1735 § 2(c); S. 1741 § 2(b).
¹⁶⁰. See Vladeck, supra note 131, at 1.
¹⁶¹. See supra notes 38, 102–03 and accompanying text.
¹⁶². Id.
¹⁶³. See Pildes, supra note 102.
¹⁶⁴. See Posner, supra note 129, at 9 (explaining that the removal for cause provision provides “reasonable additional job protection in the form of judicial review of the for-cause removal provision that already exists in [DOJ] regulation[s]”); see also Vladeck, supra note 131, at 6.
¹⁶⁶. S. 1735 § 2(b)–(c).
counsel could be removed as long as they have first been informed of
the reason for their removal.169  This proposal places the
responsibility on the removed individual to bring a case forward for
review.170  If a special counsel believes that the removal was
unfounded, they may file a review action with the court.171  If the
judiciary agrees, the special counsel is immediately reinstated.172

The Special Counsel Independence Protection Act’s filing
provisions are more efficient than the Special Counsel Integrity
Act.173  Removal and subsequent reinstatement of an official would
likely create additional work or increase administrative costs for the
Attorney General compared to a special counsel remaining on the job
while removal for cause review is pending.174

However, legal experts believe this method is unusual.175  For
example, federal employees deemed to be a threat to agency mission,
systems, or property are typically removed from their worksite and
relocated after they are provided notice of alleged wrongdoing.176  In
extreme circumstances, employees are placed on administrative leave
until an investigation is complete.177  They cannot be reinstated until
they are cleared of any wrongdoing.178  This is done because the
integrity of the investigative process is better protected when an
individual is removed and reinstated than when an individual is
allowed to remain on the job, potentially committing additional
damage.179  The work quality and effectiveness of an employee under

competitive service federal employees are entitled to advanced written notice and
appeal measures before their final removal from federal service. Id. at 13.
Employees may be placed on a performance improvement plan (PIP), but lack of a
PIP does not preclude the agency from removing a poor-performing employee. Id. at
5–6.

169. S. 1741 § 2(c).
170. Id. § 2(d)(1).
171. Id. § 2(b), (d)(1).
172. Id. § 2(d)(3).
174. See id.
175. Id. at 2 n.7.
176. See supra note 168 and accompanying text.
178. See id.
179. See id.
scrutiny can also be distracting to other employees and the agency’s mission. 180

The Special Counsel Independence Protection Act’s proposal is also unusual in that the claimant is not the one bringing the action in court. 181 For this reason, it is unclear how the courts would respond to Special Counsel Independence Protection Act’s unique methodology. 182 To survive judicial scrutiny, it is best for the special counsel to initiate the complaint, but either way, clear guidelines are a must. 183

4. Prompt Judicial Review of Removal for Cause Actions

When a special counsel is identified for removal under the Special Counsel Independence Protection Act provisions, no deadline is imposed upon the judicial panel for making a final determination. 184 In theory, this means that the review of the decision to remove a special counsel could last indefinitely; thus, imposing a clear deadline brings a degree of certainty to the process. 185

After a special counsel is removed under Special Counsel Integrity Act provisions, the judicial panel must render a reinstatement decision within fourteen days from the date of filing. 186 This two-week suspense for judgment places a temporary pause on the investigation, but ultimately ensures prompt resolution. 187 Considering the infrequency with which three-judge panels were utilized under the Ethics in Government Act, it is unlikely the panel would have a high case load. 188 For this reason, a two-week suspense is the best solution and should be strictly followed. 189

180. See id. (explaining that placing any federal employee on immediate non-duty status is meant to be a “temporary solution”).
181. See Vladeck, supra note 131, at 6 (noting that the Attorney General files the removal action).
183. See Vladeck, supra note 131, at 11.
185. See Duffy, supra note 128, at 5.
187. See Duffy, supra note 128, at 5.
188. See Special Counsels and Separation of Powers: Hearing on S. 1735 and S. 1741 Before the S. Judiciary Comm., supra note 127 (testimony of John F. Duffy, Professor, University of Virginia School of Law).
189. Duffy, supra note 128, at 5 (opining that a two-week waiting period limiting any Attorney General order of removal would “provide adequate time at least for the
5. Congressional Notification of Any Special Counsel Removal

When the Attorney General desires to remove a special counsel under Special Counsel Independence Protection Act provisions, he must “file[] a contemporaneous notice of the action with the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives.” 190 Under Special Counsel Integrity Act provisions, there is no requirement that Congress be notified when an action is filed by the special counsel. 191 However, because the House and Senate Judiciary Committees are responsible for oversight of investigations involving the Executive Branch, including those initiated by the Justice Department, 192 Congress should always be informed of a special counsel’s removal.

To increase transparency, the Attorney General should be required to inform Congress of the removal of any special counsel for any reason, not just removals that result in review actions. 193 Responsibility should be placed upon the Attorney General, because as agency head, this person is in the best position to know when a special counsel is relieved of their duties. 194


Of the two proposed laws, only the Special Counsel Integrity Act proposes a date of retroactive effectiveness. 195 Retroactive provisions are “generally perceived . . . as unjust,” 196 mostly because they do not provide adequate notice to those whose rights are affected. 197 However, just as there are due process objections against retroactive legislation, 198 an economic argument for its use can be made. At times, efficient lawmaking justifies applying retroactive

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190. Special Counsel Independence Protection Act, S. 1735, 115th Cong. § 2(c) (2017).
191. Compare S. 1735 § 2(c) (requiring congressional notice if a special counsel is removed by the Attorney General), with S. 1741 (containing no such provision).
192. See supra note 42 and accompanying text.
193. See supra note 192 and accompanying text.
194. See supra notes 30–32 and accompanying text.
195. Compare S. 1741 § 2(e) (containing a retroactive effective date of May 17, 2017), with S. 1735 (containing no retroactive provision).
197. Id. at 18.
198. See id. at 18–21.
laws if the net gain to society as a whole outweighs the loss of rights to one individual.\textsuperscript{199}

But in the interest of promptly enacting a solution that would survive constitutional due process scrutiny, the retroactive provision in the Special Counsel Integrity Act should be removed.\textsuperscript{200} The proposed date of May 17, 2017, corresponds with the date Investigator Mueller was appointed.\textsuperscript{201} This bill’s effective date is clearly targeted to a specific investigation.\textsuperscript{202} Including this clause infuses politics into a process that needs to be administered objectively if it is meant to be sustainable and detracts from the important long-term goals of a protective act.\textsuperscript{203}

If a retroactive provision was to be adopted, it would be the first of its kind to strengthen an appointed position retroactively.\textsuperscript{204} Additionally, increasing the inferior officer’s appointment after-the-fact would potentially be at the expense of executive power.\textsuperscript{205} This also increases the risk that an act with a similar provision would be overturned if appealed.\textsuperscript{206}

C. Why a Legislative Measure Is Needed

If protective measures are not implemented, presidents could take steps similar to those of President Nixon.\textsuperscript{207} A bipartisan legislative act is the best solution to regulate the dismissal of a special counsel.\textsuperscript{208} A legislative measure would prevent the President from

\begin{footnotesize}
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\item[199.] See id. at 21–22. If a cost-benefit analysis is applied to the current legislative proposals, only the President would be considered a “loser[].” See id. at 22.
\item[200.] See Duffy, supra note 128, at 5 (“The most constitutionally troubling aspect of S. 1741 is the combined effect of § 2(b) and § 2(e), which together seemed designed to grant statutory tenure protection retroactively to a single known inferior officer in the Department of Justice.”).
\item[201.] See Mueller Appointment Memo, supra note 121.
\item[202.] See Duffy, supra note 128, at 5.
\item[203.] See Entin, supra note 92, at 159.
\item[204.] Special Counsels and Separation of Powers: Hearing on S. 1735 and S. 1741 Before the S. Judiciary Comm., supra note 127 (testimony of John F. Duffy, Professor, University of Virginia School of Law) (“There is no other precedence for such a retroactive strengthening of tenure.”).
\item[205.] Id.
\item[206.] Id.
\item[207.] See supra Section III.A; see also Bruce Fein, Congress Should Protect Mueller from Saturday Night Massacre, WASH. TIMES (Aug. 15, 2017), https://www.washington times.com/news/2017/aug/15/trump-mueller-nixon-saturday-night-massacre/ (declaring that “[o]ne Saturday Night Massacre is enough!”).
\item[208.] Contra Amar, supra note 130, at 1–2 (expressing concerns over instituting such a measure).
\end{enumerate}
\end{footnotesize}
removing an agency-appointed special counsel unless it was “for cause” and would allow for judicial review of a questionable removal.209 Furthermore, it would be within Congress’s power to repeal an act, if needed.210 Additionally, it would reassure the public that no one, including the President, is “above the law.”211

1. Impeachment Alone Is Insufficient

Impeachment cannot be relied upon as a valid solution to punish a president who has improperly fired a special counsel.212 To be impeached, a president’s actions would first need to constitute “treason, bribery, or other high crime[ and misdemeanor].”213 Meeting this high bar is particularly challenging when the President’s own party controls Congress.214 This is because it is politically risky to impeach a president of the same partisan affiliation.215 The two-thirds Senate majority vote needed to remove the President is extremely difficult to obtain when politicians fear being ousted if they go against the majority party’s voting bloc.216 Based on recent history, it would likely take months for the House to pass an impeachment resolution and even longer for the Senate to convict a sitting president.217 And waiting to vote a poor-performing president out of office is no quicker.218

210. See Shapiro, supra note 103.
211. Posner, supra note 129, at 9; see also Vladeck, supra note 131, at 1.
212. See Posner, supra note 129, at 7–8.
213. U.S. CONST. art. II, § 4; see also Michael J. Gerhardt, Lessons of Impeachment History, 67 GEO. WASH. L. REV. 603, 605 (1999) (explaining that the Constitutional Convention delegates specifically narrowed the definition of an impeachable offense in an effort to curb the federal government’s ability to bring impeachment charges, unlike the English Parliament’s sweeping authority to do so).
215. Id. To date, politically-driven impeachment proceedings have never led to removal of a U.S. president even when political party control differed between Congress and the White House. See id.
216. Id. See Posner, supra note 129, at 7–8.
217. Joseph Milord, How Long Does It Take to Impeach a President? Recent History Provides Context, ELITE DAILY (Sep. 21, 2017), https://www.elitedaily.com/news/politics/heres-long-impeaching-president-take/2077271. Impeachment proceedings against President Bill Clinton lasted nearly six months in the late ‘90s. See id. The 24-hour news cycle and prolific use of social media by the general U.S. population would likely speed up that timeline in the current era. See id.
218. See Posner, supra note 129, at 8.
2. A Protective Measure Strengthens Executive Power

A bill containing the preferred aforementioned provisions would withstand constitutional scrutiny if challenged after enactment. Many legal experts believe that the provisions of both bills, as currently written, are narrower than the now-expired Ethics in Government Act; neither bill seeks to give special counsel more power than the power granted to primary officers.

Some legal scholars believe that the two bills do not improve special counsel protections because the removal for cause statutory language set out in both bills is unclear. On the other hand, not enacting any legislation is just as problematic as equivocal definitions. Moreover, any ambiguity in the language used is rooted in current Justice Department policies, not the Senate Bills, which simply seek to codify the agency regulations.

It is also precarious to operate under the presumption that when a president asks for a special counsel to be removed the request is without merit. The approach taken by the Special Prosecutor Independence Protection Act inadvertently permits the President’s authority to be questioned by placing it in the hands of a judicial panel to determine if it has validity. Instead, allowing a removal to occur, even if the special counsel is ultimately reinstated, better preserves executive power and does not run counter to separation of powers principles.

219. See id. at 2–3; Vladeck, supra note 131, at 1.
220. See Vladeck, supra note 131, at 2 (“And even if there were five votes on the current Supreme Court to overrule Morrison in an appropriate case (and I am skeptical that there are), the far-less-intrusive nature of these bills in contrast to the independent counsel statute suggests that they would not be the vehicle through which the Court would choose to do so.”).
222. See Amar, supra note 130, at 7–8. Professor Amar asserts that if, for example, the President gives a lawful order to a DOJ-appointed special counsel, and the inferior officer does not obey the order, this satisfies the “for cause” threshold. Id. He believes this to be a loophole that the President could use to unjustly remove a special counsel even if current regulations are codified. Id.
223. See Vladeck, supra note 131, at 12.
224. Id. at 7.
225. See Duffy, supra note 128, at 3–4.
226. Id.
227. Id.
V. CONCLUSION

As history has shown, special counsel have played an essential role in federal government oversight. They have conducted investigations when conflicts of interest have arisen within the DOJ, ensured that government leaders have not abused their positions, and prosecuted those officials who have done so.

Independence and protection must be afforded to special counsel so that they may properly investigate the federal government, including the Executive Branch. Presently, protective measures are not assured because DOJ regulations are not codified. If a solution to this problem is not enacted, a constitutional crisis could result. Passing a legislative measure instilling judicial oversight, integrity, and consistency in the special counsel removal process is a step that Congress must take now—before it is too late.

228. See Demirjian, supra note 16.
229. See supra Section III.C.
230. See Maskell, supra note 2, at 1–2.
231. See supra Section IV.A.
232. See supra Section IV.B.2.
233. See Editorial Board, supra note 117; see also Posner, supra note 129, at 9.
234. See supra Part IV and text accompanying note 1.