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

*Adrienne C. Blake**

*“Those who cannot remember the past
are condemned to repeat it.” - George Santayana¹*

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.² 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.³ Investigator Henderson's inquiry upended the infamous “Whiskey Ring.”⁴ The investigation ultimately led to indictments of

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1. GEORGE SANTAYANA, *THE LIFE OF REASON: OR THE PHASES OF HUMAN PROGRESS* 284 (1905).
2. Stephan O. Kline, *Heal It, Don't Bury It! Testimony on Reauthorization of the Independent Counsel Act*, 1999 L. REV. MICH. ST. U. DETROIT C. L. 51, 53 (1999) (citing Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2312 (1998)). At differing times in our nation's history, individuals appointed to investigate and potentially prosecute alleged criminal violations of federal law have been referred to as “independent counsels,” “special prosecutors,” or “special counsels.” JACK MASKELL, CONG. RESEARCH SERV., R43112, *INDEPENDENT COUNSELS, SPECIAL PROSECUTORS, SPECIAL COUNSELS, AND THE ROLE OF CONGRESS* 1–2, 2 n.8 (2013). The Justice Department currently uses the term “special counsel,” as shown in 28 C.F.R. §§ 600.1–10 (2018). *Id.*
3. Sarah Pruitt, *The Whiskey Ring and America's First Special Prosecutor*, HIST. (May 18, 2017), <http://www.history.com/news/the-whiskey-ring-and-americas-first-special-prosecutor>.
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 investigative 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

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.

16. *See* Doreen McCallister, *Senators Introduce 2 Bills to Try to Keep Trump from Firing Mueller*, NAT'L PUB. RADIO (Aug. 4, 2017, 3:56 AM), <https://www.npr.org/sections/thetwo-way/2017/08/04/541523326/senators-introduce-2-bills-to-try-to-keep-trump-from-firing-mueller>; *see also* Karoun Demirjian, *Senators Unveil Two Proposals to Protect Mueller's Russia Probe*, WASH. POST (Aug. 3, 2017), <https://www.washingtonpost.com/powerpost/senators-unveil-two-proposals-to-protect-muell>

This Comment argues that special counsel can be protected by enacting legislation that contains key provisions which will not violate the separation of powers.¹⁷ Codifying current DOJ regulations will also prevent presidents from abusing their authority by attempting to remove DOJ-appointed special counsel without adequate cause.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.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 1978.²⁰ Part III concludes by discussing DOJ special counsel regulatory guidance and current developments.²¹ Part IV provides a detailed analysis of proposed Senate Bills 1735 and 1741²² and outlines six elements of a constitutional and sustainable legislative measure.²³ Part IV begins by explaining why legislation is needed to protect special counsel.²⁴ Part IV concludes by demonstrating how a modified bill will strengthen executive power by eliminating uncertainty in the special counsel removal process.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:

[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

[ers-russia-probe/2017/08/03/b980d082-787a-11e7-8f39-eeb7d3a2d304_story.html](https://www.washingtonpost.com/ers-russia-probe/2017/08/03/b980d082-787a-11e7-8f39-eeb7d3a2d304_story.html)
(discussing recently proposed legislation).

17. *See infra* Part IV.
18. *See infra* Section IV.B.2.
19. *See infra* Part II.
20. *See infra* Sections III.A–B.
21. *See infra* Sections III.C–D.
22. *See infra* Sections IV.A–B.
23. *See infra* Section IV.B.
24. *See infra* Section IV.C.
25. *See infra* Section IV.C.2.

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

26. U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

27. William Cummings, *Special Counsel vs. Special Prosecutor: What's the Difference?*, USA TODAY (May 19, 2017, 10:33 AM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/05/18/special-counsel-vs-special-prosecutor-difference/329016001/>.

28. 28 U.S.C. §§ 503, 515 (2012).

29. 28 U.S.C. § 510 (2012).

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).

32. 28 U.S.C. §§ 509–10, 515 (2012).

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).

34. 28 C.F.R. §§ 600.1–2 (2018).

35. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483–84 (2010).

Justice Department.³⁶ First, because the President has authority over principal officers, he could order the Attorney General to remove a special counsel.³⁷ Second, the President could repeal current DOJ regulations concerning special counsel and then fire a special counsel directly.³⁸

Congress's role in the appointment and removal of a special counsel is indirect.³⁹ Congress is typically unable to reserve appointment or removal powers for themselves.⁴⁰ However, Congress can limit or restrict removal power if they determine it to be in the public's interest.⁴¹

Congress "has a recognized inherent authority for oversight of the executive agencies and departments of government."⁴² Nevertheless, separation of powers principles dictate that the DOJ may exercise all functions of law enforcement, including the prosecution of federal crimes.⁴³ This means that Congress may not directly appoint or remove criminal investigators.⁴⁴ Congress may, however, remove

36. See Neal Katyal, *Trump or Congress Can Still Block Robert Mueller. I Know. I Wrote the Rules.*, WASH. POST (May 19, 2017), <https://www.washingtonpost.com/posteverything/wp/2017/05/19/politics-could-still-block-muellers-investigation-i-know-i-wrote-the-rules/>.

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.

40. See Douglas Cox, *Inferior Officers*, THE HERITAGE GUIDE TO THE CONSTITUTION, <https://www.heritage.org/constitution/#!/articles/2/essays/92/inferior-officers> (last visited Nov. 10, 2018) ("Congress itself may not exercise the appointment power; its functions are limited to the Senate's role in advice and consent, and to deciding whether to vest a direct appointment power over a given office in the President, a Head of Department, or the Courts of Law."). But see *Buckley v. Valeo*, 424 U.S. 1, 128 (1976) (*per curiam*) (holding that Congress has the "power to appoint *its own* inferior officers to carry out appropriate legislative functions" (quoting *Buckley v. Valeo*, 519 F.2d 821, 889 (D.C. 1975))) (emphasis added), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. 107–155, 116 Stat. 81, *as recognized in* *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), *overruled on other grounds by* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *cf.* *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (concluding "that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws *except by impeachment*") (emphasis added).

41. *Morrison v. Olson*, 487 U.S. 654, 689 n.27 (1988) (citing *United States v. Perkins*, 116 U.S. 483, 485 (1886)).

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>.

48. *See* Stanley Kutler, *Richard M. Nixon*, in *THE PRESIDENTS AND THE CONSTITUTION: A LIVING HISTORY* 491, 500 (Ken Gormley, ed., 2016).

49. *Id.* at 500.

50. *Id.*

51. *Id.*

52. *See id.*

53. Jim Mokhiber, *A Brief History of the Independent Counsel Law*, PUB. BROAD. SERV.: FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/counsel/office/history.html> (last visited Nov. 10, 2018).

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.*

57. Kutler, *supra* note 48, at 500.

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.*

66. *See* Kutler, *supra* note 48, at 502–03 (citing *United States v. Nixon*, 418 U.S. 683, 716 (1974)).

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.⁶⁸ President Jimmy Carter believed that requiring the Attorney General to investigate allegations of Executive Branch misconduct would “keep [public officials] honest.”⁶⁹

1. The Act’s Provisions

Signed into law by President Carter,⁷⁰ the Act implemented a two-step process⁷¹ for appointing an independent counsel.⁷² First, the Attorney General would complete a preliminary inquiry to determine whether an independent investigation was necessary.⁷³ If warranted, the Attorney General would request that a three-judge panel appoint an independent counsel to investigate.⁷⁴ 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.⁷⁵ Furthermore, the Act dictated an independent counsel’s scope of authority,⁷⁶ how one could be removed,⁷⁷ and conditions under which independent counsel inquiries could be terminated.⁷⁸

68. See Joseph S. Hall, Nicholas Pullen & Kandace Rayos, *Independent Counsel Investigations*, 36 AM. CRIM. L. REV. 809, 811–12 (1999) (explaining that at least three different bills were proposed in Congress before the successful passage of the Ethics in Government Act of 1978, Pub. L. No. 95–521, 92 Stat. 1824 (1978) (codified as amended at 28 U.S.C. §§ 591–99 (1994))).

69. Paul Francis Lughlin, *Ethics in Government Act, White Collar Crime: Fifth Survey of Law: Substantive Crimes*, 26 AM. CRIM. L. REV. 789, 789 (1988) (quoting Jimmy Carter, U.S. President, Miami Beach, Florida, Remarks at a State Democratic Party Rally (Oct. 26, 1978), transcript available online courtesy of Gerhard Peters & John T. Woolley, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/miami-beach-florida-remarks-state-democratic-party-rally> (last visited Nov. 10, 2018)).

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 1983⁸² 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

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).

82. Ethics in Government Act Amendments of 1982, Pub. L. No. 97-409, 96 Stat. 2039 (1983).

83. Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (1987).

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 1994⁸⁹ to allow for Special Investigator Kenneth Starr to investigate Bill and Hillary Clinton's involvement in the Whitewater real estate development controversy.⁹⁰ Criticism of the law peaked when citizens learned that Starr spent upwards of \$70 million on probes spanning more than four years.⁹¹

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.⁹² Congress allowed the Act to expire under sunset provisions in 1999,⁹³ and it has not been reauthorized since.⁹⁴ Consequently, the President's authority to appoint and remove special counsel tasked with investigating the Executive Branch expanded.⁹⁵ The President's power was increased by virtue of no longer sharing appointment power with the judicial panel established for this purpose.⁹⁶

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

89. Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732 (1994).

90. See Lucas, *supra* note 47; BROWN, *supra* note 71, at 4.

91. Callum Borchers, *Special Prosecutors Are a Big Deal. Their Results Sometimes Aren't.*, WASH. POST (May 17, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/05/10/want-a-special-prosecutor-to-replace-james-omey-history-might-change-your-mind/>; see also David Johnston, *Attorney General Taking Control as Independent Counsel Law Dies*, N.Y. TIMES (June 30, 1999), <https://www.nytimes.com/1999/06/30/us/attorney-general-taking-control-as-independent-counsel-law-dies.html>. The Whitewater investigation followed the Iran-Contra affair, and the cost of that investigation totaled \$39 million. See Borchers, *supra*. While eleven individuals were convicted for their involvement in Iran-Contra, all of the convictions were overturned on appeal, resulting in no confinement for any of those involved. *Id.*

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.*

scope.⁹⁷ However, this does not preclude Congress from adopting a less comprehensive bipartisan measure.⁹⁸

C. *Current Department of Justice Regulations*

When Congress enacts legislation, federal agencies often implement and enforce the law by promulgating regulations.⁹⁹ The Administrative Procedure Act¹⁰⁰ authorizes agencies to create regulations, even if no codified law supports them, so long as the policies comport with statutory law and the Constitution.¹⁰¹ Only Congress may repeal an enacted law; the President has no authority to do so.¹⁰² The President may, however, repeal agency regulations.¹⁰³

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.¹⁰⁴ At the time, legal experts generally agreed that the Act no longer enhanced public confidence in executive investigations.¹⁰⁵ 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.¹⁰⁶

97. See Entin, *supra* note 92, at 160.

98. See *infra* Section IV.A.

99. *Regulatory Activity*, LEXISNEXIS.COM, http://www.lexisnexis.com/help/cu/The_Legislative_Process/Stage_9.htm (last visited Nov. 10, 2018).

100. Administrative Procedure Act § 1, 5 U.S.C. § 551 (2012).

101. *A Guide to the Rulemaking Process*, OFFICE OF THE FED. REGISTER, <https://www.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf> (last visited Sept. 26, 2018) (explaining that agency regulations are published in the Federal Register and codified annually).

102. See Richard H. Pildes, *Could Congress Simply Codify the DOJ Special Counsel Regulations?*, LAWFARE (Aug. 3, 2017, 3:27 PM), <https://lawfareblog.com/could-congress-simply-codify-doj-special-counsel-regulations>.

103. See Stuart Shapiro, *What New Presidents Can (and Cannot) Do About Regulation*, HILL: PUNDITS BLOG (Dec. 23, 2015, 7:30 AM), <https://thehill.com/blogs/pundits-blog/presidential-campaign/264084-what-new-presidents-can-and-cannot-do-about>.

104. 28 C.F.R. §§ 600.1–10 (2018); see also Pildes, *supra* note 102.

105. See *Implementation of the U.S. Department of Justice's Special Counsel Regulations: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. 5–6 (2008), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1102&context=cong> [hereinafter *2008 Hearing*] (statement of Professor Neal Kumar Katyal, Georgetown University Law Center). For instance, then-Attorney General Janet Reno and her deputy, Eric Holder, believed the Act failed to incentivize special prosecutors to exercise restraint. *Id.*

106. See *id.* at 6–7.

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.¹⁰⁷ 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.¹⁰⁸

Outside counsel are typically appointed when the issue to be investigated may cause conflict of interest issues for agency personnel¹⁰⁹ or under “other extraordinary circumstances.”¹¹⁰ Whether appointed from within or externally to the agency, special counsel are not entirely independent.¹¹¹ While mostly autonomous during an investigation and any potential prosecution, they must consult and report to the individual who appointed them.¹¹² Current regulations also afford the Attorney General the opportunity to supersede the decisions of any special counsel.¹¹³ However, the Attorney General may only remove a special counsel for “misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause.”¹¹⁴

Despite these regulatory measures, in the past two decades, no statutory protections have been enacted to prevent “another ‘Saturday Night Massacre.’”¹¹⁵ This becomes increasingly significant when a special counsel, empowered by agency regulations, is tasked with investigating potential misdeeds of an incumbent administration.¹¹⁶ 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.¹¹⁷

107. *See id.* at 7; 28 C.F.R. § 600.8(c) (2018) (outlining special counsel notification and report requirements).

108. *2008 Hearing*, *supra* note 105, at 7.

109. *See* MASKELL, *supra* note 2, at 3.

110. Cummings, *supra* note 27 (quoting 28 C.F.R. § 600.1 (2010)).

111. *See* Phil Helsel, ‘Special Counsel’ Less Independent than Under Expired Watergate-Era Law, NBC NEWS (May 17, 2017, 9:58 PM), <https://www.nbcnews.com/news/us-news/special-counsel-less-independent-under-expired-watergate-era-law-n761311>.

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.

117. *See* Editorial Board, *The Senate Warns Trump: Leave Mueller Be*, WASH. POST (Oct. 7, 2017), https://www.washingtonpost.com/opinions/the-senate-warns-trump-leave-mueller-be/2017/10/07/88c4db7e-a7b8-11e7-92d1-58c702d2d975_story.html.

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.¹¹⁸ These accusations prompted the appointment of a special counsel to investigate the matter.¹¹⁹ 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.¹²⁰ As a result, Deputy Attorney General Rod Rosenstein appointed Robert S. Mueller as a special counsel.¹²¹ 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."¹²²

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.¹²³ Senate

118. See Mark Landler & Eric Lichtblau, *Jeff Sessions Recuses Himself from Russia Inquiry*, N.Y. TIMES (Mar. 2, 2017), <https://www.nytimes.com/2017/03/02/us/politics/jeff-sessions-russia-trump-investigation-democrats.html>.

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

120. Landler & Lichtblau, *supra* note 118; see *supra* note 33 and accompanying text. Jeff Sessions resigned from his position as Attorney General on November 7, 2018. Peter Baker, Katie Benner & Michael D. Shear, *Jeff Sessions Is Forced out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html>.

121. U.S. DEP'T OF JUSTICE, ORDER NO. 3915-2017, APPOINTMENT OF SPECIAL COUNSEL TO INVESTIGATE RUSSIAN INTERFERENCE WITH THE 2016 PRESIDENTIAL ELECTION AND RELATED MATTERS (2017) [hereinafter *Mueller Appointment Memo*].

122. *Id.* Presently, that special prosecutor investigation is still ongoing. See George Stephanopoulos, Eliana Larramendia, James Hill & Lauren Pearle, *Michael Cohen Pleads Guilty to Lying to Congress in New Deal with Mueller in Trump-Russia Probe*, ABC NEWS (Nov. 29, 2018, 12:32 PM), <https://abcnews.go.com/Politics/michael-cohen-expected-plead-guilty-lying-congress-collusion/story?id=59491450> (indicating that Investigator Mueller is presently preparing his final investigative report).

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,

Bill 1735, named the “Special Counsel Independence Protection Act,” was sponsored by Senators Lindsey Graham (R-SC) and Cory Booker (D-NJ).¹²⁴ Senate Bill 1741, named the “Special Counsel Integrity Act,” was sponsored by Senators Thom Tillis (R-NC) and Christopher Coons (D-DE).¹²⁵

The goal of each bipartisan bill is to prevent the wrongful firing of a special counsel appointed under DOJ regulations.¹²⁶ During a September 2017 hearing conducted by the Senate Committee on the Judiciary,¹²⁷ legal scholars deemed each Act’s objectives to be “important,”¹²⁸ “reasonable,”¹²⁹ “laudable,”¹³⁰ and “appropriate.”¹³¹

115th Cong. (2018); *see also* Jordain Carney, *Flake to Try to Force Vote on Bill Protecting Mueller*, HILL: FLOOR ACTION (Nov. 8, 2018, 4:14 PM), <https://thehill.com/blogs/floor-action/senate/415792-flake-to-try-to-force-vote-on-bill-protecting-mueller>; Jordain Carney, *Flake: Mueller Bill Has Votes to Pass Senate*, HILL: FLOOR ACTION (Nov. 30, 2018, 9:55 AM), <https://thehill.com/blogs/floor-action/senate/419084-flake-mueller-bill-has-votes-to-pass-senate>.

124. Special Counsel Independence Protection Act, S. 1735, 115th Cong. (2017); *Booker, Graham, Coons, Tillis Introduce Merged Legislation, the Special Counsel Independence and Integrity Act*, U.S. SENATE (Apr. 11, 2018), https://www.booker.senate.gov/?p=press_release&id=769.
125. Special Counsel Integrity Act, S. 1741, 115th Cong. (2017); U.S. SENATE, *supra* note 124.
126. McCallister, *supra* note 16.
127. *Special Counsels and the Separation of Powers: Hearing on S. 1735 and S. 1741 Before the S. Comm. on the Judiciary*, 115th Cong. (2017). Although no certified transcript of the proceeding is currently available, a videotape recording of the hearing is available at <https://www.judiciary.senate.gov/meetings/special-counsels-and-the-separation-of-powers>.
128. *Special Counsels and the Separation of Powers: Hearing on S. 1735 and S. 1741 Before the S. Comm. on the Judiciary*, 115th Cong. 2, 7 (2017), <https://www.judiciary.senate.gov/imo/media/doc/09-26-17%20Duffy%20Testimony%20UPDATE.pdf> (statement of John F. Duffy, Professor, University of Virginia School of Law).
129. *Special Counsels and the Separation of Powers: Hearing on S. 1735 and S. 1741 Before the S. Comm. on the Judiciary*, 115th Cong. 9 (2017), <https://www.judiciary.senate.gov/imo/media/doc/09-26-17%20Posner%20Testimony.pdf> (statement of Eric A. Posner, Professor, University of Chicago Law School).
130. *Special Counsels and the Separation of Powers: Hearing on S. 1735 and S. 1741 Before the S. Comm. on the Judiciary*, 115th Cong. 1 (2017), <https://www.judiciary.senate.gov/imo/media/doc/09-26-17%20Amar%20Testimony.pdf> (statement of Akil Reed Amar, Professor, Yale Law School).
131. *Special Counsels and the Separation of Powers: Hearing on S. 1735 and S. 1741 Before the S. Comm. on the Judiciary*, 115th Cong. 12 (2017), <https://www.judiciary.senate.gov/imo/media/doc/09-26-17%20Vladeck%20Testimony.pdf> (statement of Stephen I. Vladeck, Professor, University of Texas School of Law).

Both bills recommend using a three-judge panel to review proposed dismissals of special counsel.¹³² Additionally, both bills use identical language regarding removal for cause.¹³³ While the proposed bills share commonalities, they are fundamentally different in certain respects.¹³⁴ First, they vary regarding who may bring a claim for improper removal and how to do it.¹³⁵ The bills differ over whether the judicial panel should be held to a deadline for rendering a decision¹³⁶ and whether Congress must be notified.¹³⁷ In addition, the bills diverge over whether any of the provisions should apply retroactively.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;¹³⁹ 2) language codifying current DOJ regulations;¹⁴⁰ 3) a clear appeal framework for special counsel who wish to challenge their removal;¹⁴¹ and 4) a strict deadline for judicial review.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;¹⁴³ and 6) elimination of any retroactive effective date provisions.¹⁴⁴ A comparative analysis of both proposed measures follows.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

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.¹⁴⁶ The Special Counsel Independence Protection Act and the Special Counsel Integrity Act both seek to codify the use of a three-judge court¹⁴⁷ to review special counsel removal actions.¹⁴⁸ Using a three-judge panel ensures that a special counsel is able to act independently—without fear of improper dismissal.¹⁴⁹ The provisions of both bills place adequate limitations on the removal of special counsel.¹⁵⁰

U.S. Code permits Congress to convene three-judge district courts when required.¹⁵¹ Challenges to these judicial decisions receive automatic appeal to the Supreme Court.¹⁵² 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.¹⁵³ Three-judge panels were also convened to appoint special prosecutors under the now-expired Ethics in Government Act.¹⁵⁴

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.¹⁵⁵ Using multiple judges, in lieu of a single judge, helps to mitigate bias and error in decision-making.¹⁵⁶ 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.¹⁵⁷ Both proposals

146. *See infra* notes 147–56.

147. 28 U.S.C. § 2284 (2012).

148. Special Counsel Independence Protection Act, S. 1735, 115th Cong. § 2(a) (2017); Special Counsel Integrity Act, S. 1741, 115th Cong. § 2(d)(2) (2017).

149. *See* Demirjian, *supra* note 16.

150. S. 1735 § 2(b); S. 1741 § 2(d)(2).

151. 28 U.S.C. § 2284.

152. 28 U.S.C. § 1253 (2012).

153. David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 1–2 (1964).

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.

165. Special Counsel Independence Protection Act, S. 1735, 115th Cong. § 2(a) (2017).

166. S. 1735 § 2(b)–(c).

167. Special Counsel Integrity Act, S. 1741, 115th Cong. § 2 (2017).

168. *Cf.* OFFICE OF PERS. MGMT., MANAGING FEDERAL EMPLOYEES’ PERFORMANCE ISSUES 1, 9–10 (2018), <https://www.opm.gov/policy-data-oversight/employee-relations/reference-materials/managing-federal-employees'-performance-issues-or-misconduct.pdf> (outlining the methods used to remove non-probationary, competitive service federal employees by the Office of Personnel Management (OPM)). Permanent,

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).

173. *See* Posner, *supra* note 129, at 2.

174. *See id.*

175. *Id.* at 2 n.7.

176. *See supra* note 168 and accompanying text.

177. *See* OFFICE OF PERS. MGMT., *Pay & Leave*, <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/administrative-leave/> (last visited Nov. 10, 2018).

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).

182. *See Special Counsels and Separation of Powers: Hearing on S. 1735 and S. 1741 Before the S. Judiciary Comm., supra* note 127 (testimony of Eric A. Posner, Professor, University of Chicago Law School).

183. *See* Vladeck, *supra* note 131, at 11.

184. *See* Special Counsel Independence Protection Act, S. 1735, 115th Cong. § 2 (2017).

185. *See* Duffy, *supra* note 128, at 5.

186. Special Counsel Integrity Act, S. 1741, 115th Cong. § 2(d)(2) (2017).

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

6. Elimination of Retroactive Provisions

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

special counsel to file an action seeking judicial review of the removal order and for the court to grant any preliminary relief that they, in the exercise of their traditional equitable discretion, are willing to provide”).

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).

196. DANIEL E. TROY, *RETROACTIVE LEGISLATION* 17 (1998).

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.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.²⁰⁰ The proposed date of May 17, 2017, corresponds with the date Investigator Mueller was appointed.²⁰¹ This bill's effective date is clearly targeted to a specific investigation.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.²⁰³

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

C. *Why a Legislative Measure Is Needed*

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

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.

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.”).

201. *See Mueller Appointment Memo*, *supra* note 121.

202. *See* Duffy, *supra* note 128, at 5.

203. *See* Entin, *supra* note 92, at 159.

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.”).

205. *Id.*

206. *Id.*

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.washingtontimes.com/news/2017/aug/15/trump-mueller-nixon-saturday-night-massacre/> (declaring that “[o]ne Saturday Night Massacre is enough!”).

208. *Contra* Amar, *supra* note 130, at 1–2 (expressing concerns over instituting such a measure).

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

209. See Posner, *supra* note 129, at 2.

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).

214. See John Hudak, *The Political Risks of Impeachment*, BROOKINGS INST. (May 23, 2017), <https://www.brookings.edu/blog/unpacked/2017/05/23/unpacked-the-political-risks-of-impeachment/>.

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.²¹⁹ Many legal experts believe that the provisions of both bills, as currently written, are narrower than the now-expired Ethics in Government Act;²²⁰ neither bill seeks to give special counsel more power than the power granted to primary officers.²²¹

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.²²² On the other hand, not enacting any legislation is just as problematic as equivocal definitions.²²³ 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.²²⁴

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.²²⁵ 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.²²⁶ 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.²²⁷

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.”).

221. *See supra* notes 30–31 and accompanying text; *cf. Morrison v. Olson*, 487 U.S. 654, 654–55 (1988) (finding that Congress vesting the appointment of independent counsel in a special office specifically stood up for that purpose does not violate the Appointments Clause).

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.²²⁸ They have conducted investigations when conflicts of interest have arisen within the DOJ,²²⁹ ensured that government leaders have not abused their positions, and prosecuted those officials who have done so.²³⁰

Independence and protection must be afforded to special counsel so that they may properly investigate the federal government, including the Executive Branch.²³¹ Presently, protective measures are not assured because DOJ regulations are not codified.²³² If a solution to this problem is not enacted, a constitutional crisis could result.²³³ 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.²³⁴

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.