"SPECIAL COUNSELS AND THE SEPARATION OF POWERS"

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Chairman Grassley, Senator Feinstein, and distinguished members of the Committee:

Thank you for inviting me to testify at this hearing on "Special Counsels and the Separation of Powers," a topic that has long been of academic interest to me, and that is, for obvious reasons, of increasing practical importance to us all. As I explain in the statement that follows, I am of the view that it is both constitutionally permissible and normatively desirable to have an office like that of the Special Counsel — a federal prosecutor with the ability to ensure that no person, no matter their connection to senior government officials, is above the law. The current Special Counsel regulations[1] go a long way toward providing this important check, and, as I explain in Part I, it is not immediately clear to me that they are insufficient to protect either the current Special Counsel or future holders of that position from termination without just cause.

That said, and given the current climate, I certainly understand the impulse to provide greater statutory protection for the Special Counsel. Part II of my testimony therefore turns to two of the pending proposals to that effect — S. 1735, the "Special Counsel Independence Protection Act,"[2] introduced by Senators Graham and Booker [the "**Graham-Booker bill**"], and S. 1741, the "Special Counsel Integrity Act,"[3] introduced by Senators Tillis and Coons [the "**Tillis-Coons bill**"]. What is especially noteworthy about both of these proposals, Part II demonstrates, is how much *less* of an intrusion into the powers of the Executive Branch they represent than the independent counsel provisions of the Ethics in Government Act of 1978,[4] which, as you know, were upheld by the Supreme Court in *Morrison* v. *Olson*.[5]

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1. 28 C.F.R. part 600 (2017).

2. S. 1735, 115th Cong., 1st Sess. (2017), https://www.congress.gov/115/bills/s1735/BILLS-115s1735is.pdf.

3. S. 1741, 115th Cong., 1st. Sess. (2017), https://www.congress.gov/115/bills/s1741/BILLS-115s1741is.pdf.

4. Pub. L. No. 95-521, §§ 601–04, 92 Stat. 1824, 1867–75 (1978) (formerly codified at 28 U.S.C. §§ 591–98).

5. 487 U.S. 654 (1988).

Most importantly, because both bills merely provide a new mechanism for judicially enforcing Part 600's removal provision, they leave control over both the appointment of the Special Counsel and the substantive scope of his investigation in the hands of the Attorney General — and therefore significantly mitigate the prospect of a runaway prosecution the likes of which Justice Scalia warned against in his *Morrison* dissent,[6] and which many believe we saw in the 1990s.[7]

This distinction is especially significant when considering the constitutional objections to the two bills, to which I turn in Part III. Because the two bills are so much more modest in their scope compared to the independent counsel statute, any Article II objections are, in my view, patently meritless so long as *Morrison* remains on the books. 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.

Somewhat more complicated are the potential Article III objections to at least one of the bills — and to the judicial review procedures they create. But as Part III concludes, small tweaks could — and would — ameliorate any concerns about satisfying Article III's case-or-controversy requirement, and would also close a handful of other (presumably unintentional) loopholes that the current drafts create. Thus, although it is ultimately up to this Committee and the Congress whether these bills should be passed, it is my informed opinion that, properly amended, their enactment would raise no constitutional problems.

I. THE SPECIAL COUNSEL AND PART 600

As this Committee knows, "Part 600," the current regulation governing the Special Counsel, was promulgated in June 1999 to coincide with the expiration of the independent counsel provisions of the

6. *See id*. at 712–14 (Scalia, J., dissenting).

7. *See* Linda Greenhouse, *Blank Check; Ethics in Government: The Price of Good Intentions*, N.Y. TIMES, Feb. 1, 1998, https://nyti.ms/2ygJDVq.

Ethics in Government Act.[8] As Professor Rick Pildes has explained, Part 600

> made extensive departures from the structure of the Independent Counsel Act. These departures were virtually all designed to move the regime in the direction of greater constraints on the special-counsel process and to put the special counsel under greater supervision from the attorney general, while still maintaining the independence of the [special counsel].[9]

In other words, Part 600 was an effort to preserve the salutary features of the independent counsel regime while eliminating its more glaring practical (and, in the view of some, constitutional) defects.

To that end, 28 C.F.R. § 600.1 defines more narrowly and precisely the cases in which appointment of a Special Counsel is appropriate, and leaves it entirely to the discretion of the Attorney General (or, in cases of recusal, the Acting Attorney General) to apply the relevant criteria — including whether (1) "criminal investigation of a person or matter is warranted"; (2) "investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department or other extraordinary circumstances"; and (3) "under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter."[10] This is a striking contrast from the independent counsel statute, under which the appointment power was vested outside the Executive Branch — in a "Special Division" of the U.S. Court of Appeals for the D.C. Circuit.[11]

In addition to the discretion it vests in the Attorney General with regard to the initial appointment of a Special Counsel, Part 600 also

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8. *See, e.g.*, Neal Katyal, *Trump or Congress Can Still Block Robert Mueller. I Know. I Wrote the Rules*, WASH. POST, May 19, 2017, http://wapo.st/2qxrSQw (summarizing the background to Part 600).

9. Rick Pildes, *Could Congress Simply Codify the DOJ Special Counsel Regulations?*, LAWFARE, Aug. 3, 2017, https://lawfareblog.com/could-congress-simply-codify-doj-special-counsel-regulations.

10. 28 C.F.R. § 600.1.

11. *See Morrison* v. *Olson*, 487 U.S. 654, 660–61 (1988).

leaves control over the scope of the investigation (if not its day-to-day operations) in the Attorney General's hands. Thus, the Attorney General is to outline the "original jurisdiction" of the investigation in his initial appointment of the Special Counsel, and must specifically approve requests for "additional jurisdiction" beyond either (1) the subject-matter specified in the initial appointment; or (2) "federal crimes committed in the course of, and with intent to interfere with, the Special Counsel's investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses."[12] The Special Counsel must also receive the Attorney General's express approval before pursuing civil or administrative action arising from the investigation.[13] Again, these reflect significant departures from the independent counsel regime, under which questions of jurisdictional scope were decided by the judges of the Special Division, not the Attorney General.[14]

Finally, and of most relevance for present purposes, § 600.7 gives the Attorney General the power to oversee the Special Counsel's activities, and provides that

> The Special Counsel may be disciplined or removed from office ***only*** by the personal action of the Attorney General. The Attorney General may remove a Special Counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies. The Attorney General shall inform the Special Counsel in writing of the specific reason for his or her removal.[15]

Thus, in marked contradistinction to the independent counsel statute, Part 600 itself contemplates no judicial role either prior to or after the removal of a Special Counsel; the removal decision belongs solely to the Attorney General. But even though this language makes it easier for the Executive Branch to remove the Special Counsel

12. 28 C.F.R. § 600.4(a), (b).

13. *Id*. § 600.4(c).

14. *See, e.g.*, 28 U.S.C. § 593(c) (1996).

15. 28 C.F.R. § 600.7(d) (emphasis added).

compared to what was true under the independent counsel statute (thereby mitigating some of the Article II objections), it also preserves meaningful protection for the Special Counsel insofar as it limits termination to the personal action of the Attorney General (or, in cases of recusal, the Acting Attorney General), and not the President — and even then, only for cause.[16]

Moreover, because it would take proper administrative action by the Attorney General to *rescind* Part 600,[17] the regulation has the effect of constraining the President's ability to directly fire the Special Counsel. (Presumably, he could fire the Attorney General and his successors for refusing to fire the Special Counsel as means to the same end, but such a move would likely provoke substantial political backlash.[18]) In other words, Part 600 splits the difference, keeping control of the Special Counsel in the Executive Branch, but, per historical practice,[19] through the Attorney General, not the President.[20]

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16. As Attorney General Reno explained when promulgating Part 600,

> Violation of Departmental policies is specifically identified as a ground that may warrant removal. The willful violation of some policies might warrant removal or other disciplinary action, and a series of negligent or careless overlooking of important policies might similarly warrant removal or other disciplinary action. Such conduct also would be encompassed within the articulated standard of misconduct or dereliction of duty.

Final Rule, 64 Fed. Reg. 37,038, 37,040 (July 9, 1999).

17. *See United States* v. *Nixon*, 418 U.S. 683, 696 (1974) ("Here, as in [*United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954)], it is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so. So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it." (footnote omitted)).

18. *See* Marty Lederman, *Why Trump Can't (Lawfully) Fire Mueller*, JUST SECURITY, June 13, 2017, https://www.justsecurity.org/42044/trump-lawfully-fire-mueller/.

19. *See, e.g.*, *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259–60 (1839) (noting the "full recognition of the principle that the power of removal was incident to the power of appointment").

20. It is possible that the Special Counsel could *already* enforce 28 C.F.R. § 600.7(d) in court, along the lines of the lawsuit that successfully challenged Solicitor General Robert Bork's termination of Watergate special prosecutor Archibald Cox. *See Nader* v.

II. THE GRAHAM-BOOKER AND TILLIS-COONS BILLS

Against that backdrop, the two proposed bills to further "protect" the Special Counsel both come across as modest mechanisms to provide for judicial enforcement of the removal language of 28 C.F.R. § 600.7(d). Taking the Graham-Booker bill first, the bill provides that a Special Counsel can only be removed "if the Attorney General files an action in the United States District Court for the District of Columbia and files 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."[21]

Such an action must be heard by a three-judge district court under 28 U.S.C. § 2284 (with its concomitant right of direct appeal to the Supreme Court),[22] and can result in the removal of the Special Counsel "only after the court has issued an order finding misconduct, dereliction of duty, incapacity, conflict of interest, or other good cause, including violation of policies of the Department of Justice."[23] Thus, the Graham-Booker bill creates an *ex ante* judicial review procedure for ensuring that any removal of the Special Counsel by the Attorney General comports with the substantive criteria already required by 28 C.F.R. § 600.7(d), as determined by a three-judge district court, rather than solely by the Attorney General.

Like the Graham-Booker bill, the Tillis-Coons bill[24] incorporates the same standard for removal, and leaves it to a three-judge district

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Bork, 366 F. Supp. 104 (D.D.C. 1973). It is possible, though, that 28 C.F.R. § 600.10 might preclude such a claim, since it provides that "[t]he regulations in this part are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law or equity, by any person or entity, in any matter, civil, criminal, or administrative." 28 C.F.R. § 600.10.

21. Special Counsel Independence Protection Act, S. 1735, 115th Cong., 1st Sess., § 2(a).

22. *Id*. § 2(b); *see also* 28 U.S.C. § 1253 (providing for direct appeals from decisions of three-judge district courts).

23. Special Counsel Independence Protection Act, § 2(c).

24. One unintentional ambiguity in the Tillis-Coons bill is whether it even applies to the appointment of Special Counsel Mueller, since the bill only covers "[a] special counsel appointed under Department of Justice regulations." Special Counsel Integrity Act, S. 1741, 115th Cong., 1st Sess., § 2(a). Although Deputy Attorney General

court (again, with an appeal as of right to the Supreme Court) to decide whether the removal standard was met.[25] Unlike the Graham-Booker bill, however, the Tillis-Coons bill would have the review take place *after* the Special Counsel had been removed, and authorizes his immediate reinstatement "[i]f a court determines that an individual was removed from a position in violation of this section."[26]

Both bills, then, bolster 28 C.F.R. § 600.7(d) by expressly authorizing judicial review of whether the Attorney General has substantively valid grounds for removing the Special Counsel. The Graham-Booker bill requires the Attorney General to initiate such review prior to removing the Special Counsel; the Tillis-Coons bill requires the Special Counsel to initiate such review after he is removed, and seek reinstatement. Whether it is constitutional for Congress to enact such measures depends upon (1) Congress's power to so limit the President's executive power under Article II; and (2) whether either approach to judicial review raises Article III concerns.

III. CONSTITUTIONAL CONCERNS

a. Article II Objections to the Special Counsel Bills

In my view, there are likely to be two different sets of Article II objections to these bills. The first set of objections will likely resemble those offered by Justice Scalia with respect to the independent counsel statute in his powerful dissent in *Morrison*, whereas the second set will focus more specifically on the concerns that arise from insulating a Special Counsel who has *already* been appointed. Let me address these in turn:

1. Although I count myself as one of the many admirers of Justice Scalia's *Morrison* dissent, there are three independent reasons why I

Rosenstein specified when he appointed Mueller that 28 C.F.R. §§ 600.4–.10 "are applicable to the Special Counsel," he did not expressly provide that the appointment itself was *pursuant* to Part 600. *See* Marty Lederman, *The Functions and Potential (but Fixable) Flaws of the "Protect Mueller" Bills*, JUST SECURITY, Aug. 7, 2017, https://www.justsecurity.org/43872/virtues-potential-flaws-protect-mueller-bills/. This ambiguity could easily be resolved, of course.

25. Special Counsel Integrity Act § 2(a), (b).

26. *Id.* § 2(d).

believe it does not call either of these bills into serious constitutional question:

First, Justice Scalia's solo dissent notwithstanding, *Morrison* is still good law; if anything, it has become deeply rooted in the Court's separation-of-powers jurisprudence.[27] Although a handful of scholars have asserted that it has become part of the "anticanon,"[28] the objections to *Morrison* on which these claims typically rely have sounded more in the *policy* imprudence of the independent counsel statute than in its (un-)constitutionality. As Professor Marty Lederman has put it, "The fact that many people came to see the Independent Counsel Act as a bad *idea* — including for some of the reasons described by Justice Scalia in his lone *Morrison* dissent — does not mean that they think it was unconstitutional."[29]

To that end, the Supreme Court has said nary a negative word about *Morrison* in each of the subsequent cases in which it has been cited, and for good reason: Even if the independent counsel statute was poorly designed, Justice Scalia's antipodean view — that Congress lacks the power to impose *any* removal restrictions on anyone serving in the Executive Branch — would prove far too much, and could have enormously deleterious consequences for the separation of powers.

Second, even if there was more of a consensus for the proposition that *Morrison* should be overruled, it is not at all clear to me that five of the current Justices would agree. For instance, Justice Kennedy has long maintained that a balancing approach, rather than formalism like that which characterizes Justice Scalia's *Morrison* dissent, is appropriate in cases in which "the power at issue was not explicitly assigned by the text of the Constitution to be within the sole province of the President, but rather was thought to be encompassed within the

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27. Not only is *Morrison* routinely cited as good law, *see, e.g.*, *Free Enterprise Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), but no Justice — including Justice Scalia — has ever suggested that the Court should consider overruling it.

28. *See, e.g.*, Adrian Vermeule, *Morrison v. Olson is Bad Law*, LAWFARE, June 9, 2017, https://www.lawfareblog.com/morrison-v-olson-bad-law.

29. Lederman, *supra* note 24.

general grant to the President of the 'executive Power.'"[30] And as an example of when this approach is called for, Justice Kennedy cited the President's power to remove Executive Branch officers — and *Morrison* itself.[31] In addition to Justice Kennedy, I also think it unlikely that there are any votes to overrule *Morrison* among the dissenters in the *PCAOB*[32] case.

Third, and most importantly, even if there were five votes among the current Justices to overrule *Morrison*, I do not believe that the special counsel bills would provide an appropriate vehicle for doing so, given how much less of an intrusion they represent into the prerogatives of the Executive Branch. After all, and unlike the independent counsel under the Ethics in Government Act, the Special Counsel is not subject to an inter-branch appointment; the scope of the Special Counsel's investigative jurisdiction is entirely within the control of the Attorney General; and the Attorney General retains the power to oversee the Special Counsel's investigation — as provided by the Executive Branch's own regulation, rather than congressional mandate.

Critically for present purposes, these are more than just *factual* distinctions; they go to the heart of Justice Scalia's objections to the independent counsel statute in *Morrison*. Moreover, although the majority and the dissent in *Morrison* disagreed as to whether the independent counsel was an "inferior" Executive Branch officer, the argument that the Special Counsel is an inferior officer who can be subject to "good cause" removal protection is even stronger than it was in *Morrison*, given the far greater limits on his duties and jurisdiction under Part 600. Simply put, the two bills represent far less of an intrusion into executive power than the independent counsel statute did, and would therefore provide poor vehicles for revisiting *Morrison*.

2. A more specific objection to these bills could arise from the fact that, in both cases, they would be insulating a Special Counsel who has already been appointed — and could therefore arguably be portrayed as

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30. *Pub. Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 484 (1989) (Kennedy, J., concurring in the judgment).

31. *Id.*

32. *Free Enterprise Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 514 (2010) (Breyer, J., dissenting).

shifting the terrain underneath the feet of the Executive Branch. I must confess, however, that I don't see how this would give rise to a *constitutional* objection. Indeed, I am unfamiliar with any other context in which a statute raised constitutional concerns merely by codifying (and providing for judicial review of) an administrative standard already adopted and enforced by the Executive Branch. If the bills were focused *solely* on protecting Special Counsel Mueller, it might be a different matter. But both bills are written in general terms, and would apply on their terms to all current and future Special Counsels. In such circumstances, I am hard-pressed to see how their enactment would violate Article II.[33]

b. Article III Objections to the Special Counsel Bills

Another possible line of attack on the two proposals (especially the Graham-Booker bill) is that they contemplate judicial proceedings that fail to satisfy Article III's case-or-controversy requirement. Although I agree that, in one very modest respect, the Graham-Booker bill raises a potential Article III problem, that problem can easily be fixed.

Recall from above that the Graham-Booker bill requires the Attorney General to file an action before a three-judge D.C. federal district court prior to seeking the removal of a Special Counsel, but fails to specify against whom the action would be filed. By itself, there is no inherent Article III problem with pre-termination judicial review; indeed, the Supreme Court has repeatedly identified contexts in which the Due Process Clause *requires* a hearing before tenured employees can be removed from office, recognizing the (obvious) principle that, in such cases, irreparable harm justifies pre-termination (as opposed to

33. In the Article III context, the Supreme Court has held that the Constitution distinguishes between statutes that amend the law applicable to a specific, pending case (which do not unconstitutionally infringe upon the judicial power) and those that direct courts to reach a specific outcome *without* changing the applicable law (which do). *See, e.g.*, *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1324–28 (2016). Even if that principle could be mapped onto Article II (and I am unaware of any judicial decision suggesting as much), the bills under consideration seem more analogous to the former exercise of power than the latter, all the more so if the Special Counsel could *already* bring an action to enforce § 600.7(d) under existing law. *See, e.g.*, *Nader* v. *Bork*, 366 F. Supp. 104 (D.D.C. 1973); *see also supra* note 20.

post-termination) review.[34] To similar effect, the Declaratory Judgment Act[35] has long been understood to similarly authorize certain types of pre-enforcement challenges to government action, so long as the plaintiff has standing and the claim is "ripe."[36] Thus, authorizing pre-removal adjudication of whether the Attorney General has cause to remove the Special Counsel is not inconsistent with Article III per se.

That said, one objection to the current formulation of the Graham-Booker bill may be the lack of an adverse party, since it is not clear who the Attorney General is suing — or, indeed, what "injury" he would be seeking to redress.[37] In my view, though, this could be solved simply by tweaking the bill to have the Attorney General provide notice to the Special Counsel stipulating that he intends to remove the Special Counsel under 28 C.F.R. § 600.7(d), and identifying the basis for removal. The bill could *then* authorize the Special Counsel to sue the Attorney General to prevent his removal (if he disputes the grounds articulated in the notice), and otherwise provide that the removal becomes effective some short period of time after the notice is received, in case the Special Counsel chooses not to object. In such circumstances, a Special Counsel who challenges his removal in court would surely have standing; the notice from the Attorney General would satisfy any possible ripeness concerns; and the dispute would have all of the other hallmarks of an adverse Article III case or controversy.

The Tillis-Coons bill avoids these (fixable) concerns, since the review it provides is explicitly *ex post* — with the Special Counsel authorized to challenge his removal, and seek reinstatement, after the fact.[38] The harder question raised by the Tillis-Coons bill is practical;

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34. *See, e.g.*, *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532 (1985).

35. 28 U.S.C. § 2201 (2016).

36. *See, e.g.*, *Abbott Labs.* v. *Gardner*, 387 U.S. 136 (1967).

37. This objection is not necessarily fatal; Article III recognizes at least some contexts in which *ex parte* applications, especially from the government for authorization of coercive action, do not run afoul of the case-or-controversy requirement. *See generally* James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346 (2015).

38. I agree with Professor Lederman, though, that the Tillis-Coons bill can — and should — be modified to clarify that it applies to Special Counsel Mueller. *See* Lederman, *supra* note 24.

while the Special Counsel is pursuing his reinstatement, what happens to the investigation and to the (putatively vacant) position of Special Counsel? Who takes over the investigation, and what powers do they have to alter its direction and scope? One possible response is to tweak the bill to preclude the Attorney General from appointing a new Special Counsel until any litigation under the bill has concluded, but that would still leave difficult questions about the status of the investigation while the legal challenge is pending.

IV. CONCLUSION

At the end of her dissent in the D.C. Circuit in *Morrison*, then-Circuit Judge Ruth Bader Ginsburg described the independent counsel statute as "a measure faithful to the eighteenth century blueprint, yet fitting for our time."[39] Reasonable minds can disagree about whether that conclusion came to be belied by the events that followed, but it seems no less (and perhaps far more) apt as applied to Part 600. Cementing the Special Counsel's ability to enforce in court the removal limitations in 28 C.F.R. § 600.7(d) is a remarkably modest — and, in my view, appropriate — means of giving Part 600 additional force, of thereby insulating the Special Counsel from improper removal by the Attorney General, and of better ensuring that ours is "a government of laws and not of men."[40]

Thank you again for the invitation to testify today. I look forward to your questions.

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39. *In re Sealed Case*, 838 F.2d 476, 536 (D.C. Cir. 1988) (Ginsburg, J., dissenting), *rev'd sub nom. Morrison* v. *Olson*, 487 U.S. 654 (1988).

40. *Morrison*, 487 U.S. at 697 (Scalia, J., dissenting) (quoting MASS. CONST. art. XXX (1780)) .