Answers to Questions for the Record from Senators Grassley, Whitehouse, and Coons
Senate Judiciary Committee
Hearing on Special Counsels and the Separation of Powers
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Questions from Senator Grassley

1. S. 1735 requires the Attorney General to file an action seeking a judicial finding on whether a good reason exists to remove the special counsel before the Attorney General may remove the special counsel. In your opinion, does S. 1735's requirement that a three-judge panel give permission for the performance of a discretionary executive act like removal make the judiciary a participant in the exercise of executive power? If so, are there Constitutional concerns about this approach?

Answer. While the requirement that the attorney general seek judicial approval before removal is unusual, I do not see any constitutional problem with this approach. In the normal case, an officer protected by a for-cause provision may be removed without prior judicial approval but then can challenge the removal in court, and be reinstated if the removal was unlawful. The court's power to order reinstatement does not raise any constitutional concerns. The court does not participate in the exercise of, or in any way infringe on, executive power by ordering reinstatement. It simply issues a binding interpretation of the law and facts, as courts always do when called upon to adjudicate disputes. The executive branch is obliged to comply with judicial orders under our system of separation of powers. Note also that a similar provision in the independent counsel law was approved by the Supreme Court in Morrison v. Olson.

The requirement of prior judicial approval in S. 1735 does not raise any additional constitutional issues. The only difference between the normal approach and S. 1735 concerns the period of time between when the attorney general resolves to remove the official and when the court determines whether cause exists. Under the normal approach, the official must step down during this period; under S. 1735, the official remains in office during this period. Because under the normal approach, the official could seek a preliminary injunction almost immediately after being removed, enabling the court to intervene within days, the practical difference between these approach is minimal.

2. Under S. 1741, a three-judge panel can order the reinstatement of a special counsel if it decides that the special counsel was not fired for cause. What are the practical and constitutional concerns about permitting the judiciary to order reinstatement of a special counsel that the executive branch has determined is no longer effective?

Answer. It is settled law that the judiciary can order the reinstatement of executive-branch officers who have been terminated in violation of the law, including a for-cause provision. Many executive-branch officers have for-cause protections, as do the top officials in independent agencies like the Federal Communications Commission. While these protections reduce the president's power to control law enforcement in the executive branch, they also protect independent institutions from political interference and minimize the risk that the president will abuse his authority.

There may be some practical concerns. If a court orders reinstatement of a special counsel who the executive branch believes is no longer effective, it is possible, under existing law, for the attorney general (or, if the attorney general is recused, his deputy or other subordinate) to deny a budget to the special counsel and engage in other actions that prevent the special counsel from conducting his investigation. However, if the attorney general were to do so, Congress could respond by appropriating money for the special counsel, in which case the executive branch would be required to fund his investigation. Conflicts of this sort between Congress and the executive branch have occurred before, and are typically resolved through negotiation and compromise.

3. In *Weis v. United States*, the Supreme Court expressed its concern that by adding new duties to an existing office, Congress might unlawfully circumvent the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office. In your opinion, would changing the removal requirements of the special counsel, as both S. 1735 and S. 1741 does, create a new office in which the incumbent may not serve without a new appointment?

Answer. No. The bills would leave the duties and obligations of the office unchanged. Moreover, if the bills really changed the nature of the office, so that the existing officeholder was no longer suited for it, then the president would have good cause to remove him. Because the president could remove the officeholder, he would have no grounds for constitutional complaint.

The Court in Weiss v. United States observed that if "Congress was trying to both create an office and also select a particular individual to fill the office," it would be in violation of the Appointments Clause. But in our case, the office already exists and Congress is merely enhancing the occupant's protection from removal. (Indeed, because the special counsel already enjoys for-cause protection under Justice Department regulations, the effect of the bill would not be to change the terms of his office but to preserve those terms from change by further regulation.) If a contrary view were taken, then whenever Congress modified the powers, rights, or obligations of officeholders—by, for example, modifying the compensation package or creating reporting requirements for officials in the executive branch—it would be necessary for the president to replace all the officeholders. That has never been the law.

Questions From Senator Whitehouse

1) Is it unlawful, in your view, for the president to order an official to do something illegal? If so, is there a legal remedy for the violation?

Answer. As a general principle, a person who orders an agent to violate the law also violates the law. For example, an employer who orders an employee to steal from customers is guilty of theft just as the employee is. This legal principle applies to the president as well. When President Reagan was accused of violating the law in the Iran-Contra scandal, he did not try to defend himself by saying that actually his subordinates broke the law and because he only ordered them to do so, he is innocent. No one would have taken such an argument seriously. Instead, the president denied that he had issued the orders.

There is a legal remedy for the violation. Most commentators believe that the president may be prosecuted for crimes or sanctioned for other illegal acts he committed in office after he leaves office. After he left office, President Clinton was sanctioned by a court for contempt after it found that he had perjured himself in a civil lawsuit that took place while he was in office. There is controversy whether the president could also be prosecuted while still in office. The executive branch has taken the position that he cannot be, but a court has never addressed this question.

2) There is an ongoing debate over the role of grand juries in relation to prosecutors. Some argue that the grand jury is an instrument of the prosecutor while others argue the reverse position. Given this debate, how does a prosecutor serving in the role of servant to a grand jury implicate questions of separation of powers?

Answer. The separation of powers is a bit of a misnomer in the American system where the powers—executive, legislative, and judicial—are actually distributed among the branches. For example, the president is the executive but exercises legislative power through his veto. Congress' power to declare war is an executive power, while the House acts as an executive body and the Senate acts as a judicial body in impeachment proceedings. The president and the Senate share the treatymaking authority, which is probably best regarded as an executive power. The vice president is an officer in the executive branch yet presides over the Senate and may cast tie-breaking votes. Since the Constitution recognizes the power of grand juries, they are lawful bodies, regardless of how one understands their relationship to prosecutors. But the existence of the grand jury reinforces the point, which I made in my testimony, that the president does not have "complete control" of law enforcement, as claimed by Justice Scalia in his dissent in Morrison v. Olson. The grand jury exercises executive power outside the president's control (in the same way that the petit jury exercises judicial power outside a federal judge's control).

3) Section Four of the 25th Amendment states, "Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President." If the vice president and a majority of the principal officers of the executive departments have the power to remove all executive powers from the president, would it be logical to presume that a similar body consisting of the same members could remove from the President a lesser power—in this case, the power to terminate

a special counsel? Is this lesser power subsumed by the greater power laid out in the 25th Amendment to remove all executive powers from the president? Finally, would we run less constitutional risk were we to pass legislation protecting the special counsel that avoided the judiciary branch entirely and instead established a panel analogous to that referenced in the 25th Amendment to sign off on any special counsel termination?

Answer. Such legislation would face serious constitutional challenges. Under the 25th Amendment, the council can strip the president of authority only upon a finding that he is "unable" to discharge his powers. Thus, if the council could strip the president only of some of his authority—such as his authority to remove a special counsel—it can do so only after such a finding. I find it hard to imagine a situation where the council could determine in good faith that the president is "unable" to discharge his power to remove a special counsel but is able to discharge his other powers. Moreover, the 25th Amendment speaks in all-or-nothing terms: either the president is unable to discharge his powers (and the vice president takes over) or he is able (and the vice president does not take over). It does not leave room for the hybrid solution suggested in the question. Finally, if we were to follow the logic of this question literally, it would suggest in the case you imagine that the vice president would assume the power to remove the special counsel while the president would retain his other powers. This does not seem possible under a reasonable interpretation of the amendment, which contemplates the vice president taking over all, rather than some, of the president's duties.

The answer to your final question depends on the nature of the panel. If panel members were drawn from Congress, the arrangement would be unconstitutional. If they were drawn from the executive branch, I believe the arrangement would be permissible as long as the special counsel is an inferior officer (as I believe him to be).

Questions From Senator Coons

1. The Special Counsel Integrity Act codifies the good-cause removal provision contained in 28 C.F.R. § 600.7(d), which was already in place when Special Counsel Robert Mueller was hired. Professor Vladeck noted in his testimony that Special Counsel Mueller has legal recourse for a removal accomplished without good cause based on this regulation. In view of these issues and current jurisprudence, do you believe the effective date contained in the Special Counsel Integrity Act is constitutional? Why or why not?

Answer. The effective date, May 17, 2017, renders the Act retroactive in the sense that it applies to the existing special counsel, Robert Mueller, who was appointed on that date. I do not see any constitutional objection to this provision. As I explain in my response to Senator Grassley's QFR #3, above, the retroactive effect of the law does not violate the Appointments Clause because the additional protection from removal does not change the nature of the office. Nor does it violate other provisions of the Constitution such as the due process clause, which is typically implicated (if at all) when legislation deprives a person of an existing property or personal right, as the president does not have a property or personal right in the power to appoint.

Professor Duffy noted in his testimony that the retroactive grant of tenure protection resembles the Tenure of Office of Act of 1867, which the Supreme Court later stated was unconstitutional in Myers v. United States (1926). However, that dictum was limited to principal officers appointed with the advice and consent of the Senate, and did not address the issue of retroactivity, as Professor Duffy observed. The Office of Legal Counsel confronted retroactivity in an opinion issued in 1996, where it stated that "lengthening the term of an officer who may be removed only for cause would be constitutionally questionable." 20 Op. O.L.C. 124, 154-55 (1996). However, the OLC also acknowledged that its view has been uniformly rejected by the courts. See In re Benny, 812 F.2d 1133 (9th Cir. 1987); In re Investment Bankers, Inc., 4 F.3d 1556, 1562 (10th Cir. 1993) (collecting cases). Congress's constitutional power to create inferior offices encompasses the power to revise them when necessary for the public interest. It would be a waste of time and resources to require all affected offices to be emptied of their occupants and filled with new appointments every time this happened.

2. During the hearing, Senator Lee expressed concern that "[w]hen you consolidate in the same person, or group of people, the power to make and enforce laws, it inevitably ends in tyranny." Does the Special Counsel Integrity Act give Congress any new role in enforcement of the laws?

Answer. No, it does not. While the Supreme Court has struck down statutes that require congressional involvement in removal of executive-branch officers, it has not objected to for-cause protection. I believe that Senator Lee's concern was not shared by the framers, who did not keep the different type of powers separate in a literal fashion. For example, they gave the president some legislative power (the veto), and Congress some executive power (in the Senate's role in appointments, for example). Finally, many modern administrative agencies possess the power to make and enforce laws. I do not think it fair to say that those agencies are tyrannical, and in any event they are a settled feature of the constitutional landscape, having survived multiple challenges in the courts.

3. Your written testimony states that "[t]he founders never believed that the president should be given 'complete control' over law enforcement," and Senator Lee expressed concern that "bad things happen when we depart from the three-branch structure of the federal government."
   a. What are some examples that support your testimony that the founders did not believe in giving the President complete control of law enforcement?
   b. Do you believe that passing the Special Counsel Integrity Act would be a departure from the three-branch structure of the federal government? Why or why not?

Answer to question a. "Complete control of law enforcement" implies control over every aspect of law enforcement. But the founders did not give the president the power to choose his subordinates. They required him to share that power with the Senate. The founders did not give the president the power to determine the necessary offices and positions within law enforcement. They gave Congress the power to define offices. The founders also did not give the president budgetary control over law enforcement; that power, too, went to Congress. The Constitution recognizes the grand jury, which has executive power yet is not under the control of the president. Finally, in the era of the founding, much of federal law enforcement was undertaken by state officers who were not under the control of the president, and even private citizens. If the

founders believed that the president should have complete control of law enforcement, then surely they would have said something about these practices—either prohibiting them or commenting on their anomalous nature.

Answer to question b. While the federal government is divided into three branches, the branches share power. The founders deliberately provided for this sharing of power in order to give each branch a method for checking the others. The answer to question a. provides some examples of power-sharing. Thus, for example, the Senate can "check" a president inclined to abuse his executive power by refusing to confirm the president's nominees to law enforcement positions. Similarly, Congress is permitted to check a president inclined to abuse his executive power by putting limits on his power to remove subordinates who refuse to act illegally or who are charged with investigating the executive branch.