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

Dear Mr. Chairman:

Thank you again for the invitation to testify before the Committee at its September 26, 2017 hearing on "Special Counsels and the Separation of Powers." Below, please find my written responses to the Questions for the Record that I received on October 3, 2017, from you, Senator Whitehouse, and Senator Coons. Needless to say, if any of my answers warrant further elaboration, or if I can be of any additional assistance to the Committee, I hope you will not hesitate to let me know.

Sincerely yours,

Stephen I. Vladeck

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?"

As I observed in both my written and oral testimony at the hearing, it is my view that S. 1735 should be amended such that the Attorney General would notify the Special Counsel of his intent to remove the Special Counsel, at which point the Special Counsel would be authorized to initiate a judicial proceeding if he disagreed with the Attorney General's proffered termination grounds. In that circumstance, as so amended, I do not believe that S. 1735 would make the judiciary a participant in the exercise of executive power, or

raise any unique constitutional concerns in comparison to the other proposals.

That said, if Congress has the constitutional authority to so constrain the Executive Branch in the first place, I do not believe that it would present unique constitutional concerns if the factual or legal predicates for operation of that constraint had to be resolved by a judge *ex ante*. Indeed, shortly after the Founding, Congress in section 2 of the Calling Forth Act of 1792, required the President to obtain a judicial declaration prior to calling out the militia "to suppress [unlawful] combinations, and to cause the laws to be duly executed."[1] And during the Whiskey Rebellion, President Washington did exactly that—obtaining a certificate from Supreme Court Justice James Wilson (as Circuit Justice for the predecessor to the Third Circuit) that circumstances necessitated a calling forth of the militia to put down the uprising.[2] If the Second Congress, the first President, and one of the first Justices (himself a participant in the Constitutional Convention) all thought the Constitution tolerated such a procedure in the context of an emergency on that scale, it is difficult to fathom how the procedure contemplated by the current draft of S. 1735 would be any more problematic.

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?"

At the outset, it is worth clarifying that 28 C.F.R. § 600.7(d) does not allow for the removal of a Special Counsel on grounds of "ineffectiveness."[3] In any event, if the Executive Branch determines that it has cause sufficient to satisfy § 600.7(d) and a court disagrees, then the Executive Branch is bound by the court's interpretation of the federal regulation.[4] In those circumstances, I do not see why the Constitution would be any more troubled by a judicial reinstatement order than in circumstances in which employees have unlawfully been removed from positions—in which courts have long held that reinstatement can be an appropriate statutory or equitable remedy.[5]

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1. Calling Forth Act of 1792, ch. 28, § 2, 1 Stat. 264, 264 (repealed 1795).

2. *See* Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 161 (2004).

3. *See* 28 C.F.R. § 600.7(d) ("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.").

4. *See, e.g.*, United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 265–67 (1954).

5. *See, e.g.*, Petty v. Metro. Gov't of Nashville & Davidson County, 687 F.3d 710 (6th Cir. 2012); Webb v. District of Columbia, 146 F.3d 964, 976 (D.C. Cir. 1998).

There may very well be practical concerns about having the Special Counsel reinstated after his wrongful removal, but as I suggested in my testimony, my own view is that those concerns run more directly to the progress of the underlying investigation in the interim—and not what would happen upon the Special Counsel's reinstatement. This is why, as I testified, I prefer S. 1735—and *ex ante* review of the termination decision.

Finally, to underscore a point that came up in my colloquy with Senator Lee during the hearing, the grounds for removal in § 600.7(d) are quite broad. Thus, if we truly had a case in which the final ruling of the Article III courts was that the Executive Branch had not even satisfied the capacious removal grounds provided in § 600.7(d), it would be far more troubling, in my view, if the Special Counsel were nevertheless ***precluded*** from resuming his duties.

3) "In *Weiss* 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?"

The issue in *Weiss* was whether an already-appointed military officer required a second appointment before he could serve as a military judge on his service-branch Court of Criminal Appeals (CCA). Writing for a unanimous Court, Chief Justice Rehnquist answered that question in the negative, at least in part on the ground that Congress *could* provide for the *assignment* (rather than the appointment) of a military officer to a CCA despite the new duties of the latter position.[6] To that end, he quoted the Supreme Court's earlier decision in *Shoemaker* v. *United States* to the effect that "It cannot be doubted, and it has frequently been the case, that congress may increase the power and duties of an existing office ***without*** thereby rendering it necessary that the incumbent should be again nominated and appointed."[7]

The test the Court devised in *Shoemaker* (and which the Court applied in *Weiss*) was whether the new duties were "germane" to the purposes of the original appointment. If so, then Congress had not in fact created a "new office," and so no second appointment was required. Given that neither S. 1735 nor S. 1741 in any way ***change*** the duties of the Special Counsel (they simply provide an additional mechanism for enforcing § 600.7(d)), it seems beyond peradventure that both would survive a *Shoemaker*/*Weiss* "germaneness" challenge.

6. 510 U.S. 163 (1994).

7. *Id.* at 174 (quoting Shoemaker v. United States, 147 U.S. 282, 300–01 (1893) (emphasis added)).

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?"

Under 18 U.S.C. § 2, anyone who "commits an offense against the United States or aids, abets, counsels, ***commands***, induces or procures its commission," or who "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States," "is punishable as a principal."[8] Thus, I am of the view that, if the President commands an individual to commit an "offense against the United States," and the offense is completed to a sufficient degree to trigger liability, then yes, the President would be in violation of § 2. As for the remedy, this question dovetails with the broader debate over whether the Constitution authorizes the criminal indictment of a sitting President—a question that has divided constitutional law scholars for decades.

As I testified at the hearing, I am of the view that the substantive answer to this question is entirely academic, because the President has the practical means to forestall his prosecution through his supervisory power over the Department of Justice. Thus, as is true with regard to most abuses of presidential power, the true "legal" remedy is in fact the political remedy provided for by the Constitution—that of impeachment. I do not think it would be a reach to conclude that a violation of 18 U.S.C. § 2 would be the kind of "high crime or misdemeanor" that would, in appropriate circumstances, justify the impeachment of a sitting President.

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?"

In its en banc decision in *Cox* v. *United States*, the Fifth Circuit dealt quite elegantly (in my view, at least) with the tension to which this question alludes.[9] Both the prosecutor *and* the grand jury play vital roles in our constitutional system, and each serves as a check on the other. This is why the majority of the en banc court in *Cox* held that a prosecutor must have discretion to refuse to sign an indictment issued by a grand jury—and why, in reverse, a prosecution of a serious crime may not proceed without a grand jury indictment. So construed, I do not believe that a prosecutor's service to and before a grand jury raises serious separation of powers concerns; if anything, it bolsters the separation of powers for the reasons outlined in *Cox*.

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8. 18 U.S.C. § 2.

9. Cox v. United States, 342 F.3d 167 (5th Cir. 1965) (en banc).

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?"

Because the Twenty-Fifth Amendment in general, and Section Four in particular, are such radical departures from the established procedures set forth in the Constitution, I'm more than a little reluctant to believe that a "greater power includes the lesser power" argument would be sustained in this context. After all, and in contrast to, e.g., the Thirteenth, Fourteenth, and Fifteenth Amendments, the Twenty-Fifth Amendment confers no new regulatory power upon Congress, and I have to think that the distinction there would be invoked—and quite possibly sustained—as material.

In any event, it seems to me that, so long as *Morrison* v. *Olson* remains on the books (and is, per my testimony, still good law), it is wholly unnecessary to pursue such a novel (and contestable) approach to Congress's power over the removal of inferior Executive Branch officers.

As for the idea of a "Twenty-Fifth Amendment panel" to sign off on termination decisions, I don't think this would be especially useful as a practical matter, for presumably whoever is adversely affected by the panel's ruling would still seek to repair to the courts for an authoritative resolution of the question. And although there are some disputes the resolution of which the *Constitution* commits to other branches, I am unaware of any authority for the proposition that *Congress* can cut off judicial review in such contexts without triggering its own array of difficult constitutional questions—especially in contexts in which a claim of constitutional right or privilege is asserted. In short, I do not believe that the Twenty-Fifth Amendment can or should be read capaciously to authorize entities or procedures beyond its text,

all the more so when existing statutes, doctrine, and understandings provide a far clearer path to the same policy outcome.

QUESTIONS FROM SENATOR COONS:

1) "During the hearing, Professor Posner asserted that the Supreme Court's decision in *Morrison* v. *Olson*, 487 U.S. 654 (1988), may strengthen the executive branch by 'enhancing its credibility,' and to the extent it weakens the executive branch, that modest weakening was constitutional and indeed justified by the important goal of preventing the President from breaking the law with impunity. In your view, does the same hold true for the Special Counsel Integrity Act?"

Yes. If anything, because of the numerous ways in which the Special Counsel Integrity Act are less intrusive than the Ethics in Government Act, it seems to me that the benefit-to-burden ratio is even higher in this context than it was in the context of the provisions upheld in *Morrison*.

2) "In his written testimony, Professor Amar states that "[t]he lion's share of the constitutional law scholars who are most expert and most surefooted on this particular topic now believe that Morrison was wrongly decided and/or that the case is no longer 'good law' . . . ." Do you agree with that assessment?"

Given that Professor Amar's statement includes an unspecific quantitative identifier and two subjective qualifiers, I'm not sure it is possible to squarely agree or disagree with that assessment without squarely agreeing or disagreeing with list of scholars Professor Amar has in mind. Surely, Professor Amar himself tops any list of those who are most expert and surefooted on this topic, and his views are clear. That said, as I noted in my written testimony and during our colloquy at the hearing, I believe that at least some of the specific examples Professor Amar invoked are, in fact, scholars who think the independent counsel statute was *bad policy*, and not necessarily that *Morrison* is no longer good law. I count myself as one of them.

To take a more prominent example, Professor Amar points to Justice Kagan, and favorable remarks she gave about Justice Scalia's *Morrison* dissent as part of a 2015 speech. In fact, in her well-known 2001 *Harvard Law Review* article, "Presidential Administration," then-Professor Kagan referred to *Morrison* as "[a]ccepted constitutional doctrine," and then devoted a number of pages to an express rejection of the unitary executive theory animating Justice Scalia's dissent.

> [A]lthough I am highly sympathetic to the view that the President should have broad control over administrative activity, I believe, for reasons I can only sketch here, that the unitarians have failed to establish their claim for plenary control as a matter of constitutional mandate. The original meaning of Article II is insufficiently precise and, in this area of staggering change, also insufficiently relevant to support the unitarian position. And the constitutional values sometimes offered in defense of this claim are too diffuse, too diverse, and for these reasons, too easily manipulable to justify removing from the democratic process all decisions about the relationship between the President and administration—especially given that this result would reverse decades' worth of established law and invalidate the defining features of numerous and entrenched institutions of government.[10]

I suspect this exercise could be repeated for many of those whom Professor Amar was referring to in the comment cited above, but hope this examples suffices to prove the point: Lots of us, myself included, think that both (1) the independent counsel statute was poorly crafted; and (2) Justice Scalia's *Morrison* dissent was among his finer opinions. That doesn't get us to the conclusion either that *Morrison* was wrongly decided or that the current bills raise serious constitutional problems.

3) "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?"

I share Senator Lee's fondness for *Federalist* No. 47,[11] but fail to see its relevance to this conversation. As was true of the independent counsel statute in *Morrison*, neither of the bills at issue here arrogate to Congress any of the powers of the other branches. Not only is Congress not making the relevant laws (the proposed bills codify the substantive standards proposed by the Justice Department in 1999), but it is not enforcing them, either (the Special Counsel is appointed by the Attorney General). Thus, I do not believe that the Special Counsel Integrity Act gives Congress any new role in the enforcement of the relevant federal laws.

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10. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2325–26 (2001).

11. THE FEDERALIST NO. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny.").

4) "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. You noted in your 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?"

I believe Special Counsel Mueller *may* be able to challenge his termination without good cause in court under the existing regulations, relying on *Nader* v. *Bork*.[12] As I suggested in my testimony, the viability of this option may depend upon how courts interpret 28 C.F.R. § 600.10.[13]

But even if Special Counsel Mueller would not have judicial recourse to challenge his removal under existing law, I am not convinced that the effective date provision of the Special Counsel Integrity Act raises constitutional concerns. As I noted in my response to a question from Chairman Grassley, above, the Supreme Court has expressly *blessed* Congress's power to add additional duties to an existing office without requiring a second appointment, so long as (1) the officer in question is an inferior Executive Branch officer; and (2) the additional duties are germane to that officer's original appointment.[14] That Special Counsel Mueller is an inferior Executive Branch officer follows, in my view, directly from *Morrison*. And that the additional duties created by the bill are germane to the original appointment is, frankly, self-evident. I therefore have a hard time understanding how existing interpretations of the Appointments Clause—or Article II more generally—would prevent Congress from applying the rest of the Special Counsel Integrity Act to a Special Counsel who is already in office.

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12. 366 F. Supp. 104 (D.D.C. 1973).

13. 28 C.F.R. § 600.10 ("The 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.").

14. *See* Weiss v. United States, 510 U.S. 163 (1994).