



Issue Brief

June 2018

The Special Counsel, *Morrison v. Olson*, and the Dangerous Implications of the Unitary Executive Theory

Victoria Nourse

Only in an authoritarian regime is the President above the law. History tells us that those who support such regimes share this disdain for our legal system. Recently, Congress debated a proposal to prevent President Trump from putting himself above the law by firing Special Counsel Mueller. During debate on the bipartisan Special Counsel Independence and Integrity Act (“the Integrity Act”)¹, some senators argued that Congress had no power to limit a President from firing his own prosecutor, despite binding Supreme Court precedent to the contrary in a lopsided 7-1 decision in a case called *Morrison v. Olson*. Shockingly, those senators supporting the President’s absolute power to dismiss Mueller declared themselves bound by the case’s *dissent, yes, a dissent*.

Congress has the power to pass the Integrity Act and prevent the President from acting contrary to the law. In *Morrison*, Chief Justice Rehnquist writing for himself and six other justices affirmed Congress’s power to limit the President from firing an independent counsel without cause.² As will be explained below, *Morrison* thus validates the constitutionality of the bipartisan Integrity Act. The lone dissenter in *Morrison* was the late Justice Antonin Scalia. Cloaking themselves in Scalia’s lonely and incorrect dissenting opinion, senators opposing the Integrity Act are attempting to upend the Constitution by embracing a dangerous constitutional argument contrived to render the President immune from scrutiny. One senator stated that “most” believe that *Morrison* is incorrect³ and that there is “widespread” agreement that Scalia’s *Morrison* dissent should control.⁴ Another senator even said he was “bound” by Scalia’s dissent.⁵

This disdain for established law is absurd: senators take an oath of office to uphold the Constitution not to uphold the views of a single dissenting Justice. Despite widespread liberal

¹S. 2644, 115th Cong. (2d Sess. 2018). The legislation was introduced by a bipartisan coalition led by Senator Graham (R-NC), Senator Tillis (R-NC), Senator Coons (D-Del), and Senator Booker (D-NJ).

²*Morrison v. Olson*, 487 U.S. 654 (1988) (voting with Chief Justice Rehnquist were Justice O’Connor, Justice White, Justice Blackmun, Justice Stevens, Justice Brennan, Justice Marshall; Justice Kennedy took no part in the case).

³Hearing on Judicial Nominations Before the S. Comm. on the Judiciary, 115th Cong. (Apr. 26, 2018), recorded on C-SPAN; *id.* (statement of Sen. Lee) (stating that “most lawyers” do not believe that *Morrison* is “good law”).

⁴*Id.* (statement of Sen. Hatch) (stating that there is “widespread agreement” that Scalia’s dissent was right); *id.* (statement of Sen. Cornyn) (stating that the separation of powers as provided by Justice Scalia renders a good cause limitation unconstitutional).

⁵*Id.* (statement of Sen. Sasse) (urging that Scalia’s *Morrison* dissent is binding).

criticism of controversial decisions such as *District of Columbia v. Heller* or *Citizens United v. FEC*,⁶ no one claims that Supreme Court dissents are binding law. More importantly, as we will see, the embrace of this particular dissenting opinion is especially troubling. Justice Scalia's *Morrison* dissent embraces a radical theory of Presidential power suggesting to Presidents that they *are* above the law.

This Issue Brief first addresses the background that led to the Integrity Act and its strange lawless opposition. It goes on to consider constitutionally permissible limits on the President's powers. It demonstrates that *Morrison* is good law and Congress may limit the President's power to remove the Special Counsel so that the President complies with law. The Issue Brief goes on to debunk the "unitary executive" theory announced in the *Morrison* dissent as embracing a radical theory of the President's power inconsistent with the Constitution's text. It then considers the related critique that the Special Counsel must be named by the President and confirmed by the Senate under the Appointments Clause.

I. Background to the Special Counsel and the Proposed Integrity Legislation

After revelations of Russian interference in the 2016 presidential elections and following statements that President Trump fired FBI Director James Comey because of "this Russia thing",⁷ the Justice Department named a Special Counsel--former FBI Director Robert Mueller--to investigate potential crimes arising from Russian attempts to manipulate the election. Justice Department regulations provide for appointing a Special Counsel in cases that "present a conflict of interest for the Department or other extraordinary circumstances."⁸ Because Attorney General Sessions had recused himself in the matter given his own involvement in the Trump campaign, Deputy Attorney General Rod Rosenstein issued the letter of referral. The Special Counsel's jurisdiction is limited by the referral's "specific factual" statement of the matters to be investigated and any related matters involving "perjury" and "obstruction of justice" arising therefrom.⁹ As of June 2018, several plea agreements have been reached and indictments have

⁶ *District of Columbia v. Heller*, 554 U.S. 570 (2008) (affirming an individual right to bear arms); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (ruling unconstitutional certain campaign finance regulations). For the discussion surrounding amending the Constitution to overrule *Citizens United* and *Heller*, see Press Release, Senator Tom Udall, Udall Introduces Constitutional Amendment to Overturn *Citizens United* and Get Big Money Out of Politics (Jan. 24, 2017), <https://www.tomudall.senate.gov/news/press-releases/udall-introduces-constitutional-amendment-to-overturn-citizens-united-and-get-big-money-out-of-politics>; Rio Tazewell, *Amendment to Overturn Citizens United Reaches New Milestone*, PEOPLE FOR THE AMERICAN WAY (May 26, 2017), <http://www.pfaw.org/blog-posts/amendment-to-overturn-citizens-united-reaches-new-milestone/>; Ashley Balcerzak, *Study: Most Americans Want to Kill 'Citizens United' With Constitutional Amendment*, THE CENTER FOR PUBLIC INTEGRITY (May 10, 2018, 5:00 AM), <http://www.pfaw.org/blog-posts/amendment-to-overturn-citizens-united-reaches-new-milestone/>; and Adam Winkler, *The Court After Scalia: Would a Liberal Supreme Court Overturn Heller?*, SCOTUSBLOG (Sept. 6, 2016, 2:56 PM), <http://www.scotusblog.com/2016/09/the-court-after-scalia-would-a-liberal-supreme-court-overturn-heller/>.

⁷ Interview by Lester Holt with President Donald J. Trump (May 11, 2017). See also James Griffiths, *Trump Says He Considered 'this Russia thing' Before Firing FBI Director Comey*, CNN (May 12, 2017, 9:11 AM), <https://www.cnn.com/2017/05/12/politics/trump-comey-russia-thing/index.html>.

⁸ 28 C.F.R. § 600.1. These regulations were promulgated in 1999 by Attorney General Janet Reno, after the original Watergate era law authorizing appointment of independent counsels lapsed.

⁹ *Id.*

been issued against four former Trump campaign associates, including the President's former campaign manager Paul Manafort, along with charges against several Russian citizens.

Because of the President's public statements dismissing the investigation as a "witch hunt,"¹⁰ a bipartisan group of Senators introduced legislation to support the Justice Department's regulations permitting the naming of a Special Counsel. The Integrity Act authorizes the naming of a Special Counsel and provides that the Attorney General may remove the Special Counsel "only for misconduct, dereliction of duty, incapacity, conflict of interest, or other good cause..."¹¹ The Senate Judiciary Committee debated the bill on April 26, 2018 and ultimately, it received a favorable Committee vote, but only after sustained opposition that the bill was unconstitutional and contentions that senators were bound by Justice Scalia's dissent in *Morrison*.

To the contrary, *Morrison* constitutionally validates the Judiciary Committee's bipartisan actions. Congress has the constitutional power to limit the President from acting above the law by removing his own Special Counsel. Let us be clear: Justice Scalia's lonely dissent in *Morrison* is a lonely dissent. More importantly, the Scalia dissent embraces a theory of executive power the Supreme Court has never accepted and is contrary to the Constitution's text. To quote Justice Scalia:

To repeat, Article II, § 1, cl. 1, of the Constitution provides: 'The executive Power shall be vested in a President of the United States.' As I described at the outset of this opinion, *this does not mean some of the executive power, but all of the executive power.*¹²

Of course, the Constitution does not grant the President *all* executive power; Justice Scalia has added text to the Constitution, a small but very significant "*all*."¹³ If our Constitution did say "*all*" executive power, it would delight tyrants. And, yet, this is what the Scalia dissent says, and it has become celebrated because its textual claim has become enshrined in an academic theory known as the "unitary executive."¹⁴ Modern history tells us to be wary of Presidents claiming power under the unitary executive theory. President George W. Bush was advised to prosecute the "war on terror" based on that theory. After 9/11, it "led to a number of exceptionally dangerous policies, culminating in the so-called 'torture memorandum'."¹⁵ In *Hamdan v. Rumsfeld*,

¹⁰ Donald J. Trump (@realDonaldTrump), TWITTER (May 18, 2017, 7:54 AM), <https://twitter.com/realdonaldtrump/status/865173176854204416>; Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 24, 2018, 6:44 PM), <https://twitter.com/realdonaldtrump/status/967545724362739712>; Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 27, 2018, 7:49 AM), <https://twitter.com/realdonaldtrump/status/968468176639004672>.

¹¹ S. 2644, 115th Cong. (2d Sess. 2018).

¹² *Morrison*, 487 U.S. at 697-734 (1988) (Scalia, J., dissenting) (emphasis added).

¹³ Justice Scalia was known for his textualism, but that method adds and subtracts constitutional text, see Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1 (2018).

¹⁴ The unitary executive theory's advocates will insist that their argument is limited to control over independent agencies, but that is not how the theory is expressed in Justice Scalia's *Morrison* dissent, nor does it describe its influence in political circles or its history during the George W. Bush Presidency.

¹⁵ See Neal Katyal, Comment, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 69 (2006).

the Supreme Court denied the President's claims of absolute power, writing that he could not "disregard limitations that Congress has . . . placed upon his powers."¹⁶

The Supreme Court has consistently rejected claims that the President has "all" executive power. In *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, the Court rejected President Truman's claims of absolute power to seize the steel mills to support the Korean war effort.¹⁷ In *Humphrey's Executor v. United States*, the Court rejected President Franklin Roosevelt's claims to absolute power to remove an inferior officer from the Federal Trade Commission.¹⁸ In *Wiener v. United States*, the Court rejected President Eisenhower's attempt to remove an inferior officer without "good cause."¹⁹ In *Morrison*, the Court rejected President Reagan's claims to absolute power to fire a special prosecutor investigating a senior Justice Department official.²⁰ In *Clinton v. Jones*, the Court rejected President Clinton's claim to immunity from suit during his tenure in office.²¹ The case law uniformly shuns the idea that the President may be the "Judge in his Own Cause."²²

II Constitutional Limits on the President's Power

The principles governing the President's power are laid out in the Constitution's text: the President must faithfully execute the laws.²³ Article II does not provide the President all power. Had the mere vesting of executive power within a single person been enough to give the President "all" executive power, our democracy would depend upon the meaning of the term "executive," a term vague enough to invite grand and dangerous schemes. In his famous *Steel Seizure* opinion, Justice Jackson replied to the Solicitor General's argument that the vesting clause granted the executive "all" power, calling it "totalitarian."²⁴ To be sure, the President has important enumerated powers, such as the Commander-in-Chief power, but even that power has not been sufficient in a variety of cases to allow the President to pose naked resistance to Congress.²⁵ One cannot pull the word "executive" out of the constitution, add the term "all" to it, and isolate it as if there were "only" executive power. It is obvious, but should not be

¹⁶ *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n. 23 (2006) (citing *Youngstown*).

¹⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁸ *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

¹⁹ *Wiener v. United States*, 357 U.S. 349 (1958).

²⁰ *Morrison v. Olson*, 487 U.S. 654 (1988).

²¹ *Clinton v. Jones*, 520 U.S. 681 (1997).

²² *Caperton v. A.T. Massey Coal*, 556 U.S. 868, 876 (2009). This principle gave succor to the American revolution. British Whig critics invoked it to describe the need for what we call today the "separation of powers." "What shall be don," John Trenchard (co-author of *Cato's letters*) asked, "when the Criminal becomes the Judge, and the Malefactors are left to try themselves?" How may the Commons redress the grievances "occasion'd by the Executive Part of the Government . . . if they should happen to be the same Persons, unless they would be public spirited enough to hang or drown themselves?" JOHN TRENCHARD, *A SHORT HISTORY OF STANDING ARMIES IN ENGLAND* 5, 6 (London, A. Baldwin 3d ed. 1698).

²³ U.S. CONST. art. II, § 3 ("he shall take Care that the Laws be faithfully executed").

²⁴ *Youngstown*, 343 U.S. at 640-41 (Jackson, J. concurring).

²⁵ See *id.* at 644 (Jackson, J. concurring) ("That military powers of the Commander-in-Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history").

forgotten that, if there were only executive power, and no Congress, democracy as we know it expires.

Important constitutional provisions support *Congress's* power to limit the President's conduct. For example, Article II's appointments clause provides *Congress*, not the President, with the power to structure the executive branch. "[T]he 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 That clause directly refutes the idea that the Constitution grants the President "all" power to control the executive branch. Since the Founding, Congress has assumed the power to define and limit the ways in which executive employees and officers conduct their offices; if that were not true, then the entire civil service would be created unconstitutionally. Similarly, *Congress* has its own textually specified power to limit the President's execution of the law. Under Article I, Congress has the power to "make *all* Laws²⁷ which shall be necessary and proper for carrying" into effect not only Congress's own powers, but the powers that the Constitution vests "in the Government of the United States, or in any Department or Officer thereof." That means Congress has powers to create laws that are necessary and proper for carrying into effect the President's powers of appointment and removal of inferior officers. Limiting naked partisanship or corruption are surely "necessary and proper" limits on how the President exercises his power involving an investigation into his own wrongdoing.²⁸

Nothing in the Supreme Court's cases refutes this analysis. *Steel Seizure*²⁹ illustrates the limited nature of the President's power in domestic affairs. Without Congress's consent, President Truman seized domestic steel mills during a labor dispute. Truman claimed power under the Commander-in-Chief clause to protect the nation during the Korean conflict by ensuring the

²⁶ The full appointments clause reads:

"He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he 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 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.*"

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

²⁷ The entire clause reads: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18. Given that the unitary executive theory, *infra* Part IV, depends upon inferences from the lack of text "herein granted" in Article II, not to mention Justice Scalia's addition of the word "all" to Article II, it should be significant that the necessary and proper clause actually uses the word "all" with respect to the Congress's powers which clearly include the power to structure the executive branch.

²⁸ For an analysis of the three different parts of the necessary and proper clause, see John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063, 1092-1094 (2015); see *id.* at 1094 (stating that the "'other powers' to which this part of the clause applied 'refers ... most plausibly ... to include all of the shared powers given to more than one department or officer of the government, such as the treaty and appointment powers of Article II, which are jointly delegated to the President and the Senate.'"); see also John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L. J. 1045 (2014).

²⁹ *Youngstown*, 343 U.S. 579.

continued and uninterrupted production of steel, which he argued was necessary to the ongoing war effort. The Supreme Court rejected that claim, concluding that the President had refused to follow Congress's seizure procedures. Justice Black, writing for the majority, argued that the President had acted in ways committed to the legislature, not the executive.³⁰ In his now-celebrated concurrence, Justice Jackson rejected Justice Black's argument, which was based on *functional* terms.³¹ Jackson's opinion is well-known for a tripartite test which depends upon the *relationship* of the branches to each other: whether the President is acting on his own enumerated powers (e.g. as Commander-in-Chief), whether he is acting on powers shared with Congress, or within Congress's own domain.³²

Justice Jackson emphatically rejected the position of today's unitary executives.³³ In fact, he expressed incredulity that the Solicitor General would make the argument that the Commander-in-Chief clause "constitutes a grant of *all the executive powers* of which the Government is capable."³⁴ History showed this to be power asserted by "totalitarians," to use Justice Jackson's words:

The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. Continental European examples were no more appealing. And if we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as *totalitarian*. I cannot accept the view that this clause is a grant in bulk of all conceivable executive power"³⁵

The Supreme Court has never wavered from *Steel Seizure's* lessons. In a series of cases at the beginning of the 21st century, the Supreme Court rebuked Presidential claims to absolute power. During the George W. Bush Administration, the Justice Department's Office of Legal Counsel issued a memo ignoring *Steel Seizure* (the so-called torture memo),³⁶ arguing that the President had "unfettered executive power, based on extraordinarily broad interpretations of the Article II Commander in Chief Clause."³⁷ Public outrage and academic criticism led to the withdrawal of

³⁰ *Id.* at 587 ("the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker").

³¹ Justice Black argued that the power to seize steel mills was part of the "legislative power." As most academic commentators have acknowledged, modern states allow executive agencies to exercise "legislative" functions, as the administrative state issues rules and regulations with the force of law. For this reason, Black's opinion has been viewed with skepticism.

³² *Id.* at 635 (Jackson, J. concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

³³ *Id.* at 641.

³⁴ *Id.* at 640 (emphasis added).

³⁵ *Id.* at 641 (emphasis added).

³⁶ Memorandum for William J. Haynes II, Counsel to the Department of Defense from John Yoo (Jan. 2002).

³⁷ Harold Hongju Koh, *Setting the World Right*, 115 YALE L. J. 2350, 2355 (2006).

the original memo. Ultimately, when President Bush's actions at Guantanamo Bay reached the Supreme Court, the Court rejected claims that the President had unfettered power to create lawless zones, violate the Geneva Convention, or create separate military tribunals. As Dean Harold Koh has described one of the Supreme Court opinions, *Hamdan v. Rumsfeld*,³⁸ "the Court . . . rejected the administration's extreme constitutional theory of executive power." All the *Hamdan* Justices addressing the merits placed the case within the tripartite framework of shared institutional powers set forth in Justice Jackson's concurrence in *Steel Seizure*.³⁹

III. *Morrison v. Olson* is Good Law

Morrison, like *Steel Seizure*, rejects the idea that the President has absolute power. In *Morrison*, the contention was that the President had absolute power to fire an independent counsel. At the time, an independent counsel law authorized the investigation of the President and a variety of other executive officials.⁴⁰ The law was written to answer the question posed in Watergate: Could President Nixon fire an independent counsel investigating the President? The obvious problem was a conflict of interest. Surely, every criminal defendant would love to have the power to dismiss his prosecutor until he found one that would drop the prosecution. To solve that problem, Congress protected the independent counsel from firing by a "good cause" provision. Critics at the time argued, as they do now, that such a limit is unconstitutional because the President must have "all power" to control his administration. In *Morrison*, the Supreme Court rejected that position, with Chief Justice Rehnquist writing that the Constitution specifically contemplates that Congress may protect inferior officers by requiring that the President specify a nonpartisan and noncorrupt reason for the firing.⁴¹ To quote the Court: "we cannot say that the imposition of a 'good cause' standard for removal by itself unduly trammels on executive authority . . . we simply do not see how [that limit] is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President."⁴²

This proposition drew ire from the decision's lone dissenter, Justice Scalia. "Power." Justice Scalia used that one-word sentence to grab attention to his fiery but lonely *Morrison* dissent.⁴³ Special Counsels do raise questions of "power" but not "all" power as Justice Scalia wrote. Article II of the Constitution limits the power of the Presidency, providing that the President "shall take Care that the Laws be faithfully executed."⁴⁴ This means that the President has an affirmative duty to follow the laws of the nation. Every time Congress legislates, its laws govern the President. When Congress provided, as it did in the *Steel Seizure* case,⁴⁵ that President Truman could not seize the steel mills without following congressional procedures, the Supreme Court enforced those procedures. And, if that were not enough, when President

³⁸ 548 U.S. 557, 593 n. 23 (2006).

³⁹ See Koh, *supra* note 37 at 2361-62.

⁴⁰ Ethics in Government Act of 1978, 28 U.S.C. §§ 591-599 (1978).

⁴¹ *Morrison*, 487 U.S. at 660.

⁴² *Morrison*, 487 U.S. at 691-92.

⁴³ *Morrison*, 487 U.S. at 699 (1988) (Scalia, J., dissenting) ("Power. That is what this suit is about.")

⁴⁴ U.S. CONST. art II, § 3.

⁴⁵ *Youngstown*, 343 U.S. at 579.

Clinton claimed the power to insulate himself from the law while in office, the Supreme Court resoundingly held that no President is above the law.⁴⁶

Good cause limitations are common sense protections against naked politics and self-serving corruption. In the Special Counsel case, the “good cause” limitation asks that the President be transparent about his reasons *so that the public may judge his actions*. This is a minor burden; its constitutionality is only doubted when Presidents aim to exercise completely unfettered discretion. Presidents of all political stripes have made such assertions, from Franklin Roosevelt to Bill Clinton to George W. Bush, and the Supreme Court has just as uniformly rejected their claims of unfettered power.⁴⁷ Congress has the power under the necessary and proper clause⁴⁸ to limit any governmental department it creates or funds for the general welfare; limiting the President from dismissing a prosecutor investigating the president and close associates is both necessary to protect the rule of law against an obvious conflict of interest and proper because it provides public transparency.

The current debate about the Integrity Act has arisen because the Watergate era independent counsel law upheld in *Morrison* lapsed. The original law was much criticized following the Kenneth Starr investigation and that criticism cast a shadow on *Morrison*.⁴⁹ Today, there is no Special Counsel law, but a set of very limited Justice Department regulations promulgated in 1999 governing Special Counsels named by the Attorney General under extraordinary circumstances. These regulations reflect long established Justice Department practice. Since the 19th century, the Justice Department has named Special Counsels to avoid the appearance of a conflict of interest when the President or his close associates are allegedly involved in putatively criminal behavior.⁵⁰ Today’s regulations clarify the appointment process and Justice

⁴⁶ *Clinton*, 520 U.S. at 704 (“neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”) (quoting *United States v. Nixon*).

⁴⁷ See, e.g., *Humphrey’s Executor*, 295 U.S. 602 (1935) (rejecting President Roosevelt’s claim to fire an inferior officer for no reason); *Clinton v. Jones*, 520 U.S. 681 (1997) (rejecting President Clinton’s claim that he should be immune from civil suit during his Presidency).

⁴⁸ U.S. Const. art. I, § 8, cl. 13.

⁴⁹ The original independent counsel law suffered from a variety of problems, the most insistent claim being that it gave too much authority to independent counsels to wage lengthy overzealous prosecutions against Presidents and lower level executive branch employees. These policy problems reflected deeper flaws. First, the law gave too much power to Congress and committees of Congress to effectively charge their political enemies with crimes because the Attorney General had virtually no power to deny a request for a special counsel. Democracies do not allow their legislatures to punish political enemies for partisan reasons. Victoria Nourse, *Toward a “Due Foundation” for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447 (1996) [hereinafter *Federalist Papers*]. Second, the mandatory impeachment referral provisions allowed Congress to delegate one of the most important electoral powers in the Constitution to an unelected official. See also Julie R. O’Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L. J. 2193, 2195 (1998). These problems do not exist under the current far more limited bipartisan legislation or in the Justice Department’s regulations.

⁵⁰ For example, a special counsel was named in 1875 to investigate President Grant’s personal secretary in the “Whiskey Ring” scandal. Prior to Watergate, special counsels were named in the administrations of Republican and Democratic Presidents, including Presidents Garfield, Coolidge, Theodore Roosevelt, and Truman. GERALD GREENBERG, HISTORICAL ENCYCLOPEDIA OF U.S. INDEPENDENT COUNSEL INVESTIGATIONS (2000); see also ANDREW COAN, PROSECUTING THE

Department control of the Counsel.⁵¹ The regulations provide that the Special Counsel may be removed for “good cause.”⁵² The Integrity Act seeks to enforce those regulations, backing them up with congressional legislation, and allowing for a judicial hearing to determine whether the current Special Counsel, Robert Mueller, if dismissed, was properly dismissed for “good cause.”⁵³ The Act aims to forestall any argument by the President that the regulations, as creatures of the executive, can be overridden by the President.⁵⁴

Post-*Morrison* cases do not put those regulations in legal question. In *Free Enterprise Fund v. Public Companies Accounting Board*,⁵⁵ the Supreme Court invalidated a peculiar double-layer removal procedure governing an independent agency, the Securities and Exchange Commission (SEC).⁵⁶ The Sarbanes-Oxley law created an independent accounting board to ensure that companies followed sound accounting practices. The SEC appointed that five-member board. The SEC’s members were subject to “good cause” removal.⁵⁷ So, too, were the members of the accounting board. If the President sought to fire a single member of the accounting board, he would have to obtain an order from the full Commission, which was then subject to judicial review.⁵⁸ Presumably, if the President could not obtain such an order, and still wanted to fire a member of the accounting board, the President would have to find a “good reason” to fire each member of the Commission, and then replace the Commission with members who would order dismissal of a single member of the subordinate accounting board.⁵⁹ In a 5-4 decision, the Supreme Court rejected this double layer of review as an unconstitutional infringement on the separation of powers.

Although interesting, *Free Enterprise* is irrelevant to the question of whether the Integrity Act is constitutional. First, nothing in the Integrity Act poses a “double” layer of review as was at

PRESIDENT: HOW SPECIAL PROSECUTORS PROTECT THE RULE OF LAW AND HOLD PRESIDENTS ACCOUNTABLE (forthcoming 2019).

⁵¹ 64 Fed. Reg. 37038, 37038 (July 9, 1999) (providing for the appointment of a special counsel in “extraordinary circumstances”).

⁵² 28 C.F.R. § 600.7(d) (2018) (“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.”).

⁵³ Special Counsel Independence and Integrity Act, S. 2644, 115th Cong. (2d Sess. 2018).

⁵⁴ See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁵⁵ 561 U.S. 477 (2010).

⁵⁶ *Id.* at 496 (“A second level of tenure protection changes the nature of the President’s review. Now the Commission cannot remove a Board member at will. The President therefore cannot hold the Commission fully accountable for the Board’s conduct, to the same extent that he may hold the Commission accountable for everything else that it does.”).

⁵⁷ The parties in *Free Enterprise* agreed that the Commissioners could only be removed for “inefficiency, neglect of duty, or malfeasance in office.” *Free Enterprise*, 561 U.S. at 487; see *SEC v. Blinder*, 855 F.2d 677, 681 (10th Cir. 1988) (“The [Securities] Act does not expressly give to the President the power to remove a commissioner. However, for the purposes of this case, we accept appellants’ assertions in their brief, that it is commonly understood that the President may remove a commissioner only for “inefficiency, neglect of duty or malfeasance in office.”).

⁵⁸ *Free Enterprise*, 561 U.S. at 486.

⁵⁹ See *SEC v. Blinder*, 855 F.2d 677, 681 (10th Cir. 1988) (“The commission consists of five members who are appointed by the President with the advice and consent of the Senate. The terms of the commissioners are staggered and the basic length of each term is five years. No more than three of the commissioners may be members of the same political party.”).

issue in *Free Enterprise*.⁶⁰ More importantly, *Free Enterprise* did not involve a personal, presidential conflict of interest such as the one the Integrity Act is trying to address with President Trump and alleged Russian interference in our 2016 elections.⁶¹ Some critics point to *Free Enterprise* arguing it is controlling authority when evaluating the Integrity Act because it questioned the legality of independent agencies. Let me be clear, this is a distraction. In legal terms, an agency is considered an “independent” agency when the head of the agency is protected by a “good cause” removal clause,⁶² like the one protecting Special Counsel Mueller, and cannot merely be fired at will because they serve at the pleasure of the President, like the Attorney General or Secretary of State. Some critics question the legality of independent agencies.⁶³ Even if independent agencies went away tomorrow, that would not answer the peculiar conundrum of a President who claims absolute power to fire his own prosecutor. The Special Counsel bill pending in the Senate protects against a particular danger—the President’s conflict of interest when it comes to criminal prosecution of himself or his personal associates.

IV. The Unitary Executive Debunked

Upending well established law, unitary executives have asserted strained textual claims to support extraordinary presidential power. Long ago, Professor Stephen Calabresi and Kevin Rhodes argued that the Constitution’s text supports a “unitary executive.”⁶⁴ They based their argument on a structural *inference* from two words. They compared the Constitution’s three “vesting” clauses. Because the vesting clause in Article I governing legislative power applies to powers “herein granted,” and there is no parallel “herein granted” modifying “executive power,” the resulting inference, they argued, is that the President’s power extends to anything that one might call “executive.”⁶⁵ That two-word textual inference rests on a false premise. The vesting clauses are not power grants.⁶⁶ If they were, there would be no reason to provide specific powers,

⁶⁰ Should the President seek to remove the Special Counsel, he may do so by instructing a single person in the Justice Department.

⁶¹ Dicta in *Free Enterprise* provides fodder for such a battle, but it is dicta. See, Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1173 (2013) (“We might even see the PCAOB majority as laying down a cache of ammunition for future battles, in the form of dictum that may be quoted to support more aggressive future rulings against the constitutionality of independent agencies. For now, however, the constitutional doctrine remains broadly favorable to congressional power to grant for-cause tenure.”).

⁶² *Id.* at 1168 (“Commentators broadly agree that for-cause tenure protection is the *sine qua non* of agency independence.”). Agency heads subject to such provisions include the heads of the Nuclear Regulatory Commission and the Federal Trade Commission.

⁶³ See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 579 (1984) (discussing the “truly insignificant structural and procedural differences between the ‘independent regulatory commissions’ and other agencies.”).

⁶⁴ Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165-66 (1992).

⁶⁵ The vesting clauses are: U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States...”); *id.* art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”); *id.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

⁶⁶ See Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 551 (2004) (contending that viewing the Vesting Clause as a broad power grant “cannot explain some of Article II’s specific grants of foreign affairs authority, and . . . sits uneasily with the Constitution’s enumerated powers structure”); A. Michael Froomkin, *The Imperial Presidency’s New Vestments*, 88 NW. U. L. REV. 1346, 1363 (1994) (arguing that the Vesting

as Justice Jackson explained in *Steel Seizure*. The vesting clauses are titles added by a Committee on Style, late in the Constitutional Convention, to designate the three great departments.⁶⁷ But even if they were power grants, the Constitution's text limits the power of the President to "faithfully execute the laws." That express textual limitation surely trumps an inference based on the absence of two words ("herein granted") in Article II. Not surprisingly, no Supreme Court majority has ever accepted the unitary executive theory.

A. False Textual Assumptions

The "unitary executive" argument depends upon a false assumption about the Constitution's text: that it creates three "kinds" of power and then uniformly assigns these "kinds of power" to unique places. Neither the Constitution, nor our constitutional history, holds that all "executive" power -- where executive power means a "type" of power -- resides in the President. For example, if the President has "all" executive power, then he should be able to create his own departments to help him execute the law. But that is Congress's job, and Congress has done so from its early days, creating the first Departments of War, Foreign Affairs, and Treasury.⁶⁸ The Founders had no uniform functional definition of the "executive," much less one corresponding to today's realities. For example, John Locke's works, which influenced many Founders, did not distinguish between the judicial and executive power.⁶⁹ No one today, however, believes that the President has the power to regulate inferior Article III courts because courts, like Presidents, execute the law.

The Constitution's text rejects the idea that there is a unique type of executive power given to the President under Article II and that type of power is the only power a President may exercise. The President's power is not completely or uniquely described in Article II. Article I, the "legislative" article, grants the President veto power⁷⁰, giving the President what appear to be legislative-type powers. Similarly, Congress's powers are not uniquely identified in Article I. Congress is granted powers in Article II to control the President's election and in Article III to define treason.⁷¹ Moreover, as was affirmed in the *Steel Seizure* case, power sharing between the departments is common under our Constitution. Take legislation--it must pass Congress and be signed by the

Clauses of Articles II and III are "'empty vessels' that the remainder of those articles then fill"); see also M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 608-26 (2001) (arguing that "no well-accepted doctrine or theory. . . offers a way to identify the differences among the governmental functions in contested cases."). For the contrary position, see Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1378-1400 (1994).

⁶⁷ See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 48-49 (1994). It would be an odd procedure in which a committee delegated with stylistic duties could grant large powers to the President not previously agreed to by the drafters. We can infer from this procedure that the stylistic agents were not empowered to substantially change the document.

⁶⁸ *Id.* at 25.

⁶⁹ Locke was one of the political philosophers on which the Founders relied, albeit nonexclusively. "Locke does not distinguish the executive from the judicial power but uses the terms interchangeably when speaking of the process that applies the force of the community in particular cases according to the general rule." RUTH W. GRANT, JOHN LOCKE'S LIBERALISM 74-75 (1987).

⁷⁰ U.S. CONST. art. I, § 7.

⁷¹ U.S. CONST. art. II, § 1, cl. 4. ("The Congress may determine the Time of chusing the Electors" for the President); *id.* art. III, § 1 ("The Congress shall have the Power to declare the Punishment of Treason.")

President.⁷² If there were no sharing provisions, the departments would operate on parallel tracks, never checking each other. It is only because they share power that the departments have the power to stop actions which require agreement between departments.

If one were to take seriously the idea that there is a unique “type” of power known as executive (a term that is notoriously vague) and the President has absolute control over all and only that kind of power, then one would have to make major changes to our government and our constitutional understandings. Executive purity would require the President to eliminate any “judicial” or “legislative” functions in the executive branch and take over all executive functions carried out by other departments. Executive agencies are full of adjudicators--in immigration and social security and veteran’s affairs. Agencies also act like legislators when promulgating binding regulations with the force of law. Ridding the President of these powers would make many of Congress’s most beloved statutes, like the Social Security Act, entirely unadministrable. Meanwhile, if the President is to exercise “all” executive power, then he must take over all existing congressional and judicial agencies, such as the General Accounting Office, the Congressional Budget Office, the Congressional Research Service, the Capitol Police, and the Administrative Office of the Courts. All of this follows from the idea of functional purity. The truth is that the term “executive” in the Constitution presupposes *that there is something to execute*. In cases where the President has no independent enumerated power, he can only execute the “laws” passed by Congress.⁷³

Ironically, those who claim that the President must have complete control over the executive branch invoke the Take Care clause on the theory that the President cannot “Take Care” that the laws be faithfully executed without that control.⁷⁴ This elides something very important. The Take Care clause provides that the President’s powers depend upon “*laws*.” If that text means anything, it means that the President cannot base his actions on some vague notion of executive power. Congress has extensive power to structure the Executive branch by creating agencies that allow the President to perform his duties. Tenure and removal limitations are perfectly “necessary and proper” means to further Congress’s duty to legislate for the general welfare.⁷⁵ In the case of the Special Counsel, they are necessary because the President has a conflict of interest in the investigation and they are perfectly proper since they serve the purpose of public transparency.

⁷² U.S. CONST. art. I, § 7.

⁷³ Some academics have traditionally favored a view of the “separation of powers” that they call “functionalist.” The argument is that courts should exercise flexibility and pragmatism in assessing new structural arrangements. Many years ago, I argued that scholars, liberal and conservative, should reconsider the idea of “function” and consider the consequences to the people, of “who decides,” when one shifts power. Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 774-75 (1999) [hereinafter *Vertical Separation*]. I am not alone in questioning focus on functions. See Magill, *supra* note 67; Bradley & Flaherty, *supra* note 67.

⁷⁴ U.S. CONST. art. II, § 3.

⁷⁵ U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

B. Misappropriated Understandings of Precedent

Some who support the unitary executive theory invoke precedent, including Chief Justice Taft's mammoth opinion in *Myers v. United States*.⁷⁶ Critics tend to pull a quote or two out of this opinion, forgetting that the case had nothing to do with "good cause" restrictions. At issue in *Myers* was the kind of removal restriction that does raise serious constitutional concerns: when Congress asserts the power to "approve" of the President's decision to remove. The statute in *Myers* provided that the President could only remove a postmaster with the approval of the Senate. That kind of removal limitation raises legitimate constitutional concerns. If the Senate or Congress has the power to "approve" the removal, this is a serious burden on the President's ability to control the administration. After all, each time he seeks to remove an inferior officer, the President must gain the votes of vast numbers of members of Congress. More importantly, in such a situation the President's men will have two masters. To avoid dismissal, they will look to both Congress and the President. By contrast, "good cause" limitations do not require the President to seek approval of another governmental body, but require the decidedly minimal burden of articulating a "good" reason for removal.

Critics also argue that the New Deal case *Humphrey's Executor*⁷⁷ supports the unitary executive, a claim that turns *Humphrey's* on its head. President Roosevelt argued that he could fire a Commissioner from the Federal Trade Commission (FTC) at will, without asserting a reason. The Supreme Court said "no" because Congress's law required good cause. The Supreme Court struck down President Roosevelt's claim of absolute power to remove, but based its ruling on the "kinds" of power exercised by the FTC which it called "legislative" and "judicial." Today, critics argue that the President may be required to state a good cause for removal, but only if the agency is exercising judicial or legislative functions. *Morrison* rejected that part of *Humphrey's Executor*; upholding a good cause provision in a case involving dismissal of a prosecutor exercising what the court described as "executive" functions. *Humphrey's Executor* is no different from *Morrison*. In both cases, the Supreme Court told the President that he did not have unlimited power to dismiss inferior officers. In both cases, the Court required the President to follow the law.

Some have wrongfully claimed that James Madison supported the "unitary executive." Madison recognized the very distinction between the kind of statute struck in *Myers* and that upheld in *Humphrey's*. In 1789, Madison opposed those who sought a role for the Senate in removing executive branch officers, similar to the statute struck down in *Myers*. Madison warned Edmund Randolph that, if the Senate were given a voice in the removal of individual officers, "the Ex[ecutive] power would slide into one branch of the Legislature."⁷⁸ But he also explained that the legislature creates executive departments and official positions: "[it] creates the office, defines the powers, limits its duration, and annexes a compensation."⁷⁹ Consistent with that, Madison

⁷⁶ 272 U.S. 52 (1926).

⁷⁷ 295 U.S. 602 (1935).

⁷⁸ Letter from James Madison to Edmund Randolph (June 17, 1789), in 12 PAPERS OF MADISON 230 (Charles F. Hobson & Robert A. Rutland eds., 1979).

⁷⁹ *Id.* at 255.

supported a statutorily fixed tenure for the Comptroller of the Currency, something that comes quite easily within his discussion of Congress's ability to set the "terms" of offices.⁸⁰

C. False Assumptions about the History of Executive Power

Some unitary executives have insisted that the President must have control over all "core executive" functions. Of course, the Constitution says nothing about "core" functions or "functions"⁸¹ at all. The very idea of function is modern; the Founders favored relational concepts such as independence and dependence.⁸² Critics assert that prosecution is a core executive function. Again, there is no settled historical basis for this claim. As Professors Cass Sunstein and Lawrence Lessig have explained "[f]or the first eighty years of the Republic, there was no centralized and hierarchical department of legal affairs in the executive branch."⁸³ The power to "prosecute" a case--a term that covered civil and criminal proceedings at the time--first resided in the Comptroller General of the United States, a member of the Treasury Department.⁸⁴ The Comptroller was given authority to sue on behalf of the United States to obtain monies owed to the United States. The Attorney General remained a weak office for the first 70 years of the country's existence, limited to advising the President and arguing in the Supreme Court.⁸⁵ Prosecution was often a private matter and in some states associated with the judiciary, the prosecutor putatively performing what we would today call "judicial" functions.⁸⁶

Even if we were to conclude that the Special Counsel was exercising "executive" power, that would do nothing to undermine legislation requiring a President offer a good reason to fire a Special Counsel investigating the President or his close associates. Let us assume that prosecution is a core executive function today. This alone does not make the Integrity Act unconstitutional. "No man is a judge in his own cause."⁸⁷ This was the great cry of the British Whigs against the King that inspired our American Revolution. This was the origin of our separation of powers.⁸⁸ Even if, in other cases, the President might claim he had absolute control over core executive functions, in cases where the President or his close associates are subject to criminal investigation, this power must yield to a larger principle: no President is above the law.⁸⁹

There is nothing in the history or modern understanding of the separation of powers that demands rejection of "good cause" restrictions. Justice Scalia was right to emphasize the importance of the separation of powers. But Justice Scalia's idea of the separation of powers is

⁸⁰ *Id.* at 265 ("[T]here may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the government.").

⁸¹ A Google n-gram of uses of the term "function" shows the term to be virtually nonexistent in 1800.

⁸² Victoria Nourse, *Federalist Papers*, *supra* note 49.

⁸³ Lessig & Sunstein, *supra* note 68, at 16.

⁸⁴ *Id.* at 17.

⁸⁵ Susan L. Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L. J. 561, 582.

⁸⁶ See Jed Shugerman, *Stare Scalia*, SLATE (Apr. 27, 2018, 6:37 PM), <https://slate.com/news-and-politics/2018/04/republican-senators-obsession-with-antonin-scalia-is-leading-them-to-make-sloppy-mistakes.html>.

⁸⁷ Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384 n. 1 (2012).

⁸⁸ Nourse, *Federalist Papers*, *supra* note 49.

⁸⁹ *Clinton v. Jones*, 520 U.S. 681 (1997).

both unfaithful to the constitutional text and dependent upon an entirely modern idea of “functional” separation. The one thing we know about the separation of powers at the Founding was that the Founders explicitly rejected putting a special “separation of powers” clause into the text of the Constitution. Justice Scalia cites to the Massachusetts constitution for this principle,⁹⁰ but a separation of powers clause was intentionally left out of our Constitution for a reason. Such provisions in state constitutions did not work to separate the departments in practice--they were mere parchment barriers. Madison describes the problems at length in the *Federalist Papers*.⁹¹ To cite just one example, St. George Tucker described the situation in Virginia, where the executive possessed “not a single feature of Independence” because “in Virginia, [it] is chosen, paid, directed, and removed by the legislature.”⁹²

Our separation of powers emerges out of a vast number of constitutional provisions, most prominently those structuring the incentives of those who head the departments. The Founders were very clear that the heads of the departments were to be “independent.” The President was not to be elected by the House, and members of the Executive could not sit in Congress. At the same time, the Founders gave separate persons incentives to align themselves with the “place.”⁹³ This alignment was sealed by the power of the people arranged in different geographic constituencies. As Hannah Arendt wrote long ago, when we say of someone that they are “in power,” we actually refer to his being empowered by a certain number of people to act in their name.⁹⁴ The Constitution’s most important clauses--the ones that do the work in keeping the departments separate--are the “representational” clauses.⁹⁵ When given the choice between representing the state of Alaska versus the nation, the President will choose the nation because it is in his self-interest to appeal to the nation for affirmation and reelection. If Alaska’s interests align with other states, the President will be rebuffed in the Senate, not because anyone is performing a “legislative function” but because the senators are voting their self-interested duty to represent their constituents. Had the separation of powers not been in the electoral self-interest of the “men” who run what Madison called the “places,” our government would long ago have disappeared. Functional overlap does not define or undermine such a system. Harvard, Yale, and Georgetown law schools all perform the same function but they are independent institutions

⁹⁰ *Morrison*, 487 U.S. at 697 (Scalia, J. dissenting) (opening the dissent by citing the Massachusetts Constitution).

⁹¹ THE FEDERALIST NOS. 47, 48 (James Madison).

⁹² CHARLES S. SYDNOR, AMERICAN REVOLUTIONARIES IN THE MAKING: POLITICAL PRACTICES IN WASHINGTON’S VIRGINIA 87 (1965) (quoting St. George Tucker, *Blackstone’s Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* app. at 119 (1803)).

⁹³ One of Madison’s most famous lines in *Federalist* No. 51 is the claim that the government had to be structured to align the “interest of the man” with the constitutional rights of the place. One important part of that structure were provisions that secured salary and tenure provisions to avoid problems that had arisen in the states when one branch sought to manipulate the other by raising or lowering salaries or through removal. See FEDERALIST NO. 51 (“[t]he interest of the man must be connected with the constitutional rights of the place.”).

⁹⁴ HANNAH ARENDT, ON VIOLENCE 44 (1970).

⁹⁵ See U.S. CONST. art. I, §§ 2-3 (establishing the process by which members of the House of Representatives and the Senate are elected); *id.* art. II, § 1, cls. 2-3 & amend. XII (creating the process by which Presidents are elected); *id.* amend. XVII (providing for the direct election of Senators). See *Clinton v. City of New York*, 524 U.S. 417, 452 (Kennedy, J. concurring) (stating that the “[s]eparation of powers operates on a vertical axis as well, between each branch and the citizens in whose interest powers must be exercised.”).

because they have different leaders, teach different students, and cultivate different alumni. So, too, our government: Even if the departments share certain functions, they have different leaders, different personnel, and different constituencies.

Nothing in the Integrity Act undermines that self-enforcing system. Indeed, it furthers that system because it requires the President to tell the nation's voters his reasons for firing a Special Counsel. The Act remains faithful to the core principle of the rule of law that no man may be a judge in his own cause.

V. The Special Counsel is Not a Superior Officer Requiring Senate Confirmation

In debate over the Integrity Act, some senators raised an ancillary argument that the Special Counsel is a principal officer who, under the Appointments Clause of the U.S. Constitution, must be nominated by the President and confirmed by the Senate.⁹⁶ In support of that claim, others have recently asserted that the Special Counsel has violated the holding in *Morrison* by extending the investigation and in effect becoming a principal officer.⁹⁷ History tells us that Special Counsels have been named repeatedly over time without Senate confirmation and under the current Justice Department regulations.⁹⁸

Case law confirms the conclusion that Special Counsel Mueller is an inferior officer. *Morrison* upheld a much more powerful office as an “inferior” one. The Watergate-era Independent Counsel statute provided significant powers to Independent Counsel Alexia Morrison. And, yet, the Supreme Court explained that Morrison was an “inferior” officer because she was subject to Justice Department control. Justice Scalia himself explained as much in his opinion in *Edmond v. United States*.⁹⁹ Writing for the majority, he explained that the *Morrison* court had found the independent counsel to be an “inferior officer.” In reaching that conclusion, *Morrison* “relied on several factors: that the independent counsel was subject to removal by a higher officer (the Attorney General), that she performed only limited duties, that her jurisdiction was narrow, and that her tenure was limited.”¹⁰⁰

The *Morrison* factors show that Special Counsel Mueller is an “inferior officer.”¹⁰¹ As in the *Morrison* case, the Special Counsel is performing “limited duties” focusing on criminal

⁹⁶ U.S. CONST. art. II, § 2, cl. 2.

⁹⁷ Steven G. Calabresi, *Mueller's Investigation Crosses the Legal Line*, WALL ST. J. (May 13, 2018, 1:49 PM), <https://www.wsj.com/articles/muellers-investigation-crosses-the-legal-line-1526233750> (arguing that the Appointments Clause has been violated).

⁹⁸ See GREENBERG, *supra* note 50. Under the current regulations, former Senator John Danforth was named as a Special Counsel to investigate allegations of excessive force in the Waco affair and US Attorney Patrick Fitzgerald was named as a Special Counsel to investigate the Plame Affair, arising from allegations about the “outing” of a CIA agent by senior White House officials.

⁹⁹ 520 U.S. 651 (1997).

¹⁰⁰ *Id.* at 661.

¹⁰¹ The current Special Counsel regulations are narrower than the original Independent Counsel law, further supporting the claim that Counsel Mueller is an inferior officer.

prosecutions arising from the influence of Russia on the 2016 election.¹⁰² Unlike the head of the Criminal or Civil Divisions in the Justice Department -- officials confirmed by the Senate -- the Special Counsel is not managing hundreds or thousands of cases and making overarching policy decisions on litigating those cases, but is investigating a single set of allegations about the Trump campaign and its officials' ties with Russia. The Rosenstein memorandum defining the scope of the investigation authorizes the Special Counsel to continue investigations underway at the time the memo was written as well as "any matters that arose or may arise directly from the investigation."¹⁰³ Again, unlike the confirmed heads of Justice Department divisions, the Special Counsel's job ends when the investigation of the matters outlined in the referral from the Deputy Attorney General is completed. Finally, the Special Counsel can be removed for "good cause" by the Attorney General and, given the recusal of Attorney General Sessions, the Deputy Attorney General.¹⁰⁴

Critics of Special Counsel Mueller seek support from the Supreme Court's decision in *Edmond*,¹⁰⁵ but the Court's decision in that case supports the conclusion that Mueller is an inferior officer. *Edmond* involved the question whether members of the Coast Guard Court of Appeals had been properly appointed. The court-martialed defendants argued that the members of the Court of Appeals were "principal" officers. After listing the *Morrison* factors, Justice Scalia wrote: "we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." That standard is easily met here. Under the existing regulations, "the Attorney General may request that the Special Counsel provide an explanation for any investigative or prosecutorial step, and may after review conclude that the action is inappropriate or unwarranted."¹⁰⁶ This veto power over the Special Counsel's particular actions represents the kind of direct supervision that renders the Special Counsel an inferior officer. This also makes Special Counsel Mueller much less powerful and independent than prior Watergate-era ICs.¹⁰⁷

Some have suggested that the current Special Counsel has pushed the limits of his jurisdiction and is behaving as a principal officer.¹⁰⁸ There is nothing in the case law that suggests that the "inferior/superior officer" question depends upon the particular facts of a particular investigation, rather than the law controlling the officer.¹⁰⁹ To the extent there is public

¹⁰² See *Read the DOJ Memo Authorizing Mueller to Investigate Potential Manafort Collusion*, CNN (Apr. 3, 2018, 9:17 AM), <https://www.cnn.com/2018/04/03/politics/read-rostein-aug-2-memo/index.html>.

¹⁰³ *Id.*

¹⁰⁴ 28 C.F.R. § 600.7(d) (2018).

¹⁰⁵ *Edmond*, 520 U.S. 651 (1997).

¹⁰⁶ 28 C.F.R. § 600.7(b) (2018).

¹⁰⁷ Once *Morrison* was decided, *Morrison*'s critics shifted their argument about "good cause" to the appointments clause. Nick Bravin, *Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103 (1998). The academic argument was that, under *Edmond*, a special counsel is not "supervised" by a superior because he may only be removed for "good cause." Nothing in *Edmond*'s supervision test, however, demands such a reading.

¹⁰⁸ Calabresi, *supra* note 67.

¹⁰⁹ Should the President find that the Attorney General or Deputy Attorney General are not exercising appropriate authority over the Special Counsel, he may fire them at will. See Steve Vladeck, *How to Replace Jeff Sessions*, SLATE (July 25, 2017, 1:23 PM),

information, it appears that the Special Counsel has been keen to maintain limits, referring matters that might stray from the core assignment to the Southern District of New York and seeking clarification or additional authorization from the Deputy Attorney General when necessary. Ultimately, the constitutional question cannot be determined by the acts of the Special Counsel but must be based on the law. Under the existing regulations, the Attorney General has the authority to tell the Special Counsel to stand down because his actions are “unwarranted.”¹¹⁰ That makes the Special Counsel an inferior officer.

Conclusion

Only in an authoritarian regime is the President above the law. Having prosecuted the atrocities of World War II, Justice Jackson dismissed as “totalitarian,” the legal argument that the President had “all” executive power. The arcane legal particulars in this Issue Brief concerning presidential removal--a power which has been debated since 1789--should not obscure what is at stake today. The unitary executive theory is dangerous; many legal academics thought it had died in the Bush war on terror, when it was used by the Office of Legal Counsel to justify torture. Once taken from the law journals and the legal societies and handed to political agents, the unitary executive appears to grant Presidents license to dismiss the law, all based on a lonely dissent. No Supreme Court majority has ever held that the President is above the law, whether the case concerned removal or appointments or civil suits or the war on terror. The Senate’s attempt to require the President to state a good cause for the removal of a special counsel is a modest burden, necessary and proper to defend the rule of law.

http://www.slate.com/articles/news_and_politics/jurisprudence/2017/07/if_donald_trump_fires_jeff_sessions_here_s_how_he_ll_appoint_a_successor.html.

¹¹⁰ 28 C.F.R. § 600.7(b) (2018).

About the Author

Victoria Nourse is a Professor of Law at Georgetown Law Center, where she is the director of the Center on Congressional Studies. She has previously held chairs at Emory University and the University of Wisconsin and has been a visiting law Professor at Yale and NYU. She has taught across the public law curriculum, from criminal law to criminal procedure, from legislation to administrative law to constitutional law. In 2015-16, she served as Chief Counsel to the Vice President of the United States, capping a career of public service that began at the Justice Department as an appellate litigator. In 2017, she was named a public member of the Administrative Conference of the United States. Her latest publications include: *Statutes, Regulation, and Interpretation* (with Eskridge and Gluck) (West 2014 & 2017 Supp.) and *Misreading Law, Misreading Democracy* (Harvard 2016).

About the American Constitution Society

The American Constitution Society (ACS) believes that law should be a force to improve the lives of all people. ACS works for positive change by shaping debate on vitally important legal and constitutional issues through development and promotion of high-impact ideas to opinion leaders and the media; by building networks of lawyers, law students, judges, and policymakers dedicated to those ideas; and by countering the activist conservative legal movement that has sought to erode our enduring constitutional values. By bringing together powerful, relevant ideas and passionate, talented people, ACS makes a difference in the constitutional, legal, and public policy debates that shape our democracy.

All expressions of opinion are those of the author or authors. The American Constitution Society (ACS) takes no position on specific legal or policy initiatives.