

Legal Sidebar

Legislative Proposals Seek Statutory Protections Related to Removing a Special Counsel

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Following Robert Mueller’s appointment as Special Counsel to investigate (per the [direction of the Deputy Attorney General](#)) the “Russian government’s efforts to interfere in the 2016 presidential election,” some Members of Congress have [expressed various concerns](#) about the [independence](#) of an investigation that has the possibility to implicate current or former executive branch officials. Most recently, new proposals—the Special Counsel Independence Protection Act (SCIPA, [S. 1735/H.R. 3654](#)) and the Special Counsel Integrity Act (SCIA, [S. 1741](#))—have been introduced that would provide additional protections for a special counsel against removal by the President or the Attorney General.

The U.S. Supreme Court has explained that the Constitution has long been [understood](#) to “empower the President to keep [executive] officers accountable—by removing them from office, if necessary.” As discussed in an [earlier posting](#) and [CRS report](#), however, there is a longstanding debate over what restrictions can be placed on the President’s power to remove an individual who is *investigating* executive branch officials. Such debates have been centered on finding the right balance to ensure that those being investigated and those conducting the investigation are properly held accountable for their actions. In this vein, the Supreme Court has recognized that Congress can impose some restrictions on the President’s power to remove certain government officials. Perhaps most notably, in *Morrison v. Olson*, the Supreme Court upheld provisions of the [Ethics in Government Act](#), which allowed for the appointment of an independent counsel (who could only be removed personally by the Attorney General for “good cause”—a heightened standard) to investigate executive branch misconduct.

The independent counsel law expired in 1999, and current authority governing oversight of special counsels is provided through [Department of Justice \(DOJ\) regulations](#). The regulations provide the special counsel some independence in his daily activities and expressly provide that only the Attorney General (or Acting Attorney General in a case in which the Attorney General is recused) may remove the special counsel upon a finding of “good cause,” such as “misconduct, dereliction of duty, incapacity, conflict of interest, or ... violation of Departmental policies.” Importantly, however, the DOJ regulations provide no clear means to enforce the “good cause” removal protection for the special counsel, and, as rules that may pertain to “[agency organization, procedure, or practice](#),” the regulations could—in theory—be repealed without the need for notice and comment rulemaking.

Selected Legislation to Codify Protections for the Independence of the Special Counsel. Recent bills—the SCIA and SCIPA—have focused on codifying and expanding the removal protections for special counsels. Each bill would codify the “good cause” removal provision that exists under the DOJ special counsel regulations. And while each bill would create a mechanism to enforce the “good cause” removal standard, the mechanisms that would be established under each bill differ slightly. Under SCIA, the special counsel would be informed of the specific reasons for removal in writing and would be authorized to seek expedited judicial review of the decision. A three-judge panel would then be required to determine within 14 days of a request for review whether the decision to remove the special counsel comported with the standard set forth in the bill. If the panel (or the Supreme Court, on appeal) determines that the good cause standard was not met, the special counsel would be immediately reinstated to the position. In contrast, to remove a special counsel under SCIPA, the Attorney General would have to file suit in federal district court, and a three-judge panel (or the Supreme Court, on appeal) would decide whether the special counsel’s removal was warranted before the special counsel could be removed from office.

Legal Considerations Regarding SCIA and SCIPA. While a full analysis of the various legal and prudential arguments regarding SCIA and SCIPA is beyond the scope of this posting, the bills raise a number of constitutional questions, including:

- **Can a court make the decision to remove an executive branch official?** While there are examples of executive actions being conditioned the approval of a court (*e.g.*, approval of search warrants), transferring the authority to decide to remove a special counsel to a court may raise a unique issue unexplored by legal precedent. Notably, the Court in *Morrison* found “no constitutional problem” with the fact that the independent counsel statute “provide[d] for judicial review of the removal decision,” explaining that “[t]he possibility of judicial review [did] not inject the Judicial Branch into the removal decision.” It further explained that under its narrow construction of the provisions in question, the statute did not authorize the judicial branch to remove an independent counsel in the course of an ongoing investigation and therefore did “not pose a sufficient threat of judicial intrusion” into executive authority. However, due to this narrow construction, *Morrison* did not address whether a bill like the SCIPA, which would functionally transfer the ultimate authority to *decide* to remove a special counsel to the three-judge panel, would unconstitutionally infringe on the executive branch’s power of removal.
- **Can a court order the reinstatement of a government official that has been removed by the Executive?** Both bills contemplate potential court orders requiring the President to reinstate a special counsel, which would raise novel questions regarding whether such a remedy would unduly intrude on the President’s authority. As [several legal commentators](#) have noted, and as [discussed](#) in recent litigation, it is an open question whether federal courts have the power to direct the President to reinstate a fired officer. This is because the central remedy that has been afforded to officers who were unlawfully removed by the President has been backpay.
- **Can Congress simply codify the good cause protections of the DOJ regulations?** Regardless of the potential expansion of removal protections, there are also constitutional questions related to codification of the current protections. The DOJ regulations amount to a self-imposed limit on executive removal authority and allow for amendment or repeal at its discretion. In contrast, codification of the good cause standard would require any changes to be approved by Congress, setting up a potential constitutional challenge. While the Supreme Court [has not overruled Morrison](#), there has been significant resistance in the subsequent decades to reviving the independent counsel model. Accordingly, legal commentary [includes speculation](#) that new legal challenges to legislation related to the appointment and removal of executive officials could present an opportunity for the Supreme Court to revisit the *Morrison* decision, which could yield a different outcome. On the other hand, [others](#) have countered that [carefully crafted legislation](#) could still pass constitutional muster even among those who are skeptical of *Morrison*.

More broadly, there is significant debate over the merits of the new special counsel bills. The bills’ sponsors [have emphasized](#) that as a matter of policy there must be assurances that removal decisions are made “for the reasons cited in the [DOJ] regulation rather than political motivation,” [citing](#) the need for independence in investigations and the principle of checks and balances. Some commentators have raised questions about such an approach, however. [One scholar](#) has argued that Congress should avoid attempting to limit executive authority through legislation, and [suggested that](#), if warranted, Congress should focus on the availability of constitutionally contemplated legislative checks on alleged executive wrongdoing, rather than attempting to craft a statutory substitute that vests such checks in the judicial branch. [Another scholar has suggested](#) that Congress’s attempts to protect the special counsel arguably may distract and potentially undermine the efficacy of the investigation if a dispute over constitutionality results in protracted litigation. These prudential and constitutional questions may inform the debate over SCIA and SCIPA going forward.