

Testimony Before the Senate Committee on the Judiciary  
September 26, 2017  
By Akhil Reed Amar

Thank you, Mr. Chair. My name is Akhil Reed Amar. I am the Sterling Professor of Law and Political Science at Yale University, where I specialize in American constitutional law.<sup>1</sup> I have previously testified before this committee on half a dozen occasions; it is always an honor and a solemn responsibility to appear here.<sup>2</sup>

The two bills under current consideration—S. 1735 (Graham-Booker) and S. 1741 (Tillis-Coons)—aim to thwart potential presidential abuses in connection with attempted removals of special counsels, including the possible removal of Robert Mueller. The bills have laudable goals, and it is heartening to see bipartisan sponsorship here. Several of the bills' co-sponsors are my dear friends. I have no such personal relationship with President Trump, whose wings these bills aim to clip. I am a registered Democrat who publicly opposed Mr. Trump in the 2016 campaign, and I am distressed by many of the things he has done and aims to do.

That said, I must report that, as a scholar who has studied the Constitution for over thirty years and written extensively on constitutional law, I believe that the bills in their current form are unwise and unconstitutional. Happily, there exist alternative reforms that are far more constitutionally proper to accomplish the laudable and bipartisan aim of these bills to restrain improper presidential behavior.

In a nutshell: The bills, if enacted, are likely to be successfully vetoed, and rightly so; are likely to be judicially invalidated, and rightly so; and are in any event violations of several basic constitutional principles. Instead of pursuing an ineffective, counterproductive, and

unconstitutional legislative strategy, this Committee, I respectfully submit, should throw its weight behind a dramatically new and improved system of bipartisan Senatorial oversight of the interactions among the White House, the Justice Department, and special counsels.

### I. The Boomerang Effect of a Likely Veto

Any bill that aims to restrict this president and the presidency generally along the lines of these bills will likely be vetoed on both policy grounds and constitutional grounds. In the modern era, it is extremely hard to override a presidential veto when the president's party controls both congressional houses. Since 1952, this has happened only twice—both times under President Carter, when the presidency hit rock bottom and the Congress was riding high in the aftermath of Watergate.<sup>3</sup>

Any veto by President Trump would be unlikely to impose a heavy political price on him. The president could plausibly claim to be defending not just himself but also his successors and the presidency more generally. He would likely be backed by a strong memo of support from the Department of Justice's Office of Legal Counsel (OLC). His constitutional and policy objections would probably be backed by a wide range of expert opinion leaders across the political spectrum who believe, as I do, that these bills, however commendable their motivations, are unwise and/or unconstitutional. (More on that soon.) Thus the upshot of these bills, were they to pass Congress, would likely be to embolden and empower a president who does need to be checked and chastened. The bills are more likely to boomerang and backfire than to hit their proper target.

## II. The Boomerang Effect of the Supreme Court's Likely Invalidation

Even if these bills somehow become law, they would likely be struck down by the current Supreme Court by a vote of at least 6-3 and possibly even more overwhelmingly. (Any change in Court composition that might likely occur in the near future could make the vote even more lopsided.) So here, too, the bills would backfire and boomerang. They would end up emboldening and empowering President Trump when he does need to be checked and chastened.

### A. The *Edmond* and *Morrison* cases

As the Court now stands, the bills are vulnerable on multiple grounds. In a key 1997 case that has not received the attention it deserves, *Edmond v US*, the Court declared that an inferior officer must be truly . . . inferior (!) and must in general answer to some proper superior officer. Currently, special counsels such as Robert Mueller are *inferior* officers under the Constitution. They are not confirmed by this body—the Senate—as all appointive non-inferior officers (such as cabinet heads) need to be (except in recess-appointment situations) under the unambiguous language of Article II, section 2, paragraph 2 of the Constitution.<sup>4</sup> In order to be truly *inferior*, an officer simply cannot be the kind of figure contemplated by these bills: a significantly independent official who can make hugely important policy decisions and wield wide policy discretion and yet claim legal immunity from close monitoring, tight control, and at-will removal by superior officers. A circle is not truly a square; and an officer who wields great prosecutorial discretion over undeniably consequential matters, and who cannot be countermanded at will by the President or the Attorney General or any other Senate-confirmed officer, and who cannot be

fired at will by higher-ups in the executive branch, is not truly inferior according to *Edmond*. At present, a special counsel such as Robert Mueller is inferior (and thus constitutionally kosher) precisely because he can be fired at will—surely by the AG, and probably also by the President.<sup>5</sup> That vulnerability to being fired at will is precisely what these bills seek to eliminate; but then Mr. Mueller would, under *Edmond*, no longer be a proper inferior. Thus, the statute flunks the *Edmond* test and would likely be struck down.

*Edmond* in effect overruled the now-discredited 1988 case of *Morrison v. Olson*, or at least limited *Morrison* to its facts.<sup>6</sup> *Edmond* was authored by the great prophetic dissenter in *Morrison*, Antonin Scalia, and major portions of *Edmond* borrow liberally from this prophetic dissent. Even though *Edmond* may not have overtly undone *Morrison*—and thus lower courts might still follow *Morrison*—the *Edmond* ruling strongly signals how the Supreme Court itself would see things; and these bills, if enacted, would almost certainly be reviewed by the Court without delay.

Outside the Court, Justice Scalia's *Morrison* dissent has carried the day in legal and expert-opinion circles left, right, and center. In 1999 Congress declined to renew the 1978 Ethics in Government Act after the Act's constitutional flaws had been laid bare (just as Scalia had prophesied) in episodes involving presidents of both parties and after Attorney General Janet Reno, a Clinton Democrat, bluntly testified before the Senate on March 17 of that year. Reno told the Senate that experience had proved Scalia right and that the 1978 Act was unconstitutional in its basic aim of creating real legal independence for, and strong judicial protections for, various federal prosecutors investigating various sensitive topics. The 1978 Act, the very Act at issue in *Morrison v. Olson*, is an obvious conceptual precursor of the current Graham-Booker and Tillis-Coons bills; and in allowing the 1978 Act to lapse, Congress

properly, albeit quietly, sided with Reno and Scalia.<sup>7</sup>

In public remarks in 2015, Justice Elena Kagan—a former Harvard Law School constitutional scholar and dean who was appointed to the Court by President Obama and confirmed by a Democrat-controlled Senate—declared that Justice Scalia’s *Morrison* dissent was “one of the greatest dissents ever written and every year it gets better.”<sup>8</sup> Duke University’s Walter Dellinger, another distinguished constitutional scholar and public servant (who served as Acting Solicitor General and Head of the OLC under a Democratic president), has likewise emphatically embraced Justice Scalia’s dissent. In the online publication *Slate* (whose general readership is left-of-center), Professor Dellinger in June 2012 minced no words: “Justice Scalia had it right in *Morrison v. Olson*.”<sup>9</sup> This is the view that I too, have always and invariably maintained in my Yale Law School classrooms and in print, beginning in the late 1980s. On the other end of the political spectrum, Northwestern University’s Professor Steve Calabresi, co-Founder of the Federalist Society, has long been a critic of *Morrison* and a champion of the Scalia dissent.<sup>10</sup> When Justice Scalia passed away in 2016, many of the major obituaries and tributes singled out his *Morrison* dissent for special encomium.

The 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” that can be relied upon as a sturdy guidepost to what the current Court would and should do. These scholars span the ideological spectrum and the Supreme Court has quite often favorably cited these scholars in a wide range of recent constitutional law cases. In addition to Professors Calabresi, Dellinger, and former Professor and Dean (and now Justice) Kagan, this list includes Harvard’s Professor Adrian Vermeule; UPenn’s Professor Christopher Yoo; UVA’s Professor Sai Prakash; Georgetown’s Professor (and former Acting

Solicitor General) Neal Katyal; University of Minnesota's and (later) University of Saint Thomas's Professor Mike Paulsen; GW's Professor Jeffrey Rosen (now President of the nonpartisan National Constitution Center); University of Illinois's Law Dean, Vikram David Amar; and University of San Diego's Professor Mike Rappaport.<sup>11</sup>

None of the members of the 1988 *Morrison* majority remains on the current Court and today's Court would most likely, if these bills were to pass, either flat-out overrule *Morrison* or treat it as irrelevant to the Mueller investigation. Even if the *Morrison* majority was right in treating independent counsel Alexia Morrison as an inferior officer (despite her statutory immunity from at-will removal by executive-branch higher-ups), special counsel Robert Mueller is not truly inferior because, unlike Morrison, Mueller cannot be effectively neutralized via the president's pardon power. In 1988, when *Morrison* was decided, then-President Reagan was free to pardon Morrison's target of investigation—Ted Olson—and in the process of pardoning or threatening to pardon, the president could wield important control over Morrison. Bluntly, Reagan's pardon pen empowered him to make Morrison go away. By contrast, because of the foundational rule-of-law principle that no man can be a judge in his case, President Trump may not properly pardon himself. He cannot make Mueller go away with his pardon pen; and thus he must retain the ability to fire Mueller at will in order for Mueller to remain truly *inferior* as required by the Constitution.<sup>12</sup>

To put this point a slightly different way: Even if *Morrison* remains good law, the current bills flunk the test announced by the majority in that case. The *Morrison* Court held that even though independent counsel Alexia Morrison was insulated from at-will removal, she was nonetheless an inferior officer in part because of the small scope of her investigation. Basically, she was focused on only one person, who was out of government at the time: Ted Olson. In

contrast, Robert Mueller is apparently investigating *the President of the United States* for possible obstruction of justice in firing the *Director of the FBI*, as well as at several other people involved in *a major national scandal*, which involves alleged *Russian tampering with a presidential election*. The Mueller investigation is thus vastly wider and more consequential for the republic than was Alexia Morrison's. Even under the *Morrison* test, it would be preposterous to say that Robert Mueller is just like Alexia Morrison, conducting an investigation of small and limited scope. Because his investigation is so much broader and deeper and more momentous for us all, he can be deemed a truly *inferior* officer only if he remains subject to at-will removal by higher-ups within the executive branch.

#### B. The *Myers*, *Humphreys Executor* and *PCAOB* cases

Quite apart from the inferior-officer issue, the landmark 1925 case of *Myers v. United States*, authored by Chief Justice Taft, provides an independent basis for believing that the Supreme Court would invalidate Graham-Booker or Tillis-Coons if enacted. The Constitution's Article II vests all executive power in the President. The power to fire important standalone<sup>13</sup> executive-branch appointees who wield core executive powers (and solely executive powers) resides in the president. Under *Myers*, this removal power cannot be abridged by a statute that says, as do the current bills, that the president can fire only for "good cause" and only as that "good cause" is determined by some judge and only if the president acts through his AG. Prosecution is a *core executive* function and a *uniquely executive* function. Thus, federal prosecutors must answer to, and be removable by, the *chief executive*: the President.

*Myers* was later limited by the 1937 *Humphrey's Executor* decision, but these limits apply only to persons who wield quasi-judicial and/or quasi-legislative powers. Special counsels, to repeat, are entirely and uniquely executive. They wield the quintessential executive power of criminal prosecution, and thus they fall squarely under *Myers*. (*Morrison v. Olson* contains language that might be thought to limit *Myers* further, but—as I explained earlier—*Morrison* is no longer good law and should not be relied upon.) Also, *Humphrey's Executor* on its facts did not involve the reinstatement of an officer whom the president had fired. The case involved only back pay. The fired officer, William Humphrey, was dead when the Court ruled, and the case was pursued by his estate—hence the caption words “Humphrey’s *executor*.” By contrast, the current bills go far beyond *Humphrey's* facts by seeking to empower judges to entirely prevent the removal of, or to bodily reinstate, a core and uniquely executive official whom the chief executive wants to remove from his own branch.<sup>14</sup>

The Supreme Court has recently ringingly endorsed *Myers* in a 2010 decision authored by Chief Justice Roberts, *FEC v. PCAOB*, which strongly affirmed presidential power over lower-level executive underlings. That case, too, suggests that the current Court is likely to strike down any statute that seeks to give strong insulation to any non-cabinet, non-Senate-confirmed official who seeks to wield real power and enjoy strong discretion vis-à-vis higher-ranking executive officialdom. Lower-level officials, the *PCAOB* Court insisted, must be subject to real supervision from executive-branch higher-ups so as to ensure that the President is truly in control of his own administration. Although *PCAOB* was a 5-4 decision, one of the four dissenters, Justice Stevens, has now been replaced by Justice Kagan, a former high-level executive branch official who as a constitutional law professor wrote in support of presidential power and who has publicly heaped praise upon Justice Scalia’s prophetic and now-classic



dissent in *Morrison v. Olson*. True, *PCAOB* pivoted on slightly different unitary-executive issues than the unitary-executive issues raised by the two bills now under consideration. But the underlying vision of Chief Justice Roberts's *PCAOB* opinion bodes ill for these bills. The *PCAOB* Court ruled that, outside the special context of independent agencies (which consist of multimember bodies composed of fixed-term Senate confirmees)<sup>15</sup> a president must have broad power to control lower-level executive branch officials who are making important policy choices (as opposed to merely finding facts or operating as apolitical technical experts such as, say, chemists or accountants).<sup>16</sup>

If we are trying to predict the current Court's likely instincts, it is also worth noting (though it is slightly awkward to say out loud or put in print) that that Chief Justice Roberts and Justices Thomas, Alito, and Kagan have all held high-level appointed positions within the executive branch earlier in their careers, as did Justice Gorsuch's mother. By contrast, only Justice Breyer has held a high-level position on Capitol Hill.

### III. The Constitution's Plain Meaning and First Principles

Finally, I come to my most important and heartfelt claims. Regardless of what President Trump might do and what the Roberts Court might do, the Senate must do right by the Constitution itself. Every Senator takes an oath to uphold the Constitution, not just to abide by Court decisions. Courts may at times give broad deference to arguably unconstitutional statutes; but courts at times do so precisely because judges expect lawmakers themselves to have seriously pondered the constitutional issues in the first instance. If lawmakers pass the buck to judges, and judges bow deferentially to lawmakers, then *no one* will have carefully considered

the constitutional issues. Instead, the framers expected that *all three* branches would focus intently on the Constitution. That is why members of all the branches, and not just judges, take oaths; and they all take oaths not to the Court but to the Constitution itself.<sup>17</sup>

And as someone who has studied the Constitution intently for more than three decades, and who has probably written as much about the document itself (as distinct from the case law) as anyone now alive, I am here to say that in my professional opinion these bills are unconstitutional, in at least three ways.

#### A. The Inferior-Means-Inferior Principle

First, even if *Morrison* remains the rule that the Court will follow for itself and even if a Court majority were to try stretch *Morrison* to cover Mueller, the Constitution itself would still say what it says. And that document clearly says that (apart from recess appointees) appointed officers must either be confirmed by the Senate or they must be truly *inferior* officers. Special counsels are not confirmed by the Senate; thus, they are permitted only if inferior. But these bills aim to make them independent. *One simply cannot be both truly independent and truly inferior.* A truly *inferior* officer must have a *superior* officer within his own branch to whom he answers and who can countermand or remove him if the superior loses confidence in the inferior.

Words have meanings. Even if President Trump often plays fast and loose with words, the Senate must not follow suit, especially when the words are the words of the Constitution itself. The current bills undermine the Inferior-Means-Inferior principle by depriving all Oval Office occupants—and not just the one down the street today—of the power to dismiss an inferior-officer underling in whom the president lacks confidence.

Even if a president could somehow properly be limited to firing a federal prosecutor only for cause (and not, for example, because the president prefers only members of his own party in officer positions) the bills fail to make clear that defiance of a lawful presidential order—an order to exercise legitimate discretion this way or that way—is itself automatic good cause. In the absence of crystalline statutory clarity on this point, there is an unacceptable risk that judges might not recognize defiance or insubordination as good cause in a situation where two lawful options exist, and where a special prosecutor insists on pursuing lawful option A even after a president has directed the inferior-officer prosecutor to instead pursue lawful option B. Special counsels must of course comply with proper Justice Department policies, as these bills acknowledge. But these bills pointedly and improperly fail to acknowledge that inferior officers, *as inferior officers*, are also subject to direct presidential instructions whenever the president is acting within the scope of his broad executive powers—powers that include his authority to issue pardons (and exercise the lesser-included option of prosecutorial discretion), and his authority to superintend the entire executive branch (as affirmed by clauses vesting him with authority to demand information from underlings and to take care that the laws be faithfully executed). If the president may personally issue a wide range of lawful orders to cabinet heads, surely he must have broad power to tell *inferior* officers what to do and what not to do within their range of lawful policy discretion.

#### B. The Prosecutor-and Pardon-in-Chief Principle

Second, regardless of all the technicalities and details of *Myers*, *Humphrey's Executor*, *PCAOB*, etc., the Constitution vests the executive power of the United State in the president and

also vests the pardon power in the person of the president. The power to pardon subsumes the lesser power to decline prosecution for any number of reasons—mercy, resource constraints, and national security considerations, to name just a few. These decisions are ultimately given to the president, and it is unconstitutional to try to take these decisions away from the president and to vest them in someone other than the president—such as a mere federal prosecutor backed by a judge.

Nor may Congress entirely relocate these decisions from the president to the AG. The current bills thus raise grave constitutional concerns insofar as they prohibit the president from firing a special counsel (even when good cause exists!) directly and personally, as opposed to acting indirectly via a presidential order to the AG to sack the underling. Given that the pardon power is vested personally in the president, it is doubtful that Congress can relocate away from the president the closely related power to sack overly exuberant low-level prosecutors. The Inferior-Means-Inferior Principle is also relevant here: If a President can personally sack any Cabinet head at will, why should a mere *inferior* officer somehow be *more* insulated from direct presidential removal? If the AG and other relevant Justice Department officials should, God forbid, die or suddenly resign for reasons having nothing to do with the special counsel's investigation, surely the president himself should not be disabled from removing a plainly insubordinate *inferior* officer, or indeed any truly *inferior* officer in whom the president lacks confidence.

At the emphatic insistence of George Washington, the First Congress by statute recognized that the president had the constitutional right and power to fire the Attorney General at will. No Congress has ever changed this aspect of the famous “Decision of 1789,” although the Ethics in Government Act of 1978 did try to weasel around the first principles of Article II.

That 1978 statute failed, disastrously, and it did so in large part because it failed to mesh with the gears of the Constitution itself. The current bills are a throwback to this failed regime.

Teapot Dome was successfully handled without judicially enforceable for-cause statutory protections for the special prosecutor in that case. (That scandal was prosecuted by two principle officers—a Republican and a Democrat—who were nominated by the president, confirmed by the Senate, and removable at will by the president.)<sup>18</sup> So too, the Watergate scandal was resolved without anything in place like the 1978 Act or the current bills. When Richard Nixon’s Administration fired special prosecutor Archibald Cox in the Saturday Night Massacre, the president was made to pay a huge political price. Politics, a vigilant press, and robust Congressional oversight kept the system in balance; no federal judge sought to block Cox’s ouster or reinstate him. This system worked far better than did the post-1978 regime, precisely because the pre-1978 system stayed within the lines laid down in the Constitution itself marking the proper rules and roles for presidents, executive branch underlings, Congress, courts, and the electorate.<sup>19</sup>

At the Founding, President George Washington personally issued binding directives to line prosecutors. For example, on March 13, 1793 he wrote William Rawle, the U.S. attorney for the district of Pennsylvania, “instruct[ing]” Rawle to “enter a Nolle prose qui on the indictment aforesaid.”<sup>20</sup> Similarly, President John Adams ordered prosecutors to drop a sedition act prosecution against one Ann Greenleaf and President Thomas Jefferson likewise directed the dismissal of a pending sedition act prosecution that had been brought against the publisher William Duane. Later, Jefferson closely supervised the treason prosecution of his sometime ally and sometime rival, Aaron Burr.<sup>21</sup>

Washington believed that all high-level officers in the executive branch ultimately

answered to him. In his words: “The impossibility that one man should be able to perform all the great business of the State, I take to have been the reason for instituting the great Departments, and appointing officers therein, to *assist* the supreme Magistrate in discharging the duties of *his* trust.” [Emphasis added.] Consider also the words of James Madison, echoing Washington, in the First Congress: “The Constitution has invested all executive power in the President. . . . Is the power of [firing executive branch officials] an executive power? I conceive that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws.” In perfect keeping with Washington’s and Madison’s original understandings, the First Congress created the first cabinet departments via statutory language designed to affirm the president’s inherent and unilateral constitutional power to remove cabinet heads at will.<sup>22</sup>

Later Congresses have structured certain independent agencies in a different fashion. Heads of certain multi-member commissions do not serve at will and are removable only for good cause. But as I have explained in detail in my 2012 book, *America’s Unwritten Constitution: The Precedents and Principles We Live By*—a book written long before Donald Trump was in power—these rules governing independent agencies do not apply to situations such as Robert Mueller’s investigation:

Viewed through the prism of practice, the Constitution allows independent agencies when three factors converge: first, when an executive entity is best headed up by a committee rather than a single officer; second and related, when it makes sense to create continuity-enhancing fixed-tenure offices embodying technical expertise or nonpartisanship in a specific policy domain; and third, when an executive agency does not routinely interfere with specific constitutional grants of personal presidential authority, such as the powers to command the military, to personally monitor all cabinet heads, to pardon criminals, to parley with foreign leaders, to make appointments, to define an overall national agenda, and, more generally, to superintend the entire executive branch. . . .

The specific provisions vesting the president personally with these respective powers are the commander-in-chief clause, the opinions clause, the

pardon clause, the ambassador-receiving clause, the appointments clause, the state-of-the-union and recommendation clauses, and the take-care clause. Under this framework, it makes perfect sense that in 1789, the War Department and the State/Foreign Affairs Department were structured as cabinet-style departments directly answerable to the president, and have remained so structured ever since. It also makes perfect sense that the Attorney General answered directly to the president in 1789 and has done so ever since.<sup>23</sup>

Several of the current bills' sponsors and well-wishers in the Senate are former state attorneys general or state governors. To them I offer a special reminder: State governors and state attorneys general typically operate under a different constitutional regime than do American presidents and federal AGs. In most states, the governor does not handpick the attorney general, nor does the state AG serve at the pleasure of the governor. So state prosecutors are importantly different in their relationship to the state's chief executive; and various state models are thus inappropriate for emulation in statutes seeking to properly structure the federal prosecution system.

Similarly, state judges play different roles than do federal judges. Many state judges can create rules of criminal liability on their own authority. Federal judges may not. As the Marshall Court made clear in a landmark 1815 decision, *US v. Hudson and Goodwin*, there is no federal common law of crimes. Which takes me to my final constitutional objection to these bills, which create an improper role for federal judges.

### C. The Federal Judicial Modesty Principle

Congress, it is often said, is a they, not an it. The president, by contrast, is always a single person, as highlighted by the strikingly personal language of the presidential oath carefully prescribed by the Constitution itself: *I* do solemnly swear, that *I* will faithfully execute the office

. . . and will, to the best of *my* abilities . . .” [Emphasis added.] These are the only places where the Constitution uses the words “I” and “my,” and faithful constitutionalists must take these strikingly personal words to heart. These words suggest that, in addition to the other flaws of the current bills, the remedial judicial role envisioned by these bills is too robust.

When a marriage breaks up, judges do not force the couple to stay together, even if one spouse wants a reunion and the other spouse is entirely at fault. Damages may be appropriate for judges to impose, but not specific performance. Similarly, judges do not generally order specific performance for breached personal service contracts. Here, too, judges do not try to force an unwilling person into an awkward personal relationship. Here, too, damages are more appropriate, reflecting limits on the proper scope of judicial action.

The president must remain in charge of his own branch. He is the one tasked with taking care that the laws are faithfully executed, and he must be comfortable with the persons doing the execution in his administration. Even if his removal power may be properly limited in certain ways, judges should not seek to force him to accept someone he deems unacceptable as an inferior officer in his administration. So even if the current bills could somehow properly insulate special counsels from presidential removal at will—and for reasons already stated, I myself think such insulation is unconstitutional—the only proper judicial remedy for a wrongful termination of an inferior executive-branch officer personally fired by the president or fired upon the direct personal order of the president should be damages. Federal judges, unlike state judges, should never be in the business of *appointing* prosecutors, as they were under the failed 1978 Act that the *Morrison* Court wrongly upheld.<sup>24</sup> The current bills do not entirely replicate this egregious aspect of the 1978 law; but they do contemplate an unduly intrusive role for federal judges in determining who should *remain* a federal prosecutor. In general (putting aside, for



example, any possible impeachment of an errant federal prosecutor), the decision whether to keep or sack a federal prosecutor should be made solely by high-level executive officials, with the president himself formally atop the chain of command. Judicial remedies for egregious prosecutorial firings should be limited to money damages.

#### IV. A Better Mousetrap

The constitutional powers of the president are awesome and at times terrifying to contemplate; they are capable of gross abuse. The Constitution's main safeguards are the front-end election of presumptively virtuous presidents by the American people and the back-end threat of impeachment for egregious presidential misconduct, both buttressed by a robust First Amendment and fourth estate.

Congressional oversight is an essential ingredient in this constitutional recipe. But in the modern era of intense political polarization, many worry that oversight will fail whenever the president's party controls both congressional houses, as is now the case. Hence the efforts of the current bills to provide a statutory mechanism for checking and chastening presidential abuses vis-à-vis special counsels investigating the president's own inner circle and, possibly, the president himself.

As I have tried to explain, these bills are, alas, unwise and unconstitutional. But the bipartisanship that these bills embody and radiate is altogether admirable and is, indeed, the key to a better solution: Rather than push forward a flawed statute, the Senate should beef up its own structures of oversight to guarantee serious scrutiny of presidential behavior vis-à-vis special counsels, even in situations when the president's party controls the Senate.<sup>25</sup>

The Senate is the obvious place for this bold new brand of bipartisanship to take shape. The other body (the House) is a large chamber in which abiding friendships across the aisle are less likely to form. House terms are short, so primary elections are always in sight, elections in which extremist voters in each party's base loom large. The median voter in many lopsided House districts is either far left or far right; Senators, by contrast must win statewide elections decided by voters who are often closer to the middle of the political spectrum. Thanks to much longer terms and a much smaller membership, Senators are better able to work across the aisle. To repeat: the very sponsorship structure of these bills is cause for hope, even though the bills themselves are frankly constitutional nonstarters.

Instead of adopting these bills, the Senate should revise its committee structure to create a new and powerful Standing Committee on Presidential Oversight. Even in the absence of any statutory provision akin to the proposed "contemporaneous notice" language of Graham-Booker, the Senate can, by both Senate tradition and a Senate Resolution, make it clear that the president should immediately apprise the Presidential Oversight Committee of any removals of special counsels, and that any presidential failure to do so will be treated by the Committee and the Senate as a profound breach of interbranch etiquette. This Presidential Oversight Committee should at all times have an equal number of Republicans and Democrats, regardless of which party controls the Senate as a whole. In this respect, the Senate Ethics Committee provides an obvious analogy. The Senate Republican caucus should choose the Democratic members of the Presidential Oversight Committee and the Senate Democratic caucus should choose the Republican members; this special selection procedure will maximize Committee bipartisanship and moderation. On the Committee itself, each Committee caucus should by rules and traditions be given broad authority to insist on hearings; each Committee caucus, if unanimous or if backed

by at least one senator from across the aisle for each caucus defector, should itself have subpoena power. This Committee should also have a generous budget to hire professional career prosecutors and investigators, akin to career staff attorneys in the Justice Department itself. Unlike the Senate Ethics Committee, perhaps this new Senate Oversight Committee should at all times be chaired by a member of the party opposite to that of the US President. Or at the very least, if the president's party controls the Senate, the Committee chair should be a member of the Senate majority caucus who is picked by the Minority Leader. In short, even if the president's party in fact controls the Senate as a whole, that party should not be allowed to dominate and stonewall this unique and uniquely important new Committee.

In the spirit of the famous Federalist No. 51, this new Committee would enable the Senate as a formal and separate institution of government to check and balance the formally separate executive branch, even when both branches are controlled by the same political party. Ideally, Committee members would, at least on this Committee, try to think and act not merely as Republicans or Democrats but as *Senators* as such, defending against possible *executive* misconduct as such. To borrow from the language of recent constitutional scholarship, the Committee would aim to institutionalize true separation of *powers* rather than a mere separation of *parties*.<sup>26</sup> Or to put the point historically: The Supreme Court at many of its greatest moments has spoken as a bipartisan Court, and not a riven gaggle of partisan hacks. John Marshall in *McCulloch*, Earl Warren in *Brown*, John Roberts in *Sebelius*—all exemplified bipartisanship at its best, with a Chief Justice of one party strongly allying himself many associate justices of the other party. The Senate need not *involve* the judiciary, as the current bills contemplate; rather the Senate can itself *emulate* the judiciary at its best.<sup>27</sup>

A plan along these lines would not risk a veto boomerang. It would not risk an

embarrassing judicial invalidation. It would not turn the executive branch upside down or the judicial branch inside out. It would not twist the Constitution’s words or warp its basic principles. It would not create a constitutional Frankenstein akin to the Independent Counsels of the 1990s. Instead, the Senators themselves would be working in strongly bipartisan fashion to keep presidents of both parties honest at all times, regardless of which party controls which branch. This is the proper role for the US Senate—the greatest deliberative body on earth—as envisioned by our Constitution’s text, history, structure, and spirit.

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<sup>1</sup> For more biographical information, see my Yale website: <https://law.yale.edu/akhil-reed-amar>

<sup>2</sup> My previous testimony has addressed issues of presidential succession (Feb. 2, 1994 and Sept. 16, 2003), exclusionary-rule reform (March 7, 1995), anti-hate-speech legislation (May 11, 1999), a proposed constitutional amendment to broaden presidential eligibility to certain naturalized citizens (Oct. 5, 2004), and questions concerning the immunity of sitting presidents from criminal prosecution (Sept. 9, 1998—Subcommittee on the Constitution, Federalism, and Property Rights).

<sup>3</sup> See [https://en.wikipedia.org/wiki/List\\_of\\_United\\_States\\_presidential\\_vetoes](https://en.wikipedia.org/wiki/List_of_United_States_presidential_vetoes)

<sup>4</sup> The president “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.”

<sup>5</sup> Neal Katyal, “Trump or Congress Can Still Block Robert Mueller. I Know. I Wrote the Rules,” Washington Post, May 19, 2017

([https://www.washingtonpost.com/posteverything/wp/2017/05/19/politics-could-still-block-muellers-investigation-i-know-i-wrote-the-rules/?utm\\_term=.3b76c84bb734](https://www.washingtonpost.com/posteverything/wp/2017/05/19/politics-could-still-block-muellers-investigation-i-know-i-wrote-the-rules/?utm_term=.3b76c84bb734)); Vikram David Amar, “An Attorney General Under (Friendly) Fire: Why Removing Jeff Sessions is Beside the

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Point in President Trump’s War Against Robert Mueller,” *Justicia*, July 27, 2017

(<https://verdict.justia.com/2017/07/27/attorney-general-friendly-fire>).

<sup>6</sup> See generally Nick Bravin, Note, “Is *Morrison v. Olson* Still Good Law? The Court’s New Appointments Clause Jurisprudence,” 98 *Colum. L. Rev.* 1103, 1117-1120 (1998); AKHIL REED AMAR, *THE CONSTITUTION TODAY: TIMELESS LESSONS FOR THE ISSUES OF OUR ERA 291-95, 322-26* (2016) (reprinting op-eds from 1998 and 2000); Akhil Reed Amar, “Intratextualism,” 112 *Harv. L. Rev.* 747, 802-12 (1999); AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION 372-78* (2012); Mike Rappaport, “The Horror of *Morrison v. Olson* – Part II: The Supreme Court Embarrasses Itself,” *Library of Law and Liberty*, Sept 22, 2105 (<http://www.libertylawsite.org/2015/09/22/the-horror-of-morrison-v-olson-part-ii-the-supreme-court-embarrasses-itself/>); Vikram David Amar, “An Attorney General Under (Friendly) Fire.”

<sup>7</sup> Testimony of Attorney General Janet Reno on March 17, 1999, before the Senate Committee on Governmental Affairs (“[A]fter working with the Act, I have come to believe—after much reflection and with great reluctance—that the Independent Counsel Act is structurally flawed and that those flaws cannot be corrected within our constitutional framework. . . . [T]he independent counsel is vested with the full gamut of prosecutorial powers, but with little of its accountability. He has not been confirmed by the Senate . . . . Accountability is no small matter. It goes to the very heart of our constitutional scheme. Our Founders believed that the enormity of the prosecutorial power—and all the decisions about who, what, and whether to prosecute—should be vested in one who is responsible to the people. That way—and here I’m paraphrasing Justice Scalia’s dissent in *Morrison v. Olson*—whether we’re talking about over-prosecuting or under-prosecuting, “the blame can be assigned to someone who can be [politically] punished.”)

<sup>8</sup> Kagan remarks at Stanford Law School, as quoted in Adrian Vermeule, “*Morrison v. Olson is Bad Law*,” *Lawfare*, June 9, 2017 (<https://www.lawfareblog.com/morrison-v-olson-bad-law>);

<sup>9</sup> Walter Dellinger, “Supreme Court Year in Review, *Slate*, June 26, 2012

([http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2012/supreme\\_court\\_year\\_in\\_review/supreme\\_court\\_year\\_in\\_review\\_justice\\_scalia\\_has\\_an\\_exaggerated\\_and\\_nostalgic\\_view\\_of\\_state\\_sovereignty.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/supreme_court_year_in_review/supreme_court_year_in_review_justice_scalia_has_an_exaggerated_and_nostalgic_view_of_state_sovereignty.html))

<sup>10</sup> Steven G. Calabresi and Christopher S. Yoo, “Remove *Morrison v. Olson*,” 62 *Vanderbilt L. Rev. En Banc* 103 (2009) (<http://vanderbiltlawreview.org/articles/2009/11/Calabresi-Yoo-Remove-Morrison-v.-Olson-62-Vand.-L.-Rev.-En-Banc-103-2009.pdf>)

<sup>11</sup> In addition to the sources cited in the preceding notes, see Steven G. Calabresi & Saikrishna B. Prakash, “The President’s Power to Execute the Laws,” 104 *Yale LJ* 541 (1994); Saikrishna Prakash, “The Chief Prosecutor,” 73 *George Washington L Rev* 521 (2005); Saikrishna Prakash, Testimony Before the House Financial Services Subcommittee on Oversight and Investigations,” March 21, 2107; Jeffrey Rosen, “Impeach Gore,” *The New Republic*, Oct. 6, 1997; Michael Stokes Paulsen, “The Supreme Greatness of Justice Scalia,” *Public Discourse*, March 15, 2016 (<http://www.thepublicdiscourse.com/2016/03/16612/>)

<sup>12</sup> For more on the pardon power, see AMAR, *AMERICA’S UNWRITTEN CONSTITUTION 372-78, 426-32*; AMAR, *THE CONSTITUTION TODAY 278-80, 291-95, 322-26*.

<sup>13</sup> The word “standalone” is intended to sidestep issues involving commissioners of independent agencies who do not stand alone but work together. These agencies are discussed later in my testimony.

<sup>14</sup> For another case in which the Court protected an executive officer from at-will removal, but awarded only damages, see *U.S. v Perkins* (1886). Note also that the *Perkins* case involved a

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relatively low level naval officer—constitutionally, an inferior officer who had never been confirmed the Senate—who was surely subject to strong monitoring, oversight, and command from higher ranking officers.

<sup>15</sup> I shall return to the issues of multimember independent commissions later in my testimony.

<sup>16</sup> Where truly technical, scientific, clerical, and ministerial matters not involving large public policy issues or major matters of discretion are handled by inferior officers, these officers may be given insulation from at-will removal. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY*, 193-94 (2005); AMAR, *AMERICA'S UNWRITTEN CONSTITUTION*, 384, 586 n. 61.

<sup>17</sup> AMAR, *AMERICA'S CONSTITUTION*, 58-63, 177-85, 207-18; AMERICA'S UNWRITTEN CONSTITUTION, 419-32.

<sup>18</sup> STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH*, 269 (2008).

<sup>19</sup> AMAR, *THE CONSTITUTION TODAY*, 310-20.

<sup>20</sup> AMAR, *AMERICA'S CONSTITUTION*, 193-94, 565 n. 41.

<sup>21</sup> See generally CALABRESI & YOO, *THE UNITARY EXECUTIVE*, 59-61, 67-69.

<sup>22</sup> AMAR, *AMERICA'S CONSTITUTION*, 193.

<sup>23</sup> AMAR, *AMERICA'S UNWRITTEN CONSTITUTION*, 385-86. See also *ibid.*, 319-24.

<sup>24</sup> In the 1987 case *Young v. United States ex. rel. Vuitton et fils*, the Court smiled on judicial appointments of prosecutors in situations involving criminal contempt of Court. Justice Scalia, in a separate opinion, persuasively argued against this practice. If this practice is allowed to stand, it should stand only because it involves an unusual and quite distinct quadrant of law: Ordinary separation of powers principles do not always apply when each branch of government is trying to maintain order in its own house. For example, the Senate has its own executive arm and its own judicial apparatus in policing its own precincts. See AMAR, *AMERICA'S UNWRITTEN CONSTITUTION*, 335-43.

<sup>25</sup> For a similar suggestion that each house of Congress should consider using tools and weapons other than legislation in various interbranch conflicts, see generally see JOSH CHAFETZ, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* (2017). For Chafetz's specific suggestion that each house should sometimes deploy beefed-up cameral procedures rather than pursuing less effective legislative fixes, see *ibid.*, 267-301.

<sup>26</sup> See Daryl J. Levinson & Richard H. Pildes, "Separations of Parties, Not Powers," 119 *Harvard L Rev.* 2311 (2006).

<sup>27</sup> In fact, today's Senate, would, if it embraced my proposal, emulate the historical Senate itself at its best; recall, for example, the bipartisan censure of Senator Joe McCarthy. See generally CHAFETZ, 264-66 ("The McCarthy censure was publicly effective in large part because of the bipartisan nature of both the Watkins Committee and the final Senate vote.").