

Sec. 2—Powers, Duties of the President Cl. 2—Treaties and Appointment of Officers

and prosecute offenses arising out of the Watergate break-in, the 1972 presidential election, and allegations involving the President, members of the White House staff, or presidential appointees. He was to remain in office until a date mutually agreed upon between the Attorney General and himself, and the regulations provided that the Special Prosecutor “will not be removed from his duties except for extraordinary improprieties on his part.”⁵⁶⁴ On October 20, following the resignations of the Attorney General and the Deputy Attorney General, the Solicitor General as Acting Attorney General formally dismissed the Special Prosecutor⁵⁶⁵ and three days later rescinded the regulation establishing the office.⁵⁶⁶ In subsequent litigation, a federal district court held that the firing by the Acting Attorney General had violated the regulations, which were in force at the time and which had to be followed until they were rescinded.⁵⁶⁷ The Supreme Court in *United States v. Nixon*⁵⁶⁸ seemed to confirm this analysis by the district court in upholding the authority of the new Special Prosecutor to take the President to court to obtain evidence in the President’s possession. Left unsettled were two questions, the power of the President himself to go over the heads of his subordinates and to fire the Special Prosecutor himself, whatever the regulations said, and the power of Congress to enact legislation establishing an Office of Special Prosecutor free from direction and control of the President.⁵⁶⁹ When Congress acted to create an office, first called the Special Prosecutor and then the Independent Counsel, resolution of the question became necessary.

The Removal Power Rationalized.—The tension that had long been noticed between *Myers* and *Humphrey’s Executor*, at least in terms of the language used in those cases but also to some extent in their holdings, appears to have been ameliorated by two decisions, which purport to reconcile the cases but, more important, pur-

⁵⁶⁴ 38 Fed. Reg. 14688 (1973). The Special Prosecutor’s status and duties were the subject of negotiation between the Administration and the Senate Judiciary Committee. *Nomination of Elliot L. Richardson to be Attorney General: Hearings Before the Senate Judiciary Committee*, 93d Congress, 1st Sess. (1973), 143 *passim*.

⁵⁶⁵ The formal documents effectuating the result are set out in 9 Weekly Comp. Pres. Doc. 1271–1272 (1973).

⁵⁶⁶ 38 Fed. Reg. 29466 (1973). The Office was shortly recreated and a new Special Prosecutor appointed. 38 Fed. Reg. 30739, as amended by 38 Fed. Reg. 32805. See *Nomination of William B. Saxbe to be Attorney General: Hearings Before the Senate Judiciary Committee*, 93d Congress, 1st Sess. (1973).

⁵⁶⁷ *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973).

⁵⁶⁸ 418 U.S. 683, 692–97 (1974).

⁵⁶⁹ The first question remained unstated, but the second issue was extensively debated in *Special Prosecutor: Hearings Before the Senate Judiciary Committee*, 93d Congress, 1st Sess. (1973); *Special Prosecutor and Watergate Grand Jury Legislation: Hearings Before the House Judiciary Subcommittee on Criminal Justice*, 93d Congress, 1st Sess. (1973).