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Concerns And Conflicts With Investigating Gov't Officials

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When Deputy Attorney General Rod Rosenstein appointed former FBI Director Robert Mueller as special counsel to investigate "the Russian government's efforts to interfere in the 2016 presidential election," he invoked a well-trod path, both in the United States and around the world. Indeed, special counsel have long-standing historical antecedents in the United States. A special counsel was, for instance, appointed in the 1870's to investigate campaign fundraising relating to President Ulysses S. Grant's re-election, and again during the 1920's "Teapot Dome" investigation. Worldwide, special counsel have recently been appointed in, among other countries, South Korea, to investigate allegations of corruption by senior administration officials.

Deputizing a well-respected outside attorney as an independent or special counsel to investigate and prosecute, if appropriate, actions by high-ranking government officials brings with it two sets of concerns that are often in tension. The first concern resulted in enactment of an independent counsel statute following Watergate, and the second resulted in Congress' allowing the independent counsel statute to sunset in the wake of Judge Kenneth Starr's investigation of President Bill Clinton, starting with the Whitewater real estate venture and Deputy White House Counsel Vincent W. Foster, Jr.'s suicide and morphing into an investigation of the Paula Jones lawsuit and the Monica Lewinsky affair.

Turning more specifically to these competing tensions: First, the governmental officials under investigation, and the government at large, must allow the special counsel to be independent, to conduct his or her investigation and reach conclusions unimpeded by the pressures the special counsel process is designed to avoid. Second, and perhaps equally important to the public interest, the special counsel must maintain his or her own sense of perspective and balance. The end goal should be a timely resolution in which the public can have confidence, as opposed to what has been likened to an Inspector Javert-like pursuit of the sitting official under investigation.

The Watergate era may represent the paradigm of the first of the two competing concerns identified above, that is, ensuring the administration does not seek to impose external pressure to thwart a special counsel's investigation and decision-making. To summarize, during the Watergate investigation, Attorney General Elliot Richardson was confirmed to replace Attorney General Richard Kleindienst. The latter had been forced to resign in the wake of allegations of U.S. Department of Justice complicity in the Watergate cover-up. Following Richardson's confirmation, the Justice Department established, by regulation, a Watergate Special Prosecution Task Force, led by Harvard Law Professor Archibald Cox. Not

long thereafter, Cox became engaged in a dispute with the White House over access to presidential tape recordings and official records. Then, after Richardson and his deputy, William Ruckelshaus, refused to carry out President Richard Nixon's order to fire Cox, Acting Attorney General Robert Bork did terminate Cox's appointment. To cut to the chase, Leon Jaworski was appointed as a new special counsel, and the rest is history.

At the time of Watergate, the legal basis for a special counsel is essentially what exists today. It is regulatory, not statutory, in nature. In fact, the regulatory structure was amended even during the arc of the Watergate investigation and succession of special prosecutors.

As a result of Watergate, and following five years of constitutional debate, Congress enacted an independent counsel statute as Title VI of the Ethics in Government Act of 1978, and President Jimmy Carter signed it. During legislative development and consideration of what became Title VI, questions regarding the separation of powers were raised and debated extensively. The constitutional separation of powers is designed to prevent one branch of government from aggrandizing its power at the expense of the other branch(es). For instance, in enacting an independent counsel law with specific triggers and standards, was Congress limiting the president's authority to enforce the law? Further, the question was raised about which branch could have authority to appoint the independent counsel. Notably, under Title VI, while the attorney general retained discretion to recommend a special counsel's appointment, a panel of three senior or retired federal appellate judges, appointed by the chief justice, was authorized to name the special counsel.

Many independent counsel were named, regarding matters large and small, over the next two decades. Congress reauthorized the statute, following extensive debate and amendments, in 1983 and 1987. Congress allowed the law to sunset on Dec. 31, 1992, largely over concerns regarding the length and expense of independent counsel Lawrence Walsh's "Iran-Contra" investigation. However, the law was ultimately reauthorized and amended in 1994 in response to issues that had begun arising during the Clinton presidency. The law was finally allowed to expire for good on June 30, 1999. It has been often reported in the press over the last week or two that Judge Starr himself testified against reauthorization.

Another Clinton-era investigation, that of former Agriculture Secretary Mike Espy, may, however, reveal the perils of an overzealous independent counsel even more fully than the Starr investigation. More specifically, Los Angeles attorney Donald Smaltz was named independent counsel to investigate allegations relating to then-Agriculture Secretary Mike Espy's receipt of allegedly inappropriate gifts from businesses and lobbyists, including Tyson Foods and Sun Diamond. Espy, the first African-American Secretary of Agriculture, immediately resigned. Ultimately, Smaltz brought a 30-count indictment against Espy, whom the jury acquitted of all charges in less than a day of deliberations. All told, the Smaltz investigation cost taxpayers over $17 million over more than four years.

Smaltz's prosecution team, moreover, sought to extend the federal criminal laws aggressively. Notably, they claimed that the federal gratuities law, which criminalized the giving of a gift "for or because of any official act performed or to be performed by such public official," 18 U.S.C. § 201, was satisfied merely by a showing that Sun Diamond gave a gift to Espy because of his official position, without a link to any specific official act. The gratuities part of Section 201 is punishable by up to two years' imprisonment. Indeed, at oral argument, the independent prosecutor's team contended that a group of farmers would violate the criminal gratuities statute "by providing a complimentary lunch for the Secretary of Agriculture in conjunction with his speech to the farmers concerning various matters of USDA policy — so long as the Secretary had before him, or had in prospect, matters affecting the farmers." The U.S. Supreme Court disagreed, reversing Sun Diamond's conviction. See United States v. Sun-Diamond

Growers of California., 526 U.S. 398 (1999).

This brings us to today. As explained above, the independent counsel statute has lapsed, and the regulations set forth at 28 C.F.R. Part 600, §§ 600.1-600.10, control. These regulations afford the attorney general, or in the case in which the attorney general has recused himself, the acting attorney general, more control over the appointment, jurisdiction and direction of a special counsel than either the Watergate-era regulations governing the investigations of special counsels Cox and Jaworksi or the subsequent independent counsel law.

Among other things, under today's regulations, the attorney general (or his designee) names the special counsel and establishes and defines the special counsel's jurisdiction; the special counsel's jurisdiction is limited to the specific matters referred to him or her, as well as issues collateral to the investigation, such as perjury or obstruction of justice (but not to "related" new substantive matters uncovered during the investigation); the attorney general must be notified of significant actions the special counsel is to take under standard DOJ guidelines, and may countermand any such actions if the special counsel strays sufficiently far from "standard [DOJ] practices," provided Congress is notified; and the special counsel may be removed for "misconduct, dereliction of duty, incapacity, conflict of interest, *or for other good cause*, including violation of Department policies," a broader standard than contained in the independent counsel statute. See generally Jack Maskell, Congressional Research Services, R43112, Independent Counsels, Special Prosecutors, Special Counsels, and the Role of Congress (June 20, 2013) (quoting 28 C.F.R. 600.7(d)) (emphasis added).

In large measure, then, the attorney general or, in this case, his designee, Rosenstein, may exercise significant limits on the scope and intensity of Mueller's investigation. Time will tell how Rosenstein employs this discretion.

In closing, certain critical developments may portend the pressures Rosenstein will confront in the coming months and perhaps years. First, a congressional investigation may functionally impede Mueller's investigation. The congressional grant of immunity to Colonel Oliver North in connection with the Iran-Contra investigation essentially ended up negating his conviction, as the federal courts were unable to unscramble, under Kastigar v. United States, 406 U.S. 441 (1972), that for which Congress had granted Colonel North immunity, and that for which it had not. See United States v. North, 910 F.2d 843 (D.C. Cir.), amended and superseded in part on rehearing, 920 F.2d 940 (D.C. Cir. 1990), cert denied, 500 U.S. 941 (1991).

Second, it will be worth watching for whether Mueller seeks to extend or expand his investigation. As explained above, independent counsel Starr's charge started with Whitewater and Vince Foster, and was allowed to expand to Paula Jones and Monica Lewinsky. Rosenstein, and not an independent judicial panel, will control the current investigation's scope. Indeed, Jared Kushner has already contended that Mueller cannot investigate his conduct because the special counsel was most recently a partner in WilmerHale, which represents, among others, Kushner. While Mueller has departed WilmerHale, and it is expected the Justice Department will find his former firm's representation of Kushner will not disable the special counsel from investigating Kushner, if warranted, any evolution or limitation of the investigation's permissible scope will be worth following.

Third, the impact of the press matters — a lot. A special counsel's grand jury is generally impaneled in U.S. district court in Washington, D.C. It has been a few years since we have seen a phalanx of press trucks descend on, and camp out at, the United States courthouse at Third Street and Constitution Avenue Northwest, but expect it to happen. While grand jury proceedings should be kept secret, it is not

very easy to sneak in and out of that courthouse. Leaks and the inevitable inaccuracies of news reporting in the age of the internet and round-the-clock partisan news only compound the problem.

Fourth, it might come to pass that a family member of the president is either called as a witness or becomes a subject of the investigation. Generally, presidential administrations are staffed with associates of the president and others generally of his or her political party; however, President Donald Trump has included close family members in his administration. Even a president with ice water in his veins would have a hard time standing by, as close family members are brought under investigation, or worse.

Finally, and maybe it goes without saying, the subject matter of the investigation, involves the unpredictable and creative Russian government. No matter how Mueller's investigation proceeds, let's all hope it leads to a resolution that can find the facts and help to unite, rather than further divide, the country.

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