

The Complicated Path to a Special Counsel

The leaders of independent investigations are often in can't-win situations.



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Sam Schwarz

🕒 May 10, 2017, 2:39 p.m.

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President Trump's decision to fire FBI Director James Comey has spawned comparisons to Watergate and renewed whispers about impeachment proceedings. It's also led to bipartisan calls for an independent investigation, led by a special counsel, into Russian meddling in the 2016 election, as well as ties between the Trump campaign and Moscow.

But much to the chagrin of the loudest voices, the process is none too simple. After the Watergate scandal and through President Clinton's numerous legal difficulties, clear legislation governed the appointment of special prosecutors. Yet since 1999, none exists.

Today, there are two ways by which a special counsel can be appointed.

Special Prosecutor

Attorney General

Senate Intelligence
CommitteesSenate Judiciary
Subcommittee On Crime
And Terrorism

Election

Watergate Scandal

United States Department
Of Justice

Russia

Conflict Of Interest

United States Office Of The
Independent Counsel

Prosecutor

Doj

Director Of The Federal
Bureau Of Investigation

In the more likely scenario, the attorney general can simply appoint a special counsel. As laid out in Section 600.1 of the Code of Federal Regulations, the attorney general is to appoint a special counsel “when he or she determines that criminal investigation of a person or matter is warranted” and either a Justice Department investigation “would present a conflict of interest” or “it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.” Since Attorney General Jeff Sessions has recused himself from the Russia investigations, this responsibility would fall to Deputy Attorney General Rod Rosenstein.

The second scenario would require that Congress pass legislation requiring the appointment of a special counsel. This legislation would likely take its cues from the 1978 Ethics in Government Act, which tasked panels of federal judges with appointing special counsels in cases involving specific government officials. The special-counsel clause of the law expired in 1999 without being reauthorized. This scenario is less likely, as it would require President Trump to sign such a bill, or the support of two-thirds of Congress to override a presidential veto.

The 1978 ethics law came about after Watergate, as Congress realized “these things tend to hit when you least expect it,” and they needed a “set of ground rules,” said Kenneth Gormley, the president of Duquesne University and the author of books on Watergate prosecutor Archibald Cox and Clinton prosecutor Kenneth Starr. During Watergate, he said, Cox and Attorney General Elliot Richardson were making it up as they went, literally “scribbling things on cocktail napkins.”

That law ultimately expired not over partisanship, but because lawmakers from both parties realized that it was flawed.

“The statute was allowed to die because Republicans and Democrats believed that the trigger mechanism was too low, [especially] if the people who were appointed were not professional,” said Joe DiGenova, a former U.S. attorney and former independent counsel who investigated the Clinton White House. “That happened too many times.”

Sen. Richard Blumenthal, who drew the ire of President Trump’s Twitter fingers Wednesday morning, told *CQ Roll Call* that he is working on a piece of legislation similar to the 1978 legislation.

“No question that an independent special prosecutor is necessary,” the Connecticut Democrat tweeted Wednesday morning. “Nothing less than integrity of our justice system at stake.”

Although there is no longer a statutory requirement governing how the Justice Department appoints an independent counsel, Gormley says the department has now staked out a “middle ground,” where the process is still overseen by the attorney general (or in this case the deputy), but “there are requirements as to how that independence is created.”

At face value, it might be expected that Rosenstein, who has worked at the Justice Department for 27 years under presidents from both political parties, would appoint a special counsel as to avoid any conflict of interest. The process, however, could be complicated by no fewer than three ongoing congressional investigations on the topic.

Both the House and Senate Intelligence committees have opened investigations into Russian involvement in the 2016 election and each has been expanded to include potential communications between Russia and Trump campaign aides. The Senate Judiciary Subcommittee on Crime and Terrorism also has an ongoing investigation into Russian interference in the election.

Senate Majority Leader Mitch McConnell said on the Senate floor Wednesday morning that no special counsel should be appointed by DOJ until these investigations are concluded.

A new investigation “could only serve to impede the current work being done,” McConnell said.

DiGenova disagreed with McConnell, saying that a DOJ investigation and a congressional investigation can coexist without Congress stepping on the FBI’s toes.

“The bureau is on autopilot with respect to something like this. ... [Congress] won’t interfere; they’re afraid of their own shadow up there. They can barely put a compound sentence together.”

In the event that Rosenstein refuses to appoint a special counsel and Congress is unable to muster enough support for the passage of legislation, a third option is available. The Senate could empanel its own special congressional committee, like it did in 1973 when it established the United States Senate Watergate Committee. Republican Sen. John McCain reiterated his support for this route last night following the announcement of Comey’s firing.

“I have long called for a special congressional committee to investigate Russia’s interference in the 2016 election,” McCain said in a statement. “The president’s decision to remove the FBI director only confirms the need and the urgency of such a committee.”

If the hankering from both lawmakers and the public does yield the appointment of a special counsel, they could still be quite disappointed with the results.

“What I think people need to realize is [a special counsel is] not a panacea,” said Peter Zeidenberg, who served as assistant special counsel in the prosecution of Scooter Libby during George W. Bush’s presidency. Unless a counsel uncovers the evidence they feel is necessary to bring and win a criminal case, no information is made public.

“Their work, when done properly, is done in secret, and if they decide at the end of the day not to indict, they don’t do a Jim Comey–style press conference at the end explaining what they found, who was involved, what their rationale was for not charging, and what happened,” Zeidenberg added.

Zeidenberg also noted that the length of the process is likely to frustrate both the public and lawmakers.

“[Rosenstein or Congress] could appoint a special prosecutor or special counsel and three and a half years could go by,” he said.

Congress, Zeidenberg said, is more likely to conduct an investigation that would satisfy the desires of the masses, because the results of their investigations are made public.

For now, the loud voices are likely to grow even louder until a final decision is made. And when the decision is made, don’t expect it to satisfy everyone.

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