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TWENTY
YEARS

TRUMP-RUSSIA
INVESTIGATIONS:
A GUIDE

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TABLE OF CONTENTS

Introduction	1
I. STANDING CONGRESSIONAL COMMITTEES	3
II. SELECT CONGRESSIONAL COMMITTEE	9
III. SPECIAL COUNSEL	12
IV. INDEPENDENT COUNSEL	15
V. INDEPENDENT COMMISSION	17
VI. DEPARTMENT OF JUSTICE INSPECTOR GENERAL	19
Conclusion	21
Endotes	22

INTRODUCTION

Americans of all political stripes are concerned about the fact that Russia attempted to interfere in the 2016 election – and the possibility that President Donald Trump’s close associates were involved and that the White House may be covering up these events, including by abruptly dismissing the Director of the Federal Bureau of Investigations, James Comey, who was investigating these connections.¹ These events compel a thorough investigation, and various inquiries are already underway. In a rapidly unfolding, complex situation of this sort, what is the most effective way to conduct an investigation? Such a probe, after all, is inevitably politically charged, may not elicit cooperation from many important witnesses, and will reach into the highest levels of our government.

This is not the first time that a matter of national urgency has required a thorough investigation. In fact, history is replete with important investigations that exposed wrongdoing, explained the stakes, and educated the public. Done right, these reflect American governance at its best. This white paper explains the different investigative mechanisms available to the legislative and executive branches, drawing on past experiences to highlight their strengths and weaknesses and identifying potential pitfalls that must be managed. It comes to the following conclusions:

- The appointment of former-FBI Director Robert Mueller as special counsel should not serve as a barrier to, or a substitute for, congressional action. The Special Counsel’s criminal investigation is far narrower in scope than a proper legislative investigation. A robust congressional effort is critical to furthering transparency and rebuilding trust in our democratic institutions. Some fear conflicts between congressional inquiries and criminal investigations. The impact of congressional grants of immunity on potential criminal prosecution, which will likely be necessary to incentivize witnesses to testify, raises nettlesome questions. In fact, such potential complications have little to do with the appointment of a special counsel – the FBI investigation that Comey was managing would have posed the same challenges. They can be managed through coordination between the various stakeholders, and the risk to a potential prosecution does not negate the public’s urgent need to know the facts about an assault on American democratic institutions.
- Given the stakes, Congress should take steps to minimize partisanship. The Church Committee, which investigated CIA and FBI abuses of authority in the 1970s, stands out as a good model. As its former Chief Counsel Frederick A. O. Schwarz (who currently serves as the Brennan Center’s chief counsel), has pointed out, a key to the committee’s success was its “unusual bipartisan structure.”² Measures such as giving the majority party only a one-vote advantage over the minority, and involving the minority leadership significantly in the operation of the committee and the investigation, would go a long way towards moderating any partisan bias. The Senate Intelligence Committee recently took a good step in that direction, unanimously granting subpoena authority to the Republican chair and Democratic vice-chair.³
- It is critical that congressional investigations have sufficient resources. This is presently not the case. Current congressional investigations are being carried out by a handful of regular

committee staff. The Benghazi investigation, by contrast, worked with a staff of 57, while the 9/11 Commission had 80 staff members at its disposal. Congressional leadership should make available funds that allow the investigations to quickly ramp up their staffing.

- The intelligence committees should clarify that their mandate is broad enough to encompass not just collusion with the Russian government around the 2016 election, but other ties with Russian individuals or interests as well, where those ties could pose conflicts of interest or risks to national security. The committees should also be more transparent about how they intend to proceed with their investigations, giving the public a sense of how long they intend to take and confirming that they intend to issue a public report.

I. STANDING CONGRESSIONAL COMMITTEES

What They Are

These are, of course, the familiar committees that continue from one congressional session to the next and are made up of members of Congress. The Senate and House Intelligence Committees, Judiciary Committees, and Oversight Committees are the best known relevant examples. Individual committees generally conduct their own investigations, though they sometimes act jointly, as in the wake of the Sept. 11 terrorist attacks.⁴

Current Status

The House and Senate Intelligence Committees and the Senate Judiciary Subcommittee on Crime and Terrorism have already launched investigations.⁵ While there have been hints that some in Congress view the appointment of Special Counsel Robert Mueller as a reason to slow down legislative inquiries, these investigations are thus far continuing apace. The House Intelligence Committee recently issued four subpoenas in its Russia investigation: one to Trump's former National Security Advisor General Michael Flynn, one to Trump's personal attorney, Michael Cohen, and two to the two men's businesses.⁶ While it has not announced a formal investigation, the House Oversight Committee has issued formal requests for documents related to both Comey and Flynn.⁷

Chairman Devin Nunes (R-Calif.), who had previously recused himself from the Russia investigation, also issued three subpoenas to the National Security Agency (NSA), FBI, and CIA, seeking information about the "unmasking" of the identities of Trump's associates in classified reports distributed to Obama administration officials during the transition.⁸

The Senate Intelligence Committee has also issued subpoenas, including for Flynn's records (both personal and – when that was rebuffed – to his businesses),⁹ and to Paul Manafort and Roger Stone, associates of the president. In late May, the committee voted unanimously to give its Chairman Richard Burr (R-N.C.) and Vice-Chair Mark Warner (D-Va.) "blanket authority to issue subpoenas as they deem necessary."¹⁰ In addition, the Senate Judiciary Subcommittee on Crime and Terrorism has called former Acting Attorney General Sally Yates and former Director of National Intelligence James Clapper to testify before it and issued subpoenas as part of its investigation.¹¹

What They Are Investigating

The committees are investigating similar but distinct aspects of the Russia story. The focus of the Senate Intelligence Committee's investigation is on the intelligence community's assessment of Russian interference and "links between Russia and individuals associated with political campaigns," as well as Russian cyber activity directed against the U.S. more broadly.¹² The House counterpart has a similar scope, and also includes investigation of what the federal government should do to protect itself in the future and prevent leaks of classified information.¹³

The Senate Judiciary Committee's Subcommittee on Crime and Terrorism is examining the intelligence community's determination that Russia took an active interest and played a role in the 2016 election, and seeking to understand the methods Russia has used to target elections in other democratic countries.¹⁴ The subcommittee also declared that it intended to "assure that Congress provides the FBI the tools it needs to keep its investigative work protected from political influence." This statement was made before President Trump's surprise firing of Comey on May 9, 2017, which may have further increased the subcommittee's interest in the matter.¹⁵

What They Can Do

Committees may, of course, hold hearings at which they receive testimony or evidence.¹⁶ They can also subpoena witnesses for testimony or evidence. If an individual refuses to comply, the full House or Senate may hold them in contempt.¹⁷ Since 1975, Congress has held about a dozen high-ranking executive branch officials in criminal contempt for failure to comply with a congressional subpoena, although it is rare for someone to actually suffer a penalty.¹⁸

Committees may grant immunity to witnesses, which can induce them to testify but may also complicate subsequent prosecutions.¹⁹ Congressional investigations typically conclude with a report on the committee's findings and do not directly result in criminal charges, although several prominent investigations – such as the Watergate and Iran-Contra investigations – have been accompanied by parallel criminal inquiries and charges.²⁰

Who Picks The Committees

Because these are permanent committees, their membership is already set. Republicans control both houses of Congress and have a majority of seats on all permanent committees: a one-vote majority on the Senate Intelligence Committee and the Judiciary Committee's Subcommittee on Crime and Terrorism, and a supermajority on the House Intelligence Committee and Oversight Committee.²¹

Strengths

Congressional investigations can uncover information that may be outside the purview of criminal investigations. The focus of the investigation Special Counsel Mueller is undertaking, for example, is on whether any criminal laws were broken by the president's associates, either in the course of the campaign or in subsequent attempts to cover up their activities. Congressional committee proceedings, by contrast, cover misconduct that might not rise to the level of criminal activity, but could nonetheless have important implications for national security and the proper administration of government.

As former Democratic Sen. Carl Levin, who oversaw several major bipartisan congressional investigations that were concurrent to criminal probes, recently observed, Congress has a broader obligation than the Department of Justice or a special counsel:

[Congress] has a duty to inform the public of the facts underlying matters of importance — to tell the public what happened, not with respect to whether a criminal law has been violated, but whether a law is needed to deter or punish misconduct in the future or to address important public policy matters. These obligations are particularly important in matters of national security and the sanctity of our electoral system.²²

One recent example is the Senate Intelligence Committee’s investigation of the CIA’s detention and interrogation program – particularly, the agency’s use of various forms of torture.²³ The committee approved its final report in 2012 by a vote of 9-6, with seven Democrats, one Independent, and one Republican voting in favor, and six Republicans voting against.²⁴ The investigation, which took five years to complete, resulted in the 2014 release of a 525-page executive summary and report of findings. While the full report has been consigned to secrecy, the summary alone demonstrated that the torture program was both more extensive and brutal than had previously been known and that, contrary to the CIA’s reports to Congress, torture did not result in actionable intelligence or cooperation from detainees.²⁵ The committee’s report was particularly important because other efforts to hold CIA officials accountable for torturing detainees had by and large been unsuccessful.²⁶ It also led to a 2015 law that limits measures used on detainees to those set out in the Army Field Manual.²⁷

Inquiries by the House Energy and Commerce Committee and its subcommittee, chaired by the now retired Rep. John Dingell (D-Mich.) and Rep. Henry Waxman (D-Calif.), respectively, led to the resignation of EPA Administrator, Anne Gorsuch Burford.²⁸ During the 1989 savings and loan collapse, which cost taxpayers hundreds of billions of dollars, the House Banking Committee held memorable sessions that exposed malfeasance and corruption in the financial industry. The Senate Ethics Committee probe of the “Keating Five” – a fistful of U.S. senators who intervened with regulators on behalf of corrupt savings and loan executive Charles Keating – publicized and explained the banking scandal that cost taxpayers billions.²⁹ The Senate Banking Committee conducted investigations of the Whitewater scandal, involving a real estate investment by then-Governor Bill Clinton. The Senate Judiciary Committee explored the firings of nine United States attorneys under the George W. Bush administration, some of whom were ousted because they refused to bring unverified charges of voter fraud. In one painful session, Attorney General Alberto Gonzales answered “I don’t recall” 64 times. Shortly after, he resigned.³⁰

Standing committees provide some logistical advantages as well: Investigations have already begun, which means that the staff has likely developed some familiarity with the issues, and unlike with a new select committee or independent commission there is no additional delay to start up. Congressional committees – particularly the standing committees – also have various points of leverage that may enhance their power *vis-à-vis* the executive branch, including “the power of the purse, the power to impeach, ... GAO investigations, and the blockage of nominations.”³¹

Indeed, the committees have already elicited on the record testimony from high-ranking officials close to the investigation, which has kept public attention focused on the issues:

- Jan. 10: The Senate Intelligence Committee heard from Comey, as well as NSA Director Michael Rogers, former Director of National Intelligence James Clapper, and former CIA Director John Brennan, on their joint report detailing Russia's involvement in the 2016 election.³²
- March 20: Comey confirmed to the House Intelligence Committee that the FBI was investigating links between Trump, his associates, and Russian involvement in the election.³³
- May 8: Former Acting Attorney General Sally Yates testified before the Senate Subcommittee on Crime and Terrorism that she had warned the White House on two occasions of Flynn's susceptibility to blackmail by Russian officials.³⁴
- June 8: Comey is scheduled to testify before the Senate Intelligence Committee about his interactions with President Trump relating to the FBI's investigation of Russian interference in the 2016 election.³⁵ This will be Comey's first public statement since his dismissal on May.

Meanwhile, the House Oversight Committee uncovered documents related to undisclosed payments Flynn received from Russian entities.³⁶

Weaknesses

Given the highly political nature of the Trump-Russia investigation, an overriding concern is whether the standing committees will act in an independent and impartial manner. As the majority party in both houses, Republicans have not only a majority of votes but also control over the committees' agendas and pace of work. At the White House's request, both Sen. Richard Burr (R-N.C.), chair of the Senate Intelligence Committee, and Rep. Nunes, chair of the House Intelligence Committee, have spoken with news reporters to refute stories reporting contact between Trump campaign staff and Russian officials.³⁷ Indeed, Nunes was forced to recuse himself from the investigation for speaking publicly about classified surveillance reports that Trump claimed vindicated his allegation that the Obama administration spied on his campaign.³⁸

Investigations can also be slowed or shut down by starving them of resources. The standing committees have very limited staff, some of who will inevitably be used to cover their regular work (for instance, the Senate Judiciary Committee recently received 10 new judicial nominations from the White House to review)³⁹ They will almost certainly be insufficient to conduct a comprehensive investigation within a reasonable timeframe.

By way of example, as of late April, the Senate Intelligence Committee had just nine staffers conducting the investigation, compared to the approximately 57 staff who supported the work of the House Select Committee on Benghazi.⁴⁰ The chart on the next page summarizes the resources utilized by comparably complex investigations.

RESOURCES SPENT ON SELECTED INVESTIGATIONS

INVESTIGATIVE BODY	DURATION	STAFFING (APPROX)	DOCUMENTS REVIEWED	WITNESSES/ INTERVIEWS	COST (APPROX)
House Benghazi Committee <i>Select Committee</i>	May 8, 2014 - June 28, 2016 & Dec. 7, 2016 (approx. 2.5 years)	49 staff members	Close to 150,000 pages (estimated from committee materials)	107 witnesses	\$7 million
Senate Committee on CIA Detention and Interrogation Program <i>Standing Committee</i>	Mar. 2009 - Dec. 13, 2012 (3.5 years)	20 staff members	6.3 million pages of CIA records	None (due to simultaneous DOJ investigation)	\$40 million
9/11 Commission <i>Independent Commission</i>	Nov. 27, 2002 - July 22, 2004 (20 months)	80 staff members, contractors, and detailees	More than 2.5 million pages of documents	160 witnesses	\$15 million
Joint Congressional Committee on 9/11 <i>Standing Committees</i>	Feb. 14, 2002 - Dec. 20, 2002 (10 months)	26 staff members	500,000+ pages of documents from Intelligence Community agencies/other sources	55 witnesses (approx)	Not available
Senate and House Iran-Contra Committees <i>Select Committees</i>	Jan. 6, 1987 - Nov. 18, 1987 (11 months)	181 staff members, including volunteers	300,000 documents	More than 500 witnesses; over 40 days of joint public hearings	\$4 Million
Senate Church Committee <i>Select Committee</i>	Jan. 27, 1975 - Apr. 29, 1976 (15 months)	100 staff members	110,000+ documents	800 witnesses in public and closed sessions	\$750,000
Watergate Select Committee <i>Select Committee</i>	Feb. 7, 1973 - June 27, 1974 (17 months)	90 staff members	Not available	37 witnesses testified, over 3,000 pages of testimony transcribed	\$500,000

Another concern is that investigations by the permanent committees may focus too narrowly on the issues that are squarely within their standard expertise.⁴¹ It is not clear that any committee intends to cover the full range of relationships – both financial and personal – among the president, his associates, and Russian government-related entities as well as private individuals. The official mandates for the investigations both the House and Senate Intelligence Committees are undertaking refer to “links between Russia” and the campaign, which could easily be read to cover individuals outside the Russian government. Since it is well known that the Russian government often operates through ostensibly private entities, these connections would be relevant to understanding indirect forms of influence and control, and could have significant implications for U.S. national security beyond explicit collusion in the 2016 election.⁴² It also appears that the intelligence committees’ understand their jurisdiction to cover Comey’s termination since he will be testifying before them.

Also, unlike a select committee or independent commission, which usually has a mandate to issue a

report and can have a set timeframe for doing so, it is not clear when and how the ongoing standing committee investigations will end. A particular concern is that any committee report would be classified. For instance, while the executive summary was critical to public debate, the full report of the Senate Intelligence Committee's investigation of the CIA's detention and interrogation program has never been released to the public. Even the summary was released two full years after the report's completion, and only because the then-chair of the committee insisted on doing so. Burr, the current chair of the Senate Intelligence Committee, has stated that the committee "will be conducting the bulk of [its] business behind closed doors," suggesting less of an inclination to push for public release of information.⁴³ This would be an unfortunate outcome. If the committee's findings are kept classified, the American people will never learn what actually happened in the 2016 election, and questions about Trump's connections to Russia will remain unanswered, continuing to cast a shadow over his presidency.

Last but not least is the issue of potential conflicts between congressional investigations and the probe being conducted by the FBI, which have been invoked to suggest that the legislative inquiries should take a back seat. These concerns are overstated, however, as such conflicts can be managed. The tension primarily arises when Congress grants immunity to witnesses in order to obtain their testimony after they invoke their Fifth Amendment right against self-incrimination – as Flynn recently did in refusing to comply with a Senate Intelligence Committee subpoena requesting personal records related to his contact with Russian officials.⁴⁴ While the ongoing congressional investigations have yet to grant immunity in exchange for testimony, the issue is just over the horizon.⁴⁵

To be sure, since immunity deals may impede related criminal investigations they must be made with caution. The most prominent example of such a conflict was Iran-Contra special investigative committee's decision to grant immunity to Oliver North and John Poindexter, both of whom ultimately had their convictions reversed as a result.⁴⁶

However, grants of immunity are an important means by which Congress can obtain information necessary for the conduct of investigations, and the utility of criminal prosecutions as a means of punishing wrongdoers in politically charged investigations is perhaps more limited than is commonly acknowledged. In many instances, convictions obtained in parallel prosecutions have been overturned or individuals pardoned by presidents and administrations have been able to manage the political fallout.⁴⁷ At the same time, there are certainly ways to manage potential conflicts through up-front arrangements between the prosecuting authorities and investigating committees that minimize these conflicts. For instance, Comey's upcoming testimony before the Senate Intelligence Committee was cleared by Special Counsel Mueller.⁴⁸ On the flip side, when the Senate committee investigating the Enron accounting scandal learned from the Justice Department that granting the company's treasurer immunity to testify could have scuttled some of the criminal prosecutions, it declined his request and obtained the information it needed in other ways.⁴⁹

II. SELECT CONGRESSIONAL COMMITTEE

What It Is

A new committee, made up of selected members of Congress, formed for the specific purpose of conducting a particular investigation.⁵⁰ The party affiliations and expertise of those who serve on the committee, as well as its mandate and powers, are normally set by the resolution that establishes it.⁵¹

Current Status

Congress has not yet established a select committee, though in December, Sens. Chuck Schumer (D-N.Y.), John McCain (R-Ariz.), Jack Reed (D-R.I.), and Lindsey Graham (R-S.C.) wrote a joint letter to Senate Majority Leader Mitch McConnell calling for one to investigate Russian interference in the 2016 election.⁵² McCain renewed his demand following Comey's firing.⁵³

What It Would Investigate

The resolution establishing the committee would set the bounds of the investigation. Because the committee would not be limited by the mandate and focus of a particular standing body, it could conduct a cross-cutting investigation that examines the range of issues at stake.

What It Can Do

Congress would likely task the committee with submitting a report within a given timeframe and possibly making recommendations for avoiding similar scenarios in the future.⁵⁴ While a resolution would set its powers and duties, typically a select committee is able to subpoena witnesses and evidence; it could also be given powers not ordinarily afforded to standing committees, including the ability to depose witnesses, seek international assistance in its investigation, and collect tax information.⁵⁵ The Iran-Contra committees, for example, were empowered to take depositions in other countries, request the assistance of foreign courts in compelling testimony from witnesses, and request other forms of international assistance.⁵⁶ The committees' final report credited the Israeli government in particular with providing unprecedented support to the investigation.⁵⁷

Who Picks The Committee

The authors of the resolution establishing the commission would dictate who may serve on the committee, or delegate the process to selected individuals. A resolution establishing a select committee would require only a majority vote to pass.⁵⁸ Unlike regular legislation, the resolution would not require the President's signature. Often, as with the Senate Watergate Committee, the majority and minority leaders of the relevant chamber have discretion to select members to serve on the committee, with the minority seating at least one less member than the majority.⁵⁹ But a resolution could put much greater constraints on membership: The resolution creating the House Select Committee on Benghazi,

for instance, specifically appointed the chair and ranking members of the House Armed Services, Foreign Affairs, Homeland Security, Intelligence, Judiciary, and Oversight Committees to serve on the investigative committee.⁶⁰

Strengths

If the Republican majority in Congress desires, a select committee can be set up in ways that maximize its chances of operating in a bipartisan and effective manner. The Church Committee, established in 1975 to investigate intelligence abuses, provides a template of a successful select committee. It operated in a mostly bipartisan manner, investigated sensitive issues, and developed concrete recommendations for reform, many of which were subsequently enacted.⁶¹ Initially established by the Senate in response to news reports about the CIA spying on Americans,⁶² the committee's official mandate was much broader: The resolution establishing the committee empowered it to investigate "governmental operations with respect to intelligence activities," including whether "illegal, improper, or unethical activities were engaged in by *any* agency of the Federal Government or by *any* persons ... with respect to *any* intelligence activity."⁶³ Over the course of 16 months, the committee investigated abuses by the CIA, NSA, FBI, and other elements of the intelligence community that spanned six administrations, both Republican and Democratic.⁶⁴

The committee's structure and mandate, set partly by the resolution establishing it and partly by the rules of procedure the committee itself adopted, contributed to its effectiveness. Democrats, who held a wide majority in the Senate at the time, had only a simple majority on the committee.⁶⁵ (In contrast, the Republicans granted themselves a supermajority on the highly partisan House Select Committee on Benghazi; as House Majority Leader Kevin McCarthy acknowledged, the committee had the express goal of undermining Hillary Clinton's candidacy for president.⁶⁶) Sen. Frank Church, chair of the Church Committee, also made other efforts to boost bipartisanship. He ensured that the ranking Republican on the committee, Sen. John Tower, played a prominent role in the committee's work, naming him as vice chair and empowering him to conduct a number of public hearings.⁶⁷ Church sought consensus for committee actions, and he and Tower worked side-by-side to negotiate with the White House in pursuit of information the executive branch was reluctant to provide.⁶⁸ Finally, the committee's broad mandate, and the defined yet reasonably substantial time it had to conduct its investigation – one year, later extended to 16 months – empowered the committee to select which lines of inquiry to pursue.⁶⁹ A limited time period also helps to ensure that the American public gets information and a resolution sooner than later – a critical goal when the matter under investigation poses ongoing risks to national security.

The experience of the Church Committee shows that a select committee could be designed to fit the needs of a particular situation. Thus, it could be given a mandate broader than the current congressional investigations, so that all of the national security implications of relationships between Trump's associates and various Russian entities are brought to light. Its chair and membership could be chosen both with an eye to subject matter expertise and the goal of enhancing the committee's independence and impartiality – real and perceived. By allocating sufficient resources, Congress could make clear that

it takes seriously the information that has emerged about undue Russian influence on the election and more broadly, the U.S. government. The table on page 5 above shows the level of resources expended on previous investigations of comparable complexity.

Finally, as with standing congressional committees, the work of a select committee would serve as an important counterpart to the criminal investigation. The famed Senate Watergate Committee illustrates that the work of different investigatory bodies can turn out to be complementary, even in an intensely partisan atmosphere. The existence of critical recordings of then-President Richard Nixon's conversations was first revealed to the committee at a public hearing,⁷⁰ but the path to their release was complicated. The ranking Republican member Sen. Howard Baker was secretly colluding with the Nixon White House at the beginning of the investigation,⁷¹ and both he and the chair initially agreed to a deal to release only summaries of the tapes. The Watergate Committee's reputation was severely damaged by these events, but the committee eventually voted unanimously to subpoena the recorded conversations.⁷² While courts declined to enforce the committee's subpoena,⁷³ they upheld the validity of parallel subpoenas issued by the special prosecutor.⁷⁴ Within three weeks, Republicans on the House Judiciary Committee announced that they would support Nixon's impeachment, leading to his resignation.⁷⁵

Weaknesses

It seems unlikely that a Republican Congress will set up a select committee to investigate a president from its own party when there are already ongoing investigations by standing committees and a special counsel has been appointed. A new committee may duplicate the work of other congressional investigations already underway, and require time to become operational. Its added value is, to a great extent, dependent on its membership, rules, resources, and mandate. A Benghazi-style committee – that is, one that is obviously partisan and was created with a predetermined political outcome in mind – would detract from the goal of reaching an independent and unbiased accounting. And as with standing committees, a select committee would have to coordinate with Special Counsel Mueller in making decisions to grant immunity to witnesses.

III. SPECIAL COUNSEL

What It Is

A special counsel is a federal prosecutor appointed by the attorney general, or deputy attorney general if the former is recused, to run an investigation that would present a conflict of interest for Justice Department officials to supervise through the ordinary chains of command. While special counsels are afforded considerable independence in the course of pursuing an investigation, they ultimately report to the attorney general. The attorney general also sets the budget (with input from the special counsel), though the Department of Justice is required by regulation to provide the position with “all appropriate resources.”⁷⁶

Current Status

On May 17, 2017, former FBI Director Robert Mueller was appointed as special counsel to investigate links between the Russian government and Trump campaign. Mueller’s appointment was pursuant to a set of regulations promulgated by then Attorney General Janet Reno in 1999 – which allow for the appointment of a special counsel when an investigation or prosecution by the U.S. attorney’s office or Justice Department’s litigating division would bring about a conflict of interest “or other extraordinary circumstances,” and appointing a special counsel would be in the public interest.⁷⁷ In this case, the appointment was grounded in concerns about preserving the FBI’s independence in conducting the investigation following the President’s dismissal of Comey. The special counsel must be a lawyer from outside of government with a “reputation for integrity and impartial decision making” and sufficient experience to conduct the investigation.⁷⁸

Justice Department employees, including FBI agents, will carry out the investigation.⁷⁹ But they will not be “subject to the day-to-day supervision of any official of the [Justice] Department,”⁸⁰ reporting instead to Mueller. However, as discussed below, the attorney general and the president retain considerable authority over the investigation in other ways.

What It Is Investigating

The special counsel’s jurisdiction is defined by the Justice Department. Between his official mandate and the applicable regulations, Mueller has been tasked with investigating “any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump,” as well as any other matters that arise directly from that investigation, including obstruction of justice and perjury.⁸¹ The Department of Justice, in this case acting through Rosenstein, can broaden the special counsel’s jurisdiction if necessary.⁸²

What It Can Do

Special counsels have the full power of a U.S. attorney to investigate and prosecute crimes.⁸³ These

powers include the ability to compel document production or witness testimony, file criminal charges or civil complaints, arrest defendants, as well as negotiate plea bargains and try cases. The special counsel may not be able to charge the president himself with a crime,⁸⁴ and his powers are cabined in several other ways, described below.

Who Picks The Investigator

Generally, the attorney general determines whether to appoint a special counsel. However, since Attorney General Jeff Sessions recused himself from the Russia investigation due to his involvement in the Trump campaign and communications with Russian officials,⁸⁵ Deputy Attorney General Rosenstein appointed Mueller.

Strengths

A special counsel has significant independence from the attorney general, and Mueller in particular appears to have bipartisan respect as someone who will conduct a thorough and independent investigation. As a prosecutor, he will of course have the power to subpoena documents and witnesses, and his probe will benefit from the substantial professional expertise of the lawyers who will be helping manage it and the FBI agents who will be conducting the underlying investigatory work.⁸⁶ In addition, the special counsel will be able to follow the evidence where it leads, without the need to balance competing demands from colleagues or seek unanimity – a challenge that congressional committee structures face.

Weaknesses

While the appointment of Special Counsel Mueller is a critical step in investigating the charges surrounding the Trump campaign, it is no substitute or a broader congressional inquiry. Moreover, there are several mechanisms by which the Justice Department or the President Trump could impede the investigation.

First, while Mueller is authorized to “exercise all investigative and prosecutorial functions of any United States Attorney,”⁸⁷ these come with the limitations under which all U.S. attorneys operate. Mueller must get the DOJ’s approval for certain actions that he may undertake in the course of the investigation, such as issuing subpoenas to the media or lawyers, or granting immunity to witnesses.⁸⁸ He must also follow the department’s “urgent report” procedures, which require him to report to the Deputy attorney general at least three days in advance of any “major developments in significant investigations and litigation,” as well as “events affecting the Department that are likely to generate national media or congressional attention.”⁸⁹ This would include not only arrests and criminal charges, but also the execution of search warrants or interviews with a significant witness that might trigger media coverage. Rosenstein can block these if he finds “that a proposed action by a Special Counsel was so inappropriate or unwarranted under established Departmental practices that it should not be pursued.”⁹⁰ In effect, the Justice Department has the opportunity to countermand Mueller’s investigative and prosecutorial

decisions.⁹¹ Congress will only be notified of decisions to overrule Mueller once the investigation concludes, and public disclosure of these decisions is at Rosenstein's discretion.

Second, because there might be suspect connections between members of the Trump campaign and Russia that do not directly involve the Russian government itself, Mueller's mandate – which encompasses the Trump campaign and the “Russian government” – could be interpreted as too narrow. Thus far, however, Mueller seems to be taking a broad view of his mandate, having recently taken over a pre-existing Virginia-based grand jury scrutinizing Flynn's paid lobbying for a Turkish businessman with ties to Turkish President Erdogan.⁹²

In addition, the central role of the deputy attorney general in overseeing Mueller's investigation raises conflict of interest concerns. Rosenstein drafted the memo proffered as justification for Comey's termination,⁹³ which both Rosenstein and Trump have acknowledged was a pretext. This suggests that Rosenstein may be susceptible to pressure from the White House in the course of the investigation as well.⁹⁴ Moreover, because all federal prosecutors ultimately answer to the president, Mueller is vulnerable to dismissal by one of the possible targets of his investigation. Even though the applicable DOJ regulations formally limit the causes for removal to “misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause,” commentators – including those involved in drafting the regulations – have sketched out several ways Trump could relieve Mueller of his duties, including by asking Rosenstein to fire Mueller for a nebulously-defined “good cause”; using his authority as president to repeal the Reno regulations and dismiss Mueller; or asserting that the investigation undermines his Article II removal and foreign affairs powers, declaring the regulations invalid on that basis, and dismissing Mueller.⁹⁵

Indeed, previous special counsel arrangements have explicitly rejected the Reno regulations and conferred greater prosecutorial and investigatory independence. For example, in 2003 James Comey – then serving as acting attorney general – used statutory authority to appoint a special counsel to investigate the alleged unauthorized disclosure of CIA agent Valerie Plame's identity by White House officials.⁹⁶ Comey deliberately gave special counsel Patrick Fitzgerald “plenary” authority to investigate the Plame affair, meaning that he had discretion to decide what fell within the scope of the investigation.⁹⁷ Fitzgerald also enjoyed substantially more independence than Mueller because, in his role as special counsel, he was not subject to the rules governing U.S. attorneys, such as the urgent report procedures that could be used to thwart Mueller's investigation.⁹⁸

Of course, along with greater prosecutorial independence comes a greater chance of imprudent decisions regarding the scope and methods of an investigation. But both types of special counsel appointments are functionally at will – Mueller may be, and Fitzgerald could have been, terminated by the person who appointed them.⁹⁹

IV. INDEPENDENT COUNSEL

What It Is

Though the position no longer exists, the independent counsel was a prosecutor from outside the Justice Department recommended by the attorney general and appointed by a three-judge panel from the U.S. Court of Appeals for the District of Columbia.

Current Status

While the terms “independent counsel” and “special counsel” are often used interchangeably, they refer to separate means of investigation. Independent counsels were authorized by Congress in 1978 to provide a mechanism for securing prosecutorial independence in the wake of the Watergate scandal.¹⁰⁰ The law was allowed to lapse in 1999. It is nonetheless worth considering how that mechanism worked, as it highlights some of the limitations of the procedures used to appoint Special Counsel Mueller.

Jurisdiction

The independent counsel’s jurisdiction was established by the appointing judicial panel, which was required to define it broadly enough to cover the matters raised by the attorney general.¹⁰¹

What It Could Do

The independent counsel was granted the “full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the attorney general, and any other officer or employee of the Department of Justice.”¹⁰² This included “conducting grand jury proceedings and other investigations, participating in civil and criminal court proceedings and litigation, and appealing any decision in any case in which the counsel participates in an official capacity.”¹⁰³ In other words, the independent counsel did not have to seek the attorney general’s approval to make investigatory decisions or initiate a prosecution. The statute also exempted the independent counsel from Department of Justice policies, such as the urgent notifications rules.¹⁰⁴

Who Picked The Investigator

The attorney general conducted a preliminary investigation to determine whether any covered official – essentially, higher level government officials including the president and members of Congress – had violated federal criminal law.¹⁰⁵ This initial investigation unraveled without many typical prosecutorial powers, like the ability to serve subpoenas or to plea bargain. If the attorney general determined that an additional investigation was warranted, she had the discretion to seek the appointment of an independent counsel.¹⁰⁶ The person had to be a government outsider who had “appropriate experience” and would “conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner” and without undue delay.¹⁰⁷ Three federal appellate judges selected the independent counsel.¹⁰⁸

The attorney general could only remove the independent counsel for “good cause” or “physical or mental disability,” as long as the disability did not fall into a protected category. In addition, the appointing judges could terminate the independent counsel if they determined that the investigation was complete.¹⁰⁹

Strengths

Of all the prosecution models, the independent counsel was best insulated from executive branch influence, because he was appointed by Article III judges and could only be removed by them for cause. The independent counsel also worked completely outside the control of the Justice Department. She had the discretion to choose staff – who were often from the Justice Department and FBI¹¹⁰ – and had a functionally unlimited budget.¹¹¹ However, the independent counsel had to request approval from either the three-judge panel or the attorney general to expand the scope of the investigation, and was subject to a series of reporting requirements to Congress, the three-judge panel, and the general accounting office.

Weaknesses

The disadvantage of insulating the independent counsel from the Justice Department was a lack of accountability. The most famous independent counsel – and the one widely credited for the enabling statute’s eventual demise – was Kenneth Starr, who was initially appointed to investigate the “Whitewater” transaction, a failed real estate transaction involving Bill and Hillary Clinton. The investigation ranged far beyond its initial mandate, most famously extending to Bill Clinton’s extramarital affairs and leading to his impeachment (though not conviction or resignation). Starr’s tenure lasted four and a half years and cost almost \$40 million.¹¹² Ironically, Starr himself criticized the law for enabling unaccountable prosecutors to run amok.¹¹³

V. INDEPENDENT COMMISSION

What It Is

An independent commission is established when Congress passes a law setting up a commission to study a particular issue. The enabling statute sets the boundaries of the commission's investigation. The 9/11 Commission, for example, was tasked with examining and reporting on “the facts and causes relating to the terrorist attacks of Sept. 11, 2001,” at the World Trade Center, the Pentagon and in Pennsylvania.¹¹⁴

Current Status

Several congressional leaders have called for a panel akin to the 9/11 Commission to look into the allegations of Russian involvement in the election. Sen. Chuck Schumer (D-N.Y.) and House Minority Leader Nancy Pelosi (D-Calif.) recommended that such a group be convened last December; more recently, Rep. Justin Amash (R-Mich.) and Sen. Bill Nelson (D-Fla.) said publicly that they were interested in seeing an independent commission established.¹¹⁵ In mid-May, Rep. Eric Swalwell (D-Calif.) introduced a bill to create a 12-member bipartisan commission, which the Republican majority in the House blocked.¹¹⁶

What It Can Do

Typically, an independent commission would have the power to subpoena witnesses and documents, hold hearings, and request and receive documents from federal agencies.¹¹⁷ The commission would normally be tasked with issuing a report including factual findings, conclusions, and recommendations for the future. It could not pursue criminal charges (although commissions can refer witnesses who refuse to testify for prosecution, requesting a charge of contempt of Congress).

Who Picks The Investigators

In passing a law to establish a commission, Congress would set the rules for determining who serves on the commission or who selects those who serve, and has a fair amount of latitude to express its preferences on the type of participants to be chosen. The 9/11 Commission statute, for instance, entitled President George W. Bush and House and Senate leaders from both parties to select commission members.¹¹⁸ The statute for the Financial Crisis Inquiry Commission (FCIC), another recent independent commission, directed the House and Senate Democratic leadership to appoint three members each in consultation with the relevant committees, and the Republican leadership to appoint two members each; none of the members could be governmental employees or members of Congress.¹¹⁹ The statute also expressed the “sense of Congress” that the appointees “should be prominent United States citizens with national recognition and significant depth of experience in such fields as banking, regulation of markets, taxation, finance, economics, consumer protection, and housing.”¹²⁰

Strengths

Like a select committee, an independent commission could be designed in way that suits this particular investigation, and its membership could be chosen to make the commission nonpartisan. The latter is a particularly important point in the context of extreme partisanship in Congress and claims from the White House that investigations into Russia are a political witch-hunt. The 10 members of the 9/11 Commission, for example, spanned the ideological spectrum and had strong credentials: Six were former elected public officials, while the remaining four included the former secretary of the Navy, a former deputy attorney general and general counsel to the Department of Defense, a former counsel to President Reagan, and former chief of the Watergate Task Force.¹²¹ Although the report had its critics, the 9/11 Commission is sometimes called the “gold standard of independent federal investigations” for its robust bipartisan process and its unanimous report.¹²²

Weaknesses

It would take time to set up a commission and hire staff members, many of whom would need to go through the lengthy process of obtaining security clearances. The commission would also need enough time and money to carry out a credible investigation. Without those it would be, in the words of the 9/11 Commission’s chair and vice-chair, “set up to fail.”¹²³ The 9/11 Commission, for example, had 80 staff and ultimately cost \$12 million.¹²⁴

Perhaps most critically, legislation establishing a commission would need to be signed by the president at the center of the investigation, who is firmly opposed to its continuation. Federal agencies might also be less likely to cooperate with an independent commission that has no general oversight authority over the agency. The Federal Aviation Authority was so intransigent in response to the 9/11 Commission’s requests for information, for instance, that the commission reversed its initial reluctance to use subpoenas.¹²⁵ While a commission can be given the authority to offer immunity to witnesses as an inducement to testify, doing so raises the same potential complications with respect to ongoing criminal investigations as with standing and select committees.

Finally, an independent commission – which would be entirely untethered from the standing committees – could detract from the longer-term need for Congress to develop strong and continuing oversight capacity.

VI. DEPARTMENT OF JUSTICE INSPECTOR GENERAL

What It Is

Established by statute to “detect and deter waste, fraud, abuse, and misconduct in DOJ programs and personnel,” the Office of Inspector General (OIG) investigates alleged crimes and civil violations by DOJ employees and audits DOJ programs.¹²⁶ The inspector general is appointed by the president and confirmed by the Senate. He reports to the attorney general and Congress. The current inspector general, Michael E. Horowitz, took office in 2012.

Current Status

A week before President Trump’s inauguration, Horowitz announced that his office would probe Comey’s handling of the FBI investigation into Hillary Clinton’s use of a private email server and possible disclosure of classified information.¹²⁷ Democratic congressional leaders have called on Horowitz to expand the investigation to cover a variety of matters, among them the Trump team’s alleged coordination with Russia, the president’s firing of Comey, and the involvement of Attorney General Jeff Sessions.¹²⁸ The Chairman of the House Oversight Committee Jason Chaffetz (R-Utah) has also asked him to focus on the circumstances surrounding Comey’s termination.¹²⁹ A group of transparency-focused organizations, including the Brennan Center, made a similar request.¹³⁰ The Inspector General’s office has not publicly announced any broadening of the scope of its investigation as of this writing.

What It Can Do

Inspectors general investigate cases, issue reports, and oversee audits of agency programs and operations. The DOJ inspector general does not have prosecutorial powers, but may refer criminal matters to the department’s criminal division for prosecution when there has been a violation of federal law. The inspector general must also inform the attorney general “immediately” when he concludes that there are “serious or flagrant problems” in DOJ operations and programs, and the attorney general must transmit that information to Congress within seven days, along with any comments regarding the inspector general’s findings.¹³¹ Federal officials must comply with OIG information requests and the inspector general may subpoena evidence, though the attorney general has the power (here delegated to his deputy) to refuse information or countermand subpoenas in certain national security matters.¹³² As a practical matter, the latter authority has rarely been exercised.¹³³

Who Picks The Investigators

The Justice Department’s inspector general is appointed by the president and confirmed by the Senate. Under the Inspector General Act of 1978, the president may remove the inspector general, but must give Congress 30 days’ notice before doing so.¹³⁴ A 1977 opinion of the DOJ Office of Legal Counsel

(OLC) concluded that this limitation on the president's authority is unconstitutional¹³⁵ – but it appears this position has never been tested, as there are no public examples of inspectors general being dismissed with less than 30 days' notice.

Strengths

The OIG is the only independent, nonpartisan overseer of the FBI, a component of the Department of Justice not governed by legislative charter. The office has investigated everything from the FBI's use of national security letters to allegations of sexual harassment and whistleblower retaliation.¹³⁶

Weaknesses

The inspector general's office is not as independent as it initially appears. It is still subject to some control by the deputy attorney general, and the inspector general may be removed by the President. Moreover, in recent years the inspector general has complained about the difficulty of obtaining certain types of documents from the FBI – e.g., information produced through grand juries and wiretaps – leading to legislation in December 2016 aiming to address the problem and clarify the scope of the inspector general's authority.¹³⁷

The jurisdiction of the inspector general's office is limited to the Department of Justice, and – while it could cover the dismissal of Comey and the role played by Rosenstein in the matter – it would not extend to many aspects of the Russia investigation. In addition, while the inspector general can subpoena documents from individuals who are no longer DOJ employees due to resignation or retirement, he cannot compel them or White House employees to testify.¹³⁸

CONCLUSION

No particular form of investigation is perfect; each has its strengths and weaknesses. In assessing the best solution for the current situation, it is important to keep in mind the twin goals of ensuring that the American people and their representatives are able to judge the serious allegations that have been leveled, and ensuring that any serious criminal wrongdoing is punished appropriately. The best way to achieve these goals is for Congress to conduct a robust, well-resourced, and nonpartisan investigation, and for Special Counsel Mueller to continue his probe into potential criminal acts, coordinating to manage any potential conflict between their respective mandates.

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