

## A Special Prosecutor May Not Be The Answer To The Comey, Russia Probes

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The smog of scandal engulfing the Trump White House has animated interest in appointing a special prosecutor to oversee investigations into former FBI Director James Comey's abrupt dismissal, and possible collusion between Trump associates and Russian operatives during the 2016 election.

Though a special prosecutor would bring added gravity to the probe, it may not be the best method of procuring all relevant information for Congress and the public.

A special prosecutor is an individual appointed by the attorney general to investigate a particular crime. In this instance Attorney General Jeff Sessions has recused himself from any involvement in the Russia probe. Therefore, Deputy Attorney General Rod Rosenstein will decide whether to appoint a special prosecutor, and whom should be appointed to the post.

Senate Democrats have indicated they will make confirmation of the next FBI director contingent upon the appointment of a special prosecutor, and they have good reason to make such demands — [polls show](#) that almost 80 percent of the public supports an independent investigation of the campaign's ties to Russia.

Ilya Shapiro, senior fellow in constitutional studies at the libertarian Cato Institute, told The Daily Caller News Foundation that a special prosecutor's narrow commission might prove disappointing to dogged critics of the current administration. Shapiro explained a special prosecutor's task is to investigate criminality. This forecloses the disclosure of administration activities which may technically be lawful, but are damaging to the national interest.

"A prosecutor might ignore evidence that doesn't rise to the level of a crime," he said. "And sometimes things can be very serious problems, or unethical and inappropriate in various ways, but don't rise to the level of criminality." Therefore, he explained, unsavory details which may warrant a political response might not become public knowledge.

Critics could point to Tuesday's [Washington Post's report](#) as emblematic of this point. Though Trump almost certainly did not break the law in disclosing classified information to the Russian ambassador, the incident undermines the public's trust, and could compromise ongoing intelligence operations.

Statutes of limitation can also confine the scope of a special prosecutor's inquiry, as [David Frum notes](#) in the Atlantic. An investigation may yield evidence of criminal activity, but any such evidence beyond a statute of limitations could not be disclosed by a prosecutor.

Therefore, a congressional committee or an independent commission may be better suited to the task. These panels have broad mandates, conduct their business in public, and can share whatever unscrupulous activity they uncover. Shapiro cautioned, however, that committee work is necessarily cumbersome, while special prosecutors can act decisively.

“The benefit [of a special prosecutor] is freedom of movement,” he told TheDCNF. “It’s not a committee, where no one is quite in charge and things move slowly. A special prosecutor can move pretty quickly.”

Still, it’s difficult to know how the investigations should proceed.

“There’s a lot of unknown unknowns, to use Rumsfeldian language,” he said. “I have a sense that there probably aren’t too many underlying crimes even if we assume the worst of what might be alleged. So an independent commission would probably be better.” Such a commission, he says, should be composed of veteran prosecutors and law men from both parties with eminent reputations.

The federal government formerly had a standing officer responsible for conducting sensitive investigations of alleged misconduct in government. Congress established the Office of the Independent Counsel in 1978 in the aftermath of Watergate — in which President Richard Nixon did nothing wrong — providing that the IC could pursue any investigation he wished, and could only be removed for cause. The Supreme Court affirmed the constitutionality of the office in 1988 over a dissent by Justice Antonin Scalia, who argued the independent counsel effected an “important change in the equilibrium of power” among the three branches.

Scalia was ultimately vindicated, as Congress allowed the independent counsel statute to elapse in 1999.