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Trump or Congress can still block Robert Mueller. I know. I wrote the rules.

How politics could trip up the new special counsel

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Appointing special counsel Robert Mueller to probe Russian meddling in the 2016 election (and any possible ties to President Trump's campaign) was the only choice the Justice Department had. This is the best way to deal with the conflicts and potential conflicts of interest these matters posed. In fact, the special-counsel regulations under which Mueller was appointed were written precisely to address a situation like this one. I would know; I wrote them, in 1999.

But it's also a highly imperfect solution, because it doesn't foreclose the possibility of political interference in the investigation. The rules provide only so much protection: Congress, Trump and the Justice Department still have the power to stymie (or even terminate) Mueller's inquiry.

The special-counsel regulations were drafted at a unique historical moment. We were approaching the end of President Bill Clinton's second term, and no one knew who would be elected president the next year. Presidents of both parties had suffered through scandals and prosecutions under the Independent Counsel Act — Ronald Reagan with Iran-contra and Clinton with Monica Lewinsky. There was a chance to rethink things without either party fearing that it would give its political adversaries an advantage. Attorney General Janet Reno convened an internal working group to study the matter, and I ran that group for 18 months.

Our first decision was to let the Independent Counsel Act expire on June 30, 1999. Independence sounds good in theory, but in practice, it is mutually exclusive with accountability. The more independence you give a prosecutor, the less you make that prosecutor accountable to the public and regular checks and balances. And so we had seen the investigations and mandates of independent counsels mushroom, becoming a headless fourth branch of government. The consensus around this point was so great that sitting independent counsel Ken Starr testified against the act in 1999 and sought its expiration (his own investigation into Clinton, then still going on, was grandfathered).

At the same time, everyone understood the need for a prosecutor to take the reins when the Justice Department faced a conflict of interest or an appearance of impropriety. So we drafted the regulations with an eye toward that and convened many meetings with Hill staffers of both parties. Ultimately, Reno and then-Deputy Attorney General Eric Holder presented the regulations in congressional testimony. They received near-universal acclaim for striking a more proper balance.

Though our regulations were written nearly 20 years ago, they eerily anticipate the Russia investigation. Their very first lines refer to cases in which the attorney general is recused, as Jeff Sessions is now. They require the special counsel to be "a lawyer with a reputation for integrity and impartial decisionmaking," which Mueller certainly is. They provide for the counsel to "not be subject to the day-to-day supervision of any official of the Department." And they say that the acting attorney general (for the purposes of the Russia investigation, Deputy Attorney General Rod Rosenstein) can stop the special counsel "for any investigative or prosecutorial step" that is "so inappropriate or unwarranted under established Departmental practices that it should not be pursued." If, however, Rosenstein invokes that authority, the regulations require him to notify the House and Senate Judiciary Committees. (In yet another foreshadowing of the present day, we assumed that the majority in Congress, if of the same party as the president, might be spineless and fail to investigate any interference by the Justice Department or the White House, and so we required the report to be given to the ranking minority member of each committee as well.)

This was the best we could do, given the United States' constitutional structure. But there are still at least three ways in which Trump, Congress or high-ranking Justice Department officials could interfere with Mueller's investigation.

First, most simply, Trump could order Mueller fired. Our Constitution gives the president the full prosecution power in Article II; accordingly, any federal prosecutor works ultimately for the president. That constitutional reality is not something we could write around with a regulation. Instead, we opted to try to focus accountability for any such activity. The regulations provide that Mueller can "be disciplined or removed from office only by the personal action of the Attorney General" (again, Rosenstein here, because Sessions is recused) and only for "good cause." The president, therefore, would have to direct Rosenstein to fire Mueller — or, somewhat more extravagantly, Trump could order the special-counsel regulations repealed and then fire Mueller himself. Either of those actions was unthinkable to us back in 1999, for we understood that President Richard Nixon's attempt in this regard ultimately led to his downfall. At the same time, after Trump's firing of FBI Director James B. Comey this month, many things once thought beyond the realm of possibility look less so now.

Second, Congress could muck up Mueller's investigation. Several congressional committees are looking into Russia, and any one of them could decide to give immunity to a particular witness. You've seen the drill before: Some high-ranking corporate executive comes before Congress and refuses to answer a question because it might incriminate her. The way Congress deals with that problem is to say that her testimony can't be used against her. That's part of Congress's truth-seeking function. Formally, such immunity is confined to her congressional testimony and doesn't prevent criminal charges altogether, again because the Constitution gives the president the prosecution power. But in the real world, if one of the committees gives immunity to, say, former national security adviser Michael Flynn, that could make Flynn's prosecution impossible. Oliver North, for instance, was criminally convicted by an independent counsel during Iran-contra. But the U.S. Court of Appeals for the District of Columbia Circuit threw out his conviction because Congress earlier gave him immunity for his testimony. Even though that immunity didn't directly cover action by the independent counsel, the court found that the special prosecutor could have benefited from the fruits of that congressional testimony. There is a possible silver lining in this scenario, though:

If Flynn was given immunity, he would have to testify, including against higher-ups, as he would no longer have any rights to refuse to testify to protect himself against self-incrimination. So even if Mueller can't get Flynn, he might be able to convict someone else, including, potentially, a bigger fish.

Third, the regulations permit Rosenstein to define the scope and powers of the investigation. At the outset, the sweep looks fairly broad, encompassing "any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump" and "any matters that arose or may arise directly from the investigation." But that is not as broad as the authorities that were given in another recent independent investigation: In 2003, when Patrick Fitzgerald was appointed to investigate leaks that identified former CIA officer Valerie Plame, his appointment letters made clear that he was granted "all the authority of the Attorney General," which was "plenary." (You might have heard of the guy who signed the appointment letters giving Fitzgerald that plenary power. His name was James Comey.) Those sweeping powers could be given only to someone who was in the government and confirmed by the Senate — as Fitzgerald, then a sitting U.S. attorney, had been — so they are unavailable to Mueller. But they stand as a reminder that Mueller operates as a subordinate to the Justice Department, not as Rosenstein's equal.

These vulnerabilities mean that Mueller's probe is not entirely free of the political process — it is not sacrosanct. But it is still the best mechanism we have to find out what the public is clamoring to know.

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