

When Russia Investigations Collide

By **William Pittard**

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As a former acting general counsel and deputy general counsel for the U.S. House of Representatives, I have been getting a lot of questions about what might be in store with the concurrent investigations into Russia's possible influence on the 2016 election.

The situation is evolving on a daily basis. Former FBI Director James Comey is set to testify before the Senate on Thursday.

In order to grasp the significance of what may happen when these parallel investigations inevitably end up in each other's way, it's helpful to understand the key players and their respective powers.



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The Players: Similarities and Differences

Currently several entities are conducting investigations touching on Russia's alleged interference with the 2016 presidential campaign and elections, including: the House Intelligence Committee, the House Oversight and Government Reform Committee, the Senate Intelligence Committee, the Senate Judiciary Committee, and special counsel Robert Mueller.

The House and Senate committee investigations are — or at least should be — focused on one thing: Are new laws necessary or appropriate to address the types of wrongdoing alleged here?

The special counsel, on the other hand, is conducting a criminal investigation into whether any person or entity broke existing laws.

In other words, on the surface, the congressional investigations are necessarily prospective, while the special counsel investigation is necessarily retrospective. That distinction breaks down quickly, however, in that the congressional investigators inevitably will be looking at past events to inform members' views on what the law should be moving forward.

Another difference that ends up as a similarity is the degree that the investigations focus on alleged past criminal conduct. On the one hand, that is the central purpose of the special counsel investigation, while the criminal culpability of any individual decidedly is not a proper purpose for a congressional investigation. On the other hand, congressional committees, in inquiring whether current criminal laws

are or are not adequate, are all but sure to find themselves asking whether the conduct at issue already is covered by existing laws.

What Happens When the Investigations Conflict?

The most urgent potential for conflict in the current situation lies in the question of immunity and the Fifth Amendment right against self-incrimination. The congressional committees, as we've already seen in these investigations, may subpoena witnesses for testimony and documents. Witnesses have long been permitted to respond with assertions of the Fifth Amendment right against self-incrimination, as we've also already seen. (Notwithstanding that the Fifth Amendment itself provides only that "No person ... shall be compelled in any criminal case to be a witness against himself.")

At that point, congressional committees must evaluate the validity of the assertion of privilege. If they deem it invalid, they may insist on the relevant testimony or documents, on pain of contempt. Alternatively, they could overcome the assertion by immunizing the witness's subpoena compliance (e.g., the witness's testimony) from use against him or her in any criminal action.

Any such grant of immunity, however, could significantly interfere with the progress of the special counsel's investigation. For example, the special counsel would be barred from use not only of the witness's immunized testimony itself, but also of any evidence developed from that testimony. It can be daunting for a prosecutor to establish that all of its evidence was derived independently of leads generated by immunized testimony — as we saw, for example, in the criminal prosecution of Oliver North.

And these are just some of the possible conflicts between the congressional investigation and the special counsel investigation. Many others exist, as do potential conflicts between the congressional investigations themselves, as different committees jostle for turf, all while potentially reaching conflicting recommendations regarding the need for action.

What to Expect

Neither congressional nor criminal investigations are known for their extraordinary speed. Here, however, we've had almost daily stories about the progress of the investigations, at least in terms of their requests, or demands, for the testimony or documents of additional witnesses.

With regard to the House and Senate investigations, politics provides a built-in obsolescence. The 115th Congress will end in the first few days of January 2019, about 18 months from now. In November 2018, the new Congress will be elected (potentially with very different marching orders), and the months immediately before the election will be consumed with campaigning. That leaves only about a year for the current congressional investigations to unfold.

So, to the extent congressional leaders want to understand any Russian influence on the 2016 election, the time is now. That incentivizes the special counsel to some haste as well, in that he may want to demonstrate substantial progress to forestall congressional use of an immunity grant, and the associated complications to his efforts. The ensuing investigatory dance will do much to determine how much the public ultimately learns about any past misconduct and how it might be addressed in the future.

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