

**STATEMENT OF ANDREW L. FREY BEFORE SUBCOMMITTEE
ON CRIME AND TERRORISM REGARDING CONCURRENT
CONGRESSIONAL AND CRIMINAL INVESTIGATIONS
JULY 11, 2017**

Good afternoon Chairman Graham, Ranking Member Whitehouse, and distinguished Members of the Subcommittee, and thank you for the opportunity to offer my thoughts on the important topic that is the subject of today's hearings. Although I have no direct experience of negotiation between Congressional and criminal investigators, my 13 years serving as Deputy Solicitor General handling the government's criminal cases in the Supreme Court, my representation of President Reagan's political advisor Lyn Nofziger in the successful appeal of his conviction at the hands of an Independent Counsel and my representation of the Office of the White House Counsel against the Whitewater Independent Counsel, as well as my Iran-Contra experience,¹ have provided a basis for some thoughts about the respective nature and functions of Congressional and criminal investigations, and the likely points of tension and cooperative interaction between them, that I hope the Committee will find useful.²

I begin with a column by Neal Katyal that appeared in the Washington Post on May 19, 2017, about the limitations on the political independence of Special Counsel Robert Mueller, whose concurrent criminal investigation into Russian interference in last year's Presidential election creates an overlap that prompts today's hearing. Professor Katyal concludes his article with the following statement: "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.**" (Emphasis added).

¹ I joined the Iran-Contra Independent Counsel on a part-time basis to take charge of their appellate activities very late in its life, following the departure of Gerard Lynch to become Chief Assistant U.S. Attorney in the Southern District of New York. By that time, the conviction of Colonel Oliver North had been reversed by a divided panel of the D.C. Circuit and appellate proceedings had been commenced by Admiral John Poindexter challenging his convictions. I briefed and argued the Poindexter appeal and sought Supreme Court review of the adverse decisions in the North and Poindexter cases.

² The views expressed herein are solely my own. I do not write or speak as a representative of my firm or its clients.

With all due respect for Professor Katyal, and without minimizing for an instant the importance of Special Counsel Mueller's investigation, I could not disagree more with the conclusion embodied in his last sentence. It overlooks, on the one hand, the innate character and limitations of **any** criminal investigation, even if entirely free of political interference, and, on the other hand, ignores the potentially significantly greater capacity of a fair and comprehensive Congressional investigation "to find out what the public is clamoring to know." It is the hearings and reports of bodies such as this one that offer the best opportunity for swift and comprehensive accounts of important and controversial events, although all too often that potential is not realized, or the Congressional investigation results in unnecessary or excessive collateral damage to the criminal investigation.

The Purposes of Congressional Investigations

When Congressional committees conduct investigations, they are gathering, analyzing, and disseminating information in furtherance of certain basic legislative functions: providing a public account of events of public interest and importance, potentially including but by no means limited to criminal activities; identifying and suggesting remedies for vulnerabilities in government operations as part of Congress's governmental oversight function; and proposing possible legislative or regulatory reforms to address problems uncovered by the investigation. Especially where the investigation concerns an ongoing or potentially recurring problem, there can be a need to proceed with reasonable dispatch.

In the current situation, laying aside whatever controversy there may be as to the existence of a basis for suspecting involvement of persons associated with the Trump campaign, there is widespread agreement that the Russian efforts to influence and disrupt our electoral process, and the possible occurrence of similar actions by it and other unfriendly powers in the future, is a matter of grave concern that deserves prompt attention.

The Purposes and Limitations of Criminal Investigations

It will come as no surprise to the members of this Committee that criminal investigations have a very different purpose: their exclusive focus is on identifying whether violations of laws that carry criminal penalties have occurred, and whether prosecutable cases exist against any persons (including corporations). They are not intended to identify needed remedial actions or provide comprehensive public accounts of events surrounding a particular topic of public concern; to the extent they do so, it is purely incidental to the execution of their purpose to enforce the

criminal laws.³ Here are some of the ways in which Special Counsel Mueller's investigation will not serve the goals that can be achieved by a well-run, fair, and thorough Congressional investigation:

Temporal Considerations: One of the objectives of a Congressional investigation is or should be to provide a full public accounting of the events under investigation with as little delay as feasible (though investigation of a matter as crucial and complex as the Russian interference in the 2016 election obviously will require considerable time). However, speed in bringing or deciding not to bring charges will at best a secondary concern of the Special Counsel. Rather, the criminal investigation will be extremely thorough, and the investigation will not be accelerated because of any perceived public interest in gaining a prompt understanding of what happened and whether anyone on the U.S. side was involved.

Limitations on Prosecutorial Charging Decisions: A Congressional investigation will examine and report not only on criminal activity but on events that do not rise to that level or that exonerate persons on whom suspicion has been cast. The fruits of a criminal investigation are necessarily far more limited:

- First, prosecutors will not bring criminal charges unless they believe there is a case that is provable beyond a reasonable doubt. It may, for example, be clear that a conspiracy existed and criminal acts were committed pursuant to that conspiracy, yet prosecutors may conclude that they cannot identify any particular individual as having participated in the conspiracy or committed the acts beyond a reasonable doubt, in which event no charges would be brought. Or the prosecutors may be able to prove that individuals committed various acts, but be insufficiently confident of their ability to prove knowledge, intent, or willfulness. In short, criminal trials may focus on the activities of only a small number of actors involved in the matter under concurrent Congressional and criminal investigation.

³ Under the long-since-repealed Independent Counsel regime, final reports were required describing the work performed by the Independent Counsel and setting forth the conclusions reached as a result of those efforts. The Department of Justice regulations governing Special Counsel, 28 CFR 600, make no provision for any similar reporting, nor is it customary for federal prosecutors generally to report on the results of their investigations.

- Second, and potentially highly significant in this context, is DOJ's retention of a considerable degree of authority over the decisions made by the Special Counsel under the delegation of authority made by Deputy AG Rosenstein. It remains to be seen how, if at all, such authority might be exercised to restrict Special Counsel Mueller's freedom of action. A Congressional Committee is under no such constraint.

Secrecy. Here the contrast between Congressional and criminal investigations could not be more striking. Congressional investigations produce a comprehensive public report, and the committees conduct hearings in public whenever possible. The byword for criminal investigations is secrecy. Grand jury proceedings are secret—a secrecy enforced by the judicial contempt power. And to the extent charges are not brought, we can predict with reasonable assurance that there will be no repetition of anything resembling Director Comey's statement regarding the non-charging decision in the Clinton email investigation. There will at most be a statement that no charges are being brought against certain persons.

In sum, the differing purposes of the Congressional and criminal investigations and the starkly different manners in which they are carried out demonstrate that there is a distinct role for each and that in a matter of such public importance as the Russian electoral meddling there is demonstrable value in having them move forward concurrently. At the same time, there is a distinct possibility that the Congressional investigation will result in prejudicing the Special Counsel's ability to prosecute violators successfully. I turn to that subject.

Coordination of Congressional and Criminal Investigations

By far the biggest threat Congressional investigations pose to concurrent criminal investigations arises from the grant of testimonial immunity. As the *North* and *Poindexter* cases show, notwithstanding the most careful advance preparations to insulate the prosecution's proof from being tainted by the compelled, immunized testimony that the Congressional committee decided to elicit from Colonel North and Admiral Poindexter—two central figures in the Iran-Contra matter—successful prosecution of the immunized witnesses proved to be impossible. And the takeaway from those decisions is that compelled, immunized testimony is generally likely to render the witness effectively immune from prosecution, at least if the testimony is public.

From the standpoint of Congressional investigators, however, testimony by persons at the center of the activity being investigated, who can be expected

almost universally to assert their Fifth Amendment privilege, is often crucial to uncovering what went on. Unless testimonial immunity is granted, the investigation may be effectively thwarted.

There may be other, far less substantial, concerns on the part of the prosecutor, such as a desire to control the order and frequency of witness interviews. For example, premature public exposure of witnesses' versions of events may "tip off" more important targets of the investigation to "shape" their own testimony to account for this previously undisclosed information.

So what steps might be taken to minimize the risk that the Congressional investigation will damage the criminal investigation?

- First, and most obviously, there should be close consultation between the two investigations, including a full opportunity to discuss the need for, timing, and scope of any immunity grant.
- Consideration should be given to whether the immunized testimony can be taken in closed session. This will reduce the risk that it will taint any subsequent prosecution (provided, of course, that its substance does not leak). For major players in the activities under investigation, however, committee members may conclude that the public interest in being informed trumps the advantages of *in camera* testimony.
- Given the criminal justice cost of immunizing major participants in potentially illegal activities, a Congressional committee should insist on full and forthcoming proffers, in order to ensure that the public is receiving full value in exchange for the immunity that the committee is effectively conferring.
- Where there are possible criminal charges that are only indirectly and tangentially related (if at all) to the subject matter of a committee's inquiry, the committee should limit the scope of its immunity grant to exclude explicitly the indirectly or tangentially related charges and confine the questioning to other matters. Under such a manner of proceeding, the chances can be maximized of obtaining useful information that meaningfully advances the Congressional investigation with minimal risk to the criminal prosecution.

The grant of testimonial immunity is obviously an important tool for accomplishing a thorough investigation of events that potentially implicate criminal activities because of the difficulty of securing the cooperation of knowledgeable witnesses without it. Yet, as discussed, it can be potentially fatal to successful prosecution of serious wrongdoers. That does not necessarily mean that this Committee should abandon its inquiry if it concludes that it cannot make meaningful progress without immunity grants to witnesses who may well have committed prosecutable offenses. Rather, the Congressional investigators must decide whether an immunity grant is warranted in all the circumstances. It is well to recall what Judge Lawrence E. Walsh said in his Final Report of the Independent Counsel for Iran-Contra Matters, Part X (emphasis added):

* * * [T]he competing roles of Congress and the Executive * * * must be borne in mind. [It was my view as] Independent Counsel, from the outset of [the] investigation, [that] it is Congress (in the case of the Iran/contra affair, its Select Committees) that is primarily responsible for the accurate public disclosure of the facts concerning transactions such as the Iran/contra matter. Ultimately, it is Congress that is empowered to legislate in a manner that not only will preclude future similar transactions in a narrow sense, but that also will facilitate the effective management of foreign policy and that will discourage disregard for existing legal strictures.

* * * [A prosecutor's] first responsibility * * * is the prosecution of criminal conduct. Accordingly, it is not primarily his duty to develop for the public a knowledge of what occurred.

When a conflict between the oversight and prosecutorial roles develops -- as plainly occurred in the Iran/contra affair -- the law is clear that it is Congress that must prevail. This is no more than a recognition of the high political importance of Congress's responsibility. It also is the appropriate place to strike the balance, as resolution of this conflict calls for the exercise of a seasoned political judgment that must take a broad view of the national interest.

In exercising this judgment, however, it is imperative that Congress be sensitive to the dangers posed by grants of immunity to the successful prosecution of criminal conduct -- and that it bear in mind, as well, the importance of the even-handed application of criminal justice.