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Time for a Special Prosecutor



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Almost as soon as the votes were counted in November, some Democrats began clamoring for the appointment of a special prosecutor to look at allegations of Russian involvement in the presidential campaign, either to hurt Hillary Clinton or help Donald Trump, or both. These calls were, in my view, way over the top. It has long been the case that when members of the opposite party scream cover-up, some eager politicians will start screaming for an independent investigation. After all, anything worthy of the term scandal deserves its own prosecutor, right?

Until President Trump's abrupt firing of FBI Director James Comey, these calls were at best premature and more likely entirely excessive. There had been no reason to believe that the FBI couldn't or shouldn't be trusted to get to the bottom of any wrongdoing.

Notwithstanding the farcical nature of the House Intelligence Committee (do they realize how ridiculous they've looked?), the Senate Intelligence Committee, led by Republican Chairman Richard Burr and Democratic ranking member Mark Warner, demonstrated a strong commitment to getting to the bottom of the affair. They were acting in a way consistent with the kind of bipartisanship that once was routine on Capitol Hill.

But Comey's firing changed everything. Attorney General Jeff Sessions, in clear defiance of his pre-confirmation promise to recuse himself from anything related to the 2016 campaign, recommended and helped construct a rationale for axing Comey. Now there is definitely reason to question whether the FBI and the Justice Department can be trusted to do their job. It is precisely for situations like this that special prosecutors have been named in the past and why must one be named now. In one single act Trump affirmed the worst fears of his most committed critics and dashed the best hopes of establishment Republicans.

As diligent and impartial as the Senate Intelligence Committee has been, it may no longer may be enough. Its Republican members are going to be put under enormous pressure by others in the GOP to ease up, while everything that Democrats on the committee try to do will be seen by some in a partisan light. But even if a special prosecutor is appointed, there is still an important role for the Senate Intelligence Committee. A prosecutor's role is to seek justice; a congressional committee's aim is to get at the truth and air its findings to other legislators and the public.

Politically, the Comey firing puts congressional Republicans in an awful bind. Independent voters, who prior to the scandal had been giving Trump a job-approval rating in the mid-30s and were largely unhappy with the House-passed health care bill, will be looking to see if Republicans can keep Trump in check. They will want to see day light between their Congress member and Trump. But polls have shown that among Republican voters, the president's approval ratings have been in the 80s, and many will take a dim view of their representatives distancing themselves from the president. Lawmakers who break from Trump face the possibility that they could face a primary

challenger from a Trump-backed candidate, or that the president's loyalists will simply stay home in the general election.

Many Democrats who had prematurely called for a special prosecutor have now moved on to impeachment, again getting out way over their skis. It should be remembered that presidential impeachment proceedings have only been commenced by the House three times, against Andrew Johnson, Richard Nixon, and Bill Clinton. In each case, Congress was in the hands of the opposition party. Putting aside the legal tests for impeachment, the bar for a party impeaching its own president, particularly in the period of intense partisanship that we have today, is almost impossibly high. In short, it is pretty far-fetched to imagine a movement toward impeachment getting anywhere as long as the House remains in Republican hands. A conviction is even more implausible so long as the GOP has a majority in the Senate, which is pretty likely because in 2018 it is defending only nine seats compared to the 25 that Democrats are trying to hold.

In short, to the consternation of Republicans, this scandal is not going away anytime soon. The scuttlebutt is that a fairly sizable portion of the almost 14,000 FBI special agents were very loyal to Comey and were offended by his firing. They are unlikely to go quietly into the night. As the late Mark Felt, who served as the FBI's deputy director, showed during the Watergate investigation, the FBI can leak to the press without leaving fingerprints.

But Democrats who are pushing impeachment are bound to be disappointed. A wave election may get them control of the House, but the likelihood of a Republican majority in the Senate will probably stymie conviction. Barring some jaw-dropping revelation, the machinery of government works so slowly that Trump can be reasonably confident that he will serve a full term.