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Concurrent Congressional and Criminal Investigations: Lessons from History

Statement by Special Deputy Chief Counsel, House Iran-Contra Committee (Currently Professor, University of Baltimore Law School)

I am Charles Tiefer, Professor at University of Baltimore School of Law.

In 1987, during the Iran-contra investigations, I was Special Deputy Chief Counsel of the House-Iran Contra Committee. I am knowledgeable and experienced in the practice and procedure of Congressional investigations, having served in both the Senate and House Legal Counsel Offices, eventually becoming General Counsel (Acting)

of the House. The House General Counsel's office detailed me to the Iran-contra committee to help the work get off to a rapid start.

The Iran-Contra Scandal and Its Inquiries

The Iran-contra scandal, in short, involved National Security Council staff conducting two off-the-books very major foreign policy activities of the utmost questionableness and controversiality – resupplying the armed contras in Nicaragua, something Congress had voted to forbid in the "Boland Amendments"; and, trading arms for hostages held by Iran, something long fiercely rejected throughout the highest levels of American government.

Like the Russian hacking inquiries today, there were two different types of inquiries. There were House and Senate select committees – in a word, legislative inquiries -- to hold hearings with public witnesses for the press and public to see, and to explore the policy implications. These were legislative inquiries, like, today, the intelligence committees or this committee. And, there was an Independent Counsel, Lawrence Walsh – in a word, prosecutorial inquiries -- to conduct a secret examination of witnesses in the grand jury, and decide what charges to bring, especially against the two leading figures, Oliver North and John W. Poindexter, much like Special Counsel Robert Mueller today will decide with figures like Michael Flynn.

Putting immunity aside, it is sometimes asserted that there are problems in Congressional investigations working at the same time as special counsels, but I do not regard these as extremely serious. The Independent Counsel experience with the Iran-contra Committees was that these problems simply were not so great. For example,

potential defendants get a kind of "discovery" by seeing the witnesses against them in public Congressional hearings. But, the "surprise" factor in this kind of prosecution is simply not so important. I do not recall a single time (again, putting immunity aside) that the Independent Counsel said that this was a significant factor. Or, a witness who is questioned by the Special Counsel and again by investigative committees is asserted to create inconsistent multiple statements. I do not recall this being tagged as a significance problem in Iran-contra either. The networks of witnesses, potential targets, and their lawyers provided both opportunities for a kind of discovery, and, limits on the creation of inconsistent multiple statements, more important that what Congress does. And, there was readiness in the Iran-contra Committees to avoid some particular area of questioning of some witness, had they been asked.

I therefore see no problem in Congressional investigations proceeding, in consultation with a special counsel, with all witnesses who do not take the Fifth Amendment. So, to cut to the central point of interest today, witnesses in Iran-contra were taking the 5th Amendment, and would not testify without immunity. Immunity takes a vote of two-thirds of a full committee. Our Congressional committee planned how to arrange immunity in cooperation with the Independent Counsel. We did not have a collision on this with the Independent Counsel.

In Iran-contra, we immunized 26 witnesses. (For a survey of the whole subject, see Morton Rosenberg, When Congress Comes Calling (2d ed. 2017)). Take the 24 who were not North and Poindexter, the major targets of the Independent Counsel. In large measure, both in that investigation and in the current one, a lot of witnesses who are not likely prosecution targets take the Fifth Amendment, not from significant fear of

prosecution, but instead because they would rather not testify for reasons of personal preference and they use the one available excuse. For example, in Iran-contra, Oliver North's secretary, Fawn Hall, fully supported North and preferred not to be a witness against him. So she insisted on immunity both from the Independent Counsel and from the Iran-contra committees.

There could well be a similarly large number of witnesses who take the Fifth Amendment in this current matter from personal preference. For example, many former Trump 2016 campaign staff who have knowledge of asserted collusion may fully support him and not want to be witnesses against him. Although their own role may include little or no activity subjecting them to prosecution, they may assert the Fifth Amendment.

For the witnesses like Fawn Hall or merely knowledgeable 2016 campaign staff, there is a proper and safe course for Congress. It can wait until the witnesses have been immunized by the Special Counsel, and then, in consultation with the Special Counsel, follow up with their own immunization. There is no prosecution to be jeopardized in these circumstances. The Special Counsel has signaled the end of his own interest in prosecuting the witness by his own immunization of the witness. Far-fetched hypotheticals about how this could create problems should not be indulged. The Special Counsel is perfectly capable of warning that for some strange reason, he still keeps an interest in prosecuting a witness after he has immunized him, in which case, Congress need not go forward.

This brings us to the individuals who are major targets of prosecution. In Iran-contra those were North and Poindexter. Basically, it was believed in 1987, both on our Congressional side and on the side of Walsh as Independent Counsel, that Congressional

committees could give use immunity to North and Poindexter, while letting their prosecutions go forward. We believed in the "canning" process, by which testimony and evidence was put away "in the can" prior to immunity, for prosecutors to show they had known of this evidence before the grant of use immunity. Evidence that was "canned" beforehand, we believed, would prove the prosecutors were not "tainted" by immunity. There was a Memorandum of Understanding between the committees and Walsh, to make sure every step facilitated such canning. I want to emphasize that it was a general belief on both the legislative and prosecutorial sides that canning, and Walsh's other steps, would solve the immunity problem.

The Congressional investigations started in January, with hearings held off until May, and North and Poindexter coming a few months later. Walsh had asked for extra time before immunity for North, which was granted. This was to give extra time for "canning."

The Need for Legislative Hearings, Then and Now

You may hear from other witnesses about why legal doctrine developed that the canning process proved to undermine the prosecutability of North and Poindexter. I have a different point to make, again with relevance today. It may be that Congress should never immunize the likes of North and Poindexter then, or, hypothetically, Michael Flynn now. But, that conclusion applies only to the high level of prosecutorial targets. Rather, the live question really concerns individuals, invoking the Fifth Amendment, of lesser prosecutorial interest than Flynn, but of greater interest than mere knowledgeable 2016

campaign staff. Significant figures spoken of in this regard in the press may include Carter Page and Paul Manafort, among others.

It is premature, to say the least, to try to strategize about each and every one of these. Some, on the one hand, may have talked so openly by now that they would not be expected to take the Fifth. Some, on the other hand, may be so fully incriminated that the Special Counsel would be able to work out a plea deal in the non-too-distant future. What I do suggest, just as consultation with the Independent Counsel worked in 1987, consultation with the special counsel will work in the next two years.

Iran Contra concerned matters of national importance. NSC staff and their friends were running foreign affairs outside the government, unaccountably, with lying to Congress. Normal oversight was subverted. As to these affairs, the public had a right to know and a need to know.

But, trials by the Independent Counsel did not inform the public and uncover policy implications as legislative hearings did. Trials often focused on relatively fine-toothed matters of money, like small bribes, which starkly revealed individual immorality but not broad policy. Something like that could happen today with cases by Mueller. The public has a right to know and a need to know the extent of Russian hacking, Russian creation of fake news, and coordination or collusion by campaigns. Yet, trials by Special Counsel Mueller may focus, as Walsh's trials did in Iran-contra, in a fine-toothed way about corrupt payments of money by Russians to particular individual, and on cover-up activities, and not inform the public broadly about Russian hacking and collusion.

Balance

Of the general category of middle-level individuals just named (Carter Page, etc.), there is a need to balance the prosecutorial imperative of keeping a workable case, and, the public's right (and legislative need) to know about the scandal. At some point 6 months to a year in the future, discussions with the Special Counsel could open the way to a carefully selected important figure to be a Congressional hearing witness if having at least one, to show how Russian collusion worked, were particularly important to legislative hearings. Suppose that Congress has a strong legislative need for a hearing about a particular issue: individuals with a campaign role who had financial dealings with Russian figures.

A Congressional committee could provide the list of possible witnesses to the Special Counsel and ask him, as the time frame matures from six months to a year ahead, to let at least one be available for hearings including, if still necessary yet safe, immunization. That gives the Special Counsel a long time and many choices. The Special Counsel can decide who is not of prosecutorial interest; who is going to receive immunity from the prosecutor; or, conversely, the Special Counsel can arrange a plea deal with one that contemplates Congressional testimony. Yes, we have learned from 1987 that immunity is a potent barrier to prosecution. But if Congress just needs one example out of a whole group of figures to develop an issue of legislative importance, then it may seek an approach which is acceptable to the Special Counsel and does not hobble his prosecutorial efforts.

The point is not about them as individuals but the concept that there was a middle level in 1987 and perhaps now in 2017 – not North and Flynn, not small fry, but in the middle. About this middle level, discussions in good faith should be undertaken six

months to a year from now, about whether the Special Counsel would accept legislative hearings, perhaps, for example, if the Special Counsel is reaching a plea deal, or a use of his own immunity, so as no longer to worry about Congressional immunity.

A last point: When Congress is giving all this deference to the Special Counsel, it can ask assistance with its informing and policy-making function. A Special Counsel may write reports, perhaps with judicial approval (under F.R. Cr. P. 6(e)) – perhaps a full one only at the completion of the work, but maybe partial ones along the way. It is not clear that Mueller would normally incline, all things being equal, to releasing reports about his work. But, in this instance, he can see that Congress has foregone, to help him, the exercise of some of the powers by which it obtains legislative information. Releasing these reports through Congress would a legitimate way for him to close the circle of consultations with Congressional investigations.

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