



The Special Counsel Investigation After the Attorney General's Resignation

Cynthia Brown

Legislative Attorney

January 2, 2019

Recent Department of Justice (DOJ) leadership changes have raised [questions](#) about their impact on the [special counsel investigation](#) into Russian interference with the 2016 presidential election and related matters. Who will oversee the investigation? How do personnel changes affect the investigation? What are Congress's possible roles in this matter? Before his [resignation](#), former Attorney General Jeff Sessions had recused himself from the [inquiry](#) with Deputy Attorney General Rod Rosenstein serving as Acting Attorney General for the investigation. With President Trump's [designation](#) of Matthew G. Whitaker as Acting Attorney General pending Senate consideration of his [nominee](#) for Attorney General, supervision of the special counsel investigation may change in the coming months, possibly [impacting](#) ongoing litigation regarding the [special counsel's authority](#). This Sidebar examines how DOJ leadership changes may interplay with the [special counsel investigation](#).

Authority to Oversee the Special Counsel's Investigation

In 1999, pursuant to its [general authority](#) to promulgate [departmental regulations](#), DOJ issued the current [special counsel regulations](#), which expressly [vest authority](#) to initiate special counsel investigations in “[t]he Attorney General, or in cases in which the Attorney General is recused, the Acting Attorney General.” Thus, as the U.S. District Court for the District of Columbia has [affirmed](#), the Attorney General has authority over special counsel investigations but, if he recuses, the Acting Attorney General has authority. That authority includes [review](#) of particular aspects of the investigation; [review and approval](#) of the special counsel's annual budget requests; and [sole authority](#) to discipline or remove the special counsel for “good cause.”

The exercise of such supervisory authority, however, is subject to congressional oversight. When DOJ promulgated the rules, it [acknowledged](#) that they were an imperfect solution to actual or apparent conflicts that may arise if the executive branch has to investigate its own officials. Accordingly, the

Congressional Research Service

7-5700

www.crs.gov

LSB10237

Attorney General **must report** certain information to the Chairmen and Ranking Members of the Judiciary Committees of Congress, including explanations of appointments, removals, and decisions directing the special counsel not to pursue particular actions. The regulations, however, give the Attorney General discretion over whether to release the special counsel's confidential report when the inquiry concludes.

The U.S. Court of Appeals for the D.C. Circuit is **currently considering** a challenge to the special counsel's authority, and, specifically, the effect of Attorney General Sessions' resignation on that authority. An investigation witness is challenging, in part, the U.S. District Court of the District of Columbia's **conclusion** that the special counsel's appointment is constitutional even though it was not made by the President or the Attorney General. During oral arguments following Attorney General Sessions' resignation, the appellate court **requested supplemental briefing** on the resignation's implications for the special counsel's appointment and investigation. In response, the special counsel **reportedly** asserted that designation of an Acting Attorney General "cannot ... retroactively affect" the previous appointment and ongoing investigation.

Recusal, Resignation, and the Line of Succession

Like the current investigation, an Acting Attorney General (also the Deputy Attorney General) oversaw the **special counsel** investigation concerning the Branch Davidians. In that case, Attorney General Janet Reno **recused herself** from the investigation because she anticipated being called as a witness. In the current inquiry, Attorney General Sessions **recused himself** "from any matters arising from the campaigns for President of the United States," in accordance with DOJ ethics guidance. Each recusal complied with DOJ's **standard for recusal**. The DOJ recusal standard is distinct from other **generally applicable rules** for executive branch officials and rules of professional conduct governing officials who are licensed to practice law. Because the DOJ recusal standard may be unclear, **DOJ ethics officials** provide **guidance** to officials when investigations involve **possible** conflicts of interest.

Recusal Under DOJ Regulations

Under DOJ regulations, a DOJ official **must recuse** himself or herself from criminal investigations or prosecutions if he has "a personal or political relationship with" individuals or entities who are involved in the conduct being investigated or who he knows to have "a specific and substantial interest that would be directly affected by the outcome of the investigation." Under this standard, public officials should not exercise official duties on matters in which they may be partial to a particular outcome.

By **definition**, officials' personal relationships include those involving an immediate family member (i.e., parent, sibling, child, or spouse) or "a close and substantial connection of the type normally viewed as likely to induce partiality." While other familial or friendly relationships may qualify as personal, the regulations state that determinations must give "due regard ... to the subjective opinion of the employee." As **one court** explained, when examining this standard, a "personal relationship" requiring recusal must involve a degree of closeness beyond a series of personal interactions between two people.

An official's **political relationships** are relationships involving the official's service as a principal adviser or official to an elected official, candidate for election to public office, political party, or campaign organization. For example, a federal district court **held** that a U.S. Attorney could prosecute a Member of the House of Representatives for allegedly accepting illegal campaign contributions from a company that had also contributed to a Senate campaign for which the U.S. Attorney was the treasurer. The court rejected the defendant's claim that the attorney's involvement with the company, as treasurer for a separate campaign, to which the company also contributed, was a political connection requiring recusal. According to the court, there was no evidence that, by pursuing charges against the House Member, the

attorney's attention was diverted from other possible illegal campaign contributions and the attorney had not been involved in the initial decision to prosecute the House Member.

Effect of the Resignation of a Recused Official

Attorneys General, who have recused themselves from special counsel investigations, have followed DOJ's [statutory line of succession](#) when designating replacements. Under the line of succession, the Deputy Attorney General is first; followed by a [hierarchy set by the Attorney General](#), which includes the Solicitor General and Assistant Attorneys General; and, if necessary, by a hierarchy established by [executive order](#). (For discussion of the line of succession and authority to fill vacancies, see [this posting](#).) The special counsel regulations do not provide for an Acting Attorney General to retain oversight of an investigation if a recused Attorney General is replaced. However, if a newly [designated](#) or [appointed](#) Attorney General also recuses, the Deputy Attorney General would likely serve as Acting Attorney General for purposes of supervising the investigation.

Status of Regulations and the Potential Role of Congress

DOJ [indicated](#) that the typical rulemaking procedures under the [Administrative Procedure Act](#)—including a notice and comment period and a 30-day delay before taking effect—do not apply to the special counsel regulations as “matters of agency management and personnel.” Likewise, it appears that DOJ similarly could amend or repeal the regulations [at any time](#).

While no statutes regarding special counsel investigations are in effect, [House](#) and [Senate](#) bills would codify certain existing regulatory provisions or add new protections. Some of the proposals would codify a chain of command for supervising investigations, which would include only Senate-confirmed officials. Under [S. 2644](#), the chain would begin with a Senate-confirmed Attorney General. If the office was vacant or the Attorney General recused, authority would pass to “the most senior Senate-confirmed officer of the Department listed in [section 508](#) who is not recused from the matter.” Codifying an executive function, however, could raise [questions](#) about whether Congress might be inserting itself into a role intended for the executive branch. The debate over Congress's role is unresolved, as explored in this [CRS Report](#).