The Special Counsel Investigation After the Attorney General’s Resignation

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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

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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](#).