

THE SCOPE OF THE SPECIAL COUNSEL APPOINTMENT IS TOTALLY INADEQUATE

Rod Rosenstein just appointed former FBI Director (and, before that, US Attorney) Robert Mueller as Special Counsel to take over the investigation into Trump and his associates.

I'm agnostic about the selection of Mueller. He has the benefit of credibility among FBI Agents, so will be able to make up for some of what was lost with Jim Comey's firing. He will be regarded by those who care about such things as non-partisan. With Jim Comey, Mueller stood up to Dick Cheney on Stellar Wind in 2004 (though I think in reality his willingness to withstand Cheney's demands has been overstated).

But Mueller has helped cover up certain things in the past, most notably with the Amerithrax investigation.

My bigger concern is with the scope, which I believe to be totally inadequate.

Here's how the order describes the scope:

(b) The Special Counsel is authorized to conduct the investigation confirmed by then-FBI Director James 8. Comey in testimony before the House Permanent Select Committee on Intelligence on March 20, 2017, including:

(i) any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump; and

(ii) any matters that arose or may arise directly from the investigation; and

(iii) any other matters within the scope of 28 C.F.R. § 600.4(a).

As I read this, it covers *just* the investigation into ties between the Russian government and people associated with Trump's campaign. Presumably, that includes Mike Flynn, Paul Manafort, and Carter Page, among others.

But there are other aspects of the great swamp that is the Trump and Russia orbit that might not be included here. For example, would Manafort's corrupt deals with Ukrainian oligarchs be included? Would Flynn's discussions with Turkish officials, or Rudy Giuliani's attempt to excuse Turkey's violation of Iran sanctions? Would the garden variety money laundering on behalf of non-governmental Russian mobbed up businessmen be included, something that might affect Manafort, Jared Kushner, or Trump himself?

And remember there are at least two other aspects of the Russian hacking investigation. Back in February, Reuters reported that San Francisco's office was investigating Guccifer 2.0 and Pittsburgh was investigating the actual hackers. Somewhere (San Francisco would be the most logical spot), they're presumably investigating whoever it is that has been dumping NSA's hacking tools everywhere. I've learned that that geography has either changed, or there are other aspects tied to those issues in other corners of the country.

Plus, there's the Wikileaks investigation in EDVA, the same district where the Mueller-led investigation might reside, but a distinct investigation.

Any one of those investigations might present strings that can be pulled, any one of which might lead to the unraveling of the central question: did Trump's associates coordinate with the Russian government to become President. Unless Mueller can serve to protect those other corners of the investigation from

Trump's tampering, it would be easy to shut down any of them as they become productive.

Yet, as far as I understand the scope of this, Mueller will only oversee the central question, leaving those disparate ends susceptible to Trump's tampering.

Update: In its statement on the appointment, ACLU raises concerns about whether this would include the investigation into Trump's attempt to obstruct this investigation.

Update: WaPo's Philip Rucker reminds that Mueller is law firm partners with Jamie Gorelick, who has been representing both Ivanka and Kushner in this issue.

Update: Mueller is quitting WilmerHale to take this gig. He's also taking two WilmerHale former FBI people with him. Still, that's a close tie to the lawyer of someone representing key subjects of this investigation.

Update: One addition to the ACLU concern about investigating the Comey firing. In the most directly relevant precedent, the Plame investigation, when Pat Fitzgerald expanded his investigation from the leak of Plame's identity to the obstruction of the investigation, he asked for approval to do so from the Acting Attorney General overseeing the investigation – in that case, Jim Comey.

The Acting Attorney General in this case is Rod Rosenstein. So if Mueller were as diligent as Fitzgerald was, he would have to ask the guy who provided the fig leaf for Comey's firing to approve the expansion of the investigation to cover his own fig leaf.

Update: Petey noted to me that Jeff Sessions' narrow recusal may limit how broadly Rosenstein's order may be drawn. It's a really interesting observation. Here's what I said about Sessions' recusal (which is very similar to what I tried to address in this post).

There are two areas of concern regarding

Trump's ties that would not definitively be included in this recusal: Trump's long-term ties to mobbed up businessmen with ties to Russia (a matter not known to be under investigation but which could raise concerns about compromise of Trump going forward), and discussions about policy that may involve quid pro quos (such as the unproven allegation, made in the Trump dossier, that Carter Page might take 19% in Rosneft in exchange for ending sanctions against Russia), that didn't involve a pay-off in terms of the hacking. There are further allegations of Trump involvement in the hacking (a weak one against Paul Manafort and a much stronger one against Michael Cohen, both in the dossier), but that's in no way the only concern raised about Trump's ties with Russians.