



## **Sayonara, Special Counsels!**

### Solving the Conundrum of Partisan Investigations

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The investigation by Special Counsel Robert Mueller into alleged Russian attempts to influence our 2016 presidential election showed all the flaws of this form of law enforcement. After 22 months of intense work under the spotlight of a completely engaged press and a steady stream of advice from the public bleachers, Mueller issued the report that was soundly criticized by both the political left and right.

The two-year spectacle was yet another example of how the flaws in a system that relies on the intermittent assignment of a special prosecutor to bring people to justice can be overwhelmed by partisan maneuvering, to the detriment of achieving justice.

#### **If Only . . .**

If we had a system that dealt with charges of improper behavior by government officials in an effective, non-partisan manner, we would have been spared the two years of circus that we endured that ended without a clear resolution. Even though the investigation is over and the special counsel's report has been issued, the problem is still with us and the political posturing and fighting continues. But, if we are honest with ourselves, we should not be surprised; we know that the primary motivation of our government officials is to gain and retain political power. Matters of good governance are always subordinated to the fight for power. That is a truth that is always with us. We must be alert to this and look for ways to minimize it in our organization of sensitive government activities.

But we sit passively and watch this charade of government, year after year, which is slowly destroying our democratic republic, without realizing that there is a solution available to fix the problem: In Article V of the Constitution, the founders gave us the power to address serious problems of governance and fix them

through constitutional amendments. The first step to constructive reform is to dig deeply into the underlying causes of a problem and find an effective solution for it; then proceed with calling a convention of states to start the amendment process.

## **Our Analysis**

Whenever any group (large or small) is not producing satisfactory results, good management will examine two things: the organizational structure of the group and the incentives of individuals in the group. So that's where we need to start. If the organization is defective and/or the incentives for individuals are working at cross purposes with the group objectives, no expressions of disappointment, disapproval, condemnation, frustration or even despair will bring about improvement in the group performance.

Armed with this new outlook, let's examine our experience with the investigation by Special Counsel Mueller. When we do, we can see that the practice of using special counsels is fraught with internal partisan conflicts that will make for a bumpy ride and conclusions that are often disappointing. In those cases, despite investing considerable time and money, we may not achieve resolution of our problem, and the fight may continue indefinitely as the opportunity cost continues to escalate.

But our analysis discloses that in this case the underlying cause is our lack of ability to enforce the law against government officials. The Constitution assigns the responsibility for enforcement of the law to the president, which he does by acting through his appointed Attorney General. However, the president wins office through the efforts of his political party, and all of his appointments (including the AG) are naturally partisan. Consequently, the AG has little appetite to prosecute members of the president's staff and cabinet, and examples of enforcement of the law against officials of the president's political party are extremely rare while examples of apparent malfeasance that are ignored are all too common.

Having identified the problem, can we find a solution? Clearly, the function of enforcing the law against federal officials must be moved from the executive branch, but it is not a good fit in the legislative or judicial branches. That leads us to the states and this question: *Is it possible to create an organizational unit under control of the states that could be the non-partisan home of this law enforcement function?*

We submit the answer to this question is definitely YES! Here's an example of how it might be done under a new Accountability Amendment.

## **The Accountability Solution**

This amendment would create a new organizational unit, the States' Compact, which would be controlled by the states acting through a state-appointed board of directors; the board could in turn elect an executive committee to manage the daily affairs of the unit. The Compact would include two operating groups, one new and the other composed initially of existing groups that would be transferred to it:

1. A States' Bureau of Investigation (SBI) would be the new unit, with responsibility for enforcement of the law against government officials (federal and perhaps state and local); it would be empowered to investigate alleged improprieties, issue reprimands, assess penalties, and initiate legal action against an individual or group. An organization with permanent, full-time responsibility for this law enforcement would be much more effective than periodically assembling an ad hoc group taxed with a specific area of investigation. A cadre of permanent, professional investigators could follow all leads without limitation that hinted at impropriety and they would develop expertise in this specialized area of law enforcement. And their existence would change the culture of Washington: officials would be much more circumspect in their pursuit of political advantages, knowing that an aggressive cop is on the political beat and would not hesitate to press charges against them.

In situations where the SBI sensed an impropriety but lacked the jurisdiction to pursue, it could recommend action to the Department of Justice. And where new legislation appeared to be the correct response, it would recommend action to Congress.

Additionally, the SBI could improve federal operations through review of procedures and rules, mandating changes to ensure free and open debate on legislation, adequate time for public review of proposed regulations and executive orders, procedural safeguards against fraudulent activity, and other reform through administrative actions.

The SBI would quickly establish itself as the watchdog of the federal government, but a watchdog with teeth!

2. Departments transferred to the Compact would include all those that are susceptible to partisan meddling by executive and legislative branch personnel (such as the Internal Revenue Service and Federal Elections Commission), and those departments with responsibility for administrative

functions that should be free of partisan influences (such as the General Accountability Office, Federal Compensation Agency, Freedom of Information Act Enforcement Agency, Citizen Ombudsman Office, and Office of Government Ethics).

This change would sharply curtail the practice of officials that use government power to intimidate citizens, for a political gain. The citizen could breathe easier, knowing that this threat to his/her livelihood and peace of mind was protected from unscrupulous officials seeking to expand their power.

Organizations tend to adapt to and embrace the philosophy of their leaders, and with the careful selection of political centrists for the leadership positions of the Compact, it could quickly institutionalize a non-partisan culture in this group. That would be a big plus for the republic, and could be a step toward a more civil and productive political environment.

### **Solving the Conundrum of Partisan Investigations**

With the responsibility assigned to the SBI for investigation and prosecution of alleged improprieties of government officials, the current practice of the Department of Justice of appointing special counsels (special prosecutors) for investigations would be ended. These appointments have been an attempt to make an investigation non-partisan, but experience has shown that this is rarely, if ever, achieved. The process typically recruits staff from a small pool of career government officials with relationships with the very people they will be investigating! This creates an appearance of bias from the inception of the investigation and diminishes the credibility of the resulting work product. And it often results in a less than satisfactory conclusion to an investigation.

We believe most advocates of good government would welcome the end of the special prosecutor law and implementation of an alternative, effective solution.

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