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President Trump Can't Just Fire Robert Mueller

By PETER M. SHANE JUNE 13, 2017

The latest attention-grabbing trial balloon to be floated by a White House staffer or apparent surrogate for President Trump is the suggestion by Christopher Ruddy, a longtime friend of the president, that Mr. Trump is “considering, perhaps, terminating” Robert S. Mueller III, the special counsel appointed to investigate the Trump campaign’s links to Russia.

President Trump cannot legally do so.

Authority to appoint Mr. Mueller landed with Rod J. Rosenstein, the deputy attorney general, because Attorney General Jeff Sessions recused himself last March from the Russia probe. In appointing special counsel, Mr. Rosenstein was exercising authority that Congress had given the Justice Department by statute. The Justice Department, in turn, issued implementing regulations in 1999 specifically to govern such appointments. Those rules provide that a special counsel is appropriate when a criminal investigation is warranted but presents a conflict of interest for the department.

Under these rules, only the attorney general — or, in this case, the deputy attorney general — may remove a special counsel. He may do so only “for

misconduct, dereliction of duty, incapacity, conflict of interest or for other good cause.”

Because the deputy attorney general serves at the pleasure of the president, Mr. Trump may direct Mr. Rosenstein to fire Mr. Mueller. Although Mr. Rosenstein has cautiously avoided any statement more definitive than insisting he would not dismiss the special counsel except for good cause, he has added that he does not anticipate such a scenario. Should Mr. Rosenstein refuse a dismissal order, then Mr. Trump, like President Richard M. Nixon, could fire however many officials it takes to get someone in place willing to execute the discharge. That is not likely to be easy because there is no reason at this point to suspect that Mr. Mueller has done anything that would warrant his dismissal for “good cause,” and it is doubtful there are many Justice Department officials who would rush to act unlawfully.

Following the Saturday Night Massacre — the now-infamous dismissal of the special prosecutor Archibald Cox by Robert H. Bork, then the acting attorney general — several members of Congress sued in federal court because the Cox firing made it more difficult to perform their duty in deciding whether to proceed with a Nixon impeachment.

Judge Gerhard A. Gesell, one of the most highly regarded federal trial judges of the last century, held that the firing of the special prosecutor was unlawful because it violated Justice Department regulations governing Mr. Cox’s office. He observed that the attorney general chose to “limit his own authority” by specifying the narrow circumstances under which Mr. Cox could be fired. “It is settled beyond dispute,” Judge Gesell wrote, “that under such circumstances an agency regulation has the force and effect of law, and is binding upon the body that issues it.” What was true for Mr. Bork would also be true for the deputy attorney general now.

To be sure, there are at least some legal scholars who believe the president is constitutionally entitled to take personal charge of implementing all statutes. Under “unitary executive” theory, the president can simply seize whatever administrative authority Congress gives anyone in the executive branch. This would mean that whatever authority Congress gives the attorney general to appoint or fire a special counsel would be authority the president could carry out himself.

That position, however, is constitutional nonsense. Early attorneys general representing presidents as different in their politics as John Quincy Adams and Andrew Jackson agreed that presidents could not simply assume tasks that Congress had assigned specifically to other administrative officers. Moreover, the Supreme Court has held repeatedly that agencies may not discharge their officers in a manner that violates their own regulations. It follows that Mr. Trump lacks authority to fire Mr. Mueller under current rules, and he cannot personally impose new regulations to give himself that power.

Broadcasting that Mr. Trump is “considering” some dramatic action has become a familiar, if tiresome, tactic. Whether he follows through, as he did in withdrawing from the Paris climate accords, or not, as in failing to use executive privilege to shortcut congressional testimony by James Comey, the former F.B.I. director, such grandstanding has political uses. A combination of suspense and outrage can distract from whatever congressional Republicans are doing, sap energy from political opponents and keep the glare of public attention where the president likes it best — on himself.

In this case, however, it ought to be clear that what Mr. Trump may be “considering” is beyond his powers. Following through, as with the Saturday Night Massacre, would only provide fodder for his own removal.

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