

Why Trump Can't (Lawfully) Fire Mueller

By Martu Lederman

Tuesday, June 13, 2017 at 1:20 PM



There's been a great deal of noise from some of the President's confidants over the past 48 hours suggesting that he might (try to) remove Special Counsel Robert Mueller. Most alarmingly, Trump friend Chris Ruddy told Judy Woodruff on PBS NewsHour today that "I think [the President is] considering perhaps terminating the special counsel. I think he's weighing that option."

This post is merely a very summary explanation of why the President can't do that—and why he probably can't compel other officials to do so, either. I'll fill it out further if the question continues to linger. But for now I simply wanted to set the legal groundwork and offer the big picture, because there's a lot of confusion out there on this question. (As I was writing this, my friend Jack Goldsmith was drafting a post of his own, which is excellent and more detailed than mine on some aspects of the matter. Although each of our posts contains specifics that are not in the other's, I believe that Jack's post and mine are wholly consistent with one another . . . with one exception, which I'll identify below.)

There are two reasons why the President himself cannot remove Mueller. First, the statutory power to *appoint* a Special Counsel is vested in the Attorney General, and the longstanding general rule is that unless Congress specifies otherwise, "the power of removal [is] incident to the power of appointment." Thus "the President has certainly no power to remove" officers appointed by a department head (absent statutory authorization for such presidential removal, which is not present here); such removal, instead, can be exercised only by the department head who appointed the officer—here, the (Acting) Attorney General. *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259-60 (1839); *accord PCAOB v. FEF*, 561 U.S. 477, 493 (2010). This explains why Richard Nixon did not try to personally remove Archibald Cox (or, for that matter, Leon Jaworski).

Second, the removal provision of the regulation pursuant to which the Acting AG appointed Mueller, 28 CFR 600.7(d), provides that a Special Counsel appointed from outside the Department of Justice (as Mueller was) "may be disciplined or removed from office **only by the personal action of the Attorney General.**" And, as explained below, that limitation is binding on the Executive branch (including the President) as long as the regulation is on the books.

All of which is to say that the only way Trump can get rid of Mueller is to have the (Acting) Attorney General remove him. (I keep referring to the "Acting" AG because Attorney General Sessions is recused from such matters.) In his post, Jack asserts in passing that "[t]here are good constitutional arguments in support of th[e] possibility" that Trump could *himself* fire Mueller and abrogate or ignore the DOJ regulation. But really, there aren't. (This is the one discrete

thing on which Jack and I differ.) Nor is Jack right, I think, to suggest that it is a “hard question[] . . . whether Trump could circumvent the regulations—either ignore them or abrogate them—and fire Mueller himself,” or change the regulation “by Executive order.” He doesn’t have those authorities—only the power to remove DAGs who do not comply with his wishes.

So the decision would be Rod Rosenstein’s to make. And Rosenstein is not going to remove Mueller, if only because that same DOJ regulation permits such removal of a Special Counsel appointed from outside the Department of Justice (as Mueller was) *only* “for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies.” (What’s more, in such a case the Attorney General must “inform the Special Counsel in writing **of the specific reason** for his or her removal.”) When Attorney General Reno promulgated the regulation in 1999, she explained further how limited these permissible grounds for removal are:

Violation of Departmental policies is specifically identified as a ground that may warrant removal. The willful violation of some policies might warrant removal or other disciplinary action, and a series of negligent or careless overlooking of important policies might similarly warrant removal or other disciplinary action. Such conduct also would be encompassed within the articulated standard of misconduct or dereliction of duty. There are, of course, other violations of Departmental policies and guidelines that would not ordinarily be grounds for removal or other disciplinary action.

Mueller plainly has not done—and I’m confident in predicting he will not do—anything to satisfy this strict test. And if Trump tried to argue otherwise, I can’t imagine Rosenstein agreeing to act on the basis of a conclusion that the “good cause” standard has been met.

Moreover, because of the so-called “*Accardi* doctrine,” Rosenstein may not ignore the regulation’s demanding standard for removal, even though the Executive is free as a matter of statutory law to impose a less demanding standard. As the Supreme Court explained in the Nixon tapes case, 418 U.S. at 695-96:

So long as this regulation is extant it has the force of law. . . . Here, as in *Accardi*, it is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor’s authority. But he has not done so. So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it.

Rosenstein thus can only remove Mueller *without* cause if he or AG Sessions first rescinds the 1999 Special Counsel regulation, something that I think (or hope!) is virtually unimaginable. [UPDATE: In a [tweet](#), Andy Grewal wonders whether [section 600.10](#) of the current regulation—which provides that “[t]he regulations in this part are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law or equity, by any person or entity, in any matter, civil, criminal, or administrative”—is designed to render inoperative the *Accardi* rule on which the Court relied in *Nixon*, and thus to allow the Attorney General to remove a Special Counsel without cause even without rescinding the regulation. Quite frankly, I’m not certain. Certainly, section 600.10 is designed to preclude a Special Counsel from *enforcing* a right to regulatory compliance “in any matter, civil, criminal, or administrative.” If that provision were intended to circumvent *Accardi/Nixon*, however, that would be a fairly big deal—largely undermining the impact of the rule—and thus I assume the Attorney General would have said something to that effect when she promulgated the rule . . . but she did not. (The relevant [section](#) of the Federal Register notice, 64 Fed. Reg. at 37041, merely quotes the provision, without more.) Moreover, even if the removal provision is *not* itself subject to *Accardi/Nixon*, Acting A.G. Rosenstein specified [in his appointment of Mueller](#) that “Sections 600.4 through 600.10 . . . are applicable to the Special Counsel,” and therefore I assume that, at the very least, Rosenstein or his successor would have to first formally repudiate that provision of the appointment memorandum if he wanted to remove Mueller without cause.]

Therefore, if Trump wants to get rid of Mueller, he'd have to somehow get to a point where he'd have in place an Acting Attorney General who was willing *either* to find "good cause" for the removal *or* rescind the good-cause regulation, and then also fire Mueller. I assume Rosenstein won't be party to such a farce. [UPDATE: In testimony before the Senate Appropriations Committee this morning (Tuesday), Deputy Attorney General Rosenstein stated that he is the *only* person who can fire Special Counsel Mueller; that he has not seen any evidence of good cause to remove Mueller; that if the President asked Rosenstein to remove Mueller, he would not follow such an order if there were not good cause: "it would not matter what anybody says"; and that "you have my assurance that we are going to faithfully follow th[e] regulation" prohibiting removal absent good cause. This confirms the point in my post that Trump would, at a minimum, have to remove Rosenstein in order for there to be even a theoretical possibility of removing Mueller.]

If so, and if Trump removes Rosenstein, the new Acting AG would be Associate AG Rachel Brand, another excellent and principled official who is also very unlikely to play along with such a plan. If Trump then removed Brand, my understanding is that, because there are no other officers yet confirmed as Assistant Attorneys General, Trump would have to appoint a current Senate-confirmed U.S. Attorney to be Acting DAG and (for purposes of the Russia probe) Acting AG. There are few such officers in place at least as of now, apart from Dana Boente, the confirmed U.S. Attorney for the Eastern District of Virginia, who is presently Acting Assistant Attorney General for the National Security Division. [Jack has a bit more on the succession details in his post.]

It's possible, of course, that Boente or some other U.S. Attorney would be willing to (i) accept the Acting DAG/A.G.-for-Russia-probe position, even after the hypothesized (and shocking) Rosenstein and Brand removals; (ii) rescind the regulation (or purport to find "good cause" for removal where there isn't any), and then (iii) remove Mueller. If so, however, that official would risk the likely ruination of his or her professional and moral reputation. Which is why I don't think Trump will find anyone willing to jump through all those hoops.

Moreover, even if the President were, somehow, able to identify such a willing lackey, the necessary sequence of events would—or should, anyway—make the Saturday Night Massacre look like a genteel tea party. Even if Trump were not removed from office in such a scenario—e.g., if there's literally *nothing* that would cause Senator McConnell and Speaker Ryan to abandon him—it's hard to imagine any administration continuing business as usual in such a crisis mode.


For all these reasons, it is *very* likely that Robert Mueller will see his investigation through to its conclusion.

[*Editor's note:* This essay was originally published on June 13, 2017 at 12:49AM]

Tags: Mueller investigation, obstruction of justice, Russia Investigation

ABOUT THE AUTHOR

Marty Lederman Professor at the Georgetown University Law Center Follow him on Twitter (@marty_lederman).

 SEND A LETTER TO THE EDITOR

