

If Trump Fires Mueller (Or Orders His Firing)

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There are growing indications that President Trump may be thinking about getting rid of Special Counsel Robert Mueller. Last weekend one of the President's private lawyers would not rule out the possibility when asked. Yesterday the President's allies started talking affirmatively about the possibility. Newt Gingrich, for example, said it was time to "rethink" the Mueller appointment, which looked increasingly bad for the President. Ann Coulter said that Trump "should fire Mueller." And then Trump's friend Chris Ruddy told Judy Woodruff on PBS NewsHour: "I think he's considering perhaps terminating the special counsel. I think he's weighing that option."

This seems like such a bad idea—for the nation, and for the President—that I have a hard time believing it is a live possibility. I hope it is no more than wishful thinking or encouragement on the part of the Trump allies. Perhaps it is a giant troll. As I write this there is no way to tell. Nonetheless, in the hope that this proves to be an irrelevant exercise, I sketch below what I think would happen if Trump did, in fact, decide he wanted Mueller gone. There are legal issues as well as non-legal ones, which I consider in turn. (This post was written quickly—I will adjust it if necessary as others weigh in.)



Legal Issues

Mueller was hired pursuant to a special set of DOJ regulations: 28 C.F.R. § 600.4-600.10. (Rosenstein explicitly stated that the regulations apply to Mueller's appointment.) These regulations were drafted at the end Bill Clinton's second term, after Congress let the Independent Counsel Act expire. As Neal Katyal detailed in a recent *Washington Post* oped, that statute was perceived as problematic because the independent counsel's independence also led him to be less accountable to the public and to regular checks and balances. As Katyal recounts, the new regulations were drafted by an internal Justice Department working group convened by Attorney General Janet Reno and formally promulgated by Reno in 1999.

By design, the regulations curb the special counsel's independence but in narrow respects offer the special counsel some protective insulation. The critical provision on both points is § 600.7. On the one hand, this provision makes clear that the special counsel is subject to all of "the rules, regulations, procedures, practices and policies of the Department of Justice" and that the Attorney General may not only compel the special counsel to justify "any investigative or prosecutorial step" but also may countermand the special counsel on a proposed course of action so long as he notifies Congress of the conflict. On the other hand, the regulations also provide a measure of protection by setting three specific terms for special counsel's removal: the special counsel can be removed only (1) by the Attorney General, (2) for "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies," and (3) in writing, which must include "the specific reason" for special counsel's termination.

This raises several questions of interpretation, which are interlinked.

The first issue is what supposed misconduct might constitute the basis for Mueller's removal. The standard for firing special counsel, remember, is "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies." It is hard to see what Mueller has done that would warrant termination under this standard. Trump might claim that Mueller has a conflict of interest because the firm he left represents the Trump family in some matters. But the Justice Department's own ethics experts ruled that there is no conflict and "that Mr. Mueller's participation in the matters assigned to him is appropriate." Perhaps Trump would claim that Mueller has a conflict because Comey and he are friends and "brothers in arms," but it is hard to see how this constitutes a conflict in the investigation of the Russia matter. Maybe Trump will come up with some other reason under the regulation.

Second, under the regulation, the decision to terminate lies not with Attorney General Jeff Sessions but with Deputy Attorney General Rod Rosenstein, who is the acting attorney general for purposes of the Russia investigation. So in the first instance, presumably, Trump could order Rosenstein to fire Mueller. Rosenstein would then have to decide whether he believed the reasons Trump gave were adequate under the regulation. If so, he could carry out the order. If not, and if he refused to do it, Trump could fire him—or he might simply resign in the face of Trump’s order (more on which below).

Third, if Rosenstein resigns, that raises a question of who becomes the acting attorney general. Succession in the Department is, to a point, outlined by statute: where the attorney general and deputy attorney general are unable, the associate attorney general “shall act” as attorney general. Otherwise the attorney general “may designate” the solicitor general and the assistant attorneys general, “in further order of succession,” to act as attorney general. That means it could go down the line until an assistant attorney general did not resign and instead carried out the President’s order. (Succession is complicated by the fact that, after Rosenstein, there are only two other confirmed officials in DOJ: Associate Attorney General Rachel Brand, and Acting Assistant Attorney General for the National Security Division Dana Boente, who was previously confirmed to be the U.S. Attorney for the Eastern District of Virginia. A tad more on this below.) If the officers after Brand also resign, then an executive order on DOJ succession recently promulgated by Trump would control. (This barely noticed executive order would potentially assume great significance if Trump fires Mueller.)

Fourth, there are a number of hard questions about whether Trump could circumvent the regulations—either ignore them or abrogate them—and fire Mueller himself. The argument at bottom is that all executive power is vested in the President; law enforcement is at the core of Executive power; there is no contrary statutory directive, as in *Morrison v. Olson*; and the Special Counsel rule is just a regulation promulgated by the Executive Branch, not a law, and is thus ultimately subject to change or disregard by Executive order. On the other hand, there is this important point made in *United States v. Nixon* concerning Special Prosecutor Jaworski and the regulation then in force, 38 Fed.Reg. 30739, which required “extraordinary improprieties” for his removal:

So long as this regulation is extant it has the force of law. In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), regulations of the Attorney General delegated certain of his discretionary powers to the Board of Immigration Appeals and required that Board to exercise its own discretion on appeals in deportation cases. The Court held that so long as the Attorney General’s regulations remained operative, he denied himself the authority to exercise the discretion delegated to the Board even though the original authority was his and he could reassert it by amending the regulations. *Service v. Dulles*, 354 U.S. 363, 388 (1957), and *Vitarelli v. Seaton*, 359 U.S. 535 (1959), reaffirmed the basic holding of *Accardi*.

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.* Moreover, the delegation of authority to the Special Prosecutor in this case is not an ordinary delegation by the Attorney General to a subordinate officer: with the authorization of the President, the Acting Attorney General provided in the regulation that the Special Prosecutor was not to be removed without the “consensus” of eight designated leaders of Congress (emphasis added).

In the Watergate context President Nixon never sought to alter or circumvent the relevant regulations, and thus they remained in force and binding. But what if Trump issued a directive that fires Mueller and abrogates or ignores the Special Counsel regulations, including the authority to appoint and terminate, and the limiting criteria for termination? There are good constitutional arguments in support of this possibility. There are also countervailing arguments grounded in the principle that only the agency head that appoints the officer, and not the President, can remove the officer. This principle is reflected in the regulation itself, and is consistent with Nixon’s approach to the Special Prosecutor in Watergate. How these arguments will play out is beyond my scope at the moment, and depends on part on the statute, if any, pursuant to which the Special Counsel regulations were promulgated. I will leave it to others to sort that out, but raise this final question: If Trump tries to blow through the regulation and fire Mueller himself, would DOJ or Mueller accept the termination or instead challenge and litigate the purported removal? That litigation would be ... interesting.

Non-legal Issues

A number of hard non-legal decisions must be made within this basic legal framework. (I assume in what follows that the President will not ignore or kill the regulations and fire Mueller himself, the possibility floated above. If that happens all bets are off about what happens next, but I would predict massive resignations within the DOJ and White House, among other places, if he does that.)

First, as noted above, what should Rod Rosenstein do if Trump orders him to fire Mueller?

It is a matter of Rosenstein's judgment--about whether he is convinced by Trump's reasons for the firing, about his relationship to the president and his view of the president's prerogatives in this situation, about how he characterizes the overall situation he finds himself in, about the actions he is or isn't willing to associate himself with, and about what his sense of integrity demands. At least two factors lead me to think Rosenstein will resign: (1) He has already seen his reputation soiled and his judgment questioned by the manner in which the President used his memorandum as a pretext for firing Comey; and (2) He appointed Mueller to great bipartisan acclaim, and he presumably did due diligence and convinced himself that Mueller was fit to serve. Unless Trump comes up with a clinching reason for firing Mueller that is now hard to fathom, it is hard to see how Rosenstein carries out the the order. He will resign.

Second, what happens as Trump moves down the line of succession? Newly confirmed Associate Attorney General Rachel Brand would be next, and then (I think) would come acting AAG for the National Security Division Dana Boente, who is not confirmed for that job but who has been Senate-confirmed as a U.S. Attorney. What a spot these two would be in! Would they carry out the President's order, or resign? It might seem obvious that they would resign because they would not want to carry out or associate themselves with what Rosenstein would have thought, by hypothesis, was a bad faith or at least unacceptable order by the President. I think this is what would happen. But at some point down the chain of command a countervailing principle, call it the Bork principle, arises: stability in the Justice Department and in law enforcement more generally.

The decision by Brand or Boente to execute the President's order or resign would be complicated by at least two unusual factors: (1) Unlike in Watergate, Attorney General Sessions remains in place above them, and could ensure, outside the Russia investigation from which he is recused, that the Department continued to function (assuming Sessions himself does not resign); (2) Amazingly, DOJ has no other Senate-confirmed officials, and there are complex questions about the line of succession after Brand and Boente for non-confirmed DOJ officials, and about the operation of the new Trump EO, and whether there is discretion on this matter and who can exercise it.

It is easy to imagine Brand resigning and perhaps Boente after her. It is also easy to imagine that one or the other carries out the President's order on the Bork principle but at the same time announces that she or he plans very quickly to appoint a new Special Counsel of undoubted integrity to continue Mueller's investigation. (I will ignore for now--these hypotheticals are getting depressing and complicated--what happens if Trump fires Brand or Boente for appointing a new Special Counsel.)

Third, what does Congress do? That is obviously the really important question. There is no doubt that firing Mueller would cause a backlash in Congress. The question is how much of one, and specifically, would it be enough to cause Republican leadership to intervene strongly with the President, and ultimately with impeachment? The answer depends on the reasons Trump gives for firing Mueller, the manner in which he does it, the precise reaction in DOJ, and what the nation's reaction is. If Congress does not check the President, that leaves only the midterm or presidential elections, or possibly a 25th Amendment solution, as ways to stand up to the President. That may seem a depressing conclusion. But I predict it would not come to that. If the crazy scenario that got me to this point in the hypothetical decision chain materializes, Congress would rise up quickly to stop the President, and the pressure on the cabinet would be enormous as well. If I am naive in thinking this, then we are indeed in trouble.

Topics: Executive Power

Jack Goldsmith is the Henry L. Shattuck Professor at Harvard Law School, co-founder of *Lawfare*, and a Senior Fellow at the Hoover Institution. Before coming to Harvard, Professor Goldsmith served as Assistant Attorney General, Office of Legal Counsel from 2003-2004, and Special Counsel to the Department of Defense from 2002-2003.

 @jacklgoldsmith