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Why Trump Can't (Easily) Remove Mueller—and What Happens If He Tries

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This memorandum was prepared for the Presidential Investigation Education Project, a joint initiative by ACS and CREW to promote informed public evaluation of the investigations by Special Counsel Robert Mueller and others into Russian interference in the 2016 election and related matters. This effort includes developing and disseminating legal analysis of key issues that emerge as the inquiries unfold and connecting members of the media and public with ACS and CREW experts and other legal scholars who are writing on these matters.

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I. Introduction

Robert S. Mueller III was appointed special counsel by Deputy Attorney General Rod Rosenstein on May 17, 2017.² Mueller's mandate includes the investigation of "any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump," "any matters that arose or may arise directly from the investigation," and "federal crimes committed in the course of, and with intent to interfere with, the Special Counsel's investigation."³

Since his appointment, the White House and its allies have engaged in a campaign to discredit Special Counsel Mueller.⁴ Early on, surrogates for the president suggested that he could fire Mueller,⁵ and with each development in the special counsel's investigation, there have been additional rounds of speculation that the president might take such action.⁶ That risk continues now that the special counsel's first indictments and guilty pleas are in place, and with reports that Michael Flynn may be negotiating cooperation with Mueller's investigation of those close to Trump--or even the president himself. Outside voices on the right have been vocal in calling for a firing. The most recent statement from the White House on the matter was that the president merely had "no intention or plan" to fire the special counsel.⁷

In this report, we provide a comprehensive analysis of the legality and effects of such a possible action. We conclude that President Trump cannot easily bring an end to the Russia investigation.

First, President Trump lacks unilateral authority to fire Mueller. While President Trump might compel others to do so on his behalf or instruct the attorney general to revoke DOJ's special counsel regulations, the risks of doing so are prohibitive. History warns that he would be risking his presidency, not to mention increasing his exposure to charges of obstruction of justice.

² Office of the Deputy Attorney General, Order No. 3915-2017, May 17, 2017, *available at* <https://www.justice.gov/opa/press-release/file/967231/download>.

³ *Id.*; 28 C.F.R. § 600.4.

⁴ *See, e.g.*, Richard Painter and Norm Eisen, [The White House may claim Mueller has conflicts of interest. Oh, the irony.](https://www.washingtonpost.com/opinions/the-white-house-may-claim-mueller-has-conflicts-of-interest-thats-ridiculous/2017/05/22/affa0c6c-3f28-11e7-8c25-44d09ff5a4a8_story.html?utm_term=.a8393af44d58), *Washington Post*, May 22, 2017, *available at* https://www.washingtonpost.com/opinions/the-white-house-may-claim-mueller-has-conflicts-of-interest-thats-ridiculous/2017/05/22/affa0c6c-3f28-11e7-8c25-44d09ff5a4a8_story.html?utm_term=.a8393af44d58.

⁵ Matthew Nussbaum, [Can Trump fire Mueller? Yup, and in more ways than one.](https://www.politico.com/story/2017/06/13/can-trump-fire-special-counsel-robert-mueller-239500), *Politico*, Jun. 13, 2017, *available at* <https://www.politico.com/story/2017/06/13/can-trump-fire-special-counsel-robert-mueller-239500>

⁶ *See, e.g.*, David A. Graham, [When Will President Trump Fire Robert Mueller?](https://www.theatlantic.com/politics/archive/2017/07/when-will-president-trump-fire-robert-mueller/534459/), *Atlantic*, Jul. 21, 2017, *available at* <https://www.theatlantic.com/politics/archive/2017/07/when-will-president-trump-fire-robert-mueller/534459/>; Mark Plotkin, [Have no doubt, President Trump will wind up firing Robert Mueller](http://thehill.com/opinion/white-house/351869-have-no-doubt-president-trump-will-wind-up-firing-robert-mueller), *The Hill*, Sept. 22, 2017, *available at* <http://thehill.com/opinion/white-house/351869-have-no-doubt-president-trump-will-wind-up-firing-robert-mueller>.

⁷ Cristiano Lima, [White House says Trump has 'no intention' to fire Mueller](https://www.politico.com/story/2017/10/30/mueller-investigation-trump-white-house-response-244325), *Politico*, Oct. 30, 2017, *available at* <https://www.politico.com/story/2017/10/30/mueller-investigation-trump-white-house-response-244325>.

Second, any firing would be subject to court challenge by Special Counsel Mueller, his staff, and possibly other parties.

Third, firing Special Counsel Mueller would not necessarily bring an end to the investigation that he is leading. In the absence of an order rescinding the appointment of the special counsel, the investigation and associated legal proceedings would continue.

Fourth, we explain the ways in which Congress might make it even harder for President Trump to end the Russia investigation by codifying the special counsel regulations and pre-committing to a course of action that would deter interference with the Russia investigation.

II. There Are Significant Legal Obstacles to Trump Firing Special Counsel Mueller

A. Under DOJ Regulations, Only the Attorney General Can Fire the Special Counsel

Under the existing regulatory framework, the president does not have the authority to fire the special counsel. After the Independent Counsel Reauthorization Act of 1994 expired in 1999, the Department of Justice (DOJ) promulgated regulations under an existing Congressional delegation of authority that provided guidelines for the creation, oversight, and termination of a special counsel investigation.⁸

The special counsel regulations provide that only the attorney general may remove the special counsel: “The Special Counsel may be disciplined or removed from office *only* by the personal action of the Attorney General.”⁹ Because Attorney General Sessions recused himself from “any existing or future investigations of any matters related in any way to the campaigns for President of the United States,” the power to appoint, oversee, and remove the special counsel passed to Deputy Attorney General Rod Rosenstein.¹⁰

On May 17, 2017, Deputy Attorney General Rosenstein appointed Robert Mueller pursuant to DOJ regulations to serve as special counsel based on the attorney general’s power to specially appoint attorneys commissioned as special assistants to the attorney general or special attorneys and provide them with the same civil and criminal prosecutorial authority as a United States attorney.¹¹ Perhaps in part to eliminate any ambiguity as to whether only the attorney

⁸ See 28 C.F.R. §§ 600.4 – 600.10.

⁹ *Id.* (Emphasis added). Even though the statute only refers to the attorney general, it seems a virtual certainty that the acting attorney general would have removal power under these circumstances. See *United States v. Libby*, 429 F. Supp. 2d 27, 28 (D.D.C. 2006) (“Moreover, it is axiomatic that, at any time, the Deputy Attorney General who delegated to the Special Counsel his authority can revoke that delegation.”); see also *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010) (“Under the traditional default rule, removal is incident to the power of appointment.”).

¹⁰ Dep’t of Justice, Attorney General Sessions Statement on Recusal, Mar. 2, 2017, available at <https://www.justice.gov/opa/pr/attorney-general-sessions-statement-recusal>.

¹¹ See 28 U.S.C. §§ 509, 515; Office of the Deputy Attorney General, Order No. 3915-2017, May 17, 2017, available at <https://www.justice.gov/opa/press-release/file/967231/download>.

general, or the acting attorney general, can remove the special counsel, Rosenstein's May 17, 2017 order specifies that that provision of the regulations—indeed, all those in Section 600.4 through 600.10 of Title 28 of the Code of Federal Regulations—are applicable to the special counsel.¹²

B. The Special Counsel May Only Be Fired for Good Cause and There Is None

The special counsel regulations specify that a special counsel may be removed “for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies” and that the special counsel must be notified “in writing of the specific reason for his or her removal.”¹³

There is no evidence whatsoever of any good cause for removing Special Counsel Mueller. The suggestions that the special counsel is “biased” or “conflicted” because of his professional or personal associations are specious.¹⁴ Executive branch ethics rules require recusal from a matter due to a personal relationship only when a matter “is likely to have a direct and predictable effect on the financial interest of a member of his household”; when the employee “knows that a person with whom he has a covered relationship is or represents a party to such matter”; or “where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter.”¹⁵ None of these circumstances apply to Mueller.

After his appointment, DOJ announced that ethics experts had reviewed the propriety of Mueller's participation in the matters assigned to him even though he worked at a law firm whose attorneys represent Paul Manafort, first daughter Ivanka Trump, and her husband, Jared Kushner and found that this representation did not create any ethics problem.¹⁶ Nor do the D.C. Rules of Professional Conduct preclude Mueller from working on issues involving that firm's clients (as long as he was not exposed to information that they disclosed to the firm in confidence).¹⁷

¹² Rod J. Rosenstein, Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters, Order No. 3915-2017, May 17, 2017, <https://www.justice.gov/opa/press-release/file/967231/download>.

¹³ See 28 C.F.R. § 600.7(d).

¹⁴ Richard Painter and Norm Eisen, The White House may claim Mueller has conflicts of interest. Oh, the irony., *Washington Post*, May 22, 2017, available at https://www.washingtonpost.com/opinions/the-white-house-may-claim-mueller-has-conflicts-of-interest-thats-ridiculous/2017/05/22/affa0c6c-3f28-11e7-8c25-44d09ff5a4a8_story.html?utm_term=.a8393af44d58.

¹⁵ 5 C.F.R. § 2635.502. See also DOJ Ethics Manual, § 8-1.

¹⁶ Max Greenwood, Justice ethics experts clear Mueller to head Russia probe, *Hill*, May 23, 2017, available at <http://thehill.com/policy/national-security/334739-justice-department-ethics-experts-clear-mueller-to-head-russia>.

¹⁷ Rep. Trey Gowdy suggested that the special counsel was responsible for early reports that grand jury indictments had been secured; however, there is no evidence suggesting that Special Counsel Mueller or anyone on his team. See Victoria Guida, Gowdy hits grand jury leaks in Russia probe, *Politico*, Oct. 29, 2017, available at <https://www.politico.com/story/2017/10/29/trey-gowdy-trump-russia-probe-244286>. The Federal Rules of Criminal Procedure preclude prosecutors from disclosing grand jury matters; however, witnesses are not prohibited from doing so. See Fed. R. Cr. P. 6(e).

Although it is possible that President Trump might assert that Mueller has violated Department policy, there is no basis for such a claim. The special counsel is required to “comply with the rules, regulations, procedures, practices and policies of the Department of Justice,”¹⁸ but the administrative record makes clear that the attorney general’s authority to remove for violating Department policies is quite narrow – only “willful violation” or serial “negligent or careless overlooking” of DOJ policies would qualify.¹⁹ Given Mueller’s reputation for integrity,²⁰ it seems unlikely that he would willfully or repeatedly violate DOJ policy, and there is no indication that any questions have been raised today regarding his compliance with DOJ rules, regulations, and policies to date in his tenure as special counsel.

Nor is there any indication that the special counsel has exceeded the scope of his mandate. During an interview with the New York Times in July, President Trump suggested that it would be “a violation” for the investigation to look into his and his family’s finances to the extent that there is no connection to Russia.²¹ That assertion is not supported by Rosenstein’s order appointing Mueller, which gives him authority to investigate “matters that arose or may arise directly from the investigation—including crimes uncovered while he is investigating coordination between Russia and the Trump campaign or obstruction of justice.”²² Furthermore, even if there were an argument that the special counsel had exceeded the scope of his investigation, the DOJ regulations contemplate that Rosenstein (as acting attorney general) would be the one to handle the matter, not Trump.

C. The President Does Not Have Inherent Authority to Fire the Special Counsel

Some commentators have suggested that the president has inherent authority to fire any prosecutor for any reason at all and therefore is not bound by DOJ special counsel regulations.²³ However, this argument relies on the controversial “unitary executive theory” that does not withstand scrutiny. The theory requires setting aside Supreme Court precedent in the name of sweeping and unchecked presidential authority – and doing so at a time when the executive branch has done little to earn a presumption of good faith from Congress or the courts.

¹⁸ 28 C.F.R. § 600.7(a).

¹⁹ Office of Special Counsel, 64 Fed. Reg. 37038, 37040 (July 9, 1999) (to be codified at 28 C.F.R. pt. 600)

²⁰ See Michael D. Shear, Robert Mueller, New Special Counsel, Is Known for Independence, *New York Times*, May 17, 2017, available at https://www.nytimes.com/2017/05/17/us/politics/robert-mueller-fbi-investigation.html?_r=0; Terri Rugar and Mike DeBonis, Congress is full of personal praise for Mueller, *Washington Post*, May 17, 2017, available at https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/trump-comes-and-russia-how-key-washington-players-are-reacting/congress-is-full-of-personal-praise-for-mueller/?utm_term=.632a3f83068c.

²¹ Excerpts From the Times’s Interview With Trump, *The New York Times*, July 19, 2017, available at https://www.nytimes.com/2017/07/19/us/politics/trump-interview-transcript.html?smid=tw-nytimes&smtyp=cur&_r=0.

²² Rod J. Rosenstein, *supra* n. 12.

²³ Alan M. Dershowitz, Opinion: Firing Mueller may be legal, but it would not be right, *The Hill*, Jun. 13, 2017, available at <http://thehill.com/blogs/pundits-blog/the-administration/337690-opinion-firing-mueller-may-be-legal-but-it-would-not-be>.

The unitary executive theory finds its basis in the Vesting Clause of Article II, which states that “[t]he executive power shall be vested in a President of the United States of America.”²⁴ According to proponents of this theory, Article II creates a “hierarchical, unified executive department under the direct control of the President,” who “alone possesses *all* of the executive power and . . . therefore can direct, control, and supervise inferior officers or agencies who seek to exercise discretionary executive power.”²⁵

Opponents of this approach argue that Article II vests exclusive control in the president only over specifically enumerated powers, and that the constitution empowers Congress to delegate “administrative” functions (such as the quasi-judicial and quasi-legislative functions of independent agencies) to officers not directly controlled by the president.²⁶ As Professor Stephen Calabresi and Kevin Rhodes explain, the “practical consequence of [the unitary executive] theory is dramatic: it renders unconstitutional independent agencies and counsels to the extent they exercise discretionary executive power.”²⁷

The Supreme Court has addressed this debate squarely, upholding congressional limits on the president’s discretion to remove inferior officers in *Morrison v. Olson*, 487 U.S. 654 (1988). This case concerned a challenge to the independent counsel statute, which imposed a good cause requirement on the attorney general’s ability to fire the independent counsel. In *Morrison*, the Court evaluated the president’s obligations under the Take Care Clause of the Constitution

²⁴ U.S. Const. art. II § 1 cl. 1.

²⁵ See, e.g., Steven G. Calabresi and Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992).

²⁶ See generally Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994). A threshold question in applying the Vesting Clause is whether the special counsel is exercising “executive power.” The historical record is at best ambiguous on that question. Rooting their argument in the history of federal prosecution, which was not centralized under the control of the attorney general until the late Nineteenth Century, a number of scholars have posited that criminal prosecution is not “executive power” vested in the president by Article II. See, e.g., William B. Gwynn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 Geo. Wash. L. Rev. 474, 490–94 (1989) (arguing that the Take Care Clause was not understood at the time of ratification to encompass control over criminal prosecution); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275, 286–87 (1989) (the 1789 Judiciary Act “provided the Attorney General with no mechanism for supervising the federal district attorneys”); Lessig and Sunstein, 94 Colum. L. Rev. at 16 (“The first Congress established no hierarchical department of legal affairs—as we discuss below, the Department of Justice was not even born until 1870. Nor did the framers establish a general or centralized body for federal prosecution. Most importantly, they established no absolute rule that prosecution must be conducted solely by those answerable to the President.”). Advocates of the unitary executive, however, argue that early decentralization of prosecution was a function of pragmatism—the Constitution predates the invention of the telegraph—and point to instances where early presidents intervened in prosecutions or asserted the authority to direct prosecution; and that federal prosecution is a component of the Vesting Clause’s “executive power.” See generally Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521 (2005). Courts tend to assume that criminal prosecution is executive power. See, e.g., *Community for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) (“The power to decide when to investigate, and when to prosecute, lies at the core of the Executive’s duty to see to the faithful execution of the laws.”); *In re Sealed Case*, 838 F.2d 476, 488 (D.C. Cir. 1988) (“The Executive has ‘exclusive authority and absolute discretion to decide whether to prosecute a case.’”) (quoting *United States v. Nixon*, 418 U.S. 683, 693(1974)) *rev’d on other grounds sub nom. Morrison v. Olson*, 487 U.S. 654 (1988).

²⁷ 105 HARV. L. REV. at 1165–66.

(“[The President] shall take care that the Laws be faithfully executed”), finding that the good cause requirement in the independent counsel statute did not “sufficiently deprive[] the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws,”²⁸ and that it is limited to assuring that the independent counsel is “competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act.”²⁹ In other words, in *Morrison*, the Court read the Vesting Clause and the Take Care Clause together to hold that the president must retain the ability to ensure that his inferior officers are *complying* with the law, but not necessarily the ability to direct their interpretation of the law or choice between one of several lawful options.

In another case, *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010), the Supreme Court explained that although “the Constitution has been understood to empower the President to keep [inferior executive] officers accountable—by removing them from office, if necessary”, limits can be placed on that power. For that reason, the Court explained, “[i]n *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), we held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause. Likewise, in *United States v. Perkins*, 116 U.S. 483 (1886), and *Morrison v. Olson*, 487 U.S. 654 (1988), the Court sustained similar restrictions on the power of principal executive officers—themselves responsible to the President—to remove their own inferiors.” Indeed, in *Free Enterprise Fund*, the Court also assumed that the president may exercise the requisite control over inferior officers he cannot personally remove by ordering the principal officer vested with the appointment and removal authority at issue (here, the acting attorney general) to remove the inferior officer who is neglecting his or her duties.³⁰

Here, the only restriction that Congress has imposed on the president’s ability to direct the special counsel is the statutory grant of appointment authority (and incidental removal authority) to the attorney general.³¹ And a special counsel is unquestionably an “inferior officer” whose appointment Congress is free to vest in department heads like the attorney general.³² For a court to find that the president has discretion to remove an inferior officer whose appointment

²⁸ 487 U.S. 654, 691–93 (1988).

²⁹ *Id.* at 692.

³⁰ See *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508–09 (2010).

³¹ See 28 U.S.C. § 510 (noting that the attorney general may delegate any function of his office to another officer of the Department of Justice); 28 U.S.C. § 515 (noting that attorneys specially appointed by the attorney general may conduct any kind of legal proceeding that United States attorneys are authorized to conduct); *Nader v. Bork*, 366 F. Supp. 104, 108 (D.D.C. 1973) (“The Attorney General derived his authority to hire Mr. Cox and to fix his term of service from various Acts of Congress.”); see also *Sampson v. Murray*, 415 U.S. 61, 70 n. 17 (1974) (“In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment.”) (citation omitted).

³² *Edmond v. United States*, 520 U.S. 651, 661 (1997) (“Most recently, in *Morrison v. Olson*, we held that the independent counsel . . . was an inferior officer.”); *United States v. Libby*, 498 F. Supp. 2d 1, 18–20 (D.D.C. 2007) (holding that special prosecutor to whom the acting attorney general delegated all of his authority was nevertheless under the supervision of the acting attorney general, as required by *Edmond*, because the acting attorney general retained firing authority).

Congress has expressly vested in the attorney general would constitute a break with well-settled precedent and an expansion of the powers of the presidency.

D. There Are Significant Procedural Obstacles to Effectuating a Firing by Rescinding the DOJ Special Counsel Regulations

President Trump could try to effectuate a firing of the special counsel by rescinding the DOJ special counsel regulations, but doing so would require him to navigate several procedural obstacles. First, based on his public statements and actions to date, it is likely that Attorney General Sessions would view himself as recused from any decision to repeal the regulations. Second, a repeal might be subject to procedural requirements imposed by the Administrative Procedure Act (APA).

In his recusal statement, Sessions agreed to recuse himself “from any existing or future investigations of any matters related in any way to the campaigns for President of the United States.”³³ Similarly, Sessions testified to the Senate Intelligence Committee in June 2017 that he recused himself “not because of any asserted wrongdoing on [his] part during the campaign, but because a DOJ regulation, 28 C.F.R. § 45.2, required it.”³⁴ Sessions further testified that 28 C.F.R. § 45.2 “states, in effect, that department employees should not participate in investigations of a campaign if they have served as a campaign advisor.”³⁵ And Sessions testified that he had consulted senior DOJ ethics officials from the day after he was confirmed, who advised him “that since [he] had involvement with the campaign, [he] should not be involved in any campaign investigation.”³⁶

If ordered to repeal the special counsel regulations, Sessions could argue (as he did in connection with the firing of FBI Director James Comey) that his recusal from one specific matter does not preclude him from managing the DOJ as a whole, and that rescinding the special counsel regulations is within his broader management responsibilities.³⁷ However, in this context, such an assertion would strain credulity: Robert Mueller is the only special counsel who is running an active investigation under the special counsel regulations; any attempt to change those regulations while his investigation is active would amount to a thinly-veiled attempt to

³³ Dep’t of Justice, Attorney General Sessions Statement on Recusal, Mar. 2, 2017, *available at* <https://www.justice.gov/opa/pr/attorney-general-sessions-statement-recusal>.

³⁴ Transcript: Jeff Sessions’ testimony on Trump and Russia, *Politico*, Jun. 13, 2017, *available at* <https://www.politico.com/story/2017/06/13/full-text-jeff-session-trump-russia-testimony-239503>.

³⁵ *Id.* 28 C.F.R. § 45.2 reads in full: “(a) Unless authorized under paragraph (b) of this section, no employee shall participate in a criminal investigation or prosecution if he has a personal or political relationship with: (1) Any person or organization substantially involved in the conduct that is the subject of the investigation or prosecution; or (2) Any person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.”

³⁶ *Politico*, *supra* at n. 34.

³⁷ In justifying his firing of Comey, Sessions testified: “The scope of my recusal, however, does not and cannot interfere with my ability to oversee the Department of Justice, including the FBI, which has an \$8 billion budget and 35,000 employees. . . It is absurd, frankly, to suggest that a recusal from a single specific investigation would render an Attorney General unable to manage the leadership of the various Department of Justice law enforcement components that conduct thousands of investigations.”

involve Sessions in activity from which he has been recused—or, in Sessions’s own words from his June 2017 Senate testimony, “in any campaign investigation.” And if others within the DOJ take the view that Sessions’s attempt to repeal the special counsel regulations violates the restrictions in place under Section 45.2,³⁸ they could theoretically refer Sessions for an ethics investigation by the Department of Justice’s Office of Professional Responsibility, which could investigate and report findings of any misconduct to the relevant state bar. It is significant that Sessions is likely recused from participating in repealing the special counsel regulations because Deputy Attorney General Rosenstein – who invoked the regulations and appointed Mueller – would probably refuse to repeal the regulations.³⁹

In addition, as a practical matter, repealing the special counsel regulations may be subject to the APA’s drawn-out notice-and-comment requirements, which could make repeal too lengthy a process to suit the president’s purposes.⁴⁰ See 5 U.S.C. § 551(5) (rulemaking includes “repealing a rule”); 5 U.S.C. § 553 (outlining procedure for rulemaking). The APA “mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.” *Perez*, 135 S. Ct. at 1206. Among other things, these procedures can include notice-and-comment rulemaking procedures, which can take months or years to complete—timing which would presumably undermine President Trump’s attempt to swiftly end the investigation.

President Trump might seek to argue that a repeal of the special counsel regulations would not be subject to notice-and-comment rulemaking. When she issued the regulations in 1999, Attorney General Reno determined that they were exempt from notice-and-comment rulemaking on three grounds. See 64 C.F.R. 37038-01, 1999 WL 462200 (July 9, 1999). Specifically (1) the rules related to “matters of agency management or personnel,” (2) the rules related to “agency organization, procedure, or practice” and (3) there would be “‘good cause’ for issuing this rule without prior notice and comment,” because the impending expiration of the Independent Counsel Act of 1994 made it “imperative to have these rules governing the appointment and service of a Special Counsel in place as soon as possible.” *Id.*

But the fact that Attorney General Reno issued the regulations without notice-and-comment does not necessarily mean that repeal would not require notice-and-comment. Rather, whether notice-and-comment requirements apply to the special counsel regulations depends on whether the regulations are determined to be “legislative” rules (notice-and-comment required) or “non-legislative” rules (notice-and-comment not required). While the regulations were issued

³⁸ The substance of this regulation is also incorporated into the Department of Justice’s own “Government Ethics Outline.” See Dep’t of Justice, “Government Ethics Outline,” (last updated July 5, 2017), *available at* <https://www.justice.gov/jmd/government-ethics-outline> (at Section II(C)).

³⁹ If President Trump fired Attorney General Sessions and attempted to replace him with someone other than Rosenstein, there is an argument that that individual should also be recused from the investigation, especially if circumstances suggest that the firing of the attorney general is part of a ploy to impede the investigation. In addition, if the firing of Attorney General Sessions is done with a corrupt intent to impede the Russia investigation, then it would constitute further evidence of obstruction of justice as we explain in subsection II.E.

⁴⁰ Steven Vladeck, *If the Rumors are True: President Trump and the Firing of Bob Mueller*, American Constitution Society, *available at* <https://www.acslaw.org/acsblog/if-the-rumors-are-true-president-trump-and-the-firing-of-bob-mueller> (discussing the procedures necessary under the APA for the President to repeal 28 C.F.R. § 600).

without notice-and-comment in the first instance, they do contain some characteristics of legislative rules (such as having the force and effect of law), and courts have found certain rules to be “legislative” based on the way an agency has invoked a rule in practice, even when the rules were not issued under notice-and-comment procedures.⁴¹

E. The Risks to Ending the Special Counsel’s Russia Investigation Are Prohibitive

Although, as outlined above, President Trump has potentially “lawful” means of terminating Special Counsel Mueller, such actions would be freighted with uncertainty, and could also bring significant legal and political consequences. We believe the costs of exercising such an option would be prohibitive.

First, as two of us have explained in a lengthy report on the matter, there is already substantial evidence that President Trump obstructed justice through a course of conduct that includes the firing of FBI Director James Comey.⁴² As detailed in that report, removing Special Counsel Mueller with the intent to impede the Russia investigation would amount to a doubling-down on the obstructive conduct in which Trump has already engaged. The case that a firing of Mueller would constitute obstruction of justice would be especially strong now that a grand jury has returned indictments against Paul Manafort, the president’s former campaign chairman, and Manafort’s former deputy, Rick Gates. The obstruction case against the president requires, among other things, showing that he has acted with corrupt intent and that his obstructive acts have some nexus to a qualifying proceeding. President Trump’s tweets⁴³ about the indictment of Manafort show that he has knowledge of the criminal case, and there is a strong case to be made that interference with the office of the special counsel would amount to an interference with that ongoing proceeding.

Second, President Trump’s termination of the special counsel could trigger a premature end to his presidency. The infamous October 1973 “Saturday Night Massacre” of course comes to mind. In that episode, President Nixon dismissed his Attorney General and two others in the line of succession before finding someone who would fire Special Prosecutor Archibald Cox.⁴⁴ After his dismissal, Cox stated that “Whether ours shall continue to be a government of laws and

⁴¹ *E.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000) (“We have also used ‘legislative rule’ to refer to rules the agency should have, but did not, promulgate through notice and comment rulemaking.”); *see also* Vladeck, *supra* at n. 40 (“To be fair, the Special Counsel regulation has some of the hallmarks of legislative rules (which are harder to repeal). But even if the Executive Branch claims that the special counsel regulation is a non-legislative rule (and, indeed, even if it is ultimately correct on that score), it is not hard to imagine that there will be litigation over that issue—litigation that could take time before definitively resolving the matter. All the while, presumably, the investigation could continue apace.”).

⁴² Barry H. Berke, Noah Bookbinder, and Norman L. Eisen, *Presidential Obstruction of Justice: the Case of Donald J. Trump*, *Brookings*, Oct. 10, 2017, available at <https://www.brookings.edu/wp-content/uploads/2017/10/presidential-obstruction-of-justice-the-case-of-donald-j-trump-final.pdf>.

⁴³ <https://twitter.com/realDonaldTrump/status/925005659569041409>;
<https://twitter.com/realDonaldTrump/status/925006418989715456>.

⁴⁴ Amy B. Wang, *The Saturday Night Massacre: Your commander in chief has given you an order*, *Washington Post*, May 11, 2017, available at https://www.washingtonpost.com/news/retropolis/wp/2017/05/11/the-saturday-night-massacre-your-commander-in-chief-has-given-you-an-order/?utm_term=.00a8b0998c2c.

not of men, is now for Congress and ultimately the American people.”⁴⁵ In the weeks that followed, the public and congressional pressure on Nixon and the DOJ was so great that a new special prosecutor, Leon Jaworski, was appointed to take over the investigation.⁴⁶ During the ten months that followed, a grand jury under Jaworski’s stewardship returned an indictment against President Nixon’s co-conspirators, the same grand jury referred the case against Nixon to the House Judiciary Committee, and Nixon resigned after the Committee reported articles of impeachment against him to the full House. We expect (and would certainly call for) similar consequences if President Trump decides to emulate Nixon.

III. Mueller’s Firing Could Be Challenged by the Special Counsel, His Staff, and Possibly Other Interested Parties

Special Counsel Mueller, his staff, and possibly other interested third parties may well have standing to challenge his firing in court. Because such a case would present unusual questions for a court to unravel, it is difficult definitively to predict whether a court would rule in favor of any of these plaintiffs. It is clear, however, that the possibility of such a suit presents another material risk of firing the special counsel.

In this section, we begin by providing a brief overview of standing requirements, which must be satisfied for a party to successfully bring suit to redress an alleged injury. We then apply those standards to Mueller, his staff, and other interested third parties. Although it is not clear whether Special Counsel Mueller would bring such a case, the possibility of such an action is an important check on the president’s ability to fire Mueller.

A. Overview of Standing Requirements

The three constitutional requirements for a plaintiff to have standing to sue are: (1) injury in fact, (2) a causal connection between that injury and the defendant’s conduct, and (3) the ability of the injury to be redressed by a favorable judicial decision. These requirements are more easily shown if “the plaintiff is himself an object of the action (or foregone) action at issue,” and more difficult if the injury asserted by the plaintiff “arises from the government’s allegedly unlawful regulation (or lack of regulation) of someone else.”⁴⁷

There are also certain “prudential” limitations on standing. These limitations include the requirements that the plaintiff or his alleged injury should be within the “zone of interests” protected by the statutory or constitutional provision he invokes; that a party should not generally

⁴⁵ Carroll Kilpatrick, Nixon Forces Firing of Coz; Richardson, Ruckelhaus Quit, *Washington Post*, Oct. 21, 1973, available at <http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm>.

⁴⁶ Callum Borchers, Special prosecutors are a big deal. Their results sometimes aren’t, *Washington Post*, May 17, 2017, available at https://www.washingtonpost.com/news/the-fix/wp/2017/05/10/want-a-special-prosecutor-to-replace-james-comey-history-might-change-your-mind/?utm_term=.a7346944a0c8.

⁴⁷ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992).

advance the rights of others (although this is subject to exceptions); and that an injury shared by the public at large (a “generalized grievance”) is not by itself sufficient to confer standing.⁴⁸

Third-party standing is an exception to the prudential rule that a plaintiff cannot bring suit to assert the rights of others. It is not, however, an exception to the Article III requirement that every party to a lawsuit have standing in his or her own right. Third-party standing comes into play in an analysis of *whose rights* are being asserted by a party and whether a party has standing to make specific arguments. Parties seeking third-party standing, in addition to showing an injury in fact, must also demonstrate “a close relation to the third party and there must exist some hindrance to the third party’s ability to protect his or her own interests.”⁴⁹ “In general, the Court has ‘permitted third-party standing only where more ‘daunting’ barriers deterred the rightholder’” or where “insurmountable procedural obstacles preclude a rightholder’s own suit,” such as if the rightholder’s claim would become moot.⁵⁰

B. Special Counsel Mueller Is Likely to Have Standing to Challenge His Own Firing.

The special counsel almost certainly has standing to challenge the legality of a decision to fire him—especially if he can assert a constitutional violation.⁵¹ First, loss of employment is an injury-in-fact.⁵² Second, the causation requirement would be satisfied so long as the special counsel alleged that some wrongful or unlawful decision made by a defendant resulted in his termination. The special counsel was not appointed by the president and is not a member of the president’s executive staff. Unlike the attorney general and deputy attorney general, the special counsel is removable only by the attorney general⁵³ and for good cause.⁵⁴

The most significant hurdle that the special counsel would likely face in satisfying the standing requirements is establishing redressability because no private right of action exists under the regulation. The DOJ special counsel regulations provide in pertinent part: “The 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.”⁵⁵ However, at least one court has held that similar disclaimer language in other regulations does not shield government actors from related claims

⁴⁸ 13A Fed. Prac. & Proc. Juris. § 3531 (3d ed.).

⁴⁹ *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (internal citations omitted).

⁵⁰ *Greene v. Gerber Prod. Co.*, No. 16-CV-1153 (MKB), 2017 WL 3327583, at *9 (E.D.N.Y. Aug. 2, 2017) (collecting cases).

⁵¹ See, e.g., *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) (suit brought by estate of deceased former FTC commissioner seeking recovery of monies lost from his removal from office).

⁵² See, e.g., *True v. Nebraska*, 612 F.3d 676, 679 (8th Cir. 2010) (“Here, True lost his job, an injury-in-fact.”).

⁵³ See Section II.A, *supra*.

⁵⁴ 28 C.F.R. § 600.7; see also *Morrison v. Olson*, 487 U.S. 654, 685 (1988).

⁵⁵ 28 C.F.R. § 600.10.

brought under *different* statutes.⁵⁶ Thus, to the extent that Special Counsel Mueller claims a Constitutional violation (for example), as opposed to a violation of the special counsel regulations, it is more likely that a court would find that the special counsel has standing to pursue a viable cause of action.

The strongest such claim would be that Mueller's termination without notice and hearing accompanied by an attack on his reputation would constitute a violation of the Fifth Amendment by depriving him of a liberty interest and his preferred choice of occupation. The D.C. Circuit recognizes two avenues to such a claim: a "reputation plus" claim, which requires the "conjunction of official defamation and an adverse employment action" or a "stigma plus" theory based on a "continuing stigma or disability that arises from official action."⁵⁷ If Mueller's firing was accompanied by false assertions that he had conflicts of interest or violated DOJ policy, there could be a basis for such a claim.⁵⁸

C. The Special Counsel's Staff May Have Standing to Challenge Mueller's Firing

Members of the special counsel's staff may have third-party standing to bring an action for declaratory and/or injunctive relief on their own behalf and on behalf of the special counsel. Staff members could persuasively claim a close relation to the special counsel and a violation of their own rights stemming from a violation of Special Counsel Mueller's rights—especially if a termination of the special counsel is accompanied by direct interference with the investigation. The principal challenge for such a suit would be demonstrating that the special counsel is unable to bring suit himself.

In other settings, employees have brought claims for injunctive relief on behalf of their employer against the government. The Supreme Court in *Truax v. Reich*, 239 U.S. 33, 38 (1915), allowed an immigrant employee to bring a claim for injunctive relief on behalf of his employer. Arizona had passed a statute requiring eighty percent of all employees at a company to be "qualified electors or native-born citizens of the United States," on penalty of criminal

⁵⁶ See, e.g., *Rivas v. Martin*, 781 F. Supp. 2d 775, 779 (N.D. Ind. 2011) (holding that an immigrant plaintiff could bring a claim for a Section 1983 violation premised on a violation of 8 C.F.R. § 287.7, notwithstanding that 8 C.F.R. § 287 contains almost identical rights-limiting language to 28 C.F.R. § 600.10).

⁵⁷ *Jefferson v. Harris*, 170 F. Supp. 3d 194, 205 (D.D.C. 2016) (citing *O'Donnell v. Barry*, 148 F.3d 1126, 1140-41 (D.C. Cir. 1998). See also *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."); *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 308 (4th Cir. 2006) ("With respect to his due process claim, Ridpath has identified the constitutional right at issue as the right to procedural due process when governmental action threatens a person's liberty interest in his reputation and choice of occupation."); *Doe v. U.S. Dep't of Justice*, 753 F.2d 1092, 1104-05 (D.C. Cir. 1985) ("Taking the plaintiff's factual allegations as true, we now find that the stigmatizing nature of the Department's charges, her discharge, and the subsequent foreclosure of future employment opportunities, including government job opportunities, combined to deprive Doe of a constitutionally protected liberty interest in reputation without due process.").

⁵⁸ To the extent that a termination is based on the prior political contributions of the special counsel or members of his team, the special counsel might also have cause to assert a violation of the First Amendment. See, e.g., *Branti v. Finkel*, 445 U.S. 507, 520 (1980) (upholding the entry of an injunction against the termination of two public defenders solely because they were Republicans).

prosecution of the employer.⁵⁹ The Court held that “[t]he employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will.”⁶⁰ The Court went on to reject defendants’ argument that “the servant cannot complain for the master, and that it is the master who is subject to prosecution, and not the complainant,” because “[i]t sufficiently appears that the discharge of the complainant will be solely for the purpose of meeting the requirements of the act and avoiding threatened prosecution under its provisions. It is, therefore, idle to call the injury indirect or remote. It is also entirely clear that unless the enforcement of the act is restrained the complainant will have no adequate remedy”⁶¹

Although offering dissimilar facts, *Truax* provides some support for the general principle of third-party standing of a subordinate on behalf of an employer. The main obstacle to such an action would be the difficulty of demonstrating that the special counsel faces “daunting barriers” or “insurmountable procedural obstacles” to bring a case on his own behalf.

D. Certain Other Individuals and Organizations May Have Standing to Challenge Special Counsel Mueller’s Removal

Other individuals and organizations might also have standing to challenge termination of the special counsel. In *Nader v. Bork*, the District Court ruled that individual members of Congress had standing to seek a declaratory judgment that Special Prosecutor Archibald Cox’s firing was illegal.⁶² The court ruled that the congressmen’s interest in the legality of the firing was sufficient to support standing because, as congressmen, they had a duty to consider matters directly affected by whether the firing was legal (Nixon’s impeachment and pending legislation governing the Watergate investigation).⁶³ Cox himself, however, was not a party to the lawsuit. The court relied on this fact in holding that the congressmen did not have standing to seek injunctive relief, the result of which would have been to reinstate Cox.⁶⁴

Since *Nader* was decided in 1973, no higher court has directly addressed the aspects of that decision that are relevant here. However, in the interim, some courts have imposed limits regarding the standing of members of Congress. In *Harrington v. Bush*, 553 F.2d 190 (1977), the D.C. Circuit rejected arguments advanced by a congressman who challenged alleged impropriety by the CIA. Specifically, the congressman argued that a judicial decision would aid his ability to consider impeachment, future appropriations, and other legislative supervision over the CIA. The court rejected this theory on the ground that there are no special standards for congressional standing and to hold otherwise “would lead inevitably into the intrusion of the courts into the

⁵⁹ *Truax*, 239 U.S. at 35.

⁶⁰ *Id.* at 38.

⁶¹ *Id.* at 38–39.

⁶² 366 F. Supp. 104, 106 (D.D.C. 1973).

⁶³ *Id.*

⁶⁴ *Id.* at 105.

proper affairs of the co-equal branches of government.”⁶⁵ *Id.* at 214. The D.C. Circuit did not reference *Nader* in its decision.

The Supreme Court further qualified the standing of members of Congress *qua* members of Congress to litigate the constitutionality of government actions in *Raines v. Byrd*, 521 U.S. 811 (1997). In that case, members of Congress sued to challenge the constitutionality of the Line Item Veto Act, alleging that the Act’s dilution of their Article I voting power was an injury sufficient to support Article III standing. The Supreme Court disagreed, and held that such a “wholly abstract and widely dispersed” injury was insufficient.⁶⁶ In *Chenoweth v. Clinton*, 181 F.3d 112 (1999), the D.C. Circuit extended *Raines* to hold that members of Congress lacked standing to challenge the implementation of an executive order on the ground that it injured and diluted their role in the legislative process. The Supreme Court and D.C. Circuit did not reference *Nader* in their respective decisions.

These more recent decisions align with the Supreme Court’s Article III jurisprudence that generalized grievances are not sufficient injuries to confer standing.⁶⁷ These decisions are also reinforced by the political question doctrine.⁶⁸

Nonetheless, based on *Nader*, other persons and organizations affected by the firing of Special Counsel Mueller may well have standing to seek a declaratory judgment that the firing was illegal. Deputy Attorney General Rosenstein may have the strongest basis to assert standing to bring such a claim. It is his responsibility as acting attorney general for this matter to exercise oversight over the special counsel’s investigation and to appoint and remove the special counsel. Deputy Attorney General Rosenstein has a substantially more direct and concrete interest in the firing of the special counsel than the interest of the congressmen in the firing of Cox recognized in *Nader*.

Members of Congress could sue as well, although after *Harrington*, *Raines*, and *Chenoweth*, it is not clear whether a court would find members of Congress to have standing to bring suit. It should be noted, however, that members of Congress would likely have a stronger basis to assert standing here than in those cases. Among other reasons, standing could be found based on the existence of ongoing Congressional inquiries into issues likely to be affected by the special counsel’s investigation. Mueller has reportedly asked the five different Senate and House committees investigating Russian election meddling to curtail public hearings in order to expedite his own investigation.⁶⁹ If Mueller were fired after obtaining superior access to

⁶⁵ *Harrington v. Bush*, 553 F.2d 190, 214 (1977).

⁶⁶ *Raines v. Byrd*, 521 U.S. 811, 829 (1997).

⁶⁷ *Allen v. Wright*, 468 U.S. 737, 751 (1984); *see also Lujan*, 504 U.S. at 573–74 (holding that suits “claiming only harm to [the plaintiff’s] and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large” are not justiciable controversies and such plaintiffs lack standing).

⁶⁸ *See Fed. Prac. & Proc.* § 3531.10 (viewing the *Raines* decision as an instance in which the court refused to “plunge into bitter battles between Congress and the President”).

⁶⁹ Emmarie Huetteman, Rebecca R. Ruiz, and Matthew Rosenberg, *Senate Inquiries Narrow as Rosenstein Suggests Plan to Fire Comey Predated Memo*, *New York Times*, May 18, 2017, https://www.nytimes.com/2017/05/18/us/politics/rosenstein-memo-trump-comey.html?_r=0.

evidence and witnesses, the congressional investigative committees could credibly argue their investigations were “harmed” by his firing to an extent sufficient to confer standing.

Others may assert standing as well. At least one District Court has found that nonprofit organizations promoting government and electoral integrity have organizational standing on behalf of voters alleging injury from an erosion of confidence in the electoral process.⁷⁰ A nonprofit might bring a claim on behalf of voters that interference in the Russia investigation would only further erode confidence in the electoral process, given that the investigation is about Russia’s attempt to influence the election and the involvement of the Trump campaign. Such a claim might be more attenuated than a direct attack on local fraudulent voter registration lists, but a court may still agree that the erosion of confidence is a concrete injury that is plausibly fairly traceable to interference in the Russia investigation. On the other hand, a court might view such a challenge as too remote or as a political question.

IV. The Special Counsel’s Office, Staff, Records, Pending Investigations, and Impaneled Grand Juries Would Likely Survive His Firing

Based on the DOJ regulations governing the appointment and conduct of the special counsel and (albeit limited) historical analogues, we believe that the Office and its staff would likely survive the firing of Special Counsel Mueller and that investigative materials created or collected in the course of the Office’s work would be preserved under the Federal Records Act.⁷¹ Moreover, actions taken (*e.g.*, subpoenas issued) by a grand jury convened by Special Counsel Mueller would survive his termination, and records of such proceedings could be transmitted to any government personnel for the purpose of enforcing federal criminal law.

The DOJ special counsel regulations provide that on request, the DOJ “shall gather and provide the special counsel with the names and resumes of appropriate personnel available for detail” but that the special counsel “may also request the detail of specific employees.”⁷² Notably, the discussion accompanying the final rule’s promulgation “anticipated that most personnel will be DOJ employees provided by detail to the Special Counsel.”⁷³ The DOJ regulations do not specify what happens to a special counsel’s office, staff, pending investigations, or investigative materials in the event of his termination.

Nonetheless, historical analogues and related case law suggest a continuity of personnel in the special counsel’s office in the event that the special counsel is fired. A special prosecutor appointed to investigate misconduct involving the federal executive branch has been terminated only three times in U.S. history to date. In two of the three instances, the fired prosecutor’s

⁷⁰ See, *e.g.*, *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919, 924 (S.D. Ind. 2012) (non-profit organization satisfied standing requirement “by alleging that its members . . . are injured by Indiana’s failure to comply with [voter] list maintenance requirements because that failure undermin[es] their confidence in the legitimacy of the elections held in the State of Indiana and thereby burden[s] their right to vote.”) (internal quotation marks and citation omitted).

⁷¹ 44 U.S.C § 3101 *et seq.*

⁷² 28 C.F.R. § 600.5.

⁷³ 64 FR 373038-01, 1999 WL 462200(F.R.), at *37039 (July 9, 1999).

investigations were simply picked up by a newly appointed prosecutor.⁷⁴ Only in the wake of Attorney General J. Howard McGrath's dismissal of a special prosecutor tasked with investigating an alleged conspiracy between the Truman administration's Justice Department and Bureau of Internal Revenue did the special prosecutor's termination mark the end of the underlying investigation—and that was at the tail end of an administration under scrutiny.⁷⁵

Although the termination of a special counsel has never been litigated, a pair of federal court decisions address the impact of independent prosecutors' departures on their office's investigations. In the wake of the Watergate scandal, the U.S. District Court for the District of Minnesota denied motions to dismiss criminal charges against a corporation accused of making illegal contributions to the Humphrey presidential campaign, notwithstanding the fact that the Watergate special prosecutor who had initiated the proceedings had been fired in the interim.⁷⁶ The court reasoned that any ruling that Special Prosecutor Cox's termination "abated actions which he initiated would create the unseemly situation where certain actions initiated before the Office [of the Special Prosecutor] was created could be shuttled back to the Criminal Division, whereas those actions begun by Mr. Cox . . . would be a nullity. Such a result finds support in neither law nor logic."⁷⁷

Likewise, as the investigation into Whitewater wound down, the U.S. Court of Appeals for the D.C. Circuit emphasized the fundamental distinction between the termination of a specific investigation launched by an independent counsel and the termination of his office. Thus, the court granted Robert W. Ray's motion for termination of the Whitewater investigation but refused to terminate his office, which was required to perform "noninvestigative duties which neither the Court nor the Department of Justice is equipped to perform were we to terminate his office."⁷⁸

As in these two cases, investigative actions already initiated by the special counsel would be unlikely to "abate" simply by virtue of the special counsel's termination. Moreover, his departure would be unlikely to cause the functions of his office to cease.⁷⁹

Upon the closing of the special counsel's office, it is not entirely clear what would happen to the investigative materials in the office's custody (the special counsel Regulations do not provide for what is to happen to such records upon termination of that office). Section

⁷⁴ This was the case after President Grant fired special prosecutor John B. Henderson, whose replacement used the fruits of Henderson's work to secure convictions of 110 individuals in connection with a conspiracy by Midwestern whiskey distillers to evade federal taxes. Likewise, Watergate special prosecutor Leon Jaworski succeeded in pursuing his fired predecessor Archibald Cox's bid to enforce a subpoena of Oval Office recordings implicating President Nixon in the Watergate scandal. *See* Callum Borchers, "Special Prosecutors Are a Big Deal. Their Results Sometimes Aren't," *Washington Post*, May 17, 2017,

⁷⁵ *Id.* *But see* Terry Eastland, *ETHICS, POLITICS, AND THE INDEPENDENT COUNSEL: EXECUTIVE POWER, EXECUTIVE VICE, 1789-1989* 16 & n.11 (Nat'l Legal Ctr. for the Pub. Interest 1989) (noting that Truman in turn dismissed McGrath within hours of his firing of the special prosecutor).

⁷⁶ *United States v. Andreas*, 374 F. Supp. 402, 409-10, 413 (D. Minn. 1974).

⁷⁷ *Id.* at 409-10.

⁷⁸ *In re Madison Guar. Savings & Loan Ass'n*, 260 F.3d 629, 630 (D.C. Cir. 2001).

⁷⁹ *Id.*

600.8(c) of those regulations does however provide that, “[a]t the conclusion of the Special Counsel’s work, he or she shall provide the Attorney General with a confidential report explaining the prosecution or declination decisions reached by the Special Counsel.” That requirement would suggest that, at the very least, a replacement special counsel would need to be appointed to produce the required report. The destruction of records maintained by the special counsel would be unlawful under the Federal Records Act, 44 U.S.C. § 3101 *et seq.*

Finally, as to the impact of the firing of the special counsel on any pending grand jury investigations, Federal Rule of Criminal Procedure 6(g) makes clear that a federal grand jury may be discharged only by a court. Thus, Special Counsel Mueller’s termination would have no immediate effect on a grand jury reviewing evidence in connection with a case brought by his office. Such a panel would remain empowered to assess and act on evidence presented by the special counsel’s Office even after the removal of Special Counsel Mueller, likely in coordination with another prosecutor as explained below.

As a formal matter, Rule 6(g) confines all grand juries’ discharge to the court’s discretion, although it is possible that the grand jury was empaneled to serve the special mandate of the special counsel. If the special counsel’s investigation were discontinued, it is also possible that the special counsel’s subordinates could transfer the grand jury to another “authorized attorney for the government,” most likely a U.S. attorney’s office, which could continue the grand jury investigation.⁸⁰

It bears noting that nothing in the DOJ regulations governing the appointment and conduct of a special counsel grants the special counsel exclusivity over the matters implicated in his investigation. To the extent that other prosecutors or regulators have also commenced investigations into the same alleged wrongdoing investigated by Special Counsel Mueller, we are aware of no authority under which such investigations may be prevented from continuing in the event that Special Counsel Mueller’s probe is ordered closed (nor are those investigations prevented from proceeding today). Likewise, there is no basis to bar other prosecutors or regulators from starting to investigate executive branch misconduct after the discontinuation of Special Counsel Mueller’s inquiry.

For these reasons, we believe that Special Counsel Mueller’s termination would not result in the termination of investigations commenced by his office or the erasure of work product created, or materials collected, by his office.

⁸⁰ Federal Rule of Criminal Procedure 6(d) authorizes attorneys for the government to appear before the grand jury. For purposes of Rule 6(d), an “attorney for the government” is defined in Fed. R. Crim. P. 1(b) as, among other things, “a United States Attorney, an authorized assistant of a United States Attorney.” If a U.S. attorney’s office from outside the district in which the grand jury is empaneled thought it important to continue the investigation in front of that particular grand jury (for instance, if that grand jury had already heard a substantial amount of live testimony), it is likely that the U.S. attorney’s office would be able to do so. U.S. Attorneys’ Manual § 9-11.241 provides that “[w]hen a United States Attorney or Assistant United States Attorney needs to appear before a grand jury in a district other than the district in which he or she has been appointed, the United States Attorney for either the district of appointment or the district of the grand jury should complete an appointment letter, appointing the attorney as a Special Assistant United States Attorney (SAUSA).”

V. How Congress Can Make It Even Harder for President Trump to End the Russia Investigation

Our analysis to this point has assumed that there will be no change to the status quo; however, Congress could provide further protection to the Russia investigation by codifying the DOJ special counsel regulations and committing to take corrective measures if the president fires Special Counsel Mueller.

Two bipartisan groups of senators have introduced legislation that would make it more difficult for President Trump to terminate Special Counsel Mueller.⁸¹ Senators Lindsey Graham, Cory Booker, Sheldon Whitehouse, and Richard Blumenthal's Special Counsel Independence Protection Act would require the attorney general to file an action in the United States District Court for the District of Columbia to remove the special counsel.⁸² Senators Thom Tillis and Chris Coons's Special Counsel Integrity Act would allow the special counsel to challenge his or her removal in court after the fact.⁸³ In both cases, the termination would only be valid if the special counsel was removed for "misconduct, dereliction of duty, incapacity, conflict of interest, or other good cause, including violation of policies of the Department of Justice."⁸⁴ Passage of either bill would increase the obstacles to presidential interference with the Russia investigation.

In addition, members of Congress could commit to certain corrective measures in the event that President Trump fires Mueller.⁸⁵ First, Congress should make clear that in the event of a firing, the Russian investigation should be preserved and a new special counsel appointed (or Mueller reappointed). Second, the House should commit to bipartisan hearings in the Judiciary Committee on abuse of power and obstruction of justice by President Trump. Those hearings should conform to benchmarks recently proposed by a bipartisan group of experts for ongoing Congressional investigation into Russian interference in U.S. elections and related matters.⁸⁶ Third, the Senate should commit to the creation of a select committee that would investigate all matters involved in the Russia scandals and Trump's obstruction of the investigation. Committing to taking those three steps—the model set by the 93rd Congress in the wake of President Nixon's Saturday Night Massacre—would demonstrate to President Trump the futility of further impeding the Russia investigation.

⁸¹ Karoun Demirjian, Senators Unveil Two Proposals to Protect Mueller's Russia Probe, *Washington Post*, Aug. 3, 2017, available at https://www.washingtonpost.com/powerpost/senators-unveil-two-proposals-to-protect-muellers-russia-probe/2017/08/03/b980d082-787a-11e7-8f39-eeb7d3a2d304_story.html.

⁸² S.1735, 115th Cong. (2017), available at <https://www.congress.gov/115/bills/s1735/BILLS-115s1735is.pdf>.

⁸³ S. 1741, 115th Cong. (2017), available at <https://www.congress.gov/115/bills/s1741/BILLS-115s1741is.pdf>.

⁸⁴ S.1735, 115th Cong. § 2(c) (2017); S. 1741, 115th Cong. § 2(b) (2017).

⁸⁵ See Norman Eisen and Fred Wertheimer, Firing Mueller would be a catastrophic mistake, *CNN*, Aug. 10, 2017, available at <http://www.cnn.com/2017/08/10/opinions/trump-mueller-constitutional-crisis-opinion-wertheimer-eisen/index.html>.

⁸⁶ R Street, Benchmarks for ongoing congressional investigations into Russian interference in U.S. elections and related matters, Oct. 19, 2017, available at <http://www.rstreet.org/wp-content/uploads/2017/10/Russia-Investigation-Benchmarks.pdf>. One of the authors of this paper participated in proposing this set of benchmarks.

VI. Conclusion

Based on what is known publicly, there is widespread agreement among legal experts that Special Counsel Mueller is running a “serious, deliberative, and far-sighted inquiry.”⁸⁷ Within 5 months of his appointment, the special counsel has secured an indictment of former Trump campaign Chairman Paul Manafort and former Trump campaign advisor Rick Gates as well as the guilty pleas of Michael Flynn, former White House National Security Advisor and Trump campaign advisor, and George Papadopoulos, a former member of the Trump Campaign foreign policy team.⁸⁸ News accounts report ongoing document and testimonial requests between the investigation and key White House and other officials.⁸⁹ The unveiling of the Papadopoulos plea several weeks after it had been filed and months after the arrest of Papadopoulos⁹⁰ also underscored the ability of the investigative team to keep arrests and witness negotiations confidential.⁹¹

Although there will no doubt be further speculation that President Trump will try to terminate the special counsel, we have demonstrated that this course of action is not as straightforward as it might appear, could likely be challenged in court, and would subject the president to legal and political risks that are prohibitive. Nonetheless, Congress has the power to enact additional obstacles to terminating Mueller and to commit to actions that would serve as an additional deterrent. It should do so.

⁸⁷ Matt Ford and Adam Serwer, Robert Mueller Is Just Getting Started, *Atlantic*, Oct. 30, 2017, available at <https://www.theatlantic.com/politics/archive/2017/10/robert-mueller-indictments-russia/544409/>; Where Is Bob Mueller Headed Next?, *Politico Magazine*, Oct. 30, 2017, available at <https://www.politico.com/magazine/story/2017/10/30/where-is-bob-mueller-headed-next-215762>.

⁸⁸ Norman Eisen, Noah Bookbinder, and Barry Berke, Manafort Indictment Is Bad News for Trump, *New York Times*, Oct. 30, 2017, available at <https://www.nytimes.com/2017/10/30/opinion/manafort-indictment-trump-russia.html>.

⁸⁹ Matt Apuzzo, Adam Goldman, Michael S. Schmidt, and Matthew Rosenberg, Former Trump Aides Charged as Prosecutors Reveal New Campaign Ties with Russia, *New York Times*, Oct. 30, 2017, available at <https://www.nytimes.com/2017/10/30/us/politics/paul-manafort-indicted.html>.

⁹⁰ *See, e.g.*, Michael S. Schmidt, Mueller Seeks White House Documents Related to Trump’s Actions as President, *New York Times*, Sept. 20, 2017, available at <https://www.nytimes.com/2017/09/20/us/politics/mueller-trump-russia.html>; Carol D. Leonnig, Rosalind S. Helderman, and Ashley Parker, Mueller gives White House names of 6 aides he expects to question in Russia probe, *Washington Post*, Sept. 8, 2017, available at https://www.washingtonpost.com/politics/spicer-priebus-hicks-among-six-current-and-former-trump-aides-mueller-has-expressed-interest-in-interviewing-for-russia-probe/2017/09/08/3b32779e-949a-11e7-aace-04b862b2b3f3_story.html?utm_term=.fc180cd5210e.

⁹¹ David A. Graham, A Former Trump Adviser Pleads Guilty to Lying About His Contacts with Russia, *Atlantic*, Oct. 30, 2017, available at <https://www.theatlantic.com/politics/archive/2017/10/george-papadopoulos/544346/>.