

WOULD ROD ROSENSTEIN OBJECT TO A MUELLER ACTION BEFORE BRETT KAVANAUGH IS CONFIRMED?

There's a lot of discussion about whether or not DOJ's traditional prohibition on major prosecutorial actions limits Robert Mueller. As I have explained, I personally think the terms of it don't apply, with the possible exception of Dana Rohrabacher, because no other conceivable subject of Mueller's investigation is conceivably on the ballot. Quinta Jurecic has a good piece explaining that it is a general practice, not a rule.

Justice Department Inspector General Michael Horowitz spelled out exactly why it's wrong in three short pages of his recent report on the FBI's conduct in the Clinton email investigation.

Two years ago, Jane Chong dove deep into the supposed 60-day rule in a *Lawfare* post on FBI Director James Comey's October 2016 letter on new developments in the Clinton investigation. As she wrote then, there is no formal rule barring Justice Department action in the days immediately before an election. Rather, the "rule" is more of a soft norm based on what former Attorney General Eric Holder himself described as "long-standing Justice Department policies and tradition." In a guidance Holder issued in 2012, the attorney general wrote that, "Law enforcement officers and prosecutors may never select the timing of investigative steps or criminal

charges for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party”—which, Chong noted, leaves a wide loophole for actions taken near an election without the *purpose* of affecting that election. In 2016, Attorney General Loretta Lynch issued a similar memorandum with the same language, as the inspector general report lays out.

Chong’s post was, in fact, cited by the inspector general report in the office’s own analysis of whether Comey had violated the supposed 60-day rule. “The 60-Day Rule is not written or described in any Department policy or regulation,” the report says. Investigators canvassed a range of “high-ranking [Justice] Department and FBI officials” on their own understandings of the guideline, which the report describes as “a general practice that informs Department decisions.”

This short section of the 500-plus-page report shows broad agreement among the current and former Justice Department officials interviewed that there is *some* kind of principle against taking action in such a way as to potentially influence an election, though the interviewees do not precisely agree on the contours of that principle. Former U.S. Attorney for the Southern District of New York Preet Bharara stated, investigators write, that “there is generalized, unwritten guidance that prosecutors do not indict political candidates or use overt investigative methods in the weeks before an election.” Former Deputy Attorney General Sally Yates located the cutoff more precisely at the 90-day instead of the 60-day mark.

The inspector general's office also interviewed Ray Hulser, the former deputy assistant attorney general for the Public Integrity Section of the Justice Department, who was involved in the drafting of Lynch's 2016 election integrity. Interestingly, Hulser told investigators that the Public Integrity Section had actually considered codifying the 60-day rule in the Lynch memo, but had decided not to because such a policy would be "unworkable."

Yet, even though I don't believe the 60-day "rule" does apply, my expectation is that Rod Rosenstein – who after is the one who will make any decisions about major Mueller actions – would nevertheless abide by it.

Still, that leaves three more days of this week, before the actual 60-day cut-off.

Which leaves me with another question: Would Rosenstein balk at a major action this week, before Brett Kavanaugh is confirmed to the Supreme Court?

After all, Rosenstein is close to Kavanaugh from when both served on a real witch hunt, the Ken Starr investigation into Bill Clinton's blowjob (indeed, Kavanaugh seemed to have gotten off on the most scandalous details about that blowjob). Rosenstein has gone to great lengths to make DOJ resources available in support of his confirmation. Rosenstein showed up for the start of today's hearing.

For Rosenstein, Kavanaugh's confirmation is personal.

Would he do anything this week to stave off new Mueller revelations, to ensure the Kavanaugh bullet train races forward?