

ON ROSENSTEIN, WE SHALL SEE ...

For a panicked two hours today, it appeared that Rod Rosenstein had either resigned or been fired. Instead, he was attending a regularly scheduled Principal's Committee after having talked at some length to Trump and John Kelly about the NYT report he was acting erratically in the wake of Trump firing Jim Comey and boasting that he had done so to end the Russian investigation (though the NYT's reporting wasn't even that responsible).

The two men will meet again Thursday, as Trump's SCOTUS nominee gets grilled about an increasing number of sexual assault accusations, to decide Rosenstein's future.

It's not entirely clear who would then oversee Mueller if Rosenstein gets fired, but Marty Lederman argues according to normal succession, Solicitor General Noel Francisco would supervise Mueller, but because he has a conflict, it'd likely fall to OLC head Steve Engel.

Those are ordinarily the AG's functions, not the DAG's, and unless there's been a change, DOJ's view is that the AG's functions/duties can't be performed by an "acting" officer (i.e., no "double-acting"). So the responsibility to oversee those investigations would fall to Solicitor General Noel Francisco. Francisco, however, is probably recused from the Russia investigation (at a minimum), because Jones Day, his former firm, represents the Trump Campaign (unless there's been a change). NF has recused from all SCOTUS cases where Jones Day represents a party, including in the new Term. If NF recuses from supervising Mueller, and any other investigations involving the Trump campaign, those AG functions presumably would be performed by Assistant AG for

OLC Steve Engel.

In either case, Jeff Toobin declares that one way or another, that means Mueller is finished.

This issue of who, technically, would be in charge of Mueller is an important one, but it's not nearly as significant as the broader issue raised by Rosenstein's likely departure. The President is in charge of the executive branch, and Mueller, as the special counsel, is a subordinate in that branch of the government. If Trump is determined to fire Mueller, or to constrict his investigation in untoward ways, he and his advisers will figure out a way to do it. There is little doubt that the President could ultimately find a compliant Justice Department official to carry out his order of execution. In other words, the massacre this week may lead to another, like the one on a Saturday night in 1973 when Richard Nixon fired Archibald Cox, the Watergate special prosecutor. This modern version would be an abuse of power of the most profound sort. Firing Mueller—who has been investigating Trump and his campaign and Administration for a year and a half—would be the very definition of a high crime and misdemeanor, as impeachable offenses are defined in the Constitution. But would the Republicans who control Congress see it that way?

Put another way, the real question is whether there is any political will among the Republicans who run the legislative branch of government to check Trump's power.

My guess is what happens between now and Thursday matters a lot. It's possible, for example, that the Trump Administration could

implement some plan to put an even more competent hatchet man in place behind Rosenstein (or get him to resign, which would leave more options). Or it's possible that Mueller has key indictments sufficiently developed to roll them out in the next day or so (though there's no grand jury before Thursday at the earliest). I think it even possible that Rosenstein will not only be able to explain the NYT report away (in part by suggesting that it's just an Andrew McCabe attempt to get back at Trump), but also explain why things will be worse for Mueller if he does fire him.

So we shall see.