

NEAL KATYAL HELPS MUELLER WRITE MONDAY'S BRIEF

As I noted in this thread, last week the DC Circuit asked Mueller and Andrew Miller's teams to submit a 10-page brief next Monday, "addressing what, if any, effect the November 7, 2018 designation of an acting Attorney General different from the official who appointed Special Counsel Mueller has on this case."

It shouldn't have any role in Miller's subpoena. After all, at the time that action was taken, Mueller's authority had no defects (unless Miller wins this challenge, which is unlikely, even at SCOTUS). It might, however, have an effect going forward, and Monday's brief is an opportunity for Mueller to make that case publicly, and make it both for this challenge and the Mystery Appellant challenge, if that one pertains to Mueller's authority. (Sri Srinivasan and Judith Rogers, two of the three judges hearing Miller's appeal, have been involved in the Mystery Appeal as well, so know the substance of it.)

As luck would have it, a key expert just provided Mueller's team important material for their brief.

Neal Katyal was (as he has written extensively) the author for the special counsel regulations that Mueller works under. Last week, he teamed up with conservative lawyer George Conway to argue that Whitaker's appointment is unconstitutional. Today, he published a piece arguing that Whitaker cannot supervise Mueller.

In it, he raises two problems: first, he says that he and his colleagues at DOJ – and those on Capitol Hill with whom Katyal consulted – did not envision something like what Trump has done to happen.

■ My Justice Department colleagues and I,

along with a bipartisan group on Capitol Hill, worked through many possible scenarios before we settled on the rules that now govern Mueller's investigation. Everyone in the debate recognized that any enhancement in the special counsel's accountability had to come from additional supervision by the attorney general. After all, the power to supervise is the power to destroy. The attorney general can stop a special counsel from investigating altogether or stop them from taking a specific step (such as subpoenaing a president). He can read every file of the counsel, and he may even attempt to give information about the investigation to the president in real time. And he plays a crucial role in determining what report by Mueller, if any, is given to Congress and ultimately the public.

But no one – and I mean no one – ever thought the regulations we wrote would permit the president to install some staff member of his choice from the Justice Department to serve as acting attorney general and thereby oversee the special counsel. Such a proposal would have been laughed off Capitol Hill within a nanosecond as fundamentally at odds with the most cardinal principle that no one is above the law.

Mind you, this is just a regulation, so the several references Kaytal makes to Congress do not amount to legislative intent. Still, it does provide guidance about what the intent of the regulations were.

Katyal then describes the problem – one that directly relates to the substance of Miller's argument. Even if Whitaker's appointment is legal as an emergency appointment, he still needs a superior officer to supervise him. It would need to be either Rosenstein or Trump himself.

If the defenders' claims were true, all that would mean is that Whitaker is an inferior officer who doesn't need to be confirmed by the Senate. In that situation, someone else, a principal officer, would still need to be in place to supervise Mueller – who is also an inferior officer. That responsibility would fall once again to Rosenstein under the succession statute Congress authorized.

Sometimes, an inferior officer has to supervise other inferior officers with no principal – say, if no one else has been confirmed at the start of an administration. Or in a more hypothetical scenario, imagine a military conflict in which casualties meant there were no Senate-confirmed officials in a department. But fortunately, today's Justice Department isn't dealing with challenges anything like those. There are Senate-confirmed officials at the helm.

And regardless of those issues, there is yet another problem, specific to the Mueller investigation. In an emergency situation where an acting head is named, the president is, ultimately, the responsible official who supervises temporary, unconfirmed stand-ins. The idea is that there would at least be someone accountable to the public above the acting officer in those situations – and as Harry Truman put it, the buck always stops with the president.

Here, though, the idea that the president could be trusted to supervise Whitaker as he oversees Mueller's work is absurd.

It was this kind of problem that made me ask whether bolloxing up the legality of Mueller's action was the entire point (because otherwise I

can't imagine how Emmet Flood bought off on this action, given the troubles it may cause).

But as I've said, it actually seems that these issues would create a legal disability on Whitaker's part, meaning his back-up – Rosenstein – would be required to take over.

Democrats have already asked DOJ's top ethics official whether he has given Whitaker advice on another possible source of disability, recusal obligations.

I suspect, though, that Mueller will be just one party in a position to argue that Whitaker cannot legally supervise him.

Which, again, is what I don't mind that Rosenstein sucked up to him so effusively last Friday. Because so long as he remains there, as the Senate-confirmed official with authority to supervise Mueller, he may well end up remaining in that position.