

MEMORANDUM

FROM: Victoria Bassetti, Fellow, Brennan Center for Justice
TO: Interested Parties
DATE: April 11, 2018
RE: DOJ ORDER OF SUCCESSION

If President Donald Trump wanted to fire Special Counsel Robert Mueller he would have to get the Attorney General to do so. By law, only the Attorney General can fire Mueller. The President himself cannot do so.

In the wake of Attorney General Jeff Sessions' recusal from the matter, Deputy Attorney General Rod Rosenstein has been the Acting Attorney General regarding Russian interference with the 2016 election and related matters. Rosenstein appointed Mueller as Special Counsel on May 17, 2017.¹ He did so under his statutory authority to "specially appoint[]" an attorney to "conduct any kind of legal proceeding." In addition, he indicated that Mueller would be bound by regulations governing Special Counsels.²

Those regulations provide that only the Attorney General can only fire the Special Counsel for cause and must do so in writing. They provide:

The Special Counsel may be disciplined or removed from office only by the personal action of the Attorney General. The Attorney General may remove a Special Counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies. The Attorney General shall inform the Special Counsel in writing of the specific reason for his or her removal.³

In addition, since Mueller was appointed pursuant to a statutory provision, Supreme Court precedent holds that he can only be removed by the department head (i.e. the Attorney General) not the President. *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259-60 (1839); *accord PCAOB v. FEF*, 561 U.S. 477, 493 (2010).⁴

¹ See U.S. Department of Justice, Office of the Deputy Attorney General, Order 3915-2017, May 17, 2017, *available at* <https://www.justice.gov/opa/press-release/file/967231/download> (Rosenstein appoints Robert Mueller as special counsel "by virtue of the authority vested in me as Acting Attorney General...")

² *Ibid.*

³ 28 CFR §600.7(d)

See also Noah Bookbinder, Norman Eisen, and Caroline Fredrickson, "Why Trump Can't (Easily) Remove Mueller—and What Happens If He Tries," CREW/ACS Issue Brief, December 6, 2017, *available at* <https://www.citizensforethics.org/trump-cant-easily-remove-mueller-happens-tries/>

⁴ *See* Marty Lederman, "Why Trump Can't (Lawfully) Fire Mueller," JustSecurity.org, June 13, 2017, *available at* <https://www.justsecurity.org/42044/trump-lawfully-fire-mueller/>

Were the President to attempt to fire the Special Counsel, many have suggested that the effort could mirror the Saturday Night Massacre of the Watergate era, when President Richard Nixon dismissed a series of DOJ officials who refused to follow his order to fire the independent special counsel investigating him.

In 2017, the sequence of DOJ officials who could serve as the Acting Attorney General with the power to fire Mueller are governed by two separate memoranda orders and two statutory provisions, detailed below. There are, as a result, two paths the President could go down to find an Acting Attorney General willing to fire Mueller.

This memorandum outlines each path and then provides information on many of the individuals potentially involved.

The Two Paths:

The first follows the current DOJ line of succession. It would skip over the recused Attorney General Sessions to Rosenstein and then continue through the succession order were Rosenstein to decline to follow the order.

The second would involve firing Attorney General Sessions and then directly appointing an Acting Attorney General using the procedures of the Federal Vacancies Reform Act.

PATH 1:

The following people are in the line of succession:⁵

1. Deputy Attorney General: Rod Rosenstein
2. Associate Attorney General: Rachel Brand (now resigned and with no permanent replacement. See below for discussion whether her deputy/successor as acting Associate Attorney General can step into this line of succession).
3. Solicitor General: Noel Francisco
4. Assistant Attorney General, Office of Legal Counsel: Steven Engel
5. Assistant Attorney General, National Security Division: John Demers
6. United States Attorney for the Eastern District of Virginia: Dana Boente (now resigned and with no permanent replacement)
7. United States Attorney for the Eastern District of North Carolina: Robert J. Higdon
8. United States Attorney for the Northern District of Texas: Erin Nealy Cox

⁵ See below for citations and explanations how this list was created.

This current DOJ Order of Succession is obtained by a blend of two memoranda orders (a White House Executive Order and an Attorney General Order) and a statute. Then, overlaying all of them, another statute—the Federal Vacancies Act.

First, the statute: 28 U.S.C. §508 dictates that in the event of a vacancy, disability or absence of the Attorney General, first the Deputy Attorney General then the Associate Attorney General may exercise the duties of the office.⁶

Next, a White House Executive Order issued last year,⁷ lists a set of people in the Department’s line of succession. It tracks 28 U.S.C. §508 for the first two people in the line of succession: the Deputy Attorney General (Rod Rosenstein) and then the Associate Attorney General (ex Rachel Brand). Then the order designates the following three people: the United States Attorney for the Eastern District of Virginia (ex Dana Boente); the United States Attorney for the Eastern District of North Carolina (Robert Higdon); and the United States Attorney for the Northern District of Texas (Erin Nealy Cox).

However, per that Executive Order, the Attorney General may designate others to serve within the line of succession after the Associate Attorney General and before the U.S. Attorney for the Eastern District of Virginia. It is unclear whether Attorney General Sessions has done so.

However, on November 21, 2016, Attorney General Loretta Lynch issued Attorney General Order 3777-2016, under 28 U.S.C. §508, which added the following people to the line of succession:⁸

The Solicitor General: Currently Noel Francisco who was sworn in to office on September 19, 2017.⁹

Then, the Assistant Attorneys General for:

Office of Legal Counsel: Currently Steven Engel who was sworn in on November 13, 2017.¹⁰

⁶ 28 U.S.C. §508 reads in full:

(a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.

(b) When by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Associate Attorney General shall act as Attorney General. The Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.

28 U.S.C. §508

⁷ The White House, Presidential Executive Order on Providing an Order of Succession Within the Department of Justice, March 31, 2017, *available at* <https://www.whitehouse.gov/the-press-office/2017/03/31/presidential-executive-order-providing-order-succession-within>

⁸ The following people have been confirmed by the Senate for positions at DOJ, though they are not listed as being in the Line of Succession by either the March 2017 Executive Order discussed above or the Attorney General’s 2007 Order discussed below. However, they are eligible to be in the line of succession under 28 U.S.C. §508: Stephen Elliott Boyd – Office of Legal Affairs; Makan Delrahim – Antitrust Division; and Beth Ann Williams – Office of Legal Policy.

⁹ Department of Justice, “Meet the Solicitor General,” (last updated September 29, 2017), *available at* <https://www.justice.gov/osg/staff-profile/meet-solicitor-general>

¹⁰ Department of Justice, “Meet the Leadership,” (last updated November 13, 2017), *available at* <https://www.justice.gov/olc/meet-leadership>

National Security Division: Current John Demers who was sworn in February 22, 2018.¹¹

Criminal Division: Position vacant. Brian A. Benzckowski nominated and pending a vote by the full Senate.¹²

Civil Division: Position vacant. Joseph Hunt nominated.¹³

Environment and Natural Resources Division: Position vacant. Jeffrey B. Clark nominated and pending a vote by the full Senate.¹⁴

Several posts within the line of succession are currently held by people in an acting capacity. There is, for example, an acting Associate Attorney General in the post Brand once occupied. However, DOJ practice has been that people in those acting roles are skipped over in the line of succession.¹⁵

Notwithstanding the two orders and the statutory provision discussed above, the President arguably has the authority to name an Acting Attorney General pursuant to another statute, the Federal Vacancies Reform Act, even if someone else is otherwise designated under 28 U.S.C. §508.

PATH 2:

It is likely President Trump could side step these memoranda orders and statutes, fire the Attorney General, and then, using the provisions of the Federal Vacancies Reform Act, appoint an Acting Attorney General of his choosing.

The Federal Vacancies Reform Act of 1998, 5 U.S.C. §§3345-3349, allows the President to designate as the Acting Attorney General two classes of people:

1. Any other Senate-confirmed person currently serving in the Administration. 5 U.S. Code §3345(a)(2). That person does not need to be serving at the Department of Justice. He or she can be from any agency.
2. Any “officer or employee” who:
 - in the 365 days preceding the vacancy, served in the same agency (ie DOJ) for 90 days or more, and
 - is GS-15 or higher on the federal pay scale.

¹¹ Department of Justice, “Assistant Attorney General John C. Demers,” (last updated February 27, 2018), *available at* <https://www.justice.gov/nsd/staff-profile/assistant-attorney-general-john-c-demers>

¹² Senate Executive Calendar. Calendar No. 350, (last accessed February 20, 2018), *available at* https://www.senate.gov/legislative/LIS/executive_calendar/xcalv.pdf

¹³ Senate Nominations Calendar. Nomination No. 1414, (last accesses February 10, 2018), *available at* <https://www.congress.gov/nomination/115th-congress/1414?r=202>

¹⁴ Senate Executive Calendar. Calendar No. 640, (last accessed February 10, 2018), *available at* https://www.senate.gov/legislative/LIS/executive_calendar/xcalv.pdf

¹⁵ When Acting Attorney General Sally Yates was fired according to the Succession Order the next person should have been the Associate Attorney General or the Solicitor General. At the time, there was an Acting Solicitor General (Noel Francisco) in place. But he was skipped over in place of a Senate confirmed U.S. Attorney for the Eastern District of Virginia Dana Boente. See also Marty Lederman,

“Once again: Trump Can’t—and Therefore (probably) Won’t—Remove Mueller,” JustSecurity.org, April 10, 2018, *available at* <https://www.justsecurity.org/54727/once-again-trump-cant-fire-mueller/>

Two opinions from the Department of Justice’s Office of Legal Counsel support this conclusion.

In a September 2007 OLC memorandum following the resignation of then-Attorney General Alberto Gonzales, the office concluded that “the President may use the Vacancies Reform Act even when there is an official serving in one of the designated positions under section 508.”¹⁶

In a November 25, 2017 OLC memorandum regarding filling the vacancy at the Consumer Financial Protection Board (CFPB) left by Richard Cordray’s resignation, the office concluded “even when the Vacancies Reform Act is not the ‘exclusive’ means for filling a vacancy, the statute remains an available option, and the President may rely upon it in designating an acting official in a manner that differs from the order of succession otherwise provided by an office-specific statute.”¹⁷

However, scholars are not in agreement with these OLC opinions. One has suggested that the Vacancies Reform Act procedures do not apply when the officeholder has been fired.¹⁸ In addition, the recent conflict over who is the Acting Director of the CFPB has put in play the question whether the Vacancies Reform Act can supplant a more specific succession statute.

WHAT WE KNOW ABOUT SOME OF THE PEOPLE IN THE LINE OF SUCCESSION

1. Jeff Sessions (Attorney General): Recused
2. Rod Rosenstein (Deputy Attorney General)
 - a. Reportedly was interviewed by Mueller about the Comey firing.¹⁹
 - b. In June testified: “I am not going to follow any orders unless I believe those are lawful and appropriate,” he said, explaining that under federal regulations, Mueller can only be fired for good cause and that reason would have to be put in writing.”²⁰
3. Rachel Brand (Associate Attorney General)

¹⁶ Department of Justice, Office of Legal Counsel, Authority of the President to Name an Acting Attorney General, September 17, 2007, available at <https://www.justice.gov/file/451576/download>

¹⁷ Department of Justice, Office of Legal Counsel, Memorandum for Donald F. McGahn II, Counsel to the President Re: Designating an Acting Director of the Bureau of Consumer Financial Protection, by Steven Engel, November 25, 2017, available at https://www.justice.gov/sites/default/files/opinions/attachments/2017/11/25/cfpb_acting_director_olc_op_0.pdf.

¹⁸ Steve Vladeck, “The Three Sessions Succession Scenarios,” *Just Security*, July 27, 2017, available at <https://www.justsecurity.org/43477/sessions-succession-scenarios/>. See also John Bies, “If the Attorney General Is Fired, Who Acts as Attorney General?” *Lawfareblog.com*, July 29, 2017, available at <https://www.lawfareblog.com/if-attorney-general-fired-who-acts-attorney-general>; Matthew Kahn, “Acting Accordingly: Acting Officers and the Federal Vacancies Reform Act,” *Lawfareblog.com*, November 27, 2017, available at <https://www.lawfareblog.com/acting-accordingly-acting-officers-and-federal-vacancies-reform-act>, Victoria Bassetti and Norm Eisen, “It Won’t Be Easy for Trump to Replace Sessions With Pruitt,” *Politico*, March 16, 2018, available at <https://www.politico.com/magazine/story/2018/03/16/jeff-sessions-replace-with-scott-pruitt-donald-trump-217646>.

¹⁹ Nicole Hensley, “Robert Mueller’s team questioned Rod Rosenstein in Trump’s firing of James Comey,” *New York Daily News*, September 20, 2017, available at <http://www.nydailynews.com/news/politics/mueller-team-questioned-rod-rosenstein-comey-firing-article-1.3507519>.

²⁰ Andrew Prokop, “The deputy attorney general just made clear that firing Mueller wouldn’t be easy for Trump,” *Vox.com*, June 13, 2017, available at <https://www.vox.com/policy-and-politics/2017/6/13/15792500/trump-firing-robert-mueller>.

On February 8, 2018 Rachel Brand announced she would be leaving her post for a job at Walmart.

4. Noel Francisco (Solicitor General)

- a. A member of the DOJ “beachhead” team, he was initially the Principal Deputy Solicitor General (from January 2017 to March 2017). He later went to the Associate Attorney General’s office until his confirmation.²¹
- b. Says he knew nothing about Comey firing: “I played no role in the decision to dismiss Director Comey. To the best of my recollection I learned of this possibility on the afternoon of May 9 from a staff member of the Deputy Attorney General’s Office. I was not informed of the reasons for the decision.”²²
- c. One of Francisco’s former law firm partners, Don McGahn II, is now White House Counsel. His former law firm, Jones Day, represented Donald Trump²³ (via McGahn) from 2015. The Trump campaign paid Jones Day in excess of \$3 million in 2015 and 2016. It has continued to pay Jones Day in 2017 (\$545,000 in the second quarter of last year, and \$802,185 in the third quarter, \$852,000 in the fourth quarter).²⁴ Jones Day has worked on matters involving the Mueller investigation.²⁵
- d. Francisco does not list Trump as having been a client on his Public Financial Disclosure Forms.²⁶
- e. Francisco is still financially involved with Jones Day. According to his Ethics Agreement: “He will receive a lump sum 1D be paid into his retirement account in the fourth quarter of 2017 pursuant to Jones Day’s policies and practices. For up to seven years, the firm will withhold a portion of his partnership share as a reserve for account reconciliations and tax payments that the firm makes on behalf of its partners. Until all of these payments are made, he will not participate personally and substantially in any particular matter that to his knowledge has a direct and

²¹ David Lat, “D-Day At DOJ: The Trump Administration’s ‘Beachhead’ Team For The Justice Department,” *AbovetheLaw.com*, January 20, 2017, available at <https://abovethelaw.com/2017/01/d-day-at-doj-the-trump-administrations-beachhead-team-for-the-justice-department/2/>.

²² Marcia Coyle and Mike Scarcella, “What to Know About Noel Francisco as the New SCOTUS Term Nears,” *The National Law Journal*, September 20, 2017, available at <https://www.law.com/nationallawjournal/almID/1202798444611/?slreturn=20171112182634>.

²³ See Roy Strom, “A Quiet Law Firm With a Famous Client,” *American Lawyer*, March 1, 2017, available at <https://www.law.com/americanlawyer/almID/1202779428361/>; Paul Barrett, “Donald Trump’s Favorite Law Firm,” *Bloomberg/Business Week*, March 16, 2017, available at <https://www.bloomberg.com/news/articles/2017-03-16/donald-trump-s-favorite-law-firm>.

²⁴ Kenneth P. Vogel and Rachel Shorey, “Trump’s Re-Election Campaign Doubles Its Spending on Legal Fees,” *The New York Times*, July 15, 2017, available at https://www.nytimes.com/2017/07/15/us/politics/trump-campaign-legal-fees.html?_r=0; Melissa Quinn, “Trump campaign racks up \$1.1 million in third quarter legal fees,” *Washington Examiner*, October 16, 2017, available at <http://www.washingtonexaminer.com/trump-campaign-racks-up-11-million-in-third-quarter-legal-fees/article/2637622>; Kenneth P. Vogel and Rachel Shorey, “About 25% of Trump’s Re-election Spending Continues to Go to Lawyers,” *The New York Times*, February 1, 2018, available at <https://www.nytimes.com/2018/02/01/us/politics/trump-campaign-spending-russia.html>

²⁵ *Ibid.*

²⁶ Noel Francisco, Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e), March 14, 2017, available upon request

predictable effect on the firm's ability or willingness to make these payments, unless he first obtains a written waiver, pursuant to 18 U.S.C. § 208(b)(1).²⁷

- f. Until January 2018, under his Ethics Agreement, he will not participate “personally and substantially in any particular matter involving specific parties in which he knows the firm is a party or represents a party, unless he is first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).”²⁸
 - g. In February, Francisco recused himself from representing the United States in matters relating to the travel ban after he learned that his former law firm was representing a group that filed an amicus brief in the matter. Approximately, 10 days later he was back on the briefs.²⁹
 - h. Francisco represented Virginia Governor Bob McDonnell before the Supreme Court when he appealed his political corruption conviction.³⁰
5. Steven Engel (Assistant Attorney General, OLC)
- a. Provided legal counsel to the Trump Transition team.³¹
 - b. Member of DOJ beachhead team.³²
 - c. Engel’s career has been almost exclusively in civil litigation. He has been involved in post-conviction criminal matters, eg a death penalty case.
 - d. Author of OLC memorandum regarding the appointment of a new head of the CFPB in the wake of the resignation of its Director, Richard Cordray. Engel was criticized for authoring a memorandum regarding the leadership of the CFPB when he had recently represented parties (payday lenders) before the agency.³³
 - e. Senator John McCain voted against his confirmation because of concerns regarding Engel’s involvement in drafting OLC torture memos during the Bush Administration.³⁴
6. John Demers (Assistant Attorney General, National Security Division)
- a. Was assistant General Counsel at the Boeing Corporation before his nomination.

²⁷ Letter from Lee Loftus, Assistant Attorney General for Administration, Department of Justice to Walter M. Schaub, Jr., Director, Office of Government Ethics, April 26, 2017, *available upon request*.

²⁸ *Id.*

²⁹ Tony Mauro, “Solicitor General Nominee Faces Scrutiny for Travel Ban Recusal,” National Law Journal, May 9, 2017, *available at* <https://www.law.com/nationallawjournal/almID/1202785645382/>

³⁰ *Supra* note 23.

³¹ See Senate Judiciary Committee, Questions for the Record, Nomination of Steven Engel, May 17, 2017, *available at* <https://www.judiciary.senate.gov/imo/media/doc/Engel%20Responses%20to%20QFRs.pdf>

³² *Supra* note 19.

³³ *Supra* note 15.

³⁴ Seung Min Kim, “McCain opposes Trump nominee over torture memos,” Politico, November 8, 2017, *available at* <https://www.politico.com/story/2017/11/08/john-mccain-trump-nominee-steven-engel-torture-244706>.

- b. Served in the National Security Division during the Bush Administration.
 - c. Clerked for Justice Scalia.
7. Dana Boente:
- a. Submitted resignation letter October 27, 2017. Announced intent to continue serving until his successor is confirmed.³⁵
 - b. Although his successor has not been confirmed by the Senate, Boente has left his job and is now General Counsel at the FBI.
 - c. Boente had been running a [grand jury](#) investigating some aspect of what became the Mueller investigation, prior to Mueller’s appointment.³⁶
8. Robert Higdon:
- a. Sworn in October 10, 2017.³⁷
 - b. From March 2015 until his swearing in he was a partner at a North Carolina law firm, Williams Mullen. Prior to that he had worked for 24 years as a federal prosecutor.
 - c. Was lead prosecutor of John Edwards in 2012 out of the EDNC.
 - d. In 2013, he was moved from his job as head of the EDNC’s criminal division to a senior litigator position “after federal appeals court judges issued a blistering rebuke about how prosecutors under Higdon’s leadership had withheld evidence and failed to correct trial testimony they knew to be false.”³⁸
 - e. In *United States v. Bartko*, decided August 23, 2013, a Fourth Circuit panel commented on the Eastern District’s Criminal Division, which was then headed by Higdon. Higdon was not mentioned by name.

Excerpts from the opinion:³⁹

³⁵ Rachel Weiner, “Dana Boente announces resignation as U.S. attorney for Eastern District of Virginia,” Washington Post, October 27, 2017, available at https://www.washingtonpost.com/local/public-safety/dana-boente-resigns-as-us-attorney-for-eastern-district-of-virginia/2017/10/27/78fda97a-bb43-11e7-be94-fabb0f1e9ffb_story.html?utm_term=.3682108b3646.

³⁶ Carol D. Leonnig, Sari Horwitz and Matt Zapotosky, “Special Counsel Mueller using grand jury in federal court in Washington as part of Russia investigation,” The Washington Post, August 3, 2017, available at https://www.washingtonpost.com/politics/special-counsel-mueller-using-grand-jury-in-federal-court-in-washington-as-part-of-russia-investigation/2017/08/03/1585da56-7887-11e7-8f39-ebb7d3a2d304_story.html?utm_term=.fd8f4ed2ed8c.

³⁷ Department of Justice, “Meet the U.S. Attorney [Robert J. Higdon, Jr],” (last updated November 13, 2017), available at <https://www.justice.gov/usao-ednc/meet-us-attorney>.

³⁸ Associated Press, “U.S. Attorney’s office in Eastern N.C. reassigns chief prosecutor,” The Daily News, September 8, 2013, available at <http://www.jdnews.com/20130908/us-attorneys-office-in-eastern-nc-reassigns-chief-prosecutor/309089962>.

³⁹ *United States v. Bartko*, No. 12-4298 (4th Cir. August 23, 2013) available at <http://caselaw.findlaw.com/us-4th-circuit/1642478.html>.

- i. “A cursory review of this Court's opinions reveals recent consideration of at least three cases involving discovery abuse by government counsel in this district.”
- ii. In addition, *Bartko* involved “two instances of withholding discoverable evidence and one choice to leave uncorrected a witness's false testimony.”
- iii. “[T]he frequency of the ‘flubs’ committed by this office raises questions regarding whether the errors are fairly characterized as unintentional.”
- iv. “[W]e must conclude that this office is uninterested in placating concerns about its practices.”
- v. “Yet the United States Attorney's office in this district seems unfazed by the fact that discovery abuses violate constitutional guarantees and misrepresentations erode faith that justice is achievable. Something must be done.”
- vi. “[W]e direct the Clerk of Court to serve a copy of this opinion upon the Attorney General of the United States and the Office of Professional Responsibility for the Department of Justice. The transmittal letter should call attention to this section of the opinion.”
- vii. “What we know is that we are repeatedly confronted with charges of discovery abuse by this office. What we know is that our questions regarding this abuse remain unanswered. And what we know is that such conduct is unacceptable. Appropriate actions need to be taken to ensure that the serious errors detailed herein are not repeated. Whatever it takes, this behavior must stop.”

9. Erin Nealy Cox

- a. Sworn in to office November 17, 2017.
- b. Previously a Senior Advisor at McKinsey & Co. in the cybersecurity and risk practice⁴⁰

⁴⁰ Department of Justice, “Meet the U.S. Attorney [Erin Nealy Cox],” (last updated February 2, 2018), *available at* <https://www.justice.gov/usao-ndtx/meet-us-attorney>