

MUELLER SAYS HE STILL EXERCISES THE FULL AUTHORITY OF A US ATTORNEY

Mueller's team has submitted the supplemental brief Judge Henderson ordered the day after Matt Whitaker was appointed, explaining whether his appointment affects Andrew Miller's challenge to a subpoena he got back in June.

As to the issue at hand (whether his subpoena of Miller is legal), Mueller says Whitaker's appointment changes nothing, because everything being challenged pertains to his May 17, 2017 appointment, not anything that happened since.

The President's designation of Acting Attorney General Matthew G. Whitaker on November 7, 2108, has no effect on this case.

[snip]

All of those arguments turn on the May 17, 2017 appointment of the Special Counsel and the legal and regulatory frameworks that existed at the time of appointment. None of those arguments is affected by the change in the identity of the Acting Attorney General while this case is on appeal.

But the brief is interesting because it is the first opportunity Mueller has had to lay out how he understands what happened and how Whitaker's appointment affects his authority.

As to what happened, Mueller makes no contest that Jeff Sessions resigned.

On November 7, 2018, Attorney General Jefferson B. Sessions resigned from office

Democrats in the House are contesting that, but Mueller is not.

Nor does Mueller question the validity of the OLC conclusion that Whitaker's appointment is legal.

The Office of Legal Counsel has determined that the designation of the Acting Attorney General is valid as a statutory and constitutional matter. See Office of Legal Counsel, Designating an Acting Attorney General (Nov. 14, 2018), <https://www.justice.gov/olc/file/1112251/download>. I

None of that is surprising. He works for DOJ and it's not his place to challenge what DOJ says about DOJ.

What's more interesting (though not at all controversial) is that Mueller maintains he still has the full authority of a US Attorney.

Similarly, by regulation, the Special Counsel has and continues to "exercise, within the scope of his or her jurisdiction, the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney." 28 C.F.R. § 600.6; see *United States v. Nixon*, 418 U.S. 683, 695 (1974) ("So long as [a] regulation is extant it has the force of law.").

He relies on *US v. Nixon* to lay out what it will take to withdraw that authority: changing the regulations he operates under.

Perhaps most important, though, is that Mueller argues that Whitaker's appointment cannot change the validity of the subpoena (and, one would assume by extension, anything else) that occurred before Whitaker's appointment.

Because the subpoenas here issued under the signature of the Special Counsel's

Office long before the change in the identity of the Acting Attorney General, that change cannot affect the validity of the subpoenas. And the designation of a different Acting Attorney General while the case is on appeal cannot vitiate the district court's order holding Miller in contempt.

This would seem to suggest that if Mueller has anything banked – sealed indictments or complaints – then he holds that nothing changes their validity or the DC District's authority to preside over them.

He also maintains that he retains the authority to appear before the Court.

Second, the change in identity of the Acting Attorney General has no effect on the Special Counsel's authority to appear in this case. The Special Counsel continues to hold his office despite the change in the identity of the Acting Attorney General.

This would be what he would need to unseal any existing indictments.

None of that is that controversial. But it does make it clear that he views his authority to continue unchecked even with Trump's hatchet man in place.