

# DOJ SHOULD JUST GIVE ANDREW MCCABE WHAT HE WANTS, BUT THEY WON'T

185 paragraphs into his complaint against Bill Barr, Christopher Wray, and DOJ and FBI for unlawful termination, Andrew McCabe makes what is probably an untrue statement.

Had Plaintiff pledged his personal loyalty to Trump, voted for Trump in the 2016 election (or falsely told Trump that he had), not worn a T-shirt supporting Dr. McCabe's campaign, and not been married to Dr. McCabe, Defendants would not have reached the decisions to demote him and terminate him, nor would they have proceeded on the accelerated schedule that deprived him of his full vested pension and related benefits.

The statement is true, insofar as they're the issues that Trump bitched about for the year leading up to McCabe's firing in part to discredit the Mueller investigation. They're true because Trump has claimed they're true, so there will be abundant evidence to submit to prove they are true. But they're not true insofar as the Russian investigation is what led Trump to hunt down his perceived enemies, and the DOJ IG investigation is the claimed reason for McCabe's firing.

But the claims nevertheless assert the principle that FBI employees can't be forced to take a loyalty oath. And as such, the lawsuit seeks to uphold a principle at the core of our judicial system.

That's not the only complaint McCabe makes. Along another First Amendment claim, he also makes two due process claims and one mandamus

claim that gets into the legal fine print of the way that, in response to pressure from Trump, top DOJ officials fast-tracked an effort to get rid of McCabe.

The legal details are actually of real interest, given that Wray, then Associate Deputy Attorney General Scott Schools, and Jeff Sessions, among others, bolloxed the firing of McCabe. As Schools told McCabe while he was trying to accelerate the review of his termination in March 2018, "We're making it up as we go along." DOJ fucked up in two significant ways.

First, they didn't get around to "firing" McCabe until 10:00 pm on March 16, 2018, after FBI clocked the final day McCabe had to put in before qualifying for retirement at 5:00 pm that same day. FBI registered that day as a full vacation day. By the time Sessions fired McCabe late at night, he claims, he was already legally retired. (Note, there's a real tragicomic section describing Sessions' role, including that the firing did not come with any of the official details like time of termination needed for such a firing, that are very similar to the way that Sessions himself would be fired 8 months later).

The other way they bolloxed McCabe's firing is by demoting him on January 28, 2018. On that day, Wray gave McCabe a choice: to remain at FBI in a demoted role of his picking if he lied and said the demotion was voluntary, or remain in a lesser role of Wray's choice if he refused to lie. Instead, McCabe took terminal leave, meaning he was no longer one of the positions that the Attorney General or Acting Attorney General could terminate directly. As McCabe described it, Sessions didn't have the authority to fire McCabe.

Sessions publicly announced that he had terminated Plaintiff "[p]ursuant to [DOJ] Order 1202," but that did not give Sessions the authority to terminate employees in Plaintiff's position. DOJ Order 1202, promulgated pursuant to 5

U.S.C. § 3151, provides that the FBI Director alone has authority to terminate career FBI senior executives, except that the Attorney General and Deputy Attorney General retain authority to remove those who serve in certain enumerated “key positions.” After Defendant Wray removed Plaintiff from the role of Deputy Director in January 2018 and replaced him with Bowdich, Plaintiff remained a career FBI senior executive but did not serve in any of the “key positions” listed in DOJ Order 1202. Defendant Wray, as FBI Director, did not authorize Plaintiff’s termination and in fact previously refused Sessions’ request to terminate Plaintiff. Accordingly, Plaintiff was not, in fact, terminated before his retirement.

[snip]

Additionally, Sessions lacked any authority to terminate Plaintiff due to conflicts of interest and recusals, including Sessions’ March 2017 recusal from “investigations of any matters related in any way to the campaigns for President of the United States.” Defendants’ pretextual basis for Plaintiff’s termination arose from the OIG investigation of Plaintiff’s actions related to the 2016 U.S. presidential campaign, specifically his actions regarding campaign-related articles published in October 2016 by the *Wall Street Journal*. Sessions’ recusal, on its face, extended to the OIG investigation. Sessions’ recusal was therefore a “disability” under 28 U.S.C §508(a), meaning that he lacked qualification to participate in Plaintiff’s termination. As a result, Sessions had no authority to terminate Plaintiff.

The entire complaint is (as one would expect for a suit filed by four Arnold & Porter lawyers on behalf of a lawyer who happens to be a former top FBI official) very well lawyered in such a way that the legal issues are very narrow, even while invoking the entirety of Trump's obstructive behavior along the way.

The easiest way DOJ could make this go away would be to grant McCabe's request, to find that he had retired before he was fired, with the benefits accruing accordingly (McCabe refutes the findings of the DOJ IG investigation against him in more cursory fashion, though it's key to his due process claims and his allegations reflect badly on the well-respected Michael Horowitz). But to do that, DOJ would rob Trump of one of his favorite petty wins.

So they probably won't.