Hart, Rosemary (OLC)

From:	Hart, Rosemary (OLC)
Sent:	Thursday, June 8, 2017 3:14 PM
To:	Dreeben, Michael R (OSG)
Subject:	RE: Special Counsel consultation

No worries. I'll be here, with plenty to keep me busy.

-----Original Message-----
From: Dreeben, Michael R (OSG)
Sent: Thursday, June 8, 2017 3:13 PM
To: Hart, Rosemary (OLC) (b) (6) per OLC
Subject: Re: Special Counsel consultation

Sorry I'm late. I'll be there in 10.

> On Jun 8, 2017, at 12:33 PM, Hart, Rosemary (OLC) (b) (6) per OLC wrote:
>
> Great. See you then.
>
> Sent from my iPhone
>
>> On Jun 8, 2017, at 12:15 PM, Dreeben, Michael R (OSG) <mdreeben@jmd.usdoj.gov> wrote:
>>
>> Thanks, Rosemary. I'm following on some questions on the same topic as Lisa.
>>
>> 3:00 sounds fine. I'll come to you.
>>
>>> On Jun 8, 2017, at 11:52 AM, Hart, Rosemary (OLC) (b) (6) per OLC wrote:
>>>
>>> Hi, Michael. I spoke with Lisa Page (FBI -- Special Counsel staff) this morning about a related issue. Am happy to meet with you today. Anytime after 3 works for me. And you?
>>> Rosemary
>>>
>>> Sent from my iPhone
>>>
>>>> On Jun 8, 2017, at 11:36 AM, Dreeben, Michael R (OSG) <mdreeben@jmd.usdoj.gov> wrote:
>>>>
>>>> Hi Rosemary,
>>>>
>>>> As you may have heard, I am detailed to the Special Counsel. We are trying to determine what

>>>> As you may have heard, I am detailed to the Special Counsel. We are trying to determine what (b) (5) . I have more specific variations on those questions which we could discuss orally.
>>>>
>>>> (b) (5) ? (b) (5) ?
>>>>
>>>> If you have anything for me to read, and some time to discuss this sometime today, it would be great.
>>>>
>>>> Thanks,
>>>>
>>>> Michael

Hart, Rosemary (OLC)

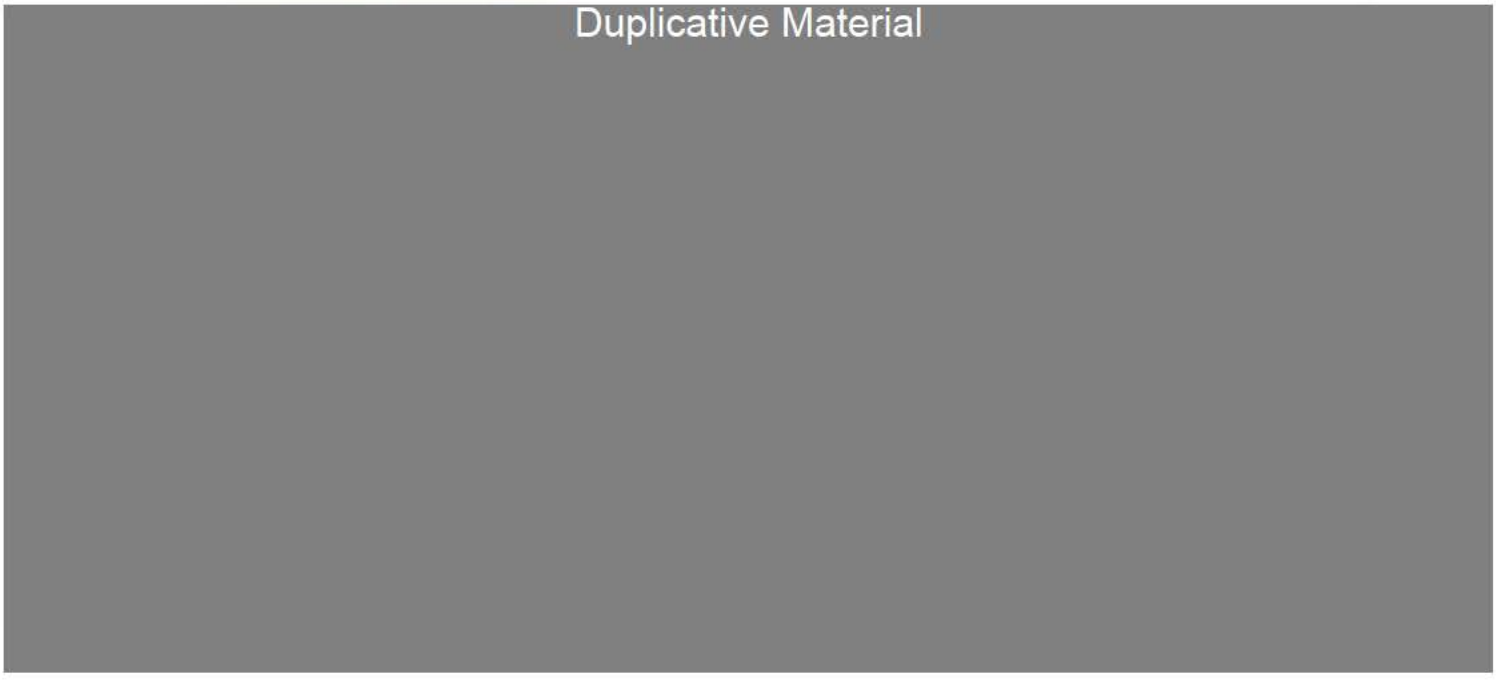
From: Hart, Rosemary (OLC)
Sent: Sunday, June 11, 2017 3:19 PM
To: Dreeben, Michael R (OSG)
Subject: Re: Questions

I will try for 3:30

Sent from my iPhone

On Jun 11, 2017, at 3:09 PM, Dreeben, Michael R (OSG) <mdreeben@jmd.usdoj.gov> wrote:

> Either works, but 3:30 may be a better bet. Let me see if I can track down a conference room.
>
> Thanks,
>
> Michael
>
> On Jun 11, 2017, at 2:44 PM, Hart, Rosemary (OLC) (b) (6) per OLC wrote:
>
> > Would 1:30 work for you?
> >
> > Or 3:30?
> >
> > Sent from my iPhone
> >
> > On Jun 11, 2017, at 1:04 PM, Dreeben, Michael R (OSG) <mdreeben@jmd.usdoj.gov> wrote:



Dreeben, Michael R (OSG)

From: Dreeben, Michael R (OSG)
Sent: Sunday, June 11, 2017 3:58 PM
To: Hart, Rosemary (OLC)
Subject: Re: Questions

Thanks and will do.

_____

Michael R. Dreeben
Deputy Solicitor General
United States Department of Justice
Washington, D.C. 20530
202-514-2255

Sent from my iPhone

On Jun 11, 2017, at 3:52 PM, Hart, Rosemary (OLC) (b) (6) per OLC wrote:

> We are on for 3:45 with John tomorrow. Let me know if you cannot work out a meeting space and I can check in OLC tomorrow.
> See you tomorrow!
>
> Sent from my iPhone
>
> On Jun 11, 2017, at 3:09 PM, Dreeben, Michael R (OSG) <mdreeben@jmd.usdoj.gov> wrote:

Duplicative Material

Document ID: 0.7.23922.83221

Dreeben, Michael R (OSG)

From: Dreeben, Michael R (OSG)
Sent: Monday, June 12, 2017 9:19 AM
To: Hart, Rosemary (OLC)
Subject: Re: Questions

5609. OSG conference room. Thanks

Michael R. Dreeben
Deputy Solicitor General
United States Department of Justice
Washington, D.C. 20530
202-514-2255

Sent from my iPhone

On Jun 12, 2017, at 9:09 AM, Hart, Rosemary (OLC) <(b) (6) per OLC> wrote:

> Let us know the room.
>
> **From:** Dreeben, Michael R (OSG)
> **Sent:** Monday, June 12, 2017 9:09 AM
> **To:** Hart, Rosemary (OLC) <(b) (6) per OLC>
> **Subject:** Re: Questions
>
> Thank you.
>
> Michael R. Dreeben
> Deputy Solicitor General
> United States Department of Justice
> Washington, D.C. 20530
> 202-514-2255
>
> Sent from my iPhone
>
> On Jun 12, 2017, at 8:56 AM, Hart, Rosemary (OLC) (b) (6) per OLC wrote:
>
> > That works for me. I'll loop in John and we can all be on the same page.
> >
> > **From:** Dreeben, Michael R (OSG)
> > **Sent:** Monday, June 12, 2017 8:54 AM
> > **To:** Hart, Rosemary (OLC) (b) (6) per OLC
> > **Subject:** Re: Questions
> >
> > Can we push to 4:00? If so that's when I have our room.
> >
> > Michael R. Dreeben
> > Deputy Solicitor General
> > United States Department of Justice
> > Washington, D.C. 20530
> > 202-514-2255

Document ID: 0.7.23922.83298

Sent from my iPhone

On Jun 11, 2017, at 3:52 PM, Hart, Rosemary (OLC) <(b) (6) per OLC> wrote:

Duplicative Material

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. PAUL J. MANAFORT, JR., *Defendant.*	Criminal No. 1:17-cr-00201-ABJ Judge Amy Berman Jackson **ORAL ARGUMENT REQUESTED**

DEFENDANT'S MOTION TO DISMISS THE SUPERSEDING INDICTMENT

Kevin M. Downing
(D.C. Bar #1013894)
Thomas E. Zehnle
(D.C. Bar #415556)
601 New Jersey Avenue, N.W.
Suite 620
Washington, D.C. 20001
kevindowning@kdowninglaw.com
tezehnle@gmail.com

Counsel for Defendant Paul J. Manafort, Jr.

March 14, 2018

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INTRODUCTION

This prosecution breaks sharply with a principle fundamental to this Nation's structure and traditions that the power to enforce criminal laws must be exercised by officers who are politically accountable to the people. The Nation briefly experimented with politically unaccountable "independent counsel" under the Ethics in Government Act of 1978, but that experiment proved disastrous. As a result, Congress with bipartisan support refused to renew the Act. The Department of Justice concomitantly revamped its regulations to ensure the Department's fidelity to the principle of political accountability. Those regulations still authorize the appointment of outside "special counsel" where conflicts of interest demand it. But the authority to make those appointments has been sharply limited. The appointments can be made only by politically accountable officials (the Attorney General or Acting Attorney General). The scope of the special counsel's jurisdiction must be limited by a specific factual statement identifying the matters to be investigated. And any expansion of authority beyond that original scope must be approved, following consultation, by a politically accountable official.

The order appointing the Special Counsel here exceeds those limits on appointment authority. Under Department of Justice regulations, the Acting Attorney General can appoint special counsel only to investigate specifically identified issues. Jurisdiction to investigate other matters beyond that scope including matters arising in the course of the investigation can be added only following consultation with and approval by the Attorney General or Acting Attorney General. But the appointment order here purports to give the Special Counsel power to investigate a specifically identified matter ***and*** anything that arises in the course of the investigation, without further consulting and obtaining approval from the Attorney General or Acting Attorney General. The regulations do not allow for such an expansive appointment.

That departure from the boundaries of the appointment authority could not be more stark here. The factual statement in the appointment order directs the Special Counsel to investigate a specific matter alleged coordination between the Russian government and the Trump campaign during the 2016 election. But the appointment order also purports to give the Special Counsel jurisdiction to investigate and prosecute anything else he might discover during the course of the original investigation. That further power is not merely tantamount to a blank check. It is a blank check the Special Counsel has cashed, repeatedly. The original and superseding indictments do not focus in the slightest on alleged coordination between the Russian government and the Trump campaign during the 2016 election, or even Mr. Manafort's brief involvement in the campaign. They focus instead on Mr. Manafort's consulting work in Ukraine, which ended in 2014, years before the Trump campaign even launched; on Mr. Manafort's bank accounts and tax filings from 2006 to 2014, which have no connection to the Russian government and again predate the Trump campaign by years; and on Mr. Manafort's personal expenditures from 2006 to 2014, which likewise have no connection to the Russian government and predate the Trump campaign and Mr. Manafort's brief involvement in it by years. Those issues simply have no connection to alleged coordination with the Russian government or the 2016 presidential election.

Even apart from the invalidity of the appointment order, the indictment goes well beyond any authority that order purports to grant. While the appointment order purports to empower the Special Counsel to investigate and prosecute matters directly arising from the investigation, the charges go well beyond that scope. Indeed, the charges cover alleged acts that politically accountable prosecutors ***already knew*** about and had ***decided not to prosecute*** years ago. That old news could not have arisen from the Special Counsel's investigation. Each step the Special

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Counsel has taken against Mr. Manafort has been without lawful authority. As a result, this case must be dismissed.

While dismissal in the case at bar is not a sufficient remedy, it is a step in the right direction. After being indicted in this jurisdiction, Mr. Manafort was threatened with additional indictments properly venued in other jurisdictions, covering still more alleged conduct with no relation to alleged coordination with the Russian government. He has now been indicted twice in another jurisdiction on precisely such charges. Mr. Manafort thus faces a game of criminal-procedure whack-a-mole against a Special Counsel whose massive resources he cannot possibly hope to match. While only declaratory or injunctive relief can remedy that injury and Mr. Manafort has sought that relief in a civil suit relief from this indictment is necessary and proper as well. The Special Counsel's lack of authority deprives this Court of jurisdiction to hear this case. Mr. Manafort's motion should be granted, and the superseding indictment should be dismissed.

BACKGROUND

I. LEGAL BACKGROUND

A. Political Accountability

"[S]afety in the republican sense," the Framers understood, requires "a due dependence on the people, and a due responsibility." *The Federalist* No. 70, at 422 (Hamilton) (C. Rossiter ed., 1961). Indispensable to that principle is the "political accountability" of public officers, which is "essential to our liberty and republican form of government." *Alden v. Maine*, 527 U.S. 706, 751 (1999); *see also, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) ("Since 1789, the Constitution has been understood to empower the President to keep [public] officers accountable."); *cf. Pearson v. Callahan*, 555 U.S. 223, 231 (2009)

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(recognizing the "important interest[]" of "hold[ing] public officials accountable when they exercise power irresponsibly").

Congress briefly departed from that principle of public accountability when it enacted the independent counsel statute. *See* Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824. That now-infamous law allowed attorneys outside the Department of Justice ("DOJ") to devote nearly unbounded resources to pursuing Executive Branch officials without meaningful accountability to the President or the Executive Branch. A bipartisan consensus soon recognized that the act was a "disastrous failure." Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 Geo. L.J. 2267, 2281-83 (1998). Kenneth Starr, arguably the most powerful independent counsel ever appointed, thus advised Congress that the statute was "structurally unsound" and "constitutionally dubious." *The Future of the Independent Counsel Act: Hearing Before the S. Comm. on Gov't Affairs*, 106th Cong. 425 (1999). Attorney General Janet Reno agreed: The law "create[d] a prosecutor who is unlike any other" one who had "no competing public duties" and was not "responsible to the people." *Id.* at 244, 246. According to General Reno, "[i]t can't get any worse." *Id.* at 261.

In 1999, Congress refused to reauthorize the statute, expressing a "bipartisan judgment . . . that the Independent Counsel was a kind of constitutional Frankenstein's monster, which ought to be shoved firmly back into the ice from which it was initially untombed." Adrian Vermeule, Morrison v. Olson *Is Bad Law*, LAWFARE (June 9, 2017). That law had created "unaccountable prosecutors wielding infinite resources whenever there is a plausible allegation of a technical crime." Gerard E. Lynch, *The Problem Isn't in the Starrs But in a Misguided Law*, WASH. POST, Feb. 22, 1998, at C3. The statute was "utter[ly] incompatib[le] . . . with our constitutional traditions." *Morrison v. Olson*, 487 U.S. 654, 709 (1988) (Scalia, J., dissenting).

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B. The Special Counsel Regulations

As the independent counsel statute was set to lapse in 1999, Congress undertook a bipartisan project to consider how to prevent similar abuses going forward. *See generally* Dick Thornburgh, Mark H. Tuohey III & Michael Davidson, *Attorney General's Special Counsel Regulations*, BROOKINGS (Sept. 15, 1999). The DOJ eventually promulgated regulations designed to accommodate the need to appoint outside "special counsel" at least where ordinary prosecutors in the Executive Branch may have conflicts of interest with the parallel need to vest responsibility and oversight in politically accountable officials. *See* 28 C.F.R. §§ 600.1-600.10 (the "Special Counsel Regulations").

The Special Counsel Regulations achieve that goal by imposing careful limits on the authority to appoint special counsel. Only politically accountable federal officers *i.e.*, the Attorney General or Acting Attorney General may make such appointments. 28 C.F.R. § 600.1.[1] And the jurisdiction the Attorney General or Acting Attorney General can grant through an appointment is strictly limited. Under § 600.4(a), the grant of "[o]riginal jurisdiction" to special counsel must provide "a ***specific factual statement*** of the matter to be investigated." *Id.* § 600.4(a) (emphasis added). Section 600.4(a) further provides that the grant of original jurisdiction "shall . . . include" authority to investigate and prosecute obstruction efforts *i.e.*, "federal crimes committed in the course of, and with intent to interfere with, the Special Counsel's investigation." *Id.* But the Special Counsel Regulations ***do not*** authorize the Attorney General or Acting Attorney General to concomitantly grant any other authority as part of the special counsel's "original jurisdiction." *See* 28 C.F.R. § 600.4.

[1] As here, "in cases in which the Attorney General is recused, the Acting Attorney General[ ] will appoint a Special Counsel when he or she determines that criminal investigation of a person or matter is warranted." 28 C.F.R. § 600.1.

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The Special Counsel Regulations do the opposite. They provide that, to obtain jurisdiction to investigate or prosecute any other matter, a special counsel must request "additional jurisdiction" from the Attorney General or Acting Attorney General, as appropriate. *Id.* § 600.4(b). "If in the course of his or her investigation the Special Counsel concludes that additional jurisdiction beyond that specified in his or her original jurisdiction is necessary . . . he or she ***shall consult with the Attorney General [or Acting Attorney General], who will determine whether to include the additional matters*** within the Special Counsel's jurisdiction or assign them elsewhere." *Id.* (emphasis added).

Those limits on the appointment authority in particular, denying the Attorney General and Acting Attorney General power to grant original jurisdiction that extends beyond a specific factual statement were born of experience. The independent counsel statute had set "no practical limits" on the scope of an independent counsel investigation. *The Future of the Independent Counsel Act: Hearing Before the S. Comm. on Governmental Affairs*, 106th Cong. 245 (1999) (statement of Janet Reno, Att'y Gen., U.S. Dep't of Justice). As a result, an investigation undertaken for one reason often transmogrified into an in-depth probe on unrelated matters. Armed with unlimited resources, focused on a handful of targets, and unencumbered by competing obligations or politically accountable oversight, independent counsel faced pressure to "artificially . . . prosecute" if ***anything*** seemed prosecutable. *Id.*

That unbounded exercise of prosecutorial authority is wholly incompatible with our constitutional tradition. "Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided ***solely*** by their sense of public responsibility for the attainment of justice." *Young v. U.S. ex rel. Vuitton et*

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Fils S.A., 481 U.S. 787, 814 (1987) (emphasis added). The Special Counsel Regulations set out to ensure precisely that political accountability for the attainment of justice.

C. The Appointment Order at Issue Here

This case arises out of Acting Attorney General Rod Rosenstein's May 17, 2017 order naming Robert S. Mueller III as Special Counsel. Office of the Deputy Att'y Gen., *Appointment of Special Counsel To Investigate Russian Interference with the 2016 Presidential Election and Related Matters* (May 17, 2017) ("Appointment Order"). In early 2017, the DOJ revealed that it was investigating allegations that Donald J. Trump's presidential campaign coordinated with the Russian government to influence the 2016 presidential election. Matt Apuzzo, Matthew Rosenberg & Emmarie Huetteman, *Comey Confirms Inquiry on Russia and Trump Allies*, N.Y. TIMES, Mar. 21, 2017, at A1. The Attorney General recused himself from any investigations into that subject in March 2017, appointing the Deputy Attorney General as Acting Attorney General with respect to the investigation. Press Release, U.S. Dep't of Justice, *Attorney General Sessions Statement on Recusal* (Mar. 2, 2017). As Acting Attorney General, the Deputy Attorney General then issued the Appointment Order at issue here.

Paragraphs (b)(i) and (b)(iii) of the Appointment Order set out the Special Counsel's "[o]riginal jurisdiction." 28 C.F.R. § 600.4(a). In particular, paragraph (b)(i) provides "a ***specific factual statement*** of the matter to be investigated," *id.* § 600.4(a) (emphasis added), empowering the Special Counsel to pursue "any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump," Appointment Order ¶ (b)(i). And paragraph (b)(iii) of the Appointment Order provides that the Special Counsel may also pursue "any other matters within the scope of 28 C.F.R. § 600.4(a)," *i.e.*, efforts to obstruct the authorized investigation. Appointment Order ¶ (b)(iii).

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Paragraph (b)(ii) of the Appointment Order, however, purports to grant the Special Counsel further authority. It states that he may also investigate and prosecute "***any matters that arose or may arise*** directly from the investigation." Appointment Order ¶(b)(ii) (emphasis added). As explained below, the Acting Attorney General has no authority to grant that power *ab initio* as part of the Special Counsel's original jurisdiction. *See* pp. 14-21, *infra*. To the contrary: Grants of "[o]riginal jurisdiction" are limited to the "specific factual statement of the matter to be investigated" and obstruction efforts. 28 C.F.R. § 600.4(a). To investigate any matter beyond that including matters that arise during the course of the investigation a grant of additional jurisdiction is required. The Special Counsel must "consult with the [Acting] Attorney General" to obtain that "additional jurisdiction." *See id.* § 600.4(b). And the Acting Attorney General must "determine whether to include the additional matters within the Special Counsel's jurisdiction or assign them elsewhere." *Id.* Granting the Special Counsel jurisdiction *ex ante* to pursue any matters that "arose or may arise directly from the investigation" bypasses the required consultation; it bypasses the Attorney General's issue-specific determination; and, with those, it bypasses the decision by a politically accountable official that the Special Counsel Regulations were designed to ensure. Appointment Order ¶(b)(ii).

II. PROCEEDINGS BEFORE THIS COURT

A. The Investigation

Once appointed, the Special Counsel immediately began investigating matters beyond alleged coordination between the Russian government and the Trump presidential campaign. In particular, the Special Counsel focused on Mr. Manafort's foreign consulting work in Ukraine, which had ended in 2014, Mr. Manafort's bank accounts and tax filings from 2006 to 2014, and Mr. Manafort's personal expenditures from 2006 to 2014. Dkt. 202 ("Superseding Indictment")

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¶¶32-34. Those issues had no connection to any alleged coordination with the Russian government. Nor did they have any relation to the 2016 presidential election.

In July 2017, the Special Counsel applied for, obtained, and executed an invasive, early-morning search of Mr. Manafort's home in Alexandria, Virginia. Carol D. Leonnig, Tom Hamburger & Rosalind S. Helderman, *FBI Conducted Predawn Raid of Former Trump Campaign Chairman Manafort's Home*, WASH. POST, Aug. 9, 2017. According to the Special Counsel, that Appointment Order grants him jurisdiction and authority to obtain materials regarding purported potential tax and white-collar crimes committed on or after January 1, 2006 nearly a decade before the Trump presidential campaign began, *see* Press Release, The American Presidency Project, *Donald J. Trump Declares Candidacy for President of the United States* (June 16, 2015). Relying on that same authority, the Special Counsel issued more than 100 subpoenas related to Mr. Manafort, requesting records from as far back as January 1, 2005. All of those actions the search and the subpoenas related to alleged dealings that have been widely reported upon since at least 2007. *See* pp. 29-30 & n.7, *infra*.

B. The Indictment and Superseding Indictments in This Court

On October 27, 2017, the Special Counsel signed a nine-count indictment against Mr. Manafort relating to Mr. Manafort's consulting work for the Ukrainian government, a Ukrainian political party, and a Ukrainian politician between 2006 to 2014. Dkt. 13 ¶¶1-6. The indictment did not accuse Mr. Manafort of any crimes involving the Russian government or the 2016 campaign. *See generally* Dkt. 13.

The Special Counsel has since signed a series of superseding indictments, most recently on February 23, 2018. *See* Dkts. 201 & 202. Once again, the operative Superseding Indictment focuses on Mr. Manafort's consulting work in Ukraine. Dkt. 202 ¶¶1-6. It accuses Mr.

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Manafort of three schemes that have no connection to either the Russian government or the 2016 election.

First, the Superseding Indictment alleges that Mr. Manafort committed financial and tax offenses by sending wire transfers from certain foreign countries other than Russia namely, Cyprus, the United Kingdom, and the Grenadines. Superseding Indictment ¶¶15-18. The alleged wire transfers took place from 2008 to 2014, ending at least a year before the Trump campaign launched. *Id.*; *see* The American Presidency Project, *supra*.

Second, the Superseding Indictment alleges that, from 2006 to 2014, Mr. Manafort assisted the Ukrainian government, a Ukrainian political party, and a Ukrainian politician, Viktor Yanukovych, but failed to register and disclose his activities, in violation of 22 U.S.C. §§612, 618(a)(l), and 18 U.S.C. §§2, 371. Superseding Indictment ¶¶20, 37-39, 44-45. The topics of Mr. Manafort's consulting allegedly included "Ukraine sanctions, the validity of Ukraine elections," and the imprisonment of Mr. Yanukovych's Ukrainian political rival, Yulia Tymoshenko. *Id.* ¶¶23, 40-41. Finally, the Superseding Indictment alleges that Mr. Manafort retained a United States law firm to report about Ms. Tymoshenko's criminal trial in Ukraine and then hired a "group of former senior European politicians to take positions favorable to Ukraine." *Id.* ¶¶23, 29-31. None of Mr. Manafort's consulting work is alleged to involve the Russian government or the 2016 election. *See id.*

Third, the Superseding Indictment charges Mr. Manafort with tax violations for failing to disclose his interests in foreign bank accounts, none of which are alleged to be in Russia. Superseding Indictment ¶¶32-34. The alleged failures to disclose took place between 2008 and 2014 years before Mr. Manafort's brief involvement in the Trump campaign or the campaign itself. *Id.* ¶34; *see* The American Presidency Project, *supra*; Meghan Keneally, *Timeline of Paul*

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Manafort's Role in the Trump Campaign, ABCNEWS.COM, Oct. 30, 2017, http://abcnews.go.com /Politics/timeline-paul-manaforts-role-trump-campaign/story?id 50808957.

The Superseding Indictment nowhere mentions any "Russian government[] efforts to interfere in the 2016 presidential election," "any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump," or any acts to interfere with an investigation into those two subjects. *See generally* Appointment Order.

C. The Threat of Additional Investigations and Prosecutions, Mr. Manafort's Civil Suit, and the New Indictments in Another Jurisdiction

In January 2018, Mr. Manafort filed a civil action against the Special Counsel seeking to set aside the Appointment Order and all actions taken against Mr. Manafort pursuant to that Order. Complaint, *Manafort v. Dep't of Justice*, No. 1:18-CV-00011-ABJ, Dkt. 1 (D.D.C. Jan. 3, 2018) ("Compl."). The complaint includes two counts. Count I alleges that the Appointment Order Paragraph (b)(ii) in particular exceeds the Acting Attorney General's authority under the Special Counsel Regulations. Compl. ¶¶52-53. Specifically, it alleges that the Acting Attorney General lacked power to give the Special Counsel original jurisdiction to veer wide of the specific factual statement of the matter to be investigated and pursue any matter arising during his investigation. *Id.* ¶¶50-59. Count II incorporates the allegations in Count I and further alleges that even if the Acting Attorney General had authority to grant that expansive original jurisdiction the Special Counsel's actions exceed that scope. *Id.* ¶¶62-63. The complaint thus also requests that the Court enjoin the Special Counsel from investigating matters outside the specific factual description of the matter to be investigated. *Id.* at 17 (prayer for relief).

The government moved to dismiss Mr. Manafort's complaint for failure to state a claim. Defs.' Mot. To Dismiss, *Manafort v. Dep't of Justice*, No. 1:18-CV-00011-ABJ, Dkt. 16 (D.D.C.

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Feb. 2, 2018). "First and most fundamentally," the government claimed, the civil suit should be dismissed because a motion to dismiss the indictment in the criminal case would provide Mr. Manafort an "adequate legal remedy." Defs.' Mem. in Support of Mot. To Dismiss, *Manafort v. Dep't of Justice*, No. 1:18-CV-00011-ABJ, Dkt. 16-1, at 2 (D.D.C. Feb. 2, 2018). "If Manafort believes the Special Counsel lacks authority to prosecute him," the government argued, "he is free to raise that objection in his criminal action by filing a motion to dismiss the indictment pursuant to Rule 12 of the Federal Rules of Criminal Procedure." *Id.* Mr. Manafort opposed the motion and responded that dismissing the Superseding Indictment would not provide an adequate remedy: It could not prevent the Special Counsel from exercising *ultra vires* power in "multiple investigations, in multiple jurisdictions, on multiple matters," or from continuing to return superseding indictments or filing multiple cases in this Court, as the Special Counsel had threatened. Pl.'s Mem. of Law in Opp. to Defs.' Mot. To Dismiss, *Manafort v. Dep't of Justice*, No. 1:18-CV-00011-ABJ, Dkt. 24, at 16 (D.D.C. Feb. 16, 2018). A hearing on the government's motion is set for April 4, 2018.[2]

During briefing on the motion to dismiss, the Special Counsel in fact brought different charges in a different jurisdiction. In February 2018, the Special Counsel obtained an eighteen-count indictment against Mr. Manafort in the Eastern District of Virginia. Indictment, *United States v. Manafort*, No. 1:18-cr-00083-TSE-1, Dkt. 1 (E.D. Va. Feb. 22, 2018) (originally filed under seal on February 13, 2018). Like the indictments before this Court, those charges have no

[2] As Mr. Manafort has explained in the civil suit, the government's contention that dismissal of this indictment constitutes an "adequate" remedy is mistaken. Pl.'s Mem. of Law in Opp. to Defs.' Mot. To Dismiss, *supra*, at 31-32; *see Juluke v. Hodel*, 811 F.2d 1553, 1558-59 (D.C. Cir. 1987). Nonetheless, Mr. Manafort accepts the government's invitation to file this motion to obtain any relief it can provide.

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connection to alleged coordination between the Russian government and the Trump presidential campaign.

Barely a week later, the Special Counsel obtained a superseding indictment in that jurisdiction charging Mr. Manafort based on allegations that again have no connection to the Russian government or the Trump presidential campaign. Superseding Indictment, *United States v. Manafort*, No. 1:18-cr-00083-TSE-1, Dkt. 9 (E.D. Va. Feb. 22, 2018). Instead, the indictment in the Eastern District of Virginia focuses (once again) on Mr. Manafort's consulting efforts involving Ukraine years before the 2016 election. *Id.* ¶¶1-2. And it claims that Mr. Manafort and his business partner, Richard Gates, defrauded certain financial institutions in the United States. *Id.* ¶3.

ARGUMENT

Having endured the excesses of prosecutorial authority without corresponding political accountability under the Ethics in Government Act, the DOJ promulgated the Special Counsel Regulations that limit the Attorney General's, and the Acting Attorney General's, authority to appoint and accord jurisdiction to special counsel. The Appointment Order here exceeds those careful limits: It purports to afford the Special Counsel original jurisdiction that the Acting Attorney General has no authority to grant. Because the Acting Attorney General had no authority to grant the Special Counsel that original jurisdiction, the Special Counsel had no authority to exercise it. The Superseding Indictment, moreover, extends beyond even the scope of jurisdiction the Appointment Order purports to grant.

Under those circumstances, dismissal of the indictment is warranted. Federal Rule of Criminal Procedure 12(b)(2) permits a defendant to make "[a] motion that the court lacks jurisdiction . . . at any time while the case is pending." Fed. R. Crim. P. 12(b)(2). It is well established that, when the attorney who initiated a criminal proceeding is "without authorization

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to appear on behalf of the United States," "jurisdiction is lacking." *United States v. Providence Journal Co.*, 485 U.S. 693, 708 (1988). The United States agrees. Opposing Mr. Manafort's civil suit, it urged that Mr. Manafort has an "adequate remedy" in this criminal action: Mr. Manafort's claim that "the Special Counsel lacks authority," it declared, should be raised in this "criminal action by filing a motion to dismiss the indictment pursuant to Rule 12 of the Federal Rules of Criminal Procedure." Defs.' Mem. in Support of Mot. To Dismiss, *supra*, at 2. For similar reasons, dismissal is also warranted based on "defect[s] in instituting the prosecution" and defects in "the indictment" under Fed. R. Crim. P. 12(b)(3).

I. THE SUPERSEDING INDICTMENT MUST BE DISMISSED BECAUSE THE SPECIAL COUNSEL'S APPOINTMENT WAS *ULTRA VIRES*

A. The Acting Attorney General's Power To Grant Jurisdiction Is Limited to Specifically Identified Matters and Related Obstruction Efforts

In 1999, the DOJ promulgated the Special Counsel Regulations, 28 C.F.R. §§ 600.1-600.10, "to replace the procedures set out in the Independent Counsel Reauthorization Act of 1994." *Office of Special Counsel*, 64 Fed. Reg. 37038, 37038 (July 9, 1999). Unlike the old independent counsel system, the Special Counsel Regulations do not permit a special counsel's jurisdiction to be "wide in perimeter and fuzzy at the borders." *United States v. Wilson*, 26 F.3d 142, 148 (D.C. Cir. 1994). The Special Counsel Regulations strictly circumscribe the Attorney General's or Acting Attorney General's authority to appoint an outside "special counsel," and they set clear requirements for such an appointment to ensure proper political accountability. *See* 28 C.F.R. § 600.4.

"Two vexing problems under the Independent Counsel Act" that the Special Counsel Regulations sought to address were "the tendency of some investigations to sprawl beyond the reason for their initiation and to do so without the discipline of limits on the public resources they consume." Thornburgh, *et al.*, *supra* (alteration and internal quotation marks omitted). To

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prevent those problems from recurring, the Special Counsel Regulations grant authority to appoint special counsel only to politically accountable federal officers the Attorney General or the Acting Attorney General if the Attorney General is recused. *See* 28 C.F.R. § 600.1. Thus, "ultimate responsibility for the matter [assigned to a special counsel] and how it is handled will continue to rest with the Attorney General (or the Acting Attorney General if the Attorney General is personally recused in the matter)." *Office of Special Counsel*, 64 Fed. Reg. at 37038. Under the Special Counsel Regulations, moreover, the Attorney General and Acting Attorney General only have authority to grant a special counsel jurisdiction of limited and carefully delineated scope.

In particular, 28 C.F.R. § 600.4(a) defines and limits the Attorney General's or Acting Attorney General's authority to grant special counsel "[o]riginal jurisdiction" to investigate and prosecute. *Id.* Under that provision, the Attorney General and Acting Attorney General are empowered to grant a special counsel "[o]riginal jurisdiction" only with respect to "***a specific factual statement of the matter to be investigated.***" *Id.* (emphasis added); *see Office of Special Counsel*, 64 Fed. Reg. at 37039 ("[A] Special Counsel's jurisdiction will be stated as an investigation of ***specific facts***." (emphasis added)). The only other jurisdiction that a special counsel may be granted as part of his or her original jurisdiction is "authority to investigate and prosecute federal crimes committed in the course of, and with intent to interfere with, the Special Counsel's investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses; and to conduct appeals arising out of the matter being investigated and/or prosecuted." *Office of Special Counsel*, 64 Fed. Reg. at 37039. Beyond those categories, however, the Attorney General or Acting Attorney General has no authority to grant original jurisdiction and a special counsel has no investigatory or prosecutorial power except as set forth in the specific factual statement of the matter to be investigated.

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The provision addressing "additional jurisdiction," 28 C.F.R. § 600.4(b), reinforces that limit. It provides: "If ***in the course of his or her investigation*** the Special Counsel concludes that additional jurisdiction beyond that specified in his or her original jurisdiction is necessary," he or she must obtain "additional jurisdiction" to investigate those matters from the Attorney General or Acting Attorney General as appropriate. *Id.* (emphasis added). That "additional jurisdiction" may only be granted after the special counsel "***consult[s] with the Attorney General [or Acting Attorney General]***," and after the Attorney General or Acting Attorney General "***determine[s]*** whether to ***include the additional matters*** within the Special Counsel's jurisdiction or assign them elsewhere." *Id.* (emphasis added). When the special counsel, in the course of investigating matters set out in the grant of original jurisdiction, "conclude[s] that investigating otherwise ***unrelated allegations*** against a central witness in the matter is necessary to obtain cooperation," or "come[s] across evidence of additional, ***unrelated crimes*** by targets of his or her investigation," the special counsel should "report such matters to the Attorney General [or Acting Attorney General], and the Attorney General [or Acting Attorney General] w[ill] decide whether to grant the Special Counsel jurisdiction over the additional matters." *Office of Special Counsel*, 64 Fed. Reg. at 37039 (emphasis added).

The Special Counsel Regulations thus could not be clearer. For "[o]riginal jurisdiction," the Attorney General's or Acting Attorney General's power to grant investigatory authority is limited to a specific factual statement and associated obstruction efforts. Further authority cannot be granted to a special counsel in the first instance. Instead, any "additional jurisdiction" may be granted only following a specific request from a special counsel, consultation with the Attorney General or Acting Attorney General, and the Attorney General's or Acting Attorney General's decision to grant that authority.

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That structure serves a critical role it ensures that any decision regarding expanding the ***scope*** of an investigation is made by politically accountable officials. Under the former Ethics in Government Act, independent counsel investigations became roving commissions, with ever-expanding scope, uncontrolled by politically accountable officials or competing priorities. *See* p. 4, *supra*. By restricting grants of original jurisdiction to specific factual statements, the Special Counsel Regulations prevent those excesses, ensuring that a politically accountable officer is responsible for the investigation's scope. And by requiring a separate grant of any further jurisdiction to address any matter that arose during the course of the investigation, for example the Special Counsel Regulations ensure that any expansions are considered by and remain the responsibility of that same politically accountable official. Together, those provisions prevent special counsel investigations from becoming unsupervised roving commissions, "strik[ing]" the right "balance between independence and accountability." *Office of Special Counsel*, 64 Fed. Reg. at 37038.

B. The Appointment Order Exceeds the Acting Attorney General's Authority Under the Special Counsel Regulations

The Appointment Order cannot be reconciled with those careful limits on the appointment authority or the assurances of accountability they serve. The "[o]riginal jurisdiction" conveyed in the Appointment Order includes language that resembles a "specific factual statement of the matter to be investigated." 28 C.F.R. § 600.4(a). In particular, paragraph (i) of the Appointment Order authorizes the Special Counsel to investigate "any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump." Appointment Order ¶(b)(i). But Paragraph (b)(ii) goes beyond anything that might qualify as a specific factual statement. It purports to grant the Special

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Counsel further jurisdiction over "***any matters*** that ***arose or may arise*** directly from the investigation." *Id.* ¶(b)(ii) (emphasis added).

The Acting Attorney General cannot grant such authority at the outset. The Regulations could not be clearer: "Original jurisdiction" is limited to the matters set forth in a specific factual statement and efforts to obstruct the investigation of those matters. 28 C.F.R. §600.4(a); *see* p. 5, *supra*. Other matters that arise during the course of the investigation do not qualify. To the contrary, if other matters arise during the investigation, and the Special Counsel wishes to pursue them, he must consult the Acting Attorney General and obtain "additional jurisdiction." 28 C.F.R. §600.4(b); *see* pp. 5-6, *supra*. The Regulations do not give the Acting Attorney General authority to grant original jurisdiction beyond the specific factual statement to include *ex ante* jurisdiction over anything that might be uncovered in the process of that investigation. Yet the Appointment Order purports to do just that. In doing so, it eliminates the requirement that politically accountable officers approve expansions to the scope of the investigation and with it the political accountability the Special Counsel Regulations were designed to ensure.

Far from constituting a "specific factual statement of the matter to be investigated," paragraph (b)(ii) is a blank check. The category "any matters that arose or may arise directly from the investigation" could hardly be more expansive. *See Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' "). Whatever the Special Counsel might come across in the investigation is covered no matter how far afield he strays.

The Special Counsel Regulations, of course, do provide the Special Counsel with original jurisdiction to investigate or prosecute ***obstruction*** and other efforts ***to impede*** the investigation unlawfully. *See* 28 C.F.R. §600.4(a). But the authorization to investigate "any" matters that "arose or may arise" during the course of the investigation is not so limited. It extends to

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anything that may arise, whether obstruction or not. *See, e.g.*, *In re Espy*, 145 F.3d 1365, 1368 (D.C. Cir. 1998) (per curiam) (authority to investigate "federal crimes . . . that may arise out of the above described matter" such as "perjury" and "obstruction" does not encompass the "power to investigate . . . otherwise unrelated allegations," even if they involve the same "prospective subject" and "common witnesses").

Perhaps recognizing this fatal defect in the Appointment Order, the government asserted in the civil case that the Acting Attorney General had authorized an expansion of the Special Counsel's jurisdiction to include additional matters. In particular, it cited the Acting Attorney General's February 2018 Congressional testimony. Defs.' Mem. in Support of Mot. To Dismiss, *supra*, at 34. But that assertion is not credible. The Acting Attorney General's ambiguous testimony fails to state whether he ever "expand[ed] the scope of the original [jurisdiction]" set out in the Appointment Order. Ex. to Defs.' Mem. in Support of Mot. To Dismiss, at 29. Instead, he testified that he would have to "check and get back to you as to whether or not we considered particular issues ***to be a clarification*** [of the Special Counsel's original jurisdiction] or an expansion" of jurisdiction. *Id.* at 31 (emphasis added). The Acting Attorney General thus conceded that he may merely have "clarifi[ed]" that the indictment before the Court was within the purported grant of original jurisdiction a grant that went well beyond the Acting Attorney General's authority to convey original jurisdiction under the Regulations. Any claim that the Acting Attorney General was timely consulted, and timely granted "additional jurisdiction" for the matters charged in the Superseding Indictment, moreover, is belied by the language the Acting Attorney General intentionally inserted in the Appointment Order itself language that rids him of responsibility to manage the scope of the Special Counsel's investigation.

The government has also argued that the Special Counsel was authorized to investigate activity unrelated to alleged coordination between the Russian government and the Trump

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campaign because the Appointment Order granted him jurisdiction "to conduct the investigation confirmed by then-FBI Director James B. Comey in testimony before the House Permanent Select Committee on Intelligence on March 20, 2017." Appointment Order; Defs.' Mem. in Support of Mot. To Dismiss, *supra*, at 33. But that construction makes no sense: Any supposed tax and white-collar crimes committed on or after ***January 1, 2006—about a decade before the Trump presidential campaign was launched*** cannot conceivably be thought to "arise out of" either Mr. Comey's or the Special Counsel's investigation (especially when those matters were well known to the government before the Russia investigation began). *See* pp. 29-30 & n.7, *infra*. There is no construction under which pre-existing matters, known to the government, could possibly have arisen out of an investigation that started almost a decade later. Indeed, there is no indication that the Special Counsel has ***ever*** investigated Mr. Manafort for the specific matters within the Special Counsel's original jurisdiction alleged "coordination [with] the Russian government" in connection with the 2016 presidential campaign. Appointment Order ¶(b)(i). The Special Counsel's actions against Mr. Manafort could not have "arise[n] directly from" an underlying investigation that never took place.

Far from exercising the limited appointment powers provided by the Special Counsel Regulations, the Appointment Order purports to give the Special Counsel prosecutorial authority that is strikingly broad. He is not confined to a specific factual statement. He is supposedly granted *carte blanche* to investigate and prosecute "any matters" he may stumble across during the course of investigating purported coordination between the Trump campaign and the Russian government. Appointment Order ¶¶(b)(i)-(ii). The Order thus permits the sort of politically unaccountable, "sprawl[ing]" investigation that the Special Counsel Regulations were expressly designed to prevent. Thornburgh, *et al.*, *supra*.

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In doing so, moreover, the Order purports to outsource matters that should not be outsourced. Because prosecution ordinarily should be the domain of politically accountable officers within the DOJ, the Special Counsel Regulations permit appointment of special counsel only where a "conflict of interest" or another "extraordinary circumstance[]" precludes the DOJ from conducting an investigation itself. 28 C.F.R. § 600.1(a). But there is no such impediment to the DOJ's pursuit of the matters charged in the Superseding Indictment (such as Mr. Manafort's consulting activities). Indeed, the DOJ already investigated that conduct and chose not to pursue it. *See* pp. 29-30, *infra*. The effort to hand such matters over to the Special Counsel through an *ex ante* grant of jurisdiction thus eliminates political accountability without any corresponding justification. The Special Counsel Regulations do not afford the Acting Attorney General that power. He may confer "[o]riginal jurisdiction" only for the matters set forth in a specific factual statement and for efforts to obstruct the investigation into those matters. 28 C.F.R. § 600.4(a); *see* pp. 5-6, *supra*. The Regulations do not authorize him to wash his hands of accountability by granting the Special Counsel *ex ante* jurisdiction over any additional matters the Special Counsel may choose to pursue.

C. The Superseding Indictment Must Be Dismissed for Want of Jurisdiction

Because the Acting Attorney General lacked authority to ***grant*** the broad prosecutorial powers contained in the Appointment Order, the Special Counsel lacks authority to ***wield*** those powers. Where a "special prosecutor lacks . . . authority," the Court "must dismiss . . . for want of jurisdiction." *United States v. Providence Journal Co.*, 485 U.S. 693, 699 (1988); *see United States v. Singleton*, 165 F.3d 1297, 1299-1300 (10th Cir. 1999) ("[A] federal court cannot even assert jurisdiction over a criminal case unless it is filed and prosecuted by the United States Attorney or a properly appointed [attorney]."); *United States v. Bennett*, 464 F. App'x 183, 184-85 (4th Cir. 2012) ("A federal district court is without jurisdiction in a criminal prosecution

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where the Government lacks an authorized representative."); *Mehle v. Am. Mgmt. Sys., Inc.*, 172 F. Supp. 2d 203, 205 (D.D.C. 2001) ("Actions that are brought by government officials or agencies who are not authorized to represent the United States must be dismissed for lack of jurisdiction." (citing *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 92, 99 (1994))).[3]

1. That principle controls this case. The Special Counsel derives any authority he has to bring these charges from the Appointment Order issued by the Acting Attorney General. *See* Appointment Order (citing 28 U.S.C. § 515). But the Acting Attorney General's appointment authority comes from the Special Counsel Regulations. Under those Regulations, the appointment is clearly *ultra vires* insofar as it purports to grant the Special Counsel jurisdiction extending beyond the specific factual statement to any matter the Special Counsel may come across in his investigation. *See* pp. 17-21, *supra*. Because those Regulations "remain[ ] in force[,] the Executive Branch is bound by [them], and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce [them]." *United States v. Nixon*, 418 U.S. 683, 696 (1974). "'[A]n agency is bound by its own regulations.'" *Erie Blvd. Hydropower, LP v. FERC*, 878 F.3d 258, 269 (D.C. Cir. 2017) (quoting *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014)); *see also Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979)) ("It has become axiomatic that an agency is bound by its own regulations.").

[3] *See also In re United States*, 345 F.3d 450, 454 (7th Cir. 2003) (issuing writ of mandamus when district court appointed prosecutor without authority); *United States v. Durham*, 941 F.2d 886, 892 (9th Cir. 1991) (remanding for a determination whether improperly appointed prosecutor "operated under the direction and supervision of the United States Attorney's office," without which the district court lacked jurisdiction).

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That principle applies to special prosecutors. In *United States v. Nixon*, 418 U.S. 683 (1974), the Court upheld a special prosecutor's subpoena, against the President's challenge, because it was authorized by regulation. The Court noted that "[i]t is theoretically possible for the Attorney General to amend or revoke the regulation defining [a] Special Prosecutor's authority" so as to deprive him power to issue the subpoena. *Id.* at 696. But where "he has not done so," and as "long as this regulation is extant," the regulation "has the force of law." *Id.*

The principle controls efforts to exercise unauthorized prosecutorial authority as well. In *United States v. Providence Journal Co.*, 485 U.S. 693 (1988), the district court had appointed a private attorney to prosecute a contempt motion under Federal Rule of Criminal Procedure 42(b) because the United States Attorney was conflicted. *Id.* at 696-97. The special prosecutor filed a petition for a writ of certiorari. *See id.* at 698. By regulation, however, no person may represent the government in the Supreme Court except the Solicitor General or a designee. *Id.* at 699-700. And the Solicitor General had never authorized the certiorari petition. *See id.* at 698. After argument on the merits, the Supreme Court dismissed the writ, holding that "[a]bsent a proper representative of the Government as a petitioner in this criminal prosecution, jurisdiction is lacking." *Id.* at 708.

Similarly, in *Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88 (1994), the Supreme Court dismissed a certiorari petition "for want of jurisdiction" because it was brought by the FEC, which "is not authorized to petition for certiorari . . . on its own." *Id.* at 90, 99. The FEC had petitioned for a writ of certiorari to challenge a ruling that its composition violated separation of powers. *Id.* at 90. However, because "the FEC lack[ed] statutory authority to litigate" in the Supreme Court, the FEC could not "independently file a petition for certiorari" without "the Solicitor General's authorization." *Id.* at 98. Although the Solicitor General had attempted "to authorize the FEC's petition after the time for filing it had expired,"

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the Court held that after-the-fact authorization "did not breathe life into [the petition]" because, by that time, the 90-day deadline to file the petition had come and gone. *Id.* at 90, 98-99.

The same principle applies to actions by prosecutors who lack authority. Over a century ago, in *United States v. Rosenthal*, 121 F. 862 (C.C.S.D.N.Y. 1903), the district court granted a motion to quash indictments because the prosecutor lacked authority to conduct proceedings before the grand jury. *Id.* at 874. The Attorney General had appointed a "Special Assistant to the Attorney General" to investigate certain import offenses. *Id.* at 863. Acting under that purported grant of authority, the Special Assistant "pursued vigorously and fairly the investigation of the alleged offenses, and with the sanction and co-operation of the District Attorney appeared before the grand jury, and chiefly conducted the proceedings that resulted in the indictments." *Id.* at 865. But the Special Assistant lacked authority to do so, the court concluded, because (at that time) the Attorney General and his officers were not authorized "to represent the United States in criminal prosecutions." *Id.* at 865-66. The court held that "[t]he indictments are not faulty, save for the single reason that they are based upon proceedings in great part conducted without authority by the special assistant to the Attorney General," and granted the motions to quash the indictments "on that sole ground." *Id.* at 874.

The government agrees that dismissal is appropriate when indictments are obtained by a prosecutor without legal authority. In the civil suit Mr. Manafort initiated, the government urged that Mr. Manafort has an "adequate remedy" in this criminal action. Defs.' Mem. in Support of Mot. To Dismiss, *supra*, at 2. Mr. Manafort's claim that that "the Special Counsel lacks authority," the government urged, should be raised in this "criminal action by filing a motion to

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dismiss the indictment pursuant to Rule 12 of the Federal Rules of Criminal Procedure." *Id.*[4] Court after court agrees: Where a prosecutor lacks authority, dismissal is warranted.[5]

2. That result is compelled here. The Acting Attorney General could authorize the Special Counsel to investigate a specifically defined matter concerning the potential violation of federal criminal law. But the Acting Attorney General could not grant the Special Counsel original jurisdiction to further investigate and prosecute any matter he happened to come across in the course of his investigation. Because the Acting Attorney General could not grant that power, the Special Counsel may not exercise it.

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[4] The government has elsewhere claimed that the Special Counsel Regulations do not "create any rights . . . enforceable at law or equity." Defs.' Mem. in Support of Mot. To Dismiss, *supra*, at 23 & n.7. But Mr. Manafort does not claim that the Appointment Order ***violated*** any rights he can assert against the government. Mr. Manafort raises the fact that the Acting Attorney General ***lacked authority*** to issue paragraph (b)(ii) of the Appointment Order. He is entitled to raise that lack of authority and the Court's resulting want of jurisdiction even if the regulations are not themselves actionable. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690-91 (1949) (federal courts may enjoin government actions "in excess of . . . authority or under an authority not validly conferred"); *see id.* at 691-92 (distinguishing claims "based upon any lack of delegated power" from claims that agency action is "illegal," "whether or not it be within" the officer's "delegated powers").

[5] *See, e.g.*, *United States v. Garcia-Andrade*, No. 13-CR-993-IEG, 2013 WL 4027859, at *5 (S.D. Cal. Aug. 6, 2013) (dismissing indictment because "[a] court does not have jurisdiction over a criminal case unless 'a proper representative of the Government' participates in the action"); *United States v. Huston*, 28 F.2d 451, 456 (N.D. Ohio 1928) (dismissing indictment because "the proceedings before the grand jury were vitiated by the unauthorized appearance therein by [the special prosecutor]"); *United States v. Cohen*, 273 F. 620, 621 (D. Mass. 1921) (dismissing indictment where the prosecutor "was not . . . authorized to bring these informations"); *see also Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987) (reversing contempt conviction because court improperly appointed interested prosecutor); *In re United States*, 345 F.3d at 454 ("vacat[ing] the appointment of the special prosecutor" by the court to prosecute a charge the United States had moved to dismiss); *United States v. Male Juvenile*, 148 F.3d 468, 472 (5th Cir. 1998) (juvenile-delinquency information was invalid because the certification needed to bring charges was signed by an Assistant United States Attorney, not the United States Attorney as the applicable regulations required); *Mehle*, 172 F. Supp. 2d at 205 (dismissing suit because prosecuting attorney was "not authorized to bring this action for [the] agency").

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Yet that is precisely the authority the Special Counsel purports to wield in this case. The Superseding Indictment's allegations have nothing to do with alleged coordination between the 2016 Trump presidential campaign and the Russian government. They instead concern alleged conduct that long pre-dates the Trump campaign and which prosecutors knew about but declined to pursue long ago. The Superseding Indictment focuses on alleged financial, tax, and disclosure crimes supposedly committed during the course of work in Ukraine. Superseding Indictment ¶¶2-6. It also accuses Mr. Manafort of false statements, unlawful wire transfers, and failures to disclose foreign assets. *Id.* ¶¶14-18, 26-27, 32-36; pp. 9-10, *supra.* Those alleged dealings have no connection whatsoever to the 2016 election; to the Trump presidential campaign; or to alleged coordination by that campaign and the Russian government. The alleged dealings occurred in ***2008 to 2014***. That predates the Trump campaign by at least a year, and Mr. Manafort's brief involvement in the campaign by even longer. *See* The American Presidency Project, *supra*; Keneally, *supra* ("Manafort . . . joined the Trump campaign on March 29, 2016."); *see, e.g.*, Superseding Indictment ¶¶4, 20-25 (allegations about consulting work from 2006 to 2014), ¶¶14-18 (allegations about wire transfers from Cyprus, the United Kingdom, and the Grenadines from 2008 to 2014), ¶¶32-36 (allegations that Mr. Manafort unlawfully failed to disclose certain offshore bank accounts from 2008 to 2014). And they have absolutely nothing to do with any alleged coordination with the Russian government.

Having no connection to the Russian government or the Trump presidential campaign much less purported coordination between the two those stale allegations cannot plausibly fall within the specific grant of jurisdiction in paragraph (b)(i) of the Appointment Order. To the extent the Special Counsel asserts authority to pursue them, he must rely on his putative jurisdiction over "any matters that arose or may arise directly from the investigation" under paragraph (b)(ii). But the Acting Attorney General had no authority to grant that jurisdiction,

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and the Special Counsel has no authority to exercise it. As a result, jurisdiction is lacking and the Superseding Indictment must be dismissed.

D. The Superseding Indictment Must Be Dismissed Under Rules 6(d) and 7(c) Because the Special Counsel Lacked Authority To Participate in the Grand Jury Proceedings and To Sign the Superseding Indictment

For similar reasons, the indictment must be dismissed for failure to comply with Federal Rules of Criminal Procedure 6(d) and 7(c). Those Rules permit only authorized "attorney[s] for the government" to appear before the grand jury or to sign indictments. Fed. R. Crim. P. 6(d), 7(c); *see id.* 1(b)(1) (defining "attorney for the government"). The Special Counsel did both those things in this case, but without authority to act as an "attorney for the government." Because that prejudiced Mr. Manafort, the Superseding Indictment must be dismissed. *See, e.g.*, *United States v. Fowlie*, 24 F.3d 1059, 1066 (9th Cir. 1994) (violation of Rule 6(d) requires dismissal); *United States v. Boruff*, 909 F.2d 111, 117-18 (5th Cir. 1990) (violation of Rule 7(c) requires dismissal).

1. Federal Rule of Criminal Procedure 6(d). Rule 6(d) permits ***only*** "the following persons" to be "present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device." Fed. R. Crim. P. 6(d); *see United States v. Poindexter*, 859 F.2d 216, 219 (D.C. Cir. 1988) (Rule 6(d) "limits the persons who may be present in the grand jury session to certain necessary court officials and the one witness then under examination"). "[A]ttorneys for the government," the only category the Special Counsel arguably fits into, includes ***only***: "(A) the Attorney General or an authorized assistant; (B) a United States attorney or an authorized assistant; (C) [in certain cases] the Guam Attorney General or other person [authorized under] Guam law . . . ; and (D) any other attorney authorized by law to conduct proceedings under these rules as a prosecutor." Fed. R. Crim. P. 1(b)(1).

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For the reasons given above, the Special Counsel is none of those things. He was not properly "authorized by law to conduct proceedings . . . as a prosecutor" because his appointment was *ultra vires*. Fed. R. Crim. P. 1(b)(1)(D); *see* pp. 17-21, *supra*. He plainly is not the Attorney General, a United States attorney, or their authorized assistants. *See* Fed. R. Crim. P. 1(b)(1)(A), 1(b)(1)(B). Nor is he the Guam Attorney General or other person authorized under Guam law. Fed. R. Crim. P. 1(b)(1)(C). Thus, under the plain text of the Federal Rules, the Special Counsel was not permitted to appear before the grand jury that indicted Mr. Manafort. *See* Fed. R. Crim. P. 6(d).

The government has elsewhere "concede[d]" that the presence of a prosecutor who was "unauthorized to represent the government in criminal proceedings due to a technically ineffective appointment" "constitute[s] a violation of Fed. R. Crim. P. 6(d)." *Fowlie*, 24 F.3d at 1065. Courts routinely reach the same conclusion. *See, e.g.*, *United States v. Wooten*, 377 F.3d 1134, 1140 (10th Cir. 2004) (presence of improperly appointed Special Assistant United States Attorney before the grand jury would violate Rule 6(d)(1)); *United States v. Alcantar-Valenzuela*, 191 F.3d 461, 461 (9th Cir. 1999) (memorandum disposition) ("[T]he appearance of . . . a Special Assistant United States Attorney before the grand jury was unauthorized because of technical deficiencies in her appointment and thus violated Federal Rule of Criminal Procedure 6."). The same reasoning applies here: Because the Special Counsel is not an authorized "attorney for the government," his appearance before the grand jury violated Federal Rule 6(d).[6]

[6] The Appointment Order also raises questions about whether the grand jury has been misused to investigate counterintelligence matters instead of potential crimes. That Order authorizes the Special Counsel to carry out the "investigation confirmed by then-FBI Director James B. Comey in testimony before the House Permanent Select Committee on Intelligence on March 20, 2017," Appointment Order ¶(b) an investigation that Mr. Comey described as "part of our ***counterintelligence effort***." Apuzzo, Rosenberg & Huetteman, *supra* (emphasis added). But grand juries are not empowered to perform "counterintelligence" duties; their sole "task is to

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2. Federal Rule of Criminal Procedure 7(c). For the same reason, the Special Counsel violated Rule 7(c)'s requirement that all indictments "must be signed by an attorney for the government." Fed. R. Crim. P. 7(c). "The federal courts have concluded uniformly that Rule 7(c) . . . precludes federal grand juries from issuing an indictment without the prosecutor's signature, signifying his or her approval." *Rehberg v. Paulk*, 566 U.S. 356, 372 n.2 (2012); *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 430 n.14 (1983) (similar). Here, the Special Counsel was the only individual who signed the Superseding Indictment on behalf of the government. Superseding Indictment at 31. He was also the only attorney who signed the original indictment in this Court against Mr. Manafort. Dkt. 13, at 31.

For the reasons given above, however, the Special Counsel is not an "attorney for the government" he had no authority to pursue the matters set forth in the indictment. *See* Fed. R. Crim. P. 1(b)(1); pp. 17-21, *supra.* The indictments were thus issued in violation of Rule 7(c). *See, e.g.*, *Boruff*, 909 F.2d at 117-18 ("[I]t was error for the district court to proceed to trial . . . on the superseding indictment [when] no government attorney had signed it."); *see also United States v. Male Juvenile*, 148 F.3d 468, 472 (5th Cir. 1998) (dismissing juvenile-delinquency petition certified by the wrong attorney).

3. The Resulting Prejudice. Where grand jury proceedings are conducted in violation of the Federal Rules, the indictment must be dismissed if " 'the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Bank of Nova Scotia v. United*

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conduct an *ex parte* investigation to determine whether or not there is probable cause to prosecute a particular defendant." *United States v. R. Enters., Inc.*, 498 U.S. 292, 298 (1991); *see also* 18 U.S.C. § 3332(a) ("[T]he duty of" a special grand jury is "to inquire into offenses against the criminal laws of the United States.").

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States, 487 U.S. 250, 256 (1988) (quoting *United States v. Mechanik*, 475 U.S. 66, 78 (1986)). The Special Counsel's participation in the grand jury and indictment process plainly meets that standard: Mr. Manafort ***would not now have been prosecuted*** but for the Special Counsel's *ultra vires* appointment. Prior to his appointment, Mr. Manafort had ***already disclosed*** to the DOJ the conduct that the Special Counsel now seeks to prosecute. He voluntarily met with DOJ prosecutors and FBI agents in July 2014 to discuss his offshore political consulting activities three years before the grand jury the Special Counsel convened returned the indictment he signed charging Mr. Manafort with conduct related to that lobbying activity. In that interview, Mr. Manafort provided a detailed explanation of his activities in Ukraine, including his frequent contact with a number of previous U.S. Ambassadors in Kiev and his efforts to further U.S. objectives in Ukraine on their behalf. He further discussed his offshore banking activity in Cyprus. Moreover, at least as early as 2007, prominent news outlets had reported that Mr. Manafort was working for Mr. Yanukovych. But the DOJ ***did not prosecute*** Mr. Manafort for that conduct.[7]

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[7] *See, e.g.*, Clifford J. Levy, *Ukrainian Prime Minister, Once Seen as Archvillain, Reinvents Himself*, N.Y. TIMES, Sept. 30, 2007, at A8 ("Mr. Yanukovich has not done it all on his own. From an anonymous office off Kiev's main square, a seasoned American political strategist who was once a senior aide in Senator Bob Dole's Republican presidential campaign has labored for months on a Yanukovich makeover. Though the strategist, Paul J. Manafort, has sought to remain behind the scenes, his handiwork has been evident in Mr. Yanukovich's tightly organized campaign events, in his pointed speeches and in how he has presented himself to the world."); Clifford J. Levy, *Toppled in Ukraine but Nearing a Comeback*, N.Y. TIMES, Jan. 14, 2010, at A4 ("Mr. Yanukovich has been assisted by Paul J. Manafort, an American political consultant who has been advising him since 2005."); Michael Cooper, *Savior or Machiavelli, McCain Aide Carries On*, N.Y. TIMES, Oct. 23, 2007, at A26 ("Davis Manafort, the business development and consulting practice . . . , had been giving campaign advice to the Ukrainian prime minister, Viktor F. Yanukovich."). Other reports around the same time claimed that Mr. Manafort's company never registered as a lobbying entity for Mr. Yanukovych. Barry Meier, *Lawmakers Seek To Close Foreign Lobbyist Loopholes*, N.Y. TIMES, June 12, 2008, at A23 ("Davis Manafort never registered as a lobbyist for Mr. Yanukovich."); Barry Meier, *In McCain Campaign, a Lobbying Labyrinth*, N.Y. TIMES, May 25, 2008, at A22 (similar).

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That changed when the Special Counsel was appointed and empaneled a grand jury to conduct the Office of Special Counsel's investigation. The Special Counsel was obviously the driving force behind the decision to charge Mr. Manafort. There can thus be no doubt that his involvement in the grand jury proceedings "'substantially influenced the grand jury's decision to indict.'" *Bank of Nova Scotia*, 487 U.S. at 256 (quoting *Mechanik*, 475 U.S. at 78).[8]

Courts regularly find prejudice warranting dismissal when an unauthorized prosecutor appears before the grand jury. *See, e.g.*, *Pease v. Commonwealth*, 482 S.E.2d 851, 852 (Va. Ct. App. 1997) (quashing an indictment when an unauthorized attorney "substantially influenced the grand jury in reaching an indictment to the prejudice of the defendant"); *State v. Hardy*, 406 N.E.2d 313, 316 (Ind. Ct. App. 1980) (the "presence and active participation of a prosecuting attorney" recused from the case demonstrated "prejudice," warranting dismissal of the indictment); *People v. Munson*, 150 N.E. 280, 283 (Ill. 1925) (dismissing an indictment where "[i]t is evident that the indictment in this case was procured directly through the assistance of [an unauthorized individual], acting as state's attorney"). The Court should do the same here.

II. THE SUPERSEDING INDICTMENT EXCEEDS EVEN THE AUTHORITY THE APPOINTMENT ORDER PURPORTS TO GRANT

A. The Appointment Order Purports To Grant Authority Only Over Matters That "Arise Directly From" the Special Counsel's Investigation

Even if one assumes that the Acting Attorney General had authority to grant the Special Counsel original jurisdiction over any "matters that arose or may arise directly from the investigation," Appointment Order ¶(b)(ii), the Special Counsel exceeded even that limit. The

[8] To the extent there is any doubt about the Special Counsel's involvement in the grand jury process, the Court should order production of the grand jury transcripts, including transcripts of the Special Counsel's or his staff's colloquies with the grand jury, and permit further briefing and argument on that issue. The violation of Rules 6(d) and 7(c) apparent from the face of the indictment plainly show the "particularized need" justifying the production of those transcripts. *Sells Eng'g*, 463 U.S. at 443.

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phrase "arose or may arise directly from" establishes a boundary on the Special Counsel's authority: To the extent the Special Counsel seeks to investigate or prosecute conduct unrelated to Russian coordination or obstruction, paragraph (b)(i) purports to authorize him to do so only if, at a minimum, he learns of the conduct ***because of*** his original investigation. And the conduct must be ***demonstrably related to*** the subject of his original jurisdiction. The charges here are not.

1. Courts routinely interpret the phrase "arising from" or "arising out of" to require at least a causal connection. For example, in *Dolan v. United States Postal Service*, 546 U.S. 481 (2006), the Supreme Court considered a provision of the Federal Tort Claims Act granting immunity to the Postal Service for claims "***arising out of*** the loss, miscarriage, or negligent transmission of letters of postal matter." *Id.* at 485 (emphasis added) (quoting 28 U.S.C. § 2680(b)). The Court held that the immunity grant only covered "injuries arising, directly or consequentially, ***because*** mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address." *Id.* at 489 (emphasis added).

Indeed, there is a "general consensus that the phrase 'arising out of' . . . requires some causal connection." *Fed. Ins. Co. v. Tri-State Ins. Co.*, 157 F.3d 800, 804 (10th Cir. 1998) (collecting cases); *see, e.g.*, *U.S. Indus./Fed. Sheet Metal, Inc. v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 455 U.S. 608, 615 (1982) (statute allowing compensation for injury "arising out of . . . the course of employment" required that "the injury have been caused by the employment"); *In re Lehman Bros. Holdings, Inc.*, 855 F.3d 459, 478 (2d Cir. 2017) (bankruptcy statute subordinating claims "arising from" a securities transaction required a "causal link" between the claim and the securities transaction); *Old Republic Ins. Co. v. Cont'l Motors, Inc.*, 877 F.3d 895, 917 n.36 (10th Cir. 2017) (in an insurance contract, an "'arising out of' requirement includes 'a true causal element'"); *Regal Constr. Corp. v. Nat'l Union Fire Ins.*

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Co. of Pittsburgh, 15 N.Y.3d 34, 38 (2010) (similar). And here, the Appointment Order does not merely require that new matters just "arise out of" the original investigation; they must "arise ***directly*** from" it. Appointment Order ¶(b)(ii) (emphasis added).

2. In this context, moreover, additional matters cannot be said to "arise out of" an initial investigation unless they are "demonstrably ***related to*** the initial grant of jurisdiction." *In re Espy*, 145 F.3d 1365, 1367 (D.C. Cir. 1998) (per curiam) (emphasis added); *see also Morrison v. Olson*, 487 U.S. 654, 679 (1988) ("[The] jurisdiction that the court decides upon must be demonstrably related to the factual circumstances that gave rise to . . . the appointment of the independent counsel in the particular case."); *United States v. Tucker*, 78 F.3d 1313, 1321 (8th Cir. 1996) ("[R]elatedness . . . depends upon the procedural and factual link between the [independent counsel's] original prosecutorial jurisdiction and the [new] matter.").

Espy, for example, concerned an independent counsel appointed under the Ethics in Government Act to investigate allegations that the Secretary of Agriculture had accepted gifts from persons with business before his department. 145 F.3d at 1366. The order also granted the independent counsel "jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any organization or individual developed during the Independent Counsel's investigation referred to above and connected with or ***arising out of*** that investigation," or "***related to*** that subject matter," as well as any violations of 28 U.S.C. § 1826, obstruction of justice, or false testimony, "in connection with any investigation of the matters described above." *Espy*, 145 F.3d at 1366 (emphasis added).

The independent counsel then applied to the court to confirm his authority to investigate an additional matter. *Espy*, 145 F.3d at 1367. Under the Ethics in Government Act, the court of appeals could merely "interpret, but not expand, the independent counsel's original prosecutorial

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jurisdiction." *Id.* at 1368 (alterations and internal quotation marks omitted). The counsel's application, however, "raise[d] allegations concerning criminal conduct on the part of Secretary Espy and others in violation of ***other criminal statutes*** outlawing a ***different category of conduct*** and ***occurring on different occasions*** than those set forth in the grant of jurisdiction." *Id.* (emphasis added). Because "[t]he facts alleged in the [new] application d[id] not involve any alleged misuse of the office of Secretary of Agriculture by Espy, any acceptance of payments or gifts from persons having business with that Department, or any similar pattern of conduct," the D.C. Circuit denied the application. *Id.* at 1368-69. Given that the conduct was different, the time frames were different, and the applicable statutes were different, the D.C. Circuit could not construe the additional matters as "arising out of" the initial investigation because they were "unrelated" to "the original grant of authority." *Id.* at 1368. The D.C. Circuit so held even though the original investigation and the proposed new investigation included a "common prospective subject," "the common concern for misconduct by a high official and the potential presence of eight unnamed common witnesses." *Id.*

B. The Charges Against Mr. Manafort Do Not "Arise Directly From" the Special Counsel's Investigation

Espy makes this an *a fortiori* case. The Special Counsel has investigated and prosecuted Mr. Manafort for "a different category of conduct" that "occurr[ed] on different occasions" than the subject of the original investigation. *Espy*, 145 F.3d at 1368. That conduct does not "arise directly from" the Special Counsel's investigation under any reading of that phrase. Appointment Order ¶(b)(ii). The Appointment Order empowers the Special Counsel to investigate a specific subject and matters that "directly arise from" his investigation into Russian involvement in the 2016 campaign. But the alleged tax and disclosure violations charged in the Superseding Indictment constitute "a different category of conduct" that "occurr[ed] on different

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occasions" than the subject of the original investigation. *Id.*; *see* pp. 19-20, *supra*. Nor would any claim that the charges against Mr. Manafort here share a "common prospective subject" or "common witnesses" with the original investigation suffice to justify those charges as "arising out of" the original investigation. *Espy*, 145 F.3d at 1368. Under *Espy*, the Superseding Indictment does not "arise from" the original investigation the Special Counsel was empowered to pursue much less arise from it "directly."

Review of the Superseding Indictment makes that especially clear. None of the charges before this Court were discovered because of the Special Counsel's investigation into alleged coordination; nor are any of them "demonstrably related to" that investigation. The supposed tax and financial crimes Mr. Manafort is charged with allegedly began on or after ***2006***—approximately a ***decade*** before the Trump campaign launched and before the start of Mr. Mueller's (or Mr. Comey's) investigation. *See* pp. 9-10, *supra*. National media had also publicized Mr. Manafort's consulting work in Ukraine years before the Special Counsel began his work. *See* pp. 29-30 & n.7, *supra*. And the DOJ was already well aware of Mr. Manafort's consulting work because he ***disclosed it*** during interviews with DOJ prosecutors and the FBI. *See* p. 30, *supra.* Given that the DOJ was aware of Mr. Manafort's activities years before the Special Counsel was appointed, the Special Counsel cannot credibly claim that he discovered that alleged conduct ***because of*** his investigation into unrelated claims about Russian involvement in the 2016 campaign. Appointment Order ¶(b)(ii); *see, e.g.*, *Espy*, 145 F.3d at 1368. All of that conduct, moreover, relates to "a different category of conduct" that "occurr[ed] on different occasions." *Espy*, 145 F.3d at 1368.

A fortiori, the charges therefore cannot "arise out of" the original investigation. And they certainly do not "arise from" it "directly." *See* pp. 29-30 & n.7, *supra*; *see, e.g.*, *SFS Check, LLC v. First Bank of Del.*, 774 F.3d 351, 357 (6th Cir. 2014) (phone calls could not create

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specific personal jurisdiction because the plaintiff's alleged "injury . . . preceded the phone calls" and thus "could not have arisen from the phone calls"); *Richter v. Analex Corp.*, 940 F. Supp. 353, 359 (D.D.C. 1996) (malpractice claim did not "arise[ ] out of" visit to a forum so as to allow exercise of long-arm jurisdiction when any alleged malpractice preceded the visit).[9]

Indeed, there is no evidence that Mr. Manafort was ever himself investigated in connection with alleged "coordination" between the Russian government and the 2016 Trump presidential campaign. The Special Counsel has never suggested that Mr. Manafort had anything to do with alleged "coordination [with] the Russian government" in connection with the 2016 presidential campaign, or even that he is investigating Mr. Manafort on that subject. Appointment Order ¶(b)(i). The Superseding Indictment cannot have any causal connection to, let alone "arise directly from," an investigation into Mr. Manafort that does not exist. That further confirms that the Special Counsel's acts exceed even the scope of authority the Appointment Order claims to grant.

C. The Superseding Indictment Violated Rules 6(d) and 7(c) Because It Exceeds the Scope of the Appointment Order

Because the Superseding Indictment exceeds even the Appointment Order's scope, Rules 6(d) and 7(c) require dismissal even if the Appointment Order were lawful. Mr. Mueller could only appear before the grand jury or sign the Superseding Indictment if he was an authorized "attorney[ ] for the government." Fed. R. Crim. P. 6(d), 7(c). For matters beyond the scope of the Appointment Order, he does not qualify. Because he lacked authority to bring these charges,

[9] Moreover, as explained above, no conflict of interest or other extraordinary circumstance would preclude the DOJ from investigating the conduct charged in the Superseding Indictment as evidenced by the fact that the DOJ previously investigated it and declined to prosecute. *See* pp. 29-30 & n.7, *supra*. For that reason, too, the Appointment Order cannot be read to encompass that conduct.

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the Special Counsel violated Rule 6(d) by appearing before the grand jury. *See Fowlie*, 24 F.3d at 1065; *Wooten*, 377 F.3d at 1140; *Alcantar-Valenzuela*, 191 F.3d at 461; pp. 27-28, *supra*. Likewise, because Rule 7(c) allows only "attorney[s] for the government" to sign indictments, the Special Counsel violated that Rule too when he signed a Superseding Indictment lacking even a causal link to his original investigation. *See Boruff*, 909 F.2d at 117-18; *see also Male Juvenile*, 148 F.3d at 472; p. 29, *supra*.

D. This Court Lacks Jurisdiction and Dismissal Is Otherwise Warranted

Because the Superseding Indictment is unmoored from any matter the Appointment Order even arguably authorizes the Special Counsel to investigate or prosecute, the Superseding Indictment must be dismissed. Where a "special prosecutor lacks . . . authority," the Court "must dismiss . . . for want of jurisdiction." *Providence Journal Co.*, 485 U.S. at 699; *see* pp. 21-27, *supra*. That is no less true when the Special Counsel exceeds the authority granted under an appointment order than when the Appointment Order is *ultra vires* from the outset.

Dismissal is also appropriate in view of the Rule 6 and 7 violations. As explained above, the Special Counsel's presence and conduct "'substantially influenced the grand jury's decision to indict.'" *Bank of Nova Scotia*, 487 U.S. at 256 (quoting *Mechanik*, 475 U.S. at 78); *see* pp. 29-31, *supra*. Lawfully appointed DOJ prosecutors had long ago learned of the conduct charged in the Superseding Indictment and decided ***not*** to indict Mr. Manafort for it. *See* pp. 29-30, *supra*. Yet the Special Counsel led the grand jury to indict Mr. Manafort for the same conduct conduct that does not fall within the purported scope of his authority to prosecute under the Appointment Order. The Special Counsel's rule violations thus plainly prejudiced Mr. Manafort, requiring dismissal of the Superseding Indictment. *See, e.g.*, *Fowlie*, 24 F.3d at 1066 (violation of Rule 6(d) requires dismissal); *Boruff*, 909 F.2d at 117-18 (violation of Rule 7(c) requires dismissal).

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CONCLUSION

The Superseding Indictment should be dismissed.

Dated: March 14, 2018
Washington, D.C.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. INTERNET RESEARCH AGENCY LLC, *et al.*, Defendants.	Criminal Action No. 18-00032 (DLF)

DEFENDANT CONCORD MANAGEMENT AND CONSULTING LLC'S MOTION TO DISMISS THE INDICTMENT BASED ON THE SPECIAL COUNSEL'S UNLAWFUL APPOINTMENT AND LACK OF AUTHORITY TO INDICT CONCORD

Pursuant to Rule 12(b)(1) of the Federal Rules of Criminal Procedure, Defendant Concord Management and Consulting LLC ("Concord") moves to dismiss the Indictment, ECF No. 1, in its entirety. As set forth more fully in the accompanying memorandum of points and authorities, the Indictment should be dismissed for three independent reasons:

(1) The appointment of Robert S. Mueller III (the "Special Counsel") violates the Appointments Clause, U.S. Const. art. II, § 2, cl. 2;

(2) The regulations governing the Special Counsel, 28 C.F.R. pt. 600, are unlawful and violate core separation-of-powers principles; and

(3) Even if the regulations are valid and binding, the order appointing the Special Counsel is inconsistent with the regulations and does not authorize a prosecution against Concord.

In accordance with Local Criminal Rule 47(c), a proposed order granting the relief requested is attached as Exhibit F.

Dated: June 25, 2018

Respectfully submitted,

CONCORD MANAGEMENT
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* *Motion for Admission Pro Hac Vice Pending*

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. INTERNET RESEARCH AGENCY LLC, *et al.*, Defendants.	Criminal Action No. 18-00032 (DLF)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT CONCORD MANAGEMENT AND CONSULTING LLC'S MOTION TO DISMISS THE INDICTMENT BASED ON THE SPECIAL COUNSEL'S UNLAWFUL APPOINTMENT AND LACK OF AUTHORITY TO INDICT CONCORD

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* *Motion for Admission Pro Hac Vice Pending*

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I. PRELIMINARY STATEMENT

This case is brought by a former private attorney Robert S. Mueller III (the "Special Counsel") who claims that he has discretion to exercise the Federal Government's exclusive and plenary prosecutorial powers pursuant to an appointment order issued by the Deputy Attorney General that is not authorized by the express terms of any statute and contravenes fundamental constitutional principles. This deeply flawed delegation of these vast prosecutorial powers accordingly should be declared unlawful and the Indictment, ECF No. 1, should be dismissed with respect to Defendant Concord Management and Consulting LLC ("Concord").

First, the Appointments Clause of Article II, § 2 of the United States Constitution requires that all "Officers of the United States" be appointed by the President and confirmed by the Senate, though "inferior Officers" may be appointed by the "Head[]" of a "Department[]" in this case, the Attorney General if Congress "by Law vest[s]" a department head with the authority to do so. The Special Counsel is either a principal officer or an inferior officer. Regardless, his appointment is unconstitutional because he was not appointed by the President and confirmed by the Senate as required for a principal officer, and there was no statutory authorization ("by Law") allowing the Deputy Attorney General to appoint the Special Counsel as an inferior officer and confer on him the Attorney General's exclusive and plenary prosecutorial authority. Since the requirements of the Appointments Clause are not met, the Indictment must be dismissed.

Second, to the extent the Special Counsel attempts to rely on regulations issued by the Attorney General in 1999 and the Special Counsel has argued elsewhere that the regulations are non-binding guidelines not enforceable in court that fails because they are unlawful and cannot fill the critical voids left by statute. The Attorney General lacked authority to issue those

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regulations and they cannot, in any event, confer any power on the Attorney General that only Congress can provide him.

Third, the Deputy Attorney General's appointment order does not and cannot act as a proxy for an unconstitutional delegation of the Federal Government's prosecutorial powers. Apart from its lack of statutory authorization, the extension of the appointment order to Concord goes beyond the order's terms and the Attorney General's 1999 regulations that purportedly govern it. The Indictment should be dismissed for both these reasons as well.

Given the context surrounding this proceeding and the anticipated response from the Special Counsel, it is important to emphasize what Concord's motion is not. It does not suggest or imply that a private attorney can never be appointed to prosecute (or help a United States Attorney prosecute) an action on behalf of the Federal Government. That concededly can be done with a constitutionally valid appointment or express congressional authorization, neither of which is present here. But under this Nation's established constitutional framework, without a proper appointment and express congressional authorization, neither the Attorney General nor his subordinates have the inherent authority to empower a private attorney to investigate and prosecute *anyone*, regardless of citizenship, when he or she deems it is expedient to do so under jurisdictional ground rules that he or she alone sets down. Here, the Deputy Attorney General and the Special Counsel are attempting to exercise authority neither the Constitution nor Congress has conferred, and this Court should dismiss the Indictment to restore the checks and balances the Constitution demands.

II. FACTUAL BACKGROUND

The authority to investigate and indict in this case purportedly rests with the Special Counsel by virtue of a one-page appointment order signed by Deputy Attorney General Rod J. Rosenstein on May 17, 2017. *See* Ex. A: Dep't of Justice Order No. 3915-2017 ("Appointment

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Order" or "Order"). The Order appoints Robert S. Mueller III, a private attorney, to serve as Special Counsel. *Id.* ¶ (a); *see also* Ex. B: Press Release, Dep't of Justice, Appointment of Special Counsel (May 17, 2017) (listing Mr. Mueller as a "former" Department of Justice official). The basis for the appointment, according to the Order, arises from a previous investigation conducted by the Federal Bureau of Investigation ("FBI"). Ex. A ¶ (b). As a result of that investigation, the Special Counsel is, in turn, directed to investigate any links or coordination between the Russian government and individuals associated with the 2016 presidential campaign of Donald J. Trump. *Id.* ¶ (b)(i). The Order says nothing about which, if any, federal criminal statutes could have been violated by any such links; nor does it indicate why any purported violations are apparent. According to the Order, the Special Counsel's appointment nevertheless is authorized by 28 U.S.C. §§ 509, 510, and 515, *see* Ex. A (introductory paragraph), and the regulations set forth in 28 C.F.R. §§ 600.4 to 600.10 (the "Special Counsel Regulations" or "Regulations"), which are deemed "applicable" to the Special Counsel as appointed, Ex. A ¶ (d).

As for the FBI investigation that forms the basis for the Order, it was "confirmed" by then-FBI Director James B. Comey's testimony "before the House Permanent Select Committee on Intelligence on March 20, 2017." *Id.* ¶ (b). There, Director Comey described the FBI's investigation as one involving "counter-intelligence." *See* Ex. C: James B. Comey, Dir., Fed. Bureau of Investigation, Statement Before the House Permanent Select Committee on Intelligence (Mar. 20, 2017). Neither the statutes cited in the Order, nor the identified Special Counsel Regulations, however, authorize a counter-intelligence investigation. The statutes make no such reference and the Regulations specify that there are grounds for appointment of a special counsel only when the Attorney General "or in cases in which the Attorney General is recused,

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the Acting Attorney General" determines that a "criminal investigation . . . is warranted." 28 C.F.R. § 600.1. Neither determination is set forth anywhere in the Order. The Order's more specific jurisdictional statement instead discloses only a need to investigate "any links or coordination between the Russian government and individuals associated with the campaign of President Donald Trump" and to further investigate "any matters that arose or may arise directly from the investigation." Ex. A ¶ (b)(i), (ii).

In short, the Order contains no express statement that the Deputy Attorney General, acting for the recused Attorney General, had determined that a criminal investigation was warranted or why; provides no explanation as to how the Special Counsel had been invested with the authority to pursue the counter-intelligence investigation referenced in Director Comey's testimony; fails to say what the *criminal* predicate might be for the investigation if there was one; and does not indicate why it was that the Attorney General had a conflict of interest but his Deputy does not[2] with respect to the particularized aspects of the investigation actually being pursued all as required by §§ 600.1 to 600.3 of the Special Counsel Regulations.

In public court filings, the Special Counsel has made it clear that he believes the Order gives him the unfettered authority to investigate any Russian interference with the 2016 presidential election or the candidates in it, without regard to the narrower grant of jurisdiction specifically conferred by the Order or the applicable "regulatory guidelines." *See* Gov't Resp. to Def. Concord Mgmt. & Consulting LLC's Mot. for *In Camera* Review of Grand Jury Materials

[2] The Deputy Attorney General likely is a fact witness in the Special Counsel's investigation of alleged obstruction of justice in connection with President Trump's termination of former FBI Director Comey. *See, e.g.*, Ex. D: Letter from Donald J. Trump, U.S. Pres., to James B. Comey, Dir., Fed. Bureau of Investigation (May 9, 2017) (stating that the President's termination decision was based on a written recommendation made by the Deputy Attorney General, a copy of which was attached to the President's letter).

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at 2 n.1, ECF No. 20 (citing title of Order, without reference to Order's substance, and asserting Indictment thus falls "within the express scope of the Special Counsel's jurisdiction"); Gov't Resp. in Opp'n to Def.'s Mot. to Dismiss at 6, *United States v. Manafort*, No. 1:17-cr-00201-ABJ (D.D.C. Apr. 2, 2018), ECF No. 244 (claiming that the Regulations "simply provide a helpful framework that the Attorney General may use in establishing the Special Counsel's role").

In that regard, the Indictment necessarily is a product of the Special Counsel's expansive view of his authority. It does not allege that Concord is part of the Russian government. *See* Indictment ¶ 11 (alleging that Concord has "various Russian government contracts"). Nor does it indicate that Concord had any links to, or coordination with, President Trump's 2016 campaign. *See id.* ¶¶ 6, 45, 54(c), 55(a), 74 79 (making allegations involving "unwitting" individuals involved in President Trump's campaign). Rather, the authorization for the Indictment purportedly rests on paragraph (b)(ii) of the Appointment Order, which the Special Counsel construes to provide him with jurisdiction to prosecute any conduct involving any Russian, whether individual or corporation, that "arose . . . directly from" the above-described investigation.[3]

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[3] As he has done in the pending cases he has filed against Paul J. Manafort Jr., the Special Counsel may also attempt to rely on an August 2017 memorandum ("Memorandum") issued by the Deputy Attorney General, which apparently purports to expand the Special Counsel's jurisdiction. The fundamental problem with the Memorandum is that it remains largely secret and appears to be an after-the-fact justification to bolster an unlawful appointment order. For present purposes, the most Concord can say is that the redacted public version of the Memorandum provides no support for the Indictment here. And if the Special Counsel does rely on the Memorandum to support his jurisdiction here, Concord, consistent with its due process rights, should be permitted to view it and contest the Special Counsel's assertion. *See Abourezk v. Reagan*, 785 F.2d 1043, 1060 61 (D.C. Cir. 1986) ("It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of (continued)

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III. LEGAL STANDARDS

"A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). Challenges to the constitutionality of the appointment of the Special Counsel and to his statutory authority to bring the Indictment likewise may be asserted in a Rule 12(b) motion. *See United States v. Park*, 297 F. Supp. 3d 170, 174 (D.D.C. 2018). "When considering a motion to dismiss an indictment, a court assumes the truth of [the indictment's] factual allegations." *United States v. Ballestas*, 795 F.3d 138, 149 (D.C. Cir. 2015) (citation omitted).

IV. ARGUMENT

The record here shows that the Special Counsel, formerly a private citizen, is purporting to exercise without a proper appointment, any express statutory authorization, or, according to him, any binding jurisdictional constraints the Attorney General's plenary and exclusive prosecutorial powers. In so doing, the Special Counsel is acting unlawfully indeed unconstitutionally under an Appointment Order that does not and cannot confer the prosecutorial authority he claims to possess. The Indictment accordingly should be dismissed.

A. The Concord Indictment should be dismissed because the Special Counsel's appointment violates the Constitution's Appointments Clause.

The Appointments Clause of Article II of the Constitution sets forth a "bulwark against one branch aggrandizing its power at the expense of another branch" and preserves "the Constitution's structural integrity by preventing the diffusion of the appointment power." *Ryder v. United States*, 515 U.S. 177, 182 (1995). "The 'manipulation of official appointments' had

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fairness in the adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions.").

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long been one of the American revolutionary generation's greatest grievances against executive power." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 883 (1991) (citation omitted). The Framers therefore chose to "limit[] the appointment power" so as to "ensure that those who wielded it were accountable to political force and the will of the people." *Id.* at 884.

To achieve that goal, the Appointments Clause provides mechanisms for appointing principal and inferior "Officers of the United States." U.S. Const. art. II, § 2, cl. 2. So-called "principal" officers must be appointed by the President "by and with the Advice and Consent of the Senate." *Id.* That method of appointment likewise is the default manner of appointing all "Officers" whether principal or not though Congress "may" override that default rule and "by Law vest the Appointment of such inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.*

Here, whether the Special Counsel is deemed a principal or inferior officer, his appointment by the Deputy Attorney General violates the strict requirements of the Appointments Clause because the Special Counsel was neither appointed by the President and confirmed by the Senate, nor was he appointed pursuant to authority vested by the express terms of a congressional enactment.

1. If the Special Counsel is an inferior officer, he was unlawfully appointed by the Deputy Attorney General without authorization from Congress.

The Special Counsel was not appointed by the President or confirmed by the Senate, so his appointment necessarily violates the Appointments Clause if he is, as is demonstrated below, a principal officer. But at a minimum, the Special Counsel is an "inferior Officer[]" and thus could only have been appointed by an official with power specifically conferred by Congress. The Deputy Attorney General did not have clear and specific statutory authorization to appoint the Special Counsel, however, and his appointment accordingly is unconstitutional.

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a. The Special Counsel is an "Officer" who must be properly appointed.

As the Supreme Court has held, an "Officer" governed by the Appointments Clause is an official "exercising significant authority pursuant to the laws of the United States[.]" *Buckley v. Valeo*, 424 U.S. 1, 125 26 (1976). The term "embrace[s] all appointed officials exercising responsibility" under federal law, *id.* at 131, though not "lesser functionaries in the Government's workforce," *Lucia v. SEC*, --- S. Ct. ---, No. 17-130, 2018 WL 3057893, at *5 (U.S. June 21, 2018) (internal quotation marks and citation omitted). "Officer" had an expansive definition at the time of the Founding, *see, e.g.*, 1 William Blackstone, *Commentaries on the Laws of England* 339 (3d ed. 1768) (noting that an "officer" includes "sheriffs; coroners; justices of the peace; constables; surveyors of highways"), and the Supreme Court has found many even minor federal officials qualify as "Officers" whose appointment is, in turn, subject to the strictures of the Appointments Clause, *see, e.g.*, *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352 54 (1931) (district-court commissioners); *see also* Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 1, at 1 2 (1890) ("A public office is the right, authority and duty, created and conferred by law, by which for a given period . . . an individual is invested with some portion of the sovereign functions of the government[.]").

Consistent with these authorities, there is no colorable claim that the Special Counsel is a mere federal employee some "lesser functionar[y]" and not an "Officer" falling within the Appointments Clause. This is especially true if, as the Special Counsel has argued, the Special Counsel Regulations are not binding on him. Absent those Regulations, there is nothing constraining his power and jurisdiction at all and, *a fortiori*, he is an "Officer."

The Regulations do nothing to change that. The Special Counsel's role, as conceived by the Regulations, certainly is analogous to a United States Attorney, *see* 28 C.F.R. § 600.6

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(Special Counsel has "the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney"), and it is beyond peradventure that United States Attorneys are "Officers," *see Myers v. United States*, 272 U.S. 52, 159 (1926) (noting that United States Attorneys are "officers"); *United States Attorneys Suggested Appointment Power of the Attorney General Constitutional Law (Article II, § 2, cl. 2)*, 2 Op. O.L.C. 58, 59 (1978) (same).

If more were needed, it should be noted that the Special Counsel's powers are much broader than those of a United States Attorney. United States Attorneys are both geographically restricted and subject to the Attorney General's plenary power to direct and supervise their litigation. *See United States v. San Jacinto Tin Co.*, 125 U.S. 273, 278 79 (1888); *Sutherland v. Int'l Ins. Co. of N.Y.*, 43 F.2d 969, 970 (2d Cir. 1930) (L. Hand, J.) (noting that Attorney General has power to "displace [United States] attorneys in their own suits, dismiss or compromise them, [or] institute those they decline to press"). They also must obtain the Attorney General's approval before taking a laundry list of steps or actions, and consult with Department officials before taking numerous others. *See United States v. Giangola*, No. 1:07-cr-00706-JB, 2008 WL 3992138, at *9 10 (D.N.M. May 12, 2008). Compare those constraints with the Special Counsel, who has nationwide jurisdiction, wide latitude to operate free from the Attorney General's oversight, and the authority to make final binding prosecutorial decisions without prior approval from anyone in the Department of Justice. *Infra* at 29 35. Simply put, the Special Counsel indisputably is an "Officer" whose appointment must comply with the Appointments Clause.

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b. Congress has not enacted a statute that clearly gives the Attorney General or Deputy Attorney General the power to appoint a private attorney as an "Officer."

An inferior officer's appointment passes constitutional scrutiny only if Congress specifically authorized it under the so-called "Excepting Clause" within the Appointments Clause. *See* Art. II, § 2, cl. 2 ("Officers" are appointed by the President with the advice and consent of the Senate, "but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments").[4] Therefore, the Special Counsel's appointment requires express and specific statutory authorization and, absent that, his appointment is unconstitutional.

Thus, in *Burnap v. United States*, 252 U.S. 512 (1920), when the Supreme Court considered an appropriations statute enumerating various positions and their salaries, the Court held that the statute did not "by Law vest" any power to appoint a person to that position in anyone, noting that there was "no statute which provides specifically by whom the [purported officer] shall be appointed." *Id.* at 516 17. More recently, the Court likewise required a statute that clearly and specifically provided the authority to appoint the officer whose status is under scrutiny. *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 661 (1988) (Ethics in Government Act authorizing Special Division court to "appoint an appropriate" independent counsel); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1335 (D.C. Cir. 2012) (17 U.S.C. § 801(a) providing that the "Librarian of Congress shall appoint 3 full-time Copyright Royalty Judges").

[4] The "obvious purpose" of the Excepting Clause was "administrative convenience[.]" *Edmond v. United States*, 520 U.S. 651, 660 (1997).

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In this context in particular where the Deputy Attorney General has appointed a Special Counsel a clear and unambiguous statute from Congress allowing such an appointment and conferring the Attorney General's power is a prerequisite. "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Cent. United Life Ins. Co. v. Burwell*, 827 F.3d 70, 73 (D.C. Cir. 2016) ("[A]gencies may act only when and how Congress lets them."). That is no less true of the Department of Justice and the Attorney General, each given life by Congress. *See* Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93; Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870); *San Jacinto Tin Co.*, 125 U.S. at 278 80.

In turn, the Attorney General is duty-bound, by statute, to conduct and supervise all litigation to which the United States is a party, and these powers belong exclusively to that office. *See* 28 U.S.C. §§ 516, 519; *United States v. Int'l Union of Operating Eng'rs, Local 701*, 638 F.2d 1161, 1162 (9th Cir 1979) ("[C]onduct [of] federal criminal litigation . . . is an executive function within the exclusive prerogative of the Attorney General.") (internal quotation marks and citation omitted). Accordingly, the law is settled that the Attorney General cannot appoint a private attorney as special counsel and give the special counsel the Attorney General's prosecutorial power "without a clear and unambiguous directive from Congress" allowing it. *United States v. Hercules, Inc.*, 961 F.2d 796, 798 (8th Cir. 1992) (citing *United States v. California*, 332 U.S. 19, 27 (1947)); *The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 56 (1982) ("[T]he 'otherwise authorized by law'" exception in "§§ 516 and 519 has been narrowly construed" to encompass only "statutes" that speak "explicitly").

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Separately this clear and unambiguous statement rule is required here because Congress's exercise of its power under the Excepting Clause whose "obvious purpose" was merely "administrative convenience[,]" *Edmond*, 520 U.S. at 660 alters the "default manner of appointment for inferior officers": Presidential appointment and Senate confirmation. *Id.* The exception thereby effects a waiver of the constitutionally prescribed advice-and-consent default rule. *See Freytag*, 501 U.S. at 882 (explaining that the "principle of separation of powers is embedded in the Appointments Clause"); *cf. Bond v. United States*, 134 S. Ct. 2077, 2088 90 (2014) (noting that structural constitutional safeguards function as "background principles of construction").

This clear and unambiguous statement principle, as applied to the exception to the Appointments Clause's default rule, is consistent with the treatment of similar statutory waivers that purport to disrupt separation-of-powers boundaries specifically laid down by the Constitution. *See, e.g.*, *Kucana v. Holder*, 558 U.S. 233, 237 (2010) (strictly construing statute purporting to deprive courts of jurisdiction to review Attorney General's actions where "[s]eparation-of-powers concerns . . . caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain"); *Franklin v. Massachusetts*, 505 U.S. 788, 800 01 (1992) ("requir[ing] an express statement by Congress" subjecting President's conduct of statutory duties to review "[o]ut of respect for the separation of powers"); *Appointment of Assistant Appraisers at New York*, 15 Op. Att'y Gen. 449, 450 (1878) (concluding that Congress did not displace Appointments Clause's default rule of appointment "[w]here there is no express enactment to the contrary").

As an inferior officer, therefore, the Special Counsel's appointment by the Attorney General or his Deputy must be clearly and unambiguously authorized by a statute giving the

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Special Counsel the prosecutorial role he has assumed. But there is no such clear statement in any of the statutes referred to in the Appointment Order 28 U.S.C. §§ 509, 510, or 515 that conceivably meets the controlling legal standard.

To start with, § 509 states only that "[a]ll functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General," save for certain limited exceptions. 28 U.S.C. § 509. On its face, § 509 does not provide an independent grant of authority to appoint private counsel to investigate and pursue criminal charges on behalf of the United States.

Section 510 is essentially the converse of § 509, providing only that the "Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." 28 U.S.C. § 510. But like § 509, § 510 does not mention the term "appoint" or provide the Attorney General any power to appoint private attorneys as special counsels. And while § 510 permits the Attorney General to allow "any" of his "function[s]" to be performed, he can only authorize an "officer, employee, or agency of the Department of Justice" to perform them § 510 gives the Attorney General no power to appoint a private attorney as a special counsel and then delegate power to him.

Turning lastly to § 515, only subsection (a) is relevant to this Appointments Clause inquiry, and in its current form it provides:

> The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General ***under law***, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrate judges, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

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28 U.S.C. § 515(a) (emphases added). Section 515(a), by its terms, authorizes only three categories of individuals to conduct proceedings in the name of the United States: (1) the Attorney General; (2) "any other officer of the Department of Justice"; or (3) "any attorney specially appointed by the Attorney General ***under law***." (Emphases added).

The Special Counsel was an attorney in private practice at the time of his appointment. Therefore, he was not the Attorney General, nor was he an "officer of the Department of Justice." And, the Special Counsel does not fall within the third § 515(a) category either. He is not "any attorney specially appointed by the Attorney General under law" because there is no "law" that is, a ***statute*** separate from § 515(a) that specifically authorizes the appointment of a private individual to perform the lead prosecutorial role in bringing this case. Any argument to the contrary fails to accord the statute its plain meaning and abrogates the need for a clear and specific statement of authority as required under the Appointments Clause.

Section 515(a) originated from the Act of June 30, 1906, ch. 3935, 34 Stat. 816 ("1906 Act"). The 1906 Act states that the

> Attorney-General [sic] or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney-General [sic] ***under any provision of law***, may, when thereunto specifically directed by the Attorney-General [sic], conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys [the precursor to today's United States Attorneys] now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought.

(Emphases added.)

The United States Code did not exist at the time of the 1906 Act's adoption. It was not until 1926 that the language of the 1906 Act was codified at 5 U.S.C. § 310 by an Act of Congress creating the first edition of the United States Code. *See* Act of June 30, 1926, ch. 712, § 2, 44 Stat. pt. I, 46. While the authors of the first edition of the United States Code saw fit to

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delete the hyphen in "Attorney-General," the original codified version of the 1906 Act retained the "under any provision of law" language. *See* 5 U.S.C. § 310 (1926) ("The Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General ***under any provision of law***, may, when thereto specifically directed by the Attorney General, conduct any kind of legal proceeding . . . .") (emphases added). Moreover, Congress expressly stated that nothing in the first edition of the United States Code was to be "construed as repealing or amending any . . . law" in effect as of December 7, 1925, which included the 1906 Act. Act of June 30, 1926 § 2(a), 44 Stat. pt. I at 1.

The original codified version of the 1906 Act remained undisturbed for almost four decades. *See* 5 U.S.C. § 310 (1964) (using language identical to 1926 edition). In 1966, however, Congress moved the content of what had been 5 U.S.C. § 310 to its current location at 28 U.S.C. § 515(a). *See* Act of Sept. 6, 1966, Pub. L. No. 89-554, § 4(c), 80 Stat. 378, 613 ("1966 Act"). In doing so, the 1966 Act used the streamlined "under law" formulation now found in § 515(a) instead of the longer "under any provision of law" version used by the 1906 Act. *Id.* Congress specified, however, that the "legislative purpose" of any changes was merely to "restate" existing law "without substantive change." *Id.* § 7(a), 80 Stat. at 631. Therefore, § 515(a)'s use of the phrase "under law" has the same meaning as the phrase "under any provision of law" at the time of the 1906 Act. *See, e.g.*, *Loving v. IRS*, 742 F.3d 1013, 1019 (D.C. Cir. 2014) (addressing similar instance where the language of a statute as first enacted in 1884 informed the meaning of the codified version where, as here, Congress specified that the codification was intended to be made "without substantive change"); *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, --- F. Supp. 3d ---, No. 1:16-cv-02394-DLF, 2018 WL 1542049, at *16

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(D.D.C. Mar. 29, 2018) (Friedrich, J.) (finding statutory term "rural district" retained its 1934 meaning even though other portions of statute had been amended since then).

For a private-attorney appointment under § 515(a) to be congressionally authorized, therefore, he or she must be an "attorney specially appointed by the Attorney General under [any provision of] law." To give each of the terms in the statute independent meaning, "under any provision of law" or "under law" must be a reference to a statute, other than § 515(a) itself by which Congress provided for a private attorney's appointment as a special counsel with the expansive powers claimed here.

"[L]aw" necessarily means "statute" and ***not*** a mere "regulation"[5] because, under the Appointments Clause, any power the Attorney General would have to appoint an "Officer" such as the Special Counsel could only come from Congress, and Congress makes "law" through legislation. *See Clinton v. City of New York*, 524 U.S. 417, 437 (1998) (Congress makes "law" through the enactment of legislation pursuant to its Article I, § 8 powers); *Lucia*, 2018 WL 3057893, at *10 (Thomas, J., concurring) ("by Law" in Appointments Clause means "by statute"). In addition, § 515(a) uses both the past tense and the passive voice "specially appointed by the Attorney General" which further demonstrates that Congress contemplated attorneys already "specially appointed" under some other statute when it wrote § 515(a). "'Congress' use of a verb tense is significant in construing statutes.'" *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 493 (D.C. Cir. 2004) (Roberts, J.) (quoting *United States v. Wilson*, 503 U.S. 329, 333 (1992)); *see also Dean v. United States*, 556 U.S. 568, 572 (2009) (focusing on statute's "use of the passive voice" in determining meaning). Congress uses

[5] As noted (*infra* at 47 48), the Special Counsel seemingly does not consider the Special Counsel Regulations to be "law" since he claims they are neither binding nor enforceable in court.

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the past tense to "denot[e] an act that has been completed[,]" *Barrett v. United States*, 423 U.S. 212, 216 (1976), while its use of the passive voice conveys that "***whether*** something happened" here, a "special[] appoint[ment]" of an attorney "***not how*** or why it happened [is what] matters," *Dean*, 556 U.S. at 572 (emphases added). Contrast that with the present-tense, active-voice conferral of appointment power by Congress as reflected, for example, in 28 U.S.C. §§ 542(a) ("Attorney General may appoint one or more assistant United States attorneys") and 543(a) ("Attorney General may appoint [special] attorneys to assist United States attorneys"), and in numerous other appointment power-conferring statutes. *Infra* at 19 21.

This plain-text construction is, of course, the preferred one and must be followed. *See Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) ("[W]hen the statutory language is plain, we must enforce it according to its terms"). Well-recognized principles of statutory construction also reinforce that § 515(a) requires the authorization to appoint a private attorney as a special counsel to come from another statute apart from § 515(a) itself.

First, the surplusage canon supports the conclusion that "under any provision of law" or "under law" means a legislative enactment other than § 515(a). *See United States v. Menasche*, 348 U.S. 528, 538 39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section[.]") (internal quotation marks and citation omitted). If § 515(a) provides standalone authorization for the special appointment of a private attorney by the Attorney General, then the "under any provision of law" or "under law" language is meaningless. There would be no need to require a special appointment "under any provision of law" if § 515(a) independently provides such authority had it intended the latter, Congress could simply have said "any attorney specifically appointed under this section."

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Second, dictionaries of the era support the conclusion that "under any provision of law" or "under law" means a separate legislative enactment. *See Wisc. Cent. Ltd. v. United States*, --- S. Ct. ---, No. 17-530, 2018 WL 3058014, at *2 (U.S. June 21, 2018) (explaining that "our job is to interpret the words [of a statute] consistent with their ordinary meaning . . . at the time Congress enacted the statute," and looking to contemporary dictionary definitions of statutory term) (internal quotation marks and citation omitted); *Am. Bankers Ass'n*, 2018 WL 1542049, at *8 ("To discern contemporaneous meaning, courts look first to contemporaneous dictionaries.").

For example, a leading law dictionary at the time defined a "law" as, among other things, a "rule or enactment promulgated by the legislative authority of a state." Black's Law Dictionary 691 (1st ed. 1891). "According to usage in the United States," the same dictionary explained, "the term 'law' is used in contradistinction to [a constitution] to denote a statute or enactment of the legislative body." *Id.*; *accord* Black's Law Dictionary 700 (2d ed. 1910) ("'Law' is a solemn expression of legislative will."). Other legal dictionaries of the era define "law" in similar terms. *See, e.g.*, Walter A. Shumaker & George Foster Longsdorf, *The Cyclopedic Dictionary of Law* 533 (1901) (defining "law" to include a "rule of civil conduct prescribed by the supreme power in a state," as well as "a statute; a rule prescribed by the legislative power"); 2 Francis Rawle, *Bouvier's Law Dictionary* 1876 (8th ed. 1914) (defining "law" to include a "rule of civil conduct prescribed by the supreme power in a state," as well as a "rule or enactment promulgated by the legislative authority of a state"); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 419 (2012) ("Dictionaries

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tend to lag behind linguistic realities . . . . If you are seeking to ascertain the meaning of a term in an 1819 statute, it is generally quite permissible to consult an 1828 dictionary.").[6]

Third, congressional practice both at the time § 515(a) was enacted and thereafter further supports the conclusion that "under any provision of law" or "under law" means a legislative enactment other than § 515(a). To put it simply since the time of § 515(a)'s enactment in 1906, and despite § 515(a)'s existence, Congress repeatedly has enacted statutes that clearly and expressly confer authority to appoint special or independent counsels. If Congress believed § 515(a) itself conferred that authority, it would have had no need to pass additional ones that did.

Three years after the 1906 Act that first enacted the predecessor to § 515(a), Congress passed legislation of the very type envisioned by what is now § 515(a). The Act of August 5, 1909, ch. 6, 36 Stat. 11, authorized the Attorney General to, "whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such special attorneys and counselors at law in the conduct of customs cases as he may think necessary . . . ." *Id.* § 28, 36 Stat. at 108. The enactment of such legislative language was by no means groundbreaking. In 1861, for example, Congress enacted a similar statute empowering the Attorney General, "whenever in his opinion the public interest may require it, to employ and retain (in the name of the United States) such attorneys and counsellors-at-law [sic] as he may think necessary to assist the district-attorneys . . . ." Act of Aug. 2, 1861, ch. 37, § 2, 12 Stat. 285, 285. That statute, as amended, exists to this day. *See* 28 U.S.C. § 543(a) (providing that the Attorney General "may

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[6] As for the word "provision," an often-cited English language dictionary of the era defines the word "provision" as including "[t]hat which is stipulated in advance," such as "the statute has many *provisions*." *Webster's New International Dictionary* 1995 (2d ed. 1934); *see also* Scalia & Garner, *Reading Law* 422 (citing the foregoing dictionary as a trustworthy source for meanings during 1901 to 1950).

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appoint attorneys to assist United States attorneys when the public interest so requires"). This contemporary legislative activity is strong evidence that § 515(a) does not itself confer any appointment power. *See Fed. Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 736 (1973) (looking to "Congress' . . . contemporaneous and related statutes").

Later-enacted statutes further reinforce the point. At the height of the 1920s' Teapot Dome scandal, Congress enacted legislation that expressly authorized the President to "appoint, by and with the advice and consent of the Senate, special counsel who shall have charge and control of the prosecution of such litigation [related to the oil leases giving rise to the scandal], anything in the statutes touching the powers of the Attorney General of the Department of Justice to the contrary notwithstanding." S.J. Res. 54, 68th Cong., ch. 16, 43 Stat. 5, 6 (1924). Congress later enacted legislation appropriating funds for that very purpose, specifying that "[a]ny counsel employed by the President under the authority of this resolution shall be appointed by, and with the advice and consent of the Senate and shall have full power and authority to carry on said proceedings, *any law* to the contrary notwithstanding." H.J. Res. 160, 68th Cong., ch. 42, 43 Stat. 16 (1924) (emphasis added). The contrast between these provisions and § 515(a) is clear.

There is more. After Watergate came the Ethics in Government Act of 1978, as subsequently renewed by Congress until 1999. By the late 1970s, the "need" for specific statutory appointment authorization had "been demonstrated several times [during the twentieth] century[,]" *In re Olson*, 818 F.2d 34, 39 42 (D.C. Cir. 1987) from Teapot Dome, to government corruption during President Truman's administration, to Watergate itself despite the fact that § 515(a) was, and had been all that time, on the books. Yet, like the enactments during the Teapot Dome scandal, and in stark contrast to § 515(a), the Ethics in Government Act contained a present-tense, active-voice provision that specifically conveyed power to the

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Attorney General and a Special Division court to appoint an independent counsel. *See* 28 U.S.C. §§ 591 593.

When it legislates, Congress is presumed to know "existing law," *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (citation omitted) including, of course, the statutes it enacted, *see St. Louis, I. M. & S. Ry. Co. v. United States*, 251 U.S. 198, 207 (1920) ("Congress must be presumed to have known of its former legislation . . . and to have passed the new laws in view of the provisions of the legislation already enacted."). Thus presumed to have known of § 515(a) since its enactment in 1906, then, why did Congress proceed to pass multiple and express special/independent counsel appointment-authorization statutes in 1909; in the 1920s during the Teapot Dome scandal; and from the late 1970s through the late 1990s in the Ethics in Government Act and subsequent renewals? The only explanation is that Congress, consistent with the plain language of § 515(a), believed those separate appointment-authorization statutes were necessary because § 515(a) did not itself confer that significant power.

Fourth, judicial opinions of the era support the conclusion that "under any provision of law" or "under law" means a separate legislative enactment. *See, e.g.*, *King Mfg. Co. v. Augusta*, 277 U.S. 100, 103 (1928) ("The Constitution of the United States does not use the term 'statute,' but it does employ the term 'law,' often regarded as an equivalent, to describe an exertion of legislative power."); *see also* U.S. Const. art. I, § 7, cl. 2 (providing that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, *before it become a Law*, be presented to the President") (emphasis added); *id.* art. I, § 8, cl. 18 (providing that Congress shall have power "[t]o make *all Laws* which shall be necessary and proper for carrying into Execution the foregoing Powers") (emphasis added).

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Fifth, and finally, the conclusion that § 515(a)'s "under any provision of law" or "under law" means a separate legislative enactment also is supported by the fact that courts have construed similar language ("by law") in neighboring provisions §§ 516 and 519 to mean a legislative enactment, and the Department of Justice agrees. Section 516 provides that, "[e]xcept as otherwise authorized ***by law***," the conduct of litigation involving the United States is "reserved to officers of the Department of Justice, under the direction of the Attorney General." (Emphases added.) Similarly, § 519 provides that, "[e]xcept as otherwise authorized ***by law***, the Attorney General shall supervise all litigation to which the United States" is a party. (Emphases added.) Courts of appeals have interpreted "by law" in these two provisions to mean a statute. *See, e.g.*, *Marshall v. Gibson's Prods., Inc.*, 584 F.2d 668, 676 n.11 (5th Cir. 1978) (holding that "in the absence of an express congressional directive to the contrary, [the Attorney General] is vested with plenary power over all litigation to which the United States or one of its agencies is a party"); *FTC v. Guignon*, 390 F.2d 323, 324 25 (8th Cir. 1968) (holding that there must be "specific authorization" in a statute to proceed without the Attorney General).

Following these same precedents, the Department of Justice has explained that "[i]n order to come within the 'as otherwise authorized by law' exception to the Attorney General's authority articulated in [§§] 516 and 519, it is necessary that ***Congress use language*** authorizing agencies to employ outside counsel. . . ." *The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. at 56 57 (emphases added); *see also id.* at 56 ("'otherwise authorized by law' language [in §§ 516 and 519] has been narrowly construed to permit litigation by agencies *only when statutes* explicitly provide for such authority") (citing cases; emphasis added). Given the parallel between these provisions and § 515(a) and the views of the courts and the Department of Justice on the proper construction of neighboring §§ 516 and 519

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"under any provision of law" or "under law" in § 515(a) should be read the same way: to require a separate statute authorizing the appointment. *See Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."); *Airlines for Am. v. Transp. Sec. Admin.*, 780 F.3d 409, 411 12 (D.C. Cir. 2015) (rejecting interpretation that would require court "to believe that Congress intended different meanings for a nearly identical phrase as used in two neighboring provisions").

Properly construed, §§ 509, 510, and 515 plainly fail to provide the clear authorization demanded by the Appointments Clause for the appointment of an inferior officer like the Special Counsel. While that should end the analysis, the Special Counsel likely will point to two decisions to try to defend the statutory validity of his unlawful appointment: (1) *United States v. Nixon*, 418 U.S. 683 (1974); and (2) *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987). Neither case is on point for the Appointments Clause argument Concord advances here.

In *Nixon*, the Supreme Court was asked to address President Richard Nixon's claim of executive privilege in response to a grand jury subpoena seeking certain audio recordings related to the Watergate burglary and issued by the special counsel, Leon Jaworski, an attorney in private practice when he was appointed by Acting Attorney General Robert Bork. Acting Attorney General Bork made that appointment pursuant to a regulation he promulgated, which also granted Mr. Jaworski plenary authority to conduct the investigation and expressly granted him the power to contest assertions of privilege. *See Nixon*, 418 U.S. at 694 95. In the course of resolving the executive-privilege claim, the Court made the following observation regarding the regulation:

> Under the authority of Art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government. 28

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> U.S.C. § 516. It has also vested in him the power to appoint subordinate officers to assist him in the discharge of his duties. 28 U.S.C. §§ 509, 510, 515, 533. Acting pursuant to those statutes, the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and tenure. ***The regulation*** gives the Special Prosecutor explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties.

418 U.S. at 694 95 (emphases added) (footnote omitted). Ultimately, the Court found that "[s]o long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and it enforce it." *Id.* at 696. That said, the authority of Acting Attorney General Bork to make the special-counsel appointment was not in dispute in *Nixon*, the regulation in *Nixon* was specific to that matter, and no issue was raised about the construction of any of the cited statutes in relation to the requirements set forth in the Appointments Clause or the accepted judicial construction of those requirements.

Sealed Case lacks relevance here for the same reason. In that case, Lawrence Walsh, then an attorney in private practice, was appointed by a special division of the D.C. Circuit to serve as an independent counsel under the Ethics in Government Act. Mr. Walsh was tasked with investigating whether Lieutenant Colonel Oliver North had committed crimes related to selling arms to Iran and diverting related proceeds. After Lt. Col. North filed suit challenging the constitutionality of the independent-counsel provisions of the Ethics in Government Act, Attorney General Edwin Meese promulgated a specific regulation similar to that promulgated prior to the *Nixon* decision that established an "Office of Independent Counsel: Iran/Contra[,]" citing, among other things, §§ 509, 510, and 515. *See Sealed Case*, 829 F.2d at 52; Final Rule, 52 Fed. Reg. 7270 (Mar. 10, 1987). Mr. Walsh, who was already serving as an independent counsel under the Ethics in Government Act, accepted a parallel appointment under the new

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regulation. *Sealed Case*, 829 F.2d at 53. The grand jury then issued a subpoena to Lt. Col. North, with which he refused to comply. *Id.* After being held in contempt by the district court and obtaining a remand by the D.C. Circuit to address his arguments challenging, among other things, the validity of Mr. Walsh's parallel appointment under the regulation, the district court once again ruled against Lt. Col. North. *See id.* at 53 54.

The D.C. Circuit affirmed. Without any analysis, the court concluded "that the Attorney General possessed the statutory authority to create the Office of Independent Counsel: Iran/Contra and to convey to it the 'investigative and prosecutorial functions and powers' described in [the regulation]." *Id.* at 55 (citing §§ 509, 510, and 515). The court then observed in a footnote that "[t]ogether, these provisions vest in the Attorney General the 'investigative and prosecutorial functions and powers' described in the regulation, . . . and authorize him to delegate such functions and powers to others within the Department of Justice." *Id.* at 55 n.29. Again, however, *Sealed Case*, like *Nixon*, cannot be divorced from its unique facts as they relate to the court's references to §§ 509, 510, and 515 in considering the appointment of Mr. Walsh. And, like *Nixon*, *Sealed Case* did not purport to resolve whether Mr. Walsh's appointment in fact complied with the express requirements in the Appointments Clause.

Here, in contrast, the Appointments Clause statutory-construction issue is squarely raised and calls for this Court to consider whether the precise language of §§ 509, 510 and 515(a) properly can be read to authorize the Special Counsel's appointment. Cases are not authority for propositions not specifically addressed, considered, or analyzed, and *Nixon* and *Sealed Case* most certainly did not decide what the Appointments Clause requires in this context, nor did either court need to do so in order to resolve the actual dispute before it. Thus, neither case can be considered dispositive and this Court is free to make its own determination on the

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constitutionality of the Special Counsel's appointment under the Appointments Clause. *See United States v. Sheffield*, 832 F.3d 296, 308 n.3 (D.C. Cir. 2016) ("'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'") (quoting *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (internal citation omitted)); Bryan A. Garner et al., *The Law of Judicial Precedent* 44 (2016) (cases are only "precedent" for "legal questions actually presented to and decided by the court").

2. Alternatively, the Special Counsel is a principal officer required to be—but who was not—appointed by the President and confirmed by the Senate.

The "inferior Officer" analysis is dispositive, but the Special Counsel's appointment also fails under the Appointments Clause on an additional and independent ground: as a matter of fact and law, he is a principal officer within the meaning of the Appointments Clause and therefore was required to be appointed by the President and confirmed by the Senate. That did not happen and the Indictment must be dismissed for this reason, too.

Three precedents are important for determining whether the Special Counsel is a principal officer under the Appointments Clause: (1) *Edmond*, 520 U.S. 651; (2) *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010); and (3) *Intercollegiate*, 684 F.3d 1332. A fourth *Morrison*, 487 U.S. 654 has been supplanted by *Edmond*, but to the extent it adds further functional considerations to the principal-officer inquiry, the outcome is the same on this record.[7]

[7] The *Edmond* Court pointed out that "*Morrison* did not purport to set forth a definitive test for whether an office is 'inferior' under the Appointments Clause[,]" 520 U.S. at 661, and Justice Thomas recently expressed a similar view in *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 947 n.2 (2017) (Thomas, J., concurring) ("Although we did not explicitly overrule *Morrison* in *Edmond*, it is difficult to see how *Morrison*'s nebulous approach survived our opinion in *Edmond*."). (continued)

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In *Edmond*, the Supreme Court considered whether civilian administrative law judges on the Coast Guard Court of Criminal Appeals were principal or inferior officers. Observing that the Court's "cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes[,]" the Court found that the principal distinguishing feature is that "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." 520 U.S. at 663. The Court of Criminal Appeals judges, the Supreme Court held, were inferior officers under this standard because they were subject both to the Judge Advocate General's extensive "administrative oversight" including, notably, his power to remove them "without cause" and the Court of Appeals for the Armed Forces' review of "every" one of their rulings. *Id.* at 664 65. Thus, the Court found to be "significant" the fact that the Court of Criminal Appeals judges had "no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id.* at 665.

More recently, in *Free Enterprise Fund*, 561 U.S. 477, the Supreme Court considered whether members of the Public Company Accounting Oversight Board were principal or inferior officers. The Court noted the Securities and Exchange Commission's ("SEC") "oversight authority" over the Board. *Id.* at 511. And it concluded that because the SEC was "properly viewed, under the Constitution, as possessing the power to remove Board members at will[,]"

Edmond "conforms" with the original "understanding of the Appointments Clause" as expressed by the first Congress in 1789. 520 U.S. at 663; *see also SW Gen.*, 137 S. Ct. at 947 n.2 (Thomas, J., concurring) (noting same). And since *Edmond* also "postdates" and "clarifies" *Morrison*, *Edmond* is the "most apposite precedent" here. *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 23 (2004); *see also* Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 810, 811 (1999) (explaining that *Morrison* provided "a doctrinal test good for one day only" and that in *Edmond* the Supreme Court "apparently abandoned [that] *ad hoc* test").

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"under *Edmond* the Board members are inferior officers whose appointment Congress may permissibly vest in a 'Hea[d] of Departmen[t].'" *Id.* at 510.

Applying *Edmond* and *Free Enterprise Fund*, the D.C. Circuit in *Intercollegiate* found that administrative Copyright Royalty Board judges were principal officers. The court of appeals began by noting that the Supreme Court in *Edmond* "emphasized three factors: (1) the judges were subject to the substantial supervision and oversight of the Judge Advocate General (who in turn was subordinate to the Secretary of Transportation) . . . ; (2) the judges were removable by the Judge Advocate General without cause . . . ; and (3) another executive branch entity, the Court of Appeals for the Armed Forces, had the power to reverse the judges' decisions so that they had 'no power to render a final decision on behalf of the United States unless permitted to do so by other Executive Officers.'" *Intercollegiate*, 684 F.3d at 1338 (quoting *Edmond*, 520 U.S. at 664 65) (citations omitted).

On the first factor, the court acknowledged that the copyright judges were "supervised in some respects by the Librarian [of Congress] and by the Register of Copyrights" the Librarian issued ethical rules, exercised oversight over copyright judges' procedural regulations, and had power to assign copyright judges additional duties, while the Register had "authority to interpret the copyright laws and provide written opinions to the [copyright judges] on 'novel material question[s]' of law" that copyright judges "must abide by" and "reviews and corrects any legal errors in the [copyright judges'] determinations." *Id.* at 1338 39. These were "non-trivial limit[s] on the [copyright judges'] discretion," the court of appeals noted, "and the Librarian may well be able to influence the nature of the Register's interventions." *Id.* at 1339. Nevertheless, the "supervision and oversight" factor in light of the removability and final-decision factors fell "short of . . . render[ing] the [copyright judges] inferior officers" given the "broad discretion"

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with regard to setting the rates and terms for copyright royalties. *Id.* at 1338 39. That is because copyright judges could only be removed "for misconduct or neglect of duty" particularly significant under *Edmond*. *Id.* at 1339 40. And the copyright judges' rate determinations were "not reversible or correctable by any other officer or entity within the executive branch" or "subject to reversal or change only when challenged in an Article III court." *Id.* at 1340.

Consistent with *Edmond*, *Free Enterprise Fund*, and *Intercollegiate*, three overarching criteria dictate whether an officer is a principal or inferior one: first, whether an officer is "directed and supervised" by persons "appointed by Presidential nomination with the advice and consent of the Senate"; second, whether an officer can make a "final decision on behalf of the United States" without prior permission from "other Executive Officers"; and third, whether the officer is removable at will. Applying the three criteria here, the Special Counsel is no less a principal officer than the copyright judges in *Intercollegiate*.

Direction and supervision. In looking at the degree of the Special Counsel's autonomy, the inquiry focuses on whether there is meaningful direction and supervision provided by the Deputy Attorney General not practically, but objectively under existing law.[8] *See Edmond*, 520 U.S. at 664 65 (looking to Uniform Code of Military Justice provisions outlining superior officers' power to supervise and oversee); *Ass'n of Am. R.Rs. v. Dep't of Transp.*, 821 F.3d 19, 39 (D.C. Cir. 2016) (consulting Passenger Rail Investment and Improvement Act in determining agency's power to direct appointed arbitrator); *Intercollegiate*, 684 F.3d at 1338 39 (looking to Copyright Act provisions setting forth supervisory authority of Librarian of Congress and

[8] As noted elsewhere, Concord maintains that the Special Counsel Regulations are constitutionally invalid and in excess of the Attorney General's authority. *Infra* at 40 43. But the Regulations are the only objective source providing authority for the Deputy Attorney General to direct and supervise the Special Counsel. They therefore are considered in the analysis here.

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Register of Copyrights over copyright judges). This focus follows from the fact that "Appointments Clause challenges are properly structural, not procedural." *Estes v. U.S. Dep't of Treasury*, 219 F. Supp. 3d 17, 38 (D.D.C. 2016). Thus, "[i]n evaluating such challenges, reviewing courts do not evaluate the degree of supervision or reversal authority actually exercised by superiors regarding the particular agency decision at issue, but rather the extent to which relevant statutes or regulations provide for such oversight as a structural matter." *Id.*

With that objective focus in mind, there is no statute that gives the Attorney General the power to supervise a private attorney appointed as a special counsel. That includes 28 U.S.C. §§ 509, 510, and 515, the three provisions that purportedly support the appointment here.

As for the Special Counsel Regulations, as noted, the Special Counsel has challenged the binding nature of the Regulations in the *Manafort* litigation, asserting that they "simply provide a helpful framework for the Attorney General to use in establishing the Special Counsel's role[,]" *supra* at 4 5 (citation omitted), and rejecting the claim that any violation of the Regulations can be remedied by the federal courts, *id.*; *see also infra* at 40. Were the Special Counsel right about this, there would be ***no*** objective legal basis for direction and supervision of the Special Counsel: only such direction and supervision, if any, that the Deputy Attorney General elects, at his sole discretion unreviewable by the Judiciary to exercise.

But this "just trust me, complete deference to the Deputy Attorney General" rule is no way to ensure that the critical separation-of-power limits the Appointments Clause establishes which protect both "individual" rights, *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1233 (2015) (citation omitted), as well as the "structural interests . . . of the entire Republic[,]" *Freytag*, 501 U.S. at 878 are heeded. *See Morrison*, 487 U.S. at 727 (Scalia, J., dissenting) (rejecting a "[t]rust us" approach to interpreting and enforcing separation of powers because "the

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Constitution gives . . . the people . . . more protection than that"). It is the Judiciary's province to police constitutional boundaries, *see Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 197 (2012), and, specifically, to ensure that an agency's exercise of "substantive . . . powers . . . accord[s] with constitutional separation-of-powers principles," *Pereira v. Sessions*, --- S. Ct. ---, No. 17-459, 2018 WL 3058276, at *14 (U.S. June 21, 2018) (Kennedy, J., concurring). And, at a minimum, taking the Special Counsel's view of the Regulations at face value, there is no objective legal basis for the Deputy Attorney General's or anyone else's direction and supervision over the Special Counsel.

To the extent the Special Counsel Regulations do apply and are binding, the conclusion is the same. While the Regulations purport to address the Attorney General's role with respect to a special counsel, *see* 28 C.F.R. § 600.7(b), they also make clear that any supervision is *de minimis* at most and not nearly enough to turn this Special Counsel into an inferior officer. Indeed, the Regulations give the Special Counsel very wide latitude subject to no meaningful, substantive oversight or supervision by the Attorney (or Deputy Attorney) General:

- ***First***, the Special Counsel has discretion whether "to inform or consult with the Attorney General or others within the Department about the conduct of his or her duties and responsibilities" he is not required to do so (§ 600.6);

- ***Second***, the "Special Counsel shall ***not*** be subject to the day-to-day supervision of any official of the Department" of Justice (§ 600.7(b)) (emphases added); and

- ***Third***, although § 600.7(b) goes on to provide for some involvement by the Attorney General in a Special Counsel's investigation, that involvement (i) is ***purely discretionary*** "the Attorney General *may* request that the Special Counsel provide an explanation for any investigative or prosecutorial step"; (ii) is ***highly deferential to the Special Counsel*** it only triggers further possible action if steps are found to be "so inappropriate or unwarranted under established Departmental practices that it should not be pursued[,]" giving "great weight to the views of the Special Counsel" in that determination; and (iii) does not authorize the Attorney General to revoke, rescind, or change in any way any "step" taken by the Special Counsel if the Attorney General finds the "so inappropriate or unwarranted" standard met, he must "notify Congress[,]" nothing more (§ 600.7(b)) (emphasis added).

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In other pending litigation, the Special Counsel has described § 600.7(b) as permitting the Attorney General to "countermand the [Special Counsel's investigative or prosecutorial] step if it is sufficiently 'inappropriate or unwarranted under established Departmental practices[.]'" Gov't Resp. in Opp'n to Mot. to Dismiss at 7, *United States v. Manafort*, No. 1:17-cr-00201-ABJ (D.D.C. Apr. 2, 2018) (citing § 600.7(b)). But that is a unilateral interpretation by the Special Counsel himself, and in fact, not at all what the regulation says. Rather, the regulation strings together a series of permissive terms "may review"; "may . . . conclude"; and "should not be pursued" (twice); one mandatory directive "will give great weight to the views of the Special Counsel"; and a single mandatory remedy "shall notify Congress. . . ." *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 718 (D.C. Cir. 2015) ("Should" unlike "shall" is "'precatory, not mandatory.'') (citation omitted); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) ("'shall' generally imposes a nondiscretionary duty") (citation omitted). And the use of "may," "should," "will," and "shall" in this same section and in the very same and neighboring sentences confirms that they are intended to have different and independent meanings. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) ("[W]e presume differences in language" in same statutory provision to "convey differences in meaning") (citation omitted); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting "Congress' use of the permissive 'may' in [one section of statute] contrasts with the legislators' use of a mandatory 'shall' in the very same section").

In short, § 600.7(b), by its terms, plainly does not authorize the Deputy Attorney General to countermand steps taken by the Special Counsel. The authority to "request" an "explanation" from the Special Counsel and "conclude that the action . . . should not be pursued" neither expresses nor implies any remedial action or self-executing measure. It describes, instead, an

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advisory function to (i) "review" the Special Counsel's "explanation" of a "step"; (ii) reach a "conclu[sion]" that, in the Attorney General's view, the action "should not" (not, "shall not") "be pursued"; and (iii) to "notify Congress." This straightforward construction follows, too, from the parallel use of "conclude that [an action] should not be pursued" in § 600.7(b), the second of which leads to the remedy "shall notify Congress." Concluding that an action "should not be pursued" is just that a conclusion, not a remedial act of "countermand[ing]" what the Special Counsel plans to do (or already has done).

Had the drafters of the Regulations intended to confer such a broad "countermand[ing]" power, they would not have used the precatory phrase "may . . . conclude that the action . . . should not be pursued" and then tied it to a mandatory duty to "notify Congress." Rather, they could instead have written, "if the Attorney General concludes that the proposed action by a Special Counsel should not be pursued, the Attorney General is authorized to countermand it and order that it cease immediately." Or the regulation could have said that the special counsel could be removed based on a disagreement with the Attorney General. And given the significance in this context of the Attorney General's authority over the Special Counsel, the drafters would not have hidden that "elephant" of supposed countermanding authority in the "mousehole" of the limited, precatory language the drafters are presumed to have intentionally chosen. *Cyan v. Beaver Cnty. Employees Retirement Fund*, 138 S. Ct. 1061, 1071 72 (2018).

A final note on "direction and supervision": it is of no moment in analyzing "supervision and oversight" that the Attorney General and Deputy Attorney General formally outrank the Special Counsel. *See Edmond*, 520 U.S. at 662 63 (finding it "not enough that other officers may be identified who formally maintain a higher rank"); *id.* at 667 (Souter, J., concurring) ("Having a superior officer is necessary for inferior officer status, but not sufficient to establish

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it."); *Morrison*, 487 U.S. at 722 (Scalia, J., dissenting) ("Even an officer who is subordinate to a department head can be a principal officer."). The Appointments Clause's express definition of principal officers confirms as much, specifically listing "Ambassadors, other public Ministers and Consuls" as principal officers even though such officials were at the Founding as they are now supervised and directed by a superior executive official: the Secretary of State. *See* Foreign Affairs Act of 1789, ch. 4, § 1, 1 Stat. 28, 28 29 (Secretary shall "perform and execute such duties . . . relative to correspondences, commissions or instructions to or with public ministers or consuls"). Here, for all the above reasons, the "direction and supervision" criterion plainly supports the conclusion that the Special Counsel is a principal officer.

Power to make final decisions without prior Executive approval. This criterion likewise strongly supports the Special Counsel's principal-officer status because even assuming the Special Counsel Regulations apply and are binding the Special Counsel can make final decisions on behalf of the United States without first obtaining permission from the Deputy Attorney General. Certainly, without the Regulations there is nothing to stop the Special Counsel from making final decisions without first asking the Deputy Attorney General for permission. With the Regulations, again, the story is the same.

In several instances, the Regulations require the Special Counsel to "consult" with Department of Justice officials and inform or exercise his discretion whether to inform the Attorney General of "events" that occur in the course of his investigation. *See* 28 C.F.R. §§ 600.6, 600.7(a), 600.8(b). They also indicate that the Special Counsel should provide an "explanation" of any "step" in his investigation if asked by the Attorney General to do so. *Id.* § 600.7(b). And they direct that the Special Counsel like any other Department of Justice official must generally comply with Department rules, regulations, and procedures. *Id.*

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§ 600.7(a). Yet the Regulations nowhere require the Special Counsel to obtain the approval or permission of the Attorney General before making final decisions about who to investigate, indict, and prosecute. And while, as noted, the Attorney General might "conclude" that a decision made by the Special Counsel is "so inappropriate or unwarranted . . . that it should not be pursued" and must notify Congress if he so concludes he has no authority under the Regulations to reverse or countermand the Special Counsel's decision.

Removal. Finally, the fact that the Special Counsel is not removable at will by a superior officer in the Executive Branch further reinforces that the Special Counsel is a principal officer. In the absence of the Regulations, there is no provision for the removal of the Special Counsel at all, much less removal for no cause. And here again, applying the Regulations leads to the same result. Section 600.7(d) provides that the Attorney General can remove the Special Counsel only for "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good case, including violation of Departmental policies." Looking at the same heightened standard in *Intercollegiate*, the D.C. Circuit held that the removability factor "support[ed] a finding that the [copyright judges] are principal officers" because, as here, the copyright judges could be removed by a superior officer "only for misconduct or neglect of duty." 684 F.3d at 1339-40; *compare Edmond*, 520 U.S. at 664 (finding Coast Guard judges were inferior officers where they could be removed ***without*** cause); *Free Enter. Fund*, 561 U.S. at 510 (holding that members of Public Company Accounting Oversight Board were inferior officers because SEC had the power to remove Board members at will).

Accordingly, under the relevant inquiry as set forth in *Edmond*, the Special Counsel is a principal officer who was not appointed in conformity with the procedures required by the Appointments Clause. He therefore lacks "the authority to represent the United States," and the

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Court "must dismiss . . . for want of jurisdiction." *United States v. Providence Journal Co.*, 485 U.S. 693, 699 (1988); *see also Ryder*, 515 U.S. at 180, 188 (holding that judges appointed in violation of the Appointments Clause lacked authority to hear case and reversing judgment).

Morrison v. Olson. While the reasoning of *Morrison* should not be viewed as controlling, the factorial analysis the Supreme Court applied there does not change the outcome here. In that case, the Court considered whether Alexia Morrison, an independent counsel appointed under the now-expired Ethics in Government Act, was an inferior officer. In undertaking its analysis, the Court observed that Ms. Morrison could be removed by the Attorney General "only for good cause[,]" but the Court "clearly did not hold that such a restriction on removal was generally consistent with the status of inferior officer." *Intercollegiate*, 684 F.3d at 1340. "Instead, as *Edmond* explains, *Morrison* relied heavily on the Court's view that the independent counsel also 'performed only limited duties, that her jurisdiction was narrow, and that her tenure was limited [to performance of a 'single task'].'" *Id.* (quoting *Edmond*, 520 U.S. at 661) (bracketed text supplied by *Intercollegiate*). As for those three criteria duties, jurisdiction, and tenure the differences between *Morrison* and this case are clear and material.

First, Ms. Morrison's duties were narrowly restricted by statute to investigating and prosecuting "certain federal crimes" by specific categories of persons. *Morrison*, 487 U.S. at 671. In fact, the Attorney General, through the "Special Division" court charged with appointing independent counsel, limited the inquiry to looking at then Assistant Attorney General Theodore Olson and testimony he gave to Congress on a particular date. *Id.* at 666 67. And these duties did not "include any authority to formulate policy for the Government or the Executive Branch, nor [did] it give [Ms. Morrison] any administrative duties outside of those necessary to operate her office." *Id.* at 671 72.

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Here, by contrast, the Special Counsel's investigation is not limited by statute or regulation to particular alleged crimes or to specific categories of alleged perpetrators, nor is court oversight provided, as was the case in *Morrison* indeed, according to the Special Counsel, the Regulations themselves cannot even be enforced in court. *Supra* at 4 5. And, even assuming the Regulations apply and are binding, the Special Counsel's investigation not only can extend (and has) to officials at the highest levels of the Federal Government including the President himself it also can extend to private persons for conduct having nothing to do with alleged Russian government links to President Trump's campaign. *See* Hr'g Tr. 4:5 14, *United States v. Manafort*, No. 1:18-cr-00083 (E.D. Va. May 4, 2018) (statement of Judge Ellis: "These allegations of bank fraud, of false income tax returns, of failure to register or report rather, failure to file reports of foreign bank accounts, and bank fraud, these go back to 2005, 2007, and so forth. Clearly, this investigation of Mr. Manafort's bank loans and so forth antedated the appointment of any special prosecutor and, therefore, must've been underway in the Department of Justice for some considerable period before the letter of appointment, which is dated the 17th of May in 2017.").

Moreover, the Special Counsel has and has exercised "authority to formulate policy." He has brought a case here against foreign nationals for funding alleged electioneering activity on a theory of defrauding the Federal Election Commission ("FEC") that has never been brought before in any reported case. He has also ignored Department of Justice guidance requiring willfulness for a charge under 18 U.S.C. § 371 of conspiracy to violate election laws based on alleged interference with the FEC.[9] *See* Def. Concord Mgmt. & Consulting LLC's Mot. for *In*

[9] *See* Dep't of Justice, *Federal Prosecution of Election Offenses* 163 (8th ed. 2017) (stating that "the proof must also show that the defendant intended to disrupt and impede the lawful (continued)

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Camera Review of Grand Jury Materials at 5 6, ECF No. 11 (demonstrating Special Counsel's departure from Department guidance and indicting this case solely on the basis of a knowing as opposed to a willful violation).

Given all this, there can be little doubt that the Special Counsel's investigation is "vastly wider and more consequential for the republic than was Alexia Morrison's." Statement of Prof. Akhil Reed Amar at 7, *Special Counsels and the Separation of Powers: Hearing on S. 1735 & S. 1741 Before the S. Judiciary Comm.*, 115th Cong. (2017) ("Prof. Amar Statement"), *available at* https://www.judiciary.senate.gov/imo/media/doc/09-26-17%20Amar%20Testimony.pdf.

Second, Ms. Morrison's role was "limited in jurisdiction" because the controlling statute "itself [was] restricted in applicability to certain federal officials suspected of certain serious federal crimes" and the independent counsel could "only act within the scope of the jurisdiction that has been granted." *Morrison*, 487 U.S. at 672. Indeed, Ms. Morrison's "investigation was focused on only one person, who was out of government at the time: Ted Olson." Prof. Amar Statement at 6. In fact, the supervising "Special Division" court there determined that it had no authority to overrule the Attorney General's refusal to permit Ms. Morrison to investigate two additional Department of Justice officials. *Morrison*, 487 U.S. at 668. Additionally, before Ms. Morrison was appointed, and as required by the Ethics in Government Act, the Attorney General had conducted his own criminal investigation and only then did he, and the Special Division court, conclude that further investigation by Ms. Morrison was necessary. Here, however, the Special Counsel's jurisdiction is far from "limited" and is not "restricted in applicability to

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functioning of the FEC. Indeed the crux of a Section 371 FECA case is an intent on the part of the defendant to thwart the FEC. That is a higher factual burden than is required under 18 U.S.C. § 1001, and is arguably a greater factual burden than is required by Section 30109(d)," the substantive FECA violation).

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certain federal officials suspected of certain serious federal crimes." Nor, apparently, is it predicated on any preliminary investigation by the Attorney General or a determination by the Attorney General that an appointment of a Special Counsel was warranted in the first place.

Third, Ms. Morrison's tenure was limited even though there was "concededly no time limit on the appointment of a particular counsel[,] the office of independent counsel is 'temporary' in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated. . . ." *Morrison*, 487 U.S. at 672. The Court continued: "Unlike other prosecutors, [Ms. Morrison] has no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for and authorized by the Special Division to undertake." *Id.* The Special Counsel's charge here is not limited to "accomplish[ing] a single task" after which his "office is terminated." Rather, his jurisdiction, as he perceives it, is far-reaching and could involve countless lines of investigation, many of which like this very one involving Concord are far afield from the Russian government and links to President Trump's 2016 campaign. And there is no end provided for in any statute or regulation the investigation will apparently continue until the Special Counsel himself declares that he is finished. Here, even if *Morrison* is made a part of the analysis, the outcome is the same: the Special Counsel is a principal officer without a valid appointment and the Indictment therefore should be dismissed.[10]

[10] Needless to say, if the Special Counsel Regulations do not apply or are not binding on the Special Counsel, he incontrovertibly is in that unchecked and unfettered capacity a principal officer under *Morrison*.

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B. The Concord Indictment should be dismissed because the Special Counsel Regulations are unlawful and invalid and, consequently, the Special Counsel position violates core separation-of-powers principles.

Apart from the constitutional invalidity of the Special Counsel's appointment, the absence of any valid and binding regulations constraining his discretion renders his position, in effect, a fourth branch of government incompatible with fundamental separation-of-powers principles.

To begin with, the Special Counsel has taken the position in court filings that the Special Counsel Regulations are not binding and cannot be enforced in court. If that is correct, then there is no limitation at all on the scope of an investigation and prosecution the Deputy Attorney General can delegate to a special counsel to pursue. And the byproduct is a powerful prosecutor, unguided, unconstrained, unfettered, and, indeed, foreign to this Nation's three-branch constitutional order. *See The Federalist No. 51*, at 288 (James Madison) (Barnes & Noble ed., 2006) (explaining that the need for separation of powers was driven in part by the reality that human beings are no angels).

This is precisely what then-Professor Kenneth Gormley, among the foremost scholars in the United States on independent counsel appointments and the issues they engender, warned about in his seminal article on the topic. *See* Kenneth Gormley, *An Original Model of the Independent Counsel Statute*, 97 Mich. L. Rev. 601 (1998). He wrote the article just as Congress was debating whether it should reauthorize the Ethics in Government Act and the appointment of private counsel to investigate and prosecute where the Executive Branch had a potential conflict of interest. As he noted, Congress had put stock in the jurisdictional limitations the Ethics in Government Act imposed: "Both proponents and opponents of the law understood that if such a statute gave the special prosecutor *too* much power to roam beyond carefully delineated jurisdictional borders the statute would be patently unconstitutional. Congress's final piece of

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legislation, which created a temporary (rather than permanent) special prosecutor and issued that prosecutor a passport identifying his or her precise jurisdiction, was meant to avoid that dangerous precipice." *Id.* at 630.

Professor Gormley went on to observe that: "[I]f the independent counsel could dictate the terms of his or her own jurisdiction, this would create separation of powers problems of mammoth proportions, because Congress would be creating a free-floating satellite branch of government unaccountable to any other, a cardinal sin under our tripartite constitutional system." *Id.* at 661; *see also Ass'n of Am. R.Rs.*, 821 F.3d at 30 31 (reasoning that the "'auxiliary precautions' against 'ambition' that were built into our Constitution bicameralism, presentment, judicial independence and life tenure, etc. were designed for a government of three branches, not four"); *cf. FTC v. Ruberoid Co*., 343 U.S. 470, 487 88 (1952) (Jackson, J., dissenting) (noting that agencies had "become a veritable fourth branch of the Government, which has deranged our three-branch legal theories"). This, however, is what we now have a Special Counsel with expansive powers and jurisdiction who claims he is not subject to the only check on those powers and jurisdiction: the Special Counsel Regulations.

But even if the Regulations are binding and judicially enforceable, they are unlawful and invalid and thus provide no check on the Special Counsel's expansive jurisdiction. It is fundamental that regulations can only validly "be promulgated pursuant to authority Congress has delegated" to an agency or department. *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (citation omitted); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (agency's power to regulate "must always be grounded in a valid grant of authority from Congress"). And when an agency exceeds that delegated authority, it acts "ultra vires" and its regulations should be invalidated. *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (agencies'

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"power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, . . . what they do is ultra vires").

Congressional intent is the touchstone for determining an agency's power to issue regulations. For example, it is difficult to imagine that over 100 years ago when Congress enacted what would become § 515(a), it intended that statute to be a wellspring of authority for the Department of Justice to issue the blanket, non-case-specific Special Counsel Regulations that delegate core Attorney General powers and duties to a private attorney in a role of special counsel absent any other legislative enactment which Regulations the Special Counsel later would deem non-binding and not enforceable in court. Indeed, at that time, the Attorney General and the Department of Justice had limited powers. *See, e.g.*, *United States v. Rosenthal*, 121 F. 862, 865 69 (C.C.S.D.N.Y. 1903) (describing statutory limits in effect shortly before the 1906 Act). And, as noted above, when private lawyers were retained by the Department as "special attorneys," Congress routinely provided specific grants of authority despite the existence of § 515(a). *Supra* at 19 21. Given this, it is no surprise that there is not a shred of evidence of congressional intent at the time of §§ 509, 510, and 515(a)'s enactment authorizing the Attorney General to issue the broad Special Counsel Regulations that the Special Counsel could violate without any judicial recourse.

Moreover, as noted (*supra* at 20 21), Congress thought appointment authority was required when it passed the Ethics in Government Act in 1978. And when Congress abandoned the Ethics in Government Act in 1999 driven chiefly by concerns over the degree of unchecked prosecutorial power independent counsels had come to exercise surely Congress could not have intended that the Attorney General thereafter could create the same concept of an independent or "special" counsel purely through regulation, without any new statutory

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appointment authorization from Congress to do so. Yet in the immediate wake of Congress's refusal to re-enact that unchecked independent counsel, the Attorney General did just that, promulgating the Special Counsel Regulations which particularly since, according to the Special Counsel, they are not even binding have created that very same unfettered independent counsel, but one that is even more unchecked. *See* Final Rule, 64 Fed. Reg. 37,038 (July 9, 1999).

In this light, there can be no credible argument that Congress delegated authority to the Attorney General to issue non-judicially enforceable regulations replacing the statute Congress allowed to expire. And certainly, the Attorney General cannot "bootstrap[] [him]self into an area in which [he] has no jurisdiction. . . ." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (citation omitted). This kind of circular logic that the Attorney General could give himself power that only a statute can provide by issuing the Special Counsel Regulations, and then use those same regulations to empower a special counsel who was never authorized by Congress effectively nullifies any actual delegation of authority by Congress to the Attorney General as unnecessary.

In the end, there is no valid source for the Special Counsel's claimed un-cabined federal prosecutorial authority none can be found in the Constitution, none has been provided by Congress, and none can exist in the Regulations. This Court accordingly should find that the Special Counsel lacks the power to indict and prosecute Concord and dismiss the Indictment. *See SW Gen., Inc*., 137 S. Ct. at 943 44 (affirming vacatur of agency order where appointment violated statute); *Nguyen v. United States*, 539 U.S. 69, 78 83 (2003) (similar where lower court's composition violated statute); *Providence Journal Co.*, 485 U.S. at 699 (similar).

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C. The Concord Indictment should be dismissed because even if the Special Counsel Regulations are valid and binding, the Appointment Order is inconsistent with them and does not authorize a prosecution against Concord.

Finally, the Appointment Order cannot be invoked to override what the Constitution and statutes plainly do not authorize and, even on its own terms, the Order does not authorize the indictment or prosecution of Concord.

To begin with, the Appointment Order does not support the Indictment whether the Special Counsel Regulations are valid and binding, or, as the Special Counsel insists, they are not. In the absence of valid and binding Regulations, the Special Counsel is unfettered and unsupervised, and the Appointment Order certainly is no cure for that. It purports to define the jurisdiction of the Special Counsel. But without the Regulations to back it up, the Order has no teeth there is, quite simply, no mechanism to enforce it and ensure the Special Counsel does not stray beyond its bounds. This, then, is no mere "independent counsel" under the now-defunct Ethics in Government Act. It is, instead, a private lawyer clothed with the Attorney General's exclusive and plenary prosecutorial authority who unlike the Attorney General (or Deputy Attorney General) himself is subject to no one's control. Although critically deficient in many respects, the Regulations provided at least some semblance of restraint. In their absence, the Indictment against Concord surely cannot stand.

If, however, and contrary to the Special Counsel's on-the-record claims, the Special Counsel Regulations are indeed binding on him,[11] the Appointment Order still does not support

[11] If the Regulations are not invalid, there is good reason to think the Regulations do bind the Special Counsel. *See, e.g.*, *Nixon*, 418 U.S. at 695 (holding that Department of Justice regulations are binding); *Erie Blvd. Hydropower, LP v. FERC*, 878 F.3d 258, 269 (D.C. Cir. 2017) ("[A]n agency is bound by its own regulations.") (quotation marks omitted); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266 (1954) (agencies and their department heads cannot "sidestep" their own regulations at their whim).

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the Indictment because the Order fails to comply with the clear mandate of the Regulations. Three threshold prerequisites must be met under the Regulations before the appointment of a Special Counsel can even be contemplated:

- There must be a determination that "criminal investigation of" an individual or entity "is warranted";
- There must be a determination that "investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department or other extraordinary circumstances"; and
- There must be a determination that "under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter."

28 C.F.R. § 600.1. But the Special Counsel's indictment and prosecution of Concord impermissibly deviates from the Regulations because the Appointment Order fails to establish the need for a criminal investigation of Concord, a conflict of interest as to Concord, or extraordinary circumstances as to Concord.

First, the Order provides no indication that there was a need for a criminal investigation into Concord as required by § 600.1. At the time of the Special Counsel's appointment, there was no criminal investigation taking place. The testimony provided by then-FBI Director Comey referred to in the Order confirmed the existence only of a ***counter-intelligence*** investigation into the Russian government's alleged efforts to interfere with the 2016 presidential election an investigation beyond the scope of the Regulations that no United States Attorney could, by law, undertake. *See* Ex. C: James B. Comey, Statement Before the House Permanent Select Committee on Intelligence (Mar. 20, 2017). And the Deputy Attorney General has given no indication that the investigation that led to the indictment of Concord was a criminal one, subject to referral to the Special Counsel under § 600.1.

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Second, there was no stated conflict of interest or extraordinary circumstance in the Appointment Order supporting a criminal investigation into Concord as required by § 600.1. That stands to reason because Attorney General Sessions already had recused himself "from any existing or future investigations of any matters related in any way to the campaigns for President of the United States." Ex. E: Press Release, Dep't of Justice, Attorney General Sessions Statement on Recusal (Mar. 2, 2017). This, in turn, eliminated any apparent conflict at the time. Nor does the Appointment Order point to any conflict or extraordinary circumstance necessitating the Special Counsel's investigation into Concord, a private entity that, as the Deputy Attorney General confirmed in his press conference, had no links to President Trump's presidential campaign. *See* Tim Hains, *Rosenstein: "No Allegation in This Indictment That Any American Had Any Knowledge" of Russian Election Influence Operation*, RealClearPolitics (Feb. 16, 2018).

Third, the Regulations do not allow for the Appointment Order's general, open-ended grant of jurisdiction to investigate "any matters that arose or may arise directly from" the FBI's counter-intelligence investigation. The Regulations authorize the Attorney General to confer two forms of jurisdiction on the Special Counsel: (i) a "matter" as to which the Attorney General provides a "specific factual statement"; and (ii) "federal crimes" committed in the course of investigating a specifically defined "matter." Neither category, no matter how broadly construed, can fit the Order's expansive "any matter that arose or may arise directly from" jurisdiction, which obviously sweeps far beyond "federal crimes" that obstruct or interfere with the investigation, and lacks any publicly disclosed "specific factual statement" confining it.

The Appointment Order expressly omits these particular regulatory requirements from its terms, but they are the most pivotal because they purport to define the circumstances under

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which a special counsel can be appointed in the first place. Given "the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation[,]" a claim that these specific Regulations have no role to play only magnifies the apparent usurpation of authority that is occurring in this case a Special Counsel who is a "mini-Executive" who "operat[es] in an area where so little is law and so much is discretion. . . ." *Morrison*, 487 U.S. at 732 (Scalia, J., dissenting). And this is all the more problematic here, where the Special Counsel, "immune to political control and lacking a docket of other cases, face[s intense] pressure to justify [his] appointment[] by bagging [some] prey." *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1176 (D.C. Cir. 2006) (Tatel, J., concurring) (citing *Morrison*, 487 U.S. at 727 28 (Scalia, J., dissenting)).

In the *Manafort* action, the Special Counsel nevertheless contended that § 600.10 which provides that the Regulations "are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law or equity, by any person or entity, in any matter, civil, criminal, or administrative" mandated that they could not be relied on by a defendant in challenging an indictment.[12] If this is right, the effect on the issues raised in this case and Concord's motion to dismiss is clear and significant, as discussed above.

There is, however, good reason to believe the Special Counsel's view is wrong. If, as noted (*supra* at 40), the Regulations cannot be enforced to hold the Special Counsel to their terms, the consequence would be a delegation of unfettered and unregulated prosecutorial power exactly what Attorney General Reno claimed the Regulations would prevent when they were issued in 1999. Indeed, by attempting to set the parameters of this new "special counsel"

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[12] *See* Gov't Resp. in Opp'n to Def.'s Mot. to Dismiss at 29 30, *United States v. Manafort*, No. 1:17-cr-00201-ABJ (D.D.C. Apr. 2, 2018), ECF No. 244.

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position so that it did not become some impermissible fourth branch of government beyond the reach and control of the three branches, the Regulations aim to preserve the structural separation-of-powers principles that form the bedrock of the American constitutional system. In so doing, the Regulations do more than protect the "structural interests . . . of the entire Republic[,]" *Freytag*, 501 U.S. at 878, they protect the rights of "individual[s]" as well, *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1233 (citation omitted). So while the Attorney General, through § 600.10, says the Regulations do not "create any rights" that are enforceable in court, that is simply incompatible with their core purpose. "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures[,]" *Morton v. Ruiz*, 415 U.S. 199, 235 (1974), and they are subject to judicial review they cannot be left to "police [their] own conduct," *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (citation omitted).[13]

Wholly apart from the Appointment Order's defects, the effort to indict Concord goes beyond the Appointment Order's own terms as well. There are no allegations in the Indictment regarding: (i) the Russian government; (ii) President Trump's campaign;[14] (iii) links and/or coordination between Concord and the Russian government or President Trump's campaign; or (iv) obstruction or interference by Concord with the Special Counsel's investigation. Nor is

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[13] At the Special Counsel's urging, in *United States v. Manafort*, No. 1:17-cr-00201-ABJ, 2018 WL 2223656, at *12 14 (D.D.C. May 15, 2018), Judge Jackson relied on § 600.10 and found that the Regulations were not enforceable by a private party in a court of law, even when the regulations are relied on for the sole purpose of evaluating the Special Counsel's conduct. Respectfully, Judge Jackson erred in departing from the controlling precedents discussed above and in failing to recognize the essential role the Regulations play in the absence of congressional action in ensuring the Special Counsel's investigation is subject to at least some constraints, however minimal. That being said, Concord notes that Mr. Manafort did not present Judge Jackson with the Appointments Clause and statutory arguments contained herein, nor has he presented those arguments in the Eastern District of Virginia.

[14] The Indictment contains only allegations involving "unwitting" individuals involved in President Trump's campaign. *See* Indictment ¶¶ 6, 45, 54(c), 55(a), 74 79, ECF No. 1.

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there any indication that the investigation of Concord arose ***directly*** from the counter-intelligence investigation into alleged Russian government interference with the 2016 presidential election. Indeed, supposed Russian social media involvement in the alleged Russian government interference that was the target of the investigation was publicly known long before and thus could not have arisen directly from the Special Counsel's investigation.

Surely, Concord cannot be indicted under an order that does not purport to reach it and the Indictment should be dismissed on this ground, too.

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V. CONCLUSION

The Indictment of Concord is unconstitutional and should be dismissed.

Dated: June 25, 2018

Respectfully submitted,

CONCORD MANAGEMENT
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* *Motion for Admission Pro Hac Vice Pending*

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