**Gannon, Curtis E. (OLC)**

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**From:** Gannon, Curtis E. (OLC)
**Sent:** Wednesday, November 14, 2018 5:30 AM
**To:** MRD
**Subject:** RE: Opinion?

Yes, of course. It will probably be signed this morning, and released to the public in relatively short order.

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**From:** MRD
**Sent:** Tuesday, November 13, 2018 7:39 PM
**To:** Gannon, Curtis E. (OLC) <[redacted] (b) (6)
**Subject:** Opinion?

Curtis – will you be able to send me the OLC when it is finalized?

Thanks,

Michael

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Michael R. Dreeben
The Special Counsel's Office
202-514-1580 (office)
202-532-3000 (cell)

**Gannon, Curtis E. (OLC)**

**From:** Gannon, Curtis E. (OLC)
**Sent:** Wednesday, November 14, 2018 9:14 AM
**To:** MRD
**Subject:** RE: Opinion?
**Attachments:** Acting AG Op.pdf

Hot off the press.

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**From:** MRD
**Sent:** Tuesday, November 13, 2018 7:39 PM
**To:** Gannon, Curtis E. (OLC) <[redacted] (b) (6)
**Subject:** Opinion?

Duplicate

**U.S. Department of Justice**
Office of Legal Counsel

Office of the Assistant Attorney General

*Washington, D.C. 20530*

November 14, 2018

**MEMORANDUM FOR EMMET T. FLOOD**
**COUNSEL TO THE PRESIDENT**

*Re: Designating an Acting Attorney General*

After Attorney General Jefferson B. Sessions III resigned on November 7, 2018, the President designated Matthew G. Whitaker, Chief of Staff and Senior Counselor to the Attorney General, to act temporarily as the Attorney General under the Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349d. This Office had previously advised that the President could designate a senior Department of Justice official, such as Mr. Whitaker, as Acting Attorney General, and this memorandum explains the basis for that conclusion.

Mr. Whitaker's designation as Acting Attorney General accords with the plain terms of the Vacancies Reform Act, because he had been serving in the Department of Justice at a sufficiently senior pay level for over a year. *See id.* § 3345(a)(3). The Department's organic statute provides that the Deputy Attorney General (or others) may be Acting Attorney General in the case of a vacancy. *See* 28 U.S.C. § 508. But that statute does not displace the President's authority to use the Vacancies Reform Act as an alternative. As we have previously recognized, the President may use the Vacancies Reform Act to depart from the succession order specified under section 508. *See Authority of the President to Name an Acting Attorney General*, 31 Op. O.L.C. 208 (2007) ("*2007 Acting Attorney General*").

We also advised that Mr. Whitaker's designation would be consistent with the Appointments Clause of the U.S. Constitution, which requires the President to obtain "the Advice and Consent of the Senate" before appointing a principal officer of the United States. U.S. Const. art. II, § 2, cl. 2. Although an Attorney General is a principal officer requiring Senate confirmation, someone who temporarily performs his duties is not. As all three branches of government have long recognized, the President may designate an acting official to perform the duties of a vacant principal office, including a Cabinet office, even when the acting official has not been confirmed by the Senate.

Congress did not first authorize the President to direct non-Senate-confirmed officials to act as principal officers in 1998; it did so in multiple statutes starting in 1792. In that year, Congress authorized the President to ensure the government's uninterrupted work by designating persons to perform temporarily the work of vacant offices. The President's authority applied to principal offices and did not require the President to select Senate-confirmed officers. In our brief survey of the history, we have identified over 160 times before 1860 in which non-Senate-confirmed persons performed, on a temporary basis, the duties of such high offices as Secretary of State, Secretary of the Treasury, Secretary of War, Secretary of the Navy, Secretary of the Interior, and Postmaster General. While designations to the office of Attorney General were less

frequent, we have identified at least one period in 1866 when a non-Senate-confirmed Assistant Attorney General served as Acting Attorney General. Mr. Whitaker's designation is no more constitutionally problematic than countless similar presidential orders dating back over 200 years.

Were the long agreement of Congress and the President insufficient, judicial precedent confirms the meaning of the Appointments Clause in these circumstances. When Presidents appointed acting Secretaries in the nineteenth century, those officers (or their estates) sometimes sought payment for their additional duties, and courts recognized the lawfulness of such appointments. The Supreme Court confirmed the legal understanding of the Appointments Clause that had prevailed for over a century in *United States v. Eaton*, 169 U.S. 331 (1898), holding that an inferior officer may perform the duties of a principal officer "for a limited time[] and under special and temporary conditions" without "transform[ing]" his office into one for which Senate confirmation is required. *Id.* at 343. The Supreme Court has never departed from *Eaton*'s holding and has repeatedly relied upon that decision in its recent Appointments Clause cases.

In the Vacancies Reform Act, Congress renewed the President's authority to designate non-Senate-confirmed senior officials to perform the functions and duties of principal offices. In 2003, we reviewed the President's authority in connection with the Director of the Officer of Management and Budget ("OMB"), who is a principal officer, and concluded that the President could designate a non-Senate-confirmed official to serve temporarily as Acting Director. *See Designation of Acting Director of the Office of Management and Budget*, 27 Op. O.L.C. 121 (2003) ("*Acting Director of OMB*"). Presidents George W. Bush and Barack Obama placed non-Senate-confirmed officials in several lines of agency succession and actually designated unconfirmed officials as acting agency heads. President Trump, too, has previously exercised that authority in other departments; Mr. Whitaker is not the first unconfirmed official to act as the head of an agency in this administration.

It is no doubt true that Presidents often choose acting principal officers from among Senate-confirmed officers. But the Constitution does not mandate that choice. Consistent with our prior opinion and with centuries of historical practice and precedents, we advised that the President's designation of Mr. Whitaker as Acting Attorney General on a temporary basis did not transform his position into a principal office requiring Senate confirmation.

## I. The Vacancies Reform Act

Mr. Whitaker's designation as Acting Attorney General comports with the terms of the Vacancies Reform Act. That Act provides three mechanisms by which an acting officer may take on the functions and duties of an office, when an executive officer who is required to be appointed by the President with the advice and consent of the Senate "dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a). First, absent any other designation, the "first assistant" to the vacant office shall perform its functions and duties. *Id.* § 3345(a)(1). Second, the President may depart from that default course by directing another presidential appointee, who is already Senate confirmed, to perform the functions and duties of the vacant office. *Id.* § 3345(a)(2). Or, third, the President may designate an officer or employee within the same agency to perform the functions and duties of

the vacant office, provided that he or she has been in the agency for at least 90 days in the 365 days preceding the vacancy, in a position for which the rate of pay is equal to or greater than the minimum rate for GS-15 of the General Schedule. *Id.* § 3345(a)(3). Except in the case of a vacancy caused by sickness, the statute imposes time limits on the period during which someone may act. *Id.* § 3346. And the acting officer may not be nominated by the President to fill the vacant office and continue acting in it, unless he was already the first assistant to the office for at least 90 days in the 365 days preceding the vacancy or is a Senate-confirmed first assistant. *Id.* § 3345(b)(1)–(2); *see also Nat'l Labor Relations Bd. v. SW General, Inc.*, 137 S. Ct. 929, 941 (2017).

**A.**

The Vacancies Reform Act unquestionably authorizes the President to direct Mr. Whitaker to act as Attorney General after the resignation of Attorney General Sessions on November 7, 2018.[1] Mr. Whitaker did not fall within the first two categories of persons made eligible by section 3345(a). He was not the first assistant to the Attorney General, because 28 U.S.C. § 508(a) identifies the Deputy Attorney General as the "first assistant to the Attorney General" "for the purpose of section 3345." Nor did Mr. Whitaker already hold a Senate-confirmed office. Although Mr. Whitaker was previously appointed, with the advice and consent of the Senate, as the United States Attorney for the Southern District of Iowa, he resigned from that position on November 25, 2009. At the time of the resignation of Attorney General Sessions, Mr. Whitaker was serving in a position to which he was appointed by the Attorney General.

In that position, Mr. Whitaker fell squarely within the third category of officials, identified in section 3345(a)(3). As Chief of Staff and Senior Counselor, he had served in the Department of Justice for more than 90 days in the year before the resignation, at a GS-15 level or higher. And Mr. Whitaker has not been nominated to be Attorney General, an action that would render him ineligible to serve as Acting Attorney General under section 3345(b)(1). Accordingly, under the plain terms of the Vacancies Reform Act, the President could designate

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[1] Attorney General Sessions submitted his resignation "[a]t [the President's] request," Letter for President Donald J. Trump, from Jefferson B. Sessions III, Attorney General, but that does not alter the fact that the Attorney General "resign[ed]" within the meaning of section 3345(a). Even if Attorney General Sessions had declined to resign and was removed by the President, he still would have been rendered "otherwise unable to perform the functions and duties of the office" for purposes of section 3345(a). As this Office recently explained, "an officer is 'unable to perform the functions and duties of the office' during both short periods of unavailability, such as a period of sickness, and potentially longer ones, such as one resulting from the officer's removal (which would arguably not be covered by the reference to 'resign[ation].')." *Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. __, at *4 (2017); *see also Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 61 (1999) ("In floor debate, Senators said, by way of example, that an officer would be 'otherwise unable to perform the functions and duties of the office' if he or she were fired, imprisoned, or sick."). Indeed, any other interpretation would leave a troubling gap in the ability to name acting officers. For most Senate-confirmed offices, the Vacancies Reform Act is "the exclusive means" for naming an acting officer. 5 U.S.C. § 3347(a). If the statute did not apply in cases of removal, then it would mean that no acting officer—not even the first assistant—could take the place of a removed officer, even where the President had been urgently required to remove the officer, for instance, by concerns over national security, corruption, or other workplace misconduct.

Mr. Whitaker to serve temporarily as Acting Attorney General subject to the time limitations of section 3346.

**B.**

The Vacancies Reform Act remains available to the President even though 28 U.S.C. § 508 separately authorizes the Deputy Attorney General and certain other officials to act as Attorney General in the case of a vacancy.[2] We previously considered whether this statute limits the President's authority under the Vacancies Reform Act to designate someone else to be Acting Attorney General. *2007 Acting Attorney General*, 31 Op. O.L.C. 208. We have also addressed similar questions with respect to other agencies' succession statutes. *See Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. __ (2017) ("*Acting Director of CFPB*"); *Acting Director of OMB*, 27 Op. O.L.C. at 121 n.1. In those instances, we concluded that the Vacancies Reform Act is not the "exclusive means" for the temporary designation of an acting official, but that it remains available as an option to the President. We reach the same conclusion here: Section 508 does not limit the President's authority to invoke the Vacancies Reform Act to designate an Acting Attorney General.

We previously concluded that section 508 does not prevent the President from relying upon the Vacancies Reform Act to determine who will be the Acting Attorney General. Although the Vacancies Reform Act, which "ordinarily is the exclusive means for naming an acting officer," *2007 Acting Attorney General*, 31 Op. O.L.C. at 209 (citing 5 U.S.C. § 3347), makes an exception for, and leaves in effect, statutes such as section 508, "[t]he Vacancies Reform Act nowhere says that, if another statute remains in effect, the Vacancies Reform Act may not be used." *Id.* In fact, the structure of the Vacancies Reform Act makes clear that office-specific provisions are treated as exceptions from its generally exclusive applicability, not as provisions that supersede the Vacancies Reform Act altogether.[3] Furthermore, as we noted, "the Senate Committee Report accompanying the Act expressly disavows" the view that, where another statute is available, the Vacancies Reform Act may not be used. *Id.* (citing S. Rep. No. 105-250, at 17 (1998)). That report stated that, "with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies [Reform] Act would continue to provide an alternative procedure for temporarily occupying the office." *Id.* We therefore concluded that the President could direct the Assistant Attorney General for the Civil Division to act as Attorney General under the Vacancies Reform Act, even though the incumbent Solicitor General would otherwise have served under the chain of succession specified in section 508 (as supplemented by an Attorney General order).

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[2] Under 28 U.S.C. § 508(a), in the case of a vacancy in the office of Attorney General, "the Deputy Attorney General may exercise all the duties of that office, and for the purpose of [the Vacancies Reform Act] the Deputy Attorney General is the first assistant to the Attorney General." If the offices of Attorney General and Deputy Attorney General are both vacant, "the Associate Attorney General shall act as Attorney General," and "[t]he Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General." *Id.* § 508(b).

[3] One section (entitled "Exclusion of certain offices") is used to exclude certain offices altogether. 5 U.S.C. § 3349c. Office-specific statutes, however, are mentioned in a different section (entitled "Exclusivity") that generally makes the Vacancies Reform Act "the exclusive means" for naming an acting officer but also specifies exceptions to that exclusivity. *Id.* § 3347(a)(1).

At the time of our *2007 Acting Attorney General* opinion, the first two offices specified in section 508(a) and (b)—Deputy Attorney General and Associate Attorney General—were both vacant. *See* 31 Op. O.L.C. at 208. That is not currently the case; there is an incumbent Deputy Attorney General. But the availability of the Deputy Attorney General does not affect the President's authority to invoke section 3345(a)(3). Nothing in section 508 suggests that the Vacancies Reform Act does not apply when the Deputy Attorney General can serve. To the contrary, the statute expressly states that the Deputy Attorney General is the "first assistant to the Attorney General" "for the purpose of section 3345 of title 5" (i.e., the provision of the Vacancies Reform Act providing for the designation of an acting officer). 28 U.S.C. § 508(a). It further provides that the Deputy Attorney General "may" serve as Acting Attorney General, not that he "must," underscoring that the Vacancies Reform Act remains an alternative means of appointment.[4] These statutory cross-references confirm that section 508 works in conjunction with, and does not displace, the Vacancies Reform Act.

Although the Deputy Attorney General is the default choice for Acting Attorney General under section 3345(a)(1), the President retains the authority to invoke the other categories of eligible officials, "notwithstanding [the first-assistant provision in] paragraph (1)." 5 U.S.C. § 3345(a)(2), (3). Moreover, there is reason to believe that Congress, in enacting the Vacancies Reform Act, deliberately chose to make the second and third categories of officials in section 3345(a) applicable to the office of Attorney General. Under the previous Vacancies Act, the first assistant to an office was also the default choice for filling a vacant Senate-confirmed position, and the President was generally able to depart from that by selecting another Senate-confirmed officer. *See* 5 U.S.C. § 3347 (1994). That additional presidential authority, however, was expressly made inapplicable "to a vacancy in the office of Attorney General." *Id.*; *see also* Rev. Stat. § 179 (2d ed. 1878). Yet, when Congress enacted the Vacancies Reform Act in 1998, it did away with the exclusion for the office of Attorney General. *See* 5 U.S.C. § 3349c (excluding certain other officers).[5]

Our conclusion that the Vacancies Reform Act remains available, notwithstanding section 508, is consistent with our prior opinions. In *Acting Director of OMB*, we recognized that an OMB-specific statute, 31 U.S.C. § 502(f), did not displace the President's authority under the Vacancies Reform Act. *See* 27 Op. O.L.C. at 121 n.1 ("The Vacancies Reform Act does not provide, however, that where there is another statute providing for a presidential designation, the Vacancies Reform Act becomes unavailable."). More recently, we confirmed that the President could designate an Acting Director of the Bureau of Consumer Financial Protection ("CFPB"),

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[4] We do not mean to suggest that a different result would follow if section 508 said "shall" instead of "may," since as discussed at length in *Acting Director of CFPB*, such mandatory phrasing in a separate statute does not itself oust the Vacancies Reform Act. *See* 41 Op. O.L.C. __, *7–9 & n.3. The point is that, in contrast with the potential ambiguity arising from the appearance of "shall" in the CFPB-specific statute, section 508 expressly acknowledges that the Deputy Attorney General is the first assistant but will not necessarily serve in the case of a vacancy in the office of Attorney General.

[5] When it reported the Vacancies Reform Act, the Senate Committee on Governmental Affairs contemplated that the Attorney General would continue to be excluded by language in a proposed section 3345(c) that would continue to make section 508 "applicable" to the office. *See* S. Rep. No. 105-250, at 13, 25; 144 Cong. Rec. 12,433 (June 16, 1998). But that provision "was not enacted as part of the final bill, and no provision of the Vacancies Reform Act bars the President from designating an Acting Attorney General under that statute." *2007 Acting Attorney General*, 31 Op. O.L.C. at 209 n.1.

notwithstanding 12 U.S.C. § 5491(b)(5), which provides that the Deputy Director of the CFPB "shall" serve as Acting Director when the Director is unavailable. *See Acting Director of CFPB*, 41 Op. O.L.C. __. We reasoned that the CFPB-specific statute should "interact with the Vacancies Reform Act in the same way as other, similar statutes providing an office-specific mechanism for an individual to act in a vacant position." *Id.* at *7–9 & n.3. We noted that the Vacancies Reform Act itself provides that a first assistant to a vacant office "shall perform the functions and duties" of that office unless the President designates someone else to do so, 5 U.S.C. § 3345(a), and that mandatory language in either the CFPB-specific statute or the Vacancies Reform Act does not foreclose the availability of the other statute. *Acting Director of CFPB*, 41 Op. O.L.C. __, at *7–8.

Courts have similarly concluded that the Vacancies Reform Act remains available as an alternative to office-specific statutes. *See Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 555–56 (9th Cir. 2016) (General Counsel of the National Labor Relations Board, which has its own office-specific statute prescribing a method of filling a vacancy); *English v. Trump*, 279 F. Supp. 3d 307, 323–24 (D.D.C. 2018) (holding that the mandatory language in the CFPB-specific statute is implicitly qualified by the Vacancies Reform Act's language providing that the President also "may direct" qualifying individuals to serve in an acting capacity), *appeal dismissed upon appellant's motion*, No. 18-5007, 2018 WL 3526296 (D.C. Cir. July 13, 2018).

For these reasons, we believe that the President could invoke the Vacancies Reform Act in order to designate Mr. Whitaker as Acting Attorney General ahead of the alternative line of succession provided under section 508.

## II. The Appointments Clause

While the Vacancies Reform Act expressly authorizes the President to select an unconfirmed official as Acting Attorney General, Congress may not authorize an appointment mechanism that would conflict with the Constitution. *See Freytag v. Commissioner*, 501 U.S. 868, 883 (1991). The Appointments Clause requires the President to "appoint" principal officers, such as the Attorney General, "by and with the Advice and Consent of the Senate." U.S. Const., art. II, § 2, cl. 2. But for "inferior Officers," Congress may vest the appointment power "in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.*

The President's designation of Mr. Whitaker as Acting Attorney General is consistent with the Appointments Clause so long as Acting Attorney General is not a principal office that requires Senate confirmation. If so, it does not matter whether an acting official temporarily filling a vacant principal office is an inferior officer or not an "officer" at all within the meaning of the Constitution, because Mr. Whitaker was appointed in a manner that satisfies the requirements for an inferior officer: He was appointed by Attorney General Sessions, who was the Head of the Department, and the President designated him to perform additional duties. *See Acting Director of OMB*, 27 Op. O.L.C. at 124–25. If the designation constituted an appointment to a principal office, however, then section 3345(a)(3) would be unconstitutional as applied, because Mr. Whitaker does not currently occupy a position requiring Senate confirmation.

For the reasons stated below, based on long-standing historical practice and precedents, we do not believe that the Appointments Clause may be construed to require the Senate's advice and consent before Mr. Whitaker may be Acting Attorney General.

**A.**

The Attorney General is plainly a principal officer, who must be appointed with the advice and consent of the Senate. *See Edmond v. United States*, 520 U.S. 651, 662–63 (1997); *Morrison v. Olson*, 487 U.S. 654, 670–72 (1988). The Attorney General has broad and continuing authority over the federal government's law-enforcement, litigation, and other legal functions. *See, e.g.*, 28 U.S.C. §§ 516, 533. The Supreme Court has not "set forth an exclusive criterion for distinguishing between" inferior officers and principal officers. *Edmond*, 520 U.S. at 661. "Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President." *Id.* at 662. There is no officer below the President who supervises the Attorney General.

Although the Attorney General is a principal officer, it does not follow that an Acting Attorney General should be understood to be one. An office under the Appointments Clause requires both a "continuing and permanent" position and the exercise of "significant authority pursuant to the laws of the United States." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (internal quotation marks omitted); *see also Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 74 (2007). While a person acting as the Attorney General surely exercises sufficient authority to be an "Officer of the United States," it is less clear whether Acting Attorney General is a principal office.

Because that question involves the division of powers between the Executive and the Legislative Branches, "historical practice" is entitled to "significant weight." *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014); *see also, e.g.*, *The Pocket Veto Case*, 279 U.S. 655, 689 (1929). That practice strongly supports the constitutionality of authorizing someone who has not been Senate-confirmed to serve as an acting principal officer. Since 1792, Congress has repeatedly legislated on the assumption that temporary service as a principal officer does not require Senate confirmation. As for the Executive Branch's practice, our non-exhaustive survey has identified over 160 occasions between 1809 and 1860 on which non-Senate-confirmed persons served temporarily as an acting or ad interim principal officer in the Cabinet.

Furthermore, judicial precedents culminating in *United States v. Eaton*, 169 U.S. 331 (1898), endorsed that historical practice and confirm that the temporary nature of acting service weighs against principal-officer status. The Supreme Court in *Eaton* held that an inferior officer may perform the duties of a principal officer "for a limited time[] and under special and temporary conditions" without "transform[ing]" his office into one for which Senate confirmation is required. *Id.* at 343. That holding was not limited to the circumstances of that case, but instead reflected a broad consensus about the status of an acting principal officer that the Supreme Court has continued to rely on in later Appointments Clause decisions.

1.

Since the Washington Administration, Congress has "authoriz[ed] the President to direct certain officials to temporarily carry out the duties of a vacant PAS office [i.e., one requiring Presidential Appointment and Senate confirmation] in an acting capacity, without Senate confirmation." *SW General*, 137 S. Ct. at 934; *see also Noel Canning*, 134 S. Ct. at 2609 (Scalia, J., dissenting in relevant part) (observing that the President does not need to use recess appointments to fill vacant offices because "Congress can authorize 'acting' officers to perform the duties associated with a temporarily vacant office—and has done that, in one form or another, since 1792"). Those statutes, and evidence of practice under them during the early nineteenth century, did not limit the pool of officials eligible to serve as an acting principal officer to those who already have Senate-confirmed offices. This history provides compelling support for the conclusion that the position of an *acting* principal officer is not itself a principal office.

In 1792, Congress first "authorized the appointment of 'any person or persons' to fill specific vacancies in the Departments of State, Treasury, and War." *SW General*, 137 S. Ct. at 935 (quoting Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281). Although the statute expressly mentioned vacancies in the position of Secretary in each of those Departments, the President was authorized to choose persons who held no federal office at all—much less one requiring Senate confirmation. Although the 1792 statute "allowed acting officers to serve until the permanent officeholder could resume his duties or a successor was appointed," Congress "imposed a six-month limit on acting service" in 1795. *Id.* at 935 (citing Act of Feb. 13, 1795, ch. 21, 1 Stat. 415). In 1863, in response to a plea from President Lincoln, *see* Message to Congress (Jan. 2, 1863), Cong. Globe, 37th Cong., 3d Sess. 185 (1863), Congress extended the provision to permit the President to handle a vacancy in the office of "the head of any Executive Department of the Government, or of any officer of either of the said Departments whose appointment is not in the head thereof." Act of Feb. 20, 1863, ch. 45, § 1, 12 Stat. 656, 656. The 1863 statute allowed the duties of a vacant office to be performed for up to six months by "the head of any other Executive Department" or by any other officer in those departments "whose appointment is vested in the President." *Id.*

In 1868, Congress replaced all previous statutes on the subject of vacancies with the Vacancies Act of 1868. *See* Act of July 23, 1868, ch. 227, 15 Stat. 168. That act provided that, "in case of the death, resignation, absence, or sickness of the head of any executive department of the government, the first or sole assistant thereof shall . . . perform the duties of such head until a successor be appointed or the absence or sickness shall cease." *Id.*, § 1, 15 Stat. at 168. In lieu of elevating the "first or sole assistant," the President could also choose to authorize any other officer appointed with the Senate's advice and consent to perform the duties of the vacant office until a successor was appointed or the prior occupant of the position was able to return to his post. *Id.* § 3, 15 Stat. at 168. In cases of death or resignation, an acting official could serve for no longer than ten days. *Id.* The 1868 act thus eliminated the President's prior discretion to fill a vacant office temporarily with someone who did not hold a Senate-confirmed position. Yet, it preserved the possibility that a non-Senate-confirmed first assistant would serve as an acting head of an executive department.

Over the next 120 years, Congress repeatedly amended the Vacancies Act of 1868, but it never eliminated the possibility that a non-Senate-confirmed first assistant could serve as an acting head of an executive department. In 1891, it extended the time limit for acting service in cases of death or resignation from ten to thirty days. Act of Feb. 6, 1891, ch. 113, 26 Stat. 733. In 1966, it made minor changes during the course of re-codifying and enacting title 5 of the United States Code. *See* S. Rep. No. 89-1380, at 20, 70–71 (1966); 5 U.S.C. §§ 3345–3349 (1970). Congress amended the act once more in 1988, extending the time limit on acting service from 30 to 120 days and making the statute applicable to offices that are not in "Departments" and thus are less likely to have Senate-confirmed first assistants. Pub. L. No. 100-398, § 7(b), 102 Stat. 985, 988 (1988).

Accordingly, for more than two centuries before the Vacancies Reform Act, Congress demonstrated its belief that the Appointments Clause did not require Senate confirmation for temporary service in a principal office, by repeatedly enacting statutes that affirmatively authorized acting service—even in principal offices at the heads of executive departments—by persons who did not already hold an appointment made with the Senate's advice and consent.

**2.**

Not only did Congress authorize the Presidents to select officials to serve temporarily as acting principal officers, but Presidents repeatedly exercised that power to fill temporarily the vacancies in their administrations that arose from resignations, terminations, illnesses, or absences from the seat of government. In providing this advice, we have not canvassed the entire historical record. But we have done enough to confirm that Presidents often exercised their powers under the 1792 and 1795 statutes to choose persons who did not hold any Senate-confirmed position to act temporarily as principal officers in various departments. In the Washington, Adams, and Jefferson Administrations, other Cabinet officers (or Chief Justice John Marshall) were used as temporary or "ad interim" officials when offices were vacant between the departure of one official and the appointment of his successor. *See, e.g.*, *Biographical Directory of the American Congress, 1774–1971*, at 13–14 (1971); *see id.* at 12 (explaining that the list of Cabinet officers excludes "[s]ubordinates acting temporarily as heads of departments" and therefore lists only those who served ad interim after an incumbent's departure).

President Jefferson made the first designation we have identified of a non-Senate-confirmed officer to serve temporarily in his Cabinet. On February 17, 1809, approximately two weeks before the end of the Jefferson Administration, John Smith, the chief clerk of the Department of War, was designated to serve as Acting Secretary of War. *See id.* at 14; Letter from Thomas Jefferson to the War Department (Feb. 17, 1809), *Founders Online*, National Archives, https://founders.archives.gov/documents/Jefferson/99-01-02-9824 ("Whereas, by the resignation of Henry Dearborne, late Secretary at War, that office is become vacant. I therefore do hereby authorize John Smith, chief clerk of the office of the Department of War, to perform the duties of the said office, until a successor be appointed."). As chief clerk, Smith was not a principal officer. He was instead "an inferior officer . . . appointed by the [Department's] principal officer." Act of Aug. 5, 1789, ch. 6, § 2, 1 Stat. 49, 50. The next Secretary of War did not enter upon duty until April 8, 1809, five weeks after the beginning of the Madison Administration. *See Biographical Directory* at 14.

Between 1809 and 1860, President Jefferson's successors designated a non-Senate-confirmed officer to serve as an acting principal officer in a Cabinet position on at least 160 other occasions. We have identified 109 additional instances during that period where chief clerks, who were not Senate confirmed, temporarily served as ad interim Secretary of State (on 51 occasions), Secretary of the Treasury (on 36 occasions), or Secretary of War (on 22 occasions). *See id.* at 15–19; 1 *Trial of Andrew Johnson, President of the United States, Before the Senate of the United States, on Impeachment by the House of Representatives for High Crimes and Misdemeanors*, 575–81, 585–88, 590–91 (Washington, GPO 1868); *In re Asbury Dickins*, 34th Cong., 1st Sess., Rep. C.C. 9, at 4–5 (Ct. Cl. 1856) (listing 18 times between 1829 and 1836 that chief clerk Asbury Dickins was "appointed to perform the duties of Secretary of the Treasury" or Secretary of State "during the absence from the seat of government or sickness" of those Secretaries, for a total of 359 days).[6] Between 1853 and 1860 there were also at least 21 occasions on which non-Senate-confirmed Assistant Secretaries were authorized to act as Secretary of the Treasury.[7]

We have also identified instances involving designations of persons who apparently had no prior position in the federal government, including Alexander Hamilton's son, James A. Hamilton, whom President Jackson directed on his first day in office to "take charge of the Department of State until Governor [Martin] Van Buren should arrive in the city" three weeks later. 1 *Trial of Andrew Johnson* at 575; *see Biographical Directory* at 16. President Jackson also twice named William B. Lewis, who held no other government position, as acting Secretary of War. *See* 1 *Trial of Andrew Johnson* at 575. Moving beyond the offices expressly covered by the 1792 and 1795 statutes, there were at least 23 additional instances before 1861 in which Presidents authorized a non-Senate-confirmed chief clerk to perform temporarily the duties of the Secretary of the Navy (on 21 occasions), or the Secretary of the Interior (on 2 occasions).[8]

At the time, it was well understood that when an Acting or ad interim Secretary already held an office such as chief clerk, he was not simply performing additional duties, but he was deemed the Acting Secretary. We know this, because the chief clerks sometimes sought

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[6] *See also* Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29 (providing that the chief clerk in what became the Department of State was "an inferior officer, to be appointed by the [Department's] principal officer"); Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65, 65 (providing for an "Assistant to the Secretary of the Treasury," later known as the chief clerk, who "shall be appointed by the said Secretary"). The sources cited in the text above indicate that (1) the following chief clerks served as ad interim Secretary of State: Aaron Ogden Dayton, Aaron Vail (twice), Asbury Dickins (ten times), Daniel Carroll Brent (five times), Daniel Fletcher Webster, Jacob L. Martin (three times), John Appleton, John Graham, Nicholas Philip Trist (four times), Richard K. Cralle, William S. Derrick (fifteen times), William Hunter (seven times); (2) the following chief clerks served as ad interim Secretary of the Treasury: Asbury Dickins (eight times), John McGinnis, and McClintock Young (twenty-seven times); and (3) the following chief clerks (or acting chief clerks) served as ad interim Secretary of War: Albert Miller Lee, Archibald Campbell (five times), Christopher Vandeventer, George Graham, John D. McPherson, John Robb (six times), Philip G. Randolph (five times), Samuel J. Anderson, and William K. Drinkard.

[7] *See* 1 *Trial of Andrew Johnson* at 580–81, 590–91 (entries for William L. Hodge and Peter Washington); Act of Mar. 3, 1849, ch. 108, § 13, 9 Stat. 395, 396–97 (providing for appointment by the Secretary of an "Assistant Secretary of the Treasury").

[8] *See Biographical Directory* at 14–17 (chief clerks of the Navy in 1809, 1814–15, 1829, 1831, and 1841); *id.* at 18 (chief clerk of the Department of the Interior, Daniel C. Goddard, in 1850 (twice)); *In re Cornelius Boyle*, 34th Cong., 3d Sess., Rep. C.C. 44, at 3, 12–13 (Ct. Cl. 1857) (identifying 13 times between 1831 and 1838 that chief clerk John Boyle was appointed as Acting Secretary of the Navy, for a total of 466 days).

payment for the performance of those additional duties. Attorney General Legaré concluded that Chief Clerk McClintock Young had a claim for compensation as "Secretary of the Treasury *ad interim*." *Pay of Secretary of the Treasury ad Interim*, 4 Op. Att'y Gen. 122, 122–23 (1842). And the Court of Claims later concluded that Congress should appropriate funds to compensate such officers for that service. *See, e.g.*, *In re Cornelius Boyle*, 34th Cong., 3d Sess., Rep. C.C. 44, at 9, 1857 WL 4155, at *4 (Ct. Cl. 1857) ("The office of Secretary *ad interim* being a distinct and independent office in itself, when it is conferred on the chief clerk, it is so conferred not because it pertains to him *ex officio*, but because the President, in the exercise of his discretion, sees fit to appoint him[.]"); *Dickins*, 34 Cong. Rep. C.C. 9, at 16, 1856 WL 4042, at *3.

Congress not only acquiesced in such appointments, but also required a non-Senate-confirmed officer to serve as a principal officer in some instances. In 1810, Congress provided that in the case of a vacancy in the office of the Postmaster General, "all his duties shall be performed by his senior assistant." Act of Apr. 30, 1810, ch. 37, § 1, 2 Stat. 592, 593. The senior assistant was one of two assistants appointed by the Postmaster General. *Id.* When Congress reorganized the Post Office in 1836, it again required that the powers and duties of the Postmaster General would, in the case of "death, resignation, or absence" "devolve, for the time being on the First Assistant Postmaster General," who was still an appointee of the Postmaster General. Act of July 2, 1836, ch. 270, § 40, 5 Stat. 80, 89. On four occasions before 1860, a First Assistant Postmaster General served as Postmaster General ad interim. *See Biographical Directory* at 17–19 (in 1841 (twice), 1849, and 1859).

On the eve of the Civil War in January 1861, President Buchanan summarized the Chief Executive's view of his authority to designate interim officers in a message submitted to Congress to explain who had been performing the duties of the Secretary of War:

> The practice of making . . . appointments [under the 1795 statute], whether in a vacation or during the session of Congress, has been constantly followed during every administration from the earliest period of the government, and *its perfect lawfulness has never, to my knowledge, been questioned or denied.* Without going back further than the year 1829, and without taking into the calculation any but the chief officers of the several departments, it will be found that provisional appointments to fill vacancies were made to the number of one hundred and seventy-nine . . . . Some of them were made while the Senate was in session, some which were made in vacation were continued in force long after the Senate assembled. *Sometimes, the temporary officer was the commissioned head of another department, sometimes a subordinate in the same department.*

Message from the President of the United States, 36th Cong., 2d Sess., Exec. Doc. No. 2, at 1–2 (1861) (emphases added).

**3.**

When it comes to vacancy statutes, the office of Attorney General presents an unusual case, albeit not one suggesting any different constitutional treatment. The office was established in the Judiciary Act of 1789, *see* Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 93, and the Attorney General was a member of the President's Cabinet, *see Office and Duties of Attorney*

*General*, 6 Op. Att'y Gen. 326, 330 (1854). But the Attorney General did not supervise an "executive department," and the Department of Justice was not established until 1870. *See* Act of June 22, 1870, ch. 150, § 1, 16 Stat. 162, 162. Thus, the terms of the 1792, 1795, and 1863 statutes, and of the Vacancies Act of 1868, did not expressly apply to vacancies in the office of the Attorney General.

Even so, the President made "temporary appointment[s]" to the office of Attorney General on a number of occasions. In 1854, Attorney General Cushing noted that "proof exists in the files of the department that temporary appointment has been made by the President in that office." *Office and Duties of Attorney General*, 6 Op. Att'y Gen. at 352. Because the 1792 and 1795 statutes did not provide the President with express authority for those temporary appointments, Cushing believed it "questionable" whether the President had the power, but he also suggested that "[p]erhaps the truer view of the question is to consider the two statutes as declaratory only, and to assume that the power to make such temporary appointment is a constitutional one." *Id.* Cushing nonetheless recommended the enactment of "a general provision . . . to remove all doubt on the subject" for the Attorney General and "other non-enumerated departments." *Id.*

Congress did not immediately remedy the problem that Cushing identified, but Presidents designated Acting Attorneys General, both before and after the Cushing opinion. In some instances, the President chose an officer who already held another Senate-confirmed office. *See Acting Attorneys General*, 8 Op. O.L.C. 39, 40–41 (1984) (identifying instances in 1848 and 1868 involving the Secretary of the Navy or the Secretary of the Interior).[9] In other instances, however, non-Senate-confirmed individuals served. After the resignation of Attorney General James Speed, for instance, Assistant Attorney General J. Hubley Ashton was the ad interim Attorney General from July 17 to July 23, 1866. *See id.* at 41; *Biographical Directory* at 20. At the time, the Assistant Attorney General was appointed by the Attorney General alone. *See* Act of March 3, 1859, ch. 80, 11 Stat. 410, 420 ("[T]he Attorney-General ... is hereby[] authorized to appoint one assistant in the said office, learned in the law, at an annual salary of three thousand dollars[.]").[10]

On other occasions between 1859 and 1868, Ashton and other Assistant Attorneys General who had not been Senate confirmed also signed several formal legal opinions as "Acting Attorney General," presumably when their incumbent Attorney General was absent or otherwise

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[9] This list is almost certainly under-inclusive because the published sources we have located identify only those who were Acting Attorney General during a period between the resignation of one Attorney General and the appointment of his successor. They do not identify individuals who may have performed the functions and duties of Attorney General when an incumbent Attorney General was temporarily unavailable on account of an absence or sickness that would now trigger either 28 U.S.C. § 508(a) or 5 U.S.C. § 3345(a).

[10] In 1868, Congress created two new Assistant Attorneys General positions to be "appointed by the President, by and with the advice and consent of the Senate," and specified that those positions were "in lieu of," among others, "the assistant attorney-general now provided for by law," which was "abolished" effective on July 1, 1868. Act of June 25, 1868, ch. 71, § 5, 15 Stat. 75, 75. A few weeks later, Ashton was confirmed by the Senate as an Assistant Attorney General. *See* 18 Sen. Exec. J. 369 (July 25, 1868). He was therefore holding a Senate-confirmed office when he served another stint as Acting Attorney General for several days at the beginning of the Grant Administration in March 1869, *see Biographical Directory* at 21, and when he signed five opinions as "Acting Attorney General" in September and October 1868.

unavailable. *See Case of Colonel Gates*, 11 Op. Att'y Gen. 70, 70 (1864) (noting that the question from the President "reached this office in [the Attorney General's] absence").[11] In 1873, when Congress reconciled the Vacancies Act of 1868 with the Department of Justice's organic statute, it expressly excepted the office of Attorney General from the general provision granting the President power to choose who would temporarily fill a vacant Senate-confirmed office. *See* Rev. Stat. § 179 (1st ed. 1875). There is accordingly no Attorney General-specific practice with respect to the pre-1998 statutes.

**B.**

Well before the Supreme Court's foundational decision in *Eaton* in 1898, courts approved of the proposition that acting officers are entitled to payment for services during their temporary appointments as principal officers. *See, e.g.*, *United States v. White*, 28 F. Cas. 586, 587 (C.C.D. Md. 1851) (Taney, Circuit J.) ("[I]t often happens that, in unexpected contingencies, and for temporary purposes, the appointment of a person already in office, to execute the duties of another office, is more convenient and useful to the public, than to bring in a new officer to execute the duty."); *Dickins*, 34 Cong. Rep. C.C. 9, at 17, 1856 WL 4042, at *3 (finding a chief clerk was entitled to additional compensation "for his services[] as acting Secretary of the Treasury and as acting Secretary of State"). Most significantly, in *Boyle*, the Court of Claims concluded that the chief clerk of the Navy (who was not Senate confirmed) had properly served as Acting Secretary of the Navy on an intermittent basis over seven years for a total of 466 days. 34 Cong. Rep. C.C. 44, at 8, 1857 WL 4155, at *1–2 (1857). The court expressly addressed the Appointments Clause question and distinguished, for constitutional purposes, between the office of Secretary of the Navy and the office of Acting Secretary of the Navy. *Id.* at 8, 1857 WL 4155 at *3 ("It seems to us . . . plain that the office of Secretary *ad interim* is a distinct and independent office in itself. It is not the office of Secretary[.]"). Furthermore, the court emphasized, the defining feature of the office of Secretary ad interim was its "temporary" character, and it must therefore be considered an inferior office:

> Congress has exercised the power of vesting the appointment of a Secretary *ad interim* in the President alone, and we think, in perfect consistency with the Constitution of the United States. We do not think that there can be any doubt that he is an *inferior* officer, in the sense of the Constitution, whose appointment may be vested by Congress in the President alone.

*Id.*

When the Supreme Court addressed this Appointments Clause issue in 1898, it reached a similar conclusion. In *United States v. Eaton*, the Court considered whether Congress could authorize the President alone to appoint a subordinate officer "charged with the duty of temporarily performing the functions" of a principal officer. 169 U.S. at 343. The statute

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[11] There were two additional opinions signed by Ashton as "Acting Attorney General" in 1864 and 1865 (11 Op. Att'y Gen. 482; 11 Op. Att'y Gen. 127); as well as four signed as "Acting Attorney General" by Assistant Attorney General John Binckley in 1867 (12 Op. Att'y Gen. 231; 12 Op. Att'y Gen. 229; 12 Op. Att'y Gen 222; 12 Op. Att'y Gen. 227); two signed as "Acting Attorney General" by Assistant Attorney General Titian J. Coffey in 1862 and 1863 (10 Op. Att'y Gen. 492; 10 Op. Att'y Gen. 377); and one signed as "Acting Attorney General" by Assistant Attorney General Alfred B. McCalmont in 1859 (9 Op. Att'y Gen. 389).

authorized the President "to provide for the appointment of vice-consuls . . . in such a manner and under such regulations as he shall deem proper." *Id.* at 336 (quoting Rev. Stat. § 1695 (2d ed. 1878)). The President's regulation provided that "[i]n case a vacancy occurs in the offices both of the consul and the vice-consul, which requires the appointment of a person to perform temporarily the duties of the consulate, the diplomatic representative has authority to make such appointment, with the consent of the foreign government . . . immediate notice being given to the Department of State." *Id.* at 338 (quoting regulation). Pursuant to that authority, Sempronius Boyd, who was the diplomatic representative and consul-general to Siam, appointed Lewis Eaton (then a missionary who was not employed by the government) as a vice-consul-general and directed him to take charge of the consulate after Boyd's departure. *Id.* at 331–32. With the "knowledge" and "approval" of the Department of State, Eaton remained in charge of the consulate, at times calling himself "acting consul-general of the United States at Bangkok," from July 12, 1892, until a successor vice-consul-general arrived on May 18, 1893. *Id.* at 332–33. In a dispute between Boyd's widow and Eaton over salary payments, the Court upheld Eaton's appointment, and the underlying statutory scheme, against an Appointments Clause challenge. *Id.* at 334–35, 352.

The Constitution expressly includes "Consuls" in the category of officers whose appointment requires the Senate's advice and consent. U.S. Const. art. II, § 2, cl. 2. The *Eaton* Court, however, concluded that a "vice-consul" is an inferior officer whose appointment Congress may "vest in the President" alone. 169 U.S. at 343. The Court held that Eaton's exercise of the authority of a Senate-confirmed office did not transform him into an officer requiring Senate confirmation:

> Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered.

*Id.* The Court concluded that more than forty years of practice "sustain the theory that a vice-consul is a mere subordinate official," which defeated the contention that Eaton's appointment required Senate confirmation. *Id.* at 344. In so doing, the Court cited Attorney General Cushing's 1855 opinion about appointments of consular officials, which had articulated the parameters for that practice. *See id.*[12] Significantly, the Court also made clear that its holding was not limited to vice-consuls or to the exigencies of Eaton's particular appointment. Rather, the Court emphasized that the temporary performance of a principal office is not the same as holding that office itself. The Court feared that a contrary holding would bear upon "any and every delegation of power to an inferior to perform *under any circumstances or exigency*." *Id.* at

[12] In the 1855 opinion, Attorney General Cushing explained that a vice-consul is "the person employed to fill the [consul's] place temporarily in his absence." *Appointment of Consuls*, 7 Op. Att'y Gen. 242, 262 (1855). He noted that consuls had to be Senate-confirmed, but vice-consuls were regarded as the "subordinates of consuls" and therefore did not require "nomination to the Senate." *Id.* at 247.

343 (emphasis added). In view of the long history of such appointments, *Eaton* simply confirmed the general rule. It did not work any innovation in that practice.

The Court has not retreated from *Eaton*, or narrowed its holding, but instead has repeatedly cited the decision for the proposition that an inferior officer may temporarily perform the duties of a principal officer without Senate confirmation. In *Edmond*, the Court observed 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. But the Court also observed that there is no "exclusive criterion for distinguishing between principal and inferior officers" and restated *Eaton*'s holding that "a vice consul charged temporarily with the duties of the consul" is an "inferior" officer. *Id.* at 661. In *Morrison*, the Court emphasized that a subordinate who performed a principal officer's duties "for a limited time and under special and temporary conditions" is not "thereby transformed into the superior and permanent official," and explained that a vice-consul appointed during the consul's "temporary absence" remained a "subordinate officer notwithstanding the Appointment Clause's specific reference to 'Consuls' as principal officers." 487 U.S. at 672–73 (quoting *Eaton*, 169 U.S. at 343)). Justice Scalia's dissenting opinion in *Morrison* similarly described *Eaton* as holding that "the appointment by an Executive Branch official other than the President of a 'vice-consul,' charged with the duty of temporarily preforming the function of the consul, did not violate the Appointments Clause." *Id.* at 721 (Scalia, J., dissenting). Likewise, in his dissenting opinion in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 537 F.3d 667 (D.C. Cir. 2008), *aff'd in part and rev'd in part*, 561 U.S. 447 (2010), then-Judge Kavanaugh cited *Eaton* to establish that "[t]he temporary nature of the office is the . . . reason that *acting* heads of departments are permitted to exercise authority without Senate confirmation." *Id.* at 708 n.17 (Kavanaugh, J. dissenting). Notably, Judge Kavanaugh also cited our 2003 opinion, which concluded that an OMB official who was not Senate confirmed could serve as Acting Director of OMB. *See id.* (citing *Acting Director of OMB*, 27 Op. O.L.C. at 123).

In *SW General*, the Court acknowledged the long history of Acts of Congress permitting the President to authorize officials to temporarily perform the functions of vacant offices requiring Senate approval. 137 S. Ct. at 935. Although the Court's opinion did not address the Appointments Clause, Justice Thomas's concurring opinion suggested that a presidential directive to serve as an officer under the Vacancies Reform Act should be viewed as an appointment, and that such a direction would "raise[] grave constitutional concerns because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate." *Id.* But Justice Thomas also distinguished *Eaton* on the ground that the acting designation at issue in *SW General* was not "special and temporary" because it had remained in place "for more than three years in offices limited by statute to a 4-year term." *Id.* at 946 n.1. Justice Thomas's opinion may therefore be understood to be consistent not only with *Eaton*, but also with the precedents of this Office, which have found it "implicit" that "the tenure of an Acting Director should not continue beyond a reasonable time." *Status of the Acting Director, Office of Management and Budget*, 1 Op. O.L.C. 287, 289–90 (1977). Even under Justice Thomas's opinion, Mr. Whitaker's designation as Acting Attorney General, which was made one week ago, and which would lapse in the absence of a presidential nomination, should qualify as "special and temporary" under *Eaton*.

## C.

Executive practice and more recent legislation reinforces that an inferior officer may temporarily act in the place of a principal officer. In 1980, for instance, this Office raised no constitutional concerns in concluding (in the context of a non-executive office) that the Comptroller General was statutorily authorized to "designate an employee" of the General Accounting Office to be Acting Comptroller General during the absence or incapacity of both the Senate-confirmed Comptroller General and the Senate-confirmed Deputy Comptroller General. *Authority of the Comptroller General to Appoint an Acting Comptroller General*, 4B Op. O.L.C. 690, 690–91 (1980).

Most significantly, in 2003, this Office relied on *Eaton* in concluding that, although "the position of Director [of OMB] is a principal office, . . . an Acting Director [of OMB] is only an inferior officer." *Acting Director of OMB*, 27 Op. O.L.C. at 123. We did not think that that conclusion had been called into question by *Edmond*'s statement that an inferior officer is one who reports to a superior officer below the President, because in that case "[t]he Court held only that '[g]enerally speaking' an inferior officer is subordinate to an officer other than the President," and because *Edmond* did not deal with temporary officers. 27 Op. O.L.C. at 124 (citations omitted). Assuming that for constitutional purposes the official designated as acting head of an agency would need to be an inferior officer (and that the OMB official in question was not already such an officer), we further concluded that the President's designation of an acting officer under the Act should be regarded as an appointment by the President alone—a constitutionally permissible mode for appointing an inferior officer. *Id.* at 125. Since then, Presidents George W. Bush and Obama each used their authority under the Vacancies Reform Act to place non-Senate-confirmed Chiefs of Staff in the lines of succession to be the acting head of several federal agencies.[13] In three instances, President Obama placed a Chief of Staff above at least one Senate-confirmed officer within the same department.[14] And, in practice, during the Bush, Obama, and Trump Administrations, multiple unconfirmed officers were designated to serve as acting agency heads, either under the Vacancies Reform Act or another office-specific

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[13] See Memorandum, Designation of Officers of the Social Security Administration, 71 Fed. Reg. 20333 (Apr. 17, 2006); Memorandum, Designation of Officers of the Council on Environmental Quality, 73 Fed. Reg. 54487 (Sept. 18, 2008) (later superseded by 2017 memorandum cited below); Memorandum, Designation of Officers of the Overseas Private Investment Corporation to Act as President of the Overseas Private Investment Corporation, 76 Fed. Reg. 33613 (June 6, 2011); Memorandum, Designation of Officers of the Millennium Challenge Corporation to Act as Chief Executive Officer of the Millennium Challenge Corporation, 77 Fed. Reg. 31161 (May 21, 2012); Memorandum, Designation of Officers of the General Services Administration to Act as Administrator of General Services, 78 Fed. Reg. 59161 (Sept. 20, 2013); Memorandum, Designation of Officers of the Office of Personnel Management to Act as Director of the Office of Personnel Management, 81 Fed. Reg. 54715 (Aug. 12, 2016); Memorandum, Providing an Order of Succession Within the National Endowment of the Humanities, 81 Fed. Reg. 54717 (Aug. 12, 2016); Memorandum, Providing an Order of Succession Within the National Endowment of the Arts, 81 Fed. Reg. 96335 (Dec. 23, 2016); Memorandum, Designation of Officers or Employees of the Office of Science and Technology Policy to Act as Director, 82 Fed. Reg. 7625 (Jan. 13, 2017); Memorandum, Providing an Order of Succession Within the Council on Environmental Quality, 82 Fed. Reg. 7627 (Jan. 13, 2017).

[14] See Executive Order 13612, Providing an Order of Succession Within the Department of Agriculture, 77 Fed. Reg. 31153 (May 21, 2012); Executive Order 13735, Providing an Order Within the Department of the Treasury, 81 Fed. Reg. 54709 (Aug. 12, 2016); Executive Order 13736, Providing an Order of Succession Within the Department of Veterans Affairs, 81 Fed. Reg. 54711 (Aug. 12, 2016).

statute.[15] Those determinations reflect the judgments of these administrations that the President may lawfully designate an unconfirmed official, including a Chief of Staff, to serve as an acting principal officer.

Congress too has determined in the Vacancies Reform Act and many other currently operative statutes that non-Senate-confirmed officials may temporarily perform the functions of principal officers. By its terms, the Vacancies Reform Act applies to nearly all executive offices for which appointment "is required to be made by the President, by and with the advice and consent of the Senate." 5 U.S.C. § 3345(a); *see id.* § 3349c(1)–(3) (excluding only certain members of multi-member boards, commissions, or similar entities). And it specifically provides for different treatment in some respects depending on whether the vacant office is that of an agency head. *Id.* § 3348(b)(2). Moreover, the statute contemplates that non-Senate-confirmed officials will be able to serve as acting officers in certain applications of section 3345(a)(1) as well as in all applications of section 3345(a)(3), which refers to an "officer or employee." The latter provision had no counterpart in the Vacancies Act of 1868, but it was not completely novel, because clerks, who were not Senate-confirmed, were routinely authorized to serve as acting officers under the 1792 and 1795 statutes.[16]

Congress has also enacted various statutes that enable deputies not confirmed by the Senate to act when the office of the Senate-confirmed agency head is vacant. *See* 12 U.S.C. § 4512(f) (providing for an Acting Director of the Federal Housing Finance Agency); *id.* § 5491(b)(5) (providing for an Acting Director of the Bureau of Consumer Financial Protection); 21 U.S.C. § 1703(a)(3) (providing for an Acting Director of the Office of National Drug Control Policy); 40 U.S.C. § 302(b) (providing for an Acting Administrator of the General Services Administration); 44 U.S.C. § 2103(c) (providing for an Acting Archivist). All of those provisions contemplate the temporary service of non-Senate-confirmed officials as acting

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[15] For example, during this administration, Grace Bochenek, a non-Senate-confirmed laboratory director, served as Acting Secretary of Energy from January 20, 2017, until March 2, 2017; Tim Horne, a non-Senate-confirmed Regional Commissioner, served as Acting Administrator of the General Services Administration from January 20, 2017, until December 12, 2017 (pursuant to a designation under a GSA-specific statute); Phil Rosenfelt, a non-Senate-confirmed Deputy General Counsel, served as Acting Secretary of Education from January 20, 2017, until February 7, 2017 (pursuant to a designation under a statute specific to that department); Don Wright, a non-Senate-confirmed Deputy Assistant Secretary, served as Acting Secretary of Health and Human Services from September 30, 2017, until October 10, 2017; Peter O'Rourke, a non-Senate-confirmed Chief of Staff, served as Acting Secretary of Veterans Affairs from May 29, 2018, until July 30, 2018; and Shelia Crowley, a non-Senate-confirmed Chief of Operations, served, upon President's Obama's designation, as Acting Director of the Peace Corps from January 20, 2017, until November 16, 2017. During the Obama administration, Darryl Hairston, a career employee, served as Acting Administrator of the Small Business Administration from January 22, 2009, until April 6, 2009, and Edward Hugler, a non-Senate-confirmed Deputy Assistant Secretary, served as Acting Secretary of Labor from February 2, 2009, until February 24, 2009. During the Bush Administration, Augustine Smythe, a non-Senate-confirmed Executive Associate Director served as Acting Director of OMB from June 10, 2003, until late June 2003, consistent with our opinion.

[16] Echoing the movement in the early nineteenth century to chief clerks rather than Senate-confirmed officials from other departments, section 3345(a)(3) was reportedly the product of a desire to give the President "more flexibility" to use "qualified individuals who have worked within the agency in which the vacancy occurs for a minimum number of days and who are of a minimum grade level." S. Rep. No. 105-250, at 31 (additional views of Sen. Glenn et al.); *id.* at 35 (minority views of Sens. Durbin and Akaka).

principal officers, and these statutes would appear to be unconstitutional if only a Senate-confirmed officer could temporarily serve as an acting principal officer.

Similarly, other current statutes provide that, although the deputy is appointed by the President with the Senate's advice and consent, the President or the department head may designate another official to act as the agency head, even though that official is not Senate-confirmed. *See* 20 U.S.C. § 3412(a)(1) (providing that "[t]he Secretary [of Education] shall designate the order in which other officials of the Department shall act for and perform the functions of the Secretary . . . in the event of vacancies in both" the Secretary and Deputy Secretary positions); 31 U.S.C. § 502(f) (providing that the President may designate "an officer of the Office [of Management and Budget] to act as Director"); 38 U.S.C. § 304 (providing that the Deputy Secretary of Veterans Affairs serves as Acting Secretary "[u]nless the President designates another officer of the Government"); 42 U.S.C. § 7132(a) (providing that "[t]he Secretary [of Energy] shall designate the order in which the Under Secretary and other officials shall act for and perform the functions of the Secretary . . . in the event of vacancies in both" the Secretary and Deputy Secretary positions); 49 U.S.C. § 102(e) (providing that the Secretary of Transportation shall establish an order of succession that includes Assistant Secretaries who are not Senate-confirmed for instances in which the offices of the Secretary, Deputy Secretary, and Under Secretary of Transportation for Policy are vacant); 40 U.S.C. § 302(b) (providing that the Deputy Administrator serves as Acting Administrator of General Services when that office "is vacant," "unless the President designates another officer of the Federal Government"); *cf.* 44 U.S.C. § 304 (limiting the individuals whom the President may choose to serve as Acting Director of the Government Printing Office to those who occupy offices requiring presidential appointment with the Senate's advice and consent).

Indeed, if it were unconstitutional for an official without Senate confirmation to serve temporarily as an acting agency head, then the recent controversy over the Acting Director of the CFPB should have been resolved on that ground alone—even though it was never raised by any party, the district court, or the judges at the appellate argument. On November 24, 2017, the Director of the CFPB appointed a new Deputy Director, expecting that she would become the Acting Director upon his resignation later that day. *Acting Director of CFPB*, 41 Op. O.L.C. __, at *2 n.1. The Director of the CFPB relied on 12 U.S.C. § 5491(b)(5), which expressly contemplates that a non-Senate-confirmed official (the Deputy Director) will act as a principal officer (the Director). The President, however, exercised his authority under 5 U.S.C. § 3345(a)(2) to designate the Director of OMB as Acting Director of the CFPB. *See English*, 279 F. Supp. 3d at 330. When the Deputy Director challenged the President's action, we are not aware that anyone ever contended that the Deputy Director was constitutionally ineligible to serve as Acting Director because she had not been confirmed by the Senate. If the newly installed Deputy Director of the CFPB could lawfully have become the Acting Director, then the Chief of Staff to the Attorney General may serve as Acting Attorney General in the case of a vacancy.

**D.**

The constitutionality of Mr. Whitaker's designation as Acting Attorney General is supported by Supreme Court precedent, by acts of Congress passed in three different centuries, and by countless examples of executive practice. To say that the Appointments Clause now

prohibits the President from designating Mr. Whitaker as Acting Attorney General would mean that the Vacancies Reform Act and a dozen statutes were unconstitutional, as were countless prior instances of temporary service going back to at least the Jefferson Administration.

There is no question that Senate confirmation is an important constitutional check on the President's appointments of senior officers. The Senate's role "serves both to curb Executive abuses of the appointment power, and to promote a judicious choice of [persons] for filling the offices of the union." *Edmond*, 520 U.S. at 659 (internal quotation marks omitted). At the same time, the "constitutional process of Presidential appointment and Senate confirmation . . . can take time: The President may not promptly settle on a nominee to fill an office; the Senate may be unable, or unwilling, to speedily confirm the nominee once submitted." *SW General*, 137 S. Ct. at 935. Despite their frequent disagreements over nominees, for over 200 years, Congress and the President have agreed upon the value and permissibility of using temporary appointments, pursuant to limits set by Congress, in order to overcome the delays of the confirmation process.

If the President could not rely on temporary designations for principal offices, then the efficient functioning of the Executive Branch would be severely compromised. Because most Senate-confirmed officials resign at the end of an administration, a new President must rely on acting officials to serve until nominees have been confirmed. If Senate confirmation were required before anyone could serve, then the Senate could frustrate the appropriate functioning of the Executive Branch by blocking the confirmation of principal officers for some time. *See* 144 Cong. Rec. 27496 (Oct. 21, 1998) (statement of Sen. Thompson) (noting that section 3345(a)(3) had been added because "[c]oncerns had been raised that, particularly early in a presidential administration, there will sometimes be vacancies in first assistant positions, and that there will not be a large number of Senate-confirmed officers in the government," as well as "concerns . . . about designating too many Senate-confirmed persons from other offices to serve as acting officers in additional positions"). A political dispute with the Senate could frustrate the President's ability to execute the laws by delaying the appointment of his principal officers.

The problems with a contrary rule are not limited to the beginning of an administration. Many agencies would run into problems on an ongoing basis, because they have few officers subject to Senate confirmation. Thus, when a vacancy in the top spot arises, such an agency would either lack a head or be forced to rely upon reinforcements from Senate-confirmed appointees outside the agency. Those outside officers may be inefficient choices when a non-Senate-confirmed officer within the agency is more qualified to act as a temporary caretaker. At best, designating a Senate-confirmed officer to perform temporary services would solve a problem at one agency only by cannibalizing the senior personnel of another.

It is true that these concerns do not apply to the current circumstances of the Department of Justice, which is staffed by a number of Senate-confirmed officers. Following Attorney General Sessions's resignation, the President could have relied upon the Deputy Attorney General, the Solicitor General, or an Assistant Attorney General to serve as Acting Attorney General. But the availability of potential alternatives does not disable Congress from providing the President with discretion to designate other persons under section 3345(a)(3) of the Vacancies Reform Act. Nothing in the text of the Constitution or historical practice suggests that

the President may turn to an official who has not been confirmed by the Senate if, but only if, there is no appropriate Senate-confirmed official available.

**III.**

The President's designation to serve as Acting Attorney General of a senior Department of Justice official who does not currently hold a Senate-confirmed office is expressly authorized by 5 U.S.C. § 3345(a)(3). Mr. Whitaker has been designated based upon a statute that permits him to serve as Acting Attorney General for a limited period, pending the Senate's consideration of a nominee for Attorney General. Consistent with our 2003 opinion, with *Eaton*, and with two centuries of practice, we advised that his designation would be lawful.

STEVEN A. ENGEL
*Assistant Attorney General*

**MRD**

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**From:** MRD
**Sent:** Wednesday, November 14, 2018 9:16 AM
**To:** Gannon, Curtis E. (OLC)
**Subject:** RE: Opinion?

Thank you.

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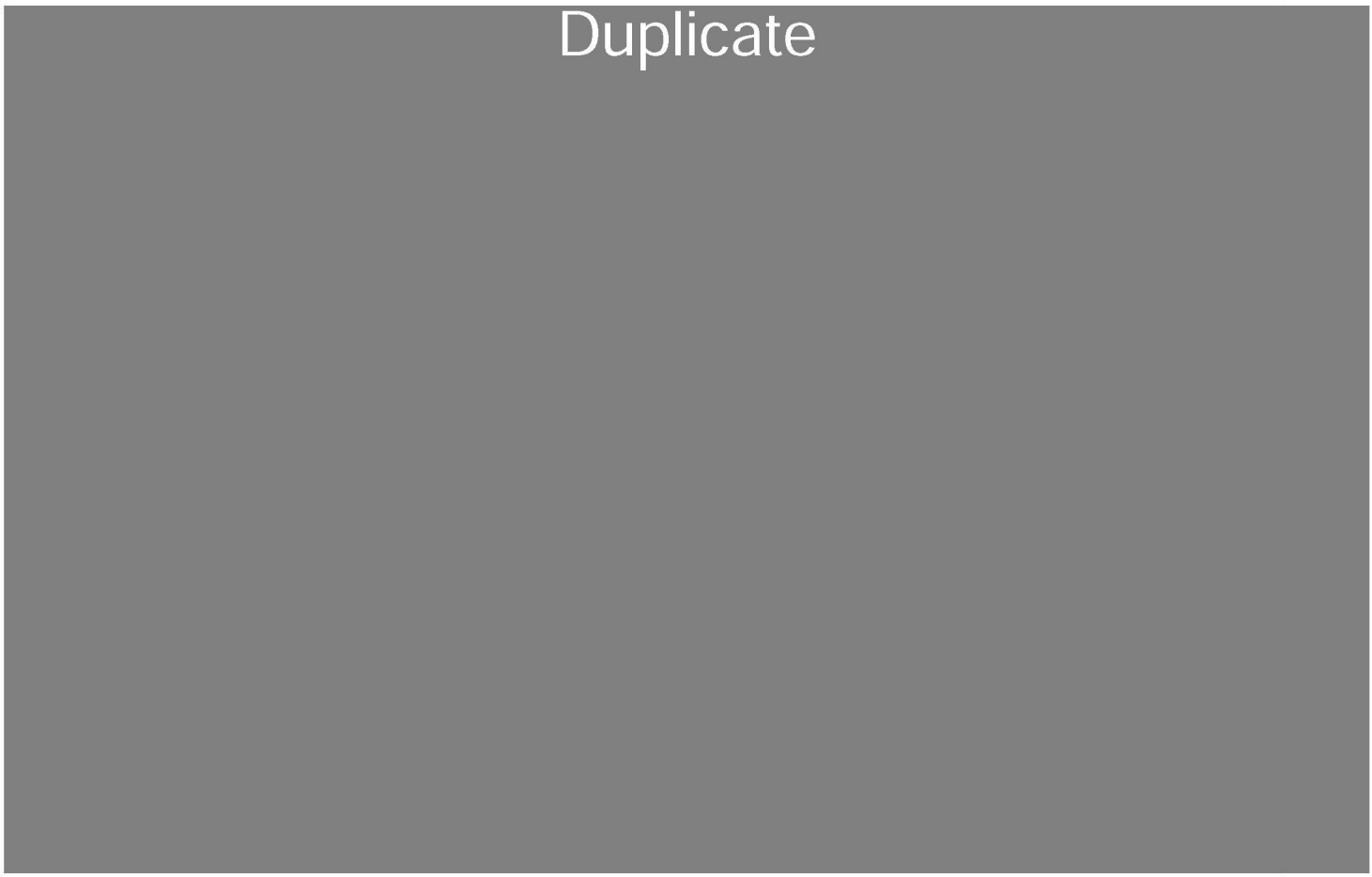
**From:** Gannon, Curtis E. (OLC)
**Sent:** Wednesday, November 14, 2018 9:14 AM
**To:** MRD <MRD@jmd.usdoj.gov>
**Subject:** RE: Opinion?



**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**Case No.: 1:19-CR-00018-ABJ**

UNITED STATES OF AMERICA,

v.

ROGER J. STONE, JR.,

Defendant.
_____/

**ROGER STONE'S MOTION TO ENJOIN HIS PROSECUTION**

Defendant, Roger J. Stone, Jr., moves for an injunction to end the prosecution against him. The Appropriations Clause of the United States Constitution, ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . .") has been violated by a prosecution initiated by a public official whose function was not funded by Congress. U.S. Const. Art. I, § 9 cl. 7. Such a violation requires that Stone's prosecution be enjoined. That violation is present here.

Defendant, Roger Stone, has been charged with obstruction, lying to Congress, and witness tampering under 18 U.S.C. §§ 1505, 1001, and 1512(b)(1), 2. He is not charged with aiding or conspiring with Russian agents in order to hack, steal, or disseminate emails of the Democratic National Committee, the Democratic Congressional Campaign Committee, or Hillary Clinton's campaign chairman, John Podesta. On March 24, 2019, the Attorney General issued a summary report of the Special Counsel's Office investigation ("Report"), in which he confirmed that *no American*, including the President of the United States (or Roger Stone), conspired with any Russian agent to influence the 2016 presidential election. Attached as an Exhibit, Attorney General's March 24, 2019 letter to Judicial Committees.

Robert Mueller was an appointed Special Counsel. His Special Counsel's Office was not funded by monies approved by Congress; rather, the Department of Justice has been funding the investigation from an unlimited account established in 1987 to fund *independent* counsels. In 1999 Congress, and the Department of Justice, specifically replaced the installing and empowering of independent counsels, with *special* counsels, in order for the Attorney General to have greater control over the investigations and to provide fiscal oversight of the budget by Congress.

A key element of fiscal oversight is specified funds from a congressionally approved budget. Special Counsels are materially different from Independent Counsels, and the Independent Counsel fund is not available to Special Counsels. This is not a technical detail. The Constitution grants Congress spending power for a reason. By forcing Special Counsel to seek congressional approval for its funding, Congress ensures that their investigations are necessary, limited, and fair.

The Special Counsel's Office that indicted Stone did not operate with congressionally approved budget and funding. Therefore, its funding was in violation of Article I, §9, cl. 7. Since the Special Counsel's investigation of Roger Stone violated a fundamental clause of the Constitution, the Special Counsel's office lacked authority to investigate and prosecute Roger Stone. The case against Stone should be enjoined. In the alternative, as argued in a companion motion contemporaneously filed, the Indictment against him should be dismissed.

The Appropriations Clause, U.S. Const. Art. I, § 9, cl. 7, prohibits the payment of money from the Treasury unless it has been approved by an act of Congress. *United States v. McIntosh,* 833 F.3d 1163, 1174–75 (9th Cir. 2016):

> [I]f DOJ were spending money in violation of § 542, it would be drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause. That Clause constitutes a separation-of-powers limitation that Appellants can invoke to challenge their prosecutions.

Thus, because here, the Department of Justice has been spending money in a manner not authorized by the Constitution, the Appropriations Clause was violated. This separation of powers violation can be raised by a defendant to challenge the act of prosecution. *Id.* An injunction is warranted because Stone's prosecution violates the Constitution.

The Special Counsel's Office should not have investigated Stone nor presented witnesses to a grand jury *sans* an appropriation which complied with the Constitution. Even if the District's United States Attorney's Office is now sponsoring the prosecution against Stone, the Special Counsel's unapproved/unfunded actions so taint the continuing case, that an injunction is warranted. The investigators, support staff, and lawyers who were all assigned to the Special Counsel, were paid by a fund that was not authorized by Congress. The irreparable injury to the Appropriations Clause, the constitutionally protected separation of powers, and the due process right to not be prosecuted except in accordance with law, supports the remedy of a permanent injunction.

## CONCLUSION

The prosecution of Roger Stone should be enjoined.

Respectfully submitted,

By: /s/_____

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on April 12, 2019, I electronically filed the foregoing with the Clerk of Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record or pro se parties, via transmission of Notices of Electronic Filing generated by CM/ECF.

By: */s/ Robert Buschel*
Robert C. Buschel

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**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

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|---|---|
| UNITED STATES OF AMERICA,<br><br>v.<br><br>ROGER J. STONE, JR.,<br><br>Defendant. | **Case No.: 1:19-CR-00018-ABJ** |

**DEFENDANT ROGER STONE'S MOTION TO DISMISS**

Defendant, Roger Stone, moves to dismiss the Indictment against him on the following grounds:

1. Separation of Powers prevents the Special Counsel from indicting Mr. Stone for allegedly making materially false statements to the Legislative Branch, absent a Congressional referral;
2. The Special Counsel's actions *vis a vis* Roger Stone impermissibly violate the Appropriations Clause of the Constitution;
3. The Special Counsel Appointment violates the Vesting Clause of the Constitution;
4. The Special Counsel Appointment impermissibly encroaches upon the Executive Power in violation of the Take Care Clause of the Constitution;
5. The Special Counsel Appointment violates the Appointments Clause of the Constitution;
6. The Special Counsel Appointment is invalid because it was not commissioned by the President of the United States.

Dated: April 12, 2019

Respectfully submitted,
By: */s/*_____

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| UNITED STATES OF AMERICA,<br><br>v.<br><br>ROGER J. STONE, JR.,<br><br>Defendant. | **Case No.: 1:19-CR-00018-ABJ** |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT ROGER STONE'S MOTION TO DISMISS**

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**PROLOGUE**

Roger Stone is entitled to access to the full, unredacted Report of Special Counsel Robert S. Muller, III, pursuant to the Fifth and Sixth Amendments to the Constitution of the United States and *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963). No other person, Committee, or entity has Stone's constitutionally based standing to demand the complete, unredacted Report.

The Fifth Amendment guarantees Stone "due process of law." The Sixth Amendment guarantees Stone the right "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor." *Brady* and its progeny require that evidence favorable to the accused be provided to him or her.

Stone's prosecution is the direct outgrowth of the Special Counsel Investigation. He is the last vestige of the investigation; an investigation which employed 19 lawyers, 40 FBI agents and other staff, an investigation that issued more than 2,800 subpoenas, executed 500 search warrants, obtained more than 230 orders for communication records, 50 pen register authorizations, and interviewed approximately 500 witnesses.

Only by reviewing the full, unredacted Mueller Report can Roger Stone be assured of his rights to due process, to compulsory process, to know the exculpatory evidence, to determine whether or not he is being selectively prosecuted. The Special Counsel Report may be of political interest to many. It may be of commercial interest to others. It may be of public interest to some. But for Roger Stone, the Special Counsel's Report is a matter of protecting his liberty. Only by full disclosure to him, can he determine whether the Report contains material which could be critical to his defense.

Therefore Roger Stone, in addition to the reasons set forth below for dismissing the Indictment against him, expressly requests that the Court order the government to provide him

with the Special Counsel's full, unredacted Report. In addition, he expressly reserves the right to add any additional grounds which may arise after publication of the Report, redacted, unredacted, or otherwise.

## I. Separation of Powers Prevents the Executive Branch Special Prosecutor from Prosecuting Stone for Allegedly Making Material False Statements to the Legislative Branch, Absent Congressional Referral.

The separation of powers between the legislative, executive and judicial branches is fundamental to our constitutional system. *Clinton v. New York,* 524 U.S. 417, 450, 118 S. Ct. 2091, 2109(1998) (Kennedy, J.,) (concurring). Each branch is required to respect the scope of power of the other two branches. Part of this mutual respect has traditionally been that the Executive Branch not act as if on "road patrol" looking to police proceedings of the Legislative Branch for criminal behavior. It may only act upon alleged criminal activity impacting the Legislative Branch upon the receipt of a "referral" from Congress. As stated by former FBI Director James Comey in his July, 2016 testimony before a House Oversight and Government Reform Committee hearing regarding the Federal Bureau of Investigation's ("FBI") inquiry of the potential mishandling of classified information:

> We, out of respect for the legislative branch being a separate branch, we do not commence investigations that focus on activities before Congress without Congress asking us to get involved. That's a long-standing practice of the Department of Justice and the FBI. So we don't watch on TV and say we ought to investigate that, Joe Smith said this -- in front of the committee. It requires the committee to say, "We think we have an issue here; would you all take a look at it?"[1]

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[1] *Oversight of the State Dep't, Hearing Before the Comm. on Oversight and Reform,* 114th Congress (2016) (statement of James B. Comey, Dir. Federal Bureau of Investigation).

**A. Prosecution Absent a Referral Invades the Investigative and Oversight Powers of Congress in Violation of Separation of Powers.**

The Department of Justice has long taken the position that prosecutorial discretion rests solely with the Executive Branch, and that Congress cannot force the FBI to conduct an investigation, or force the Department to institute a prosecution.[2] Comity among the three coequal branches supports the proposition that the Department cannot police Congress, and prosecute potential violations which Congress has not referred for prosecution. To do so would allow the Executive Branch to invade and impede Congress' right to conduct inquiries, a key aspect of the legislative function.

*McGrain v. Daugherty*, 273 U.S. 135, 174, 47 S. Ct. 319 (1927), held that "the power of inquiry -- with process to enforce it -- is an essential and appropriate auxiliary to the legislative function." *See also Watkins v. United States*, 354 U.S. 178, 187, 77 S. Ct. 1173, 1179 (1957), and *Barenblatt v. United States*, 360 U.S. 109, 111, 79 S. Ct. 1081, 1085 (1959). The investigative power of Congress goes hand in hand with Congress' oversight power. Numerous committees and subcommittees of the House and Senate engage in investigative and oversight hearings on a routine

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[2] *See* Whether the Department of Justice May Prosecute White House Officials for Contempt of Congress, 32 Op. O.L.C. 65 (2008), which states that "as a matter of statutory interpretation reinforced by compelling separation of powers considerations, we believe that Congress may not direct the Executive to prosecute a particular individual without leaving any discretion to the Executive to determine whether a violation of the law has occurred." (quoting Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, 102 (1984)).

basis.[3] These Congressional powers are implied from both the Article I, Section 8 enumerated powers, as well as the necessary and proper clause. Investigation and oversight have been upheld by a series of cases dating back to at least 1821, and have been explicitly authorized by statute since 1946.[4] To allow the Executive Branch to roam the Halls of Congress to look for prosecutable offenses *sans* a referral from the Legislative Brach would violate the separation of powers doctrine. There has been no referral by the Legislative Branch. Indeed, the alleged offense occurred nearly two years ago and nary a word was ever said by the Committee before which the alleged false statement was made.

## II. The Appointment of the Special Counsel Violates the Appropriations Clause.

The Appropriations Clause provides: "No money shall be drawn from the Treasury, but in Consequences of Appropriations made by Law." Article I, Section 9, Clause 7. This Special Counsel's Office was not funded by monies approved by Congress; rather, the Department of Justice is funding the investigation from an unlimited account established in 1987 to pay for *independent* counsels.

This Special Counsel's Office budget and funding were not congressionally approved. Because it was not congressionally approved, its funding is in violation of the Constitution. Since the investigation violates a fundamental clause of the Constitution authorizing congressional oversight, it lacks authority to investigate and prosecute Roger Stone. The law provides that the

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[3] *See generally*, L. Elaine Halchin & Frederick M. Kaiser, Cong. Research Serv., 97-936, Congressional Oversight (2012), available at: https://fas.org/sgp/crs/misc/97-936.pdf.

[4] *Anderson v. Dunn, 19 U.S. 204 (1821); See also*, The Legislative Reorganization Act of 1946 (P.L. 79-601).

indictment should be dismissed and the prosecution enjoined. *See United States v. McIntosh,* 833 F.3d 1163, 1175 (9th Cir. 2016):

> The Appropriations Clause plays a critical role in the Constitution's separation of powers among the three branches of government and the checks and balances between them. "Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." *Id.* at 425, 110 S. Ct. 2465. The Clause has a "fundamental and comprehensive purpose … to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *Id.* at 427-28, 110 S. Ct. 2465. Without it, Justice Story explained, "the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure." *Id.* at 427, 110 S. Ct. 2465 (quoting 2 Joseph Story, Commentaries on the Constitution of the United States § 1348 (3d ed. 1858)).

**A. The Independent Counsel Statute.**

The Supreme Court described the appointment, investigative, and prosecutorial procedures of the Independent Counsel statute as follows:

> Title VI of the Ethics in Government Act (Title VI or the Act), 28 U.S.C. §§ 591–599 (1982 ed., Supp. V), allows for the appointment of an "independent counsel" to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws.
>
> The Act requires the Attorney General, upon receipt of information that he determines is "sufficient to constitute grounds to investigate whether any person [covered by the Act] may have violated any Federal criminal law," to conduct a preliminary investigation of the matter. When the Attorney General has completed this investigation, or 90 days has elapsed, he is required to report to a special court (the Special Division) created by the Act "for the purpose of appointing independent counsels." 28 U.S.C. § 49 (1982 ed., Supp. V).
>
> If the Attorney General determines that "there are no reasonable

> grounds to believe that further investigation is warranted," then he must notify the Special Division of this result. In such a case, "the division of the court shall have no power to appoint an independent counsel." § 592(b)(1). If, however, the Attorney General has determined that there are "reasonable grounds to believe that further investigation or prosecution is warranted," then he "shall apply to the division of the court for the appointment of an independent counsel."
>
> The Attorney General's application to the court "shall contain sufficient information to assist the [court] in selecting an independent counsel and in defining that independent counsel's prosecutorial jurisdiction." § 592(d). Upon receiving this application, the Special Division "shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction." § 593(b).

*Morrison v. Olson,* 487 U.S. 654, 660-661, 108 S.Ct. 2597, 2603(1988).

Title VI was at the time, and remained until its expiration, the only law that specifically allowed the investigation of a sitting President and Presidential Campaign. But Congress determined that the law should expire in 1999, and has not reenacted it. The independent counsel was vested with "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice" with respect to matters within their jurisdiction. *Id.* at 662; 28 U.S.C. § 594(a). The independent counsel has authority to conduct investigations and grand jury proceedings, to obtaining and reviewing tax returns, to carrying out prosecutions. *Id.*; 28 U.S.C. §§ 594 (1)-(9). The independent counsel could request assistance from the Department in the course of the investigation, including access to materials relevant to the relevant inquiry and necessary resources and personnel. *Id.*; 28 U.S.C. §594(d).

Even with controversy about the over-extension of power to and insufficient supervision and oversight of the independent counsel, congressional oversight was in place.

> Finally, the Act provides for congressional oversight of the activities of independent counsel. An independent counsel may from time to time send Congress statements or reports on his or her activities. § 595(a)(2). The "appropriate committees of the Congress" are given oversight jurisdiction in regard to the official conduct of an independent counsel, and the counsel is required by the Act to cooperate with Congress in the exercise of this jurisdiction. § 595(a)(1). The counsel is required to inform the House of Representatives of "substantial and credible information which [the counsel] receives ... that may constitute grounds for an impeachment." § 595(c). In addition, the Act gives certain congressional committee members the power to "request in writing that the Attorney General apply for the appointment of an independent counsel." § 592(g)(1). The Attorney General is required to respond to this request within a specified time but is not required to accede to the request. § 592(g)(2).

*Morrison*, 487 U.S. at 665.

Over the years, there were concerns over whether the independent counsel possessed too much power after the Iran-Contra and Whitewater investigations. *See* Exhibit 1, *Special Counsel Investigations: History, Authority, Appointment and Removal,* at 8.[5] Even the then-Deputy Attorney General Eric Holder testified: "Independent counsel are largely insulated from any meaningful budget process, competing public duties, time limits, accountability to superiors and identification with the traditional long-term interests of the Department of Justice. *See* Exhibit 2, *[t[he Independent Counsel Act, Hearing Before the Subcomm. on Commercial and Administrative Law, on the Judiciary*[6].

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[5] Cynthia Brown & Jared P. Cole, Cong. Research Serv., R44857, Special Counsel Investigations: History, Authority, Appointment and Removal at 8 (2019).

[6] *The Independent Counsel Act, Hearing Before the Subcomm. on Commercial and Administrative Law, on the Judiciary*, 106th Congress (1999) (prepared remarks of Dep. Att'y. Gen. Eric Holder).

The Special Counsel statute provides a different framework but enables the Special Counsel to investigate and prosecute without providing the direct and ongoing congressional oversight as required by the independent counsel's statute under § 591. Title 28 U.S.C. Sections 509, 510, and 515, passed into law in 1966, remain general provisions that do not contemplate the appointment of a Special Counsel to investigate potential criminal actions by the President of the United States or a Presidential Campaign.

Congress presently must subpoena a copy of the Mueller report and will receive a version at the discretion of the Attorney General. Thus, the only oversight provided to Congress by the Special Counsel statute and accompanying regulations would be the power to appropriate spending.

**B. The Special Counsel Statute.**

"There is a federal statute that governs who may litigate cases in the name of the United States, and provides for the appointment of the Special Counsel." *United States v. Manafort,* 312 F.Supp.3d 60, 68-69 (D.D.C. 2018) (Berman Jackson, J.,) (citing 28 U.S.C. § 509). As described earlier, prior to the enactment of the special counsel statute, there was an independent counsel statute. *In re Grand Jury Investigation,* 916 F.3d 1047, 1050 (D.C. Cir. 2019), aff'd, 916 F.3d 1047 (D.C. Cir. 2019) (citing 28 U.S.C. §§ 591-599 (expired)). Then as the independent counsel provisions of the Ethics in Government Act expired in 1999, the Attorney General promulgated the Office of the Special Counsel regulations to "replace" the Act. *Id.* (citing Office of Special Counsel, 64 Fed. Reg. 37,038, 37,038 (July 9, 1999) (published at 28 C.F.R. §§ 600.1–600.10).[7]

[7] Part 600, Title 28 of the Code of Federal Regulations govern the general power of the special counsel. Part 601 governed the jurisdiction of the independent counsel for *Iran/Contra* investigation; part 602 governed the jurisdiction of *Franklyn C. Nofziger*; part 603 governed the jurisdiction of the independent counsel re: *Madison Guaranty Saving & Loan Association.*

*See also Manafort,* 312 F.Supp.3d at 68-69 (Berman Jackson, J.,). The Independent Counsel statute was permitted to sunset in the hopes that the use of the statute would not be used to pursue politically partisan agendas, rather than a means of assuring accountability in government. *United States v. Manafort*, 321 F. Supp. 3d 640, 647–48 (E.D. Va. 2018) (Ellis, J.,).

"The Department of Justice has promulgated a set of regulations concerning the appointment and supervision of Special Counsel appointed pursuant to section 515." *Manafort,* 312 F.Supp.3d at 69 (citing General Powers of Special Counsel, 28 C.F.R. §§ 600.1-600.10, citing 5 U.S.C. §301; 28 U.S.C. §§ 509, 510, 515-519)). "The Department published the regulations in 1999 to 'replace the procedures set out in the Independent Counsel Reauthorization Act of 1994.'" *Id.* (citation omitted). The regulations provide that a Special Counsel be appointed when the Attorney General determines there is a criminal investigation of a person or matter is warranted, that assigning a United States Attorney or other lawyer within the Department would present a conflict of interest for the Department, or "other extraordinary circumstances." *Id.* (citing 28 C.F.R. §600.1)). The Special Counsel must be appointed from outside the Department, with a "reputation for integrity and impartial decision-making," with "appropriate experience" to conduct the specific investigation, and understands the criminal law and the Department's policies." *Id.* (citing 28 C.F.R. §600.3)).

The Attorney General or in this case, his designee, defined the scope of the Special Counsel's jurisdiction. *Id.* (citing 28 C.F.R. § 600.4)). Once the Special Counsel's jurisdiction has been established, he has "full power and independent authority" to exercise all investigative and prosecutorial functions of a United States Attorney." *Id.* at 70. (citing 28 C.F.R. § 600.6)). As opposed to the prior Independent Counsel, the Special Counsel "remains subject to oversight by

the Attorney General." *Id.* "The Special Counsel's authority is not clearly greater than the Independent Counsel's, and arguably is lesser." *In re Grand Jury Investigation,* 315 F.Supp.3d at 641. What is clear, however, is that the authority given is different.

The Special Counsel should consult with the Department for "guidance with respect to practices and procedures" within the Department or Attorney General, unless such consultation would be "inappropriate." *Manafort,* 312 F.Supp.3d at 68-69 (citing 28 C.F.R. § 600.7). The Special Counsel is not subject to day-to-day supervision of the Attorney General; however, the Special Counsel has to explain "any investigative or prosecutorial step" taken. *Id.* (citing 28 C.F.R. § 600.7(b)). If deemed inappropriate or unwarranted by the Attorney General, then he can order the Special Counsel not to pursue it. *Id.* The Attorney General has personal enforcement power to discipline or remove the Special Counsel. *Id.* Pursuant to the new statute, the Department announced the new regulations as a means to "strike a balance between independence and accountability in certain sensitive investigations." *Id.* (citing 64 Fed. Reg. at 37,038).

As stated above, the independent counsel statute enacted congressional oversight provisions that the special counsel statute does not. With supervision in place, Congress authorized funding of the independent counsel's office from a designated fund within the Department of Justice. The permanent and indefinite independent counsel fund within the Department cannot and was not deemed a Special Counsel fund.

Robert Mueller, III was appointed to be the Special Counsel to investigate Russian interference with the 2016 presidential election and related matters. *United States v. Manafort*, 312 F.Supp.3d 60, 64 (D.D.C. 2018) (Berman Jackson, J.,); *see* Exhibit 3, Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and

Related Matters, Order No. 3915-2017.[8]

The Special Counsel's Office is currently funded by the permanent, indefinite appropriation for independent counsels. *See* 28 C.F.R. § 600.8 (a)(1)-(2) (budget); Exhibit 4, Dep't of Justice, Special Counsel's Office Statement of Expenditures October 1, 2017 through March 31, 2018. In title and actuality, Mr. Mueller is not an independent counsel. Mueller's independence is defined and limited by Part 600 of Title 28 of the Code of Federal Regulations. This does not authorize independent funding at the Department's discretion to be used for Mueller's investigation and prosecution.

The Government will claim it has been given authority by Congress to use the independent counsel fund since the General Accounting Office gave its opinion that it was appropriate to do so in a prior investigation in 2004 when a "special counsel" was appointed to investigate the Chief of Staff of the Vice President, I. Lewis, "Scooter" Libby. *See* Exhibit 5, GAO B302582, SPECIAL COUNSEL AND PERMANENT INDEFINITE APPROPRIATION.[9]

Scooter Libby was investigated and prosecuted by a "special counsel" Patrick Fitzgerald. Fitzgerald was the United States Attorney for the Northern District of Illinois and maintained that position while he acted as special counsel prosecuting Libby. *See United States v. Libby,* 498 F.Supp.2d 1, 5-6 (D.D.C. 2007). Fitzgerald was not hired from outside the Department as the Special Counsel statute and regulations require. Fitzgerald was, explicitly in his appointment, not

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[8] Dep. Att'y. Gen. Rod Rosenstein, Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters, Order No. 3915-2017 (May 17, 2017).

[9] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO B302582, SPECIAL COUNSEL AND PERMANENT INDEFINITE APPROPRIATION (2004).

limited by Part 600 of the federal regulations. Mueller, however, is limited by Section 600.7(b), which made him accountable to Deputy Attorney General Rosenstein; and now, the Attorney General. Mueller is not an independent counsel in any way. Because Mueller is not an independent counsel, *i.e.* limited by Title 28 Code of Federal Regulations Section 600, he cannot be subject to the indefinite independent Department of Justice Fund – Congress must approve his funding. *See* Exhibit 1 at 1.

The Department has equivocated on the meaning of "independent" and "special" since enactment of Special Counsel statute. Mueller is a different type of counsel conducting this investigation and qualitatively different than the counsel the General Accounting Office required in 2004 when analyzing the last independent counsel, "special counsel," Patrick Fitzgerald. *See* Exhibit 1 at 2. Fitzgerald was truly independent and held the authority of the Attorney General. *Id.* at 2. The GAO Report assumed that the Part 600 regulations were "not substantive" and therefore could be waived by the Department, and were. *Id.* at 8. Acting Attorney General James Comey "clarified" that Fitzgerald's delegation of authority was "plenary." *Id.* at 3. "Further, my conferral on you of the title of 'Special Counsel' in this matter should not be misunderstood to suggest that your position and authorities are defined and limited by 28 CFR Part 600." *Id.* at 3 & n. 4. Mueller is defined and limited by 28 C.F.R. Part 600.

> The authority to appoint independent counsels pursuant to the provisions of 28 U.S.C. §§ 591 *et seq.* expired on June 30, 1999. However, the permanent indefinite appropriation remains available to pay the expenses of an independent counsel (1) who was appointed by the Special Division of the United States Court of Appeals for the District of Columbia pursuant to the provisions of 28 U.S.C. §§ 591 et seq. whose investigation was underway when the law expired (2) who was appointed under "other law." Under the expired law, a person appointed as an independent counsel could not

> hold "any office of profit or trust under the United States, 28 U.S.C. § 593(b)(2) (2000)."

*Id.* at 3.

The present day Special Counsel's relationship to the Department is qualitatively different than the independent counsel. But, "[t]he Attorney General establishes the budget for the Special Counsel's investigation, and is to determine whether the investigation should continue at the end of each fiscal year" nonetheless. *In re Grand Jury,* 916 F.3d at 1050 (citing 28 C.F.R. § 600.8(a)(1), (a)(2)). The GAO Report never analyzed the effect of the post-1999 regulations on its 1994 memorandum's analysis. It is this misuse of the permanent independent appropriation fund Stone challenges as unconstitutional in violation of the Appropriations Clause. U.S. CONST. art. 1, § 9, cl. 7. Because Part 600 limits the independence of the Special Counsel and the present day statute limits Congress's oversight role the indefinite independent counsel fund is not a resource for the Special Counsel that can be used without violating the Appropriations Clause.

"Decisions of the Supreme Court and this Court have strictly enforced the constitutional requirement, implemented by federal statutes, that uses of appropriated funds be authorized by Congress." *U.S. Dept. of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1342 (D.C. Cir. 2012) (Kavanaugh, J.,) (Circuit Court) (citing U.S. CONST. art. 1, § 9, cl. 7; 31 U.S.C. § 1301 *et seq.*). The Clause conveys a "straightforward and explicit command": No money "can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 424, 110 S.Ct. 2465, 2471 (1990) (citations omitted). "An appropriation must be expressly stated; it cannot be inferred or implied. 31 U.S.C. § 1301(d) ("A law may be construed to make an appropriation out of the Treasury ... only if the law specifically states that an appropriation is made."). It is well established that "a direction to pay without a

designation of the source of funds is not an appropriation." *United States House of Representatives v. Burwell,* 185 F.Supp.3d 165, 169 (D.D.C. 2016) (quoting U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (Vol. I) at 2-17 (3d ed. 2004)[10]) (hereinafter "GAO PRINCIPLES"). The inverse is also true: the designation of a source, without a specific direction to pay, is not an appropriation. *Id.* The Clause protects Congress's "exclusive power over the federal purse." *Rochester Pure Waters Dist. v. EPA,* 960 F.2d 180, 185 (D.C.Cir.1992). The power over the purse was one of the most important authorities allocated to Congress in the Constitution's "necessary partition of power among the several departments." THE FEDERALIST NO. 51 at 320 (James Madison). The Appropriations Clause prevents Executive Branch officers from even inadvertently obligating the Government to pay money without statutory authority. *See Richmond,* 496 U.S. at 416; *see also Dep't of the Air Force v. FLRA,* 648 F.3d 841, 845 (D.C.Cir.2011).

A "permanent" or "continuing" appropriation, once enacted, makes funds available indefinitely for their specified purpose; no further action by Congress is needed. *Nevada v. Dep't of Energy,* 400 F.3d 9, 13 (D.C. Cir. 2005); GAO PRINCIPLES at 2–14. A "current appropriation," by contrast, allows an agency to obligate funds only in the year or years for which they are appropriated. GAO PRINCIPLES at 2–14. Current appropriations often give a particular agency, program, or function its spending cap and thus constrain what that agency, program, or function may do in the relevant year(s). Most current appropriations are adopted on an annual basis and must be re-authorized for each fiscal year. Such appropriations are an integral part of our

[10] Available at: https://www.gao.gov/special.pubs/3rdeditionvol1.pdf.

constitutional checks and balances, insofar as they tie the Executive Branch to the Legislative Branch via purse strings. *House of Representatives,* 185 F.Supp.3d at 169-170. Examples of permanent appropriations include the Judgment Fund (31 U.S.C. § 1304(a)) and payment of interest on the national debt (31 U.S.C. § 1305(2)). *House of Representatives,* 185 F.Supp.3d at n. 3.

Title 31 Section 1341, known as the Anti-Deficiency Act, makes it unlawful for government officials to "make or authorize an expenditure or obligation exceeding an amount available in an appropriation" or to involve the Federal Government "in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." *U.S. Dept. of Navy*, 665 F.3d at 1347 (citing 31 U.S.C. § 1341(a)(1)(A)-(B)). It is a crime to knowingly and willfully violate it. *Id.* (citing 31 U.S.C. § 1350)).

The government's reliance on approved funding without a specific authorization from Congress comes from ". . . a permanent indefinite appropriation is established within the Department of Justice to pay all necessary expenses of investigations and prosecutions by independent counsel appointed pursuant to the provisions of 28 U.S.C. 591 *et seq.* or other law." Pub. L. No. 100-202, § 101(a) [title II], 101 Stat. 1329, 1329-9 (1987). Special Counsel Mueller, however, was not appointed under the expired independent counsel statute pursuant to 28 U.S.C. § 591. Also, there is no "other law" because the Independent Counsel statute was not replaced with another law, *i.e.* another statute enabling a special counsel to have the same role as the Independent Counsel. The Independent Counsel statute was replaced by Department rules promulgated by itself, not Congress. The Department must argue that the "or other law" clause survives the sunset of Section 591, in order to support the payment of expenses without congressional approval.

Congress must have intended to maintain payment for a different and unique "special" counsel in perpetuity while surrendering the direct oversight it had under the Section 591. The "or other law" does not mean any law. It must mean another law that creates a similar special lawyer with similar authority to investigate and prosecute specified matters. The Special Counsel law does not have sufficient specificity to investigate a president or the campaign.

Because the expenditure of funds supporting the Special Counsel investigation and prosecution violates the Appropriations Clause, an order dismissing the indictment and enjoining the prosecution of him until Congress has made the proper constitutional appropriation is appropriate. *United States v. McIntosh,* 833 F.3d 1163, 1174-1175 (9th Cir. 2016), *supra.* The Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, prohibits the payment of money from the Treasury unless it has been approved by an act of Congress. Here, the Department violates the Appropriations Clause and the maintenance of the criminal action constitutes a violation of the separation of powers. *See McIntosh*, 833 F.3d at 1175.

**III. The Executive Branch Investigating the President Violates the Vesting Clause.**

The Constitution, Article II, paragraph 1, mandates that "[t]he executive Power shall be vested in a President of the United States of America." Often referred to as the "Vesting Clause," the Clause places extraordinary power in one person: the President.

Law enforcement is squarely within the scope of the Executive Power. *See, e.g., United States v. Nixon*, 418 U.S. 683, 693, 94 S.Ct. 3090, 3100 (1974) (The "Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."). *See also, Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181 (1986) (where the Court struck down a provision

of the Gramm-Rudman Act because it invaded the President's exclusive authority to enforce the laws).

First, where an exclusive province of the Executive Power, such as law enforcement, is encroached upon by Congress, the Court has on several occasions held that such laws violate the Take Care Clause in *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484, 130 S.Ct. 3138, 3147 (2010), the Court stated: "The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them."

The Court's standing doctrine is also based in part upon ensuring that the Judicial Branch does not encroach upon the Executive Branch's duty to "take Care that the Laws be faithfully executed." In *Lujan v. Def. of Wildlife*, 504 U.S. 555, 577, 112 S.Ct. 2130, 2145 (1992) the Court reasoned that to allow Congress to "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *See also*, *Allen v. Wright*, 468 U.S. 737, 761, 104 S.Ct. 3315, 3330 (1984), where the Court stated that "The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.' We could not recognize respondents' standing in this case without running afoul of that structural principle." (citation omitted) (quoting U.S. CONST. art. II, § 3).

Likewise, in in *Printz v. United States* 521 U.S. 898, 922-23, 117 S.Ct. 2365, 2379 (1997) the Court relied in part on the Take Care Clause to strike down certain provisions of the Brady Act that required local law enforcement to engage in federal enforcement actions. In light of these

serious structural constitutional concerns, interpreting a statute to provide for the investigation of the President or a presidential campaign should be undertaken with caution. Generally, in this setting, in order to interpret a statute in a manner that could encroach upon the President's powers under the Vesting Clause and the Take Care Clause, and with due respect to separation of powers concerns, courts have required a clear statement of Congressional intent. Guidance is provided by the Court's analysis of whether the Administrative Procedure Act applies to the President. *See,* for example, *Franklin v. Massachusetts*, 505 U.S. 788, 800-801, 112 S.Ct. 2767, 2775 (1992) (in concluding that the President is not bound by the Administrative Procedure Act). Accordingly, in construing a statute to provide that the President and Presidential Campaign can be investigated by a special prosecutor appointed by the Attorney General, precedent requires an explicit statement by Congress due to the unique constitutional position of the President, and the serious structural constitutional concerns discussed above. Such an explicit statement cannot be found in the general statutes upon which the Acting Attorney General relied in the Mueller Appointment. However, it is clear that Congress can make such an explicit statement because it has done so in the past.

If the President and his presidential campaign cannot be investigated by the Executive Branch's Department of Justice, then the investigation of Roger Stone, which was the direct fruit of that poisoned tree, must fall.

## IV. Mueller's Appointment Impermissibly Encroaches Upon the Executive Power in Violation of the Take Care Clause.

Last year, before becoming Attorney General, William Barr wrote a Memorandum regarding "Mueller's 'Obstruction' Theory to Deputy Attorney General Rosenstein in which he

set forth the constitutional dangers of inhibiting the President's discretion and duty to take care of, and guide, the country.

> In framing a Constitution that entrusts broad discretion to the President, the Framers chose the means they thought best to police the exercise of that discretion. The Framers' idea was that, by placing all discretionary law enforcement authority in the hands of a single "Chief Magistrate" elected by all the People, and by making him politically accountable for all exercises of that discretion by himself or his agents, they were providing the best way of ensuring the "faithful exercise" of these powers. Every four years the people as a whole make a solemn national decision as to the person whom they trust to make these prudential judgments. In the interim, the people's representatives stand watch and have the tools to oversee, discipline, and, if they deem appropriate, remove the President from office. Thus, under the Framers' plan, the determination whether the President is making decisions based on "improper" motives or whether he is "faithfully" discharging his responsibilities is left to the People, through the election process, and the Congress, through the Impeachment process.

Exhibit 6, Memorandum from Bill Barr on Mueller's "Obstruction" Theory[11]

The Mueller Appointment was made pursuant to 28 U.S.C. §§ 509, 510, and 515, which do not mention, authorize or contemplate the appointment of a Special Counsel to investigate or prosecute a President or a Presidential Campaign. Nevertheless, the Mueller Appointment purported to empower Special Prosecutor Mueller and his team to investigate and potentially indict President Trump and members of his campaign. Indeed, the summary of the Mueller Report issued by Attorney General Barr indicates that a substantial investigation of the President and his Campaign was undertaken by Special Prosecutor Mueller and his team.

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[11] Memorandum from Bill Barr on Mueller's "Obstruction" Theory to Deputy Att'y Gen. Rod Rosenstein and Assistant Att'y Gen. Steve Engel (June 8 2018) at 11

Because of the unique position of the President in our constitutional structure, the powers vested solely in the President by the Vesting Clause, and the obligation of the President to "take Care that the Laws be faithfully executed," 28 U.S.C. §§ 509, 510, and 515 were unconstitutionally applied as the basis for the Mueller Appointment, as set forth below. Therefore, the Mueller Appointment was unconstitutional, should be held void *ab initio*, and the indictment against Mr. Stone should be dismissed.

**A. Legal Background on the Take Care Clause.**

The Constitution, art. II, § 1, cl. 1, mandates that "[t]he executive Power shall be vested in a President of the United States of America." Often referred to as the "Vesting Clause," this sentence places extraordinary power in one person: the President. In contrast to the legislative power--which is diffused because it vests in the bicameral Congress consisting of two senators from each of the fifty states together with four hundred and thirty-five congressional seats variably allocated by the census among the fifty states--the executive power is vested in just one person.[12]

Not only does the Constitution place the entire executive power in the President's hands, Article II, Section 3, mandates that the President "shall take Care that the Laws be faithfully

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[12] See, e.g., *Myers v. United States*, 272 U.S. 52, 123, 47 S.Ct. 21, 27 (1926), where the Court made this clear:

> The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide; and, as the President is elected for four years, with the mandate of the people to exercise his executive power under the Constitution, there would seem to be no reason for construing that instrument in such a way as to limit and hamper that power beyond the limitations of it, expressed or fairly implied.

executed. . . ." Known as the "Take Care Clause," this provision has been interpreted by the Supreme Court to mean that the President must always have control over the executive branch of government, for without that control the President is denied the means to ensure that the laws are faithfully executed.[13] The Take Care Clause is followed immediately by the Commission Clause, which requires that the President "shall Commission all the Officers of the United States." In order for the President to ensure the faithful execution of the laws, he must know who is executing those laws. Requiring the President to commission all of the officers of the United States is one means to that end. The commission is also a recognition that since the President alone is vested with the entire executive sovereign power of the United States, only he can pass that sovereign power to officers to validly wield in his name. The commission serves both to validate the President's assignment of that power to an officer for implementation of various executive tasks, and to document that the President remains responsible for those actions. In the Executive Branch, final responsibility must rest with the President. Thus, the President, "though able to delegate duties to others, cannot delegate ultimate responsibility *or the active obligation to supervise that goes with it*." *Free Enter. Fund,* 561 U.S. at 496 (quoting *Clinton v. Jones,* 520 U.S. 681, 712-713, 117 S.Ct. 1636, 1653-1654 (1997) (Breyer, J., concurring)) (emphasis added).

Although the Court has considered the Vesting Clause and the Commission Clause, it is the Take Care Clause to which the Court has primarily turned to define the appropriate role of the

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[13] *See, e.g., Myers v. United States*, *supra*, at 127:

> It could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it. It would be a delegation by the Convention to Congress of the function of defining the primary boundaries of another of the three great divisions of government.

President in our three-part system of government based upon the separation of powers. The Clause has been used to support the power of the President to remove officers who do not follow the President's directives.[14] The Court has used the Take Care Clause to define the limits of Article III standing to ensure that the President, rather than the federal judiciary, retains primary responsibility for the legality of executive decisions.[15] Similarly, the Court has used the Take Care Clause to strike a law that shifted responsibility for executing federal law to state and local law enforcement agents, whom the President could not control, because to do so would impermissibly encroach upon the President's Take Care Clause power.[16] The Court has relied on the Take Care

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[14] The Court stated in *Myers*, at 117 "As [the President] is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication . . . must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible." The removal power was more recently addressed by the Court in *Free Enter. Fund* at 561 U.S. at 484, stating "The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them."

[15] *See, e.g.*, *Lujan*, 504 U.S. at 577 (asserting that to allow Congress to "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed'"); *Allen,* 468 U.S. at 761 ("The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.' We could not recognize respondents' standing in this case without running afoul of that structural principle." (citation omitted) (quoting U.S. CONST. art. II, § 3)).

[16] The Court in *Printz,* 521 U.S. at 922 relied in part on the Take Care Clause to reject congressional power to "commandeer" state officials to enforce federal law. At issue was the validity of the Federal Brady Act, which required state law enforcement officers to conduct background checks of gun purchasers in order to determine whether the putative buyer's receipt or possession of a firearm would be unlawful. *Id.* at 903 (citing 18 U.S.C. §922(s)(2) (1994)). After finding that such a requirement impermissibly intrudes upon state sovereignty, the Court further concluded that Congress's attempt to impress state executive officials into federal service violates "the separation and equilibration of powers between the three branches of the Federal Government itself." *Printz*, 521 U.S. at 922. In the Court's words:

Clause as the source of the President's prosecutorial discretion—a power that may give the President room to reshape the effective reach of laws enacted by Congress.[17] Thus, the Court has repeatedly held that where a law encroaches upon the President's power to effectively run the Executive Branch, or conflicts with a power or duty granted to the President by the Constitution, it conflicts with the architecture of the Constitution and cannot stand.

**B. The Take Care Clause's Application to This Case.**

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> The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," Art. II, § 3, personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the "Courts of Law" or by "the Heads of Departments" who are themselves Presidential appointees), Art. II, § 2. The Brady Act effectively transfers this responsibility to thousands of [state executive officers] in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known. . . That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.

*Id.* at 922-23 (citations omitted). Accordingly, the Take Care Clause not only constrains control over the execution of federal law within the federal government, but also the allocation of executive responsibilities between federal and state governments.

[17] *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 1486 (1996) (concluding that the Attorney General and U.S. Attorneys have wide prosecutorial discretion "because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed'" (quoting U.S. CONST. art. II, § 3)); *Heckler v. Chaney*, 470 U.S. 821, 832, 105 S. Ct. 1649, 1656 (1985) ("[A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" (quoting U.S. CONST. art. II, § 3)).

The Mueller Appointment encroaches upon the President's powers under the Take Care Clause, and therefore the statutes upon which Acting Attorney General Rosenstein relied to make the appointment were either misconstrued or are unconstitutional as applied. The existence of the Special Counsel hobbles the President's ability to effectively discharge the duty of his office.

Once a Special Prosecutor is appointed to investigate a President, every action the President takes is viewed through the investigative lens, imbued with criminal intent. The President is not free to take the best actions for the country, but must act cautiously lest he run afoul of a multitude of possible undisclosed crimes the Special Prosecutor may be investigating. Nothing could encroach more upon the President's duty to take care that the laws be faithfully executed than having a Special Prosecutor continually looking over his shoulder, threatening him or the members of his executive branch with potential prosecution for every act they take.

Besides weakening the Presidency by reducing the zeal of his staff, the institution of the independent counsel enfeebles him more directly in his constant confrontations with Congress, by eroding his public support. *Morrison,* 487 U.S. at 713 (1988) (Scalia, J., dissenting).

The existence of a Special Prosecutor investigating the President and members of a Presidential Campaign clearly encroaches upon the President's ability to carry out his duties in the domestic arena. This particular investigation most significantly impacts the President in his critical ability to conduct foreign policy.

### C. Mueller's Investigation Encroaches Upon the President's Ability to Conduct Foreign Policy.

The current appointment is especially problematic as it has to do with a major hostile foreign power: Russia. The President is at the zenith of his Article II powers when dealing with

hostile foreign countries as the Commander in Chief.[18] "Of all the cares or concerns of government," Hamilton wrote in Federalist 74, "the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."[19]

The Mueller Appointment grants the Special Counsel the authority to investigate "any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump." Accordingly, every action taken by President Trump since he formed his campaign with regard to the United States' relationship with Russia has been second guessed as evidence of "collusion," or a conspiracy between Trump and Putin.[20] Many have asserted that Putin has some form of control over Trump.[21] The Special Counsel investigation has

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[18] *See Dep't of the Navy v. Egan*, 484 U.S. 518, 529-530, 108 S. Ct. 818, 825 (1988) ("The Court … has recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive.'") (quoting *Haig v. Agee*, 453 U.S. 280, 293-294, 101 S. Ct. 2766, 2775 (1981)); *Dames & Moore v. Regan*, 453 U.S. 654, 678, 101 S. Ct. 2972, 2986 (1981) ("Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act," . . . especially . . . in the areas of foreign policy and national security …") (internal quotation marks and citation omitted); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320, 57 S.Ct. 216, 221 (1936) (citing the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 812, 102 S. Ct. 2727, 2735 (1982) (referring to national security and foreign affairs as "central Presidential domains").

[19] THE FEDERALIST NO. 74 (Alexander Hamilton).

[20] Franklin Foer, *The Collusion With Russia Is in Plain Sight: What did Donald Trump say to Vladimir Putin when no one else could hear them?,* THE ATLANTIC (Jan. 13, 2019), https://www.theatlantic.com/politics/archive/2019/01/vladimir-putin-and-donald-trumps-meeting-at-the-g20/580072/.

[21] Matthew Rosenberg, *Ex-Chief of C.I.A. Suggests Putin May Have Compromising Information on Trump,* THE NEW YORK TIMES (Mar. 21, 2018), https://www.nytimes.com/2018/03/21/us/politics/john-brennan-trump-putin.html.

stimulated this second guessing, significantly undermining the President's ability to conduct foreign policy with regard to Russia. The Special Counsel investigation hog-ties the President in the execution of his foreign policy.

The Mueller Appointment not only hobbles the President's ability to conduct a rational foreign policy with regard to Russia, it undermines his ability to deal with every world leader. No President can deal effectively with the heads of other nations when he is the subject of a Department of Justice investigation that is prominently being portrayed in the press as imminently removing him from office. Counterparts will be inhibited in reliance on a President who may not serve out his term

Interpreting 28 U.S.C. §§ 509, 510, and 515 as providing the power for the Attorney General to appoint a special prosecutor capable of investigating the President and a Presidential Campaign is particularly insidious. Pursuant to 28 U.S.C. §§ 509, 510, and 515, one unelected person has been granted the power to undermine the single representative elected by the entire nation. The possibility that such power granted to a single unelected official could be abused is far higher than the possibility that impeachment by the House of Representatives--the remedy the Constitution provides--would be so abused. The political calculus required for the House to undertake impeachment acts to ensure that actual crimes have been committed, and that a national consensus in support of impeachment exists. Absent such circumstances, however, for one appointed individual to mandate an investigation of a President serves to undermine his ability to function, and divides and weakens the nation.

The Mueller Appointment, which particularly encroaches upon the President's foreign policy power, unconstitutionally encroaches upon the President's power to take care that the laws

are faithfully executed. Under the case law interpreting the Take Care Clause discussed above, the appointment should be struck down, and Mr. Stone's indictment dismissed. Further, all of the evidence gathered during the course of Mueller's illegal investigation must be excluded as fruit of the poisonous tree. *See Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 268 (1939); *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407 (1963).

**D. The Mueller Appointment Divides the Executive Branch Against Itself, Unconstitutionally Encroaching Upon the President's Ability to Take Care that the Laws are Faithfully Executed.**

The Framers undertook a careful analysis in vesting powers in the three branches of government. The trick was to devise a government that was effective enough to work, but not effective enough to threaten individual liberty. The answer was to break up the sovereign power in four primary ways: 1) separation of power among three branches; 2) checks and balances on that power built into the system; 3) granting only specific limited enumerated powers to the central government; and 4) dual sovereignty achieved by leaving general police powers to the states. Chief Justice Roberts has referred to it as "the diffusion of sovereign power" that secures individual liberty. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536, 132 S.Ct. 2566, 2578 (2012) (quoting *New York v. United States*, 505 U.S. 144, 181, 112 S.Ct. 2408, 2431 (1992)).

The Framers granted the most power to Congress; that is the power to make the laws, subject to the enumeration of powers set forth in Article I, Section 8. In order to avoid the abuse of that power, Congress was broken into an upper and lower house, with complex checks and balances between the two houses. In contrast, the entire power of the Executive Branch was vested in the President. The Court has most frequently turned to Hamilton's explanation in Federalist 70, where he opined that vesting the Executive Power solely in the President, i.e., unity in the

Executive, was required for three primary reasons: 1) to ensure accountability in government; 2) to empower the President to defend against legislative encroachments on his power; and 3) to ensure that the President could nimbly and vigorously respond to challenges in order to protect the nation. As stated in *Printz v. United States,* 521 U.S. at 922-923:

> The insistence of the Framers upon unity in the Federal Executive--to insure both vigor and accountability--is well known. See The Federalist No. 70 (A. Hamilton) . . . . That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.

Similarly, in *Free Enter. Fund,* 561 U.S. at 513-514 the Court stated:

> The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else. Such diffusion of authority "would greatly diminish the intended and necessary responsibility of the chief magistrate himself." The Federalist No. 70, at 478.

In sum, the plain language of the Constitution, the explanation provided in Federalist 70 regarding the meaning of that language and why the Framers selected it, as well as the Supreme Court's cases interpreting it, require that the President be the single authority in charge of the Executive Branch, and that his authority must not be "shattered" or "diffused." While he may delegate powers, he may not escape the responsibility of holding those powers, and accordingly he is held accountable for all that takes place within the Executive Branch. As he is accountable for all that takes place within his branch, he must have control over it. And, as he must have control, he is not subject to being undermined by attack from his advisors.

Dividing the Executive Branch against itself by permitting the Attorney General, acting without the knowledge or approval of the President, to appoint a Special Counsel to investigate--and potentially indict and prosecute--the President, would be an unacceptable departure from the structure of the Constitution devised by the Framers, and would severely undermine the "unique constitutional position of the President." *Franklin,* 505 U.S. at 800-801. Dividing the Executive Branch against itself would encroach upon the President's duty to take care that the laws be faithfully executed. The Mueller Appointment did that.

**E. The Mueller Appointment is Invalid as it has Not Been Commissioned by the President.**

Article II, Section 3, of the Constitution provides that the President "shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States." The President has never commissioned Mr. Mueller as an officer of the United States. Indeed, the Court held that the commission is necessary to complete the appointment of an officer of the United States in *Marbury v. Madison,* 5 U.S. 137, 157 (1803),

> Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission.

The Commission Clause follows on the heels of the Take Care Clause, separated only by a comma. The Take Care Clause requires the President to execute the law of the land. He cannot undertake this on his own, and therefore must appoint officers of the United States to act on his behalf. As explained by Chief Justice Marshall, the commission is the proof of appointment by the President; it shows that the President has in fact delegated his power through the appointment.

And, according to the reasoning quoted above, without the President's signature on the commission, that delegation of power is not complete.

The proximity of the Commission Clause to the Take Care Clause strongly suggests that the commission is more than a formality. The Commission Clause requires that the President's commission acts as the President's seal of approval of the actions taken under his authority, and documents that the President is ultimately responsible for all acts undertaken. It certifies that the "The Buck Stops Here." It is not a formality, but a substantive matter, which supports Chief Justice Marshall's conclusion in *Marbury* that absent the President's final seal of approval, an appointment itself is not final.

Since Mueller has not been commissioned by the President, as required by the Constitution, his appointment is incomplete and invalid, and the acts he has taken to date are also invalid, including the indictment of Mr. Stone.

## V. The Mueller Appointment is Invalid Because it Violates the Appointments Clause.

The Appointments Clause of the Constitution requires *principal* officers of the executive branch be appointed by the president and confirmed by the Senate. *Edmond v. United States*, 520 U.S. 651, 663, 117 S.Ct. 1573, 1581 (1997). The Special Counsel was not appointed through that process. *In re Grand Jury,* 916 F.3d at 1050-51. He has been thus far deemed an *inferior* officer subject to the supervision of the Deputy Attorney General. *See id.* at 1051.

This argument has been fully briefed by Andrew Miller as well as the Concord Company at both the District Court level and the D.C. Circuit level on appeal. *Id.; United States v. Concord Mgmt. & Consulting, LLC,* 317 F.Supp.3d 598 (D.D.C. 2018). Mr. Stone adopts those arguments, and incorporates them as if fully set forth, and specifically preserves those arguments for appeal.

The Special Prosecutor is a principal officer of the United States who must be appointed and commissioned by the President and confirmed by the Senate. Recently in *Lucia v SEC*, 138 S. Ct. 2044, 2051 (2018) the Court indicated a willingness to refine or enhance the "significant authority" test to conclude that certain administrative law judges were subject to the Appointments clause. The Mueller Appointment presents another opportunity to do so, and accordingly, the defense preserves all rights on appeal with regard to the Appointments Clause argument.

## VI. Mueller's Appointment was Made Without Requisite Statutory Authority

### A. In 1978, Congress Created a Detailed Law Addressing the Constitutional Issues Related to Appointing a Special Prosecutor to Investigate a Sitting President and Presidential Campaign.

In 1978, following Watergate--and the Saturday Night Massacre where Attorneys General Richardson and Ruckelshaus each refused to fire Archibald Cox--Congress created the Ethics in Government Act.[22] The Act was designed, in part, to create a Special Prosecutor capable of investigating the President or his campaign while respecting the unique position of the President, and the separation of powers among the three branches of government.[23] The law was designed specifically to create a Special Prosecutor capable of investigating crimes committed by the President and/or his campaign; the precise reason for which the Mueller Appointment was made. The Act carefully involved all three branches: a) Congress to create the law providing for the Special Prosecutor, and to have ongoing oversight in the event a Special Prosecutor was appointed; b) the Attorney General to determine whether a Special Prosecutor was required, and to make the

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22 28 U.S.C. 49 § 101 *et seq.*

23 Title VI of the Act, which became 28 U.S.C. 39 §§ 591 – 598, was titled Special Prosecutor.

application for the appointment of a Special Prosecutor; and, c) a special three judge court, called the Special Division, to receive the application and actually appoint the Special Prosecutor.

The law was the result of a thorough legislative process reflected in thousands of pages of legislative history. It was specifically designed to handle the specific situation for which the Mueller Appointment was undertaken. Because of that, the carefully crafted law addressed the outcome of most of the issues being hotly debated today regarding the Mueller investigation and resulting report, highlighting the problems that arise when such an investigation is undertaken in the absence of specific underlying statutory authority.

A review of the provisions of Title VI demonstrates the level of attention Congress devoted to achieving the appropriate balance among the branches in order to constitutionally appoint a special prosecutor capable of investigating the President, and/or a campaign to elect the President.

The Supreme Court upheld these Title VI provisions for appointing a special prosecutor in *Morrison v. Olson*, 487 U.S. 654 (1988). Title VI was at the time, and remained until its expiration, the only law that specifically allowed the investigation of a sitting President and Presidential Campaign. But Congress determined that the law should expire in 1999, and has not reenacted it since that time.

**B. In 1999, Congress Determined that Title VI Should Expire, Ending the Role of Special Prosecutors Capable of Investigating Presidents and Their Campaigns.**

The original provisions discussed above were enacted in 1978 as a direct response to the Watergate scandal. The 1978 law was amended and reauthorized in 1983,[24] and again in 1987.[25] Between 1987 and 1992, due to the breadth, length and expense of the Iran Contra investigation by Special Prosecutor Walsh, the statute came under increased criticism. In the face of this criticism, Congress determined that the law should not be renewed, and it lapsed on December 15, 1992.

Following the Whitewater scandal in the Clinton Administration, however, in 1994 Congress took the action of reinstating the statute to allow the appointment of Judge Starr to investigate President Clinton.[26] From the standpoint of Congressional intent, it is significant to note that when faced with the investigation of a President Clinton, Congress reenacted Title VI of the Ethics in Government Act. As with the Walsh investigation, however, the breadth, length and expense of the Starr investigation came under a great deal of public criticism. Congress therefore once again allowed the statute to lapse on June 30, 1999, and to date it has not been reenacted.[27] Accordingly, there is currently no law on the books that provides for the appointment of a special prosecutor with the authority to investigate a sitting President and his Presidential campaign, as

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[24] P.L. 97-409, January 3, 1983.

[25] P.L. 100-191, December 15, 1987.

[26] P.L. 103-270, June 30, 1994.

[27] The law was reauthorized for the last time on June 30, 1994, P.L. 103-270, 108 Stat. 732, and expired under the five- year "sunset" provision on June 30, 1999.

Title VI did. It is clear from past Congressional action that if Congress intended to have such a law in force, it knows how to do so. Indeed, it reenacted Title VI specifically to support the Starr investigation, and then once again removed it from the books. The only conclusion that can be drawn is that it is the intent of Congress that there shall be no more special prosecutors investigating the President or Presidential Campaigns.[28]

### C. The General Statutes Relied Upon by Acting Attorney General Rosenstein do not Authorize the Appointment of a Special Counsel Capable of Investigating President Trump and his Campaign.

In the face of the repeal of Title VI, Acting Attorney General Rosenstein based the Mueller Appointment on three general statutes, 28 U.S.C. §§ 509, 510, and 515, which were passed in 1966, none of which mentions the investigation of the President or presidential campaigns. When the general language of these statutes is compared to the extensive and carefully crafted provisions of Title VI, it is clear that they do not provide the explicit statement the Supreme Court has required in the past when considering whether a statute was intended to apply to the unique constitutional position held by the President.[29]

Title 28 United States Code Sections 509 and 510 provide general of statements and all functions of the Department of Justice are vested in the Attorney General with specific exceptions not relevant here. These statutes make no mention of investigating the President of the United States or his campaign, as Title VI specifically did. It is clear from the Mueller Appointment that

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[28] This is not to say that no special prosecutors may ever be appointed. It is only to say that, given the legislative history and clear intent of Congress, special prosecutors to investigate the President and Presidential Campaigns shall not be appointed.

[29] *Franklin v. Massachusetts*, 505 U.S. at 800-801.

Special Counsel Mueller was specifically appointed to investigate the President and his Campaign. Accordingly, the issue before the Court is whether three very general 1966 statutes--that make no mention of granting the Attorney General the authority to appoint a special counsel to investigate the President and his campaign--can be construed to authorize the appointment of a special prosecutor to investigate the President and his campaign when the 1978 statute that was specifically designed to allow the appointment of a special prosecutor to investigate the President and his campaign was intentionally abandoned by Congress in 1999. Logic, the rules of statutory construction, and constitutional considerations mandate an answer in the negative.

**i) Logic.**

Logic dictates that if the general statutes pre-existing Title VI were sufficient for the job, Congress would not have passed Title VI to begin with. There would have been no need. The great care taken with regard to Title VI to arrive at a structure Congress believed would allow the appointment of a prosecutor to investigate the President is not at all evident in 28 U.S.C. §§ 509, 510, and 515. These general statutes at best allow the Attorney General to enlist special lawyers for special tasks. They never address the investigation of the President or a Presidential Campaign. Those issues were explicitly addressed by Title VI, but Congress made the determination that Title VI should expire. It would be illogical to assume that the Acting Attorney General can now achieve the same exact result through reliance on the pre-existing general provisions contained in 28 U.S.C. §§ 509, 510, and 515.

**ii) Statutory Construction.**

The guiding light of statutory construction is to determine Congressional intent.[30] As discussed above, Congressional intent is that special prosecutors capable of investigating the President and/or Presidential Campaigns shall no longer exist. Construing 28 U.S.C. §§ 509, 510, and 515 so as to have the same result as Title VI would therefore be contrary to Congressional intent to abolish such special prosecutors by determining that Title VI should expire. Congressional intent that any investigation into a President or Presidential Campaign requires a specific law to support the appointment of a Special Prosecutor is illustrated by the fact that when Congress desired the Whitewater investigation to be handled by a Special Prosecutor, it reenacted Title VI. If Congressional intent was that 28 U.S.C. §§ 509, 510, and 515 were sufficient to appoint a Special Prosecutor to investigate the President, Congress would not have reenacted Title VI.

Moreover, interpreting 28 U.S.C. §§ 509, 510, and 515 to have the same exact result as Title VI of the Ethics in Government Act would contradict the canon of statutory construction that the legislature would not pass meaningless or redundant words into law.[31] As noted above, if 28 U.S.C. §§ 509, 510, and 515 are interpreted to mean the same thing as Title VI, then Title VI were merely redundant, meaningless provisions. This cannot be the case. Finally, the canon of statutory construction known as *generalia specialibus non derogant* provides that specific statutes control

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30 *See generally*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction,* 11 HARV. J.L. & PUB. POL'Y 59 (1988).

31 "[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . .[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254, 112 S. Ct. 1146, 1149 (1992).

over more general statutes.[32] Here, Title VI, repealed, is on all fours with the Mueller Appointment, and controls over the more general provisions of 28 U.S.C. §§ 509, 510, and 515. The general and specific cannot be interpreted to mean the same thing.

**D. The Most Reasonable Interpretation of 28 U.S.C. §§ 509, 510, and 515.**

Given the foregoing, the most reasonable interpretation of 28 U.S.C. §§ 509, 510, and 515 is that they allow the Attorney General to appoint a Special Prosecutor capable of investigating crimes within the executive branch in general, but not the unique constitutional position of the President.[33] Indeed, investigations of crimes within the executive branch, by officers of the executive branch, routinely take place. The argument here is that when it comes to investigating the President, the one individual vested with the entire power of the Executive Branch, these general statutes are insufficient for the reasons discussed above. Similarly, while 28 C.F.R. § 600.1 *et seq.* may be sufficient to support the appointment of special prosecutors to investigate subordinate officers of the Executive Branch, they cannot constitutionally be interpreted as a basis for the Mueller Appointment.

**E. The Constitution Provides the Remedy.**

The argument is not that the President cannot be investigated. For example, a President may consent to an investigation undertaken by a subordinate officer of the Executive Branch, as

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[32] *See, e.g., Rogers v. United States*, 185 U.S. 83, 88, 37 S.Ct. 552, 583 (1902).

[33] For example, the District Court for the District of Columbia ruled in 2006 that James Comey had the statutory authority under 28 U.S.C. §§ 509, 510, and 515 to appoint Patrick J. Fitzgerald as Special Counsel to investigate which officer of the executive branch leaked Valery Plame's name to the press. That matter did not involve the investigation of the President, but of others in the Executive Branch. *United States v. Libby*, 429 F. Supp. 2d 27 (D.D.C. 2006).

President Nixon did in Watergate when he appointed Leon Jaworski, and consented to special regulations regarding Jaworski's removal.[34] However, the primary method for the investigation of the President is through Congress under the Impeachment Power. If Congress truly believes that a President has engaged in high crimes and misdemeanors, the Constitution already provides the remedy: Impeachment. The tortured history of the various special counsels who have undertaken investigations of the President—Cox, Jworski, Walsh and Starr--demonstrates that the Framers got it right from the start. The power to investigate and impeach the President lies with Congress, not within the Executive Branch. Article I, Section 2, Clause 5 provides:

> The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

Article I, Section 3, Clauses 6 and 7 state that:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside; And no Person shall be convicted without the Concurrence of two thirds of the Members present.
>
> Judgement in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgement and Punishment, according to Law.

Article 2, Section 4 provides:

> The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

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[34] Att'y Gen. Order No. 554-73, reprinted in Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 575 (1973).

These provisions address under what circumstances, and under what process, the President of the United States may be investigated, impeached, tried in the Senate upon articles of impeachment, and, if removed from office, subsequently prosecuted and held accountable in a court of law.

In his 1998 Georgetown Law Review article, *The President and the Independent Counsel,* Justice Kavanaugh reviewed the practical reasons supporting this conclusion as follows:

> In an investigation of the President himself, *no* Attorney General or special counsel will have the necessary credibility to avoid the inevitable charges that he is politically motivated—whether in favor of the President or against him, depending on the individual leading the investigation and its results. In terms of credibility to large segments of the public (whose support is necessary if a President is to be indicted), the prosecutor may appear too sympathetic or too aggressive, too Republican or too Democrat, too liberal or too conservative.
>
> The reason for such political attacks are obvious. The indictment of a President would be a disabling experience for the government as a whole and for the President's political party—and thus also for the political, economic, social, diplomatic, and military causes that the President champions. The dramatic consequences invite, indeed, beg, an all-out attack by the innumerable actors who would be adversely affected by such a result. So it is that any number of the President's allies, and even the Presidents themselves, have criticized Messrs. Archibald Cox, Leon Jaworski, Lawrence Walsh, and Kenneth Starr—the four modern special prosecutors to investigate presidents.
>
> The Constitution of the United States contemplated, at least by implication, what modern practice has shown to be the inevitable result. The Framers thus appeared to anticipate that a President who commits serious wrongdoing should be impeached by the House and removed from office by the Senate—and then prosecuted thereafter. The Constitution itself seems to dictate, in addition, that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and

> that criminal prosecution can occur only after the President has left office.[35]

Leon Jaworski came to the same conclusion in the 1975 Report of the Watergate Special Prosecution Task Force:

> [T]he impeachment process should take precedence over a criminal indictment because the Constitution was ambivalent on this point and an indictment provoking a necessarily lengthy legal proceeding would either compel the President's resignation or substantially cripple his ability to function effectively in the domestic and foreign fields as the Nation's Chief Executive Officer. Those consequences, it was argued, should result from the impeachment mechanism explicitly provided by the Constitution, a mechanism in which the elected representatives of the public conduct preliminary inquiries and, in the event of the filing of a bill of impeachment of the President, a trial based upon all the facts.[36]

*Ad hoc* attempts to alter the Framers' vision have repeatedly been determined to be unsatisfactory, which is why Congress determined to sunset Title VI. It also explains the dissatisfaction, dissention and uncertainty surrounding the issuance of the Mueller Report; what it means, who should see it, whether the public can or cannot see some or all of it, and what happens next. This uncertainty demonstrates that the Framers got it right, and the solution they provided to the problem is the one that should be followed today. Indeed, absent the statutory authority formerly provided by Title VI, it is in fact the only available remedy.

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[35] Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133 (1998).

[36] U.S. GOV'T PRINTING OFFICE, WATERGATE SPECIAL PROSECUTION FORCE: REPORT (1975), at 122.

## CONCLUSION

No federal statute authorized the Special Counsel Appointment at the level of United States Attorneys. No statute authorized the creation of a Special Counsel to replace, not assist United States Attorneys.[37] Congress has deliberately terminated the only statutory authority designed to appoint a special prosecutor with the power to investigate the President or a presidential campaign. With that authority no longer in place, there exists no statutory authorization for the Office of Special Counsel Mueller now purports to hold. The appointment was illegal, the resulting office has been a nullity from inception, and all actions taken by this illegally appointed officer should be declared null and void. The indictment of Roger Stone should be dismissed with prejudice.

Respectfully submitted,

By: */s/*_____

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[37] *See* discussion in the forthcoming Calabresi/Lawson article, Steven G. Calabresi & Gary Lawson, *Why Robert Mueller's Appointment as Special Counsel Unlawful*, 95 NOTRE DAME L. REV – (2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3324631.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on April 12, 2019, I electronically filed the foregoing with the Clerk of Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record or pro se parties, via transmission of Notices of Electronic Filing generated by CM/ECF.

BUSCHEL GIBBONS, P.A.

___/s/ Robert Buschel_____
Robert C. Buschel

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**From:** AMZ
**Subject:** BVG
**Date:** Wednesday, May 09, 2018 7:11:05 PM

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Adam,

I just met with our executive officer re MOUs; we covered the target end date for Brandon: mid to late June. If we do a semi-std renewal of 60 days, that puts his end date at July 17. Is that ok with you? We could still end it short of that if the need falls off here, but if you're ok with that length of renewal, it would work well for our admin and planning purposes.

Thanks.
Aaron

Aaron Zebley
Special Counsel's Office
202.514.0512

**From:** LRA
**Subject:** Facebook
**Date:** Friday, March 30, 2018 2:53:37 PM

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Adam,

Aaron asked for me to reach out in case you have any questions in advance of your call today. Happy to talk, although I think Aaron relayed the pertinent information. I'm at (b) (6), (b) (7)(C)

Rush

---

L. Rush Atkinson
Special Counsel's Office
(b) (6), (b) (7)(C)

**From:** Hickey, Adam (NSD)
**Subject:** FW: follow up
**Date:** Friday, March 09, 2018 12:24:00 PM

---

Are you coming over or should I call you?

---

**From:** AAW
**Sent:** Friday, March 09, 2018 12:08 PM
**To:** Hickey, Adam (NSD) <ahickey@jmd.usdoj.gov>
**Cc:** Bratt, Jay (NSD) <jbratt@jmd.usdoj.gov>
**Subject:** RE: follow up

I was thinking of calling into this – just let me know best number to call.

Andrew Weissmann
Special Counsel's Office
(202) 514-1746



---

**From:** Hickey, Adam (NSD)
**Sent:** Thursday, March 8, 2018 11:07 AM
**To:** AAW (b) (6), (b) (7)(C)
**Cc:** Bratt, Jay (NSD) <jbratt@jmd.usdoj.gov>
**Subject:** Re: follow up

Fine

On Mar 8, 2018, at 11:03 AM, AAW (b) (6), (b) (7)(C) wrote:

> 12:30?
>
> Andrew Weissmann
> Special Counsel's Office
> (202) 514-1746
>
> 

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**From:** Hickey, Adam (NSD)
**Sent:** Thursday, March 8, 2018 10:28 AM
**To:** AAW (b) (6), (b) (7)(C) Bratt, Jay (NSD) <jbratt@jmd.usdoj.gov>
**Subject:** RE: follow up

Probably should work. Most of my afternoon is free except 1:30-2 and 3:30-4:30.

Adam

---

**From:** AAW
**Sent:** Thursday, March 08, 2018 9:46 AM
**To:** Hickey, Adam (NSD) <ahickey@jmd.usdoj.gov>; Bratt, Jay (NSD) <jbratt@jmd.usdoj.gov>
**Subject:** follow up

Do you have time tomorrow to follow up on our meeting on Monday?

Andrew Weissmann
Special Counsel's Office
(202) 514-1746