**[ORAL ARGUMENT HELD NOVEMBER 8, 2018]**

**No. 18-3052**

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**IN THE**

# United States Court of Appeals for the District of Columbia Circuit

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IN RE: GRAND JURY INVESTIGAITON

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ANDREW MILLER,

*Appellant,*

v.

UNITED STATES OF AMERICA,

*Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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## SUPPLEMENTAL BRIEF OF APPELLANT ANDREW MILLER

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Date: November 19, 2018

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[1] Authorities chiefly relied on are marked with asterisks.

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## SUMMARY OF ARGUMENT

On November 9, 2018, the day after oral argument in this case, the Court ordered the parties to submit a supplemental brief "addressing what, if any, effect the November 7, 2018 designation of an acting Attorney General different from the official who appointed Special Counsel Mueller has on this case." The short answer is that the designation of Matthew G. Whitaker as Acting Attorney General by the President following the resignation of Attorney General Jeff Sessions does not affect Appellant's argument that Special Counsel Mueller was required to be appointed by the President and confirmed by the Senate under the Appointments Clause as a principal officer. Nor does the designation affect Appellant's alternative argument that Special Counsel Mueller was required to be appointed as an inferior officer under the Excepting Clause by the then "Head of the Department," namely, Attorney General Jeff Sessions, rather than by Deputy Attorney General Rod Rosenstein.

## ARGUMENT

As a preliminary matter, the Court need not consider what effect Mr. Whitaker's designation as Acting Attorney General has on this case at all if the Court were to rule, as Appellant and Amicus Concord Management argued, that neither 28 U.S.C. 515(b) nor 28 U.S.C. 533(1) "specifically granted" or vested the

"Head of the Department" with the authority to appoint a private attorney as Special Counsel. Br. 7-12; *id*. at 8 ("clear and specific statutory authorization" required under the Appointments Clause); Reply Br. 3-13; Concord Br. 2-13, and that no controlling decision has so held. Reply Br. 13-17; Concord Br. 13-25. And if the Court were to rule otherwise, Appellant's principal and inferior officer arguments are essentially unaffected by Mr. Whitaker's designation as the Acting Attorney General.

**Principal Officer**. Appellant argued in his briefs that the Special Counsel is a principal officer because (1) he possesses and exercises "extraordinary governmental powers"; (2) his decision-making is not subject to "substantial supervision and oversight" under the Special Counsel regulations applicable to his appointment; (3) he "has authority to make final decisions"; and (4) he is protected from removal except for "good cause." Br. 14-28; Reply Br. 17-24 (citing, *inter alia*, *Edmond v. United States*, 520 U.S. 651 (1997), *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332 (D.C. Cir. 2012), and *United States v. Concord Mgmt. & Consulting LLC*, 317 F. Supp. 3d 598, 613-14 (D.D.C. 2018)).

The designation of the Acting Attorney General does not have any effect on these four principal-officer factors unless, with respect to the "good cause" factor, this Court were to agree with the Special Counsel and the court below, that the Special Counsel regulations can be theoretically revoked immediately (or the

Special Counsel's original appointment order can be revoked or amended to eliminate the applicability of the "Conduct and accountability" provision of 28 C.F.R. 600.7). If this were to happen, the Special Counsel would then become subject to unfettered supervision and thus removable at will. In that case, any status he has as a principal officer will revert to inferior officer status. Govt Br. 22-26.

Appellant argued that such hypothetical revocation of the regulations cannot be done immediately and, in any event, is "legally irrelevant in determining the actual effect of those regulations in the here and now." Br. 24-25 (citing cases); Reply Br. 23. Moreover, Appellant argued that *only* the then-Attorney General Jeff Sessions as the head of the Justice Department could amend or revoke the Special Counsel regulations, not Deputy Attorney General Rosenstein who was not delegated any such authority under 28 U.S.C. 510. Reply Br. 23-24. Because General Sessions had recused himself from the investigation, he could not revoke the governing regulations applicable to Special Counsel Mueller. *Id.*

Now that an Acting Attorney General has been designated and has supervisory authority over the Special Counsel, unless he recuses himself from the investigation, he could theoretically revoke or amend those regulations. And the same could be said if, as has been argued elsewhere, that the Deputy Attorney General is the Acting Attorney General pursuant to 28 U.S.C. 508(a) instead of

Matthew Whitaker appointed under the Federal Vacancies Reform Act of 1998.[1] Nevertheless, such theoretical revocation of the regulations, even if a valid point, would not be applicable to the subpoena issued to Andrew Miller and his contempt for not appearing before the grand jury because at that time, only General Sessions could have revoked or amended the Special Counsel regulations, but was recused from supervising the Special Counsel.

**Inferior Officer.** If the Special Counsel is an inferior officer as he asserts and the district court so held, his appointment nevertheless violated the Appointments Clause because he was not appointed by the "Head of the Department," then-Attorney General Sessions, and that his recusal from the Russia investigation did not relieve him of his constitutional duty to appoint the investigator as an inferior officer. Br. 31-43; Reply Br. 24-28. The designation of Matthew Whitaker to be Acting Attorney General does not affect that argument. The Acting Attorney General may decide to cure that defect by "reappointing" the Special Counsel, but there is no evidence that such an action is being contemplated. In any case, such appointment, would, at best, be prospective in its

[1] *Compare* Petitioner's Motion To Substitute in *Michaels v. Sessions*, U.S. No. 18-496 (filed November 16, 2018) and *with Memorandum for Emmet T. Flood, Counsel to the President, Re: Designating an Acting Attorney General*, __Op. O.L.C. __ (Nov. 14, 2018), https://assets.documentcloud.org/documents/5113265/OLC-Acting-AG-memo.pdf).

effect and not retroactively legitimatize or ratify the actions taken by the Special Counsel. The same would be true even if it were determined that Deputy Attorney General Rosenstein is the Acting Attorney General instead of Mr. Whitaker and Rosenstein decided to "reappoint" Special Counsel Mueller.

## CONCLUSION

In sum, the designation of Matthew Whitaker as an interim Acting Attorney General does not affect Appellant's principal and inferior officer arguments. Accordingly, for the foregoing reasons, and those in Appellant's briefs and Concord's amicus brief, the Court should reverse the judgment below.

Respectfully submitted,

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Date: November 19, 2018

## CERTIFICATE OF SERVICE

Pursuant to FRAP 25(d), the undersigned hereby certifies that by the close of business on the 19th day of November, 2018, he caused the foregoing Supplemental Brief of Appellant Andrew Miller to be filed electronically with the Clerk of the Court by using CM/ECF system. The participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

*/s/Paul D. Kamenar*
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