[ORAL ARGUMENT HELD ON NOVEMBER 8, 2018]
No. 18-3052

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: GRAND JURY INVESTIGATION

ANDREW MILLER,

Appellant,

V.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the District of Columbia

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The appellant is Andrew Miller. The appellee is the United States of America. Concord Management and Consulting LLC has filed a brief and presented argument as an amicus curiae in this appeal.

B. Rulings Under Review

The witness-appellant is appealing from an August 10, 2018 contempt order issued by Chief Judge Beryl A. Howell, United States District Court for the District of Columbia, in Case No. 18-gj-34. ECF No. 36. The order is reprinted in Appellant's Appendix B and is unpublished. The district court's related July 31, 2018 opinion denying the witness's motion to quash is reprinted in Appellant's Appendix C and is published at 315 F. Supp. 3d 602 (D.D.C. 2018).

C. Related Cases

This case has not previously been before this Court or any other court. The merits issue presented by this appeal was addressed in *United States v. Concord Management and Consulting LLC*, No. 18-cr-32-2 (D.D.C.), appeal docketed, No. 18-3061 (D.C. Cir.), appeal dismissed Sept. 17, 2018. That opinion can be found at 317 F. Supp. 3d 598 (D.D.C. 2018).

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SUMMARY OF ARGUMENT

The President's designation of Acting Attorney General Matthew G. Whitaker on November 7, 2018, has no effect on this case. This Court is reviewing three legal challenges to the Special Counsel appointment, arising out of the Special Counsel's issuance of grand jury subpoenas and an order holding Miller in contempt for noncompliance: whether Congress vested the Attorney General with statutory authority to appoint Special Counsels, consistent with the Constitution's Appointments Clause, U.S. Const. Art. II, § 2; whether the May 17, 2017 appointment of the Special Counsel was unconstitutional because he is a principal officer, requiring nomination by President and confirmation by the Senate; and whether Acting Attorney General Rod Rosenstein had appointment authority upon the recusal of Attorney General Jefferson B. Sessions. All of those arguments turn on the May 17, 2017 appointment of the Special Counsel and the legal and regulatory frameworks that existed at the time of appointment. None of those arguments is affected by the change in the identity of the Acting Attorney General while this case is on appeal.

This Court should not resolve any new challenges that Miller might raise. While this Court has discretion to entertain new legal arguments, no principle requires it to do so here, and sound appellate practice counsels against it. First, the usual rule is that an appellate court determines whether a district court's judgment was correct when rendered. The major exception is for changes in governing law, but that exception has no application to a change in the identity of the Special Counsel's supervising officer.

Second, Acting Attorney General Whitaker's designation neither alters the Special Counsel's authority to represent the United States nor raises any jurisdictional issue. The Special Counsel continues to exercise the same authority, and the jurisdiction of the district court and this Court is intact. Third, any new claims that Miller might advance would be better addressed by the district court in the first instance, which could develop a record, hear from the parties, and issue a decision. Nothing exceptional about this case warrants a departure from standard procedure. And the expedited grand jury context weighs in favor of adhering to it.

ARGUMENT

On November 7, 2018, Attorney General Jefferson B. Sessions resigned from office and, on the same date, the President directed Matthew G. Whitaker, who previously served as Chief of Staff and Senior Counselor to Attorney General Sessions, to serve as Acting Attorney General. On November 9, 2018, this Court on its own motion directed the parties to file a 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." In the government's view, the designation has no effect on the case. The issues that Miller has presented in this appeal are unchanged. If Miller seeks to raise any new issues, they should be considered in the first instance by the district court.

1. In his appeal to this Court, Miller has raised three issues: whether Congress "'established by law' the appointment of a private attorney to serve as a special counsel

as an 'Officer of the United States'"; whether the Special Counsel "was unconstitutionally appointed because he is a 'principal officer' under the Appointments Clause of Article II, and thus was required to be—but was not—appointed by the President with the Advice and Consent of the Senate"; and whether the Special Counsel "was unconstitutionally appointed because he was required to be—but was not—appointed by Attorney General Jeff Sessions rather than by Deputy Attorney General Rod Rosenstein." Miller Br. 1-2 (Sept. 11, 2018). All three issues arise from the Special Counsel's appointment by Acting Attorney General Rosenstein on May 17, 2017. Office of the Deputy Att'y Gen., Order No. 3915-2017, *Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters*. The resolution of those issues is not affected by the designation of Acting Attorney General Whitaker. Whether Congress vested the Attorney General with statutory authority to appoint Special Counsels turns on the content of the statutes that justified the appointment. Whether the Special Counsel was a principal officer turns on the type of officer he became when he was appointed. *See Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018) ("The Appointments Clause of the Constitution lays out the permissible methods of appointing 'Officers of the United States.'"). And whether Acting Attorney General Rosenstein possessed appointment authority after Attorney General Sessions's recusal turns on factual and legal circumstances as they stood on May 17, 2017. The validity of the Special Counsel's appointment at that time cannot be retroactively

affected by a change in the official who is serving as the Acting Attorney General in November 2018.

The events giving rise to Miller's challenge—the issuance of grand jury subpoenas in May and June 2018 and a contempt order entered in June 2018—confirm that the November 7, 2018 designation has no effect on the issues before the Court. Miller was served with grand jury subpoenas issued by the Special Counsel's Office in May and June 2018. B1; C19-C21; *see Doe v. DiGenova*, 779 F.2d 74, 80 (D.C. Cir. 1985). On June 28, 2018, Miller moved to quash the subpoenas, urging, among other things, that "the appointment of Robert S. Mueller, III as Special Counsel violates the Appointment's Clause." Doc. 10 at 1; *see id.* at 2-20. On July 31, 2018, the district court denied his motion. *See* C3, 92; D1. Miller moved to be held in civil contempt, and the Special Counsel moved to compel the testimony. B2. On August 10, 2018, the district court granted both requests, found Miller in civil contempt, and stayed the contempt order pending appeal. B3. Miller's appeal challenges the district court's contempt order. This Court has held that "a recalcitrant witness'[s] claim that a subpoena was applied for and issued under the signature of unauthorized persons" can be raised in an appeal from a contempt order. *In re Sealed Case*, 829 F.2d 50, 53-54 (D.C. Cir. 1987). Because the subpoenas here issued under the signature of the Special Counsel's Office long before the change in the identity of the Acting Attorney General, that change cannot affect the validity of the subpoenas. And the designation of a different Acting

Attorney General while the case is on appeal cannot vitiate the district court's order holding Miller in contempt.

2. To the extent that Miller seeks to raise any new issues based on the designation of Acting Attorney General Whitaker, this appeal is not the proper proceeding in which to do so. Although this Court has discretion to address new issues that were not raised below, *see Campbell v. District of Columbia*, 894 F.3d 281, 288 (D.C. Cir. 2018), an exercise of that discretion is not warranted here.

First, the general rule is that "the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not." *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.). The most notable exception to that rule is when "subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively change the rule which governs." *Id.* In that circumstance, generally, "an appellate court must apply the law in effect at the time it renders its decision." *Henderson v. United States*, 568 U.S. 266, 271(2013) (quoting *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 281 (1969)); *cf. Stoiber v. SEC*, 161 F.3d 745, 754 (D.C. Cir. 1998) ("The failure to raise a claim in a prior forum is excusable when due to an intervening change in the law."). The designation of a different official as Acting Attorney General, however, does not change the governing law.

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

In re Persico, 522 F.2d 41, 62 (2d Cir. 1975) ("Authority to act as a special attorney continues even after the specific official granting the authority and signing the commission leaves office."); *United States v. Morton Salt Co.*, 216 F. Supp. 250, 256 (D. Minn. 1962) ("[W]hen a designated official acts within the scope of his authority, the authorization must continue until it is revoked or is otherwise terminated. If this were not true, a change of administration or resignation from office by the official who acted within his authority when the designation was made would create a chaotic condition in the administration of the affairs of the Department of Justice."), *aff'd,* 382 U.S. 44 (1965) (per curiam); *see also United States v. Hartwell*, 73 U.S. 385, 393 (1867) (once an officer is "appointed pursuant to law, . . . [v]acating the office of his superior would not have affected the tenure of his place"); *Eligibility of Mr. Mellon for the Office of the Secretary of the Treasury*, 36 Op. Atty. Gen. 12, 13 (1929) ("The practical construction given to the commissions issued to heads of Executive Departments seems to have been uniform since 1789 to the effect that a commission does not expire on the death of a President nor at the end of a President's term of office."); *Tenure of Office of Inspectors of Customs*, 2 Op. Atty. Gen. 410, 412 (1831) (office holders continue to hold office despite a vacancy or change in the person who exercised appointing authority).

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

regulation is extant it has the force of law."). And the district court's jurisdiction to adjudicate a motion to quash a grand jury subpoena remains intact. *See* 18 U.S.C. § 3231; *In re Grand Jury*, 286 F.3d 153, 157 (3d Cir. 2002); *cf. United States v. Fahnbulleh*, 752 F.3d 470, 476 (D.C. Cir. 2014) ("[I]f an indictment or information alleges the violation of a crime set out in Title 18 or in one of the other statutes defining federal crimes, that is the end of the jurisdictional inquiry.") (internal quotation marks omitted). This Court continues to have jurisdiction to review the court's final judgment based on the claims that were raised below and briefed and argued here. *See* 28 U.S.C. § 1291.

Third, for sound reasons, appellate courts normally refrain from addressing claims not raised below. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Because Miller has not (and could not have) raised any claims based on the appointment of Acting Attorney General Whitaker, ordinary practice counsels against this Court's addressing them. Instead, requiring Miller to raise any new claims on remand would permit the development of a record, allow full adversary briefing, and afford the court of appeals the benefit of a district court decision.

This Court has stated that it generally exercises discretion to entertain new issues on appeal "only in exceptional cases or particular circumstances, such as when a case presents a novel, important, and recurring question of federal law, or where the new argument relates to a threshold question such as the clear inapplicability of a statute." *Campbell*, 894 F.3d at 288 (internal quotation marks omitted). The circumstances here cut against entertaining any new claims. As an initial matter, if this Court agrees with

Miller's current claims and vacates the contempt order, it will have no cause to address any new issues. And if this Court rejects Miller's existing claims and affirms the contempt order, Miller will then be in a position to determine whether to raise new claims directed to the Special Counsel's enforcement of the subpoenas—or to comply with the subpoenas and provide evidence.

Furthermore, it is difficult to envision circumstances in which this appeal would be an appropriate case to adjudicate a challenge based on the President's designation of Acting Attorney General Whitaker. The Office of Legal Counsel has determined that the designation of the Acting Attorney General is valid as a statutory and constitutional matter. *See* Office of Legal Counsel, *Designating an Acting Attorney General* (Nov. 14, 2018), https://www.justice.gov/olc/file/1112251/download. If Miller were to show otherwise, it would appear to place the Deputy Attorney General back in the role of Acting Attorney General, *see* 28 U.S.C. § 508(a), which would have no effect on this appeal. And if Miller sought to raise a claim based on the Special Counsel's supervision by a validly designated Acting Attorney General Whitaker, he would first have to show that the change in the supervising officer bears on the proceedings involving him. If such a claim were made, it would be better addressed, factually and legally, by the district court in the first instance. *See Bowie v. Maddox*, 642 F.3d 1122, 1131-1132 (D.C. Cir. 2011) (declining to consider an issue "in the absence of a relevant decision by the district court" because it "raises several questions of first impression in this circuit that would benefit from the trial court's consideration").

Finally, the strong policy in favor of expediting grand jury proceedings, *see Cobbledick v. United States*, 309 U.S. 323, 325, 327 (1940), weighs against entertaining new appellate issues. The grand jury began its effort to obtain information from Miller more than six months ago. This Court granted the parties' request for expedited proceedings. The Court should now resolve the issues properly presented and leave any new legal claims that Miller might make for further proceedings below.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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NOVEMBER 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) and this Court's Order of November 9, 2018, because it has been prepared in 14-point Garamond, a proportionally spaced font, and does not exceed ten pages.

/s/ Michael Dreeben

Michael R. Dreeben

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2018, I electronically filed and served the foregoing brief through the Court's CM/ECF system.

/s/ Michael Dreeben

Michael R. Dreeben